The UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach

by

Andrew Kaponga Clifford Erueti

A thesis submitted in conformity with the requirements for the Degree of Doctor of Juridical Science

Faculty of Law
University of Toronto

© Copyright by Andrew Kaponga Clifford Erueti 2016
The UNDRIP: A Mixed Model Interpretative Approach

Andrew Kaponga Clifford Erueti

Degree of Doctor of Juridical Science

Faculty of Law
University of Toronto

2016

Abstract
This dissertation offers a distinctive means of reading the key international instrument for promoting indigenous peoples’ rights, the UN Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007.

The current orthodoxy is to read the Declaration as containing human rights adapted to the indigenous situation. This is supported by a particular reading of the political history of the Declaration – that is, that initial claims based on anti-colonialism advanced by Northern indigenous advocates were abandoned in favor of a more pragmatic human rights model. However, this reading does not do full justice to the complexity and diversity of indigenous peoples’ participation in the Declaration negotiations.

I provide a fresh account of the political history of the international indigenous movement as it intersects with the Declaration negotiations. What this reveals is tension between two movements that can be broadly separated along the lines of the North and South. Northern indigenous peoples were the originators of the international movement and sought to shoehorn their sovereignty-based claims into an international project. They relied in particular on anti-colonial justifications drawn from the UN-directed decolonization movement (decolonization model). But they were soon joined by a vibrant and skilled Southern movement of indigenous peoples representing Latin America, Asia and Africa. This movement placed greater emphasis than their Northern counterparts on human rights and especially the right to culture (human rights model).

One of my core arguments is that contrary to conventional accounts, the decolonization model was not eclipsed by the human rights model but maintained throughout the Declaration
negotiations. And it is the decolonization model that accounts for what I describe as the self-determination framework in the Declaration. This argument is developed through chapters 1-3. As a result the Declaration reflects two normative models, aimed at the two different regions: human rights for the South; and decolonization for the North (the mixed-model).

The principal benefit of this bifurcated reading of the Declaration is that it enables both the Northern and Southern indigenous movements to gain the rights they seek from the Declaration. But how, precisely, does this political history translate into a legal justification for this mixed-model? In Chapter 4, I argue that the mixed model is also supported by legal and political justificatory arguments.

The challenge of my mixed-model is to avoid the decolonization model being absorbed by the human rights model through the practices of interpretation. I hope to assist advocates to reposition their arguments and set out two case studies in chapter 5 that seek to show the potential implications of the decolonization model.
Acknowledgments

The University of Toronto Faculty of Law has provided me with terrific support from start to finish. Initially, Prof Darlene Johnson took me under her wing in 2007 as my lead supervisor and I’m grateful for her advice and providing me with a solid foundation. I had heard the Law Faculty was a great environment for graduate work and I was impressed with the program and variety of talks and symposia available for students. David Dyzenhaus, Mariano Prado, Julia Hall and Whittney Ambeault ran a tight ship and kept me on my toes.

It was only two years into my studies that I was offered a position as Amnesty International’s adviser on indigenous rights in the International-Secretariat, London. It seemed like too good an opportunity to test out my ideas and observe the international movement in action. I would like to thank my colleagues at Amnesty for the many ideas generated in late-night conversations on indigenous rights but especially the Gender, Sexuality and Identity team (Madhu, Stephanie, Lisa, Kathryn), Shanta Martin, the Asia (Abbas Faiz) and Americas regional programs (Fernanda Doz Costa, and Guadalupe Marengo) and Canadian indigenous rights researcher, Craig Benjamin. I would also like to thank the communities I worked with over that time but in particular, the indigenous activists and communities in the Chittagong Hill Tracts, Bangladesh.

In 2009, Karen Knop became my supervisor after Darlene ventured west to British Columbia University. I think the experience at Amnesty really helped but I recall when I provided Karen Knop with my draft chapters that they needed a lot of work. Karen introduced me to Courtney Jung’s work, The Moral Force of Indigenous Politics, and then Karen Engle’s book, The Elusive Promise of Indigenous Development. And it was only after reading these works that I began to see the real possibilities for the dissertation. Engle of course, opened up the door by being the first to talk about the regional tensions within the international movement. And I’m fortunate that she didn’t explore in detail the impact of the Asian and African indigenous movements thus allowing space for my dissertation to emerge. Reading these and related works enabled me to explore new areas of political and legal theory and this added a freshness and novelty to the research. And I now apply much of this theory to my new work as a lecturer at the Faculty of Law, University of Auckland and I think my students enjoy it. I also strive to emulate the qualities that I saw in Karen as a supervisor: encouragement and enthusiasm, good humor and strong, sound and clear advice. Karen has

iv
also been very supportive of my partner’s, Claire Charters, academic work and we both have the utmost admiration for her.

I also have Professors Patrick Macklem and Douglas Sanderson to thank for great insights and advice that helped me to complete the final stages of the dissertation. I’ve always been a fan of their work, and when reading Douglas’s piece on *Redressing the Right Wrong* it struck me how close we are in our arguments – it’s about political sovereignty not only land rights!

I’d like to say thank you to those who provided me with support and inspiration and ideas over the years. James Anaya stands out. I’ve always admired his ability to be both a leading scholar and effective indigenous rights advocate. Practically anyone who has ever written about international indigenous rights is responding in some way to his seminal work, *Indigenous Peoples in International Law*. I recall stumbling into his Tucson offices with my backpack as a junior academic on my first sabbatical, and sensing that this was the centre of it all. He and his family and the Indigenous Peoples Law and Policy Program at the University of Arizona have always made me and Claire welcome in Tucson. Others I’d like to acknowledge are: Edward Durie, Paul G McHugh, Richard Boast, Tony Angelo, Bob Dugan, Virginia Grainer, Alan Ward, Bob Clinton, Robert Williams, Gina Cosentino, Brenda Gunn, Kirsty Gover, Matthew Palmer, my colleagues at the law faculties of the University of Auckland, Waikato and Victoria, Tracey Whare, Moana Jackson, Claire Breen, Linda Te Aho, Matiu Dickson, Brad Morse, Kent McNeil, Alex Xanthaki, Benedict Kingsbury, Janet McLean, Catherine Iorns, and Paul Meredith. And thanks to Chiaretta Giordano and Kyle Levenberg for your advice.

A special thank you to the DOCIP team and Pierrette Birraux in Geneva – I relied a great deal on the interventions by states, indigenous peoples and NGOs compiled by DOCIP during the Declaration negotiations and this dissertation could not have been completed without this fantastic resource.

I’ve been accompanied by good friends along the way keen to talk about my dissertation, and tease me for constantly carrying it around London pubs. Suresh, Shona, Lawrence, Claire, Justin, I finally finished it! To my whanau, Mum, Dad, Andy and Kath, Trina, Caity, Claire and Hema and Claire’s family Barbara, Richard, Jack and Manfred and Cristal – my love and
gratitude. I cannot remember the number of times Barbara Charters has swiftly landed in the midst of our chaotic life ready to take command and lead us to safe ground.

During the tough times I would often call on Hema for strength. We miss you and this dissertation is for you.

To Max and Mia – thank you for putting up with your Dad tapping away at his laptop during our 5 and 3 respectively years together. It’s over now. We can go out and play.

And of course my partner in life, Claire Charters. She radiates intellect, fun and love. I’m in constant amazement at how she manages to keep all of the balls up in the air – social, professional and family life. I stand in awe of you. Claire never doubted I would complete my thesis. I often did. But it was Claire who got me across the finish line. And what a journey we have had around the globe and back again (and probably off round the globe many more times). You made life an adventure again for me and I feel blessed to be with you, Max and Mia.
# Contents

Acknowledgments .............................................................................................................. iv

INTRODUCTION: ........................................................................................................... 1

READING THE DECLARATION ANEW .......................................................................... 1

1 Two models of the Declaration .................................................................................. 2

2 Turning to the Politics of the International Indigenous Movement ...................... 5

3 An Alternative Political History of the Declaration .................................................. 10
   3.1 North-North tension ......................................................................................... 14
   3.2 A broader South and North-South tension ..................................................... 14

4 Reading the Declaration anew ................................................................................... 15

5 Outline of Chapters .................................................................................................... 18

CHAPTER 1: .................................................................................................................... 22


1 The rise of contemporary indigenous movements in the CANZUS States ............ 22
   1.1 CANZUS and indigenous advocacy ................................................................. 23
   1.2 The call for historical rectification ................................................................ 29

2 Which Model of International Protection? - human rights, minority rights or decolonization? ........................................................................................................ 32
   2.1 The human rights model ................................................................................ 32
   2.2 The minority rights model ............................................................................ 33
   2.3 The decolonization model ............................................................................ 35

3 The rise of the international indigenous rights movement ....................................... 42
   3.1 Indigenous movements of the North .............................................................. 42
   3.2 The Cobo Report: self-determination as the basic pre-condition .................. 47

4 The Working Group on Indigenous Populations ....................................................... 48
   4.1 The human rights vs the decolonization model ............................................. 51
   4.2 The right to independence had to be an option ............................................ 58

5 The Declaration with a Self-Determination Framework .......................................... 62

6 Conclusion .................................................................................................................. 73

CHAPTER 2 ..................................................................................................................... 74

1 Asian indigenous peoples’ participation in the international indigenous movement 74
   1.1 The anthropology-NGOs ................................................................................ 75
   1.2 Asian states’ opposition to Asian indigenous peoples’ participation in UN Working Group 81
   1.3 Asian indigenous peoples’ human rights model ......................................... 86
   1.4 The Martinez treaty report .......................................................................... 90

2 ILO Convention 169 and the human rights model ................................................. 92

3 Emergence of an African Indigenous Peoples’ movement ..................................... 99
CHAPTER 3
One-note interpretations of the Declaration
1.1 Human rights models
1.2 Historical injustice models

CHAPTER 4:
Mixed-Model Interpretations of the Declaration
2.1 States’ and Kingsbury’s mixed models
2.2 A new mixed-model interpretative approach

CHAPTER 5:
Applying the Mixed-Model Interpretative Approach

Conclusion

Introduction

The human rights model in Asia, Africa, Latin America
2.1 Asia
2.2 Latin America
2.3 Africa
2.4 The Merit of the Mixed-Model in the South

Decolonization model in the North/CANZUS states
3.1 Australia
3.2 Canada
3.3 United States
3.4 New Zealand

Redirection towards the Decolonization Model in the North
4.1 Proving Aboriginal Title in Canada
4.2 Takamore v Clarke – Tuhoe burial rights

Conclusion

Northern indigenous advocates response to globalization of the movement

Chapter

Tuhoe burial rights

Impact of Globalization: How to Read the Declaration
1

One-note interpretations of the Declaration

1.1 Human rights models
1.2 Historical injustice models

Introduction

No change position of the Northern indigenous advocates

The positions of States in the Working Group on the Draft Declaration

The split between no-change and change advocates

African opposition to the Declaration in the UN General Assembly

The UN General Assembly’s Adoption of the Declaration

The CANZUS reversal

Conclusion

The CANZUS reversal

Introduction

Northern indigenous advocates response to globalization of the movement

Model in the South

Model Interpretations of the Declaration

Note interpretations of the Declaration

How to Read the Declaration

- Takamore v Clarke
  - Proving Aboriginal Title in Canada
  - Takamore v Clarke – Tuhoe burial rights

- Human rights models
  - Historical injustice models

- States’ and Kingsbury’s mixed models
  - A new mixed-model interpretative approach

- The “interpretive community” associated with the Declaration

- Indigenous Peoples’ effective participation in Declaration negotiations

Conclusion

Conclusion

Conclusion
INTRODUCTION:
READING THE DECLARATION ANEW

The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), has been heralded as a breakthrough achievement for indigenous peoples. With the Declaration’s adoption by the UN General Assembly in 2007, international indigenous rights has become a significant field in international law. Although other international treaties, standards and policies on indigenous rights exist, notably International Labour Organization Convention No 169, no other international instrument provides such robust protections for collectives living within states. In particular, article 3 of the Declaration provides: “Indigenous 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.” This restates the language in common article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights (International Covenants), but with reference to indigenous peoples.

What accounts for these breakthrough rights is indigenous peoples’ participation. Typically negotiations are governed by states with limited input from interest groups, and any subsequent disagreement about meaning requires reference back to states’ negotiating positions. However, what is remarkable about the Declaration negotiations is that indigenous peoples were effectively accorded the same status as states. Thus, who participated and what

---

4 The Declaration, supra note 1, art 3.
they said are important in terms of the resulting rights and their meaning and also the Declaration’s legitimacy and authority.\(^8\)

Most leading normative accounts of the Declaration fail to register the full implications of this political legitimacy grounded in extensive and diverse indigenous peoples’ participation as well as that of states. Moreover, few accounts of the Declaration explore extensively the dynamics among those diverse indigenous participants. This dissertation addresses both gaps in the literature and the link between them. There is much disagreement about the normative models underpinning article 3 of the Declaration and other rights in the Declaration. The dissertation joins with recent ground-breaking work that takes up the question of the normative model(s) at work in the Declaration through the political history of the international indigenous movement as it intersected with the Declaration’s drafting. Its contribution is twofold. First, it offers a new account of this history – one that seeks to highlight the diversity and complexity of the Declaration negotiations particularly the distinctive contributions made by Northern and Southern indigenous movements. And, second, the dissertation offers an alternative interpretative model that is supported by this political history together with legal and political justificatory argument.

1 Two models of the Declaration

In addition to the right of self-determination, the Declaration contains many classic human rights adapted to the specific situation of indigenous peoples, such as the right to religion,\(^9\) property,\(^10\) and the right to practise and revitalize their cultural traditions and customs.\(^11\) In the leading text, *Indigenous Peoples in International Law*, indigenous scholar James Anaya argues that indigenous rights in international law – specifically those set out in the Declaration – are an application to indigenous peoples of the universal human rights contained in core human right treaties, particularly the International Covenants.\(^12\)

---


\(^9\) The Declaration, *supra* note 1, art 12.


When the Chair of the Indigenous Global Caucus (the organizing body comprised of indigenous representatives), Les Malezer, addressed the UN General Assembly after it voted 143-4 to endorse the Declaration, he articulated this model, which I describe as a “human rights model” of international indigenous rights: 13

We emphasise once again that the Declaration on the Rights of Indigenous Peoples contains no new provisions of human rights. It affirms many rights already contained in international human rights treaties, but rights which have been denied to the Indigenous Peoples. As Indigenous Peoples we now see a guarantee that our rights to self-determination, to our lands and territories, to our cultural identities, to our own representation and to our values and beliefs will be respected at the international level … The Declaration carries a message for all States that have links and association with Indigenous Peoples. That message is not about secession, as some States may fear, but about co-operation and partnership to ensure that all individuals, regardless of race or beliefs, are truly equal and that all peoples are respected and allowed to develop.

This human rights model is now so prominent that it has effectively become the mantra of the international movement. 14

However, the human rights model has difficulty accounting for all aspects of the Declaration. Ultimately, according to Anaya, the normative basis of his model is “freedom” and “inherent human equality.” 15 The Declaration includes the right to self-determination; 16 self-government; 17 historical redress; 18 the right to free, prior and informed consent (FPIC); 19 and the right to the recognition, observance and enforcement of treaties. 20 I will refer to article 3 and these related rights as constituting the Declaration’s “self-determination framework.” Although the right to self-determination is contained in common article 1 of the International

14 See for example, the essays in Joffe, Hartley, & Preston, supra note 2; and Charters & Stavenhagen, supra note 2.
15 Anaya, supra note 12 at Chapter 5.
16 The Declaration, supra note 1, art 3.
18 Ibid, arts 11(2) and 28.
19 Ibid, arts 19 and 32(2).
20 Ibid, arts 37.
Covenants – and article 27 of the International Covenant on Civil and Political Rights, on the rights of persons belonging to minorities, covers some of this ground for indigenous peoples – it is not obvious that the human rights model can support the self-determination framework.\(^2\)

There may be a plausible link between equality and the right to self-determination, and respect for indigenous-state treaties (equality means indigenous peoples, as peoples, should be entitled to these rights) but not FPIC and historical redress. In short, the human rights model has to work hard to justify the self-determination framework. Furthermore, Malezer’s assurance that, consistent with a human rights model, the Declaration’s message is “not about secession” obscures quite fundamental disagreements within indigenous movements about whether the Declaration leaves open the possibility of independence, as was recognized for the former colonies of Africa, Asia and the Middle East. Indeed, the decolonization movement, as we will see, was the driving force behind the indigenous movement at its inception as led by indigenous peoples of North America.\(^2\) This was a major concern for many states, especially those dealing with internal security and stability issues relating to minorities. These origins reveal an alternative justificatory model for indigenous rights, that is, a “decolonization model” premised on the injustice of European colonization and settlement of indigenous peoples. However, Anaya sees decolonization as a completed project. Given the “contemporary absence of colonial structures in the classical form” and the desire of most indigenous peoples’ to maintain an enduring relationship with the state, ordinarily autonomy not independence is the appropriate remedy\(^2\) (although his human rights model accepts the possibility of secession due to abuse of fundamental human rights).\(^2\)

---

\(^2\) See Helen Quane, “The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights” in Allen & Xanthaki, supra note 2 (“Notwithstanding assertions that the Declaration contains no new rights, it is anything but a codification of existing international law. Even a cursory glance at its provisions reveals significant innovations, particularly in the area of self-determination and participatory rights” at 259).


\(^2\) Anaya, supra note 12 (“In most cases in the postcolonial world ... secession would most likely be a cure worse than the disease from the standpoint of all concerned” at 86).

\(^2\) Ibid (“where there is a violation of self-determination and human rights, presumptions in favor of territorial integrity or political unity of existing states may be offset to the extent required by an appropriate remedy” at 67). However, it is not clear in international law that this creates an additional legal category to classic colonialism. See, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Kosovo Opinion), Advisory Opinion, [2010] ICJ Rep 403 at 436. See also Reference re Secession of Quebec, (1988) 2 SCR 217 at para 135.
2  Turning to the Politics of the International Indigenous Movement

Until recently scholars have not delved into the politics of the international indigenous movement and its implications for the interpretation of the Declaration. Political and legal theorists have inquired into the normative bases of indigenous rights, and questions of definition of indigenous peoples. Social movement theorists and anthropologists have engaged with the rapid rise of indigenous peoples’ movements in Latin America, Asia and Africa. However the literature on the international indigenous movement has tended to be limited to expositions written mostly by indigenous scholars and advocates, and their supporters, and directed at the domestic application of indigenous rights or comparative analyses. It is surprisingly sparse on critiques of the movement.


However, since the Declaration was adopted in 2007, there have been several significant contributions on the politics of the international indigenous movement by non-indigenous scholars, notably Karen Engle’s *The Elusive Promise of Indigenous Development* and Courtney Jung’s *The Moral Force of Indigenous Politics*. Both argue that the movement has focused on the use of culture and related human rights to support claims to indigenous rights, to the neglect of more powerful agendas relating to structural economic and political redress.

These works sit within a larger body of scholarship critiquing the reification of culture by the identity-based movements that arose during the 1960s, including the Black Power, Second Wave Feminism, Gay and Lesbian and Indigenous or Native American movements. These groups had suffered marginalisation and discrimination and as a result were disadvantaged structurally relative to dominant majority cultures. They saw their marginal group status as connected to their inherent or essential character whether it was race, sexuality, gender, or ethnicity. Their search for justice was often made on the basis of this identity and the movements often stressed their core cultural differences from other dominant cultures.

A number of liberal theorists of “recognition” and “multiculturalism” supported these social movements. For example, philosopher Will Kymlicka emphasized the connection between culture and individual freedom. According to Kymlicka, “liberals should be concerned about the fate of cultural structures, not because they have some moral status of their own, but because it is only through having a rich and secure cultural structure that people can become aware in a vivid way of the options available to them, and intelligently examine their value.” Mirroring the social movements themselves, multiculturalists often used a particular concept of culture to support their theories. For Kymlicka, the assumption is that the culture is complete, and closed with capacity to govern and that members see that particular culture as central to their way of life. The idea of culture as distinctive, timeless, relativist, and

---

37 *Ibid*.
38 *Ibid*.
antagonistic to progress has a long history in colonial policy, political theory and anthropology.\(^{39}\)

This idea of culture continues to influence contemporary thinking about social groups.\(^{40}\) However, contemporary anthropology and political theory tends to have discarded it, preferring a “constructivist” understanding of culture as hybrid, contested and constructed through historical processes, thus ever-changing.\(^{41}\) As philosopher James Tully observes, cultures are not only “overlapping, interactive and internally negotiated but also densely interdependent in their formation and identity.”\(^{42}\)

In this vein, Nancy Fraser has been perhaps the most influential critic of the “politics of recognition” promoted by multiculturalism and identity-based movements.\(^{43}\) According to Fraser, the politics of recognition encouraged essentialism and simplification of social groups and ran counter to a constructivist account of culture. This she called the “problem of reification.”\(^{44}\) However, Fraser’s most significant contribution was the argument that the “politics of recognition” neglected the economic dimensions of an injustice resulting in the “problem of displacement.”\(^{45}\) It is one thing to recognize and respect one’s gay, lesbian or indigenous identity, and another to recognize that their social status in society is also due to economic injustice, or the “politics of distribution.”\(^{46}\) Fraser emphasized that matters of recognition and distribution are intertwined and both need to be addressed to end an injustice.\(^{47}\)

The problems of reification and displacement that Fraser identifies resonate with Engle’s and Jung’s critiques of indigenous peoples’ politics. Engle seeks to dampen conventional readings of the Declaration as a “breakthrough” achievement for the international movement.

---


\(^{40}\) Ibid.

\(^{41}\) See, for example, Nancy Fraser & Axel Honneth, Redistribution or Recognition?: A Political-Philosophical Exchange (London; New York: Verso, 2003); Nancy Fraser, “Rethinking Recognition” (2000) 3 New Left Rev 107; Merry, supra note 39; James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (Cambridge: Cambridge University Press, 1995); Iris Marion Young, Inclusion and Democracy (Oxford: Oxford University Press, 2002).

\(^{42}\) Tully, supra note 41 at 10.

\(^{43}\) Fraser & Honneth, supra note 41.

\(^{44}\) Fraser, supra note 41 at 108.

\(^{45}\) Ibid.

\(^{46}\) Ibid at 110–112.

\(^{47}\) Fraser & Honneth, supra note 41 at 19, 25.
She recognises that in the early years of negotiations, indigenous advocates (predominately of the United States) advanced historically-grounded “strong forms of self-determination”, that is, asserting the “right of secession or independence as a nation state.” These advocates sought to shoehorn their domestic claims to Indian sovereignty into the Declaration negotiations and invoked the right of peoples to self-determination and decolonization.

However, Engle argues that several years into the Declaration negotiations this line of argument was abandoned as advocates instead based their claims on human rights and especially the human right to culture. Under this human rights model, the focus is on maintenance of a way of life/tradition through land, heritage and development. Engle attributes this to a decision made by indigenous advocates to adapt to the realities of working within the UN human rights system. Many indigenous advocates saw strong claims to self-determination as a “futile attempt to affect international law too dramatically.” She cites James Anaya as one of the lead proponents of this shift in strategy. She also notes that the human rights model was the preferred approach of indigenous advocates of the former Spanish colonies of Latin America where claims to political sovereignty were not realistic – given the presence of repressive regimes – or aligned with the aims of the Latin American movement. When Latin American indigenous advocates did participate, their focus, as she shows, tended not to be political independence, but cultural autonomy and basic human rights.

Conceiving indigenous rights as human and cultural rights, Engle argues, has raised the problem of reification. It has also raised the problem of displacement: that is, it has “largely displaced or deferred many of the economic and political issues that initially motivated much indigenous advocacy: issues of economic dependency, structural discrimination, and lack of indigenous autonomy”. The movement has in short drifted from its moorings in self-determination towards matters of culture, consultation and land rights. Engle describes this as the “soft edge” of the claims of indigenous peoples, resulting in less of a threat to the state, and cites ILO Convention No. 169 as “both representative of and central to the move to

---

48 Engle, supra note 32 at 3.
49 Ibid.
50 Ibid at 6.
51 Ibid at 2.
52 Ibid at 98.
53 Ibid at 55–66.
54 Ibid at 3.
protect indigenous rights under a human rights framework, particularly through the right to culture.\textsuperscript{55}

This “soft approach”, Engle argues, is evident also in the decisions of UN and Inter-American human rights treaty bodies. Advocates have largely couched their demands in terms of cultural rights as treaty bodies have proven increasingly receptive to these arguments. Here, Engle dwells especially on the Inter-American Court of Human Rights which has upheld indigenous rights to consultation, land and resources, and FPIC.\textsuperscript{56} All of this jurisprudence as she rightly notes (and as I discuss in Chapter 5) is based on human rights and especially the right to culture.\textsuperscript{57}

Like Engle, Courtney Jung seeks to free indigenous claims making from “the cultural straitjacket that has been imposed on it by a conception of legitimacy that relies on traditional practices and customs.”\textsuperscript{58} She does not delve as deeply as Engle into the use of the right to culture as a strategy in the international movement but critiques the Zapatista movement in Mexico.\textsuperscript{59} Applying a constructivist conception of culture, Jung argues that movements form around culture not because it expresses a people’s deepest sense of itself, but because it is among the social markers used by the state to include or exclude.\textsuperscript{60} Indigenous identity has been forged through state-sponsored policies that have used race, then class, then ethnicity to categorize indigenous peoples.\textsuperscript{61} Indigenous peoples have organized around these successive identities because access to power and resources has been regulated in these ways.

The Zapatista movement, Jung argues, emerged due to the decline of the power and connections provided through class-based campesino politics.\textsuperscript{62} The Zapatistas increasingly came to assert their indigenous identity as they came to appreciate its potential politically to

\textsuperscript{55}Ibid at 5. ILO Convention 169 has indeed become the prominent “go to” instrument for indigenous peoples in Latin America. The Convention contains basic rights for indigenous peoples. It affirms rights to traditional lands and the right to be consulted on activities that will affect them. See \textit{Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries}, supra note 3, at Preamble.

\textsuperscript{56}Engle, supra note 32, ch 4.

\textsuperscript{57}As I note in Chapter 5, the Inter-American Court has extended the human right to property to indigenous peoples’ traditional lands. But instead of equality, the rights are said to be based on culture, which has led to the essentialization of indigenous rights. See, \textit{Case of the Mayagna (Sumo) Awas Tingni Indigenous Community v Nicaragua} (2001), Inter-Am Ct HR (Ser C), No 79.

\textsuperscript{58}Jung, supra note 25, at 235.

\textsuperscript{59}Ibid, ch 2.

\textsuperscript{60}Ibid. at 37.

\textsuperscript{61}Ibid at 19.

\textsuperscript{62}Ibid at 169-182.
advance their aims of self-government and territory.\textsuperscript{63} Peasants became indigenous peoples. But, in Jung’s view, it has ultimately boxed them in. Like Engle, she cites the limitations of claims based on indigenous culture including failure to challenge structural injustices and the exclusion of groups by indigenous power brokers.\textsuperscript{64}

Instead of grounding obligations to indigenous peoples in the cultural difference of groups, Jung advocates a “critical liberalism” that finds an alternative justificatory basis in the structural origins of marginalized social groups.\textsuperscript{65} As Jung puts it, “the normative standing of these groups lies … in the political history that has forged them as groups not in the extent to which they are culturally distinct.”\textsuperscript{66} For indigenous peoples, the focus should therefore lie with historical and ongoing injustices. Cultural difference is relevant insofar as the state has helped to make it relevant to the nature and extent of the injustices.\textsuperscript{67}

3 An Alternative Political History of the Declaration

Engle’s and Jung’s compelling critiques have largely gone unanswered by indigenous advocates and scholars.\textsuperscript{68} In this dissertation, I seek to contribute to the welcome turn to indigenous politics in the international law literature by developing an alternative political history of the Declaration to that of Karen Engle and by showing how we might think differently about the Declaration if we discover that the political context of its drafting differs in important ways from the reading Engle gives it. The historical narrative I offer contrasts with Engle’s account of “strong forms of self-determination” being displaced by human rights and culture. As Engle and Jung demonstrate, cultural difference may have been significant to the Zapatista movement and to Latin American and Northern indigenous movements generally. However, human rights and the human right to culture were not the only normative arguments that endured in the Declaration negotiations.

\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid at 213-232.
\textsuperscript{65} Ibid at 233.
\textsuperscript{66} Ibid at 234.
\textsuperscript{67} Ibid at 238.
The narrative I develop in this thesis focuses on tensions between different regional indigenous movements that can broadly be separated along the lines of the “North” and “South.” By the “North”, I refer to the indigenous peoples of the former British Colonies of Canada, Australia, New Zealand and the United States (often known as the “CANZUS” states). The “South” in this thesis refers to the indigenous peoples of Latin America, Asia and Africa and the Saami of the Nordic states (Sweden, Finland, Norway) principally. However, I focus on the Asian and African movements given their particular emphasis on human rights and culture and that their participation resulted in the globalization of the movement and as a result further emphasis on human rights.

These Northern and Southern movements came to the international movement at different stages. As Engle notes, indigenous advocates of North America were the first to engage actively in the Declaration negotiations. First Nation advocates of North America were soon followed by advocates of Australia and New Zealand. Reacting against assimilationist policies, and drawing on their special historical relationship with the state, these activists sought restoration of the tribe’s inherent sovereignty and, given the resistance to significant reforms domestically, they saw potential in the international legal system to advance these claims.

When negotiations commenced, states sought a Declaration that would promote basic human rights of indigenous peoples, or minority rights; in other words, standards that broadly reflected what most states had already committed to domestically in word if not in deed.

69 Henry Minde, “The Destination and the Journey: Indigenous peoples and the UN from the 1960s through 1985” in Henry Minde, Asbjorn Eide & Mattias Ahrén, eds, United Nations Declaration on the Rights of Indigenous Peoples (Guovdageainnu/Kautokeino, Norway: Galdur Resource Centre for the Rights of Indigenous peoples, 2007). While the Saami were early participants in the international movement and Northern-based, they share many historical similarities with “Southern” Asian and Africa indigenous peoples in that their peoples were gradually absorbed by adjacent colonising powers rather than subjected to overseas colonization and settlement. They cannot, therefore, like the Asian and African movements, rely on the decolonization model. Other Southern indigenous peoples’ movements could be included such as the “indigenous small numbered peoples” of the Russian Federation and the Tartar movement in the Ukraine, see for example Alexandra Xanthaki, “Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East” (2004) 26:1 Hum Rights Q 74.

70 See, for example, New Zealand, New Zealand Statement under Item 5 (1989) doCip Doc. 200284_1 (on file with author) (Referring to UN Resolution 21/120 and the need to “ensure compatibility with existing human rights instruments” at 200284_2).

71 See, for example, Canada, “Information received from Governments”, UNWGIP, 6th Sess, UN Doc E/CN.4/Sub.2/AC.4/1988/2/Add.1 (1988) (“Canada is of the view that rights, referred to in the draft principles, should generally be oriented towards rights of individuals. In this regard we should emphasize Article 27 of the International Covenant of Civil and Political Rights where a right with a collective aspect has been stated in terms of individual rights” at 3).
Northern indigenous peoples also stressed the importance of basic human rights. However, these indigenous advocates primarily advanced a “decolonization model.” This model highlighted the parallels between Northern indigenous peoples’ historical experience and that of colonised peoples of Asia, Africa and the Middle East who had obtained their independence under UN supervision by virtue of the right to self-determination of peoples as developed from the chapters of the UN Charter on trust territories and non-self-governing territories (and earlier the provisions of the Covenant of the League of Nations on mandate territories). Advocates sought to fit the decolonization model to the “historical sovereignty” arguments advanced against their states domestically, whereby indigenous peoples sought restoration of their prior, sovereign rights. Although overseas decolonization had led to independence for peoples as constituted by the colonially imposed borders, rather than for the previously sovereign peoples, the argument in the Declaration negotiations was that indigenous peoples were likewise colonised peoples entitled to the right to self-determination and independence; to deny them the right would be to discriminate.

In support of the decolonization model, Northern indigenous peoples pointed to treaty-making with European states, and a long established practice of recognition of indigenous peoples as first peoples with a sui generis political-legal status. This Northern experience of colonization and settlement was also relatively recent in that the most intensive period for these states was in the mid- to late-19th century.

The decolonization model therefore speaks to a nation-to-nation relationship between Northern indigenous peoples and CANZUS states, whereas a human rights model is directed at domestic issues of equality and political participation. The decolonization model indicated that self-determination in the Declaration offered indigenous peoples the option of independence should indigenous peoples and states fail to negotiate their terms of co-existence. It also indicated the need for international supervision of indigenous-state relations.

---

72 See, for example, Statement of the Grand Council of the Crees (of Quebec) (1988) doCip Doc. 210980_1 (on file with author) (“While we meet here, we are fighting for our survival as a people. Our collective rights are being denied in many lands, and even in the most wealthy countries of the world, our people are always the poorest of the poor” at 210980_1)

73 Generally, see Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge: Cambridge University Press, 1998).

74 For an illuminating account of this practice of indigenous-states relations in CANZUS states, see Kirsty Gover, Tribal Constitutionalism (Oxford: Oxford University Press, 2010).
As noted above, Engle recognizes that this “strong form of self-determination”, as she puts it, was advocated by Northern indigenous peoples. However, she argues the decolonization model became less prominent due to a combination of: (1) its shelving by indigenous advocates in the North; and (2) a preference for human rights and culture in the Latin American indigenous movement.

In contrast, I argue it is the globalization of the movement and in particular the participation of indigenous peoples of Asia and later Africa that saw a particular emphasis on human rights and culture in the Declaration negotiations. This threatened to undermine the decolonization model and unravel the self-determination framework. These movements placed particular emphasis on culture and human rights because this established common cause with indigenous peoples of the North. While Northern indigenous peoples focused on the decolonization model, they also repeatedly referred to their marginalization, threatened cultural identity, and denial of basic rights. The Southern movement’s emphasis on human rights was also an effort to defuse anxiety held by Southern states over minority security and stability issues. Asian and African states were particularly concerned about the right to self-determination in the Declaration. In response, Asian indigenous advocates held themselves out as “harmless” communities of remote, mountain and hilltop areas seeking cultural survival in the face of unrelenting Western development and culture (not secession). Because Asian and African movements’ participation in the Declaration negotiations are not featured in Engle’s narrative, she misses a pivotal North-South tension.

There are two particular implications that follow from this alternative narrative of the Declaration’s history. First, Engle overstates the emphasis on the human rights model by Northern indigenous advocates – indeed the Northern movement split between advocates of a human rights model and advocates of the decolonization model with the latter group persisting right up to the Declaration’s UN General Assembly adoption (North-North tension). Secondly, by overlooking the impact of Asian and African indigenous peoples’ participation in Declaration negotiations, Engle underestimates the pressure placed on Northern indigenous peoples to drop the decolonization model (broader South and North-South tension).
3.1 North-North tension

In this dissertation, contrary to Engle, I demonstrate that while many Northern advocates did come to shift their emphasis from the decolonization model towards a human rights model (witness the statement read by Malezer before the UN General Assembly), other Northern “hardline” advocates stayed the course. They did not want to compromise their core roots in radical sovereign tribal politics. Indeed, it is this persistence in advancing the decolonization model that accounts for the inclusion of the self-determination framework in the Declaration. By not according real weight to the connection between this decolonization model advanced by indigenous advocates of the North and the Declaration’s self-determination framework, Engle limits the interpretive horizons of the Declaration. By this, I do not mean in the technical sense of understanding the travaux preparatoires as a subsidiary means of treaty interpretation, but more broadly as predisposing the reader to assume that the Declaration’s wording cannot be read in an alternative way and/or that there is no longer a politics supporting this alternative reading. Contrary to Engle, the self-determination framework is thus directed at the restoration of tribal political power and tribal economic assets that would address issues of structural injustice.

3.2 A broader South and North-South tension

The participation of Asian and African indigenous peoples in the Declaration negotiations meant that there was significantly more emphasis on human rights and especially the human right to culture and greater pressure to drop the decolonization model than Engle describes. Whereas Engle’s account features the Latin American indigenous movement as the other factor explaining why the decolonization model was displaced, my research demonstrates the pivotal role played by Asian and African indigenous advocates. The decolonization model was not practical, nor persuasive, in the context of Asia and Africa. Latin America indigenous peoples could at least claim the decolonization model – although I argue the decolonization model is for the North only based in particular on treaty-making. However, Asian and African indigenous peoples could not ground their claims in the same history of colonialism and thus could only benefit from alternatives to the decolonization model. Furthermore, Asian and African (and also Latin American) indigenous peoples were not as

75 Vienna Convention on the Law of Treaties, supra note 7, art 32. The Declaration is, of course, not a treaty.
interested in historical injustices as they were with contemporary struggles – the need for their cultural survival and basic human rights.

4 Reading the Declaration anew

By recognizing the part played by the indigenous advocates of the South, particularly Asia and Africa, my account has the effect of sharpening the North-South politics of the trade-off involved in passing the Declaration. However, the place of the North-North politics in my account suggests that we should also re-examine the final trade-off itself. Engle’s rise-and-fall story of the indigenous advocacy behind the Declaration dovetails with a one-note interpretation of the Declaration as flowing from human rights and especially the human right to culture. Likewise, Anaya asks us to see the Declaration as a set of universal human rights elaborated to fit the indigenous context.

The few scholars who propose a more radical reading of the Declaration as grounded in rectificatory justice, notably Patrick Macklem, do so as a normative matter and not, as I do, through an account of its political history.76 Moreover, Macklem offers a one-note interpretative model akin to the decolonization model – it is only about rectificatory justice for denial of sovereignty.

I take issue with both the one-note human rights reading and the one-note decolonization approach. The alternative political history outlined in this thesis shows that neither the impact of the Southern indigenous peoples’ movement nor the Northern movement has been fully appreciated. The South contributed towards the human rights in the Declaration while the North ensured the decolonization model was retained.

The picture of the Declaration that emerges in this thesis is normatively mixed. This mixed-model account sees the Declaration as containing two normative strands: one based on human rights and the other based on anti-colonialism. The human rights strand is directed at indigenous peoples of the North and South. Almost all of the 46 articles of the Declaration apply to indigenous peoples of the South as well as indigenous peoples of the North on the basis of a human rights model. These include the rights to practise and revitalize their cultural

76 Macklem, supra note 25.
traditions and customs (Article 11); the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies (Article 12); and the right to determine and develop priorities and strategies for exercising their right to development (Article 23). This interpretation of the Declaration enables indigenous peoples of the South to access the rights that mean most to them. This could conceivably include self-determination itself, although in the sense of promoting the right to effective participation in public life, inclusion of indigenous peoples in decisions affecting them, and local autonomy.

However, the right to self-determination, self-government, historical redress, treaty rights and FPIC – the self-determination framework – resulted from the decolonization model. Indigenous peoples are first peoples, prior to the current state, and entitled to recognition of their inherent sovereign status. For indigenous peoples of the CANZUS states, the self-determination framework is in the Declaration to address their specific circumstances. It also shows that Northern indigenous peoples’ claims are not mired in claims to culture – as Engle argues – but rather directed at major economic and political reforms.

Others offer mixed-models that view the Declaration as containing human rights and aspirations – the latter being the self-determination framework. However, these models seek to disconnect the self-determination framework from the decolonization model. The United States, Canada and New Zealand argue that the aspirations are ultimately to be determined by states within their respective legal system and practices. 77 Benedict Kingsbury sees the aspirations as grounded in history and culture, not anti-colonialism. 78

The important benefit of my mixed-model is that it is not a zero-sum game between North and South. This interpretation of the Declaration enables indigenous peoples of Africa and Asia (as well as Latin America) to access the rights in the Declaration that mean most to them and are grounded in their particular experience. It also helps to address African and Asian states’ opposition to their self-identification as indigenous peoples. This opposition was largely due to the self-determination framework in the Declaration, sparking fears of secession. It would also hopefully lead to less emphasis on culture. There would be less need


78 Kingsbury, supra note 25 at 244.
to use culture to establish common cause with the international movement and to defuse anxiety held by Southern states over minority security and stability issues. Thus indigenous peoples and most states benefit. CANZUS states of course would oppose the inclusion of decolonization in the mixed-model but this is based on its concern about the power of the decolonization model rather than any question about its normative salience.

The question however is whether my mixed model is the better model of interpretation. Can the Declaration be given such a mixed-model interpretation, so that it serves both Northern and Southern indigenous peoples at the same time? Is this argument within the bounds of current thinking in international law? I argue that the mixed-model is for three reasons: (1) the “interpretive community” associated with the Declaration’s negotiations and its implementation shared and continue to share a set of assumptions, expectations, and knowledge that support my mixed-model interpretation of the Declaration;79 (2) insofar as the Declaration’s distinctive political legitimacy derives from broad-based indigenous participation, the mixed-model reflects the participation of both Northern and Southern movements and the incorporation of their respective normative arguments; and (3) drawing on traditional treaty interpretation principles, it could be argued that the mixed model is legally relevant because it informed how states understood what ideas had been captured in the Declaration.

The contemporary challenge is to revive the normatively mixed account of the Declaration which I argue is truest to its political history, maximizes the gains for all indigenous peoples and is legally and politically plausible for the three reasons just stated respectively. The human rights model is dominant in the South. Nevertheless, as I argue, there remains strong resistance to indigenous rights – especially in Asia and Africa – due to the Declaration’s self-determination framework. In Latin American there is a heavy emphasis on culture and not equality leading to the reification of indigenous rights. Ironically, even in the North indigenous peoples rarely refer to the decolonization model. The challenge now for Northern indigenous advocates is to re-assert the self-determination framework in the Declaration and emphasize its basis in the decolonization model.

Chapter 1 tracks the origins of the contemporary international indigenous movement in advocacy in North America followed by Australasia. The focus of these advocates was political sovereignty. I track their impact on the Declaration negotiations in the first UN working group established to draft the Declaration (1982-1993), and show that it was the decolonization model advanced by the indigenous advocates of the North that led to the inclusion of the article 3 right to self-determination and the self-determination framework in this draft of the Declaration. Northern indigenous peoples sought a reference to self-determination identical to common article 1 of the International Covenants (without any reference to territorial integrity) so as to provide their nations with the option of independence should they fail to negotiate fair terms of co-existence with the settler-state government. Indigenous peoples also called for these negotiations to be monitored by an independent international mechanism. The Declaration adopted by the working group was then approved by its parent body, the UN Sub-Commission on the Prevention of Discrimination (becoming known as “the Sub-Commission text”). However the Sub-Commission’s parent body, the UN Human Rights Commission re-directed the Declaration to a second working group (1995-2006) for “further elaboration”.

Chapter 2 outlines the globalization of the indigenous movement through the work of anthropology-based NGOs which foregrounded the commonalities between Asian and African indigenous peoples and indigenous peoples of the North and Latin America by emphasizing their struggle for cultural survival and recognition of basic human rights. These NGOs encouraged indigenous peoples of Asia and Africa to attend the Declaration negotiations and advocate accordingly. The emphasis on human rights and culture also sought to address the security concerns of Asian states, which were wary of the self-determination claims of indigenous peoples of the North and the implications of extending the right to local minorities.

This human rights model received support from government representatives of the North keen to shift the focus in the Declaration negotiations away from the decolonization model. However, the participation of indigenous advocates of Asia and Africa was strongly opposed by Asian and African states attending the Working Group. These concerns might be described as political in nature – about security and state control of resources. But
underpinning them was the normative claim that indigenous rights in the Declaration – and in particular the self-determination framework – was specific to the historical circumstances of Northern indigenous peoples.

Chapter 3 describes the impact of the globalized indigenous rights movement on efforts to maintain the self-determination framework in the second working group. It was at this point that increasing numbers of Asian and African indigenous advocates participated in the negotiations. Advocates of the North insisted on no-change to the Sub-Commission text, employing UN-sponsored treaty seminars, and hunger strikes (among the strategies) to preserve the self-determination framework. Although some of these advocates eventually yielded to calls from Southern indigenous advocates to accept some changes to the text, the Working Group’s final version retained the self-determination framework. Most significantly, article 3’s right to self-determination contained no reference to territorial integrity. However, in the UN General Assembly, African states called for a complete overhaul of the Declaration, including the extraction of the self-determination framework. Eventually, a compromise led to the inclusion of a reference to territorial integrity. Despite these changes, CANZUS states voted against the Declaration in the UN General Assembly, casting the self-determination framework as a set of *sui generis* aspirations.

These three chapters emphasizing indigenous voices in the Declaration negotiations draw on my personal experience working as an advocate for the past twenty years for tribal communities in New Zealand and as an advocate in the UN, and on the documentation compiled by the Swiss-based NGO, doCip (the Center for Documentation, Research and Information), which has gathered documentation since the 1977 International Conference on “Discrimination against the Indigenous Populations in the Americas”. In particular, I used the doCip CD Rom database of: (i) reports drawn up by the members and special rapporteurs of the Working Group; and (ii) presentations and statements made by states, NGOs, inter-governmental bodies, and indigenous advocates during the Declaration negotiations. The database is particularly comprehensive because it contains written submissions that are not in the UN documentation database including many submissions made by indigenous advocates and NGOs.

Consistent with my alternative history, Chapter 4 argues for a normatively mixed reading of the Declaration. The right to self-determination and the self-determination framework are in
the Declaration because of the specific historical experience that indigenous peoples of the North brought to bear. The right was subjected to the protection of territorial integrity in the final stages of negotiations in the UN General Assembly. However, this limit should not detract from the connection that the article 3 right to self-determination has with decolonization. The self-determination framework’s principal normative force comes from the UN decolonization programme, not the human rights programme. At the same time, elements of the Declaration also encompass aspects of basic rights. Much of the Declaration in fact is directed at human rights standards elaborated so as to fit the demands made by indigenous peoples of the North and South.

I argue that this mixed-model is consistent with the shared understandings and beliefs of the interpretive community associated with the negotiation and implementation of the Declaration. In addition, through their participation in negotiations, both Southern and Northern indigenous peoples contributed to the political legitimacy of the Declaration, each providing important evidence supporting the inclusion of both the human rights and decolonization models. Thus only a mixed model is vested with the full political legitimacy of broad-based participation. By broadening the peoples affected by the Declaration and by expanding participation in the drafting to represent them, Southern indigenous peoples’ contribution also provided momentum in the negotiations and provided the Declaration as a whole, in the outcome, with political legitimacy and authority.

In Chapter 5, I discuss the benefits of the mixed-model to both the Northern and Southern indigenous movements. The mixed model I argue can substantially benefit the Southern movements, particularly the Asian and African movements, by removing state concerns with the category of indigenous peoples and the self-determination framework. It would also emphasize the political legitimacy that these rights have for Southern indigenous peoples and shift the focus from culture to equality.

In the North, the challenge of my mixed-model approach is to avoid the decolonization model being absorbed by the human rights model through the practices of interpretation. By revealing the place of the decolonization model in the political history and thereby in the text of the Declaration, I seek to position indigenous advocates to re-assert the decolonization model so as to counter-act the effects of both the one-note models and the mixed models exemplified by Benedict Kingsbury and Canada, the United States and New Zealand. By
way of illustration, I close by considering how greater emphasis on the decolonization model could have influenced the outcome in two cases. The first case concerns aboriginal title litigation in Canada; the second, judicial and political treatment of Maori customary law in New Zealand.

Chapter 6 concludes by taking up the recent critique by several authors that the Declaration’s universalized propositions on indigenous rights have limited utility in the domestic context, given the need for indigenous rights to engage with competing interests, economic issues and extant constitutional structures. Certain on-the-ground practices, some even involving private industry, are noted as out ahead of international standards. In response I argue that this critique overlooks the power of the mixed-model to address fundamental gaps in the domestic indigenous rights architecture of both the North and South and thereby to speak to these different contexts in ways that the conventional interpretation of the Declaration does not.
CHAPTER 1:


1 The rise of contemporary indigenous movements in the CANZUS States

During the early 1920s, at a time when indigenous peoples of the CANZUS nations had undergone several decades of the most intensive phase of British expansion and settlement, two indigenous leaders journeyed many miles to Geneva to seek a hearing before the League of Nations. Representing the Iroquois Confederacy of Canada, Chief Deskaheh wanted to raise his concern about a Canadian government proposal to disassemble the traditional government of the Iroquois and replace it with a system of elected chiefs and councils. The central point Deskahheh raised before the League was the political sovereign status of the traditional leadership of the Six Nations. He sought recognition of the Iroquois Confederacy as an independent state in international law as recognized in the Jay Treaty 1794 and Treaty of Ghent 1814 signed by the British Crown. Canada argued the League lacked jurisdiction, this being an issue for the British Empire and especially a domestic concern for Canada beyond the purview of other states. Canada enacted a law that effectively installed a new elected tribal council for the Iroquois thereby undermining Deskaheh’s authority to represent them at the League. Chief Deskaheh left Geneva in 1924 without a hearing.

Maori chief, Tahupōtiki Wiremu Rātana, also appealed to the League. His concern, like Deskaheh’s, was about treaty promises violated, the loss of tribal lands and sovereignty. The Treaty of Waitangi signed between the British Crown and Maori tribes in 1840 had guaranteed the right of tribes to tino rangatiratanga (chieftainship) over their lands and fisheries. However, by the time of Rātana’s journey to Geneva, almost all of the tribal lands had been appropriated by the settler state. Like Deskaheh, Rātana was refused an audience.

---

2 Ibid at 70.
3 Ibid.
5 Ibid.
6 Malezer, supra note 1 at 71.
before the League and returned home empty handed. But not before stopping off in Japan on his journey home, curious to see how these Non-Western peoples governed their own independent state.

These leaders travelled long distances and endured great hardship in their quest for justice, a justice related to the right to exercise sovereignty on their own terms consistent with promises made in treaties between nations. Frustrated with their inability to stop the loss of their lands and political power domestically, they sought access to a higher supra-national authority. As we will see, these are the primary animating forces underpinning the beginnings of the contemporary indigenous rights movement. The reality for Deskaheh and Tahupōtiki Wiremu Rātana was that their cause was not considered important or relevant to the League. The League did administer “trust territories” under its mandate system ie, the former colonies of the defeated Axis powers. However, as historians now note, the League was in fact primarily directed towards the consolidation of empires such as the British Empire. It was not placed to hear their claims.

It was an inauspicious beginning to indigenous peoples’ engagement with international institutions and international law, setting the stage for the theme of most of the 20th century. When the League was dismantled following the Second World War, and the UN was established, there was no consideration of the status of indigenous peoples. But the UN did provide the setting for the end of empire through decolonization. It would also set out a new vision for avoiding the horrors of the Second World War through a human rights program. It would be via these two forms of liberation that indigenous advocates would seek to advance their cause.

1.1 CANZUS and indigenous advocacy
Significant international attention towards indigenous peoples would not emerge until the end of the twentieth-century during a new era of rights-based movements. From the late 1960s and early 1970s, indigenous social movements arose within the settler states of Canada, Australia, New Zealand and the United States (CANZUS or Northern states). Disenchanted

---

7 Ibid.
8 Sanders, supra note 4 at 74.
9 League of Nations, Covenant of the League of Nations, 28 April 1919, art 22.
with leftist-socialist movements and inspired by the decolonization movement, indigenous activists worked alongside other identity-based movements, including women’s rights, and black power movements, to mobilize for state reforms.

From the beginning, the indigenous movements from these four common law countries would work closely together. Each national movement had its own distinctive flavor. But there were also many commonalities given their shared origins as “first peoples” colonized by the English from the 18th century. Initially, British colonial policy was aimed at engaging with local indigenous inhabitants.\textsuperscript{11} Treaties were established with tribes in all states, excepting Australia. Between 1776 and 1871, the colonial Crown signed hundreds of treaties with tribes in what was then known as British North America (now Eastern USA and Canada).\textsuperscript{12} In New Zealand, the Treaty of Waitangi was signed in 1840 between representatives of the Crown and Maori “tribes.” In addition to treaties, colonial judicial decisions and proclamations recognized Indian sovereignty. For example, the United States Supreme Court in the trilogy of “Cherokee Cases” recognized Indian tribal rights to land and inherent sovereignty as “domestic, dependent nations.”\textsuperscript{13}

Once the balance of power began to shift in favor of a rapidly expanding settler population, the settler governments’ focus became the rapid acquisition of land. Powerful speculators and governments hungry for land to finance the colonization project sought to remove indigenous peoples from their lands. Colonial judicial decisions and policy turned against indigenous peoples. In New Zealand, for example, only several decades after the Treaty of Waitangi, the judicial decision of Wi Parata ruled Maori possessed no property in their traditional lands and that the Treaty was a “nullity”.\textsuperscript{14} Conflicts over land between settler governments and indigenous peoples resulted in the confiscation of tribal lands.\textsuperscript{15} In the United States and New Zealand, lands retained by indigenous peoples were individualised undermining collective


\textsuperscript{12} McHugh, “Aboriginal Societies”, supra note 11.

\textsuperscript{13} Johnson v M’Intosh, 21 US 543 (1823) [Johnson]; Cherokee Nation v Georgia, 30 US 1 (1831) [Cherokee Nation]; Worcester v Georgia, 31 US 515 (1832) [Worcester].

\textsuperscript{14} See Wi Parata v the Bishop of Wellington (1877) 3 NZ Jur 72 (NS).

\textsuperscript{15} Almost one quarter of New Zealand was acquired by the state through land confiscation from tribal “rebels” who resisted requests to sell their land to the Crown, see, Richard Boast & Richard S Hill, eds, \textit{Raupatu: the Confiscation of Māori Land} (Wellington: Victoria University Press, 2009).
control over alienation. By the end of the 19th century, nearly the entire landmass of the CANZUS states was transferred from indigenous to non-indigenous ownership. The jurisdiction recognized in the United States under the “Cherokee Cases” was whittled away by Congress under its so-called “plenary power.”

Moving into the 20th century, government policy across the CANZUS states generally pursued two tracks. First, successive governments recognized the tribe and applied special laws and codes to them – in the United States, this was the “federally recognised domestic dependent nation.” In Canada, the Indian Act was established to administer life on Indian band reserves. Similar reserves were established in Australia while in New Zealand, tribal land rights and corporate bodies were regulated by legislation. These reservation lands were often in remote areas out of sight to most and plagued by poor health, and general poverty. Secondly, governments adopted a policy of assimilation, encouraging tribal members to leave the land base and merge into the general citizenry. The ultimate policy goal was that there would be a race of North America Indians or Maori or aboriginal people and an end to the tribe as a historical-political institution.


17 The Major Crimes Act, 18 USC § 1153 (1885) (which established paramount federal jurisdiction over certain crimes committed in Indian country, whether by an Indian or non-indian); see also the Public Law 280 of 1953, which extended state criminal and civil jurisdiction to Indian country in specified states; see also Russel L Barsh, “The Red Man in the American Wonderland” (1984) 11:3 HRts 14.


19 McHugh, “Aboriginal Societies”, supra note 11 at 224-43.

20 Ibid at 245-62.

21 Ibid at 276-84.

22 Ibid at 264-74.

23 McHugh, “Aboriginal Title”, supra note 11 (“[t]he implicit presumption, sometimes made explicit, was that tribes would become an urban proletariat. It was generally believed that their movement to the cities would dissolve their customary polities and that those old forms would be superseded by new patterns of ethnic association and cultural identity” at 34).
It was this last push to assimilate indigenous peoples, coinciding with the rise in the 1960s and 1970s of identity-based movements and the UN decolonization movement that inspired indigenous activism across the CANZUS states. Rather than led by leaders of the government recognized tribes, the initiators of this movement were mostly urban-based indigenous youth who had left the reservation during the assimilation era.

Indigenous advocates across the CANZUS states organized a series of high-profile protests including land marches and the occupation of government offices and sites of historical significance. In the United States, Indian student activists occupied Alcatraz in 1969 for nineteen months. As one of the activists, Lanada Boyer, later reflected:

We took the island because we wanted the federal government to honour our treaties and its own laws. The previous claim [to the island] had been made back in 1964, so we were the follow up. We also wanted to focus our attention on Indian reservations and communities throughout the nation where our people were living in poverty and suffering great injustice.

Other protests included the “Trail of Broken Treaties” march to Washington D.C. and the two-month siege at Wounded Knee on the Pine Ridge Sioux reservation by American Indian Movement activists. Aboriginal activists in Australia staged an occupation outside Parliament grounds in the “Aboriginal tent embassy.” In New Zealand, there was the “Great Land March” from Te Hapua in the far north of the North Island to the capital in Wellington at its extreme south. Thus, these movements emerged practically simultaneously across the


27 *Ibid* at 418.


four states and they increasingly provided one another with inspiration and a sense of solidarity.\footnote{See, Foley, Schaap & Howell, \textit{supra} note 24 at 123 (aboriginal activists establishing the tent embassy in Australia were inspired by the American Indian Movement’s occupation of Alcatraz).}

What were these activists seeking and why? Their ambitions were different to most other social movements of the North. Their agenda was political power for indigenous peoples based on their prior nationhood status – in particular, \textit{the restoration of indigenous historical-political institutions and traditional lands and resources}. This “historical sovereignty” argument challenged the legitimacy of state sovereignty and sought restoration of their prior, sovereign rights.\footnote{For a description of this “historical sovereignty” argument, see James Anaya, “Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend” (2005) 16 Colo J Intl Envtl L & Pol’y 237 at 241.} While many radical activists spoke of indigenous independence and sovereignty, most called for political autonomy within the modern state.

In North America there was particular emphasis by activists on treaties. The Trail of Broken Treaties to Washington produced a “20-Point Program” whereby 7 of the 20 points spoke to treaty rights and point 6 demanded that all Indians in the United States be governed by Treaty relations.\footnote{Boyer, \textit{supra} note 26 at 166–67.} As Tom LaBlanc notes:\footnote{See Tom LaBlanc, “Indianismo!” in Susan Lobo & Steve Talbot, eds, \textit{Native American Voices: A Reader} (Upper Saddle River, NJ: Prentice Hall, 2001).}

\begin{quote}
[T]he 20 point program proposed restoring the treaty process as a way to once again recognize the sovereignty of North America tribes and nations, and as a solution to the current situation of poverty, exploitation, and racism.
\end{quote}

Citing the Treaty of Waitangi of 1840, Maori activists in New Zealand called for sovereign control over their communities and lands alongside the sovereign power of the state.\footnote{Sharp, \textit{supra} note 18.} Rather than dividing sovereign power in New Zealand, some Maori activists demanded complete sovereign control by Maori over the whole country.\footnote{\textit{Ibid} at 256–265 (for discussion about Maori activists and their calls for sovereignty).} Donna Awatere, for example, in the early 1980s wrote:\footnote{\textit{Ibid} at 257.}
Maori sovereignty is the ability to determine our own destiny and do so from the basis of our land and fisheries. In essence, Maori sovereignty seeks nothing less than the acknowledgment that New Zealand is Maori land and further seeks the return of that land.

In addition to treaties, indigenous advocates repeatedly appealed to a history of land taking and its role in undermining indigenous peoples’ sovereignty. This was a particular feature of the movement in Australia – given the absence of treaty-making between the British and aboriginal peoples.\(^{37}\) In particular, aboriginal activists could point to the well-recognized fact that aboriginal peoples had occupied Australia for tens of thousands of years prior to white settlement. Australia had in fact been acquired on the basis of *terra nullius* – that is, the fiction that it could be settled because there were no other people on the land (aboriginal people being too “backward” to be considered occupiers).\(^ {38}\) The Aboriginal tent movement issued a five-point plan for land rights seeking Aboriginal control of the Northern Territory as a state within Australia.\(^ {39}\)

Indigenous advocates also pointed to their severe socio-economic marginalization. Indigenous peoples were vastly outnumbered by a predominantly English-speaking settler majority, and comprised only a tiny minority of national populations. Indigenous peoples comprised 4% in Canada, 2.6% in Australia, 1.5% in the United States and 15% in New Zealand. They were vastly over-represented in domestic statistics on crime, unemployment and ill-health. This continues to be the case, thereby constituting a stark difference given that CANZUS states are all affluent liberal democracies. Indigenous activists argued that their advancement socially, culturally and economically would be through the restoration of sovereignty, and the indigenous way of life.

The loss of a land base combined with assimilation policies took their toll on indigenous political institutions. And for indigenous peoples this had to be a major concern. They could not legitimately seek rectification for historical and ongoing injustices without showing that their tribal political institutions had endured despite many years of dislocation and

\(^{37}\) See, Foley, Schaap & Howell, *supra* note 24 (The aboriginal tent embassy was a response to the Prime Minister’s public statement on land rights, which in essence was a perpetuation of the policy of assimilation and rejection of land claims).

\(^{38}\) *Mabo v Queensland (No 2)*, [1992] 175 CLR 1 (overturning as discriminatory the common law rule that Australia was terra nullius when sovereignty was asserted over the country) [*Mabo (No 2)*].

\(^{39}\) Foley, Schaap & Howell, *supra* note 24 at 33–34.
assimilation. By the mid-twentieth century, many indigenous peoples of CANZUS states lived away from their traditional land base, although the local rural, tribal community remained.

What assisted indigenous movements in establishing continuity were the foundations laid by government policy and law. The legal “protectionist” institutional system for categorizing and managing indigenous peoples’ governance structures and property separate from other citizens played its role in perpetuating the corporate community.40 Some tribal governments, especially those in North America, were still in possession of large territories. In the United States, the federally-recognized tribes exercised jurisdiction, operating courts and legislatures, although the jurisdiction had been severely limited by Congress’ plenary power.41 The tribe then carried the claim of indigenous peoples against the state. Despite intermingling, the application of western laws to tribes, and the urbanization of many indigenous peoples, the tribe represented the continuance of the tribal polity from the moment of contact until the contemporary era of indigenous rights activism. It would be these remnant tribal communities of the CANZUS states that would provide the focal point for the indigenous peoples’ movements in the 1960s and 1970s, although the movements would be led by young indigenous activists based in the cities.

1.2 The call for historical rectification

What was ultimately required was a serious inquiry by the CANZUS states into the injustices of the past and a process of historical rectification for tribes – including the restoration of tribal political autonomy. The United States had sought to comprehensively resolve the grievances of Indian tribes in 1946 with the Indian Claims Commission.42 However, the only remedy provided under the relevant statute was monetary compensation upon a finding of extinguishment or taking of rights, leaving many fundamental issues unresolved.43

Gradually, government policies came to increasingly recognize group-differentiated rights through exemptions and the granting of specific rights. The reforms were based on the notion

40 Gover, supra note 18.
41 Williams Jr., supra note 16.
of indigenous peoples as first peoples with a special relationship with the state. In the United States, President Nixon’s 1977 “Self-Determination Policy” looked to a “new era in which the Indian future is determined by Indian Acts and Indian decisions.” Tribes were to be able to assume the planning and administration of federal programs devised for their benefit. The Alaska Native Claims Settlement Act (ANCSA) 1971 sought to resolve the long-standing issues surrounding aboriginal land claims in Alaska. In Australia, statutory land agreements resulted in the return of large tracts of land to aboriginal peoples. The Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) in the Northern Territory – the state with the largest Aboriginal population – resulted in approximately half the Northern Territory being held by aboriginal peoples under a collective form of freehold title. The Waitangi Tribunal was granted power in 1985 to inquire into the historical violations of the Treaty of Waitangi in New Zealand, ushering in a new era of historical inquiry and redress through modern treaty settlements. In Canada, the British Columbia Treaty Commission was established for addressing aboriginal land claims in British Columbia. These reforms were also accompanied by a series of judicial decisions in an emergent era of public interest litigation recognizing native interests in fisheries, minerals, and other resources.

However, Indian activists, particularly the more radical elements, were frustrated at their relatively weak bargaining power as small minorities. An enduring problem throughout the history of indigenous-settler state relations was the unilateral manner in which reforms were determined, and this continued to plague policy making in the new era of indigenous rights recognition. Furthermore, indigenous rights in the CANZUS states tended to fall within the realm of the executive which left indigenous peoples at the mercy of prevalent political

49 McHugh, “Aboriginal Societies”, supra note 11.
50 In the United States, in the early 1970s, there was judicial recognition of treaty rights to fish in Washington State, see United States v Washington, 384 F Supp 312 (1974) (which ruled that treaties signed in 1854 and 1855 reserved the right to fish); see also, Santa Clara Pueblo v Martinez, 49 US 436 (1978) (the Supreme Court upheld the right of recognized tribes to determine their membership base in accordance with their inherent sovereignty); Mabo (No 2), supra note 38 (rejecting principle of terra nullius); Te Weehi v Regional Fisheries Officer, [1986] 1 NZLR 680 (recognizing a Maori customary right to fisheries); Calder v Attorney-General of British Columbia, [1973] SCR 313 (recognizing aboriginal title in Canada).
attitudes.\textsuperscript{51} The courts on occasion would intervene and prompt government action by recognizing common law aboriginal rights to land and resources. However, the courts tended to defer to the Executive.\textsuperscript{52}

The reformist decisions and policies were no doubt influenced by the sovereignty arguments of indigenous movements. But at the same time, they seemed to be the tweaking of old policies. As was the case for many other social movements of the time, reform was neither fast enough nor radically transformational. What advocates sought – and continued to be denied to them – was the restoration of indigenous historical-political institutions and traditional lands and resources.

Indigenous peoples did not trust governments to address their calls for major reform. As Robert T Coulter, director of the Indian Law Resource Centre, one of the foundation international indigenous organizations, remarked in 1977 on the United States, “the conclusion is certain that no remedy is available and no legal relief is possible under United States law with respect to all of the fundamental issues of Indian rights and Indian relations with the United States.”\textsuperscript{53} What offered greater hope was international law – the notion of appealing to a supranational authority that applied objective standards directed to indigenous peoples’ specific concerns. As the Grand Council of the Crees would remark during the Declaration negotiations:\textsuperscript{54}

History has shown us that domestic law is not a reliable standard for protection of human rights. It is a fundamental principle of the United Nations that we set higher ideals. We attempt to transcend national and municipal law, and bind ourselves to a

\textsuperscript{51} Gover, supra note 18; See also Mark Hickford, \textit{Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire} (Oxford: Oxford University Press, 2011).
\textsuperscript{52} In New Zealand, see \textit{Te Runanga o Wharekauri Rekohu Inc v Attorney- General}, [1993] 2 NZLR 301 (“[p]arliament is free to enact legislation on the lines envisaged in the Deed or otherwise. Whether or not it would be wise to do so and whether there is a sufficient ‘mandate’ for any such legislation are political questions for political judgment. The Court is not concerned with such questions” at 309); see also, \textit{New Zealand Maori Council v Attorney-General} [2013] 3 NZLR 31 (the Supreme Court declined to stop privatization of a hydro-project on the basis that Maori could access redress from the government).
\textsuperscript{53} Robert T Coulter, 1977 “The Continual Denial of Our Existence” Akwesasne Notes 9, 3 (1977) at 16-17 cited in Jens Dahl, \textit{The Indigenous Space and Marginalized Peoples in the United Nations} (New York, NY: Palgrave Macmillan, 2012) at 25; Kenneth Deer, who attended the international meeting that established the Treaty Council, notes that after the conflict at Wounded Knee “elders and traditional leaders in the Americas concluded that there was no way we could get justice in the domestic situations in which we found ourselves” (ibid at 25–26).
\textsuperscript{54} See Statement of the Grand Council of the Crees (of Quebec) (1 August 1988) doCip Doc. 210980_1 (on file with author) at 210980_2.
higher ideal in order to overcome the misguided interests, greed, and political motivations that can result in abhorrent domestic legislation.

In the late 1970s, there were already signs the UN would be inquiring into the rights of indigenous peoples due to the lobby efforts of indigenous advocates.\textsuperscript{55} To have a set of international standards – especially if they were set high – would be a significant advancement for the cause of indigenous peoples’ movements. The aim, then, was to shoehorn radical, domestic sovereignty-based claims into this international project.

2 \hspace{1em} Which Model of International Protection? - human rights, minority rights or decolonization?

2.1 \hspace{1em} The human rights model

When the founding indigenous organizations and advocates entered the UN and sought to use international law to support their local movements, there were several different models they could use to support their claims. One candidate was the human rights model set out in the Universal Declaration of Human Rights of 1948 (UDHR).\textsuperscript{56} This was the preferred approach of states who argued that all indigenous peoples needed was the conscientious application of human rights standards to their situation. But being drafted by Western states with an emphasis on individual rights held universally – irrespective of the person’s cultural, religious or political ties and allegiances – the UDHR failed to address those matters that were of most importance to Northern indigenous activists; that is, restoration of political sovereignty and territory.\textsuperscript{57}

More fundamentally for indigenous activists, human rights were closely attached to the construction of, and implied fidelity to, the modern liberal democratic state. As Samuel Moyn notes, rights established the boundaries of citizenship as a means of solidifying the power of


\textsuperscript{57} Also, a particular quirk of human rights instruments is their ahistorical nature. See Richard A Falk, \textit{Human Rights Horizons the Pursuit of Justice in a Globalizing World} (New York, NY: Routledge, 2000) at 290.
the nation state. The classic liberal equality model, which provided the core foundation for the drafting of the UDHR in the post-war years, was not about protection of the citizen against the state but the promotion of the state itself.

Human rights were important to Northern indigenous advocates – their communities occupied the margins of social life in their home states. However, the human rights model was not an ideal option for indigenous advocates. Most indigenous activists’ claims extended to the legitimacy of the liberal state itself. Sovereignty claims meant indigenous peoples were logically prior to the establishment of the liberal democratic settler-state and indicated that the state lacked legitimacy or consent to govern indigenous peoples.

2.2 The minority rights model

The other potential model was minority rights. However, standard-setting for minorities is notoriously weak. During the inter-war Years, the League of Nations established a minority rights regime, due to anxieties about the plight of minorities in Eastern Europe. The League made recognition of new states dependent on their commitment to treat minorities properly and grant them new rights under international law that the League itself monitored. But these protections were discredited given their cynical use by the Nazis to justify invading neighboring states on the basis that the rights of German minorities were being violated.

Minority rights were seen by states as sources of insecurity and destabilization because they could be used by collectives to assert independence or autonomy. If human rights struggled to emerge during the post Second World War-years, minority rights faced even greater

58 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010), ch 1. As Moyn notes, liberal democracy’s rights instruments, including the right to equality, was not about the protection of the individual as against the state. They were aimed at establishing the boundaries of citizenship as a means to solidify the power of the nation state.

59 Ibid.


63 Thornberry, *supra* note 61 at 122.

resistance. When the United Nations was established, the UN Charter contained no reference to minority rights. The UDHR also omitted reference to these rights. The Genocide Convention was adopted in 1948 but contained no reference to “cultural genocide” or “ethnocide.” The European Convention on Human Rights (1950) does not speak of minority rights, nor does the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969).

The security threat posed by minorities was not only a concern of the original members of the UN but also for the newly decolonized members from Asia, Africa and the Middle East. Many of these “post-colonial states” contained minorities with secessionist ambitions. Minority rights posed a threat to these new states which often used force to suppress demands for autonomy or secession. And there was resistance to international intervention into their domestic treatment of minorities.

It was not until several decades after the UDHR that the UN set out to frame minority rights protections. Even then, they were framed as the rights of individuals belonging to minorities, as opposed to collective rights. Article 27 in the ICCPR, adopted by the General Assembly in 1966, provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the

---

65 Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945).
66 Universal Declaration of Human Rights, supra note 56.
68 Ibid.
72 Kymlicka, supra note 64.
73 See, for example, the conflict between West and East Pakistan resulting in the secession of East Pakistan in 1971 and the creation of Bangladesh, see Richard Sisson & Leo E Rose, War and Secession: Pakistan, India, and the Creation of Bangladesh (Berkeley, CA: University of California Press, 1991); Generally on post-colonial states concerns with internal minorities, see, Kymlicka, supra note 64.
74 Kymlicka, supra note 64.
75 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 27 (entered into force 23 March 1976) [ICCPR].
other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 has been successfully invoked in a series of cases to help protect indigenous cultural practices in claims before its monitoring body, the UN Human Rights Committee. The Committee has noted that “while the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.” As a result, states may need to protect the “identity of a minority” to ensure members enjoy and develop their culture, language and practise their religion. However, Article 27 has clear limitations as a framework for articulating indigenous claims. As Kymlicka notes:

To oversimplify, Article 27 can be invoked to contest discrete laws or policies adopted by states, but it does not contest the structure of the state itself. It sets limits on how states govern their indigenous peoples, but it does not put in question the right of states to govern indigenous peoples and their territories. Yet it is precisely the structure of the state that is the central issue for many indigenous peoples. They do not simply want the state to govern them differently; rather, they want to govern themselves.

2.3 The decolonization model

For several decades following the Second World War, the dominant international movement...
for the freedom of peoples was the anti-colonial movement directed by the UN. The purposes of the UN Charter included a reference to developing “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” which seemed to offer the promise of independence. However, this formulation of self-determination was ambiguous and the development of a right of self-determination from the Charter proved, instead, to emerge from the chapters on self-government for trust territories and non-self-governing territories. The founding states of the UN, most of them imperial powers, were ambivalent about decolonization and self-determination. Mark Mazower notes:

One can view the Charter and especially its preamble, along with the UDHR and the Genocide Convention, as testifying to the foundational imperatives of the new world order established in the fight against Nazism. Or one can read them as promissory notes that the UN founders never intended to cash.

Like the League of Nations, the UN was a club of Western states concerned about shoring up and maintaining their power. However, this changed due to a battle of ideas about the protection of minorities and agitation from former colonial nations who were early entries into the UN system. India’s Prime Minister, Jawaharlal Nehru, led his country’s protests at the South African treatment of its Indian population and found a receptive audience despite the UN’s formal prohibition on intervening in internal matters. This triggered a major shift in direction for the UN from its initial project of protecting imperialism to the active promotion of decolonization. Relying in particular on the principle of self-determination set out in the UN Charter the decolonization movement succeeded in making the UN an instrument for the emancipation of colonial peoples throughout the world. Self-determination then, moved from a principle of international law to a widely accepted legal right. This movement and the process of decolonization radically shifted international politics.

---

81 Charter of the United Nations, supra note 65, art 1(2).
82 Ibid at chapters XI (governing non-self-governing territories), XII and XIII (establishing the trustee system).
83 Mazower, supra note 10 at 8.
84 Ibid.
at its inception in 1945 the UN consisted of fifty-one states, mostly representative of the Americas, Western Europe, and with minimal representation from Asia and Africa, by 1970 there were over seventy new member states. These additions were almost all newly decolonized nations of Asia and Africa. In 1960 alone, seventeen African states joined the UN.\(^{87}\)

In fact, the decolonization movement was so powerful that the reference to self-determination in the International Covenants was largely due to this shift in representation in the UN. When the UN organs debated the Covenants in the 1950s, the post-colonial states *insisted* that the Covenants contain the right of peoples to self-determination as the threshold right.\(^{88}\) In this, they found support from the Soviet Union and Communist bloc countries.\(^{89}\) Lenin had long advocated for the self-determination of colonized peoples as did subsequent Soviet political leaders.\(^{90}\)

For the post-colonial states, the right to self-determination was about the liberation of “peoples under foreign domination.”\(^{91}\) This was the right upon which all other rights depended. Western states were opposed to any provision on self-determination in the International Covenants, with the UK, France and Belgium taking the lead given their concern about retaining control over their colonies and investment in the South.\(^{92}\) According to Cassese, Western States advanced a number of technical arguments to support their opposition, including that self-determination was a political principle, not a justiciable right, or that it was too nebulous and vague to be included in an international treaty.\(^{93}\)

---

\(^{87}\) The countries were Cameroun, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Cyprus, Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Niger, Nigeria, Senegal, Somalia, Togo, Upper Volta.

\(^{88}\) Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1998) (“[t]he socialist countries -- soon joined, at least at the political level, by an increasing number of freshly independent Third World countries -- were the most active advocates of anti-colonial self-determination. They adopted and developed Lenin’s thesis that self-determination should first and foremost be a postulate of anti-colonialism” at 44).

\(^{89}\) *Ibid* at 47–52 (noting how in 1950 the Soviet Union proposed a provision regarding self-determination in the International Covenants – “the primary concern was the right of self-determination of colonial peoples” at 48).

\(^{90}\) *Ibid* at 14–19 (although as Cassese notes “the Soviet leader championed self-determination more to further his ideological and political objectives than to safeguard peoples” at 18).

\(^{91}\) Moyn, *supra* note 58.

\(^{92}\) Cassese, *supra* note 88 at 49–50 (“By and large, it can be contended that Western countries opposed the provision on self-determination either on account of their colonial interests, or out of fear that the paragraph relating to the free disposition of natural resources imperiled foreign investments and enterprises in developing countries” at 50). See also Musgrave, *supra* note 86 at 67–68.

\(^{93}\) Cassese, *supra* note 88 at 50–51. As we will see, these reasons are advanced by CANZUS states to oppose the inclusion of self-determination in the Declaration. See, for example, *Information received from governments,*
Western states saw that self-determination would be included in the text – and as a result constitute a clear legal right – they sought to define the right of self-determination in terms of their own political tradition of popular sovereignty and representative government. Indeed this interpretation of self-determination can be traced back to the statements of President Woodrow Wilson endorsing self-determination in “human rights terms” as supporting “democratic self-government” and “internal self-determination.”

When debate about self-determination in the International Covenants ended, most Western states voted against it and the post-colonial states, the Soviet Union and the Communist bloc states voted overwhelming in favor of it. Common article 1 thus provides:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In addition to the common article 1, the freshly minted states together with the Soviet Union and the communist bloc states sought a series of resolutions in the UN General Assembly that linked self-determination to decolonization and sought to emphasize the independence of the newly formed states by affirming their territorial integrity. The most significant statement was Resolution 1514(XV) of 14 December 1960 entitled the “Declaration on the Granting of Independence to Colonial Countries and Peoples” (1960 Declaration on the Granting of Independence) which declared self-determination to be a “right” for “all peoples” and stressed “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.” The Declaration also contained a reference to territorial integrity in article 6:

---


94 Musgrave, *supra* note 86 at 68.

95 Cassese, *supra* note 88 at 19–23.

96 Musgrave, *supra* note 86 at 68.


100 *Ibid* at para 6.

101 *Ibid* art 6. To reaffirm the point, art 7 provided; “All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on
Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

Territorial integrity was not set out in the International Covenants. However, it has always been an integral aspect of international law and is set out in article 2(4) of the UN Charter.102 And it became increasingly significant during decolonization. Newly decolonized states wanted to ensure that their independence would be safe from internal secessionist claims.103 As we have seen, within many post-colonial states in the Middle East, Africa and Asia, there were threats by minorities seeking autonomy or independence. The reference to territorial integrity in the 1960 Declaration on the Granting of Independence would protect newly decolonized nations’ territories from any internal claims and confirm their sovereign independence. Later, it would also shield them from unwanted intervention and interference into their domestic affairs.104 A question raised by the 1960 Declaration was its effect on the assumption in international law that the colonized territory is the territory of the colonizer. The self-determination of colonies would seem to violate the colonizing power’s territorial integrity. However, General Assembly Resolution 1541, passed shortly after the 1960 Declaration, defines a non-self-governing territory prima facie as “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”105 Eighty-nine states voted in favor of the 1960 Declaration on the Granting of Independence, there were nine abstentions. Those abstaining were the US, and mostly European colonial powers, including the United Kingdom, Belgium, Portugal, Spain, 

102 Charter of the United Nations, supra note 65, art 2(4).
103 See, for example, Frontier Dispute (Burkina Faso v Mali) 1986 ICJ Reports 554 (concerning the line of the frontier between Burkina Faso (previously Republic of Upper Volta) and Mali, both formerly French colonies).
105 Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Res 1541(XV), UNGAOR, 15 Sess, UN Doc A/RES/1541(XV) (1960), Principle IV [GA Res 1541(XV)]. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8082 (1970) (noting that a colony or other non-self-governing territory has a separate and distinct territorial status) [1970 Friendly Relations Declaration].
However Western states did support Resolution 2625 (XXV) of 24 October 1970, entitled “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations” (1970 Declaration on Friendly Relations).\(^\text{107}\) Adopted by consensus, it contained a clear compromise between the self-determination aims of the Soviet Bloc and post-colonial states and the aims of the West. The Declaration endorsed self-determination and, like the 1960 Declaration on the Granting of Independence, noted the need to bring “a speedy end to colonialism.”\(^\text{108}\)

This resolution did not limit the right to self-determination to colonized peoples. Paragraph 1 provided that “by virtue of the principle of equal rights and self-determination of peoples … all peoples have the right to freely determine their political status.”\(^\text{109}\) Moreover, paragraph 7 linked self-determination to representative government and subjected territorial integrity to the maintenance of representative government and respect for human rights: \(^\text{110}\)

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

This extension of self-determination beyond decolonization to include representative government was a push back from Western states concerned about human rights violations within the Soviet and post-colonial states. But it also met with a long-term agenda to promote democracy and representative government. Subsequently scholars have argued that paragraph 7 should be read as granting a right to independence in cases of gross abuses of human rights.

\(^{106}\) Cassese, supra note 88 at 71.

\(^{107}\) 1970 Friendly Relations Declaration, supra note 105.

\(^{108}\) Ibid.

\(^{109}\) Ibid, para 1 [emphasis added].

\(^{110}\) Ibid, para 7. See, also Cassese, supra note 88 at 109 (noting Western states had originally sought language in the Declaration that would explicitly equate self-determination with representative democracy).
rights.\textsuperscript{111} However, it is not clear in international law that this notion of remedial secession constitutes an additional legal category to classic colonialism.\textsuperscript{112}

Decolonization was a significant movement but it was denied to indigenous peoples. As noted, above the 1960 Declaration indicated that decolonization applied to those colonies geographically separate from the country administering it. Thus there had to be salt-water between the colonizing country and the colony or, at least, a geographically discrete set of boundaries.\textsuperscript{113} Moreover, the subjects of decolonization were the populations as defined by the borders of the colonial territories and not the historically sovereign peoples. This salt-water thesis excluded indigenous peoples of the Americas and Australasia from decolonization and was endorsed by the United States and Latin American states concerned to ensure that decolonization would not apply to indigenous peoples within their territories. At the time, Belgium – which was required to surrender its colonies in Africa and Asia under the decolonization programme – advanced the argument that decolonization should include “indigenous peoples” within independent nations.\textsuperscript{114} But this proposal – called the Belgian thesis – was defeated. It therefore seemed indigenous peoples would not be able to call upon the right to self-determination and decolonization because of the salt-water thesis.

A key feature of decolonization that would prove significant later in the context of the international indigenous movement, was the tension between decolonization and human rights. The human rights program was significant to the achievement of decolonization in terms of the high ideals of equality and freedom. However, the anti-colonial movement was suspicious of human rights. As Samuel Moyn notes:\textsuperscript{115}

\begin{quote}
The surprising fact of the matter is that postwar anticolonialists rarely invoked the phrase “human rights,” or appealed to the Universal Declaration of 1948 in
\end{quote}


\textsuperscript{112} Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Kosovo Opinion), Advisory Opinion, [2010] ICJ Rep 403 at 436. See also Reference re Secession of Quebec, (1988) 2 SCR 217 (noting: (1) it is “unclear” whether such a remedial legal category is an “established law standard”; and (2) even if it did exist, “the current Quebec context cannot be said to approach such a threshold” at para 135).

\textsuperscript{113} See GA Res 1541(XV), supra note 105; and 1970 Friendly Relations Declaration, supra note 105.


\textsuperscript{115} Moyn, supra note 58 at 85.
particular, though decolonization was exploding precisely in the moment of its passage and after.

According to Moyn, this was because during the post-war years the human rights program was seen as closely linked to citizenship and state sovereignty – i.e., maintaining the *status quo*. Thus, human rights could detract from the main prize of self-determination and independence. Instead of emphasizing human rights, the decolonization movement appropriated and applied human rights to the ends of decolonization. The notions of equality, non-discrimination and liberty were used to support decolonization. In this way, for many decades up until the rise of the contemporary human rights movement, “human rights were defined by antiracism and anti-colonialism.” This dual relationship – with human rights both antagonistic to anti-colonial arguments and supportive of it – can be seen in the indigenous struggle.

3 The rise of the international indigenous rights movement

3.1 Indigenous movements of the North

The first indigenous organizations to participate in international politics in the UN emerged from North America as extensions of domestic Indian sovereignty movements. The two leading indigenous organizations were the International Indian Treaty Council (Treaty Council) and the World Council of Indigenous Peoples (WCIP). The Treaty Council was formed in June 1974, at the first International Indian Treaty Conference, by the American Indian Movement (AIM) and traditional leaders of the Sioux Nation. The Sioux Nation maintain many separate tribal governments scattered across several reservations, communities, and reserves in North and South Dakota, Nebraska, Minnesota, and Montana in the United States. The landmass of the four largest reservations – Cheyenne River, Standing...

---

116 Ibid. Compare Burke, supra note 104 (arguing that during the negotiations on the International Covenants, many Third World states argued self-determination and decolonization offered the means to promote universal human rights but, as Third World states acquired independence, this approach hardened to one of connecting self-determination with sovereignty and non-intervention for those subjected to European colonization).

117 See, Kay, supra note 86 (for the newly decolonized states, “the traditional concern of the United Nations with human rights has been but another vehicle for advancing their attack on colonialism and associated forms of racial discrimination” at 802).

118 Moyn, supra note 58 at 99.

119 Ortiz, supra note 24.
Rock, Rosebud and Pine Ridge – would match the size of the state of Israel.\textsuperscript{120} Many of the AIM activists were from Pine Ridge or other Sioux reservations. AIM was originally formed by young urban-based American Indians in Minnesota to fight mistreatment by police and to improve prospects for jobs, education, and housing.\textsuperscript{121} However, it formed an alliance with members of the Sioux Nation during the 1973 occupation of the town of Wounded Knee on the Pine Ridge Sioux reservation in South Dakota.\textsuperscript{122} AIM was invited to join a radical “traditionalist” faction of the Pine Ridge reservation, the Pine Ridge Sioux Oglala Civil Rights Organization, who were protesting against non-compliance with treaty obligations but also corruption and nepotism in the Pine Ridge tribal government.\textsuperscript{123} Wounded Knee was chosen due to its symbolic significance as the site of the 1890 Wounded Knee Massacre of Indians by U.S. cavalry soldiers.\textsuperscript{124} The protest, which resulted in the death of a U.S. Marshall and two tribal activists during shootouts, drew substantial media attention and put AIM in the national spotlight. AIM’s forging of close ties with the traditional leaders of the Sioux and other Nations made good sense. While the original object of AIM was to combat urban racism, it became increasingly clear that the greater cause was tribal sovereignty.\textsuperscript{125} As an urban-based organization, it lacked legitimacy without some connection with the tribal base. Tribal sovereignty meant much more than the jurisdiction exercised by the federally-recognized Indian governments – which were seen as corrupt cronies of the state.\textsuperscript{126}

From the outset, the Treaty Council was particularly interested in the anti-colonial movement and the UN decolonization process. The Treaty Council’s first director, Cherokee activist Jimmie Durham, had lived in Geneva during the late 1960s and had been inspired by the decolonization movement.\textsuperscript{127} In Geneva, Durham befriended a number of the African liberation leaders who came there seeking independence for their nations. Durham and other founders of the Treaty Council were particularly encouraged by the decolonization of small island states in the Caribbean and South Pacific. As Dunbar-Ortiz notes, “few of [them] were

\begin{footnotes}
\footnote{120} Ibid at 78. \\
\footnote{121} Ibid. AIM was founded in 1968 as a red power defence organization, analagous to, and allied with the Chicano (Mexican) Brown Berets and the Black Panthers (\textit{ibid}). See American Indian Movement of Des-Moines, \textit{By-Laws of the American Indian Movement of Des Moines}, online: History Matters <http://historymatters.gmu.edu/d/6897>. \\
\footnote{122} Ortiz, \textit{supra} note 24. \\
\footnote{123} Ibid at 119. \\
\footnote{124} Ibid; Means, \textit{supra} note 24. \\
\footnote{125} Ortiz, \textit{supra} note 24. \\
\footnote{126} Ibid. \\
\end{footnotes}
larger in size or more populated than a number of Indian territories in the United States."  

This suggested nations like the Sioux might achieve its stated aim of independent nation status. And if the Sioux obtained this, other nations might follow.  

The other major international indigenous organization was the World Council of Indigenous Peoples established in 1975 at the International Conference of Indigenous Peoples in British Columbia. Compared to the Treaty Council, the World Council had closer ties with officially recognized tribal-governments given its affiliation with the National Indian Brotherhood (NIB) of Canada – a collective of Indian band governments – through its founding chair, and former head of the NIB, George Manuel. And it obtained financial support from states including Canada, Norway and Denmark. Also, unlike the Treaty Council, which was directed at the United States, Canada, and to a lesser extent, Latin America, the World Council membership was more diverse, including indigenous peoples of CANZUS, Latin America, Sami of the Nordic states and Inuit of Greenland. At this very early stage, the World Council envisaged a global indigenous movement whereas the Treaty Council were very much focused on North America and to some degree Latin America. As a result, there were some tensions between the Treaty Council and the World Council. At the time, there were questions about whether Sami were indigenous peoples given they had not been subjected to overseas colonization and settlement.  

The event that marked the beginning of indigenous peoples’ direct engagement in the international system was the 1977 International NGO Conference on Indigenous Peoples of the Americas, held at the United Nations in Geneva. The conference was organized by the Treaty Council and attended by over a hundred activists from North America and Latin America.

---

128 Ortiz, “Human Rights”, supra note 24 at 34.  
129 Ibid (As its first measure, the Treaty Council established “the Declaration of Continuing Independence” which outlined the responsibilities of the Treaty Council including “a mandate to open offices in New York and elsewhere in order to facilitate access to international political forces;” and noted that Indian people allied themselves with the “colonized Puerto Rican people in their struggle for independence from the same United States” at 33).  
131 Minde, supra note 130 at 17.  
132 Sanders, supra note 130 at 20.  
133 Ibid at 15.  
134 Ibid at 21.  
135 Ibid at 20.  
America. The delegates met over several days at the UN’s Palais des Nations and discussed an agenda for obtaining international legal recognition of their sovereign status. The delegates produced an international instrument setting out their agenda, entitled the “Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.” According to this Declaration, indigenous peoples had to be recognized as independent nations. Article 4 of the Declaration noted: “Indigenous nations or groups” shall be accorded such degree of independence as they may desire in accordance with international law.” Article 7 referred to “Jurisdiction”:

No state shall assert or claim to exercise any right of jurisdiction over any indigenous nation or group unless pursuant to a valid treaty or other agreement freely made with the lawful representatives of the indigenous nation or group concerned. All actions on the part of any state which derogate from the indigenous nations’ or groups’ right to exercise self-determination shall be the proper concern of existing international bodies.

Treaties between indigenous peoples and states were to “be recognized and applied in the same manner and according to the same international laws and principles as the treaties and agreements entered into by their states.” In relation to claims to territory, the Declaration noted: “No state 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 valid treaty or other cessation freely made.”

As a precursor of the forthcoming tensions between Northern and Southern indigenous movements, articles 1 and 2 referred to two different types of nations. Article 1 was clearly directed at the indigenous peoples of North America. Indigenous people were to be recognized as: “nations and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental requirement of nationhood, namely: (a) having a permanent population; (b) having a defined territory; (c)

138 Ibid art 7.
139 Ibid art 5.
140 Ibid, art 8.
having a government; (d) having the ability to enter into relations with other states.”141 

Article 2 was directed at indigenous peoples of Latin America. It referred to “Indigenous groups not meeting the requirements of nationhood” – these would also be “subjects of international law and are entitled to the protection of this Declaration, provided they are identifiable groups having bonds of language, heritage, tradition, or other common identity.”142 This contrast between the aims of the North American advocates and those of Latin America can be seen in a video documentary on the Conference prepared by indigenous advocates and supporters entitled “An Indian Summer in Geneva.”143 The documentary shows the arrival of indiand advocates of North America and those from Latin America with a focus on Brazilian activists of Mato Gross do Sul. Jimmie Durham is interviewed and speaks of the decolonization model:144

\[
\text{I have a dream, many other Indians have a dream, of making our sovereignty as} \\
\text{Indian nations primarily with each other, as we started out before we were} \\
\text{colonised. Of making a real organisation of Indian nations, like the OAS that} \\
\text{would work together economically.}
\]

But other interviews with Latin America advocates adopt a very different stance. They speak about land rights and basic rights to health care and education. That is, their focus is on human rights and the human right to culture.

In closing, the Conference established a “program of action” to be carried out by indigenous organizations, the most significant being the establishment of a Working Group in the UN to focus on the elaboration of an international instrument on indigenous peoples’ rights. Clearly, the aim was to have the UN draft an international instrument along the lines of the Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.

141 Ibid art 1.
142 Ibid art 2.
144 Ibid at 00h:32m:45s
3.2 The Cobo Report: self-determination as the basic pre-condition

The advocacy efforts of the Treaty Council happened to coincide with efforts within the UN to address the status of indigenous peoples. Since the late 1960s, the UN Human Rights Division and Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) began to inquire into the status of indigenous peoples. These efforts expanded as part of the UN Decade for Action to Combat Racism and Racial Discrimination (1973 to 1983). Chilean diplomat Hernan Santa Cruz wrote a report on the economic, social and cultural discrimination of minorities, which contained two chapters on the situation of indigenous peoples.145 However, the Commission on Human Rights had to be persuaded that indigenous peoples should be treated as a distinct category of study from minorities.146 Finally in 1971, mandated by the Economic and Social Council,147 the Sub-Commission requested Jose R. Martinez Cobo to prepare a study on indigenous peoples – which came to be known as the “Cobo Report”.148

To begin with, this was a racial discrimination project, directed at the basic human rights of indigenous peoples and not an anti-colonialism project. But as the Cobo study progressed, it became increasingly clear that there were broader issues being raised by indigenous advocates, especially those of North America. Discrimination and human rights were not seen as the complete answer to the status of indigenous peoples. The Cobo report concludes that existing human rights standards “are not fully applied” to indigenous peoples and, moreover, are “not wholly adequate” to the task.149 Most importantly, Cobo noted that “[s]elf-determination, in its many forms, must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future.”150 As Cobo remarks:151

147 ECOSOC Resolution 1589(L), 21 May 1971, UN. ESCOR, 50th Sess., Supp. No.1 at 16, UN Doc E/5044 (1971) (authorising the Sub-Commission to conduct a general and complete study into the problem of discrimination against indigenous populations and to suggest the necessary national and international measures by which to eliminate this).
149 Ibid at paras 624, 625.
150 Ibid at para 580.
151 Ibid at para 581.
In essence, [self-determination] constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.

As noted above, the Treaty Council and other indigenous organizations were also calling for new international standards. Several of the Nordic states – especially Norway – took the lead in advancing the idea through the UN approval process. Eventually a proposal was put to the UN Commission on Human Rights by the Sub-Commission to establish a Working Group directed at the current status of indigenous peoples and the elaboration of standards of protection. This was approved by the Commission on Human Right’s parent body, the Economic and Social Council (ECOSOC) in 1982.

Both the UN-led activities and the Geneva NGO Conference played an important role in securing the Working Group’s establishment. However, just as important was their role in setting out, at such a crucial and formative stage, the issues that would be of most importance for the Working Group. The principal model was the decolonization model.

4 The Working Group on Indigenous Populations

The Working Group on Indigenous Populations was originally a human rights project. It was located in the human rights division of the UN as a subsidiary body beneath the Sub-Commission. The Sub-Commission itself was a subsidiary body of the UN Commission on Human Rights. The Working Group’s task was to: (1) review developments concerning the promotion and protection of the human rights and fundamental freedoms of indigenous populations; and (2) and give special attention to the evolution of standards concerning the

153 ECOSOC Res 1982/34.
rights of indigenous populations.\textsuperscript{154}

In terms of working procedure, the Working Group was comprised of five members of the Sub-Commission elected annually from its ranks of independent experts, one from each regional grouping. These experts would have the task of preparing each iteration of the Declaration. The first Chair was Norwegian human rights expert, Asbjørn Eide, chosen due to his country’s role in promoting the Working Group. However, he would be replaced in 1985 by Erica-Irene Daes who would lead the negotiations for the balance of the Working Group’s ten-year tenure. The Working Group would meet annually for up to five working days at the Palais des Nations in Geneva before the annual sessions of the Sub-Commission in August — although this was later extended to ten working days.

In the first Working Group meeting, practically all indigenous advocates were of the North. Thirteen Northern indigenous organisations attended and only one Latin America indigenous organization. There were no indigenous organisations representing Asian or African indigenous peoples.\textsuperscript{155} Northern indigenous peoples – as they had done in the 1977 Geneva NGO Conference – immediately linked their struggle to the international anti-colonial agenda. As with the 1977 Conference, indigenous advocates represented the more radical element in domestic indigenous rights movements. The indigenous organizations tended to be specialist international NGOs – established for the specific task of appealing to international standards and bodies. It was easier for them to adopt a stronger stance against states because they were not dependent on government subsidies in the way many officially-recognized tribes were. The Treaty Council and World Council on Indigenous Peoples were prominent. And there were new groups. The Sami Council represented the Sami of Norway, Sweden, Finland and Russia. Several bodies were effectively the vehicles of individuals. This included the Indian Law Resource Center run by Potawatomi lawyer, Tim Coulter,\textsuperscript{156} with links to the New York Akwasasne Mohawk community;\textsuperscript{157} the Indigenous World Association founded by Roxanne Dunbar-Ortiz – who was a founding member of the Treaty Council;\textsuperscript{158} and the

\begin{enumerate}
\item\textsuperscript{156} Joelle Rostkowski, Conversations with remarkable Native Americans (Albany, NY: State University of New York Press, 2012) at 85.
\item\textsuperscript{157} Todd Leahy & Raymond Wilson, The A to Z of Native American Movements (Lanham, MD: Scarecrow Press, 2009) at 79.
\item\textsuperscript{158} Sanders, supra note 4 at 78–79.
\end{enumerate}
National Aboriginal and Islander Legal Services Secretariat (NAILSS) run by Paul Coe, a long time Aboriginal activist and lawyer. The Four Directions Council originally represented four Canadian Nations but was increasingly represented by Russel Barsh, a non-indigenous lawyer and academic.

The Latin America organizations tended to be (mostly) urban-based organisations often called ‘Indianista organisations,’ including the Indian Council of South America or “Consejo India de Sudamerica” (CISA). CISA was originally a branch of the World Council of Indigenous Peoples though it would eventually operate independently. But like many others from Latin America, CISA had tenuous connections with specific tribal communities and advanced a Quechua indianist ideology - a return to the basic institutions and values of Incan society, and not the more day-to-day struggles faced by rural-community based Quechua and Aymara Indians.

A unique feature of the Working Group was its open process of participation. According to standard rules, representatives of governments, specialized agencies and regional international organizations were entitled to participate as observers. Representatives of NGOs that had been given consultative status by the ECOSOC were also entitled to participate as observers. These included long-established NGOs such as Amnesty International, Survival International and the Anti-Slavery Society. But in 1982, at the first meeting there were only five indigenous organizations with ECOSOC consultative status. This threatened to exclude large numbers of indigenous peoples as the process for applying for consultative status was cumbersome. However, due to prompting by UN officials and the Sub-Commission, a special registration procedure was established that allowed any indigenous advocate to register and participate in the Working Group sessions. This would set a precedent for all of the Working Group Declaration negotiations. Given the Working Group mandate it was essential that indigenous advocates themselves were permitted to speak out in

---

159 Ibid at 179. NAILSS was the first Australian indigenous organizations to obtain NGO consultative status with ECOSOC. See, Sarah Pritchard, “Declaration on the Rights of Indigenous Peoples: Drafting Nears Completion in the UN Working Group” (1993) 60:2 Aboriginal Law Bulletin 9 at 10.
160 Sanders, supra note 4 at 78.
161 Ibid.
162 Ibid.
164 First Working Group meeting, supra note 155 at 6.
165 See Augusto W Diaz, supra note 146 at 26–27.
the Working Group. Moreover, the decolonization model advanced by Northern indigenous peoples dictated that as nations they should be given equal rights to participate in the negotiations alongside states.

4.1 The human rights vs the decolonization model

The prominent states participating in the Declaration negotiations included the CANZUS, Latin American, Nordic, and Asian states. The CANZUS states would have great influence, given their economic and political clout but also their recognized experience of settler-indigenous relations and the presence of significant numbers of indigenous peoples in their countries. During the annual meetings of the Working Group, each member of the CANZUS group normally made several oral and written interventions.

Unsurprisingly, the human rights model was the preferred approach of CANZUS and other states. And it found support in the resolution establishing the Working Group as well as the UN General Assembly’s 1986 resolution on standard setting in the field of international human rights. General Assembly resolution 41/120 read in part:

Recalling the extensive network of international standards in the field of human rights …

---


167 See International Indian Treaty Council, (9-13 August 1982) doCip Doc. 200252_1 (on file with author). (“We believe that the elaboration of standards should include the direct participation of indigenous peoples in the discussions and drawing up of instruments, and should take into account the right of indigenous peoples to self-determination” at 200252_2). See also Karen Knop, Diversity and Self-Determination in International Law (Cambridge: Cambridge University Press, 2002), ch 5 (noting how the Working Group adopted an open process of negotiations treating indigenous peoples on the same basis as states).

168 See, for example, New Zealand, New Zealand Statement under Item 5 (1989) doCip Doc. 200284_1 (on file with author) (Referring to UN Resolution 21/120 and the need to “ensure compatibility with existing human rights instruments” at 200284_2). See also Working Group on Indigenous Population, Information Received from Governments: Canada, UNESCO, 6th Sess, UN Doc E/CN.4/Sub.2/AC.4/1988/2/Add.1 (1988) (“Canada is of the view that rights, referred to in the draft principles, should generally be oriented towards rights of individuals. In this regard we should emphasize Article 27 of the International Covenant of Civil and Political Rights where a right with a collective aspect has been stated in terms of individual rights” at 3) (“Information from Canada”).

Emphasizing the primacy of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in this network,

Recognizing the value of continuing efforts to identify specific areas where further international action is required to develop the existing international legal framework in the field of human rights …

2. Urges Member States and United Nations bodies engaged in developing new international human rights standards to give due consideration in this work to the established international legal framework …

4. Invites Member States and United Nations bodies to bear in mind the following guidelines in developing international instruments in the field of human rights; such instruments should, inter alia:

(a) Be consistent with the existing body of international human rights law …

(e) Attract broad international support;

According to CANZUS states, the clear plight of indigenous peoples suggested that the priority should be the basic human rights set out in the International Covenants. CANZUS states saw these as important issues in their own countries but especially in Latin America. In addition to human rights, states also preferred a minority rights model for the Declaration, i.e., an elaboration of the right of minorities in Article 27 of the ICCPR – which, as we have seen, is directed at the protection of the individual members of minorities.¹⁷⁰

Some indigenous advocates spoke of the need for existing human rights to be better implemented, or strengthened or supplemented to provide greater protection for indigenous peoples.¹⁷¹ Northern indigenous peoples frequently noted that while they lived in an affluent

¹⁷⁰ Information from Canada, supra note 168.
¹⁷¹ See Statement of the Chiefs of Alberta (1982) doCip Doc. 200286_1 (on file with author) (requesting that “in the event that indigenous peoples continue to be not recognized by the UN as a peoples with their own homelands … the Working Group … consider putting forward amendments to [the International Covenants] in order that indigenous peoples rights are specifically protected within those existing Covenants” at 200286_5).
liberal democracy, they suffered deeply entrenched poverty. They also expressed concern about the violation of indigenous peoples’ fundamental human rights in Latin America. At the first Working Group meeting, the Indian Law Resource Centre insisted that the Working Group give “priority attention to the grave human rights problems now facing Indians of Central and South America.” However the prominent view was that human rights were deficient.

In regard to the objectives and scope of the Draft Principles [of the draft Declaration], it is not sufficient to simply confirm that existing international standards apply to indigenous peoples. Nor is it adequate to adapt such standards to meet particular indigenous requirements. What is necessary is to ensure that the Draft Principles will also create new standards.

To focus too much on basic human rights or poverty would divert attention from the indigenous advocates’ decolonization model. In the context of the Declaration negotiations, the decolonization model represented an adaptation of the “historical sovereignty” arguments advanced against the state domestically whereby indigenous peoples challenged the legitimacy of state sovereignty and sought restoration of their prior, sovereign rights. This argument was merged with classic anti-colonialism arguments because of the parallels between classic colonialism and the Northern experience of colonization and settlement by European powers. Indigenous peoples referred to the human right to self-determination in common article 1 of the International Covenants because of its clear connection to the decolonization project. The indigenous decolonization model thus connected Northern indigenous peoples to a tried and tested UN-sponsored means of delivering the right to independence. Therefore the decolonization model was a hybrid of the classic anti-colonial argument advanced by colonized peoples and domestic, indigenous historic sovereignty arguments.

\footnote{See Statement of the Grand Council of the Crees (of Quebec) (1988) doCip Doc. 210980_1 (on file with author) (“while we meet here, we are fighting for our very survival as a people. Our collective rights are being denied in many lands, and even in the most wealthy countries of the world, our people are always the poorest of the poor” at 210980_1).}

\footnote{See, Indian Law Resource Centre, “Summary of Oral Statement Presented by the ILRC” (11 August 1982) doCip Doc. 200284_1 (on file with author) (The genocide in Guatemala demonstrated to the ILRC “the need to study (1) why present governing human rights standards … have failed to protect the rights of Indians and whether (2) there are means whereby existing standards might be strengthened or supplemented to provide protection for the most fundamental human rights which are now being denied Indians” 200284_1).}

\footnote{See, Inuit Circumpolar Conference, \textit{Information received from NGOs}, UNESCOR, 1988, UN Doc E/CN.4/Sub.2/AC.4/1988/5 at 6.}
Human rights in the abstract did support the goals of popular or collective liberation – just as they had with the anti-colonialism movement. And indigenous advocates did occasionally argue that self-determination could provide a path for the better protection of human rights. The Cobo report, for example, had characterized self-determination as the “pre-condition” for indigenous peoples’ enjoyment of their fundamental rights.\(^{175}\). Human rights and self-determination were seen by some advocates as inter-dependent. But self-determination mostly was connected to the end-goal of decolonization. Like the anti-colonial movement of the 1950s and ‘60s, human rights largely promoted the end of independence. The right to equality was key to this. Indigenous advocates argued that the right to self-determination was a right for all “peoples” and to deny the right to indigenous peoples would be to discriminate against them. This non-discrimination argument was important in the context of the salt-water thesis. As noted above, this sought to limit self-determination and decolonization to overseas colonial possessions. However, indigenous advocates consistently stressed that the salt-water doctrine had discriminated against them. All peoples, including indigenous peoples and not just those in salt-water states, should be entitled to self-determination and decolonization. As noted by the Four Directions Council:\(^{176}\)

Looking around the world today, we observe a curious phenomenon. Peoples of every race, with one exception, have been achieving self-determination and decolonization under the auspices of the UN. There are independent States today of every colour, save one. Is this a temporary oversight, or the result of institutionalized discrimination?

During the initial working group meetings, the World Council of Indigenous Peoples,\(^{177}\) the Four Directions Council,\(^{178}\) the Indian Law Resource Centre,\(^{179}\) and the Treaty Council\(^{180}\)

---

176 Four Directions Council, supra note 175, doCip Doc. 200479_2 (on file with author). See also Submission to the Working Group by the Coalition of First Nations and Treaty Council delivered by Sharon Venne (1984) doCip Doc. 200518_A (on file with author) (Urging the Working Group on Indigenous Populations to consider a recommendation to the Sub-Commission that: “The standards and obligations enunciated in the UN Charter on non-self-governing and trust territories, chapter 11, Article 73 must apply to self-determining Indigenous peoples” at 200518_1).
177 Information received from NGOs: WCIP International Covenant on the Rights of Indigenous Peoples, UNESCOR, 1983, UN doc E/CN.4/Sub.2/1983/5 (noting “all peoples have the right to self-determination. By virtue of that right
provided the working group with their idealized model declarations. Apart from references to the International Covenants and the UDHR, and specifically the right to equality and right of peoples to self-determination, the declarations themselves did not mirror human rights in the conventional sense. Rather, they were all directed at rights connected with obtaining political autonomy and control over their territories. For example, the Treaty Council’s model declaration provided: 181

Article 1. Indigenous populations are subject to an economic and/or political and/or social domination which is alien and colonial or neo colonial in nature.

Article 2. Indigenous populations are composed of nations and peoples which are collective entities entitled to and requiring self-determination. The Working Group should, therefore, develop a definition of the ultimate goals of self-determination, appropriate to indigenous populations, and procedures for achieving those goals.

Article 3. Indigenous nations and peoples who so desire should be granted the full rights and obligations of external self-determination.

Article 4. Indigenous nations and peoples who wish to limit themselves to the exercise of internal self-determination only should be granted the freedom to do so. The rights of internal self-determination should include, but not be limited to, the right to:

(a) control their own economies;
(b) freely pursue their economic, social and cultural development in conformity with their tradition, custom and social mores;
(c) engage in foreign relations and trade if they so desire
(d) restore, practice and educate their children to their cultures, languages, traditions and way of life;
(e) and the right to the ownership of land as the territorial base for the existence

---

181 Ibid.
of indigenous populations as such.

Throughout the balance of the model declaration, the Treaty Council refer not to human rights, but to “Treaties,”182 “National and Cultural Integrity”,183 “Religious and Spiritual Freedom”,184 “Child Welfare”,185 “Land and Environment”,186 and “Indigenous Membership”187 and all in the context of indigenous peoples’ control over these themes. The declaration did not assume that sovereignty would be exercised subject to human rights – any attempt to impose laws on indigenous peoples required their prior consent.188 The language in the model declarations correlates more with activists’ domestic priorities and goals than with human rights.

Advocates in the Working Group referred to historical treaties to support their claims to self-determination and decolonization. However, in this international setting the argument had particular bite. According to the Four Directions Council:189

Treaty relations are evidence of international recognition of statehood, and recognition, once given, cannot ordinarily be withdrawn. Yet we find in the reports of international arbitration and human rights proceedings an assumption that treaties made with peoples of the Indian race are not treaties at all, and have no international legal consequences. The United Nations cannot afford to admit that a document calling itself a ‘treaty’ and signed by the representatives of two nations is without effect, merely because one of the nations signing it is of the wrong race.

Questions concerning fairness of the treaties were brushed aside. Within the UN Working Group, it was the concept of an international treaty between two independent nations that was

182 Ibid Part IV.
183 Ibid Part VI.
184 Ibid Part VII.
185 Ibid Part VIII.
186 Ibid Part X.
187 Ibid Part XI.
188 Ibid art 7.
189 See, Four Directions Council, supra note 175, doCip Doc. 200479_2.
all-important. In the case of Australian aboriginal advocates, where no treaty was made, a different approach was adopted. The absence of a treaty was used to signify that they had never ceded sovereignty.

It is plain that aboriginal people never executed any treaty surrendering their political rights, nor voted to incorporate themselves with Euro-Australians … There is no real question of the territorial integrity of Australia because Australia can show no deed or treaty of title to the continent and occupied much of it within living memory. The principles of self-determination and decolonization appear applicable.

However, the major difficulty with indigenous advocates’ anti-colonialism line was the increasing prominence of the principle of territorial integrity. As noted above, territorial integrity is directed at protecting the sovereignty of existing states. The 1960 Declaration on the Granting of Independence, while directed at decolonization for colonial peoples, contained a reference to territorial integrity but this was aimed at affirming the sovereignty of the newly independent states. And decolonization could not undermine the territorial integrity of colonizing powers because General Assembly Resolution 1541 treated the colonizer and colonized as separate and distinct.

During the Declaration negotiations, states concerned about indigenous advocates calls for self-determination would repeatedly stress that the right had to be read as including the exercise of forms of autonomy, or effective participation within the bounds of the modern state. To make this perfectly clear, some states sought an express reference to territorial integrity in the Declaration. A reference to territorial integrity would ensure for them that self-determination meant something other than the option of independence. Instead it would indicate the right to a form of “internal self-determination.” As the Declaration advanced

---

190 Indigenous advocates of the United States were also able to point to the Cherokee Supreme Court cases recognizing inherent aboriginal sovereignty, see Johnson, supra note 13; Cherokee Nation, supra note 13; Worcester, supra note 13.


192 See, for example, Canada (1991), doCip Doc. 200166_1 (on file with author) (“Any reference to a right to self-determination, explicit or implicit, must be put in the context of not implying any right to threaten the boundaries or political integrity of existing states, as is done in the context of the UN Declaration on Principles of International Law on Friendly Relations and Cooperation among States in Accordance with the Charter of the UN” at 200166_1). See also, New Zealand (1991) doCip Doc. 200176_1 (on file with author) (noting its “insistence that the Declaration contain a proviso regarding the use of the term “peoples” has not found its way into the text …” at 200176_4).
through the Working Group process, more and more states called for an express reference to territorial integrity. Several states also had concerns about collective human rights,\textsuperscript{193} and references to historical redress.\textsuperscript{194} Given the call for self-determination, states objected to the use of the word indigenous “peoples” in the Declaration given the UN Charter and common article 1 of the International Covenants spoke of self-determination as a right of “peoples.” Rather than peoples, states preferred references to “populations”, “minorities” or “people” in the singular. Hence the Working Group was called, the Working Group on Indigenous \textit{Populations}.\textsuperscript{195}

Northern indigenous advocates on the other hand rejected any reference to territorial integrity. Again the principle of equality for all peoples was stressed. Common article 1 of the International Covenants contained no reference to territorial integrity. Therefore, any attempt to counter balance self-determination in the Declaration with the right of states to territorial integrity would be discriminatory to indigenous peoples.

\textbf{4.2 The right to independence had to be an option}

This emphasis on self-determination and decolonization by the Treaty Council and other Northern indigenous organizations did not mean that the substantive goal had to be independence. Most indigenous advocates did not seek independence but rather self-determination in a relational sense – that is, self-determination exercised within the modern state through self-government and other expressions of autonomy.\textsuperscript{196}

Domestically this was the position held by most indigenous advocates. As we have seen, activists called for complete sovereign rule over their countries. But most were seeking autonomy and control over their territories. At the international level, this is clear from the Declaration of Defense issued at the 1977 Geneva NGO Conference, and the “model declarations” presented by the Treaty Council, and other Northern indigenous organizations.

\textsuperscript{193} See, for example, Canada (1991), docCip Doc. 200165_1 (on file with author) (“As classical human rights instruments typically are formulated in terms of individual rights, we believe that the general emphasis in this Declaration should be on individual rights” at 200165_3).

\textsuperscript{194} See, for example, Canada (1992) Docip doc 960245_A (on file with author): (“the wording of ‘lands, territories and resources’ in the past tense is very broad. Its use in the document may imply possession over all lands traditionally occupied by indigenous people at all previous stages of their history …” at 960245_K).

\textsuperscript{195} See Statement of the Treaty Council (1984) docCip Doc. 200514_1 (on file with author) (calling for “the word ‘Peoples’ to be substituted for the word ‘Populations’ in the title of the Working Group on Indigenous Populations”).

\textsuperscript{196} See the model declarations, \textit{supra} note 177-80.
For example, the Treaty Council’s model declaration presented to the Working Group, notes in article 3: “Indigenous nations and peoples who so desire should be granted the full rights and obligations of external self-determination.”  

However, the right to independence had to be an option. Autonomy is preferable to independence but it does not necessarily rule out secession. This “hardline element” was maintained by prominent indigenous organizations throughout the course of the Declaration negotiations – right up to the point of the Declaration’s adoption by the UN General Assembly. Indigenous peoples wanted a backup plan to ensure that states would engage in meaningful negotiations. Any qualification of the right to self-determination would detract from this by suggesting that it could only ever be exercised within the state.

Insistence on an unqualified right to self-determination and independence as an option can be seen as a largely symbolic move. Full independence was not a realistic option for most indigenous peoples. CANZUS states also knew that there was no ever-present threat of secession by indigenous peoples. Indigenous peoples in the North American states had experience with forms of self-government but more akin to that of municipalities or local governments. Independence was a completely different matter. However, both CANZUS states and indigenous advocates appreciated that self-determination without qualification provided indigenous peoples with tremendous leverage in negotiating their status within the state. This indicated that self-determination in the Declaration was connected to common article 1 of the International Covenants and in turn the decolonization project. It made self-determination a supra-national issue. It also indicated that disputes between indigenous peoples and states needed to be resolved at the international level through an independent international mechanism.

Treaties provided the tool to realize this. Historical treaties established evidence of indigenous peoples’ self-determination, but modern treaties between two sovereign states

---

197 Treaty Council model Declaration, supra note 180 (referring to indigenous peoples’ right to “such degree of independence as they may choose,” and states are forbidden to “assert or claim” any political jurisdiction over indigenous communities except under a “valid treaty or agreement freely made with the lawful representatives [of the people]”) [emphasis added].


199 See, Four Directions Council, “Strengthening the Working Groups Standard Setting Role” (1988) doCip Doc. 210975_1 (on file with author) (“[t]he study of past treaties will lead to an understanding of the role that future treaties and agreements could play in adjusting the political relations between indigenous peoples and...”)
could set out the terms of their co-existence. At the 1991 Working Group session, Mick Dodson, speaking for the Australian Northern Land Council, simply insisted that the Australian government negotiate a modern treaty with aboriginal peoples. This potential for modern treaty-making was set out in the model declarations prepared by indigenous advocates. The Declaration prepared at the 1977 Geneva NGO Conference noted:

No state shall assert or claim to exercise any right of jurisdiction over any indigenous nation or group or the territory of such indigenous nation or group unless pursuant to a valid treaty or other agreement freely made with the lawful representatives of the indigenous nation or group concerned. All actions on the part of any state which derogate from the indigenous nations’ or groups’ right to exercise self-determination shall be the proper concern of existing international bodies.

Indeed, in order to direct attention towards treaties and their potential for setting out the terms of co-existence between indigenous nations and states, indigenous advocates called for a special UN study on treaties between states and indigenous peoples.

It should be stressed that this decolonization model was not the only game in town for indigenous advocates. Increasingly, an alternative human rights model was being discussed by indigenous advocates acutely aware of the political sensitivities about decolonization. United States-based indigenous scholar, James Anaya, took the classic human rights model and sought to renovate it. In his book, Indigenous Peoples in International Law, Anaya argued that the indigenous rights proposed by indigenous peoples – including the right to self-determination – be viewed as human rights adapted to the specific situation of

states – and thus could form an important element of the implementation strategy for any declaration of indigenous rights” at 210975_3. See also, “Statement of the Grand Council of the Crees (of Quebec)” (1988) docCip Doc. 210980_1 (on file with author) (“[t]reaties are important in our consideration here both because they have been a source of abuse and have led to tragedy, but also because they provide recognition of indigenous self-determination, and may offer a practical mechanism to protect indigenous rights in the future” at 210980_3).

201 See Treaty Council model Declaration, supra note 180.
202 See Statement of the Treaty Council (1984) docCip Doc. 200516_1 (on file with author) (calling for “the Working Group on Indigenous Populations to advise the Sub-Commission to carefully study the Indian Treaties, the lack of observance of these Treaties and its influence on the human rights situation of indigenous peoples in the United States and Canada, and the viability of these treaties today …” at 200516_2).
indigenous peoples. Anaya stressed self-determination’s fundamental connection with “freedom” and “inherent human equality”. According to Anaya, denial of the human right to self-determination to colonized peoples called for the *sui generis* remedy of decolonization. Denial of the right to indigenous peoples called for another *sui generis* remedy represented by the human rights in the Declaration and ILO Conventions, with independence arising in a remedial sense for extreme violation of indigenous peoples’ human rights (for example, as set out in the 1970 Friendly Relations Declaration). In this new approach, Anaya was part of a new school of thought about self-determination and human rights. During the early 1990s, leading international law scholars, Hurst Hannum, Robert McCorquodale, and Thomas Franck, were all talking about self-determination in a human rights sense in terms of promoting representative government and democratic governance.

This human rights reading of self-determination had much support in international law, including the insertion of self-determination in the International Covenants – although, as we have seen, common article 1 was connected to the decolonization movement. The 1970 Friendly Relations Declaration accepted self-determination meant decolonization but paragraph 7 made clear that it also meant representative government.

The shift from a decolonization model was a politically savvy move. Anaya’s human rights model would address states’ concerns with self-determination’s connection with decolonization. As a human right, self-determination would be exercised within states – it is not directed at secession. Thus, there was no need for an express reference to territorial integrity in the Declaration or even if there was a reference, it would not be inconsistent with the right to self-determination so conceived as a human right. In addition, cast as a human rights instrument – or the elaboration of widely ratified human rights – the rights in the Declaration have binding qualities, despite its technical status as a non-binding instrument. They are not *special* rights but part of the set of human rights guaranteed to all peoples and

---

204 *Ibid* at 75–76.
205 *Ibid* at 80-85.
206 *Ibid* at 84-85.
210 Anaya, *supra* note 203 at 86.
denied to indigenous peoples. Indeed, several states came to accept this notion towards the end of the Working Group sessions. However, by viewing the Declaration as based in human rights, Anaya’s account indicated that remedies would ordinarily be provided for, and located within, the modern state. The human rights model applies, and in fundamental ways depends on, existing configurations of state power. The decolonization model challenges the existing configuration and legitimacy of the state and extended indigenous peoples’ claims to the international plane as a nation-to-nation concern. Self-determination provided the option of independence if states and indigenous peoples failed to negotiate their terms of co-existence. And that offered the promise of real change. The dominant model, then, in the Working Group was the decolonization model and it led I argue to the inclusion of the self-determination framework in the Declaration. Anaya’s human rights model would however gain increasing traction as the Declaration advanced towards the UN General Assembly for adoption.

5 The Declaration with a Self-Determination Framework

The initial resolution establishing the Working Group had referred to “the evolution of standards concerning indigenous populations” but did not specify the type of instrument. Candidates were a mere “body of principles,” a declaration, or a convention. Quickly it became apparent that it made sense to aim for a declaration. Like the UDHR, a declaration is technically a resolution of the UN General Assembly and not binding on member states. As the first Working Group chair, Asbjørn Eide, noted in 1983, while a declaration is not legally binding:211

> It will be more easily negotiated, exactly because it will not carry binding obligations. If a convention is to be adopted it must be assumed that states, in the negotiating process, will be cautious in order not to bind themselves to more than a minimum. A Declaration which might be more advanced in its contents might still influence policies and legislation at the national level.

Indigenous advocates also appeared to support this.212 At the 1985 session, the Working

211 Asbjorn Eide, supra note 152 at 31.
Group agreed 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 UN General Assembly.”

Early drafts presented by the Working Group in 1985 and 1986 contained basic human rights and affirmations of culture. For example seven principles were considered at the fourth session in 1985:

1. the right to the full and 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 human 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 these 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 inter cultural information and education, recognizing the dignity and diversity of their culture.

States were obviously advancing the human rights model with an emphasis on basic human rights and cultural rights. But the maintenance of the decolonization model by advocates of the North increasingly gained traction in the Working Group. As Karen Knop notes, over the

---

213 Ibid.
214 Ibid at Annex II.
eight years that the Declaration was prepared it “developed from an inoffensive standard setting exercise to a bold frontrunner of the rights of indigenous peoples.”

As negotiations advanced, the Working Group began to incorporate references to the self-determination framework in the Declaration. By 1989, in addition to references to equality and minority rights, the Declaration referred to land rights, treaty rights, political participation and autonomy. There were measures aimed at historical redress: Paragraph 12 recognized a right of indigenous peoples to “collective and individual ownership of … lands or resources which they have traditionally occupied or used”; that is, occupied in the present and past tense, which implied a right to recover lands that were confiscated or settled upon without indigenous consent. In addition, Paragraph 15 referred to “the right to reclaim land and surface resources or, where this is not possible, to seek just and fair compensation for the same when the property has been taken away from them without their consent, in particular, if such deprival has been based on theories such as those related to terra nullius, waste land or idle lands.”

There was a provision on the need to honour treaties in Paragraph 27 – although it noted the “right to claim that States honour treaties and other agreements concluded with indigenous peoples.” Paragraph 23 noted the “collective right to autonomy in matters relating to their own internal and local affairs” over matters such as education, culture, housing, land and resources and the environment. And Paragraph 24 referred to the right to “decide upon the structures of their autonomous institutions, to select the membership of such institutions, and to determine the membership of the indigenous people concerned for these purposes.”

At this point, all references to collective rights were enclosed in square brackets (meaning there was no consensus on their inclusion in the Declaration) but all references to indigenous peoples were in the plural form. However, the only reference to self-determination was a preambular paragraph noting nothing in the Declaration may be used to deny the right of self-

---

215 Knop, supra note 167 at 263.
217 Ibid at 33 (Operative paragraph 12).
218 Ibid at 33 (Operative paragraph 15).
219 Ibid at 33 (Operative paragraph 23).
determination to any people “which otherwise satisfies the criteria generally established by human rights instruments and international law …”\textsuperscript{220} This possibly indicated the right to self-determination in those cases of gross human rights abuses as recognized by the 1970 Declaration on Friendly Relations.

At the Working Group’s ninth session in 1991, a more developed version was completed.\textsuperscript{221} The preamble of the Declaration noted that the International Covenants “affirm the fundamental importance of the right to self-determination.”\textsuperscript{222} But it did not connect this right with indigenous peoples. The first Paragraph referred to the right of indigenous peoples to self-determination “in accordance with international law” which left self-determination’s meaning unclear. However, a new Paragraph 13 appeared to qualify self-determination – it provided nothing in the Declaration was to be interpreted as implying any right to engage in any activity contrary to the UN Charter or to the 1970 Declaration on Friendly Relations.\textsuperscript{223} The reference to the Declaration on Friendly Relations could be seen as an attempt to indirectly incorporate a reference to the territorial integrity of states. At the same time, it could be read as allowing secession as a last resort if a group is subjected to gross violation of human rights.

In relation to historical redress, the Declaration continued to refer to the right to own land traditionally occupied in the past tense (Paragraph 15) and now contained a new reference to the right to “restitution” (Paragraph 16) – not the mere right to reclaim land or surface resources – or if this was not possible, compensation for lands and territories confiscated, occupied used or damaged without their informed consent.\textsuperscript{224} There continued to be a reference to autonomy in internal and local affairs (Paragraph 23)\textsuperscript{225} and the right to claim that States honour treaties (Paragraph 27) – although this now noted that indigenous peoples had the right to “submit any disputes that may arise in this matter to competent national or international bodies.”\textsuperscript{226}

\textsuperscript{220} Ibid at 31 (10\textsuperscript{th} preambular paragraph).
\textsuperscript{222} Ibid at 31 (13th preambular paragraph).
\textsuperscript{223} Ibid at 34 (Operative paragraph 13).
\textsuperscript{224} Ibid at 34 (Operative paragraph 15 and 16).
\textsuperscript{225} Ibid at 36 (Operative paragraph 23).
\textsuperscript{226} Ibid at 36 (Operative paragraph 27).
Instead of consultation, there were now references to informed consent. Paragraph 22 noted “the right of indigenous peoples to be involved … in devising any laws or administrative measures that may affect them directly, and to obtain their free and informed consent through implementing such measures.” Military activities and the storage and disposal of hazardous substances could not occur on indigenous peoples’ land and territories without their agreement.

In 1992, the Paragraph 1 on self-determination was extended. Instead of ending with a reference to the right of indigenous peoples to self-determination “in accordance with international law” it went on to say “by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government.” The former Paragraph 13 prohibiting an interpretation of the Declaration implying any right to engage in any activity contrary to the Charter or the Declaration of Friendly Relations was now moved up to Paragraph 4, closer to the Paragraph 1 reference to self-determination. Paragraph 25 referred to “the right to autonomy in matters relating to their own internal and local affairs …”. The Declaration continued to refer to the right to lands “traditionally occupied” and the right to the restitution of lands taken. Paragraph 31 continued to refer to “the right to claim that States honour treaties” and a right to submit disputes to national and international bodies.

While most states were consistently opposed to any reference to self-determination in the Declaration, during the 1991 and 1992 Working Group sessions Australia and Canada accepted a reference to self-determination in the Declaration provided it was clear it did not relate to decolonization. Australia at the 1991 and 1992 session of the Working Group

227 Ibid at 36 (Operative paragraph 22).
228 Ibid at 34 (Operative paragraph 17).
230 Ibid (Operative paragraph 4).
231 Ibid at 50 (Operative paragraph 25).
232 Ibid at 48 (Operative paragraphs 16 and 17).
233 Ibid at 51 (Operative paragraph 31).
234 Australia “Speaking Notes on Self-Determination” (1991) docip Doc. 200175_1 (on file with author) (“Events in all parts of the world show … that the concept of self-determination must be considered broadly, that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their languages, cultures and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments” at 200175_2) [emphasis in original].
Realization of the right to self-determination is not limited in time to the process of decolonization nor is it accomplished by a single act or exercise. Rather it entails the continuing right of all peoples and individuals within each state to participate fully in the political process by which they are governed. Clearly enhancing popular participation in this decision-making is an important factor in realizing the right to self-determination. It is evident that, even in some countries which are formally fully democratic structural, attitudinal and procedural barriers exist which inhibit the full democratic effective participation of particular groups.

Australia was detaching self-determination from its historical connection with decolonization. Not wishing to be too prescriptive about the precise form self-determination should take, Australia noted that for its own country, “a system which guarantees full and genuine participation and fundamental human rights as well as recognizing the special position of indigenous peoples could provide an adequate and real realization of self-determination.”236 To assuage the concerns of states with self-determination Australia suggested that the Declaration contain a reference to territorial integrity similar to that set out in the 1970 Friendly Relations Declaration.237 By this reading, self-determination was a means of advancing such human rights as effective participation in public life and other basic democratic rights. This approach chimed with the human rights model being advanced by James Anaya, although Anaya envisaged self-determination as also encompassing self-government and other forms of autonomy.

Similarly, the Canadian approach was to disconnect self-determination from decolonization and promote the notion of self-determination as internal self-determination.238

Canada supports the principle of self-determination for indigenous people, within the framework of existing nation-states, where there is an inter-

236 Ibid at 960255_3.
237 Ibid at 960255_6.
238 See, “Canada’s suggestions on Draft Operative Paragraphs” (1992), doCip Doc. 960245_A (on file with author).
relationship between indigenous and non-indigenous jurisdiction that gives indigenous people greater levels of autonomy over their own affairs but that also recognizes the jurisdiction of the state.

For Canada, this internal self-determination was to be negotiated between indigenous peoples and state governments. Otherwise, states continued to call for the elaboration of existing basic human rights and minority rights to the situation of indigenous peoples. The United States was opposed to the reference to self-determination, since it “might be construed as guaranteeing the right to full independence as a separate state to all indigenous groups.” The United States could, however, accept the right of indigenous peoples to “autonomy,” provided there was recognition of the State’s right in some cases to limit indigenous peoples’ autonomy:

… the environmental law adopted at a national level may restrict the ability of persons belonging to indigenous groups to take certain decisions. The ability of indigenous groups to decide on the duties indigenous people owe to their group is likewise limited, properly, by the rights accorded individuals under national law.

By 1993, the year of the final Working Group meeting, the Declaration was comprised of a preamble with 19 paragraphs and 45 articles, and contained the self-determination framework. The Declaration contained a reference to self-determination in almost identical terms to the rights as expressed in common article 1 of the International Covenants. Article 3 of the Declaration provided:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Prior versions had stated that nothing in the Declaration should permit any activity contrary

---

239 Ibid.
243 Ibid at 48 (Article 3).
to the UN Charter and the 1970 Declaration on Friendly Relations. But due to prompting from indigenous advocates, the reference to the Declaration on Friendly Relations was removed. Article 45 only prohibited activity “contrary to the Charter of the United Nations.” There was no reference to territorial integrity.

Article 31 referred to the right of indigenous peoples to “autonomy or self-government”:

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

Indigenous peoples were concerned that this right was stated to be “a specific form of exercising their right to self-determination.” This could indicate that self-determination ought to be limited to internal self-determination (or self-government) only, thus excluding any form of external self-determination. However, this article was positioned at the end of the Declaration so as not to indicate that self-government was the only means by which self-determination could be exercised.

With respect to land rights, the Declaration guaranteed the right to “own, develop, control and use the lands and territories, and other resources” which they have “traditionally owned or otherwise occupied or used.” Also, land was not necessarily limited to surface rights and included the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. The Declaration also recognized “the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent.”

In terms of consultation with indigenous peoples, the Declaration contained requirements to

---

244 Ibid at 56 (Article 45).
245 Ibid at 54 (Article 31).
246 Ibid at 52 (Article 26).
247 Ibid at 53 (Article 27).
obtain free and informed consent in the context of “any project affecting their lands, territories and other resources”,248 “legislative or administrative measures” affecting indigenous peoples;249 proposals to relocate them;250 or proposals to conduct military activities on their traditional lands.251 In relation to treaties, indigenous peoples had the right to the “recognition, observance and enforcement of treaties, agreements and other constructive arrangements” and “conflicts and disputes which cannot otherwise be settled” were to be “submitted to competent international bodies.”252

The linchpin and significant breakthrough was article 3. What did it mean? There is no doubt that the right to self-determination was a response to the decolonization arguments of indigenous peoples of the North. The repeated assertion of the decolonization model in the Working Group led to the self-determination framework in the Declaration. It also finds support in the interpretations offered by the working group Chair Madam Erica-Irene Daes.

After completion of the Working Group sessions and acceptance of the Declaration by the Sub-Commission, Daes issued a reading of the Declaration that endorsed the decolonization model.253 She notes:254

> With few exceptions, indigenous peoples were never a part of State-building ... They did not have an opportunity to participate in designing the modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making.

As a result, they were “not now, full partners in the political process and lack others’ ability to use democratic means to defend their fundamental rights and freedoms.” According to Daes, this imposed obligations on states to:255

> accommodate the aspirations of indigenous peoples through constitutional

---

248 Ibid at 53 (Article 30).
249 Ibid at 51 (Article 20).
250 Ibid at 49 (Article 10).
251 Ibid at 49 (Article 11).
252 Ibid at 54 (Article 36).
254 Ibid at para 24.
255 Ibid at para 25.
reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise their right to self-determination by this means and other peaceful ways, to the extent possible.

Daes continued: 256

Furthermore, the right of self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of “belated State-building”, through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean that assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.

The emphasis by Daes is on domestic reform negotiated peacefully and on fair terms. She seems to contemplate – as indigenous peoples did in the Working Group – the creation of contemporary treaties negotiated under the supervision of international institutions. However, the right to negotiate implied indigenous peoples could also choose to remain outside the state should there be no mutual agreement on just terms. 257 This approach is consistent with the decolonization model. However, Daes also endorsed another approach that saw self-determination as a right to “share power democratically,” endorsing a right to decolonization and independence in cases of gross human rights abuses as recognized by the Friendly Relations Declaration 1970: 258

Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues

256 Ibid at para 26.
258 Daes, supra note 253 at para 23.
unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be “representing the whole people”. At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State for their safety and security. Indeed, in such a state of affairs, legal arguments cease to have any real significance since peoples will defend themselves by whatever means they can. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.

....

The concept of “self-determination” has accordingly taken on a new meaning in the post-colonial era. Ordinarily, it is the right of the citizens of an existing, independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. The international community and the present writer discourage secession as a remedy for the abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out completely in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is “effectively representative”.

Thus Daes applied a mixed interpretative approach to self-determination. It included the possibility of secession if the decolonization-inspired, belated State-building project failed. But she also endorsed a human rights model recognizing a right to secession as a remedy for the gross abuse of fundamental rights.
6 Conclusion

The Declaration on the Rights of Indigenous Peoples represented a major breakthrough in two fundamental respects. First, while initially there was a very strong institutional bias towards human rights – given the Working Group’s mandate and setting – this was effectively subverted by Northern indigenous peoples. Human rights were important to their movement but principally as a means of advancing their broader claims to self-determination. These strong claims to self-determination were grounded in anti-colonialism. The parallels between the historical experience of colonial peoples and indigenous peoples of the North were consistently made throughout the Working Group negotiations. And in the end the self-determination framework was inserted into the Declaration.

Secondly, the decolonization model resulted in a novel approach to UN standard-setting. While normally treaty and declaration making is controlled by states who will seek input from NGOs and other interested groups. The Working Group shifted from this approach to treat indigenous peoples as equals with states with the Working Group experts acting as mediators. The Working Group approach was no doubt influenced by the historical-based decolonization model. The adaptation of the process not only allowed Northern indigenous peoples to continually assert the decolonization model, it had a feedback effect boosting the normative claims to the self-determination framework. If indigenous peoples were participating alongside states, like states, then they ought to be entitled to the right to self-determination just like other states/peoples. This open process and resulting standards set a precedent that would prove to be enormously difficult for states to disassemble.

Yet at the same time, a human rights model was emerging – as can be seen from the commentary on the Declaration by Daes. As we will see in the next chapter, the emphasis on human rights and especially the human right to culture was significantly enhanced due to the increased participation of Asian indigenous advocates (followed by the African movement) in the Declaration negotiations. This threatened to undo the achievements made in the Working Group on Indigenous Populations.

259 Knop, supra note 167 at 248–55.
CHAPTER 2
ASIAN AND AFRICAN INDIGENOUS MOVEMENTS’ APPROPRIATION OF THE HUMAN RIGHTS MODEL

1 Asian indigenous peoples’ participation in the international indigenous movement

As demonstrated in Chapter 1, indigenous advocates from the Northern, or CANZUS states, were prominent in the Working Group from 1982 through to 1993. These advocates advanced a historically-based decolonization model for the Declaration, according to which indigenous peoples were first peoples with the same sovereign rights as other peoples. Drawing parallels with colonised peoples in Asia and Africa, these advocates sought recognition of their right to self-determination, including the possibility of independence.

At the first Working Group session, virtually all indigenous organizations and advocates were Northern-based and most of the observer governments were from CANZUS or Latin American states. However, from 1987 onward, increasing numbers of indigenous advocates of Asia – then Africa to a much lesser degree – attended and participated. Latin American indigenous advocates’ numbers also grew steadily. By the tenth and final Working Group session in 1993, there were many more indigenous organizations of the South, representing Latin America, South East Asia and Africa. There were 50 Northern indigenous organisations, 16 Asian and 4 African indigenous organisations and 31 Latin America indigenous organisations.

TABLE A: Number of indigenous organisations participating in the Working Group on Indigenous Populations based on the Working Group’s Annual Reports (note: there was no meeting in 1986 due to the UN’s financial crisis).

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>NORTH</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>32</td>
<td>-</td>
<td>29</td>
<td>39</td>
<td>33</td>
<td>36</td>
<td>40</td>
<td>51</td>
<td>50</td>
</tr>
<tr>
<td>ASIA</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>-</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>5</td>
<td>13</td>
<td>13</td>
<td>16</td>
</tr>
<tr>
<td>AFRICA</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>-</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
</tbody>
</table>
Southern indigenous peoples’ participation posed considerable challenges to the indigenous movement of the North. In particular, the emphasis placed by Southern indigenous advocates on human rights and the right to culture threatened to undermine the decolonization model and unravel the self-determination framework. In this chapter, I track the emergence of these new indigenous movements of the South but with a focus on the Asian and African movements given their particular emphasis on human rights and culture.

1.1 The anthropology-NGOs

From the late 1960s, during the earliest stages of the international indigenous movement, NGOs made up of “activist anthropologists” played a key role in raising awareness of the plight of indigenous peoples. Originally, their focus was on the vulnerable indigenous peoples of Latin America. In the Americas, virtually every nation state had some law or decree regulating the sale and use of tribal lands and special administrative agencies to deal with the “indian problem”. But most states vacillated between benign neglect and assimilation. Indigenous peoples almost everywhere occupied the margins of social life and were denied access to basic rights to health, education and welfare. Anti-Slavery drew attention to indigenous peoples being kept in conditions tantamount to slavery as serfs to landlords. In addition, states were opening up areas to settlement and development, leading to the encroachment on indigenous lands of ranchers, miners, loggers, military personnel and missionaries. From the late 1970s, there were increasing reports of torture and extrajudicial killings of indigenous peoples in Peru, El Salvador, and Guatemala. In Guatemala, for

---

1 See, for example, Judith Ennew, Debt Bondage: A Survey (London: Anti-Slavery Society, 1981).
5 See, Edward Fischer, “Beyond Victimisation: Maya Movements in Post-War Guatemala” in Nancy G Postero, ed, The Struggle for Indian Rights in Latin America (Sussex, UK: Sussex Academic Press, 2004); See also, Kay
example, Mayan leftist insurgents were caught up in a lengthy and often vicious civil war with the army. This would continue for 30 years and ultimately lead to the death or disappearance of more than 200,000 people – mostly civilians. The anthropology-NGOs sought to shine a light on these issues. Three Northern European organisations – International Working Group of Indigenous Affairs (IWGIA), Survival International, and Anti-Slavery - were at the vanguard of this new movement. In 1968, Kleivan Helgien – an anthropologist based at the University of Copenhagen’s Department of Anthropology and Ethnology – along with fellow anthropologists established IWGIA. IWGIA had close ties with the North American indigenous movement, as Helgian had carried out fieldwork with indigenous peoples in Canada and IWGIA had helped establish the World Council of Indigenous Peoples. However, IWGIA’s principal focus was the South, especially South America.

The London-based Primitive Peoples Fund (later renamed Survival International) was established in 1969 in response to a letter to a London paper lamenting the lack of national interest in the atrocities carried out against remote indigenous communities of Latin America. The third organisation, Anti-Slavery, was established in 1839, to promote the abolition of slavery throughout the world. However, its focus soon became the ill-treatment and slavery of colonised peoples, particularly those in Africa. With the decolonization of African colonies, Anti-Slavery began to focus more on contemporary forms of slavery, including forced labour in Latin America.

What all of these organizations shared, was their founders’ background in anthropology. They were scholars with an academic interest in indigenous peoples, but became activist-
anthropologists given their concerns surrounding the plight of indigenous peoples. As Wright notes, “with their critique of the ‘colonial situation,’ anthropologists began to look critically at the legacy and goals of the profession, ‘awakening’ to their ethical responsibilities, and directing their interests to the concerns of native peoples.”\(^{12}\) Anthropology was perceived as giving succor to the colonial ideologies that supported the settlement and colonization of indigenous peoples.\(^{13}\) The move from the science of anthropology to activist-anthropology caused a stir amongst scholars of anthropology who sought to uphold the objectivity of the science.\(^{14}\)

Many of the communities the anthropology-NGOs wrote about had been their subjects in fieldwork. They were mostly remote, culturally distinctive communities in Amazonia. The view was that these peoples lacked political know-how and sophistication to protect themselves, with little contact with the outside world. These peoples did not have access to basic human rights and needed to be treated as equals, and adopt western life on their own terms. Survival International, for example, would “attempt to find humane, practical and constructive solutions which will allow each individual group to adapt to the outside world at a pace and in a manner which will make it possible for them to maintain their identity and dignity as human beings.”\(^{15}\) Survival International did not undertake work on the struggle of the Kurds, Basque, Ukrainians, or First Nations of the United States who were said to be “relatively more sophisticated politically and have their own informed and articulate spoke-peoples.”\(^{16}\) Neither did IWGIA or Anti-Slavery. The NGOs were interested in the most culturally distinct, remote and vulnerable “natives.” Their interests were different from the anti-colonial agenda of Northern indigenous peoples.

Throughout the 1970s, these NGOs were busy collecting and disseminating information and reports on Latin America indigenous peoples in journal articles, newsletters, talks delivered to

\(^{12}\) Wright, supra note 8 at 367 (according to Wright the Declaration of Barbados became “the manifesto of anthropology’s alliance with the liberation struggles of native people”); See “The Declaration of Barbados: For the Liberation of Indians” (1973) 14:3 Current Anthropology 267.

\(^{13}\) Robin Wright, supra note 8.

\(^{14}\) Ibid.


\(^{16}\) Ibid at 70.
The typical newsletter briefly described the plight of the tribe, followed by a short description of the tribes’ history, culture and the social and political context and ended with recommendations as to what could be done. Increasingly, these organizations also campaigned on the situation of indigenous peoples in Asia, in light of the clear similarities between their situation and that of Amazonian Indians in Latin America. Indigenous peoples of Asia, like those of the Americas, were culturally distinct and remote communities struggling with the onslaught of modern life. In their advocacy efforts then, these organizations argued simultaneously for indigenous peoples of Asia and the Americas and advanced the human rights model emphasizing culture.

The most important action in terms of incorporating Asian indigenous peoples into the international movement was the move from the late 1970s by IWGIA, Survival International, and Anti-Slavery to channel their reports on Asian and Latin American indigenous peoples into international human rights bodies. The ILO was the initial site of interest – until the Working Group was formed – because of ILO Convention 107. Drafted by the International Labour Organization, this was the first treaty directed at indigenous and tribal peoples’ rights. However, it was focused on the protection of the basic rights of the tribe through their absorption into the nation’s citizenry. The ILO Convention 107 therefore promoted basic rights to social security, and health, vocational training, and education. There was recognition of the need to respect indigenous values, institutions, language and significantly, the protection of indigenous peoples’ traditional lands. But only to the extent this did not undermine the project of integration. Land rights, for example, were to be protected but with the expectation that indigenous peoples would leave the land and participate in the social and economic life of society. If their traditional way of life obstructed economic development it

17 Dahl, supra note 7.
18 Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [Convention (No 107)].
20 Convention (No 107), supra note 18, art 19.
21 Ibid art 20.
22 Ibid arts 16-18.
23 Ibid arts 21-25.
24 Ibid arts 11-14.
had to “gradually eliminated” or “at least adapted to the economic and social needs of the communities concerned.”

Thus it was clear that the recognition of land rights was intended to be a temporary measure, as indigenous and tribal peoples gradually became “more acculturated and productive members of society.” However, the anthropology NGOs advanced an interpretive spin consistent with the emerging era of indigenous rights promotion and protection. After an initial phase of relative indifference towards implementation of the Convention, Rodríguez-Piñero refers to a second phase from 1975-1989, whereby the “interaction between the international NGO movement and the [ILO] organization’s supervisory system gradually fostered an interpretation of Convention No 107 as an instrument for the defence of indigenous rights, opening the most active phase thus far of the international protection of the rights of Indigenous Peoples by the ILO.”

Efforts were made by the ILO to engage directly with the states in question, including the conduct of research visits to conflict zones under its “direct contact procedure.”

Through submissions made to the ILO by IWGIA, Survival International and Anti-Slavery, the situation of both indigenous peoples of the settler states and tribal peoples of South Asia were highlighted. While directing attention to the land rights of scheduled tribes in India and the Jumma tribals in the Chittagong Hill Tracts of Bangladesh, Anti-Slavery and IWGIA would also make reference to the impact of settlement on the rights of Yanomami in the Brazilian Amazonia. Bangladesh had attracted the attention of international media and human rights NGOs due to the Chittagong Hill Tracts conflict following the Bangladesh government’s policy of encouraging Bengali settlement of the Hill Tracts as a means to

---

26 Rodríguez-Piñero, supra note 19 at 124.
27 Ibid at 251.
28 Ibid; see, for example, Observations of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in relation to India and the Sardar Hydro Project, UNILOR, 1988, Report III (Part 4A), 75th Session (noting that recent occupation of government-owned lands did not mean that tribal peoples had no land rights) [ILO CEACR India].
30 Rodríguez-Piñero, supra note 19 at 249–52 (commenting on IWGIA and Survival International’s engagement with the ILO supervisory mechanism to bring attention to tribal peoples in Brazil, India and Bangladesh).
control and supplant local Jumma tribal authorities and land rights. The transmigration policy brought to mind the settlement policies of the American Amazon in Brazil, Ecuador and Peru. The conflict between the Jumma, the army and Bengali settlers resonated with similar experiences of indigenous peoples in Guatemala, Chile, Peru, and El Salvador. Other Asian cases resonated with the experience in Latin America, including the Sardar Sarovar dam project in India and the World Bank-funded Chico River Dam project in the Cordilleras of the Philippines, both of which had displaced significant numbers of indigenous peoples.

But the UN Working Group was the most significant forum because it was the effective gatekeeper to the international indigenous movement. As we saw in Chapter 1, the Working Group was the crucible by which the movement was formed through negotiations on the Declaration. To be accepted with credibility in this forum would offer Asian indigenous peoples several opportunities. First, it would direct more international attention towards their cause. Secondly, minority rights in these states were and remain notoriously weak while the Declaration appeared to be on the path towards creating robust standards in relation to protection of culture, traditional lands and autonomy. As Kymlicka notes, “If they come to the international community under the heading of national minority, they get nothing other than generic Article 27 [minority] rights; if they come instead as ‘Indigenous Peoples’, they have the promise of rights to land, control over natural resources, political self-government, language rights and legal pluralism.”

Once the Working Group was established, the anthropology-NGOs attended its sessions and again, spoke in the same breath of the struggle of indigenous peoples in Asia and the Americas. However, as we will see, Asian indigenous peoples had to contend with strong

---

32 This was part of the Narmada dam project initially supported by the World Bank that resulted in large-scale displacement of tribal peoples, see Amita Baviskar, *In the Belly of the River: Tribal Conflicts Over Development in the Narmada Valley* (Oxford: Oxford University Press, 2004).
opposition to their participation in the Working Group from Asian states.

1.2 Asian states’ opposition to Asian indigenous peoples’ participation in UN Working Group

Within the Working Group, the participation of Asian indigenous advocates was vigorously opposed by Asian states, especially China, Indonesia, India and Bangladesh. These states asserted that the Working Group had no business looking into the situation of minorities in their states, arguing that “indigenous peoples,” related to the specific historic experience of colonization and settlement of first peoples by Europeans in the Americas and Australasia. The following statement made by China in the Working Group in 1995 typifies the argument made by Asian states:

The Chinese Government believes that the question of Indigenous Peoples is the product of European countries’ recent pursuit of colonial policies in other parts of the world. Because of these policies, many Indigenous Peoples were dispossessed of their ancestral homes and lands, brutally oppressed, exploited and murdered, and in some cases even deliberately exterminated. To this day, many Indigenous Peoples still suffer from discrimination and diminished status. As in the majority of Asian countries, the various nationalities in China have all lived for aeons on Chinese territory. Although there is no Indigenous Peoples’ question in China, the Chinese Government and people have every sympathy with Indigenous Peoples’ historical woes and historical plight. China believes it absolutely essential to draft an international instrument to protect their rights and interests. The special historical misfortunes of Indigenous Peoples set them

---

apart from minority nationalities and ethnic groups in the ordinary sense. For this reason, the draft declaration must clearly define what Indigenous Peoples are, in order to guarantee that the special rights it establishes are accurately targeted at genuine communities of indigenous people and are not distorted, arbitrarily extended or muddled.

Therefore, according to China, “indigenous peoples” related to the West’s colonization project in the settler states of the Americas and Australasia. Asia does not have indigenous peoples but “minorities” – a different category altogether. Asian states attending the Working Group negotiations, therefore, sought a definition of indigenous peoples that made clear they were to be found in the settler states and asserted it was ultimately for states to determine who constituted an indigenous people. The urgency of the situation in Latin America was stressed. India highlighted the need to focus on Latin America where “in the last few decades indigenous peoples in some countries have been subjected to ethnocide and decimation on such a large scale that their very survival is at stake.”\(^{37}\) The implication was that the claims of Asian indigenous peoples were a distraction from the more pressing issue of fundamental human rights abuses in Latin America.

Asian states were obviously concerned about the consequences of indigenous rights in their home states. In all of the relevant Asian states, there were minority movements seeking greater autonomy or independence thus raising security and stability issues. Above all, Asian states were concerned about the claims of Northern indigenous advocates to self-determination and the associated rights of secession and independence. This concern was much stronger than the independence concerns of the CANZUS states.\(^{38}\) There has never been a serious threat to the territorial integrity of these states. And while Northern indigenous peoples sought self-determination almost all of them envisaged an enduring relationship within the state.


\(^{38}\) Roderic Pitty & Shannara Smith, “The Indigenous Challenge to Westphalian Sovereignty” (2011) 46:1 Aust J Political Science 121 at 10 (noting that the Africa concern about territorial integrity and local secession claims was different to the CANZUS states where the “rhetoric of opposition to self-determination focused on excluding external scrutiny of what government regard as domestic policy making.”). Although note CANZUS concerns were not merely about intervention, but, as I argue in Chapter 1, the normative power with obvious legal and political consequences that came with a reference to self-determination without a reference to territorial integrity.
Asian states also were wary of international scrutiny. Indonesia, for example, was repeatedly criticized in international fora for its annexation of the Moluccas and West Papua;\(^39\) Burma for its oppressive treatment of the Chin and Karen and other ‘hill-tribes’ on its eastern border with Thailand;\(^40\) and Bangladesh for its transmigration policy of settling Bangladesh settlers on Jumma homelands in the Chittagong Hill Tracts.\(^41\) As most of these nations had emerged from a long period of Western imperial rule, they were sensitive to foreign intervention and the imposition of “Western-derived” human rights standards.\(^42\) As a case in point, Bangladesh had acquired independence in 1971 after a bloody war of independence against West Pakistan involving the deaths of hundreds of thousands of Bengalis – just a decade before the Working Group on Indigenous Populations was established. Thus, Asian states frequently referred to their history of Western oppression and described their whole nation-states as comprised of indigenous peoples.\(^43\) We are all indigenous peoples, we have all suffered from Western rule, and we identify with those still subject to “Western imperial rule.”\(^44\) Additionally, indigenous rights threatened to undermine state-sponsored development projects and the private investment seen as essential to the economic growth and independence of these states.\(^45\) As Will Kymlicka notes:\(^46\)

> There is a widespread perception that international organisations are internationalising minority rights precisely in order to destabilise certain countries. In particular, it is widely believed in many post-colonial states that the international sponsorship of minority rights is simply a conspiracy by the West, and particularly the US, to weaken and divide post colonial states.

---


\(^41\) *Information from Survival International*, supra note 36 at 5 (commenting on land rights of “tribal peoples” in Bangladesh).


\(^43\) See for example, “Statement by the Bangladesh Delegation” (23 November July 1995), doCip Doc.034_AS01 (on file with author) (arguing Bangladesh is an indigenous people, and so, the Declaration would also protect the nation of Bangladesh).

\(^44\) *Ibid*.

\(^45\) ILO CEACR India, *supra* note 28 (criticising India for failing to respect land rights of local Adivasi affected by the Sardar Hydro Project).

\(^46\) Kymlicka, *supra* note 34 at 282.
Kymlicka also notes how post-colonial states resented the intrusion of foreign powers in local affairs, given that imperial rulers collaborated with small minorities and granted them power and privilege in order to maintain control over the rest of the population. In addition, tensions resulted from the creation of kin-state minority groups due to the arbitrary delineation of country borders, whereby a minority may have ethnic links and higher loyalty to the population of a neighbouring kin-state thereby creating security concerns.

As a result, there is anxiety that such minorities are irredentist—that is, that they wish to redraw international boundaries so as to unite (or reunite) the territory where they live with their adjacent kin-state. Indeed, it is often assumed that they would collaborate willingly with their kin-state if it militarily invaded the country in order to claim this territory, as, indeed, some have done at various times in the twentieth century.

Matters were complicated by the broader geopolitical interests of the time, due to the work of the Working Group occurring during the height of the Cold War era. The United States and other Western states emphasized individual freedom and used human rights as a means to embarrass the Soviet Union particularly during President Carter’s administration when the President made human rights a platform of his administration. As Falk notes of the dynamic at the time:

Intervention on behalf of human rights resembles the Mississippi River, it only flows from North to South. Human rights activism that is associated with the foreign policy of big states and particularly the United States, is therefore seen as a post-colonial kind of interventionary politics that uses the banner of human rights, often to the detriment of people in the target societies. Not only do these important

---

47 Ibid at 78.
states in the North invoke human rights, it is argued, but they invoke human rights as a pretext to interfere in foreign societies in ways that oppress people.

And so during the 1970s, the US State Department was critical of the Communist Sandinista government of Nicaragua due to human rights failings, while other states – Honduras and Guatemala – who were United States allies were left alone.  

The United States supported the extension of the indigenous rights movement beyond the North to the Asian region. This provided the United States with the opportunity to criticize the Soviet states and Communist bloc countries for neglecting the human rights of their indigenous peoples. The United States could use indigenous rights to undermine the internal stability and security of these states. It also diverted attention from the Northern states. To extend the indigenous rights movement beyond the North meant there would be no directed focus – as had been the case in the early years of the Working Group – on the decolonization model. Asian states were also likely to oppose any reference to self-determination if there was the prospect of the Declaration applying to their states. In response, in the Working Group and the UN Sub-Commission on the Prevention of Discrimination, the Soviet Union and China criticized the United States for its seizure of Indian lands and called for land redistribution measures. The Soviet Union also offered political asylum to Leonard Peltier – an American Indian Movement activist convicted in 1982 for the murder of FBI agents on Indian lands. China consistently called for recognition of collective rights which contradicted the United States claim that the Declaration focus only on individual rights. With the end of the Cold War, the focus shifted from ideology to culture. In the early 1990s, human rights began to be

---

50 Ibid at 61.
51 See “General Statement by Leslie A Gerson, Deputy Assistant Secretary of State, United States Department of State” (1998) doCip Doc. 021_as01 (on file with author) (The United States was “concerned by statements from regional groups that have suggested the need for a definition of the indigenous groups which would exclude their own groups of indigenous people. Such insistence on a narrow definition would in our view derail the process altogether. In this regard we do not believe that the focus of the Declaration should be the privileging of historically prior inhabitants” At 021_as03).
52 Sanders, supra note 29 at 415.
53 Ibid.
54 Ibid.
55 See, for example, “Statement of China” (1998) doCip Doc. 023_as01 (on file with author) (“The Chinese delegation believes that indigenous peoples have not only individual rights but also collective rights” at 023_as02).
critiqued by Asian states given their Western origins. Under the banner of “Asian values,” they extolled new civilization outlooks positing the Western system of human rights as individualistic and out of step with the East’s emphasis on communitarian values.\textsuperscript{56} Against this, critics argued that human rights were not necessarily the preserve of the West and that Asian values were being used to divert attention from internal human rights violations.\textsuperscript{57}

1.3 Asian indigenous peoples’ human rights model

In response to the security concerns of Asian states, Asian indigenous advocates and the anthropology NGOs, sought to distinguish Asian indigenous peoples from other (typically more acculturated and powerful) minority groups who sought secession or strong forms of regional autonomy. Instead of calling for strong forms of self-determination like Northern indigenous peoples, Asian advocates emphasized human rights and culture. With culture and not independence as the priority, a line was drawn between Asian indigenous peoples and other more controversial minorities like the Tamil, the Uighur and the Tibetan movement. Asian indigenous peoples were the “harmless” communities of remote, mountain and hilltop areas seeking cultural survival in the face of unrelenting Western development and culture. They were not to be confused with the more militant and controversial separatist movements of Asia.

There were other practical reasons for emphasizing human rights and culture. This allowed Asian indigenous peoples to show their \textit{common cause} with indigenous peoples of the settler states. While Asian indigenous advocates could not rely on the same justificatory arguments that supported the decolonization model, there were many other commonalities in terms of denial of basic human rights, culture and land. This was especially the case in relation to the indigenous peoples of Latin America.

\textsuperscript{56} The Asian regional preparatory meeting for the Vienna Conference on Human Rights See, \textit{Report of the Regional Meeting for Asia of the World Conference on Human Rights}, UN World Conference on Human Rights, 1993, UN Doc A/CONF.157/ASRM/8 (adopting the Bangkok Declaration, which included the statement: “while human rights are universal in nature they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds” at 38).

\textsuperscript{57} Sally E Merry, “Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)” (2003) 26:1 PoLAR Political and Legal Anthropology Rev 55.
This human rights strategy can be seen in the 1995 publication, “Indigenous Peoples of Asia,” edited by international lawyer, Benedict Kingsbury, and anthropologists, Andrew Gray (then director of IWGIA) and R.H Barnes.  

Each chapter deals with a different South Asian country, however all describe culturally distinctive groups occupying remote, forested, hilly areas that have been marginalized and exploited by a dominant culture. As Andrew Gray notes of those participating in the Working Group negotiations on the Declaration, “[e]xamples range from the Indigenous Peoples in India suffering the relocation effects of the Narmada dam to the hill peoples of the Chittagong hill tracts; the Natives of Sarawak and Peninsular Malaysia; the minority peoples of Burma; the hill peoples of Thailand, Laos, Cambodia, and Vietnam; the Aboriginal peoples of Taiwan and the Ainu.”  

These peoples typically did not seek secession but rather “an autonomy that falls short of independence.”  

The issues raised by them related to the effects of development and land displacement, respect for culture and basic human rights.

These communities are not first peoples – this being too difficult to establish with millenia of migration and movement of peoples across South Asia. However, they could claim to be “prior peoples.” To illustrate, the Jumma may not, strictly speaking, have been the first to settle the Chittagong hill tracts, but they had firmly settled there prior to the more recent influx of Bangladesh settlers.

The editors acknowledged, however, that some Asian minorities did not fit neatly into their Asian indigenous people category. These were ethnic minority groups with a very different agenda seeking independence and self-determination or at least strong forms of autonomy, or variations of these themes. This included communities subject to transmigration by Indonesia – West Papua, Timor Leste (East Timor), and Moluccas Island. This category also included the claims of the Tamil in Sri Lanka, and Nagaland and Jharkhand in India. These groups

60 Ibid.  
61 Mohsin, supra note 31.
would attend the Working Group but also higher-level UN bodies that were more concerned with decolonization (that is, the UN Decolonization Committee). As Andrew Gray notes, “The West Papuans usually make a statement at the Working Group but they also make it clear that their presence at the Working Group should be seen in respect of human rights.”62 “However as they feel that their case is one of independence as well as human rights, many believe a higher forum such as the Decolonization Committee would be better for them.”63

When “Indigenous Peoples of Asia” was published in 1995, the indigenous movement was still emerging within the region. However, the editors noted that despite only “vague indications of a nascent indigenous movement,”64 it was clear the concept was present, ready to be deployed and extended to them. As noted by Andrew Gray in the book: “Regardless of whether these people refer to themselves as indigenous, or are even called indigenous, in the context of human rights issues, their definition emerges out of the problems they face and the rights for which they are fighting.”65

Benedict Kingsbury also made an independent contribution to the debate in an article entitled, “Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy”, published in 1998 (“Asian Controversy Article”).66 In this article, Kingsbury sought to overcome Asian states’ opposition to local tribal groups self-identifying as such by shifting the emphasis away from, as he put it, historical continuity with first peoples (ie the decolonization model) as the primary normative basis of indigenous rights. This emphasis, he noted, was due to the dominance of the Northern indigenous peoples in the Working Group. Instead, Kingsbury stressed the commonalities between Northern indigenous peoples and Asian tribal peoples in terms of “functional matters such as dispossession of land, cultural dislocation, environmental despoliation and experiences with large development projects.”67 These were the “essential” justifications for indigenous rights. These, Kingsbury argued,

62 Gray, supra note 59 at 55.
63 Ibid.
64 Barnes, Gray, & Kingsbury, supra note 58.
65 Gray, supra note 59 at 56.
67 Ibid at 457.
“establish a unity that is not dependent on the universal presence of historical continuity.” 68 Historical continuity, however, should be viewed as a “strong” justification.” 69 Thus, the response to Asian states would be that historical continuity was merely one consideration underpinning indigenous rights, but there were many others, including functional elements that were germane to Asian indigenous peoples. 70

IWGIA, Survival International and Anti-Slavery would form close ties with Asian indigenous advocates and actively supported their movement in the form of advice and funding to attend the Working Group meetings. 71 IWGIA had always prioritized the need to work closely with and for Asian indigenous peoples. Of the bonds made, the most crucial would be the leaders of the Philippines-based Tebtebba and Cordillera Peoples Alliance – the latter being IWGIA’s first long-term partner in the Asia region – established in June 1984 by indigenous advocates to challenge the Work Bank-funded Chico Dam. 72 IWGIA also established strong links with indigenous advocates of the Chittagong Hill Tracts and helped to establish the Chittagong Hill Tracts Commission – a European based NGO aimed at advancing indigenous rights in Bangladesh. 73 As the international indigenous rights movement grew, so did IWGIA. Today it is the largest non-indigenous organization working on indigenous rights. Survival International, on the other hand, would play less of a role in the UN but it would continue to mount campaigns for indigenous peoples of Asia, Africa and Latin America. Anti-Slavery eventually withdrew from active participation in the international movement. Eventually Asian indigenous advocates themselves – often with the financial support of the anthropology NGOs – attended the Working Group.

68 Ibid.
69 Ibid at 455.
70 Although, Kingsbury’s approach does not address Asian states’ concern that local self-identified indigenous peoples – which could include the controversial independence movements – may simply claim a right to self-determination. Kingsbury, supra note 66.
71 Sanders, supra note 29 (“[f]our of the European support organisations established a temporary ‘Human Rights Fund’ to enable indigenous represents to travel to Geneva. In 1987 that fund resulted in much wider representation from Asia, including new delegations from the Philippines, India, and Burma. It also funded representatives from Bangladesh and Indonesia” at 416).
73 Sanders, supra note 29.
As we will see, this human rights model would also be used by the emergent African indigenous movement when they sought to participate in the Declaration negotiations. And the anthropology NGOs, especially IWGIA, would play a central role in supporting this new movement. However, these southern movements would consistently meet objections from their states as well as from some quarters in the UN.

1.4 The Martinez treaty report

A significant flashpoint occurred with the appointment of the Cuban member of the Working Group to complete a study on treaties.\(^{74}\) Miguel Alfonso Martínez had been given the task to follow-up on some of the recommendations made by the UN Special Rapporteur José Martínez Cobo in the Cobo Report.\(^{75}\) The report had suggested an additional study on “Treaties between Indigenous Populations and States.”\(^{76}\) Indigenous advocates of the North, led by the Treaty Council, lobbied the Working Group to undertake the study. In the UN Sub-Commission on the Prevention of Discrimination, which was required to supervise the report and appoint its rapporteur, Canada and the United States strongly opposed Martínez’s appointment. It was highly likely his report would be critical of their states and call for historical inquiry into implementation of treaties. But Martínez was approved. Martínez could see the efforts made to accommodate communities from Asia and Africa in the Working Group and he disagreed with it. His report was highly critical of the globalization of the indigenous peoples’ movement. According to Martínez, neither the Asian nor African situations qualify for the usage of the term ‘indigenous peoples’. “[I]n post-colonial Africa and Asia”, he states, “autochthonous groups/minorities/ethnic groups/peoples … cannot … claim for themselves, unilaterally and exclusively the “indigenous” status in the United Nations context.”\(^{77}\)


\(^{76}\) Ibid at paras 388–392.

\(^{77}\) Study on Treaties, supra note 74, at para 88.
According to Martínez, several historical points distinguished the claims of settler-state indigenous peoples. First, he draws a distinction between the brutality visited upon settler-state indigenous peoples:  

The inherent nature of the colonial undertaking, the exploitative, discriminatory and dominating character of its “philosophy” as a system, the methods employed and the final results it had on very dissimilar societies mark the difference.

Secondly, unlike indigenous peoples of the settler states, he notes that most Asian, African, and Middle Eastern states have undergone decolonization.  

Finally, treaties mark another distinction, and few could be found in Asia or Africa.

Martínez suggests that cases relating to any of the Asian, African and European continents should be handled in forums other than the Working Group, preferably at the (then) newly established Working Group on Minorities. Martínez insisted on a “clear-cut distinction between indigenous peoples and national or ethnic minorities,” but refrained from providing his own definition of indigenous peoples, or minority rights. The basic distinction, from his perspective, ultimately related to the different historical trajectories of, on the one hand, “territorial expansion by indigenous nations into adjacent areas” (e.g. like Bengalis in Chittagong Hill Tracts of Bangladesh) and, on the other, “organized colonization, by European powers, of peoples inhabiting, since time immemorial, territories on other continents.” Martínez sought to emphasize the particular shock of conquest and its effects over centuries on indigenous peoples of the settler states. The term “indigenous Peoples” should thus only be reserved for cases of the latter kind.

For Martínez, some of the blame for the blurring of the differences between indigenous peoples and “minorities,” could be laid at the feet of the UN, for having merged the two

---

78 Ibid at para 175.
79 Ibid at para 68.
80 Ibid at paras 78 and 79.
81 Ibid at para 90.
82 Ibid at para 68.
83 Ibid at paras 71-73.
categories in official publications such as “The Rights of Indigenous Peoples” (Fact Sheet No. 9), prepared by the UN Centre for Human Rights.\textsuperscript{84} The fact sheet referred to indigenous peoples in both the classic case of colonization from afar, as well as those cases where “dominant neighbouring peoples have expanded their territories” onto indigenous lands. The UN Secretary of the Working Group and the manager of the Indigenous Peoples’ Programme in the Office of the High Commissioner for Human Rights was Julian Burger who had, prior to joining the UN, championed the cause of indigenous peoples in Asia while working for the Anti-Slavery Society. The Indigenous Peoples’ Programme established the “UN Voluntary Fund for Indigenous populations” which also financed both Northern and Southern Indigenous advocates. There was then, a broad perception that the UN administration responsible for indigenous rights was supportive of a global approach to indigenous peoples. Asian indigenous activists were highly critical of the Martínez report, calling it “colonial” and “racist,”\textsuperscript{85} while Asian states commended it.\textsuperscript{86} The conclusions of the Special Rapporteur encouraged Asian governments to demand a definition that would exclude Asian indigenous peoples. It also aggravated an increasingly tense situation between indigenous advocates of Asia and those of the North. The report clearly indicated that the Northern movement would be better off without the Asian movement in the Working Group.

2 ILO Convention 169 and the human rights model

As we saw earlier, the ILO Convention 107 was a milestone for the setting of standards on indigenous peoples, although it was firmly grounded in an assimilationist frame.\textsuperscript{87} ILO Convention 107 was directed at the protection of the basic rights of the tribe through their assimilation into the nation.\textsuperscript{88} However, in the emerging era of indigenous rights activism, the Convention’s focus on integration was seen as outdated and destructive.\textsuperscript{89} In the early 1980s –

\begin{itemize}
  \item \textsuperscript{84} The Rights of Indigenous Peoples (Fact Sheet No. 9), UN Centre for Human Rights, Geneva, 1990.
  \item \textsuperscript{86} Several Asian states commended the Report, see, “Statement of Bangladesh” (1989) doCip Doc. 211081_1 (on file with author)(commending Martinez for his scholarly work); See also, “Statement by the India Delegation” (1991), doCip Doc. 200170_1 (on file with author) (commending “the excellent preliminary report on treaties” at 200170_2).
  \item \textsuperscript{87} Convention (No 107), supra note 18.
  \item \textsuperscript{88} Rodríguez-Piñero, supra note 19 (for discussion on drafting of ILO Convention No. 107).
  \item \textsuperscript{89} Ibid at 298.
\end{itemize}
several years into the Working Group negotiations on the Declaration – the ILO decided to revise ILO Convention 107. The objective of integration was to be replaced by a focus on promoting the identity of indigenous and tribal peoples and improving their participation in decisions affecting them.\(^{90}\)

The ILO’s effort may have appeared unusual given the Working Group was at the time drafting the Declaration.\(^{91}\) But the ILO Office argued it was compelled to act quickly because the situation was now “urgent.”\(^{92}\) In particular, the demarcation and titling of traditional lands was a pressing issue, and indigenous peoples were being displaced due to transmigration policies, resource-extraction and hydroelectric projects. As a result, indigenous peoples were on the “verge of extinction,” and no one knew how long the Declaration drafting process would take or what the outcome, if any, might be.\(^{93}\) On the other hand, Rodríguez-Piñero notes the ILO was prompted largely by a turf war with the UN Working Group over standard setting for indigenous peoples.\(^{94}\)

Northern indigenous advocates saw the revision process as an opportunity to advance the decolonization model in an international treaty.\(^{95}\) At the same time, there was the risk that it would fall below expectations given the process was based on the revision of a treaty that was assimilationist at heart. The first pressing issue was the effective participation of indigenous advocates. In contrast to the ILO Convention 107 drafting process, in this new era of rights recognition the ILO Office was under considerable pressure to incorporate indigenous peoples in the revision exercise. This was particularly so because the Working Group had established a radically open participation process for indigenous advocates. However, in accordance with

---


\(^{92}\) Rodríguez-Piñero, *supra* note 19 at 267.

\(^{93}\) Ibid at 264–280 (discussing the reasons given by the ILO Office to justify the revision).

\(^{94}\) Ibid at 265.

\(^{95}\) Indigenous advocates of the North included the Four Directions Council, Indigenous World Association, International Organization of Resource Development, the World Council of Indigenous Peoples, and the Treaty Council. Apart from the North, there was the Indian Council of South America (CISA), the Inuit Circumpolar Conference, and the Nordic Sami Council. There were also the international human rights NGOs, IWGIA and Survival international. There were no indigenous organizations from Asia or Africa.
the ILO’s tripartite (government-employer-worker) membership, the ILO drafting process did not allow for effective NGO participation. Following ILO standard procedures, the drafting of ILO Convention 169 involved state delegations comprised of government representatives, employers’ organizations, and trade unions representing workers. Some efforts were made to incorporate indigenous advocates into the drafting exercise. For example several employer’s and worker’s delegations had indigenous advisers and some states carried out domestic consultations. But as Rodríguez-Piñero notes these processes “proved insufficient to placate the feeling of frustration and exclusion of many indigenous organisations present at the [Convention negotiations].” Nevertheless, it is unclear whether their effective participation would have made much of a difference. As noted by Rodríguez-Piñero:

Irrespective of the adequateness or lack of enhanced channels of effective participation orchestrated by the ILO bureaucracy, the need to involve the indigenous movement in the revision process weighed considerably less than the Office’s drive to advance its own decision and priorities concerning the revision of Convention 107.

The ILO never sought indigenous peoples’ meaningful input into the process, as it had already determined the aims of the Convention. The ILO did not perceive this as a decolonization project. The ILO knew the decolonization model was being advanced by the Northern advocates in the Declaration negotiations. According to the ILO, these advocates were from:

… well defined territories, they have in the past entered into treaty relations with colonizing powers, they are familiar with international law, and many of them are

---

96 Rodríguez-Piñero, supra note 19 at 300–319 (discussing indigenous peoples’ participation in the drafting process).
97 Ibid at 312-319. See also, Lee Swepston, “New Step in the International Law”, supra note 90, at 686–687 (for an account of the drafting process and indigenous peoples’ participation by the then lead ILO Officer).
98 Rodríguez-Piñero, supra note 19 at 317.
99 Ibid at 319.
now seeking to bring about radical changes in the nature of their relationship with the governments of the states in which they reside.

On the other hand, the ILO recognized there were:¹⁰¹

… many other indigenous and tribal groups and organizations which also seek to protect their economic, social, cultural and civil and political rights against abuse by the state and other encroachers but whose primary concerns are local autonomy and self-fulfillment, rather than the more ambitious declaration of principle adopted by certain international indigenous organizations.

The ILO was concerned more with these “other indigenous and tribal groups.”¹⁰² This included “peasant communities and tribal groups” of Latin America but also groups in “Africa and Continental Asia,” who were at an “embryonic stage” or yet to be formed altogether.¹⁰³ The indigenous peoples of Latin America, Africa and Asia were being denied their most fundamental human rights.

The ILO was working within a narrow mandate aimed at human rights.¹⁰⁴ An additional factor for the ILO was that it was creating a Convention and wanted it to be widely ratified by states. As noted by ILO officer Lee Swepston:¹⁰⁵

There are some who advocate the inclusion in the ILO Convention of the term “self-determination.” It has no defined meaning in international law, but its use arouses visions of the fragmentation of states. Its inclusion in a Convention would guarantee that the Convention would not be ratified.

¹⁰¹ Ibid.
¹⁰² Ibid.
¹⁰³ Ibid at 16.
¹⁰⁴ Rodríguez-Piñero, supra note 19 at 293.
The UN, however, was working on a non-binding Declaration, which meant that it was more able to accommodate the aspirations of Indigenous Peoples. The UN then, was the forum for addressing issues of self-determination, not the ILO.¹⁰⁶

The basic thrust of ILO Convention No. 169 is indicated by its preamble, which recognizes: “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.”¹⁰⁷ Whereas ILO Convention 107 was grounded in formal equality and a vision of integration, the ILO Convention 169 was directed at human rights adapted to the situation of indigenous peoples.¹⁰⁸ The package of protections in the Convention include matters relating to traditional land and resource rights.¹⁰⁹ The Convention requires governments to “take steps as necessary to identify these lands”¹¹⁰ and to guarantee effective protection of their “rights of ownership and possession,” including prosecution for “unauthorized intrusion upon, or use of, the lands of the peoples concerned.”¹¹¹ The Convention also notes the “special importance for the cultures and spiritual values of indigenous peoples of their relationship with the land.”¹¹² There is recognition of indigenous peoples’ rights to natural resources within their territories.¹¹³ The Convention also guarantees rights to recognition of custom,¹¹⁴ employment,¹¹⁵ social security and health,¹¹⁶ and education.¹¹⁷

¹⁰⁸ International Labour Office, Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107), 1986, ILO Doc APPL/MER/107/1986/D.70 (“[t]he experts felt the revised Convention should include the principle of respect for the cultures, religious and traditional institutions and ways of life of these peoples, as well as the requirement that they be accorded the right to participate in an effective manner in taking the decisions which affect them” at para 46).
¹⁰⁹ Convention No. 169, supra note 107, art 14(1).
¹¹⁰ Ibid art 14(2).
¹¹¹ Ibid art 18.
¹¹² Ibid art 13.
¹¹³ Ibid art 15.
¹¹⁴ Ibid art 9.
¹¹⁵ Ibid art 20
¹¹⁶ Ibid arts 24-25.
The ILO does not contain any reference to self-determination. The Convention does refer to indigenous “peoples” and not indigenous “populations” given indigenous peoples’ insisted on being called peoples. However, given its connection with self-determination, the ILO adopted a savings clause: “The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”. The ILO did not want to deny indigenous peoples had a right to self-determination in international law but saw this as a political issue that could be considered and addressed in the UN Working Group.

There are no measures in the Convention directed at historical redress, or treaties, or forms of self-government. The self-determination framework advanced by Northern indigenous peoples was therefore filtered out of the ILO drafting process. These were “political” issues, whereas the ILO was focused on the fundamental human rights issues applicable to indigenous peoples of Latin America, Asia, Africa and the Middle East.

This human rights model was a disappointment for Northern advocates. However, in many ways, the ILO’s approach to ILO Convention 169 was pre-determined by the utilitarian approach of the ILO Convention 107, and the fact that this was a “partial revision” of that Convention, not an entirely new instrument. Like its predecessor, ILO Convention 169 would be directed at culturally distinctive peoples – both indigenous peoples of the settler states and those of Asia etc – throughout the world. This would not be an agenda to be hijacked by indigenous peoples of the North and their decolonization model.

---

118 Ibid, art 1(3).
120 Ibid at 690–691 (discussing disagreement in the drafting process on whether indigenous peoples should consent to measures that may affect them).
121 Indeed, aspects of historical continuity were rendered less significant in the definition provision of the ILO Convention No. 169. The definition of “indigenous peoples” in ILO Convention No. 107 had reflected first peoples’ historical experience with its reference to “historical continuity with the populations which inhabited the country at the time of conquest or colonization.” The ILO Convention No. 169’s definition of indigenous peoples retains this, but also extends the concept by including groups with “historical continuity with the populations which inhabited the country at the time of the establishment of present state boundaries.” As a result, indigenous peoples conceptually, are no longer confined to the first peoples of the settler states – but now include tribal peoples living within the boundaries of newly independent states established during the decolonization process such as India, Bangladesh, and Indonesia.
As a result, many indigenous delegates of the North were strongly opposed to the ratification of ILO Convention 169. According to Sharon Venne, Canadian aboriginal lawyer, the ILO Convention 169 provided “an invitation to further assimilation.” There was obvious concern that the modest standards in the ILO Convention 169 might set a precedent for the Working Group negotiations on the Declaration. At the Working Group session in 1989, there was resounding criticism by indigenous advocates of ILO Convention 169. When an ILO official took the floor to introduce the new Convention, indigenous advocates walked out in protest. Indigenous delegates condemned the process as “paternalistic and racially discriminatory” and the ILO as “the most inappropriate forum to determine the rights of Indigenous Peoples.”

However, indigenous advocates of Latin America and the Nordic states were more pragmatic. The Sami Council lobbied for the Nordic states to ratify the convention and Norway did so promptly in 1990. In Latin America, almost all states have ratified the convention. Those Latin American states that had opposed the revision process came, at least in theory, to accept it. The reality was, given the precarious circumstances for indigenous peoples in Latin America, their indigenous advocates could more readily accept the Convention than the advocates of the North. The claims to self-determination seemed too abstract and distant to be of any practical value to indigenous peoples in Latin America and other southern regions. There was recognition too, by several indigenous advocates of the North that there could be value in the ILO Convention 169 for movements in the South.

---

124 “Statement by Nordic Sami Council” (1989) doCip Doc. 211072_1 (on file with the author) (“We share the opinion expressed by some other indigenous NGOs that the adoption of this convention has to be considered as a step forward in the general efforts of developing more positive and adequate universal standards on the rights of indigenous peoples and our member organizations are most likely to recommend the Nordic government to ratify the ILO Convention 169 as soon as possible” at 211072_1).
125 See “Statement of Chief Littlechild for the International Indigenous Organisations of Indigenous Peoples Resource Development” (1989) doCip Doc. 211022_1 (on file with author) (“I do not think we are in a position today to tell states that they should or should not ratify this convention. I was co-chairman of the indigenous peoples Working Group on the revision of ILO Convention 107 in Canada. We worked long and hard on the text of the revision; and I attended the ILO conference. I was personally insulted and demeaned by the process at the ILO conference … Nevertheless there are some good and important provisions in the revised convention that some indigenous peoples may find useful. Some of our brothers and sisters live in such terrible circumstances
3 Emergence of an African Indigenous Peoples’ movement

Maasai advocate, Moringe ole Parkipuny, was the first African indigenous advocate to speak in the UN Working Group. Addressing the sixth session, Parkipuny described the contemporary situation in Africa:

The environment for human rights in Africa is severely polluted by the ramifications of colonialism and neo-colonial social and economic relationships in which we are compelled to pursue our development and our sovereignty in a global system replete with injustices and exploitation.

For Parkipuny, African states were up against the wall, given the history and impacts of Western colonialism. However, there was a danger that the drive to reinforce national identities would have thrown wide open the door for prejudices against the fundamental rights and social values of those peoples with cultures that are distinctly different from those of the mainstream national population. Such prejudices have crystallized in many African countries into blatant cultural intolerance, domination and persistent violations of the fundamental rights of minorities.

Parkipuny went on to describe two main categories of vulnerable minority peoples who have been subjected to flagrant violations of community and individual rights:

These are hunter and gatherers, namely the Hadza, Dorobo and Sandawe together with many ethnic groups who are pastoralists. The Maasai of Kenya and Tanzania

---

127 Ibid.
128 Ibid.
129 Ibid.
are the largest and most widely known of the many pastoral peoples of East Africa. These minorities suffer from common problems which characterize the plight of Indigenous Peoples throughout the world. The most fundamental rights to maintain our specific cultural identity and the land that constitutes the foundation of our existence as a people are not respected by the state and fellow citizens who belong to the mainstream population. In our societies the land and natural resources are the means of livelihood, the media of cultural and spiritual integrity for the entire community as opposed to individual appropriation. The process of alienation of our land and its resources was launched by European colonial authorities at the beginning of this century and has been carried on, to date, after the attainment of national independence. Our cultures and way of life are viewed as outmoded, inimical to national pride and a hindrance to progress. What is more, access to education and other basic services are minimal relative to the mainstream of the population of the countries to which we are citizens in common with other people.

With the increased presence of Asian indigenous advocates in the Working Group from the late 1980s, increasing numbers of African indigenous advocates began to participate in the Working Group sessions. Moringe ole Parkipuny, as he notes in his statement, is the trailblazer for this new movement. What gave rise to the Africa indigenous movement? The African movement was preceded by mobilization of local minorities against alienation of lands for large-scale commercial farming, mining, game parks and wildlife reserves to attract tourists. They were facing similar pressures to those of Latin American, and Asian indigenous peoples. However, these factors do not explain why advocates like Parkipuny chose the indigenous category as opposed to the minority rights category. As was the case with the Asian indigenous movement, the participation of African indigenous advocates in the Working Group had been prompted by the anthropology-NGOs. IWGIA, in particular, played

---

a leading role in supporting local movements and assisting with the shaping of their claims.\textsuperscript{131} In fact, IWGIA was involved in bringing Parkipuny to the Working Group.\textsuperscript{132}

IWGIA commenced work on the African movement during the mid-1980s but accelerated its efforts from the early 1990s,\textsuperscript{133} organising the key international “Conference on Indigenous Peoples in Africa” in Copenhagen in 1993, which included representatives from select African groups.\textsuperscript{134} The object of the conference was to open debate on “whether we are justified in applying the concept of indigenous peoples in Africa.”\textsuperscript{135} Most of the papers in the published conference proceedings were directed at pastoralist and hunter-gatherer communities. The picture of indigenous peoples in the African context was quite clear. As was the case with Asia, indigenous peoples in Africa meant the “primitive” tribes categorized as such by colonizing powers and later the independent state. Examples include the Batwa or Twa of Central Africa (Rwanda, Burundi, and Democratic Republic of Congo) who are commonly known as “Pygmies.” The other category of pastoral tribes referred to by Parkipuny occupy Eastern and Southern Africa and include the Maasai of Tanzania and Kenya and the San of Botswana and South Africa. Parkipuny was seeking to show common cause with the international movement by employing the human rights model used by Asian indigenous advocates and their supporters. He was advancing this claim in the context of the Working Group, fully aware that this was the place to become “indigenous” in the international movement.

IWGIA set to work at sponsoring national, regional, and international workshops to

\textsuperscript{132} Dahl, \textit{supra} note 7 at 30.
\textsuperscript{133} See E Waehle “Africa and the concept of Indigenous Peoples” (Copenhagen: IWGIA Yearbook, 1990) at 144-148 (arguing for the applicability of the concept of indigenous peoples in Africa).
\textsuperscript{134} Dahl, \textit{supra} note 7.
\textsuperscript{135} \textit{Ibid.}
encourage awareness and discussion of the applicability of the concept of African indigenous people.\textsuperscript{136} It publicized the debates and initiatives in its annual Yearbook and quarterly periodical, Indigenous Affairs, and financed the participation of African indigenous activists in the annual meetings of the Working Group, the UN Permanent Forum on Indigenous Issues, and relevant U.N. World Summits.\textsuperscript{137} IWGIA assisted African indigenous advocates to attend the 1993 Vienna World Conference on Human Rights. It also funded the capacity-building, land rights, and human rights programs of some African indigenous organizations.\textsuperscript{138}

In the years following Parkipuny’s speech before the Working Group, African indigenous advocates assumed a visible presence in the Working Group sessions. When the UN Permanent Forum on Indigenous Issues was formed it recognized Africa as one of the seven regions within its mandate and there has always been a representative of African Indigenous Peoples on the Forum’s panel. The Expert Mechanism on the Rights of Indigenous peoples has a representative from Africa. James Anaya, in his capacity as UN Special Rapporteur on Indigenous Peoples visited and issued reports on indigenous peoples in Namibia,\textsuperscript{139} the Republic of the Congo,\textsuperscript{140} and Botswana.\textsuperscript{141} His predecessor, Rodolfo Stavenhagen undertook missions to Kenya,\textsuperscript{142} and South Africa.\textsuperscript{143}

\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid.
It was important to secure a foothold in international meetings, above all the Working Group, in order to gain recognition as indigenous peoples by international institutions. But, it was clear that very few African states participated in those meetings and a regional campaign was also needed. There were signs of strong resistance to the domestic application of indigenous peoples in Africa, just as there had been in Asia and for much the same reasons; concern about security, unity, exploitation of resources and foreign interference. African leaders particularly recall their self-description as “indigenous peoples” during their struggle for decolonization and independence against their European imperial rulers, which suggested these emergent groups might be candidates for self-rule. Thus, there were security concerns with the self-determination framework in the Declaration and the many groups claiming autonomy and independence in Africa. As African indigenous advocate Naomi Kipuri notes, “to many Africans, the common interpretation of the word indigenous is “home grown”, or “ours” and “not foreigners.” All people of Africa are therefore indigenous to Africa.

Nigeria, for example, had struggled for decades with the Ogoni indigenous movement as most of Nigeria’s oil is based in the Niger Delta, a region claimed by the Ogoni. Ogoni advocate Ken Serowiwa had raised the issue before several meetings of the Working Group. To demonstrate what was at stake and the measure of concern by some African states, in 1995 he was executed, with five other Ogoni, by the Nigerian military government on charges widely seen as politically motivated. This sparked international outrage and Nigeria’s suspension from the British Commonwealth. Additionally, there were also concerns about indigenous claims to land and resources. Botswana had felt the effect of an “indigenous-framed” claim to lands by local San communities when a domestic court decision ruled the San had aboriginal title to much of the Kalahari game reserve. The case had been supported by Survival International.

145 Another high profile case is the South African Constitutional Court’s decision, Alexkor Ltd v Richtersveld Community, [2003] 12 B Const LR 1301 (S Afr Const Ct).
At the regional level, from the late 1990s, IWGIA focused on the African Commission with the aim of establishing a Working Group within the commission on the indigenous peoples’ question. IWGIA’s logic was that: 146

if a major human rights body like the African Commission recognizes the existence of marginalized indigenous communities in Africa and initiates a dialogue with African member states on recognition and protection of the human rights of indigenous communities, this will potentially be a major step forward for the advancement of the human rights of Indigenous Peoples in Africa.

Subsequently, IWGIA began to lobby for the Commission to establish a Working Group. In 2001, the African Commission agreed to establish a group of experts—the “Working Group on the Rights of Indigenous People and Communities in Africa”—to debate the issue, present a report and make recommendations to the African Commission. 147 The Working Group included IWGIA as a member - the first occasion in which an NGO had been permitted to do so.

The report became a manifesto for the basis of the African movement. 148 The key issue addressed by the report was how to identify indigenous peoples in Africa and how to describe their particular human rights. To address the issue of definition, the Africa Commission Working Group’s report focused on basic human rights, particularly the right to culture. Indigenous peoples did not correlate to first peoples. 149

Indigenous Peoples’ has come to have connotations and meanings that are much wider than the question of “who came first”. It is today a … global movement

---

146 Dahl, supra note 7.
147 Dorothy L Hodgson, Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World (Bloomington, IN: Indiana University Press, 2011)(The whole process of the Working Group, its study, the report and the subsequent missions of the Commission and Working Group were all supported by IWGIA with financing from the Danish government. As noted by Hodgson, “without this Danish support, it is unlikely that the ACHPR process would have been so thorough and convincing” at 77).
149 Ibid at 87.
fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by the dominating mainstream … and whose very existence is under threat of extinction.

The focus instead should be on:  

… the more recent approaches focusing on self-identification as indigenous and distinctly from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective cultural and physical survival as peoples; on an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.

To address concerns about the connection between indigenous peoples, self-determination and decolonization, the report argued indigenous peoples were not seeking self-rule, but effective participation in governance and a say in relation to development on their lands. Land rights were key to indigenous peoples of Africa because of their close cultural affinity with ancestral lands and the need for land to sustain their communities.

Like the Asia movement, the emphasis on human rights and culture by the emerging African indigenous movement had the benefit of excluding from the new category of indigenous those groups in Africa seeking secession or strong forms of regional autonomy. The hunter-gatherer and pastoral peoples were not seeking independence – unlike the separatist movements in Rwanda, and the Democratic Republic of Congo. This separateness offered some means of addressing the security concerns of the African states. The emphasis on human rights and culture also allowed the African movement to show common cause with the movements in the North, particularly the emphasis on connection to land and cultural difference.

The report of the African Commission’s Working Group received criticism from several

150 Ibid at 92-93.
African states who saw the concept of indigenous as divisive and an imposition from the outside. One would have thought that the preparation of the Working Group’s report might have increased states’ sensitivity and acceptance of indigenous rights—as the UN Working Group had in relation to the drafting of the Declaration. However, there were major shortcomings with the African Commission’s Working Group. Specifically, the meetings lacked profile, were held for short periods (typically 2-days), often before the sessions of the African Commission, and were not attended by large numbers of state representatives. Compared with the drafting of the Declaration, states did not participate in the drafting of the African Commission’s report on Indigenous populations/communities. Nevertheless, the report had fulfilled an important function in setting out how indigenous peoples was to be understood in the African context, that is, as a category of people deemed “backward” and “primitive” by states and in need of protection of basic human rights and culture.

However, the full extent of African state opposition to the African movement, or at least their lack of appreciation of its potential implications for state security and ownership of natural resources, was not made apparent until the Declaration was sent to the UN General Assembly for endorsement. Opposition from African states to the application of the Declaration to the Africa continent came close to scuttling efforts to have it adopted by the UN General Assembly.

4 Northern indigenous advocates response to globalization of the movement

With the door now opened by the Asian and African indigenous peoples’ movements, other movements emerged in Russia as well as Eastern and Central Europe. As had been the case with the Asian and African movements, IWGIA and other anthropology NGOs supported

---

151 Bojosi, supra note 131 at 68 (noting ‘African governments have been generally dismissive of the report of the Working Groups of experts on Indigenous populations/communities, particularly with respect to the concept of Indigenous Peoples: Ethiopia has been more outright in its criticism, going as far as to question the establishment of the Working Group and the validity of its report. Sudan has cautioned against the bifurcation of populations into indigenous and non-indigenous, arguing that this was a recipe for conflict. Uganda emphasised that all Ugandans were indigenous to Uganda. Kenya preferred the term “minorities”, whilst Zimbabwe preferred the phrase “small Tribal Peoples”).

these movements participation in the Working Group and other international meetings. However, it was the establishment of the UN Permanent Forum on Indigenous Issues (Permanent Forum) in 2002 that would cement the notion of a global movement directed at human rights.

Asian, African and Russian Indigenous advocates – with strong support from IWGIA – lobbied hard for their regions to be included within the Permanent Forum’s mandate. Ultimately the Permanent Forum would be established with indigenous members from seven regions. These included: Africa; Asia; Central and South America and the Caribbean; North America; the Pacific; the Arctic; and Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia. The Permanent Forum’s mandate not only anticipated a global movement but also endorsed a human rights model. Its mandate is to “discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.” Philippina indigenous advocate Vicky Tauli-Corpuz was Chair of the Permanent Forum for two successive terms.

This gave the Northern indigenous advocates good reason to think about the implications of extending the international movement to the South. The concept of indigenous peoples presented by advocates of the Treaty Council and other Northern indigenous organizations during the early Working Group sessions, did not contemplate indigenous peoples in Asia or Africa. The Declaration of Defense issued at the Geneva NGO Conference referred to the “Redman” of the “Western Hemisphere.” If anything, it became clear to the Treaty Council and others that more effort was needed to secure greater participation of the indigenous advocates of Latin America. And as the negotiations progressed increasing numbers of

153 Dahl, supra note 7 (From the early-1990s IWGIA and others focused on tribal peoples of Russia and helped to establish RAIPOP. This was facilitated by the fall of the Soviet Union and resulting increased capacity of local movements to mobilize. IWGIA met with activists in Russia and invited them to attend the Working Group meetings. The 1990 meeting of the Working Group on Indigenous Populations marked the entrance of Russian Indigenous Peoples onto the international human rights scene. Since then, IWGIA has invited (usually through the Human Rights Fund for Indigenous Peoples) representatives of the Russian Indigenous Peoples to participate in all UN human rights meetings dealing with indigenous issues. The concept of Indigenous Peoples established by Asia and Africa provided them with the template for making these claims).
154 The Permanent Forum provides advice on these issues to the UN Human Rights Council, as well as to programs, funds and agencies of the United Nations.
indigenous advocates from Latin America participated in the Working Group. But like the movements of Asia and Africa their aims diverged from those of indigenous advocates of the North. Human rights and culture were more important than strong forms of self-determination and decolonization type claims were impracticable given the presence of many repressive regimes in Latin America.

There were advantages to globalization of the movement. The movement gained a greater profile and patronage as well as achieving financial support from international institutions and civil society, largely due to the perception of indigenous peoples as a global issue. However, there was no doubting the problems this might cause. First, globalization would result in Southern states resisting the self-determination framework in the Declaration. There were real security concerns about minorities in Asian and African states—more so than any other security concerns relating to Northern indigenous peoples. This resistance could potentially lead to indigenous rights in the Declaration being significantly diluted. Secondly, there would likely be a shift in focus from the decolonization model towards the human rights model. Asian and African indigenous advocates especially placed marked emphasis on the human right to culture—more so than Latin American indigenous advocates, who could at least appeal to the decolonization model, and who were accepted as indigenous peoples by Latin American states.

It was possible for indigenous advocates of the North to shift from the position of no definition in the Declaration—apart from self-identification—or accept, or offer, a definition that excluded indigenous peoples of Asia. But a fundamental problem with this approach was that any definition would undermine the core project of self-determination. The right of peoples to self-determination implied indigenous peoples themselves would determine their identities. Acceptance of a definition would indicate that the indigenous peoples’ right to

---

156 Dahl, supra note 7 (“In a global perspective however the Indigenous Peoples from Latin America, Asia, Africa and Russia made the indigenous issue a global issue and alliances were created with governments who otherwise never have cared”).
157 Pitty & Smith, supra note 38.
158 The early statements in the Working Group by El Salvador, for example, that it had no Indigenous Peoples were quickly abandoned in the face of the rise of Indigenous social movements across Latin America.
159 See, Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, On the concept of Indigenous People,
self-determination was somehow of a lesser quality than that enjoyed by other peoples. The governing principle had to be self-identification.

There was particular objection to the notion asserted by Asian states that it was up to states to determine ultimately who would be indigenous. The issue was especially sensitive in the US and Canada given the federal government had clear policies on who would receive recognition. Calls by Asian states to insert a definition in the Declaration, therefore, drew objectionable associations with these state-imposed policies, and the possibility of the exclusion of indigenous peoples. And any definition suggested that the decision ultimately would be made by states who, as history had shown, would likely read it in a narrow manner to limit the scope of their obligations.

As we will see in Chapter 3, the Declaration would not advance to the UN Commission on Human Rights for approval as expected but instead would be directed to a second Working Group where Asian and African indigenous advocates participation would continue to grow. Subsequently, there was substantial risk that the self-determination framework in the Declaration might be diluted. Faced with this risk, the strategy for Northern indigenous advocates was to oppose any changes to the Sub-Commission text.

UN Commission on Human Rights, 14th Sess, Supp No 2, UN Doc E/CN.4/Sub.2/AC.4/1996/2 (“Indigenous Peoples themselves have stated on numerous occasions that they are the rightful authority to define and determine whether they are indigenous and how membership is attributed. Arts 8, 9 and 32 of the draft declaration go some way to reflect that concern. The Declaration produced by the Working Group guaranteed the right of Indigenous Peoples to define themselves” at para 28).
CHAPTER 3

THE WORKING GROUP ON THE DRAFT DECLARATION: THE NO-CHANGE STRATEGY

1 Introduction

The Declaration drafted by the Working Group on Indigenous Populations represented a significant breakthrough for indigenous peoples. They had achieved their aim of including the self-determination framework in the Declaration. In particular, the Declaration contained an unqualified right to self-determination. There was no reference to territorial integrity. The Working Group’s parent body, the Sub-Commission on the Prevention of Discrimination (Sub-Commission), approved the Declaration which came to be known as the “Sub-Commission text.” However, the UN Commission on Human Rights, a body composed of member States expressed concerns with the Declaration. Asian states on the Commission noted the lack of a definition of indigenous peoples in the Declaration. Bangladesh and India were particularly critical of the UN Centre of Human Rights and its promotion of indigenous peoples in Asia. Nicaragua noted that “care should be taken to ensure that the final version was acceptable to the international community, and that its provisions did not undermine the sovereignty and territorial integrity of States.” As the Brazilian representative noted, while “most of the views expressed by indigenous observers had been reflected in the draft” it was now time “to engage in an effective negotiating effort to strike a balance between what was expected by some and what was acceptable to the international community.”

---

3 Ibid, at 10 and 12.
5 Ibid, at 11.
Instead of referring the Declaration to its parent body, the Economic and Social Council (ECOSOC), the Commission on Human Rights decided to establish a second, open-ended inter-sessional Working Group to “elaborate the Declaration.” This Working Group would be known as the Working Group of the Draft Declaration (WGDD). Disagreement regarding the use of “indigenous peoples” or “indigenous populations” in the title was avoided by not making any reference at all to the rights-holders. The vagueness of “elaborate” was intentional. States knew that indigenous advocates would not want any changes, yet it was clear some would be required if the Declaration was to be acceptable to a prominent number of States. The understanding was that once this process was complete, the Commission on Human Rights would be in a position to approve the Declaration, followed by approval from the ECOSOC (the Commission’s then parent body); and finally, the UN General Assembly.

The CANZUS states assumed the new process would be led by states. An internal brief to the incoming government of New Zealand in 1996 explains the general view held by CANZUS states:

The draft Declaration has now entered the inter-governmental negotiating stage in the United Nations system and a new inter-governmental working group has been established for this purpose. Indigenous representatives can apply to the ECOSOC for accreditation to attend these meetings, although they do not have voting rights. This reflects the fact that ultimately it will be governments which ratify the Declaration. The inter-governmental negotiating stage is likely to take several years and the text will undergo further changes as governments

---


7 See Te Puni Kokiri, “Brief to Incoming Government 1996” (Wellington, 1996) at 136; See also, Douglas Graham, “The New Government’s Policy” in Alison Quentin-Baxter, ed, Recognising the Rights of Indigenous Peoples - Ministry of Social Development (Wellington, New Zealand: Institute of Policy Studies, Victoria University of Wellington, 1999)(Douglas Graham, then Minister of Justice, assumes changes to the Declaration are inevitable: “It is likely to take a number of years before this inter-governmental stage is completed. No doubt there will be many suggestions that the text of the Draft should be amended. As a result, the outcome, as with all UN negotiations will clearly be a compromise” at 4).
discuss it. The Declaration that is finally agreed will be the outcome of negotiation among governments with many different viewpoints.

The statement assumes that the Working Group was always the next inevitable step in the process of negotiating the Declaration and that states would negotiate and make changes to the text (indigenous peoples having made their contribution in the UN Working Group on Indigenous Populations). The statement also assumed indigenous peoples could attend but would have no voice in the Working Group.

Northern indigenous advocates were strongly opposed to the establishment of the second Working Group. It was clearly an opportunity for states to weaken the self-determination framework and especially qualify the right to self-determination by reference to territorial integrity. Also, this Working Group would be directly responsible to the Commission on Human Rights and comprised of government delegates (an ‘intergovernmental body’), not comprised of independent expert members of the Sub-Commission, as had been the case with the first Working Group.

A further concern of Northern indigenous advocates was the presence of indigenous peoples of Asia and then Africa. In this Working Group, indigenous peoples of the South were even more prominent than in the Working Group on Indigenous Populations. Not only did this mean Northern indigenous advocates had to contend with opposition to the self-determination framework by Southern states, but also from the Asian and African indigenous advocates who were advancing the alternative human rights model. Whether the right to self-determination was limited was not of great import to Asian and African indigenous advocates, however access to basic human rights was. There was little Northern indigenous advocates could do to stop the Declaration advancing to another Working Group, so their task was to ensure that the integrity of the self-determination framework was maintained.

---

The Working Group on the Draft Declaration held its first session in November 1995. The goal was to finish this work within the next Decade. That same year, the UN General Assembly proclaimed 1996-2005 the International Decade of the World’s Indigenous People with adoption of the Declaration by the General Assembly being a major goal of the Decade.\(^{10}\)

2 **No change position of the Northern indigenous advocates**

Indigenous advocates of the North remained prominent in the second Working Group. At the second Working Group session in 1996 when it became clear that the Working Group planned to embark on a review of each article of the Declaration, a joint Global Indigenous Caucus statement called for the Working Group to “immediately adopt the [Sub-Commission text] … without change, amendment or deletion.”\(^{11}\) Rather than pick apart each article, the Indigenous Caucus requested “all participants to engage in a general debate on the fundamental issues and concepts of the draft Declaration.”\(^{12}\) Indigenous peoples would not engage in any “dilution” of the Declaration, which “represented minimum international standards on Indigenous Peoples’ rights.”\(^{13}\) Indigenous advocates of the North led this “no change” position, particularly the Treaty Council and others who were strong supporters of the decolonization model. The Treaty Council would be consistent in its opposition to any change to the Declaration right up to the moment of its adoption in 2007 by the UN General Assembly.

An important means of maintaining this line in the face of increasingly diverse indigenous participation in the Working Group was the Global Indigenous Caucus. The Caucus was comprised of only indigenous advocates, gathering before each Working Group meeting and in the evenings during the Working Group sessions to discuss

\(^{10}\) *Programme of activities of the International Decade of the World’s Indigenous People*, UNGAOR, 57th Sess, UN Doc A/58/505 (2003).


\(^{13}\) *Ibid* at 160_a02.
strategy and indigenous positions. This had been critical in the Working Group on Indigenous Populations in order to hammer out strategy and language for the Declaration. But in the Working Group on the Draft Declaration, it was an important means of ensuring all indigenous advocates, including those of the South, adhered to the no-change position.

The no-change position had the effect in the Declaration negotiations of minimizing changes, as all proposed revisions had to be considered in light of the Sub-Commission text. As noted by Andrea Carmen of the Treaty Council:

This prevented certain States, and groups of States, from promoting their new and often seriously flawed drafts on an equal footing with the [Sub-Commission text]. This also ensured that the [Sub-Commission text] remained the official Text that was presented, referenced, quoted, used and applied in many situations and contexts, including in UN bodies and expert seminars over the years of the negotiations.

Indigenous advocates’ effective participation in the new Working Group was essential towards upholding the no-change position. However, at this higher-level Working Group, only properly accredited NGOs were ordinarily permitted to attend the meetings. At the first meeting there were only twelve indigenous organizations with ECOSOC accredited status – most from the North. And states were sensitive to the need to ensure indigenous peoples were present in the negotiations.

With pressure from indigenous advocates, and the support of states, the Commission on Human Rights eventually permitted indigenous peoples to submit special applications to attend the Working Group; the applications being subjected to screening by the

---

15 See Information received from Governments: United States, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2/Add.1 (The United States for example noted in the Working Group that it “fought hard to ensure that indigenous organisations not in consultative status with the ECOSOC, including tribal governments would also have an opportunity to contribute to the negotiation” at 7).
committee responsible for reviewing applications for consultative status with ECOSOC. But this decision was adopted late in 1995 and not all applicants were approved in time to attend the first meeting. In particular, Asian indigenous advocates struggled to gain entry to the Working Group, as very few of them had consultative status and many struggled with the bureaucratic accreditation process.

The next procedural issue concerned the role of indigenous peoples in making submissions to the Working Group. Ordinarily not even formally accredited NGOs could make proposals relating to the text of human rights instruments. However, the Working Group on Indigenous Populations had allowed statements to be made including suggestions regarding agenda items. It was unclear whether the new Working Group would allow this, however indigenous advocates led by advocates of the North insisted that the process be the same as the Working Group on Indigenous Populations. This was to be a dialogue between equals and not a one-sided affair led by state delegates – even though this was a higher tier, inter-governmental body. When the Chair of the Working Group consistently failed to recognize indigenous advocates when they put up their hand to speak, indigenous advocates walked out in protest. A Global Caucus statement stressed the need for indigenous peoples’ effective participation:

First, it must be explicitly recognized that Indigenous Nations and Peoples are equal participants in this Working Group and not “observers”. We should have full input on the drafting of the [Working Group] report of this and all future sessions. Why else would Indigenous delegations take the time and expense to travel all this way? Merely to observe, while States discuss the international recognition of our rights? No, common sense should tell you we must be fully involved. There should be no decisions or recommendations

---

18 “Cordillera Peoples Alliance” (1997) doCip Doc. 048_a01 (on file with author).
here which do not have our full and informed consent. Second, in future, Indigenous Peoples must have an equal ability to recommend how the work of this Working Group is to proceed and play a direct role in the development of the agenda and all other decision making processes of this body. Indigenous participants must have equitable input on organizing the work and other procedures.

Indigenous advocates were persuaded to return only after they had received assurances about effective participation. Some advocates – including Maori advocates of New Zealand – never returned, convinced that states were committed to adulterating the Declaration.\(^20\)

However, from this point on, the Working Group mode of operation shifted so that it effectively operated along the same lines as the Working Group on Indigenous Populations.\(^21\) Indigenous advocates operating through the Global Indigenous Caucus would forward requests to the Chair in relation to agenda items at the Working Group and these were often accepted. This was a major achievement – it sent a clear message to states that the process was not state-directed. It also helped to maintain the no-change stance of the North. However, when indigenous advocates sought to have an indigenous

\(^20\) See, Jackson, *supra* note 8 (“The specific catalyst was a rejection by states of an earlier joint resolution tabled before the Working Group that the text was a minimum set of standards which should not be amended. The resolution included article three, and the continued attempts by States to seek substantive amendment or rejection was seen as yet another attempt by them to consign us to a subordinate status” at 28).

\(^21\) Kenneth Deer, “Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples” in Paul Joffe, Jackie Hartley & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon, Canada: Purich Publishing, 2010) (“As a result of the walk-out, for which we received considerable international and UN attention, we achieved a ground-breaking and confidence-building victory, ensuring that Indigenous Peoples would be equal participants in reaching consensus on the Text. It also made it clear that the negotiation process would not garner any legitimacy without the participation of Indigenous Peoples” at 11); See also, Mattias Ahrén, “The UN Declaration on the Rights of Indigenous peoples – How was it Adopted and Why is it Significant?” in Henry Minde, Asbjørn Eide & Mattias Ahrén, eds, *The UN Declaration on the Rights of Indigenous Peoples* (Guovdageaidnu/Kautokeino, Norway: Galdu Resource Centre for the Rights of Indigenous peoples, 2007) (“… throughout the Declaration process state and indigenous peoples representatives would informally participate on an equal footing in the Working Group on the Draft Declaration. They would be given the floor in turn, and the position of the state and indigenous representatives would carry equal weight” at 86).
chair of the new Working Group appointed, their request was rejected. Later, the Indigenous Caucus proposed the nomination of Mr. Wilton Littlechild, an indigenous advocate of Canada, as an indigenous co-chair. This was also rejected, on the grounds that UN rules of procedure do not permit the appointment of a co-chair.

The common request by indigenous advocates was the inclusion of an agenda item entitled “general debate” focusing on self-determination, land rights and natural resources. This had the effect of steering the debate away from negotiations about changes to the language in the Sub-Commission text. Although states would seek discussion on various articles clustered by theme, with the result that both general debate and clusters of articles ordinarily became the core agenda items.

At the 1997 Working Group session, at the request of indigenous peoples, the principle of self-determination was placed on the agenda. Forty-three representatives of indigenous advocates, predominantly from the North, called for an unqualified right to self-determination. This did not necessarily mean secession but equality demanded that indigenous peoples be accorded the right as “peoples”. As Mick Dodson on behalf of Aboriginal and Torres Strait Islander Commission noted:

Whilst unqualified recognition of our right to self-determination is fundamental to the integrity of the Declaration, it is important to note that

---

22 Barsh, supra note 17 (Barsh notes that he sought to make a proposal that Quebec Cree Ambassador Ted Moses be nominated as the chair).
24 See, for example, “Resolution of the Indigenous Nations and Peoples Delegates” (1996) doCip Doc.159_a01 (Noting indigenous peoples “deep concerns with the proposed agenda” which “assumes amendments to specific articles” and calling for “a more appropriate agenda that will address the following matters: (i) opening comments; (ii) general discussion on the document in its totality; (iii) recommendations for its immediate adoption in present form.”); See also, “Joint Statement of the Indigenous peoples Caucus” (1996) doCip Doc. 160_a02 (on file with author) (calling for “a general debate on the fundamental issues and concepts reflected in the Draft Declaration and requesting “recognition that the final report of this Working Group must be produced with the full involvement and consent of indigenous peoples”).
25 See, “Statement delivered by Mick Dodson on behalf of Aboriginal and Torres Strait Islander Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, National Aboriginal and Islander Legal Services Secretariat” (1996) doCip Doc. 212_as02 and 212_as03 (on file with author); See also, “Statement of Assembly of First Nations ‘Self-determination (Article 3) and Definition’” (1998) doCip Doc. 067_as01 (on file with author).
in the exercise of self-determination, few indigenous peoples actually seek independence from existing states … If structures emerge which ensure full recognition of our rights as indigenous peoples – to our institutions of self-government, to control our territories and resources, to organize our societies and to maintain our cultures and ways of life – few indigenous nations and peoples are likely to have any reason to desire independence from existing States. It would be discriminatory, however, to foreclose, a priori, the option of independent Statehood as the ultimate expression of indigenous self-determination.

3 The positions of States in the Working Group on the Draft Declaration

Few states could accept the Sub-Commission text without change and the core concern, as always, was the right of indigenous peoples to self-determination and the absence of a reference to state territorial integrity. During the first two sessions of the Working Group, Australia as it had done so in the 1991 and 1992 sessions of the Working Group on Indigenous Populations, gave self-determination in the Declaration a human rights reading. According to Australia, self-determination was not “a static concept” but rather:

an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic free and fair elections), and the right of distinct peoples within a state to make decisions on and administer their own affairs.

---

27 See, Information received from Governments: Australia, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2/Add.2.
28 Ibid at 4.
Australia could accept a reference to self-determination on these terms without a reference to territorial integrity, although it sought a reference to the 1970 Declaration on Friendly Relations (which included a reference to territorial integrity but also indicated a right to secession due to abuse of fundamental human rights). However, with the election of the Howard Liberal government in 1996, Australia’s position on the right to self-determination changed dramatically. At the 1998 Working Group session, Australia proposed that self-determination be replaced with “self-management” or “self-empowerment.”

New Zealand, Canada and the United States were not opposed “in principle” to self-determination in the Declaration, provided it was clear that self-determination was to only operate within States and that it would be exercised in a manner that was broadly consistent with current law and policy. The United States drew a distinction between “human rights” and “aspirations” in the Declaration – the latter appeared to be directed at the self-determination framework. And the United States argued that such aspirations ought not to be caste as human rights. “Rather the term “rights” should be reserved for those duties that governments owe their people, the breach of which generally gives rise to a legally enforceable remedy.” The United States sought to merge Articles 3 (self-determination) and 31 (self-government) in order to clarify that

---

29 Ibid at 5.
30 See, “Australia” (1998) Docip Doc. 131_as01 (on file with author) (“Self-determination has no settled meaning, and for many, it implies the establishment of separate nations or separate laws. Australia considers this interpretation inappropriate to its situation and is thus unable to accept inclusion of the term. Our view is that it would be more productive for the Working Group to look at the use of alternative language in the Declaration which would more accurately express the principle of indigenous peoples having greater opportunities to exercise meaningful control over their affairs” at 131_as12).
31 See “New Zealand” (1998) Docip Doc. 030_as01 (on file with author) (Amongst the CANZUS states, New Zealand was most explicit about this point: “Subject to any draft Declaration being consistent with domestic understanding of the relationship between Maori and the Crown … and respecting the territorial integrity of democratic states and their constitutional frameworks where these meet current international human rights standards, New Zealand could accept the inclusion in the Declaration of a right to self-determination for indigenous peoples” at 030_as02).
32 See, Information received from Governments: United States, supra note 15 (noting a distinction between “rights” in the Declaration and references to “rights” which do not currently exist under international law. “It should not be necessary to convert aspirations or objectives into “rights” in order to call attention to them” at 7).
33 Ibid.
indigenous peoples have the right of “internal self-determination.” By virtue of that right, they may negotiate their political status within the framework of the nation state …”. This was consistent with the United States long-standing federal policy of recognition of aboriginal self-government. New Zealand adopted the stance that self-determination “must be elaborated clearly in a way which, as a minimum, preserves and recognizes the territorial integrity of States and their constitutional frameworks.” As the New Zealand Minister of Justice in 1999 explained:

… the terms ‘autonomy’ and ‘self-government’ as used in the draft Declaration seem to suggest forms of responsibility which go beyond what the New Zealand government has indicated it is willing to consider. These terms are normally associated with indigenous people living on reservations and not integrated into the wider community.

Maori were said to be “fully-integrated.” And New Zealand would only commit to exploring ways in which Maori can exercise greater control over their own affairs within the national legal and constitutional system.

Canada could accept a reference to self-determination, provided it was clear that this related to arrangements for self-government to be implemented flexibly through negotiations between governments and indigenous peoples. Canada had in 1995

34 See “United States” (2004) doCip Doc. 194_as01 (on file with author) (Proposing a merger of Article 3 and Article 4: “indigenous peoples have the right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the nation-state and are free to pursue their economic, social and cultural development. Indigenous peoples in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs …” at 194_as01).
35 Ibid.
36 “New Zealand” (1997) doCip Doc. 11_as02 (on file with author). See also New Zealand (1998) doCip Doc. 030_as02 (on file with author).
37 Graham, supra note 7.
38 Ibid at 10.
39 Ibid.
40 “Canada” (1996) doCip Doc. 228_as01 (on file with author) (“Canada accepts a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various indigenous peoples within those states to determine the political status of the indigenous peoples involved … the right of self-determination is intended to promote harmonious
released its policy on recognition of aboriginal peoples’ inherent self-government through negotiations with the state.\(^{41}\) If there was a right to external self-determination, for Canada, Australia and New Zealand this seemed to be premised on the gross and sustained violation of the human rights of indigenous peoples.\(^{42}\)

The CANZUS States position on land and resources, treaties and informed consent continued to reflect positions made in the Working Group on Indigenous Populations. On land and resources, CANZUS states again expressed concern regarding the right of indigenous peoples to own land “traditionally occupied” with states calling for the right to relate to land they occupy in the present tense. Rectification for loss of lands was acceptable, though most opposed the use of the word “restitution” and called for measures of “redress.”\(^{43}\) The right to enforce treaties was acceptable to many, however, CANZUS states called for the issues of redress and implementation to be addressed within domestic states.\(^{44}\) Regarding consultation with indigenous peoples, CANZUS continued to oppose the right of indigenous peoples to give their free, prior and informed consent to any legislative or administrative measures which may affect them. Instead, they preferred an emphasis on consultation.

The CANZUS states adopted a fairly consistent common position on collective indigenous rights. They were not opposed “in principle” to collective rights but rather


\(^{42}\) See “Canada” (1996), doCip Doc. 228_as21 (on file with author); see also, Information received from Governments: Australia, supra note 27; “New Zealand” (1998) doCip Doc. 030_as01 (on file with author)(“New Zealand considers that, consistent with an emerging usage at international law, any right to self-determination included in the Declaration shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states, possessed of a government representative to the whole people belonging to the territory, without distinction as to race, creed, or colour” at 030_as02).

\(^{43}\) “United States” (1996) doCip Doc. 231_as01 (on file with author) (commenting on Article 27, relating to historical rectification for land loss, the United States doubts: “whether restitution is a viable means for resolving such issues in most states. For this reason, we believe that the Declaration should call on states to consider the possibility of negotiated settlements, including restitution, as appropriate” at 231_as08).

\(^{44}\) See, for example, “General Statement by Leslie A Gerson, Deputy Assistant Secretary of State, United States Department of State” (1998) doCip Doc. 021_as04 (on file with author).
sought to make amendments to clarify that these collective rights could not trump individual human rights; or that collective rights should be interpreted consistently with other human rights instruments; or to designate certain group rights as special measures designed to address indigenous disadvantage.\(^{45}\) CANZUS states also suggested that certain indigenous rights to land and self-governance should accommodate third party interests. This can be contrasted with other states that expressly opposed collective human rights. Japan argued collective rights were fundamentally inconsistent with human rights, preferring a basic human rights or minority rights model.\(^{46}\) In this respect, Japan was joined by France,\(^{47}\) Argentina\(^{48}\) and towards the end of the Declaration negotiations, the United Kingdom.\(^{49}\) The United States also consistently opposed the notion of collective human rights\(^{50}\) and would eventually support the United Kingdom’s view that all collective rights in the Declaration were *sui generis* rights, not human rights.

State positions in Latin America varied throughout the negotiations but broadly there was support for an approach akin to the human rights model in the ILO Convention 169. As Chile noted:\(^{51}\)

\(^{45}\) *Ibid.*

\(^{46}\) See, *Information received from Governments: Japan*, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2/Add.1 (“Collective rights” stipulated in this declaration … cannot be found in international instruments drafted and adopted by the UN in the past … Introducing a new category of rights would be overstepping the mandates of the Commission of Human Rights by broadening the scope of the rights claimed” at 2).


\(^{48}\) *Information Received from Governments: Argentina*, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2 at 3 (Argentina opposed collective rights as detrimental to the enjoyment of individual rights, but nevertheless recognized the collective holding of land rights).

\(^{49}\) “United Kingdom” (2004) doCip Doc. 197_as01 (on file with author) (“The United Kingdom recognizes that the governments of many states with indigenous populations have granted them various collective rights at the national level in their constitutions, national laws and agreements. The United Kingdom has no objection to this welcome fact being reflected in the Declaration. But it is important that these rights bestowed nationally remain distinct from individual human rights, enjoyed by indigenous people and all others, which are founded in international law and which provide protection to the individual” at 197_as02)

\(^{50}\) See *Information received from Governments: United States*, supra note 15 (“[i]nternational law, with few exceptions, protects and promotes the rights of individuals, as opposed to groups” at 7); See also, “General Statement by Leslie A Gerson, Deputy Assistant Secretary of State, United States Department of State”, *supra* note 44 (Suggesting the Working Group “follow the approach taken by the Declaration on the rights of persons belonging to National or Ethnic Religious and Linguistic Minorities, which refers throughout to “persons belonging to minorities …” at 021_as04 and doCip Doc. 021_as05).

\(^{51}\) *Information received from Governments: Chile*, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2 at 6.
the work of putting the final touches to the text proposed by the Sub-
Commission should be guided by the objective of making it as compatible
as possible with International Labour Organization Convention No. 169
concerning Indigenous and Tribal Peoples in independent countries,

Although some Latin America states, in the early years of the Working Group, were
highly critical of the Declaration, albeit without much specification, Colombia, Bolivia, Guatemala, Mexico, and Ecuador remained highly supportive of the
Declaration. Although they all insisted self-determination was to be exercised within the
state. Mexico sought express language that would clarify the scope of self-
determination. Later Mexico, Peru and Guatemala would support the call for no-change
to the Sub-Commission text at least until some change seemed inevitable. However,
Argentina opposed any reference to the “right of self-determination” or the term

52 Colombia supported self-determination viewing it as recognition of a right to political autonomy, see, “Colombia” (1997) doCip Doc. 005_es01 (on file with author) (“El gobierno de Colombia considera que en la libre determinación de los pueblos indígenas, entendida como esta autonomía interna, se encierra el pleno ejercicio de sus derechos colectivos fundamentales, y la base de su supervivencia étnica” at 005_es01).
53 According to Bolivia self-determination in the Declaration did not allow for secession but rather recognized indigenous peoples right to practice their traditions, culture, languages, religion, education and self-government, see, “Bolivia” (1997) doCip Doc. 004_es01 (on file with author) (“Mi delegación considera que la libre-determinación de los pueblos indígenas no constituye una secesión, sino el reconocimiento a los pueblos indígenas a practicar libremente sus tradiciones milenarias, se cultura, sus lenguas, su religión, la educación, a practicar libremente el autogobierno como lo practicaron desde siglos” at 004_es01).
54 According to Guatemala self-determination had to be exercised within the borders of the united and indivisible state, see, “Guatemala” (1997) doCip Doc. 006_es01 (on file with author) (“[M]i delegación es la opinión que el artículo 3 de este Proyecto de Declaración debería considerar la libre determinación de los pueblos indígenas dentro del marco de la unidad de la nación y de la indivisibilidad del Estado” at 004_es01).
56 See Information received from Governments: Mexico, UNESCO, 1995, UN Doc E/CN.4/WG.15/2/Add.1 (Mexico expressed concerns about self-determination noting “it might be understood, for the purposes of international law, in the same way as in the first Articles of the [International Covenants]. Mexico therefore sought further wording to “clarify the scope of [Article 3]” or language that confined Article 3 to a right to “pursue their development” at 3).
57 Information received from Governments: Argentina, UNESCO, 1995, UN Doc E/CN.4/WG.15/2 (“The Argentine Government does not consider the wording of [Article 3] acceptable, nor does it consider acceptable the other implicit references to the “right to self-determination” elsewhere in the draft” at 3).
“territories”\(^{58}\) while Brazil argued that many of provisions of the Declaration needed “extensive redrafting” and self-determination was unacceptable.\(^{59}\) Chile opposed any reference to the unqualified use of ‘indigenous peoples’ and supported the right to “special political representation” but not the right of self-determination or autonomy.\(^{60}\) Further, while Venezuela supported the “thrust and intent” of Articles 3 (self-determination) and 31 (self-government), it noted that they overlapped and suggested they be merged into one article, to make clear that indigenous peoples have a right to internal self-determination (similar to the United States).\(^{61}\) Later these states would soften their critique but express a preference for the human rights model in the ILO Convention 169.

The Nordic States were supportive of most elements of the Sub-Commission text. Denmark accepted Article 3’s wording in the Sub-Commission text,\(^{62}\) although Norway\(^{63}\) and Sweden\(^{64}\) sought further clarification – with Sweden at one point suggesting that the right to self-determination be clearly defined within the Declaration itself – Finland preferred an express reference to either internal self-determination or to territorial integrity.\(^{65}\)

Asian States continued to seek a definition of indigenous peoples in order to clarify that the Declaration did not apply to Asia. In the Working Group they were joined by

---

Argentine thus sought a reference to territorial integrity in the Declaration’s preamble and in the text of the Declaration itself. ( ibid).

58 “Argentina” (1995) doCip Doc. 008_A01 (on file with author) (“… use of the term “territories” in several passages of the draft … is not considered acceptable, as it is applicable exclusively to States …” at 008_A03).
59 “Brazil” (1996), doCip Doc. 27 (on file with author).
60 Information Received from Governments: Chile, supra note 51 at 7.
61 Information Received from Governments: Venezuela, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2.
62 “Denmark” (1997), doCip Doc. 012_as01 (on file with author) (Although Denmark noted that the right to self-determination was to be “exercised ‘within’ the framework of the States in which they live” at 012_as01).
63 “Norway” (1998), doCip Doc. 138_as02 (on file with author) (Questioning “whether it might clarify the issue [of self-determination] to group Article 3 together with related Articles like Articles 31, 19, 20 and 21 and 30 which elaborate on how self-determination can be exercised in different forms” and noting “We do … support the principle that indigenous peoples have the right to self-determination in accordance with the principles of international law” at 138_as02).
64 “Sweden” (1998), doCip Doc. 037_as01 (on file with author) (“[Sweden] would like to see the right to self-determination clearly defined within the Declaration itself” at 037_as01).
65 “Finland” (1997), doCip Doc. 014_as02 (on file with author).
Ukraine, given the participation of Tartar advocates in the Working Group sessions in increasing numbers. China, India and Bangladesh were most persistent. However, from 1998, Asian states would cease their call for a definition of indigenous peoples, given that it seemed increasingly unlikely due to the strong opposition from both Southern and Northern indigenous peoples. Furthermore, the United States criticized Asian states for attempting to avoid obligations to protect indigenous peoples in their states. Asian states’ strategy instead was – as Northern indigenous advocates had feared – to call for qualification of the right to self-determination. Later, once the Declaration was adopted by the UN General Assembly, almost all Asian states would simply deny indigenous peoples existed in their states.

4 The split between no-change and change advocates

Five years into negotiations indigenous peoples and states were deadlocked. States sought changes and the no-change camp held firm to their position. However, some indigenous advocates recognized the need for compromise if the Declaration was to have any chance of reaching the UN General Assembly.

The first indication that there might be a split within the indigenous caucus on the no-change position was in the year 2000, at the sixth Working Group session. At that point, the Working Group had adopted only two articles, Articles 5 and 43. These articles were

66 Information Received from Governments: Ukraine, UNESCOR, 1995, UN Doc E/CN.4/WG.15/2 (on file with author) (“First and foremost, the meaning of indigenous peoples and indigenous community or nation … is open to question. As no definition of such concepts is to be found in Ukrainian law, a section providing an interpretation of these terms should be included in the draft Declaration” at 11).
67 See, “Statement by the Chinese Delegation” (1995), doCip Doc. 032_AS01 (on file with author); see, “Statement by the Indian Delegation” (1995), doCip Doc. 035_AS01 (on file with author) (“My delegation would like to suggest that we should first of all work on the definition [of indigenous peoples]” at 035_AS02); see, “Statement by the Bangladesh Delegation” (1995), doCip Doc. 036_AS01 (on file with author)(“As it stands, the draft does not sufficiently respond to the question of whether a given group is indigenous peoples or not …” at 036_AS01).
68 Compare “General Statement by Leslie A Gerson, Deputy Assistant Secretary of State, United States Department of State”, supra note 44 (expressing concern “by statements from regional groups that have suggested the need for a definition of the indigenous groups which would exclude their own groups of indigenous people. Such insistence on a narrow definition would in our view de-rail the process altogether. In this regard we do not believe that the focus of the Declaration should be the privileging of historically prior inhabitants”).

125
not considered controversial as they related to the rights of indigenous individuals. The proposal to consider changes came from outside of the North.\textsuperscript{69} The leaders were the Sami Council and Inuit Circumpolar Conference, although they were later joined, and actively supported by, Asian indigenous organizations – especially Tebtebba – and IWGIA. The Inuit Circumpolar Conference represented Inuit communities of Alaska, Canada, Greenland and Russia and had long-standing ties with the Saami Council.\textsuperscript{70} The Saami Council had always adopted a more pragmatic human rights approach towards indigenous rights. Recall that when ILO Convention 169 was drafted, while many Northern indigenous advocates opposed it because it failed to adopt the self-determination framework, the Saami Council supported it and requested that the Nordic states ratify it.\textsuperscript{71}

The North-South divide quickly became a contest between the no-change advocates led by the Treaty Council – and change advocates led by the Sami Council and Asian indigenous advocates and IWGIA. The Inuit Circumpolar Conference and the Nordic Saami Council delivered a joint statement in the Working Group’s sixth session, indicating a willingness to consider changes to the Declaration:\textsuperscript{72}

if such amendments strengthened and/or clarified the text, respected principles of equality and non-discrimination and were in conformity with international legal standards, including the right to self-determination and also otherwise respected the rights of Indigenous Peoples.

This move clearly signaled there might be some acceptance of qualification of the right


\textsuperscript{71} “Statement by Nordic Saami Council” (1989) doCip Doc. 211072_1 (“We share the opinion expressed by some other indigenous NGOs that the adoption of this convention has to be considered as a step forward in the general efforts of developing more positive and adequate universal standards on the rights of indigenous peoples and our member organizations are most likely to recommend the Nordic government to ratify the ILO Convention 169 as soon as possible” at 211072_1).

\textsuperscript{72} “Statement of the Nordic Saami Council”, supra note 71.
to self-determination in the Declaration through the inclusion of a reference to territorial integrity. The joint-statement was met with strong objections from indigenous advocates of the North led by the Treaty Council. Mattais Ahrén notes how the “Inuit Circumpolar Conference and the Saami Council were literally attacked by adherents of the no-change position, who accused the organizations of being sell-outs” and “not truly indigenous.”

This call to accept some changes to the Declaration created considerable tension within the Global Indigenous Caucus meetings at the Working Group. The focus on history and self-determination by Northern indigenous peoples was viewed as extravagant and self-indulgent by some Asian indigenous advocates, given the denial of basic human rights in their home states. The pro-change indigenous advocates could see that the no-change principle held to by indigenous advocates of the North threatened the aim of having the Declaration adopted by the UN General Assembly. As observed by Suhas Chakma, Director, Asian Centre for Human Rights:

Un fortunately, the Draft Declaration on the Rights of Indigenous Peoples is viewed more in the context of historical injustices rather than preventing recurrence of similar injustices and the need to promote and protect the rights of Indigenous Peoples to preserve their distinctiveness. There will be no progress in the Working Group on the Draft Declaration so long as some radical indigenous representatives construe the right of self-determination in the Draft Declaration as a license to restore sovereignty of their nations, Chairman/Rapporteur provides more importance to these representatives at the cost of the silent majority and

73 Ahrén, supra note 21 at 88; see also, Henriksen, supra note 69 (“This created severe problems within the Indigenous caucus, and [the ICC and Saami Council] were branded as deserters by many other indigenous organisations. However, other indigenous organizations gradually joined this position when they, too, realized that to hold on to the strict no-change position was infeasible. The no-change group in the caucus began to lose ground” at 82).
74 See, Chakma, supra note 9; see also, Asian and Indigenous Tribal Network, Written Statement submitted by the AITPN: The Damp Squib of the International Decade: Adoption of the Draft Declaration on the Rights of Indigenous Peoples, UN Commission on Human Rights, 60th Sess, UN Doc E/CN.4/2004/NGO/138 (2004) (“It is a delusion to think that Indigenous Peoples cause is advanced by sticking to present stalemate situation. Unless something drastic happens, after the deluge of the International Decade, the WGDD will end up being a damp squib”).
some governmental representatives including the only super power, the United States construe these statements as a threat to their territorial integrity. The Working Group on the Draft Declaration is full of “UN made revolutionary” indigenous representatives and ultra-conservative governmental representatives.

The Global Indigenous Caucus meetings had proven crucial to promoting joint positions on strategy and promoting the no-change position but the division between the change and no-change camps meant the Indigenous Caucus was no longer able to operate effectively. Any effort to discuss changes to the Sub-Commission text was met with resistance from the no-change camp. Eventually, pro-change indigenous advocates frustrated with their inability to discuss changes to the text in the caucus meetings proposed that it be split into regional caucuses representing the seven UN regions, that is, Africa, the Arctic, Asia, Latin America, North America, the Russia Federation/Eastern Europe and the Pacific. According to Ahrén, “this would prove imperative, since the small number of indigenous representatives adhering to the no-change position could no longer hold the caucus hostage by blocking discussions on proposed amendments to the Sub-Commission text.”

There had in fact been an increasing shift towards regionalization of the Indigenous Peoples caucus. The Northern indigenous advocates worked closely together and the Latin America, Asia and Africa movements had increasingly begun to hold their own regional caucus meetings.

The momentum for change was significantly assisted by a workshop hosted by IWGIA in Copenhagen in May 2003, attended by the American Indian Law Alliance, the Inuit

75 Ahrén, supra note 21 at 96.
76 In Latin America, indigenous organizations of Central and South America created a technical secretariat in charge of the co-ordination and preparation of their work with the UN.
77 In Asia the Indigenous Peoples Pact was established in 1992 to represent tribal peoples’ organizations across South, South-East and East Asia. AIPP has been one of the key Asian partners of IWGIA, which provided much of its financial support throughout the 1990s.
Circumpolar Conference, the Saami Council, the Tebtebba Foundation and IWGIA. According to Saami advocate Mattais Ahrén, it was here that “key indigenous organizations “officially” decided to break with the no-change position” and create “an informal core group of relatively like-minded indigenous representatives that would from then on convene, network, consult and strategize on the Declaration process.” For the remaining Working Group sessions, indigenous advocates would operate predominantly through the regional caucuses. The split had the effect of isolating the hard-line no-change activists of the North and the decolonization model.

A fundamental shift also occurred on the side of States. Norway in the 2002 Working Group session sought a compromise by suggesting amendments to the text that kept Article 3’s reference to self-determination intact but included a reference to territorial integrity in one of the Declaration’s preambular paragraphs – a suggestion which was praised by some pro-change advocates like the Saami. Moreover, in the 2004 Working Group session, the Nordic States - Denmark, Finland, Iceland, Sweden - led by Norway, together with New Zealand and Switzerland, introduced for the first time a complete new version of the Declaration – known as “CRP 1” – building on Norway’s earlier proposal. CRP 1 left the language in Article 3 intact but added two additional preambular paragraphs noting that indigenous peoples’ right to self-determination must not be construed as authorizing or encouraging any action which would dismember or impair the territorial integrity of States.

Australian indigenous advocate, Lez Malezer notes “of the indigenous delegations the Saami council took the lead in supporting discussion of the CRP.1 text, thus breaking with the no-change position of the Indigenous Caucus.” This was followed up at the 2004 session by the presentation of the Sami Council, the Sami Parliamentary Council,

80 Ahrén, supra note 21.
81 Ibid at 95.
82 Ibid at 89-90.
83 Ibid at 93-94.
and Tebtebba, of a new and complete draft text of the Declaration.\(^85\) This draft contained a reference to territorial integrity in a preambular paragraph. According to Ahrén, this:\(^86\)

> encouraged indigenous organizations to become even more active in the constructive negotiations on specific language, not only as respondents to state proposals, but also by taking control over the process by submitting concrete language of their own.

Even within the North there were indigenous advocates prepared to shift from the hardline no-change position. They preferred a reference to self-determination without any reference to territorial integrity, but were also prepared to accept the need to compromise for the sake of having the Declaration adopted. Many Northern indigenous advocates began to talk about self-determination’s connection with human rights, consistent with Anaya’s human rights model. As we saw in Chapter 1, this model could support the self-determination framework in the Declaration (albeit disconnected from the power of the decolonization model).\(^87\) Further, it could accept an express reference to territorial integrity on the basis that it saw self-determination for indigenous peoples as being exercised within the state (though there would be the option of secession for gross abuse of human rights).\(^88\) Also, the human rights model offered a reasonable response to the alarmist assertions of states that the right to self-determination in the Declaration would result in the break-up of states. The decolonization model had achieved the hard work of getting self-determination into the Sub-Commission text. Now, tactically for many Northern indigenous advocates it made sense to place greater emphasis on human rights.

Despite this shift among indigenous advocates of the North, the Treaty Council and other Northern indigenous advocates stuck to the principle of no-change to the Sub-

---

\(^{85}\) Ahrén, *supra* note 21 at 96.  
\(^{86}\) *Ibid.*  
\(^{88}\) *Ibid.*
Commission text. At the 2004 Working Group session, the Treaty Council, Sioux Nation Treaty Council and other no-change advocates initiated a hunger strike/prayer fast and occupied the back of the meeting room. They asked for the Declaration to be:  

sent back to the UN Commission of Human Rights with the message that, in 10 years, proposals by States to weaken or amend the text have not gained the consensus of the Working Group effective participants, which includes both States and Indigenous Peoples.

According to Charmaine Whiteface, representative of the Sioux Nation Treaty Council and one of the no-change advocates, the fast ended after six days when an agreement was secured from UN officials that if there was no consensus on the Declaration by the end of the 2004 session, the original Sub-Commission version of the Declaration would be presented to the UN Commission of Human Rights for approval.

At the end of the 2004 session, there continued to be no agreement on self-determination. An extra session was secured from the Commission on Human Rights for 2005, but by the end of this final Working Group session, there was still a lack of consensus on the core issues related to the self-determination framework. Therefore, at the conclusion of the final Working Group meeting, the Working Group Chairperson-Rapporteur, Luis Enrique Chavez, announced he would prepare a “compromise text” for submission to the UN Commission on Human Rights, based on proposals he had earlier circulated in the Working Group together with proposals submitted by States and indigenous representatives.

---

89 "Hunger Strike by Indigenous Peoples Representatives at the UN" (2004) doCip Doc. 126_a01 (on file with author) (“We will not allow our rights to be negotiated, compromised or diminished in this UN process”).


The no-change advocates were strongly opposed to this move. Others accepted that this was the realistic option. According to Ahrén, “The majority of the participants – state and indigenous delegations alike – agreed … that the Working Group had come as far as it possibly could. The general sentiment was that continued negotiations would not result in the [Working Group] making further significant progress.” On 3 February 2006 at the end of the last Working Group session, no-change advocates presented a statement to the Working Group noting their concern that Chairman Chavez would be presenting a text they had not sighted to the Commission. They argued that there was no consensus on the changes made to the Sub-Commission text in the Working Group sessions and that some changes were opposed by the signatories to the statement. For them, “the Sub-Commission text represents the minimum standard we require as we said over and over again.”

The text produced by the Chair resulted in some watering down of the self-determination framework in the Sub-Commission text but most significantly, Article 3’s right to self-determination was untouched with no reference to territorial integrity. Article 31 on self-government was moved up to become a new Article 4, indicating self-determination would ordinarily be exercised through self-government. Further, the right to “restitution” was now a right to “redress” which met state demands for more flexibility while still leaving open the possibility of restitution. The right to free, prior and informed consent was retained, although the Chair’s text now described “informed consent” as an objective of consultations, i.e. consultation must be carried out “in order to” obtain consent, which helped to address the concerns of States who saw informed consent as absolute and unworkable. The rights in the Declaration were generally expressed as collective rights.

92 Ahrén, supra note 21 at 104.
95 Ibid, art 27.
96 Ibid, art 30 (Although Article 10 asserted that there could be no relocation of indigenous peoples without FPIC).
Under Article 46, the Chair’s text also permitted limitations on the exercise of the rights contained in the Declaration, including group rights, where those limitations:  

are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

Article 46 also provided that the provisions of the Declaration “shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.” With respect to treaties, whereas the Sub-Commission text spoke of conflicts being “submitted to competent international bodies”, the new Article 36 only referred to the “indigenous right to recognition … and to have States honour and respect such Treaties” – which might imply an international remedy.  

Most indigenous advocates, including those of the North, accepted the Chair’s text. At the May 2006 session of the UN Permanent Forum on Indigenous Issues a joint statement signed by over one hundred indigenous organizations and their supporters, called for the Declaration’s adoption by the newly established UN Human Rights Council at its inaugural July 2006 meeting. The joint statement at the UN Permanent Forum noted that:  

97 Ibid, art 46.
98 Ibid, art 36.
99 Malezer, supra note 84 at 33; Deer, supra note 21 (“We were not happy with every aspect of this final text, but it was a compromise. The revised text kept intact the provisions relating to self-determination; our rights to lands and resources; our collective rights; FPIC; and treaties. These were the major provisions we wanted affirmed” at 23).
While the Chair’s text could be improved in certain key areas, we believe that additional meetings would not assure us of a stronger Declaration. Rather, further delays could easily result in major reversals of our collective progress to date. The Declaration could be seriously undermined or else sacrificed in the process.

In June 2006, the Human Rights Council met to consider the Declaration. Before the meeting, a statement issued by proponents of the no-change position was circulated requesting that the Council not consider the Declaration and for there to be more meetings to facilitate discussion concerning the Declaration. According to Ahrén, indigenous advocates worked quickly to consult amongst their regions and supportive States to make clear that this stance was now a marginal position within the international indigenous movement. The Council voted to support the Declaration with only Canada and Russia voting against it.\(^\text{101}\)

The Council then agreed to send the Declaration to the UN General Assembly. However, before adoption by the General Assembly, the Declaration would encounter more opposition and calls for change, this time from the African Group of States – prompted it seemed, by the CANZUS states who were frustrated by their inability to amend the self-determination framework.

5 African opposition to the Declaration in the UN General Assembly:

After adoption of the Declaration by the Human Rights Council, it was directed to the Third Committee of the UN General Assembly, which focuses on social, humanitarian and cultural issues. At the Third Committee session of 16 October 2006, the Group of

\(^{101}\) *Summary Record of the 21st Meeting*, UNHRCOR, 1st Sess, UN Doc A/HRC/1/SR.21 (2006) (Adopted 30 February 2012; Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia voting in favour; Canada, Russian Federation voting against; Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine abstaining.)
States sponsoring the Declaration (the Sponsor States) – led by Peru, Mexico, and Guatemala – sought to introduce a resolution recommending that the Declaration be referred to the UN General Assembly for adoption at its next session. However, Namibia on behalf of the African Group of States presented a “non-action resolution” which called for a vote on the Declaration to be deferred.102

The African Group of States had serious concerns about the Declaration, as set out in a five-page paper entitled, “Draft Aide Memoire African Group” (Aide Memoire).103 According to the Aide Memoire, Africa was said to be “still recovering from the effects of ethnic based conflicts” and the absence of a definition in the Declaration would “create tensions amongst ethnic groups and instability within sovereign States.” The right to self-determination was said to only apply to “nations trying to free themselves from the yoke of colonialism.” Therefore, reference to self-determination in the Declaration could be: misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity and the territorial integrity of any country.

“Its very basis and content, namely ethnicity, culture and language could easily become a rationale for other groups seeking exclusivity within nation states.”108 The Aide

---

104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid at para 3.0.
108 Ibid.
Memoire also expressed concern at the right to free, prior and informed consent, which “can be interpreted to confer upon a sub-national group a power of veto over the laws of a democratic legislature.”\textsuperscript{109} The recognition of land rights and treaties were said to conflict with the constitutional provisions of African states.\textsuperscript{110} According to indigenous advocates, this move by Africa was due to the lobbying of the CANZUS states frustrated at their inability to make fundamental changes to the Declaration before its advancement to the Third Committee.\textsuperscript{111}

New Zealand, Australia, and the United States also voiced their criticism in the Third Committee of the Declaration.\textsuperscript{112} New Zealand was particularly critical of the Declaration’s reference to self-determination, which it said “could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace.”\textsuperscript{113} Further:\textsuperscript{114}

[t]he lack of definition or scope of application within the Chair’s text means that separatist or minority groups, with traditional connections to the territory where they live – in all regions of the globe - could seek to exploit this Declaration to claim the right to self-determination, including exclusive control of their territorial resources.

The land rights were said to “ignore the contemporary realities in many countries with indigenous populations”\textsuperscript{115} by threatening rights to lands now “lawfully owned by other

\begin{footnotes}
\item[109] \textit{Ibid} at para 6.0.
\item[110] \textit{Ibid} at paras 7.0 and 8.0.
\item[111] IPACC, “UN Declaration on the Rights of Indigenous Peoples delayed by Africa Group”, \textit{IPACC} (4 May 2007) (As reported by IPACC, “according to certain African diplomats, Namibia had not prepared the ’aide memoire’. Rather it had been prepared by a set of industrialized Anglo-Saxon States which strongly oppose the Declaration and the powers of the new Human Rights Council.”).
\item[113] \textit{Ibid}.
\item[114] \textit{Ibid}.
\item[115] \textit{Ibid}.
\end{footnotes}
and the redress provisions were simply “unworkable and contradictory.”

The Declaration also undermined the universality of human rights and was discriminatory by providing “human rights that are denied to other groups within the same nation-state.”

The African Group resolution to defer a vote on the Declaration was adopted by the Third Committee and so the Declaration would not be considered by the General Assembly until the September session in 2007. Indigenous activists immediately denounced the Third Committee’s decision and were highly critical of the African Group’s position. In a press statement entitled “Africans deny Inuit and Saami Human Rights,” the Saami Council and Inuit Circumpolar Conference expressed their outrage, noting that the African States were not acting alone in this mission but “were aided and abetted by the deceitful work of Canada, Australia, New Zealand and the United States.” Amar International and other human rights NGOs also were highly critical of the African Group. On 13 December, only a month after the Third Committee vote, a Botswana court ruled that the Kalahari were not to be displaced from their ancestral lands in the Central Kalahari Game Reserve. IWGIA immediately issued a press release noting its expectation that the ruling will “encourage African governments to endorse the UN Declaration on the Rights of Indigenous Peoples.”

116 Ibid.
117 Ibid.
118 Ibid.
The prospect of further negotiations presented a major challenge for indigenous advocates. A “Global Indigenous Peoples’ Caucus Steering Committee” was established in New York to address the General Assembly politics, representative of the seven indigenous regions that had emerged during the Working Group meetings.\textsuperscript{124} While the split between change and no-change advocates in the Working Group sessions had led to the end of the Global Caucus meetings, universal agreement remained that all regions needed to work together to address the African states’ strong opposition to the Declaration.\textsuperscript{125} Indigenous advocate, Les Malezer, was appointed convenor of the Steering Committee.

In the UN offices of Geneva, indigenous advocates knew the diplomats and were experienced in working within the human rights bodies of the UN, including the Working Group, UN Office of the High Commissioner of Human Rights and the UN Human Rights Council. Further, Geneva-based diplomats participating in Working Group negotiations were experts on human rights. But in New York, in the UN General Assembly, the emphasis shifted from human rights to \textit{realpolitik}. Diplomats were not well versed in indigenous rights issues. Moreover, there was no formal means for indigenous advocates to engage directly with states – particularly African state diplomats and those capable of influencing these diplomats.\textsuperscript{126} Indigenous advocates had struggled in the past to be involved in key decisions relating to the Declaration, but in the two Working Groups they had maintained a meaningful key role in negotiations. However, now indigenous activists were working from the margins. They could seek meetings directly with diplomats but from November 2006 onwards, negotiations on the Declaration were largely conducted between states – i.e., the Sponsor States of Mexico, Peru and Guatemala and African States.

\textsuperscript{124} Malezer, \textit{supra} note 84 at 33.
\textsuperscript{125} \textit{Ibid}.
\textsuperscript{126} Ahrén, \textit{supra} note 21 at 111 (“…throughout the Declaration process, indigenous representatives were treated as equal partners. This changed however … after the Third Committee’s decision to defer deliberations on the Declaration. From then on, the Declaration process was predominantly a state affair.”).
The Global Indigenous Caucus issued statements at the May 2007 Permanent Forum on Indigenous Issues meeting aimed at countering the concerns raised by African states in the Aide Memoire.\textsuperscript{127} These statements played down self-determination’s connection with decolonization and emphasized its connection with human rights.\textsuperscript{128} However, it was the African indigenous movement that responded with a strong human rights reading of the Declaration. In the form of a “Response Note” to the Aide Memoire, Africa indigenous advocates (signed by several African experts on indigenous rights)\textsuperscript{129} argued:\textsuperscript{130}

there is no one single indigenous community in Africa that is claiming statehood or threatening its country with secession. On the contrary, these peoples or communities are claiming aspects of the right to self-determination that do not threaten national boundaries, including the right to full participation in national life, the right to local self-government, the right to be consulted and to participate in the making of certain laws and programmes, the right of recognition and appreciation of their traditional structures along with the freedom to enjoy and promote their cultures. These variant aspects of the right to self-determination are different from secessionist demands that threaten the territorial integrity of States.

The implication was that a “strong form of self-determination” was for Northern indigenous peoples not African indigenous peoples. In the African context, the

\begin{footnotes}
\item[127] Les Malezer, “Address by the Chair of the Indigenous Caucus on the UN Declaration on the Rights of Indigenous Peoples” (Statement delivered at the UN Permanent Forum on Indigenous Issues, 18\textsuperscript{th} May 2007) online: <http://cendoc.docip.org/collect/upd_en/index/assoc/HASH0178.dir/Upd75e.pdf>.
\item[128] Ibid.
\item[130] Ibid at para 3.4.
\end{footnotes}
Declaration was about affirmation of human rights and culture.\textsuperscript{131} The absence of a definition in the Declaration was addressed by re-emphasizing the concept of African indigenous peoples as those pushed to the margins of social life due to their perceived cultural difference.\textsuperscript{132}

With the help of IWGIA, members of the group of African experts travelled to New York to meet with African diplomatic missions to advance their arguments in the Response Note.\textsuperscript{133} The African Commission on Human and Peoples Rights produced an advisory opinion asserting, as it had done in its earlier report on indigenous peoples in Africa, that indigenous peoples ought to be understood in terms of human rights and culture.\textsuperscript{134}

Despite these lobby efforts, on May 15, 2007, the African Group of States submitted its Proposal to the President of the UN General Assembly to substantially revise the Declaration by making over thirty amendments.\textsuperscript{135} These called for changes that would remove the self-determination framework from the Declaration and reduce it to an instrument aimed at human rights and minority rights. In relation to self-determination, the words “right to self-determination” were replaced with “right to participate in the political affairs of the State.”\textsuperscript{136} The proposal contained the “right to define who constitutes indigenous people in their respective countries or regions taking into account

\begin{footnotesize}
\textsuperscript{131} Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (New Jersey: Transaction Publishers; Banjul, Gambia: ACHPR; Copenhagen: IWGIA, 2005) (The Report also quoted the African Commission’s position on self-determination in Africa: “In Africa, the term ‘indigenous peoples or communities’ is not aimed at protecting the rights of the ‘first inhabitants that were invaded by foreigners’. Nor does the concept aim to create a hierarchy among national communities or set aside special rights for certain people. On the contrary, within the African context the term ‘indigenous peoples’ aims to guarantee equal enjoyment of rights and freedoms to some communities that have been left behind” at 4).

\textsuperscript{132} IPACC, supra note 129.


\textsuperscript{135} See, Letter from the African Group to the President of the General Assembly (10 May 2007).

\textsuperscript{136} \textit{Ibid}.\
\end{footnotesize}
its national or regional peculiarities.”

Each of the rights of concern to the African Group of States—including rights to traditional lands and restitution—were now expressed to be “subject to national laws.”

The large number and nature of the suggested amendments by the African Group left many skeptical about any chance of ever reaching a consensus between states and indigenous peoples.

A real shift in momentum did not occur until indigenous activists began to accept the reality that there would need to be further changes made to the Declaration to address the principal concerns of the African Group of States. In May 2007, Sponsor States advised the Global Caucus Steering Committee that they were in negotiations to see if an acceptable agreement could be achieved between the Co-Sponsors and the African Group leading to final adoption of the Declaration. By the end of August 2007, Mexico advised the Steering Committee that the negotiations had resulted in a proposal. The African Group would require changes to the text, most significantly a reference to territorial integrity. The initial Article 46(1) text had stated: “Nothing in this Declaration may be interpreted as implying for any State, people or group or person any right to engage in any activity or perform any act contrary to the Charter of the United Nations.”

The following additional phrase was added: “or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.”

In addition, the African Group of States secured the addition of a complete and new paragraph in the Declaration’s preamble on national and regional particularities:

137 Ibid.
138 Ibid.
139 This included a reference to the Charter of the United Nations in the preamble of the Declaration; and the deletion of the whole fifteenth paragraph of the preamble, which recognized that “Indigenous Peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect.” This would have stood in tension with the right to territorial integrity. A third amendment added the Vienna Declaration and Programme of Action to the international instruments mentioned in paragraph 18 of the preamble, because the Vienna Declaration refers to States’ territorial integrity.
140 An earlier version had contained additional language noting States had the “prerogative to define who constitutes indigenous people in their respective countries.” But this was abandoned due to strong objections from Indigenous advocates. Other amendments were to Article 8(2)(d), which requires States to “provide effective mechanisms for the prevention of, and redress for, forced assimilation.” the following words were deleted “by other cultures or ways of life imposed on them by legislative, administrative or
Recognizing also that the situation of Indigenous Peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

African States sought to emphasize that the self-determination framework was really for indigenous peoples of the North, not the African states. Otherwise, all key provisions, including those relating to land and resource rights, self-determination, free prior and informed consent and treaties, remained intact. This included an agreement by the African Group of States to vote against any amendments proposed on the floor of the UN General Assembly by other States (i.e., CANZUS states and supporters).

For indigenous advocates, this was a difficult pill to swallow. The Global Indigenous Caucus Steering Committee referred the amendments to the seven indigenous regional caucuses. There was clear reluctance to accept the reference to territorial integrity. However given the limited options available to indigenous peoples there was general acceptance of the changes, provided other key provisions in the self-determination framework remained intact.\footnote{Malezer, \emph{supra} note 84 at 34.} The Steering Committee then directed the Sponsor States that indigenous advocates would accept the changes to the Declaration.

\section*{6 The UN General Assembly’s Adoption of the Declaration.}


Today, the General Assembly faces the enormous responsibility and
challenge of bridging a significant gap in the area of promoting and protecting human rights: the protection of Indigenous Peoples. As attested by the various human rights protection mechanisms, such peoples are among the most vulnerable groups.

Noting the 25 year process by which the Declaration had travelled through the UN, including the negotiations between the African Group and Sponsor States during the preceding 12 months, Peru said it was:\[143\]

... convinced that the changes do not undermine the substantive aspects of the protection of Indigenous Peoples and, at the same time, that they guarantee adoption of the Declaration at the present session.

Peru then called upon all states to adopt the draft resolution without a vote.\[144\] However, the representatives of Australia, New Zealand and the United States requested a recorded vote on the draft resolution.

The CANZUS group of states all voted against the Declaration.\[145\] All CANZUS states underscored the Declaration’s non-binding status.\[146\] Their principal objection remained self-determination. Australia noted its “long expressed dissatisfaction”\[147\] with the references to self-determination in the Declaration. According to Australia, self-determination was related to “decolonization” and “the break-up of States into smaller States” or “where a particular group within a defined territory is disenfranchised and is denied political or civil rights.”\[148\] Australia could accept “the full and free engagement of indigenous peoples in the democratic decision-making processes in their country”, but not “a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a

\[143\] *Ibid* at 10 (Statement of Peru delivered by Mr Chávez).
\[144\] *Ibid*.
\[145\] *Ibid*.
\[146\] *Ibid*.
\[147\] *Ibid* at 11.
\[148\] *Ibid*. 

143
system of democratic representative Government”.  

Australia also expressed concern that “the declaration places indigenous customary law in a superior position to national law.”

Canada and New Zealand expressed no specific concern regarding self-determination. Canada noted it had concerns about a reference to “self-government without recognition of the importance of negotiations” which reflected its earlier statements. New Zealand noted its opposition to indigenous peoples having any rights that others do not have — which suggested that it was not supportive of the self-determination framework.

The United States, however, continued to offer its construction of self-determination in the Declaration as a new right specific to indigenous peoples:

It was not the mandate of the Working Group (nor was it within its power) to qualify, limit, or expand the scope of the existing legal obligations set forth in common article 1, and it was never the intent of States to do so. Instead the mandate of the Working Group was to articulate a new concept, i.e., self-government within the nation-state. It is not the same concept as the right contained in common article 1.

References in the Declaration to “Indigenous Peoples being free and equal to all other peoples” and affirmation of “the fundamental importance of the right to self-determination of all peoples” were:

not intended to imply that the existing right of self-determination is

149 Ibid.
150 Ibid at 12.
151 Ibid.
152 Ibid at 14.
153 Ibid at 15. See also the Statement of the UK delivered by Ms. Pierce noting Article 3 of the Declaration was understood as “separate and different from the existing right of all peoples to self-determination in international law, as recognized in common article 1 of the two International Covenants.” (ibid 21).
154 Ibid at 15.
automatically applicable to Indigenous Peoples *per se* or to indicate that Indigenous Peoples automatically qualify as “peoples” for purposes of common article 1.

The United States (joined by the United Kingdom) also rejected the indication in the Declaration that indigenous rights were collective human rights.\(^\text{155}\) Rather, “the rights set forth in this declaration are collective rights of Indigenous Peoples as first peoples and are in a distinct category from human rights, which are held by all individuals.”\(^\text{156}\) The UK acknowledged that these collective rights could be seen in the domestic laws of States and that accounted for their inclusion in the Declaration.

In relation to land rights, CANZUS states objected to the provisions on lands and resources because, as Australia put it, “they could be read to require recognition of indigenous rights to lands without regard to other legal rights existing in land, both indigenous and non-indigenous.”\(^\text{157}\) On FPIC, CANZUS states complained that the right was “unworkable” on a practical level as it would give a sub-set of the population a veto power over the legitimate decisions of a democratic and representative government.\(^\text{158}\)

The United States’ objections to the redress measures were blatantly self-interested. The goal of states in the Working Group, according to the United States, was “to encourage just, transparent and effective mechanisms for redress for actions taken by states after endorsing the declaration.”\(^\text{159}\) The United Kingdom also noted that it understood the Declaration “does not propose to have any retroactive application on historical

\(^{155}\) Ibid. Several states that voted in favor of the Declaration noted their reservations about collective human rights, for example, Sweden was of the firm opinion that individual human rights prevailed over the collective rights (not collective human rights) in the Declaration and stressed the principle of territorial integrity. (ibid at 24).


\(^{157}\) UN Doc A/61/PV.107, *supra* note 142 at 11 (Statement of Australia delivered by Mr. Hill).

\(^{158}\) Ibid at 14.

\(^{159}\) Robert Hagen, *supra* note 156.
For the United States and the United Kingdom, there would be no inquiry into historical takings of lands, violation of treaty rights and so forth.

In relation to Asian states, Bangladesh noted its disappointment that indigenous peoples had not been defined or identified in clear terms and decided to abstain in the vote. India, Indonesia and Pakistan observed that, while there was no definition in the Declaration, they understood the term to mean indigenous peoples as outlined in ILO Convention 169, that is, the description of indigenous peoples as first peoples in settler states. India noted self-determination only applied to “peoples under foreign domination” and noted the reference to territorial integrity in Article 46. Therefore, the Declaration had no application to their States. Myanmar and Thailand did not raise any concerns over lack of a definition but emphasized the reference to territorial integrity in the Declaration. Both the Philippines and Nepal noted their domestic recognition of indigenous peoples and their rights, although the Philippines acknowledged the reference to territorial integrity, and Nepal emphasized that the Declaration was not binding but provided “guidelines” for the promotion of indigenous rights.

Latin America states, excepting Colombia, voted for the Declaration. However, several Latin American states emphasized that self-determination was to be exercised within the state and would not interfere with the sovereignty or political unity of states (Mexico, Brazil, Suriname). Likewise, most African states present in the General Assembly
voted for the Declaration (Nigeria, Burundi, and Kenya, abstained), although most
African states who spoke endorsed the principle of territorial integrity and/or said the
Declaration would operate consistently with constitutional frameworks and other
national laws of States. Nigeria noted its abstention was due to the issue of territorial
integrity, self-determination and the control of lands, territories and resources.173

The Nordic states also endorsed the Declaration and encouraged implementation.
Although Norway and Sweden gave self-determination (or in Finland’s case, the whole
Declaration)174 a human rights reading, with Norway noting the right: “requires that
indigenous peoples have full and effective participation in a democratic society and in
decision-making processes relevant to the indigenous peoples’ concern.”175 Sweden also
rejected the notion of collective human rights.176

After the vote, Lez Malezer, in his capacity of Chair of the Indigenous Global Caucus
addressed the General Assembly. In stark contrast to the positions of the United States
and the United Kingdom on self-determination and collective rights, Malezer stressed
the Declaration’s basis in existing human rights.177

We emphasise once again that the Declaration on the Rights of
Indigenous Peoples contains no new provisions of human rights. It
affirms many rights already contained in international human rights
treaties, but rights which have been denied to the Indigenous Peoples. As
Indigenous Peoples we now see a guarantee that our rights to self-

174 Ibid at 9.
175 See, UN Doc A/61/PV.107, supra note 142 at 22. See also, Statement of Sweden: “A large part of the
realization of the right to self-determination is without doubt possible to ensure through article 19, which
deals with the duty of States to consult and cooperate with indigenous peoples.” (ibid at 24).
176 Ibid.
177 Les Malezer “Statement by the Chairman, Global Indigenous Caucus; Indigenous declaration
framework for the future, tool for justice.” (13 September 2007) online:
<http://www.iwgia.org/images/stories/int-processes-eng/decl-rights-ind-peop/docs/07-09-
13IPCaucusStatementAdoptionDeclaration%20.pdf>. See also Les Malezer, “Keynote Speech” (Delivered
at the Annual Human Rights Dinner of the Human Rights Law Centre, 15 June 2012) online:
determination, to our lands and territories, to our cultural identities, to our own representation and to our values and beliefs will be respected at the international level … The Declaration carries a message for all States that have links and association with Indigenous Peoples. That message is not about secession, as some States may fear, but about co-operation and partnership to ensure that all individuals, regardless of race or beliefs, are truly equal and that all peoples are respected and allowed to develop.

7 The CANZUS reversal

While the CANZUS states were strongly opposed to the Declaration in the 2007 UN General Assembly vote, between April 2009 and December 2010 each of them reversed their positions and endorsed it, although, as we will see, their formal substantive positions had not altered. In April 2009, Indigenous Affairs Minister Jenny Macklin gave a speech announcing the official change in Australia’s position on the Declaration to one of “support.” A year later, on 19 April 2010, during the opening ceremony of the United Nations Permanent Forum on Indigenous Issues, New Zealand’s Minister of Maori affairs, the Honourable Dr Pita Sharples, announced New Zealand would also be supporting the Declaration. Canada took a less public approach, releasing, without fanfare, a statement on the website of Indian and Northern Affairs Canada on 12 November 2010 that it would formally endorse the Declaration. The Obama administration in the United States, after an extended review and tribal consultation process, announced its change of position on 16 December 2010 during presidential remarks at the White House Tribal Nations Conference. Near the end of his remarks,

Obama briefly announced that the United States would be “lending its support” to the Declaration.\textsuperscript{181} That same day the Whitehouse released a 15-page explanation of its vote.

While the shift was celebrated amongst indigenous advocates, there was also recognition that acceptance had been made with many hedges and qualifications. The United States emphasized the importance of fundamental human rights to indigenous peoples including non-discrimination, land rights, education and health. But it also drew a distinction between these human rights and other elements of the Declaration. Self-determination continued to be characterized as a “new and distinct international concept of self-determination specific to indigenous peoples.”\textsuperscript{182} It is “different from the existing right in international law.”\textsuperscript{183} This new aspirational concept of self-determination was said to be “consistent with the United States existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance.”\textsuperscript{184} This indicated that this new meaning of self-determination was a reflection of legal practice in the United States, ie, state practice of recognizing limited powers of indigenous self-government. Free, prior and informed consent was given a human rights reading as: “a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”\textsuperscript{185} In relation to “the lands, territories, resources and redress provisions of the Declaration”, the United States understood these provisions to: “call for the existence of national laws and mechanisms for the full legal recognition of the land, territories, and natural resources Indigenous Peoples currently possess.”\textsuperscript{186} Thus the provisions could not refer to lands taken from them. The United States continued to

\textsuperscript{182} Ibid at 3.
\textsuperscript{183} Ibid.
\textsuperscript{184} Ibid.
\textsuperscript{185} Ibid 5.
\textsuperscript{186} Ibid at 6 [emphasis added].
assert that the “collective rights” were not human rights “which are held by all individuals.”

According to New Zealand: “The Declaration is an affirmation of accepted international human rights and also expresses new, and non-binding, aspirations.” New Zealand referred to the new aspirations no less than six times in its short statement of support. The aspirational elements of the Declaration were to be defined within the bounds of New Zealand’s existing “legal and constitutional frameworks”. As an example of these aspirational elements, New Zealand cited “restitution of traditionally held land and resources” which New Zealand had addressed through its “distinct”, well-established domestic processes for resolving Treaty claims. Likewise, in relation to the Declaration’s “principles for indigenous involvement in decision-making” – which included FPIC – New Zealand noted it “will continue to rely upon its own distinct processes and institutions that afford opportunities to Māori for such involvement.”

Canada adopted a similar line to New Zealand and the United States, focusing on its human rights commitments while also noting the Declaration’s aspirational and non-legally binding status. The reference to aspirations – while not as explicit as the United States and New Zealand – appeared to be aimed at the self-determination framework. For example, Canada’s need to assert the non-binding status of the Declaration seemed

187 Ibid at 2 (The United States’ concern was the status of internal minorities); See also, Hagen, supra note 156 (The United States notes: “if a collective entity or group – as opposed to individuals – could hold and exercise human rights, individuals within those groups would be extremely vulnerable to potential violations of their human rights by the collective. In addition, if groups and individuals could each hold human rights, it would be difficult to reconcile disputes over which human rights should prevail.”); As we saw in chapter 3 Japan, Slovakia and the UK supported this position when voting for the Declaration.


189 Ibid (“In moving to support the Declaration, New Zealand both affirms those [human] rights and reaffirms the legal and constitutional frameworks that underpin New Zealand’s legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand’s domestic circumstances, define the bounds of New Zealand’s engagement with the aspirational elements of the Declaration”).

190 Ibid.

191 Sharples, supra note 179 (New Zealand indicated that these “principles for indigenous involvement in decision-making” would include consent noting the processes “range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate.” Although, FPIC is not a policy or law in New Zealand excepting access to medical data.).
to be directed at its continuing concern with provisions dealing with lands, territories and resources, FPIC, and self-government without recognition of the importance of negotiations. Canada, like New Zealand, noted the Declaration was to be interpreted “in a manner that is consistent with [Canada’s] Constitution and legal framework.”

Australia’s approach was to give the Declaration’s self-determination framework a human rights reading while speaking of the Declaration as a whole as non-binding and aspirational. Self-determination was read as “the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully.” Free, prior and informed consent’ was to be “interpreted in accordance with Article 46”, although Australia recognized “how important it is for Indigenous Australians to have a voice, and a means to express it.” Land rights disputes were to be resolved through mediation and negotiation rather than litigation and “Australia’s laws concerning land rights and title [would] not be altered by Australia’s support of the Declaration.” There was no mention made of historical redress.

All statements of support, therefore, sought to read down the self-determination framework and preserve the status quo, through a combination of emphasizing human rights, characterizing the self-determination framework as aspirational and noting that ultimately the framework would be determined domestically by the state.

8 Conclusion

As the negotiations on the Declaration advanced through the second Working Group, there was a clear shift by most indigenous advocates towards reading the Declaration through a human rights model. This was largely due to the presence of Asian and African indigenous advocates, although it was also increasingly a better strategy for

---

192 Indigenous Affairs and Northern Development Canada, supra note 178.
193 Macklin, supra note 178 (“While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to” at 3).
194 Ibid at 3.
195 Ibid at 5.
196 Ibid at 4.
Northern indigenous advocates as well due to the concern CANZUS states had with self-determination’s connection with decolonization. Furthermore, the human rights model offered by Anaya still supported indigenous peoples’ claims to the self-determination framework – albeit disconnected from the power of the decolonization model. By the end of the negotiations in the second Working Group, the human rights model proposed by Anaya was the dominant model for many indigenous peoples of the North as well as the South.

The no-change position had no doubt contributed to maintenance of the self-determination framework in the second Working Group.\(^\text{197}\) However, many Northern indigenous peoples eventually agreed to shift from the no-change position, although many also continued to reject states’ call for a reference to territorial integrity in the text. Others maintained the no-change position right up to the UN General Assembly vote on the Declaration. They continued to endorse the decolonization model, opposing in particular, any reference to territorial integrity.

In addition to the now dominant human rights model and the decolonization model, the United States, New Zealand and Canada offered a “mixed-model” reading of the Declaration, viewing the Declaration as containing established human rights but also “aspirations” – code for the self-determination framework – which were to be implemented in a manner consistent with States domestic law and practice.

Given these different renderings of the Declaration, in the next chapter, I offer a means of reading the Declaration which progresses beyond what I describe as the one-note interpretations of the Declaration and the states’ mixed model.

\(^{197}\) Deer, supra note 21 (As Kenneth Deer put it “for years [the no-change] strategy was a major factor in maintaining the integrity of the Declaration … if we had allowed governments to make changes to the WGIP text we would not have the Declaration that we have today … While some changes were eventually made to the WGIP text, our persistence in holding to our granted us time to convince states to agree to the core right to self-determination” at 22).
CHAPTER 4:

IMPACT OF GLOBALIZATION: HOW TO READ THE DECLARATION

In Chapters 1-3, I demonstrated that the politics behind the drafting of the UN Declaration on the Rights of Indigenous Peoples involved a continual and unresolved struggle between proponents of different models of interpreting the Declaration. In the main, the decolonization model used by advocates from the North competed with the human rights model used by advocates from the South and also preferred by states. Now that the Declaration has been adopted by an overwhelming number of states, ultimately including the CANZUS states, what are the implications of the historical narrative I have established for the implementation of the Declaration?

In Part 1 of this chapter, I argue that the existing normative models informing the interpretation of the Declaration are all unsatisfactory. I criticize the one-note human rights model proposed as historically accurate by Karen Engle, a variation on which is advanced by James Anaya. I also criticize the accounts of Will Kymlicka and Patrick Macklem which feature decolonization as the sole normative idea animating the Declaration. This model in effect excludes Southern indigenous peoples, especially Asian and African movements, from the Declaration.

Instead, in Parts 2 and 3, I argue for a new mixed-model interpretation of the Declaration that incorporates both the decolonization and human rights models. The benefits of this bifurcated reading of the Declaration are that it enables both the Northern and Southern indigenous movements to gain the rights they seek from the Declaration. The mixed model is supported by the political history of the Declaration negotiations as outlined in this thesis. It is also supported by legal and political theory justificatory arguments. First,

the mixed-model is justified by the widely-shared understandings of the “interpretive community” associated with the Declaration negotiations, the relevant interpretive community not being limited to states as tends to be assumed for the purposes of treaty interpretation. Secondly, insofar as the Declaration’s distinctive political legitimacy derives from indigenous participation, the mixed-model reflects the participation of both Northern and Southern movements and the incorporation of their respective normative arguments.

1 One-note interpretations of the Declaration

1.1 Human rights models

As discussed in the Introduction, Karen Engle rejects most indigenous advocates’ characterization of the Declaration as a “breakthrough” achievement for the international indigenous movement, seeking to establish instead that: (1) part way through the negotiations, indigenous advocates made a pragmatic choice to give up on “strong forms of self-determination” (ie. secession or independence), and (2) began to articulate their claims in human rights terms, particularly the human right to culture. This leads to a focus on maintenance of a way of life/tradition through land, heritage and development.

This strategy was a response to resistance to such strong forms of self-determination by states, and to a focus on human rights and culture by Latin American indigenous advocates. This is a mistake, she argues, because it results in indigenous peoples giving up on the bigger rewards that may be gained from the self-determination project. Engle’s advice to the international indigenous movement is to shift “away from the acceptance and deployment of static and essentialized notions of culture and to raise questions about whether the right to culture – and perhaps human rights more generally –

---

5 See Part 3.1 of this chapter.
6 Engle, supra note 1 at 3.
7 Ibid.
8 Ibid at 6.
9 Ibid at chapters 2-3 (She also adds that indigenous advocates enjoyed some successes with cultural rights before international law and regional human rights bodies).
is up to the task of the major economic and political restructuring that many advocates (if covertly) seem to seek.”\(^{11}\) Courtney Jung similarly sees the claims of the indigenous rights movement as based in culture and, like Engle, seeks to encourage indigenous advocates to focus instead on structural injustice.\(^{12}\)

Whereas Engle’s argument is that a human rights model emerged from the politics of the negotiations, she singles out James Anaya as “perhaps the strongest proponent of self-determination as a human right”.\(^{13}\) Anaya has indeed played a key role in the shift within the indigenous movement towards a human rights model and rejects “historical sovereignty” arguments that call for recognition of indigenous statehood based on the illegitimate denial of indigenous peoples’ prior sovereignty.\(^{14}\)

According to Anaya, self-determination as a precept of international law has always been fundamentally grounded in human rights, and especially rights to freedom and equality. In its “substantive” sense, self-determination promotes governmental legitimacy by serving as an ongoing standard to evaluate how governing institutions are constituted and how they continue to operate. Self-determination also operates in a “remedial” sense for deviations from the substantive elements of self-determination. The decolonization process represents a remedy for a “sui generis” violation of the substantive right of peoples to self-determination.\(^{15}\) But self-determination’s remedial prescriptions will not always require decolonization. The remedy will depend on the nature of the violation of the substantive right to self-determination. Thus, “the substantive elements of self-determination apply broadly to benefit all segments of humanity, that is, all peoples”, however “self-determination applies more narrowly in its remedial aspect.”\(^{16}\)

\(^{11}\) Engle, \textit{supra} note 1 at 10.
\(^{13}\) Engle, \textit{supra} note 1 at 98.
\(^{15}\) Anaya, \textit{supra} note 2 at 104.
\(^{16}\) \textit{Ibid}
In the specific case of indigenous peoples, Anaya argues that while there are historical similarities between the indigenous experience and “classic colonialism,” the violations experienced by indigenous peoples are distinct. In particular he points to the contemporary absence of “formal colonial structures.” Thus, rather than independence as a remedy, the rights in the Declaration and the ILO Conventions may require change in the political order but independence would be a course of last resort (in those cases of gross abuse of human rights).

Contrary to Engle, Anaya’s human rights model delivers much more than rights to land and culture. Anaya’s model, in theory, supports the self-determination framework and could lead to significant autonomy for indigenous groups vis-à-vis the state. However, by viewing the right to self-determination in the Declaration as grounded in human rights, Anaya’s account obscures the connection between self-determination in the Declaration and anti-colonialism. The human rights model is directed at equality, property rights, and autonomy and relies on the state to provide these remedies, whereas the decolonization model challenges existing state sovereignty and is directed at a nation-to-nation relationship to be negotiated at the international plane.

The narrative of the drafting of the Declaration that I develop in Chapters 1-3 contradicts Engle’s account in two principal ways. First, it disagrees that “strong forms of self-determination” were abandoned in favor of the human rights model. While it confirms that many adopted the human rights model and some placed emphasis on the right to culture, the narrative developed here also establishes that the decolonization model was, in fact, consistently maintained throughout by the Treaty Council and other prominent indigenous advocates of the North. Although Engle notes that not all advocates abandoned their commitment to a strong form of self-determination, she de-emphasizes this internal struggle amongst Northern indigenous advocates and the continued assertion of a decolonization model right up to the Declaration’s adoption by the UN General

17 Ibid at 110.
18 Ibid at 109.
19 Anaya, supra note 2, at 106-110, and 150-156.
20 Engle, supra note 1 (“some indigenous groups, primarily in the former British colonies, long insisted on keeping open the possibility of external self-determination” at 73).
Assembly. She also does not register the full extent of the pressures placed upon Northern advocates to give up the decolonization model.

In contrast, I argue that it is the decolonization model that created the self-determination framework in the Declaration. Adapting their domestic, historical sovereignty claims to the UN standard setting process, advocates of the North sought recognition of the right to self-determination. They had been battle-hardened by their advocacy experience in their home states and were positioned at the more radical end of the domestic indigenous advocacy movement. They sought the advice of experts in international law and many soon became experts themselves, basing their argument on their particular experience of colonization and settlement by the British. They were prior sovereigns and (excepting Australia) this status was recognized in their treaties, which were international in character. These advocates of the North did not seek independence, although recognition of the right to self-determination without qualification indicated that they had the option of independence. Human rights were important – there was no doubting that indigenous peoples occupied the margins of life in their home states, but human rights were most important as a means of supporting their decolonization model just as it had been for the anti-colonial movement.21

As I have shown, in the Working Group on Indigenous Populations, it was extremely difficult to have the right to self-determination included in the Declaration. Yet, this was achieved. Not only did Northern indigenous advocates manage to secure recognition of the right to self-determination without reference to territorial integrity in the first Working Group, they also managed to achieve this in the second Working Group. Northern advocates like the Treaty Council insisted on no-change to the text produced by the first Working Group (especially self-determination without any reference to territorial integrity). They walked out in protest when the chair did not recognize their right to speak; and sought input into the Working Group agenda; and the appointment of an indigenous chair. They sought to maintain the no-change line through the Global

21 Moyn, supra note 10 at 85. See also, Roland Burke, Decolonization and the Evolution of International Human Rights (Philadelphia: University of Pennsylvania Press, 2010).
Indigenous Caucus meetings, even though there was mounting pressure from states as well as Asian and African indigenous advocates and their supporters (including IWGIA) to break from the no-change position. The advancement of the decolonization model via the UN sponsored treaty seminars and hunger strikes were all aimed at shoring up the decolonization model, securing the self-determination framework and keeping territorial integrity out of the Declaration.

Secondly, the account of the drafting history that emerged in Chapters 1-3 showed that while Engle is correct that the decolonization model was replaced as the dominant model by an emphasis on human rights, she misses a crucial element that led to the shift because she confines her analysis to the settler states. As she notes, Latin American indigenous advocates seemed to prefer human rights and culture. Latin America advocates were slow to participate in the emerging international movement given the difficulties many advocates faced with mobilization under repressive political regimes. When they did participate, however, their focus, as she shows, tended not to be political independence, but issues of cultural autonomy and basic human rights. However, as is clear from Chapter 2, it is the participation of indigenous peoples of Asia and later Africa that saw a particular emphasis on human rights and culture in the Declaration negotiations. These factors established common cause with indigenous peoples of the North. Asian and African indigenous peoples could not credibly advance the decolonization model. They can only benefit from alternatives to the decolonization model. Also, Asian and African (as well as Latin American) indigenous peoples were not as interested in historical injustices as they were with contemporary struggles.

22 Raidza Torres, “The Rights of Indigenous Populations: The Emerging International Norm” (1991), 16 Yale J Intl L 127 at 144 (Writing about the first Working Group, Torres notes, “Guatemalan Indians currently do not emphasize the right of self-determination as strongly as indigenous groups in other countries. In part, this is because they face the more immediate challenge of countering widespread murders by the government. In addition, because Indians form the majority of the Guatemalan population and because they are dispersed throughout the country, it is impracticable to advance the cause of a separate Indian state within Guatemala. The Guatemalan government is sensitive to any threats to the country’s territorial integrity, especially given its struggle against leftist groups. Indian demands for substantial autonomy are perceived as threats to the state and are likely to result in more repressive policies.” On the other hand Torres notes how: “In contrast to Guatemala’s Indians, the Miskito Indians of Nicaragua have enjoyed greater political autonomy throughout most of the twentieth century.”).
23 Engle, supra note 1; Jung, supra note 12.
Because it is the Asian and African movements which led to the heavy emphasis on human rights and culture and because they are not featured in Engle’s narrative (apart from a few oblique references), she misses a pivotal North-South tension. Engle overstates Northern indigenous advocates emphasis on human rights and culture. The greatest emphasis came from the Asian and African movements. As a result, there was more pressure on Northern indigenous peoples to shift from the decolonization model than Engle records. Recall that it was Asian and Saami indigenous advocates that led the break from the no-change strategy in the second Working Group. Also, this pressure to shift came from not only Southern indigenous peoples but also Southern states who were concerned about the implications of self-determination for internal security issues. They sought a definition of indigenous peoples that clearly excluded minorities in their states but they did not succeed. Instead, these Southern states imposed their definition of indigenous peoples (directed at the historical experience of indigenous peoples in the settler states); and/or emphasized human rights and culture; and/or sought an express reference to territorial integrity in the Declaration. Eventually, as we saw in Chapter 3, Northern indigenous peoples themselves could see the merit of Anaya’s human rights model. And this created tensions between the no-change advocates advancing the decolonization model and those Northern advocates who preferred a more pragmatic approach.

What then, are the implications of this alternative history and, in turn, this alternative reading for the current implementation of the Declaration? It is clear that the human rights model has become the prominent means of reading the Declaration. Because Engle fails to accord real weight to the connection between the self-determination framework in the Declaration and the decolonization model, she is too quick to dismiss the model’s relevance in the implementation era. Seeing the tensions within the Northern indigenous movement help us to see that the decolonization model is still there and able to do the work she wants it to do. CANZUS states were all too aware of, and concerned about, the right to self-determination in the Declaration and the decolonization model. The United States, for example, when voting against the Declaration in the UN General Assembly emphatically asserted that the reference to self-determination in the Declaration was
never meant to “qualify, limit, or expand the scope of the existing legal obligations set forth in common Article 1”. Even the reference to territorial integrity was not enough to assuage the CANZUS states’ concerns with the self-determination framework. Even after CANZUS states endorsed the Declaration they all continued to read down the effects of the framework.

The inclusion of the self-determination framework and the decolonization model has significant normative implications. Ultimately it means that the state is required to engage with indigenous peoples to determine the terms of their co-existence. Self-determination in the Declaration relates to this nation-to-nation relationship. In particular, as I elaborate in Chapter 5, the decolonization model has two implications for implementing the self-determination framework. First, the decolonization model shows that the first priority should be a negotiation between indigenous peoples and the state about their relationship in the contemporary state. Secondly, until those reforms occur the model can be used as a means for influencing debate about the extent of indigenous rights by highlighting the importance of political autonomy and territorial rights for indigenous peoples.

In Engle’s analysis of indigenous rights, the abandonment of a decolonization model in the drafting of the Declaration serves as a critical counterpoint to the human rights model that, she argues, carried the day. While a decolonization model addresses her criticisms of the latter, she does not argue for it outright. It is important to note here, though that a decolonization model would foreclose African and Asian reasons for being in the international indigenous rights movement. These southern indigenous movements can only appeal to the human rights model and would therefore resist any return to a single note decolonization model.

---

For Latin America there could be some potential for asserting a decolonization model given its history of colonization and settlement by European powers. To this extent there are parallels with the historical experience of Northern indigenous peoples. However, key ingredients to the decolonization model are absent in Latin America, especially nation-to-nation treaty-making, and a long-standing political relationship with the state. Engle seems to assume that there was some potential for Latin American advocates to press for “strong forms of self-determination.”25 At the same time, she also seems to accept that the particular history of the North – especially treaty-making – indicates Northern indigenous peoples have greater claims to strong forms of self-determination.26 But, as we have seen, the decolonization model was not pursued by Latin America indigenous advocates. Instead the emphasis was on land and revitalization of culture.

1.2 Historical injustice models

One alternative might be to exclude Asian and African movements from the international movement altogether by relying on a single-note decolonization model directed at Northern indigenous peoples or more broadly at indigenous peoples of the settler states. Such an approach can be seen in Patrick Macklem’s book, *The Sovereignty of Human Rights*.27 Macklem approaches the question of which types of groups might be considered indigenous peoples in international law by looking for the answer in international law itself. Macklem is especially critical of the constructivist model that Benedict Kingsbury develops in his article on the Asian controversy,28 whereby the concept of “indigenous peoples” (and indigenous rights) in international law can be seen as sourced in a variety of justifications, some historical others contemporary and functional in nature. Such a broad range of justifications for indigenous rights makes it easy for all types of cultural communities to self-identify as indigenous. As Macklem notes:29

25 Engle, *supra* note 1 at 78.
26 Ibid at 52–55 and 78–82.
29 Macklem, *supra* note 4 at 160.
Kingsbury’s approach, unless supplemented by an explanation of the normative significance of international indigenous rights, risks conflating different forms of international legal protection into an undifferentiated concern about the disruption or exploitation of diverse communities of value. Numerical minorities, cultural minorities, national minorities, religious communities, linguistic communities, impoverished majorities – are we all indigenous peoples now?

Pointing to Kingsbury’s essential attributes of self-identification; experience of severe disruption and so on, Macklem questions why these factors ought to merit international legal protection in the form of indigenous rights “as opposed to more generic human rights, such as minority rights and rights to cultural protection as well as those that protect civil, political, social, and economic interests.”30 Macklem’s point seems to be that the self-determination framework must be based in something more distinctive than a history of displacement.

Macklem approaches the problem of recognition of indigenous peoples by considering the distinction made between legal and political recognition of states in international law. He draws on Hans Kelsen’s observation that there can be political recognition in the form of actions like the establishment of diplomatic relations.31 But for recognition to be legal, states must meet criteria prescribed by international law itself. Likewise, Macklem notes, a political movement may self-identify as an indigenous people but it must meet certain criteria determined by international law in order to possess the legal status of indigenous peoples and thereby access indigenous rights in international law.32

30 Ibid.
32 Macklem, supra note 4 at 156–162.
According to Macklem, these criteria for legal recognition derive from the nature and purpose of indigenous rights. Macklem gleans this purpose from his review of the legal history of international indigenous rights during the twentieth-century, that is, the protection of “indigenous workers” in colonies by the International Labour Organization in the 1920s, to the promulgation of ILO Conventions 107 and 169, up to its most contemporary expression in the UN Declaration on the Rights of Indigenous Peoples. The object of these protections, according to Macklem, is to address the wrongs established by international law, in particular indigenous peoples’ “historic exclusion from the distribution of sovereignty initiated by colonization that lies at the heart of the international legal order.” Given this purpose, “Indigenous peoples in international law”, Macklem argues:

… are communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization. They are located in States whose claims of sovereign power possess legal validity because of international law’s refusal to recognize these peoples and their ancestors as sovereign actors. What constitutes indigenous peoples as international legal actors, in other words, is the structure and operation of international law itself.

This of course describes the historical experience of indigenous peoples of the settler states. However, as will be apparent from chapters 1-3, the purpose of indigenous rights has not always been consistent. The targeted category of “indigenous peoples” as well as the aims of international standards and their underlying justifications have always shifted. The ILO protections for “indigenous workers” of the 1920s were aimed at forced labour and workers conditions for colonial populations. The ILO Convention 107 and ILO

33 Ibid at 135.
34 Ibid at 141–156.
35 Ibid at 162.
36 Ibid at 135.
Convention 169 were aimed at both “indigenous peoples” and “tribal peoples” – the former being indigenous peoples of the settler states and the latter tribal peoples of Asia, Africa and Middle East.\textsuperscript{38} And the intention of ILO Convention 107 was to assimilate indigenous peoples.\textsuperscript{39} Admittedly at the time this was the benevolent approach, but it would be difficult to describe ILO Convention 107 as a remedy for the denial of sovereignty. The ILO Convention 169 shifted the focus from integration towards the promotion of indigenous rights, but again, mostly rejected historical considerations and directed its attention towards contemporary basic rights and cultural autonomy.\textsuperscript{40} Again indigenous peoples were defined separately from tribal peoples, but little turned on this – the Convention was directed at fundamental human rights and rejected calls by Northern indigenous peoples to recognize the range of rights in the self-determination framework.\textsuperscript{41} Both the ILO Convention 107 and ILO Convention 169 were thus directed at basic human rights.

As we saw in Chapters 1 and 2, the Declaration itself – and this is the most significant international development – was initially directed at the anti-colonialist claims of Northern indigenous peoples, but it also came to be directed at the human rights concerns of Southern indigenous peoples. This indicates that the Declaration is serving two purposes, not one.

Macklem’s reading of the nature and purpose of international indigenous rights comes close to the decolonization model detailed in this dissertation. However, unlike Macklem, I see this as a project confined to indigenous peoples of the North whereas he sees it as directed at indigenous peoples of the settler states. In my view, Macklem’s argument has greater force and resonance in the context of Northern indigenous peoples’ experience of dependent territories; in other words, to the populations living under a legal status of dependency in conditions of formal colonialism” at 47).

\textsuperscript{38} See chapters 1 and 2 of thesis.
\textsuperscript{39} Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959), art 2(1) (“Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.”)
\textsuperscript{40} See chapter 2 of thesis.
\textsuperscript{41} Ibid.
treaty-making, treaty-breaking and international law’s refusal to recognize their sovereign status. Implicit in his argument is the idea that indigenous peoples were akin to nations and candidates for sovereignty but international law after a period of recognition of their nationhood – for purely political, self-serving motives – refused to recognize them as sovereign legal actors. Once the colonizing power had the upper hand, international law doctrines of “terra nullius” and “discovery” were deployed under international law to deny their sovereign status. This nation-to-nation historical experience is difficult to find outside of the North. Indigenous peoples of Latin America would struggle to meet this notion. As would indigenous peoples in Thailand, Nepal, Indonesia, and the Philippines. Moreover, indigenous peoples in Asia and Africa live in states that have enjoyed decolonization. In other words, they have been provided with a remedy, albeit it is the state as a whole that benefits.

Will Kymlicka also advocates an approach that sees indigenous rights as directed at the settler states. He is critical of the move by minorities to re-invent themselves as indigenous peoples. The reasons are clearly due to the weak nature of minority rights:

“[i]f they come to the international community under the heading of national minority, they get nothing other than generic Article 27 [minority] rights; if they come instead as ‘indigenous peoples’, they have the promise of rights to land, control over natural resources, political self-government, language rights and legal pluralism.”

For Kymlicka, these minorities (including Asian and African indigenous peoples) are politically opportunistic: self-identifying as indigenous peoples for not only stronger standards of protection than minority rights but to gain greater publicity, and access to

---

42 Macklem, supra note 4 at 138-141.
43 Ibid at 162 (Macklem notes his argument does not “necessarily preclude international law from recognizing indigenous peoples in Africa or Asia”. However, he is aware of the extension of the international indigenous movement to the South (and how Kingsbury has justified this) and his argument seems to be aimed at re-directed attention once more on the indigenous peoples of CANZUS and Latin America).
44 Kymlicka, supra note 3.
Kymlicka’s argument is that there ought to be different standards for different types of peoples. For indigenous peoples, there are the standards in the Declaration that promote self-government and territorial rights based on the “decolonization-based model of indigenous rights.” Kymlicka thinks this is the underlying justification of indigenous rights. These “targeted norms” are differentiated from those that could be established for “immigrant groups, or for other types of groups with unique histories and needs, such as Roma and Afro-Latinos.”

The aim of both Macklem’s and Kymlicka’s approaches, then, is to counter the obfuscation caused by Kingsbury’s constructivist model, developed in the context of the Asian controversy, by providing greater clarity about the normative basis of the most significant indigenous rights in the Declaration. Macklem and Kymlicka are aware that the normative argument does not match the legal right and that indigenous peoples of Asia and Africa have self-identified as indigenous to access the rights in the Declaration. And they seek to remedy this by re-directing attention to the historical experience of the settler states.

However, I don’t see the Declaration as directed at the settler states. Nor do I see the need to establish different normative texts to meet the needs of different categories of people. Rather, as I argue below, the Declaration is a global initiative, although different aspects of the Declaration can serve different types of peoples.

2 Mixed-Model Interpretations of the Declaration

2.1 States’ and Kingsbury’s mixed models

As detailed above, at the time of their endorsement of the Declaration, the United States, Canada and New Zealand emphasized the “human rights” in the Declaration while also

---

46 Ibid at 168.
47 Ibid at 300.
48 Ibid at 281.
49 Ibid.
50 Ibid at 301.
characterizing the self-determination framework as new and “aspirational”. However, according to CANZUS states, the aspirations in the Declaration are ultimately to be determined by states within their respective legal system and practices. This approach is not the one-note human rights method of interpreting the Declaration (which was Australia’s method when it endorsed the Declaration). There is no single model underpinning indigenous rights here. Instead the model mixes basic human rights and aspirations with the latter’s content comprised of domestic laws and policies relating to indigenous peoples. Thus, according to this “States’ mixed-model”, indigenous rights will vary from state to state disconnected from any international context and determined according to the discretion of the state. In doing so, this approach disconnects the right to self-determination in the Declaration from the decolonization model, or indeed, the human rights model.

Benedict Kingsbury’s model continues with this mixed notion, some rights in the Declaration are human rights and others aspirational. As we saw in Chapter 2, according to Kingsbury’s “Asian Controversy” article, while initially indigenous rights were strongly connected to the decolonization model – or as he put it “historical continuity with first peoples” – matters shifted with the inclusion of Asian indigenous peoples. Asian indigenous peoples shared Northern indigenous peoples’ concern about “functional matters such as dispossession of land, cultural dislocation, environmental despoliation and experiences with large development projects.” These “establish a unity that is not dependent on the universal presence of historical continuity.”

Therefore, Kingsbury argued, it was best to see indigenous rights in the Declaration as grounded in a wide range of justifications graduating from “relevant”, to “strong” and

---

53 Kingsbury, supra note 28.
54 Ibid at 457.
55 Ibid.
“essential” justifications. Historical continuity with first peoples would not be an essential justification but a relevant one. The essential justifications as we saw in Chapter 2 were: (1) self-identification as a distinct ethnic group; (2) historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; (3) long connection with the region; and (4) the wish to retain a distinct identity.\(^{56}\)

This method was meant to address strong opposition by Asian states to indigenous rights, specifically the historical continuity justification. The response to Asian states would be that this was merely one justification underpinning indigenous rights, but there were many others also applicable, including elements that were germane to Asian indigenous peoples. This approach did not see specific indigenous rights as being sourced in specific justificatory argument. The self-determination framework was not based on historical continuity with first peoples. Rather, all of the indigenous rights in the Declaration – one catch-all category – have their basis in a range of justifications including historical continuity but also the four essential justifications outlined above. As Macklem notes, this leads to conceptual confusion about the basis of indigenous rights. All of the rights may flow from all of these justifications, or some from some – we are not sure which from Kingsbury’s argument.\(^{57}\) Whereas, as we saw in Chapter 1, the self-determination framework in the Declaration is the result of the anti-colonialism arguments (including historical continuity) advanced by advocates of the North.

Kingsbury’s mixed-model also failed to address Asian states concerns with self-determination – if anything, it made matters worse by obfuscating the clear connection North indigenous peoples sought to make between self-determination and the decolonization model. Now all Asian indigenous peoples could claim a right to self-determination, even though they could not advance the decolonization model.

\(^{56}\) *Ibid* at 455.

\(^{57}\) Admittedly my mixed-model does this to some degree. While it separates human rights from the self-determination framework, it admits for example both a human rights and decolonization reading of self-determination. Self-determination in the human rights sense would include say, greater local autonomy for Southern indigenous peoples. However, under Kingsbury’s mixed model there is nothing to stop Southern indigenous peoples claiming stronger forms of self-determination, whereas my model sees this as the right of the North on the basis of the decolonization model.
In a later article on indigenous rights – “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative law” – Kingsbury explores the indigenous rights justifications in more detail.58 The five conceptual structures said to underpin indigenous rights comprise four “established categories” of: human rights; minority rights; self-determination; historic sovereignty and a distinct, “emerging conceptual category of indigenous peoples”.59 Kingsbury surveys the use of these categories in domestic and international indigenous rights advocacy as well as standard-setting in international law.

Historic sovereignty is dismissed by Kingsbury as too radical and impractical.60 Likewise, in his view, self-determination as the realization of an end-state (or the decolonization model).61

“is not viable as an express formulation for a UN Declaration on the Rights of Indigenous Peoples to be adopted by states, nor does it embody the current preoccupations of most internationally active indigenous peoples.

According to Kingsbury, “most of the groups participating in the international indigenous peoples’ movement … expect to continue in an enduring relationship with the state(s) in which they presently live.”62 Thus, self-determination in the Declaration is best seen in relational terms as promoting an enduring relationship between indigenous peoples and state governments. And as Kingsbury notes, the “Declaration provides much of the material from which the concept of self-determination may be reconstructed in relational terms.”63

For Kingsbury, “indigenous peoples” as a distinct category offered the most promise of a program that extended beyond the existing established categories and the Declaration

59 Ibid at 190.
60 Ibid at 237.
61 Ibid at 223.
62 Ibid at 221.
63 Ibid at 226.
embodied such an approach. In his view, the Declaration comprised renovated human rights but also new, extensive aspirations:

While many of the provisions of the [Declaration] apply or restate human rights norms or other principles of international law to reflect particular concerns and experiences of indigenous communities, other provisions depart from this pattern to express specific aspirations and self-understandings of indigenous groups, often couched as “rights.”

Examples of the aspirations include the right not to be subjected to ethnocide and cultural genocide, the right to maintain and strengthen their distinctive spiritual and material relationship with their traditional lands, and the right to autonomy or self-government. Therefore, many of the Declaration provisions are adaptations of human rights, while others are not – and here Kingsbury is essentially speaking about the self-determination framework. However, it is not clear what underlies the aspirations that comprise the distinctive category of indigenous peoples. Unlike the mixed-model proposed by New Zealand, Canada and the United States, Kingsbury does not seek to confine the content of these aspirations to the particularities of the domestic domain. What is clear is that the aspirations are not based on decolonization. In the “Asian Controversy,” historical continuity plays a role as a justificatory basis – though it is mixed up with others. However, in “Reconciling Five Competing Conceptual Structures,” as we have seen, self-determination in the sense of decolonization is rejected as too controversial as a justificatory basis.

64 Ibid at 237.
65 Ibid at 237–238.
66 Ibid (According to Kingsbury, other normative features of this aspirational Indigenous category are: “restitution of traditional lands and territories; historically-grounded and culturally-grounded entitlements and responsibilities with regard to natural resources, religious sites, and spiritual or guardianship relationships with particular land, water, mountains, etc.; entitlements and responsibilities based on treaties or other agreements to which the indigenous people is party; certain constitutional arrangements for participation and political structures for membership and self-government; duties in relation to ancestors and future generations; continuance of certain kinds of economic practices; and perhaps entitlements and responsibilities in relation to traditional knowledge” at 240).
67 Ibid. While Kingsbury includes the right to self-determination in his first category of human rights/general principles of international law, as we will see, in his view self-determination in the Declaration is clearly relational, that is, it is to be exercised within the state. Thus it is like a human right and not a legal right connected with decolonization (ibid at 226).
If the aspirations are not based on the decolonization model, what is their basis? According to Kingsbury, it seems to be a combination of state “legal practice” and the generic notion of “wrongful deprivation, above all, of land, territory, self-government, means of livelihood.” This he describes as “the most powerful argument for a distinctive legal category based on special features of indigenous peoples.” In other words, “The appeal is thus to history and culture.” Therefore, we come back to Kingsbury’s broad ranging four “essential criteria” that he refers to in the “Asian controversy” article. In terms of the Declaration, Kingsbury’s five conceptual categories collapse into two: (1) human rights; and (2) culture and history. Thus Kingsbury’s mixed-model – by basing the aspirations in broad justifications linked to “history and culture” – de-couples the self-determination framework from its decolonization roots resulting in greater emphasis on functional, human rights issues as the basis of all indigenous rights.

2.2 A new mixed-model interpretative approach

Whereas the Northern indigenous movement initiated the UN-based activity that led to the adoption of the UN Declaration on the Rights of Indigenous Peoples, it was the project’s extension to the Southern movement – the Declaration’s globalization – that provided it with significant momentum. While Engle emphasizes the great material cost of this globalization for the North, and Macklem and Kymlicka focus on the normative dissipation of indigenous rights’ raison d’etre, all three argue against a focus on human rights and thus necessarily exclude the Southern movement.

In contrast, I offer an account of the Declaration that seeks fully to reflect - and respect - the impact of both Southern and Northern indigenous peoples. On this account, the political history of the Declaration led it to carry two normative strands. At the same time, mine is not the mixed model advanced by Kingsbury or, say, the United States. These seek to divide the Declaration into two components: basic human rights adapted to

---

68 Ibid at 244.
69 Ibid.
70 Ibid.
the situation of indigenous peoples; and aspirations (the self-determination framework) disconnected from the decolonization model.

Instead, I propose that the Declaration be read as containing two normative themes for different categories of peoples. On the one hand, the Declaration can be read as an instrument for Northern indigenous peoples, it contains human rights but also the self-determination framework which is supported by their decolonization model. On the other, the Declaration can be read as a human rights instrument for Southern indigenous peoples.

The benefit of this model is that it is not a zero sum game for the Northern and Southern movements. Both get what they want from the Declaration. This interpretation of the Declaration enables indigenous peoples of Africa and Asia (as well as Latin America) to access the rights in the Declaration that mean most to them and are grounded in their particular experience. These include the rights to practise and revitalize their cultural traditions and customs (article 11); the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies (article 12); and the right to determine and develop priorities and strategies for exercising their right to development (article 23). And many more – almost all of the 46 articles in the Declaration. This could conceivably include self-determination itself, though in the sense of promoting the right to effective participation in public life and local autonomy.

However, the self-determination framework – the right to self-determination, self-government, historical redress, treaty rights and FPIC – resulted from the decolonization model. Indigenous peoples are first peoples, prior to the current state, and entitled to recognition of their inherent sovereign status. For indigenous peoples of the CANZUS states, this interpretative approach highlights the normative power of the decolonization model and demonstrates that the self-determination framework is in the Declaration to address their specific circumstances. Northern indigenous peoples would of course claim the basic human rights outlined in the Declaration. These are important to them, albeit, their first priority was decolonization and self-determination. Thus, under this mixed-
model, the decolonization model can be applied to counter the trend among states to interpret the Declaration as a human rights model.

This reading of the roots of self-determination diverges sharply from conventional renderings and it has important implications for domestic implementation. According to Anaya, self-determination is ordinarily a human right to be exercised within the confines of the state in various forms from self-government to participation in public life. Anaya rejects the possibility of independence, excepting secession as a last resort due to gross human rights abuses (as provided for in the penultimate paragraph of the Friendly Relations Declaration 1970). My reading of self-determination indicates that indigenous peoples have the option of independence should there be no agreement with the state about their terms of co-existence. The difficulty of course is Article 46’s reference to territorial integrity, inserted due to pressure from the African Group of States. It provides that: “nothing in this Declaration may be interpreted as implying … any right to engage in any activity … which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.”

On the one hand, it could be argued that this last-minute insertion of a reference to territorial integrity in the Declaration should not detract from the longstanding connection that Article 3 has with the UN decolonization programme and that, as I have shown, was kept alive by Northern indigenous peoples. This would account for the CANZUS states’ continual efforts after their endorsement of the Declaration to read down the self-determination framework despite the inclusion of states’ right to territorial integrity. Territorial integrity is not sacrosanct – as is clear by the qualifications imposed by the 1970 Friendly Relations Declaration. On this argument, independence remains an option.

---

71 Anaya, supra note 2 at chapter 3. See also, Hurst Hannum, “Rethinking Self-Determination” (1993) 34:1 Virginia Journal of International Law 1 (Hannum notes the new “post-colonial era” for self-determination “in which international law guarantees to individuals and non-colonial peoples a much broader range of human rights, including meaningful self-determination but excluding a right to independent statehood” at 67).
72 Anaya, supra note 2.
although of course instead of independence the goal of most indigenous advocates was to fundamentally re-adjust indigenous-state relations.

On the other hand, even if external self-determination is not available through Article 3, at the very least it requires that states engage with indigenous peoples on a nation-to-nation basis to negotiate their terms of co-existence. The Declaration’s right to self-determination is still imbued with strong decolonization overtones and the close association between self-determination and anti-colonialism remains and that will help at least to fill out and give meaning to self-determination as applied domestically. If there is no agreement then indigenous peoples can avail themselves of this right to independence under the penultimate paragraph of the 1970 Friendly Relations Declaration. In other words, the 1970 Declaration would confer external self-determination on Northern indigenous peoples if their self-determination as specified in the Declaration is violated. Thus, it is the 1970 Declaration that performs this function not the Declaration.

3 The case for the new mixed-model

Such a mixed-model interpretation of the Declaration might best reflect the political history of its negotiations. It might also offer the best fit with the kinds of rights found in the Declaration. But how, precisely, does that translate into a legal justification for this model? Those who favour a return to the decolonization model could argue that Southern indigenous peoples, particularly Asian and African movements, are not *bona fide* indigenous peoples and entered the negotiations at a later stage attracted to the human rights in the Declaration. On the other hand, it could be argued that the human rights model adequately meets the needs of both the North and South and the decolonization aims are unrealistic and merely symbolic. In response to this, I advance two arguments both of which depend on the nature of indigenous peoples’ participation in negotiations. The first locates the meaning of the Declaration in the “interpretive community” that gave rise to the text, where that community extends to the full range of participants.

74 Although it is not clear in international law that this creates an additional legal category to classic colonialism). See *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Kosovo Opinion), Advisory Opinion* 2010 ICJ Reports 403 at para 79; see also, *Reference re Secession of Quebec*, (1988) 2 SCR 217 at para 135.
whose interaction generated shared understandings. I argue that the “interpretive community” associated with the Declaration negotiations and its implementation shared, and continue to share, a set of assumptions, expectations, and knowledge that support my mixed-model interpretation of the Declaration.

The second focuses on the argument that indigenous participation – and in particular their treatment as equals with states by the UN Working Groups during Declaration negotiations – has bestowed the Declaration with significant political legitimacy and authority. This I argue is true, but once we focus on who participated and what they sought, we can see that what is vested with authority and legitimacy is in fact the mixed-model reading of the Declaration.

3.1 The “interpretive community” associated with the Declaration

In this section, building on an “interpretive communities” theory of treaty interpretation found in international law scholarship, I argue that the “interpretive community” associated with the negotiation and implementation of the Declaration shared and continue to share a set of assumptions, expectations, and knowledge that support my mixed-model interpretation of the Declaration. According to Ian Johnstone, interpretive communities are basically comprised of all those closely associated with the negotiation and implementation of an international treaty. Johnstone refers to a set of concentric circles with an inner group of government officials (diplomatic representatives to UN, for example) involved in the actual negotiation of the treaty; and a second circle of experts engaged in professional activities related to the norms in the treaty including international lawyers, NGOs, and academic critics.75

The idea of interpretive community, which originated as an idea about literary interpretation, sees “interpretive authority as residing in neither reader nor text but in the community of experts and interested participants engaged in the field of practice in which

the interpretive dispute arises.”76 In international law, the interpretive community is an attempt to address particular shortcomings with international law, especially the criticism that all international law is interpreted by states to serve their own interests, and that international law lacks an authoritative, impartial adjudicator of interpretation disputes.77 The concept rejects both: (i) purely subjective readings of a treaty (whether by states or say, civil society); and (ii) a supposedly objective textual approach whereby meaning can be extracted from a text by a reader who employs the correct process. The notion is that this community “through the process of formulating, negotiating, adopting, and applying rules, come to share a set of assumptions, expectations, and a body of consensual knowledge”.78 Thus, “good arguments can be distinguished from bad.”79

The approach is particularly compelling given the collaborative nature of treaty making. The “interpretive community” indicates that no one member of the community can simply offer its view and say that is the only answer for all time. It is the broader community that determines the persuasiveness of any position.80 And states have buy-in to this process because ultimately they prefer to base their decisions in law and not some politically motivated position as this protects their reputation, and self-interest in reciprocity and stability in international law.81

In the context of the Declaration, Johnstone’s theory of treaty communities requires some adaptation. The Declaration is not a treaty, but nonetheless it resulted from a comprehensive exercise in norm creation and is an international rights instrument that is widely considered to possess significant normative force.82 A further important difference in the context of the Declaration negotiations was the “inner circle” of norm

77 Ibid at 380–393.
78 Ibid at 41.
79 Johnstone, “The Power of Interpretive Communities”, supra note 75 at 189.
80 Ibid (“[i]nternational law is an intersubjective enterprise. Interpretation is the search for an intersubjective understanding of the legal norm at issue: the interpretative task is to ascertain what the law means to the parties to a treaty or subjects of the law collectively rather than to any one of them individually” at 192).
81 Ibid at 188.
creators was not confined to government officials as is typically the case with standard setting. Northern indigenous peoples sought to ensure their equal participation in the negotiations as if they were states. Once the change was instituted, Southern indigenous peoples likewise were able to engage in negotiations in this open manner. As a result, the leaders of movements in Johnstone’s second circle made their way into the inner circle and once there participated alongside states as equals. This counters criticisms that interpretive communities can be overly technocratic, comprised of “elite” officials and experts.83 While on the indigenous side there certainly were indigenous and non-indigenous scholars and lawyers involved in negotiating the Declaration, there were also indigenous leaders and community members, NGOs and activists. And that remains the case in the context of implementation of the Declaration.

It is Johnstone’s insights about the shared understandings of the interpretive community that are most useful for the mixed-model advanced in this dissertation. By the time the Declaration was brought before the UN General Assembly there was a widely held view that the Declaration contained two distinct normative models aimed at different movements. And this continues to be the case in the implementation era following the Declaration’s adoption by the UN General Assembly. Those closely associated with the Declaration negotiations appreciated that the self-determination framework was in the Declaration due to Northern advocates emphasis on the decolonization model. This was the shared view despite the increasing prominence of the human rights model. It was also widely understood that the decolonization model was not directed at independence but that this was an option if states and indigenous peoples failed to negotiate their fair terms of co-existence.

Indeed, the mixed-model can be witnessed at the very beginning of the contemporary movement at the 1977 Geneva Conference.84 This was well before the rise of the Asian and African indigenous movements but it was well attended by Latin American indigenous advocates who spoke more of human rights and culture than their North

---

83 Johnstone, “The Power of Interpretive Communities”, supra note 75 at 53.
American counterparts, who emphasized self-determination and decolonization. The model declaration produced at this conference thus referred to two types of indigenous peoples – Article 1 described “Indigenous Nations” as those who:85

“shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental requirements of nationhood, namely,

a. having a permanent population;
b. having a defined territory;
c. having a government; and
d. having the ability to enter into relations with states.”

This definition captured the US indigenous peoples’ experience as “domestic, dependent nations” and their aims of independence. However, it had little meaning for Latin American indigenous peoples who at the time were struggling for recognition of basic human rights. The Declaration thus referred in Article 2 to “Indigenous Groups” who could not meet the requirements of nationhood yet were “subjects of international law” and entitled to the protections of the Declaration provided they had “bonds of language, heritage, tradition, or other common identity.”86

In addition, the mixed-model is reflected in the Working Group on Indigenous Populations Chair’s explanatory comments on the first draft of the Declaration. Erica-Irene Daes noted that Article 3 would “ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live.”87 But she also gave self-determination a human rights reading noting that “[o]rdinarily, it is the right of the citizens of an existing, independent State to share power democratically” or more strongly that gross human rights abuses could result in independence (here, Daes was

86 Ibid at 25.
referencing the 1970 Declaration on Friendly Relations). It could be argued that the dual reading of self-determination seeks to accommodate the competing demands of Northern indigenous peoples and states. However, Daes was clearly aware of the tensions between the North and South and their different objectives. Her mixed reading of self-determination I argue also accounts for these differences.

Of course, as we saw in Chapter 1, the right to self-determination itself has always been the subject of dual interpretations. President Woodrow Wilson saw self-determination in “human rights terms” as supporting “democratic self-government” and “internal self-determination.” On the other hand, Lenin and Soviet political leaders saw self-determination as an anti-colonial project. Later, the issue arose during the negotiations on common article 1 in the International Covenants and the 1970 Declaration on Friendly Relations with the Southern states asserting self-determination in anti-colonial terms and the Northern states arguing that it promoted democracy and political participation.

Focusing on the interpretive community associated with the Declaration negotiations, it is clear that indigenous peoples and states accepted a mixed model. Asian and African indigenous advocates accepted that the “strong self-determination claims” related to the situation of Northern indigenous peoples (as did the anthropology-NGOs, responsible for introducing them). The African Commission Working Group, which lobbied for African indigenous peoples’ participation in the Declaration negotiations, advanced a mixed-model. Generally, Latin American indigenous advocates did not pursue strong forms of self-determination seeing this as the preserve of the North. However, as discussed below, the mixed model is not the main model used by Northern indigenous peoples’ advocates have to date failed to sufficiently emphasize the decolonization model. And this as I argue below is due to the dominant human rights model.

88 Ibid.
90 Ibid.
States involved in the negotiations also accepted these positions. China, India and Bangladesh consistently insisted that self-determination was for the North – as did African states. To an extent, this was a political strategy by states wary of international scrutiny and concerned about local secessionist movements. But it was also because these states saw indigenous peoples and self-determination as suited to the particular historical circumstances of the North. Latin American states saw the Declaration as affirming basic human rights like the ILO Convention 169 and this approach is reflected in local reforms. That no doubt accounts for why all Latin American states have endorsed the Declaration. Their statements at the time of the UN General Assembly adoption of the Declaration make clear that it is the human rights that are of most significance in Latin America.  

The Northern states opposed the local application of the decolonization model. Yet they all understood its connection with the self-determination framework. They had witnessed the shift from a human rights and minority rights model in the early stages of the Declaration negotiations and the emergence of the self-determination framework. These states were consistently exposed to the decolonization model advanced by Northern indigenous advocates. The CANZUS states repeatedly said that self-determination could be read as conferring a unilateral right of self-determination and possible secession. However there was no ever-present threat of secession by indigenous movements – not compared to the threats faced by many Asian and African states. Instead, the Northern states fully appreciated that the inclusion of a right to self-determination in the Declaration would have weighty normative implications domestically. 

At the same time, there was a shared understanding that the Declaration also met the core concerns of Southern indigenous peoples through the human rights set out in the

---

92 See, for example, UNGAOR, 61st Sess, 107th Plen Mtg, UN Doc A/61/PV.107 (2007) at 23 (Statement of the Brazil delivered by Mr. Tarragô) (Latin American states emphasized that self-determination was to be exercised within the state and would not interfere with the sovereignty or political unity of states).


Declaration. Asian and African states continue to oppose local application of indigenous peoples. But that is largely due to the threat posed by minorities with secessionist ambitions. The right to self-determination is seen as too dangerous. However, they ought to be more willing to accept a human rights application of the Declaration. Thus the mixed-model helps to address Asian and Africa objections to local application of the Declaration.

The mixed-model is now applied in practice by indigenous advocates seeking implementation of the Declaration, including Southern indigenous advocates and international institutions. For example, James Anaya in his capacity as the UN Special Rapporteur on Rights of Indigenous Peoples would advance the human rights model in Southern states (for example, his reports on the Democratic Republic of Congo and Asia), and direct his attention at groups commonly accepted by the movement to be indigenous in Asia and Africa (the culturally distinctive and marginalized, Batwa, San, Massai etc). Yet he adjusts his approach and applies both human rights and decolonization-type models when working on Northern states (for example, his New Zealand and Canadian reports).95

3.2 Indigenous Peoples’ effective participation in Declaration negotiations

The idea of treaty communities is not reflected in the law of treaties as such, although it has important affinities with the use of travaux preparatoires (Art. 32) and the relevance of subsequent practice (Art. 31(3)), for example, in the Vienna Convention on the Law of Treaties.96 Principles of treaty interpretation in international law, strictly speaking, attend directly only to the negotiating positions taken by states parties. Moreover, non-binding declarations do not benefit from any established alternative principles of interpretation.

As opposed to the interpretive communities argument made above, it could be argued more traditionally that the advocacy of one model or another by indigenous peoples (and others) during the negotiations is legally relevant because it informed how states understood what ideas had been captured in the Declaration. Such an argument would analogize the interpretation of a non-binding declaration to the interpretation of a treaty – perhaps even bolstered by the view that the declaration elaborates on existing treaty obligations in the ICCPR and elsewhere as applied to indigenous peoples. It would be entirely consistent with principles of treaty interpretation, in which only states’ positions count directly, but those positions can indirectly reflect any number of non-state inputs from lobby groups, experts and affected parties regarding the meaning of the text being negotiated.

Such an argument, however, would be deeply at odds with the legitimacy that derived from the participation, and specifically the recognized status as participants, of indigenous peoples in the drafting of the Declaration. In this section, I offer an alternative to the analogy with treaties, which privileges states. This alternative also differs from the interpretive communities justification, which arguably does not distinguish between participants so long as they take part in the creation of meaning. I advance a political theory justification for the inclusion of both a decolonization and human rights model in the Declaration that is based on the significant legitimacy that the Declaration gained by the prominent role played by indigenous advocates in the drafting process.\(^\text{97}\) Compared to other standard setting processes, the UN Declaration is held up as the exemplar of fair process and in turn this is said to bestow the Declaration with legitimacy and authority.\(^\text{98}\)

Typically, NGOs and interested parties play a marginal role in drafting instruments, with states driving the process – which was the case for example in relation to the negotiations

\(^{97}\) See, Claire Charters, “The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples,” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) at 300; see, Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002) at 17 (Scholars like Iris Marion Young use theories of deliberative democracy to argue for the participation of groups that have traditionally been excluded from international law making, including Indigenous peoples and minorities).

\(^{98}\) Charters, *supra* note 97 at 300.
of the ILO Convention 169. As we saw in Chapter 1, Northern Indigenous peoples argued that as “peoples” they should be treated on par with states. As successively reported by the chairperson of the Working Group on Indigenous Populations, this was achieved -- all indigenous advocates were able to comment on the Declaration’s content and equal weight was accorded to their statements.99 On this basis, as equals with states, Northern indigenous peoples argued that the Declaration ought to contain a right to self-determination. Their participation and normative argument in fact led to the self-determination framework in the Declaration and thus vested it with political legitimacy. Of course, the full story of the making of the Declaration is that Southern indigenous peoples also participated in the negotiations. Initially, it was only the Latin American movement. But increasingly Asian and then African indigenous advocates began to participate and while there was early opposition to their participation, ultimately, they gained a secure footing in negotiations, came to be accepted by Northern indigenous peoples, and in negotiations were also treated on par with states. These Southern indigenous advocates provided argument and an empirical basis to support the inclusion of the basic human rights in the Declaration. And in some respects their argument was more powerful than the human rights arguments made by Northern indigenous peoples. Many of the Latin American, Asian and African indigenous advocates came from countries widely recognized as failed or failing states.100 The issues raised in the South tended to underscore the urgency of the project of adoption of the Declaration by the UN General Assembly. Issues of life and liberty, and the impacts of extractive industry in the South provided a more immediate and perhaps compelling motivation than the Northern-based historical-centric arguments. In relation to Asia in particular, their sheer numbers (most UN estimates are 2 million) provided a compelling case for international action. These southern advocates through their participation and argument vested the human rights in the Declaration with political legitimacy and authority.

99 See, Erica-Irene Daes First Revised text of the Draft Universal Declaration on the Rights of Indigenous Peoples, UNESCO, 1989, UN Doc E/CN.4/Sub.2/1989/33 (Referring to the 1989 draft of the Declaration and noting “The text as it stands now, constitutes a fair balance between the aspirations of indigenous peoples and the legitimate concern of States and, for that reason, seems to be a realistic approach to the issues.”).
The inclusion of the South and the globalization of the movement engendered broad institutional support for the Declaration – there are now three specific bodies directed at indigenous rights in the UN, including the Permanent Forum which ranks high in the UN system as a subsidiary body of the UN Economic and Social Council. Thus it is clear Southern indigenous peoples served an important purpose in generating attention towards the Declaration and ensuring that it was adopted by the UN General Assembly. Thus Southern indigenous peoples not only provided human rights argument, they contributed considerable momentum in the negotiations and lifted the profile of the Declaration thereby advancing the aims of the Northern movement, and vesting the overall project with significant authority.

4 Conclusion

The normatively mixed account of the Declaration is truest to its political history and can also be justified in terms of legality and legitimacy. But it is not the model applied today. In Chapter 5, I focus on how the mixed model ought to be applied in this implementation era. In the South, the mixed model will assist local movements in their struggle for recognition of indigenous rights. The mixed model ought to address Latin American states’ ambivalence towards, and Asia’s and Africa’s outright objection to, indigenous rights while also emphasizing the salience of the human rights model in the Declaration for Southern indigenous peoples.

In the North, the challenge for the mixed model proposed is how to avoid the risk of the decolonization model being subsumed by the human rights model. The human rights model reigns supreme. The mixed model reading offered by Benedict Kingsbury in particular – which sought to accommodate the movements of the North and South but under the generic categories of “history and culture” – has facilitated this process by de-emphasizing the connect between the decolonization model and the self-determination framework. James Anaya and Karen Engle are part of a self-fulfilling prophecy. Anaya’s human rights model has provided the main platform for his work as (former) UN Special Rapporteur on the Rights of Indigenous Peoples. The more Engle convinces that the
Northern indigenous groups caved in to culture, the less likely they are to use the Declaration’s self-determination framework and the decolonization model. However, Engle overstates Northern indigenous advocates’ emphasis on cultural difference by reading the political history too starkly. Anaya seems to favor human rights for its broad appeal and utility.

It is possible for the Declaration to contain competing narratives without one collapsing into the other. Indeed, as Martti Koskenniemi argues in From Apology to Utopia, there is a perennial tension in international law between utopian and apologetic models – one necessarily borrows from the other but neither is ever submerged in the other. The utopian model refers to the ideal of international law – the notion, say, of human rights as supranational – while the apologetic model speaks to the realities of international law – i.e., that international law is simply made by states for states. International lawyers therefore navigate their way between extreme versions of the two poles. To consider this in the context of the Declaration, each of the component parts of the mixed-model contains elements of both utopia and apology. The human rights model is based on state practice and what many states have committed to in human rights treaties while also being utopian insofar as human rights impose limitations on the exercise of sovereignty. The decolonization model likewise, is utopian in the sense that it extends beyond current state practice in the North but is also realist insofar as it involves the negotiation of a social contract after the fact of unjust deprivation of sovereignty. The mixed model is thus both utopian and apologist without being completely one or the other.

A comparison can also be made to the competing interpretative approaches towards constitutions in modern constitutional democracies (eg the American Constitution, or the

---

102 Frederic Megret, “The Apology of Utopia: Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law” (2013) Temp Int'l & Comp LJ at 484 online: <http://www.temple.edu/law/ticlj/fall2013/Megret_TheApologyofUtopia.pdf> (As Megret observes, “human rights adjudication is a constant balancing act-nodding to an eager civil society whilst winking at states that one has understood their concerns … The heart of that form of practical knowledge is that international legal reasoning is never so strong as when it navigates adroitly-typically at roughly equal distance-between the twin traps of apology and utopia.”).
There is much at stake, given the special role constitutions play in defining and limiting the authority and powers of government. On the one hand, we have what is commonly known as the “originalist model.” According to this model, Constitutions establish – at their point of creation and for all time – a framework of broadly stated moral and political commitments by which the various branches of government are to function. Emphasis is placed on the intentions of those who created the constitution, or the original public understandings of the words chosen for inclusion in the constitution.

On the other hand, is the model of “living constitutionalism.” This model sees a constitution as an evolving, living entity that is capable of adapting to changing social circumstances and contemporary moral and political beliefs. Originalists oppose this approach on the basis that it undermines the certainty and neutrality offered by the originalist model. There is the risk that contemporary judges, through their interpretation, will change the constitution to suit their own political inclinations and moral preferences. The point of this example is that there is a continuing contest between the “originalist position” and the “living constitutionalism model,” with neither ever being victorious. However, this is due to persistence of the originalist position, particularly by those concerned about the rising influence of the courts under the living constitutionalism model. As I discuss in Chapter 5 the onus is on indigenous advocates to redirect attention towards the decolonization models.

---

CHAPTER 5: APPLYING THE MIXED-MODEL INTERPRETATIVE APPROACH

1 Introduction

Chapter 4 presented the case for a mixed-model interpretation of the Declaration based on the fact that throughout negotiations two strands of argument were emphasized by two different types of social movements. The mixed-model thus keeps faith with the Declaration’s political history, particularly the diverse and extensive participation of indigenous peoples, while also emphasizing the legitimacy that flows from this participation.

However, as I note in Part 2 of this Chapter, while Southern movements use the human rights model, the Southern states – especially African and Asian – continue to resist local application of indigenous rights given their connection with the self-determination framework in the Declaration. The exception to this is Latin America where the “indigenous category” is long-established and widely accepted by states. However, even these states tend to favor the ILO Convention 169 over the Declaration on the basis it seems that the Convention does not contain the self-determination framework. I argue the mixed-model could benefit the Southern movements, particularly the Asian and African movements, by: (1) removing state concerns with the self-determination framework and fear of secession movements; (2) emphasizing the political legitimacy that these human rights have for Southern indigenous peoples and thus strengthening the obligations owed by Southern states; and (3) hopefully lead to less emphasis on cultural difference by southern movements – there would be less need to use culture to establish common cause with the international movement and to defuse anxiety held by Southern states over minority security and stability issues. The human rights model would draw attention away from culture towards equality as the fundamental basis of their indigenous rights in the Declaration.
In Part 3 of this Chapter, I note that ironically even in the Northern states, indigenous rights reforms track the human rights model. Indeed, many indigenous advocates themselves have resiled from the key demands sought in the early years of the movement and hard-won, as I have argued, in the Declaration. But that does not mean that decolonization has been given up completely by domestic movements. What I call for is clearer positioning of the decolonization model as *the* interpretative model by Northern indigenous advocates domestically and internationally – which generally has not been the case so far. Indigenous advocates need to re-assert the decolonization model to counter-act the current emphasis on the human rights model (or its correlates). I also set out how the decolonization model can make a difference to indigenous advocacy in CANZUS states by considering how greater emphasis on the decolonization model could have influenced the outcome in two case studies. The first concerns aboriginal title litigation in Canada; the second, judicial and political treatment of Maori customary law in New Zealand.

2  The human rights model in Asia, Africa, Latin America

Within the regions of Asia, Africa and Latin America, the indigenous movements apply the human rights model. And they are assisted in this by UN institutions, and international human rights organizations.¹ However, the problem is that Southern states remain wary of the Declaration – especially African and Asian states – given the presence of secessionist movements.

2.1  Asia

In Asia, there have been regular calls by Asian indigenous advocates for the UN Special Rapporteur on Indigenous Rights to carry out country field missions to Asian states but it is not politic for the Rapporteur to do so without a government invitation. Since the

---

¹ The human rights groups that adopted the human rights model and were closely associated with the Declaration negotiations included: Amnesty International, Canadian Friends Service Committee (Quakers), International Service for Human Rights, International Work Group for Indigenous Affairs (IWGIA), Kairos: Canadian Ecumenical Justice Initiatives, Netherlands Centre for Indigenous Peoples (NCIV), and Rights & Democracy.
mandate of the Special Rapporteur was established in 2001, there has been only one
mission to Asia – the Philippines, one of the few Asian countries to recognize indigenous
peoples.\(^2\) In 2013, the (then) Special Rapporteur – James Anaya – participated in a
“consultation” in Malaysia with representatives of indigenous peoples from several Asian
states including Bangladesh, India, Indonesia, Japan, and Malaysia.\(^3\) The report was
careful to avoid shaming specific states and so directed its criticism towards particular
human rights “themes,” including the lack of adequate regulatory protections for
indigenous peoples’ customary rights over land; political participation; socio-economic
conditions; and religious discrimination.\(^4\)

Despite these efforts by the movement to emphasize human rights there continues to be
opposition to indigenous rights. Bangladesh, India, China, and Indonesia remain the
strongest opponents. Their principal concern continues to be the Article 3 right to self-
determination in the Declaration and the self-determination framework. As noted in
Chapter 3, most Asian states voted for the Declaration but also argued there were no
indigenous peoples in their states while also noting the significance of territorial integrity
in the Declaration. As an example of the resistance, in 2010, the UN Permanent Forum on
Indigenous Issues sent a rapporteur to Bangladesh without the government’s invitation to
investigate continuing disputes over land in the Chittagong Hill Tracts. Bangladesh
strongly objected when the Forum’s rapporteur presented his report at the 2011 session,\(^5\)
asserting that while there may be “ethnic minorities” or “tribals” in the Chittagong Hill
Tracts, all citizens of Bangladesh are indigenous peoples.\(^6\) As a result, Bangladesh argued
the Permanent Forum lacked “locus standi” to consider the Chittagong Hill Tracts

---

\(^2\) Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of
Indigenous People, Rodolfo Stavenhagen: Mission to the Philippines, UN Commission on Human Rights,

\(^3\) Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum:
Consultation on the Situation of Indigenous Peoples in Asia, UN Human Rights Council, 24th Sess, Supp
No 41, UN Doc A/HRC/24/41/Add.3 (2013).

\(^4\) Ibid at para 4 (there is a reference to self-determination but this is said to include issues such as identity,
religious discrimination, customary justice and political participation).

\(^5\) Study on the Status of Implementation of the CHT Peace Accord of 1997 Submitted by the UN Special

\(^6\) See Statement by the Bangladesh delegation to the 10th session of the UN Permanent Forum on
situation\textsuperscript{7} and suggested that initiating inquiries such as this could lead to questioning of the Permanent Forum’s tenure\textsuperscript{8} and mandate.\textsuperscript{9}

Several Asian states formally recognize indigenous peoples within their borders. Nepal recognizes indigenous peoples in its constitution, while the Philippines enacted in 1998 the Indigenous Peoples Right Act (IPRA), providing a process for demarcating traditional lands and instituting a right to FPIC. Japan while initially opposed to indigenous rights now accept the Ainu as indigenous peoples.\textsuperscript{10} In Taiwan local tribal peoples are recognized in domestic law as indigenous peoples. However, even these states exhibit ambivalence towards implementing indigenous rights. In Nepal, for example, just who qualifies as indigenous has become a vexed issue given the preferential treatment accorded indigenous peoples and the ethnic tensions and political instability following Nepal’s civil war.\textsuperscript{11} Japan does not recognize the fishing rights of the Ainu and continues to reject the concept of collective rights for the Ainu.\textsuperscript{12} Critics argue the Philippine’s IPRA is not implemented.\textsuperscript{13}

\subsection*{2.2 Latin America}

Latin America does not expressly reject the Declaration or the indigenous peoples’ category in domestic law and policy. Nevertheless, Latin American states tend to favor the ILO Convention 169 over the Declaration – it seems because most of the Latin

\textsuperscript{7} Ibid.
\textsuperscript{8} Ibid (“We believe, this ‘cherry picking’ approach might not be beneficial for the Forum in the long run bearing in mind that we have seen the demise of even higher bodies on allegations of selectivity” at 4).
\textsuperscript{9} Ibid (noting the report was not “related to the mandate of the Forum” at 4).
America states have ratified the Convention and it does not contain the self-determination framework.

Compared to Africa and Asia, there is little threat of self-determination being used by secessionist movements. But Latin American states are concerned about the right to FPIC. Indigenous peoples have lobbied for consultation laws – or initiated their own consultation processes\(^\text{14}\) – and there have been some important reforms. For example, in Peru, and Ecuador – both countries with large numbers of indigenous communities – the governments have each enacted regulations that emphasize the right to free, prior and informed consultation, rather than a right to FPIC.\(^\text{15}\) Indigenous organizations throughout the Americas often insist on a right to FPIC, not merely the right to consultation, and in support point to the right to FPIC in the Declaration. However, many indigenous advocates seem to be content to have a robust framework for consultations given the absence in many cases of any proper form of consultation.

The Inter-American system has developed a body of law that sees indigenous rights as human rights adapted to the indigenous situation. However, rather than seeing the rights as grounded in equality, the Inter-American Court sees them as based on “cultural survival”. The breakthrough decision was Awas Tingni (2001), where the Inter-American Court recognized that the human right to property in Article 21 of the American Convention included indigenous peoples’ collective forms of land tenure.\(^\text{16}\) Equality was

\(^{14}\) In Guatemala, for example, in response to mining proposals by corporates and the absence of any official consultation process or efforts at engagement by mining companies, indigenous communities have organized their own consultas populares – or local referenda – to decide on whether mining should proceed in their area, see, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Observations on the Situation of the Rights of the Indigenous People of Guatemala with Relation to the Extraction Projects, and other Types of Projects, in their Traditional Territories, UN Human Rights Council, 18th Sess, Supp No 35, UN Doc A/HRC/18/35/Add.3 (2011) at 1; See also, Amnesty International “Guatemala: Mining in Guatemala: Rights at Risk”, AMR 34/002/2014 (2014).


\(^{16}\) Case of the Mayagna (Sumo) Awas Tingni Indigenous Community v Nicaragua (2001), Inter-Am Ct HR (Ser C), No 79.
key to the decision.\textsuperscript{17} The Awas Tingni community’s indigenous tenure was deserving of the same equal protection as non-indigenous tenures. But the human right to culture was also used quite independently as a rational for recognition of the right to land. As the Court put it:

- The close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities relations to the land are not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

This jurisprudence has been subjected to criticism given its essentialization of indigenous peoples.\textsuperscript{18} It is only the most culturally distinctive indigenous peoples that can lay claim to these rights.\textsuperscript{19} The difficulty lies in basing indigenous rights in culture and not the human right to equality, which lies at the heart of the human rights model.

### 2.3 Africa

Likewise, in Africa the local indigenous movement and supporters continue to assert the human rights model. During his tenure as UN Special Rapporteur, James Anaya carried

\textsuperscript{17} S. James Anaya, “Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend” (2005) 16 Colo J Intl Envtl L & Pol'y 237 (“The interpretive method that resulted in the outcome in Awas Tingni arises within a human rights frame of analysis, rather than one that sees indigenous peoples' rights as based fundamentally on a continuity of historical sovereignty.”).


\textsuperscript{19} The constraining effect of the human rights model is clear from the Inter-American Court’s treatment of the Saramaka claim to natural resources and gold within its territory, see, \textit{Saramaka People v. Suriname} (2007), Inter-Am Ct HR (Ser C), No. 172 (A right to timber was permitted because it was seen as “essential for the survival of their way of life,” but not gold as this was not traditionally used by the Saramaka people. The human rights model also leads to the notion that all “cultural communities” in Latin America are indigenous peoples. With the cultural survival of indigenous peoples as the basis of indigenous rights recognition, the Inter-American Court of Human Rights has been able to extend indigenous rights to similarly situated “cultural communities,” like the Afro-Carribean peoples of Suriname. Indeed, the \textit{Saramaka} decision of the Court was about the rights of an Afro-Carribean Maroon “tribal people”, not an indigenous people. The Saramaka people did not self-identify as an indigenous people. And the Court did not see them as indigenous.)
out visits to the Democratic Republic of Congo,\textsuperscript{20} and Botswana\textsuperscript{21} in 2011, and Namibia in 2013.\textsuperscript{22} His reports followed the cue of the African movements in framing local indigenous identities within the human rights model but with a particular emphasis on the human right to culture. For example, in his report on Namibia, indigenous peoples are characterized as “culturally distinct peoples”\textsuperscript{23} who are “disadvantaged relative to other groups in the country.”\textsuperscript{24} The report focuses on human rights including rights to lands, exclusion from decision-making processes, health and education.\textsuperscript{25}

However, despite the emphasis on human rights, African states remain wary of the Declaration and indigenous peoples’ rights. There have been very few reforms in the name of indigenous rights. The Republic of the Congo endorsed the Declaration in 2007 and has adopted an Indigenous Rights Law – the first of its kind on the African continent – that specifically targets the disadvantaged conditions of indigenous peoples, and promotes their collective and individual rights.\textsuperscript{26} This includes rights to lands and resources as well as consultation regarding measures that affect indigenous lands or resources. However, this is the exception to the rule.

There have been efforts by NGOs and indigenous advocates to have the courts adopt and apply the human rights model with some successes. For example, the African Commission on Human and Peoples’ Rights decision in Endorois recognized the land rights of the Endorois indigenous people of Kenya who were forcibly evicted from their

\begin{flushleft}
\textsuperscript{23} Ibid at 4.
\textsuperscript{24} Ibid at 1.
\textsuperscript{25} Ibid.
\textsuperscript{26} Act No. 5-2011: On the Promotion and Protection of the Rights of Indigenous Peoples (Republic of Congo).
\end{flushleft}
lands around Lake Bogoria. The Commission accepted that the human right to property extended to traditional lands but like the Inter-American jurisprudence (which Endorois draws on liberally) based the right in culture. Yet Kenya continues to reject local application of indigenous rights, characterizing the rights in the Endorois decision as tribal rights. As noted in Chapter 2, in Botswana, Survival International led a human rights campaign to keep the San on their ancestral lands in the Central Kalahari Game Reserve including judicial proceedings that ruled the San had aboriginal title to much of the Kalahari. However, Botswana has failed to implement the decision.

2.4 The Merit of the Mixed-Model in the South

The ambivalence, or outright rejection, of indigenous rights in Asia and Africa is due largely to concern about the connection between indigenous rights and the self-determination framework. There are security concerns raised by self-determination. In Latin America, states are concerned about the implications of FPIC and the Inter-American indigenous rights jurisprudence is fixated with culture. The mixed-model could therefore benefit the Southern movements by removing this cause for concern while also emphasizing that the human rights in the Declaration owe much to their participation in Declaration negotiations thus underscoring the political legitimacy these rights have for the South. A direct focus on human rights would also reduce Southern indigenous peoples’ emphasis on cultural difference.

3 Decolonization model in the North/CANZUS states

---

27 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Application No 276/03, African Commission on Humans and Peoples’ Rights, 25th November 2009 ["Endorois"].

28 Ibid (Referring to jurisprudence on indigenous rights in Latin America created by the Inter-American Court of Human Rights, the Endorois decision notes there is a common thread running through all attempts to define indigenous peoples – that is, “indigenous peoples have an unambiguous relationship to a distinct territory” … “the linkages between people, their land, and culture” at para 154).

In the CANZUS states, the dominant model is not strictly speaking a human rights model. However, the resulting reforms over the course of the last forty years, in effect, correlate with those proposed by this model. That is, most prominent reforms have included processes on consultation and recognition of culture, existing land rights and economic development. The focus then, is on recognition of present issues and needs. There are few instances of policies and laws aimed at rectification for loss of sovereignty and territory.

Kirsty Gover has argued that the CANZUS concerns with the Declaration can best be explained by considering their unique approach to addressing indigenous rights claims.\(^{30}\) She notes while reforms may be complemented – and in some cases prompted – by legal mechanisms, many of them are deals struck outside of the formal “rights based” legal process via quasi-political negotiations between the executive branches of states and indigenous peoples. Examples of this “ politicization” of indigenous rights include contemporary historical settlements in New Zealand and the contemporary treaty-making process in Canada. This special relationship between indigenous peoples and the State/Crown flows from their historical dealings and is given expression in terms of “trust” or “fiduciary” duties in the United States, or the “honour of the Crown” in Canada and New Zealand. As she puts it:\(^{31}\)

CANZUS states may be reluctant to accede to some expressions of indigenous ‘rights’ in international law, even when domestic agreements give effect to norms that are consistent with such rights, because of the possibility that these could disrupt or undermine local bargains, allow non-discrimination principles to be used to challenge settled claims, empower settler judiciaries to enforce or refer to those rights at the expense of domestic executive prerogatives and obligations, and in so doing, perhaps bring the discursive processes of bargaining to a premature close. These reforms, especially the settlements, put standard liberal premises (including those associated with the rule of law: non-discrimination, equality, universality, certainty and transparency) under


\(^{31}\) Ibid at 347.
increasing strain. Introducing a indigenous rights/human rights framework in terms of the Declaration threatens to undo these political compacts.

Thus the CANZUS states are caught in a bind between meeting their commitment to the liberal promise of equality while also seeking to further the legitimacy of the state through the vesting of self-government and property rights in historical communities. By shifting the debate out of a rights-based regime into a political regime the state has sought to shield indigenous rights from rights-based challenges. The Declaration threatens to import a human rights analyses that can undo all of the work done to give effect to collective-historical rights.

There is no doubt that many of the recent reforms have been struck in the political domain and considerable gains have been made. But I would not see this as being an attempt to shield contemporary state-indigenous agreements from human rights. Instead it reflects a longstanding method of tribal-Crown relations. In New Zealand, for example, Maori interests are largely dealt with through executive power. To some extent this makes sense for Maori tribes in that rather than legal or human rights their claims are based on a longstanding historical, political relationship. However, the problem is that Maori remain a minority that struggles to exert influence in the political process. The relationship between Maori and the Crown is often couched in terms of the Treaty of Waitangi and a relationship of “partnership.” However, this belies the reality of the inequality in bargaining power for Maori.

At the same time, human rights have always been a part of this dynamic. It is not as if the Declaration introduces human rights talk for the first time. Challenges to statutory

32 Ibid at 346.
settlements can be made through human rights codes in New Zealand and Australia. And in fact few cases have been brought to challenge indigenous rights reforms.\textsuperscript{36} In New Zealand, the government is required to evaluate all draft legislation for compliance with the New Zealand Bill of Rights Act 1990, and in relation to all treaty settlement legislation has ruled that the settlements do not violate the right to non-discrimination.\textsuperscript{37}

In contrast to Gover, I think the overriding concern for the CANZUS states is the power of the self-determination framework and the decolonization model. This is the primary reason why the CANZUS states opposed the Declaration in the UN General Assembly and continue to characterize the right to self-determination as aspirational even though the Declaration contains a reference to territorial integrity. Gover notes that CANZUS states’ objected to self-determination in the Declaration but she does not note the connection between the decolonization model and the self-determination framework.

The Declaration has made indigenous rights an international issue and it is clear that domestic legal practice falls well short of the self-determination framework. Gover, in fact, tends to overstate the types of reforms adopted by CANZUS states. She assumes, for example, that contemporary land and self-government agreements in Canada are reparative in nature when in fact, as I note below, these agreements are a response to existing aboriginal rights.\textsuperscript{38} She accepts “the substantive scope of tribal jurisdiction is much narrower in New Zealand and Australia than in North America” but argues “recognised institutions and land entitlements permit \textit{de facto} forms of self-governance that can be significant.”\textsuperscript{39} By \textit{de facto} self-government, Gover is referring to the notion that aboriginal land rights may give rise to aboriginal governmental rights in the

\textsuperscript{36} Compare, for exceptions, \textit{Gerhardt v Brown} [1985] HCA 11, 159 CLR 70; and \textit{Bullock v Department of Corrections}, [2008] NZHRRT 4.


\textsuperscript{38} Gover, \textit{supra} note 30 (noting “In fact, land claims settlements in the CANZUS states include distributive as well as reparative aspects, designed to repair and bolster tribal economies as well as to restore wrongfully acquired property” at 371).

\textsuperscript{39} \textit{Ibid} at 357.
management of those lands.\textsuperscript{40} In theory this makes sense, although in practice aboriginal rights are governed more by state regulation than indigenous rule.\textsuperscript{41} In New Zealand, there have been innovations in treaty settlements aimed at co-management of resources and the devolution of government services.\textsuperscript{42} Although it remains to be seen, as noted below, to what extent this will deliver political autonomy.

Moreover, both New Zealand and Australia were strongly opposed to forms of political autonomy in the Declaration negotiations and this is reflected in a longstanding opposition to indigenous self-government in domestic law and policy.\textsuperscript{43} Indigenous rights to self-government are recognized in Canada and the US however. Yet as we will see below, indigenous peoples in these states object to the limited nature of these rights. Throughout the Declaration negotiations, CANZUS states sought to weaken the self-determination framework and insist on a reference to territorial integrity.\textsuperscript{44}

\begin{enumerate}
\item \textsuperscript{40} Ibid ("Even where indigenous self-government is not expressly supported as such in domestic law and policy, the recognition of collective property rights by necessity entails a degree of ‘de facto’ self-governance because the collective must decide on the intra-group allocation of rights among members of the group and determine rules for the governance of transfer, succession and conservation of ‘inter se’ property rights" at 369).
\item \textsuperscript{41} See, for example, \textit{Foreshore and Seabed Act 2004} (NZ), 2004/93; see also, \textit{Native Title Act 1993} (Cth).
\item \textsuperscript{42} See, for example, \textit{Tūhoe Claims Settlement Act 2014} (NZ), 2014/50.
\item \textsuperscript{43} See, Jenny Macklin, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (Speech delivered at the Australian Parliament, Canberra, 3 April 2009) online: \url{http://www.converge.org.nz/pma/AustDecl0409.pdf} (As Minister Macklin said when Australia endorsed the Declaration in 2009, “Australia’s position in relation to self-determination is that it recognizes the right to participate in public life, self-management and “the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully.”); See also, Austl, Commonwealth, Department of the Attorney-General, \textit{Public Sector Guidance Sheets: Right to Self-Determination} online: \url{https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttosenfodetermination.aspx} (Under the heading, What is the scope of the right to self-determination?, the Guidance Sheet notes: “[t]he Australian Government believes that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to impact on them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs. Aboriginal and Torres Strait Islander peoples also have the right to preserve their group identity and culture … Self-determination is widely understood to be exercised in a manner that preserves the territorial integrity, political unity and sovereignty of a country.”); In New Zealand’s case, see “New Zealand Statement under Item 5” (31 July – 4 August 1989) doCip Doc. 200284_1 (on file with author) (“The right to autonomy in matters relating to their own internal and local affairs … presupposes a system of Indigenous reserves or separate areas. There is an implication or presumption of segregation which New Zealand finds unhealthy” at 200284_8).
\item \textsuperscript{44} See, for example, Robert Hagen, USUN Press Release, “Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007” (2007) online: \url{http://www.fns.bc.ca/info/UNDeclaration/Stmnts%20Made%20by%20States%20Before%20and%20After}
It is the prospect of meaningful autonomy and territorial rights that is of most concern to CANZUS states and the use of international law to advance these rights. Ultimately this calls for a process of rectification. None of these countries have made the requisite steps to restore self-government and return territory. Thus, rather than a concern for the rights-talk that could be generated by the Declaration, CANZUS states are more concerned about the large gap between what Northern indigenous peoples are entitled to under international law (the self-determination framework based on anti-colonialism) and what they have obtained through four decades of state reforms (the human rights model and its correlates).

Indeed, the decolonization model has important implications for the application of human rights to indigenous governance in CANZUS. If the self-determination framework is cast as a set of human rights then it means self-determination is more amenable to human rights qualifications because it operates on the same moral plane. And this is the reason why indigenous peoples seek to except their historical collective rights from human rights. Maori objected to the Treaty of Waitangi being incorporated into the New Zealand Bill of Rights Act 1990.\textsuperscript{45} This was not only due to the potential denigration of the Treaty of Waitangi but also skepticism about human rights. This is evident also in the Canadian Charter of Rights and Freedoms whereby section 25 of the Charter shields the protected aboriginal and treaty rights in section 35 of the Constitution Act, 1982 from Charter rights. If, as I argue, the self-determination framework is based in decolonization (not human rights) then that indicates self-determination will be more resistant to human rights challenges.

\textbf{3.1 Australia}

In Australia, the most important contemporary breakthrough for aboriginal peoples was the 1992 High Court decision of \textit{Mabo v. Queensland (No. 2)} (\textit{“Mabo (No 2)”}), which

\textsuperscript{45} Palmer, \textit{supra} note 35.
determined that following annexation of the country by the British Crown aboriginal peoples’ pre-existing land rights continued to exist under the introduced common law. \(^{46}\) \textit{Mabo (No.2)} heralded the rejection of the notion that Australia was \textit{terra nullius} – land owned by no one – on the basis of aboriginal peoples’ supposed backward character. However, native title relates to only existing property rights that have “survived” colonization and settlement. If this title has been “extinguished” – for example, by simple grant of freehold title by the state – or has “expired” due to the effects of European settlement, then the title does not exist and compensation to indigenous peoples whose rights have been extinguished is extremely difficult to obtain. \(^{47}\)

Efforts to obtain recognition of native title have proven so difficult that Justice Callinan – described by aboriginal scholars Marcia Langton and Lisa Palmer as one of the most conservative members of the Australian High Court \(^{48}\) – observed that: \(^{49}\)

\begin{quote}
It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law.
\end{quote}

Australia has never had a national policy directed at historical rectification relating to self-determination and territories. The \textit{Mabo (No.2)} decision was not directed at rectification and the historical and ongoing injustices experienced by Australian aboriginal peoples provided only a distant backdrop to the decision. In Australia, statutory land agreements have resulted in the return of large tracts of land to aboriginal peoples. The Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) in the Northern Territory – the state with the largest Aboriginal population – has resulted in approximately half the Northern Territory being held by aboriginal peoples under a

\(^{46}\) \textit{Mabo v Queensland (No 2)}, [1992] 175 CLR 1. \\
\(^{47}\) \textit{Ibid} at para 68. \\
\(^{49}\) \textit{Western Australia v Ward}, (2002) 213 CLR 1 at para 398 – 399 per Callinan J.
collective form of freehold title. This was an act of reparation for historical taking of the land. Other similar statutory settlements have followed in all other states. Under this legislation about 15% of Australia’s land mass has been returned to aboriginal peoples. But there are winners and losers. Not all aboriginal peoples are covered by these agreements and they vary in terms of their rationale, aims and specific rights. In some cases rather than reparations the agreements are seeking to grant rights to land already occupied by aboriginal peoples such as “reserves” (Anangu Pitjantjatjara Yankunytjatjarra Land Rights Act 1981). Other agreements allow any aboriginal community – whether they have an ancestral connection to the land or not – to apply for areas of land (for example, Aboriginal Land Rights Act 1983, s 3 (New South Wales). In all cases, the agreements relate to “Crown land”, that is, land now owned by the state. Land in private ownership cannot be claimed. In addition, the statutory agreements are directed at land rights not at the recognition of aboriginal political institutions. Aboriginal rights have not been conceptualised in a more holistic way.

The prospect of native title interests in lands has also resulted in negotiated agreements. These agreements may provide for recognition of land rights, compensation for impacts of projects or access to land, benefit sharing with resource companies, and consultation protocol. However, they are motivated by the notion of lands being subject to existing native title rights.

Australia has never recognized a right of self-government for aboriginal peoples. Subsequent to Mabo (No.2), the Australian courts have been adamant that aboriginal peoples lost the power to make cognizable laws after the assertion of British sovereignty. Aboriginal scholars have argued that this defies logic. As Langton and Palmer note:

---

50 See, Austl, Commonwealth, National Native Title Tribunal, Annual Report 2011-2012 (As at 30 June 2012, there were 646 registered Indigenous Land Use Agreements, covering about 1,398,127 km² (or approximately 18.1%) of Australia’s land mass.).
52 See, Members of the Yorta Yorta Aboriginal Community v Victoria, (2002) HCA 58 (“[r]ights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order

201
Aboriginal people have continued to argue that not only customary property rights in land but also ancient jurisdictions survive, on the grounds that, just as British sovereignty did not wipe away Aboriginal title, neither did it wipe away Aboriginal jurisdiction. Aboriginal governance under the full body of Aboriginal customary laws, by the same logic as that that led to the recognition of native title at common law, must, even if in some qualified way, have survived the annexation of Australia by the Crown.

Instead, governments have established a series of aboriginal representative structures charged with providing government with advice in relation to aboriginal policy. The Aboriginal and Torres Strait Islander Commission (ATSIC) established in 1990 provided services to aboriginal peoples and delivered some of the government’s indigenous programs and services. But its goal was to “promote indigenous self-management and self-sufficiency.” In any event, it was dismantled by the Howard liberal-led government in 1995. A new national representative body – National Congress of Australia’s First Peoples – was established in 2010 to formulate policy and act as an advocate for indigenous rights. Membership of Congress is open to Aboriginal and Torres Strait Islander individuals and organisations but it has struggled to engender support from aboriginal communities.
The end of the Howard government in 2008 and start of a new left-leaning Labour government resulted in a series of positive reforms aimed at “re-setting the relationship,” including the Australian Federal Parliament’s apology to Australia’s indigenous peoples on 13 February 2008 for “the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss” on Aboriginal and Torres Strait Islanders. However, rather than address calls for restoration of aboriginal self-government or historical rectification, the crux of current government aboriginal policy is aimed at reducing the significant disadvantages faced by Aboriginal peoples in socio-economic areas such as health and education (called the “Closing the Gap” policy).

Aboriginal activists of the 1970s emphasize the lack of progress made on their original goals. Gary Foley, reflecting in 2012 on the Aboriginal tent embassy, noted: “Whilst politicians and bureaucrats in Canberra would prefer that people focus on more timid and gentle distractions such as ‘reconciliation’, ersatz land rights in the form of native title, and a completely meaningless and empty Prime Ministerial ‘apology,’ the Aboriginal Embassy remains on the lawns of Parliament as a reminder of the truth.” The “truth” for Foley was the “basic values of self-determination, land rights and political independence” that for him “continue to this day to be at the heart of Aboriginal-white relations in Australia.”

There are currently calls for amendments to the Australian Constitution to repeal measures that enable the Government to enact laws that discriminate on the basis of race,

56 Macklin, supra note 43.
58 See, Council of Australian Governments, “Closing the Gap in Indigenous Disadvantage” online: <https://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage> (Created in 2008 through an agreement of the Council of Australian Governments (COAG), the Closing the Gap campaign aims to reduce indigenous disadvantage across seven identified “platforms”: early childhood, schooling, health, economic participation, healthy home, safe communities, and governance and leadership.).
60 Ibid at 40.
and recognize aboriginal peoples as the first peoples of Australia. An expert panel established by the government to consult with Aboriginal peoples about the proposed reforms reported that many aboriginal peoples sought recognition of “aboriginal sovereignty.”61 However, any amendment to the Constitution requires a nation-wide referendum and the expert panel noted “any proposal relating to constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians, and likely to jeopardize broad public support for the Panel’s recommendations.”62 Instead the Panel favored language that expressly prohibits racial discrimination while allowing special measures for aboriginal peoples.63

3.2 Canada

In Canada, reform has focused on land rights, consultation and social benefits. Major issues remain in relation to poverty, discrimination, housing and education.64 However, indigenous scholars and leaders lament the lack of reforms relating to rectification for the loss of aboriginal sovereignty and territories.65 The 1996 Report of the Royal Commission on Aboriginal Peoples called for a comprehensive rectification process under the framework of nation-to-nation treaty negotiations. A new treaty process would “lead the way to reconciliation between Aboriginal and non-Aboriginal people over the next 20

61 Expert Panel on Constitutional Recognition of Indigenous Australians, “Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution” (January 2012) at 97 online: http://www.recognise.org.au/wpcontent/uploads/shared/uploads/assets/3446_FaHCSIA_ICR_report_text_B ookmarked_PDF_12_Jan_v4.pdf (“At almost every consultation, Aboriginal and Torres Strait Islander participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished.”).
62 Ibid, at 213 (The Panel held the same views in relation to recognition of a Treaty: “any proposal for a form of constitutional backing for a treaty or other negotiated agreements with Aboriginal and Torres Strait Islander peoples would be likely to confuse many Australians, and hence could jeopardise broad public support for the Panel’s other recommendations” at 201).
63 Ibid at 231.
65 Douglas Sanderson, “Redressing the Right Wrong: The Argument from Corrective Justice” (2012) 62:1 UTLJ 93 (Sanderson argues the single greatest wrong committed against Canadian Indigenous peoples has been the historical and ongoing suppression of institutions in Indigenous communities. However, Canada has focused on recognition of land rights, not restoration of aboriginal self-government.).
years.” These treaties would deal with self-government and the re-distribution of the land and resources required to make self-government viable. The Commission observed:

Negotiation is the best and most appropriate way to address these issues, and land claims policies should be replaced by treaty processes, primarily under the auspices of regional treaty commissions, with Aboriginal Lands and Treaties Tribunals performing supplementary functions.

However, the Commission’s recommendations have not been taken up by Canada. Many of the reforms that have taken place are directed at addressing claims to existing aboriginal rights to land. The decision of Calder v. Attorney-General of British Columbia – like Mabo (No.2) – recognized aboriginal rights survived sovereignty at least until the rights were legally extinguished. Ever since, Canada has grappled with the prospect of much of the North West Territories, Nunavut, the Yukon and British Columbia being subject to existing aboriginal rights because there were few historical treaties extinguishing aboriginal rights negotiated in these regions.

In British Columbia, the British Columbia Treaty Commission (BCTC) was established to address existing aboriginal rights in lands through the negotiation of “comprehensive land agreements” or “modern treaties”, which extinguish existing aboriginal rights, replacing them with specific rights contained in the treaties. The Nisga’a Treaty, for example, included a cash settlement of $190 million, the creation of the Nisga’a Lisims Government, ownership of 2000 square km of land, together with entitlement to fish stocks and wildlife harvests. But the Nisga’a had to give up all aboriginal title interests. The BCTC process has been criticized for this in particular. As Taiaiake Alfred notes:

---

66 Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship (Ottawa, Canada: Supply and Services, 1996).
67 Ibid at 430.
69 Nisga’a Final Agreement Act, SC 2000; See also, the Tsawwassen First Nation Final Agreement Act, SC 2008 and the Maa-nulth First Nations Final Agreement Act, SC 2009; See, BC Treaty Commission, Negotiation Updates online: <http://www.bctreaty.net/files/updates.php>.
The BCTC process is not about negotiating treaties, which would in fact represent the start of a new relationship between the First Nations and the newcomers to this land. The process is all about assimilation and control; it uses base manipulation of our people’s poverty and weakness in an attempt to terminate their freedom and achieve a final degree of control over the futures of Indigenous peoples.

In addition to the BCTC process, there is a “comprehensive claims process” led by the Federal Government that aims to address aboriginal rights in provinces outside of British Columbia. Like the BCTC process, Indian tribes – through direct negotiations – “cede” aboriginal rights in “Comprehensive Land Claims Agreements” in exchange for other benefits. Since 1973, across Canada twenty-six comprehensive land claims agreements have been concluded and are in effect. These cover approximately 40% of Canada’s land mass and affect 95 indigenous communities. Almost all of these agreements are in the remote northern areas of Canada (the North West Territories, Nunavut, the Yukon).71

There may be elements of reparation in the agreements but in the main they are a response to existing aboriginal rights in areas of Canada that are abundant in natural resources, their legal extinguishment, and the creation of new legal rights in “modern treaties”. The agreements create certainty for government and private enterprise about the nature and scope of indigenous rights. Arguably, rather than providing a means of reparations for historical wrongs, these treaties in fact create new injustices by extinguishing aboriginal title.

The Canadian government has committed to recognizing aboriginal peoples’ self-government. Recognition of the inherent right of aboriginal peoples to self-government

71 See, Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, online: <http://www.gov.nu.ca/sites/default/files/files/013%20-%20Nunavut-Land-Claims-Agreement-English.pdf> (The Nunavut Land Claims Agreement relates to a major portion of Northern Canada, and most of the Canadian Arctic Archipelago. It is one of the most remote, sparsely settled regions in the world, with a population of 31,906, mostly Inuit, spread over land area the size of Western Europe. They are comprehensive agreements in the sense that they recognize a broad range of rights.).
has been official government policy since 1995.\textsuperscript{72} These are reached through “self-government agreements.” The self-government policy could be viewed as reparative in nature – the reference to self-government as an inherent right indicates that it pre-dates Canadian sovereignty and has its source in aboriginal law. But the policy says little about the need to recognize self-government in order to address past injustices. Rather the emphasis lies more with the benefits of control over their lives and economic benefits. Moreover, practically all self-government agreements form part of comprehensive land claim agreements. Of the 20 self-government agreements reached to date, 17 are attached to a comprehensive land claim agreement.\textsuperscript{73} In other words, the self-government rights are more readily realized in those cases where aboriginal land rights continue to exist. The vast majority of Indian communities, however, exercise self-government under the Indian Act which offers very limited powers. As Canadian Cree scholar, Douglas Sanderson, notes, “Because of the Indian Act, Indigenous communities lack meaningful powers of taxation and so have no fiscal capacity to set and pursue ends without asking for Federal money – that means no meaningful choices in education, in health and child care, in policing and housing, and virtually no choice as to the economic, social, or environmental world around them.”\textsuperscript{74}

Canada has a process for addressing Aboriginal claims of non-compliance by the Canadian state with historical treaties. The “Specific Claims Process” includes a “treaty lands entitlement mechanism,” a procedure for settling land debt owed to First Nations who did not receive all of the land to which they were entitled under historic treaties. However, there is no means to pursue issues of consent, coercion and adequacy of consideration relating to these treaties or any other injustice related to treaty making.


\textsuperscript{74} Sanderson, \textit{supra} note 65 at 119.
3.3 United States

Self-government and historical redress remain core issues of concern for indigenous peoples in the United States. As noted in the UN Special Rapporteur on Rights of Indigenous Peoples report on the United States: “new measures are needed to advance reconciliation with indigenous peoples and to provide redress for persistent deep-seated problems.”\(^75\) This included: \(^76\)

[initiatives to address outstanding claims of treaty violations or non-consensual takings of traditional lands to which indigenous peoples retain cultural or economic attachment, and to restore or secure indigenous peoples’ capacities to maintain connections with places and sites of cultural or religious significance, in accordance with the United States international human rights commitments.

The Rapporteur also noted concerns about self-government and “limited powers of tribal regulatory authority especially in relation to non-indigenous persons.”\(^77\) As noted above, First Nation tribes in the United States possess a measure of sovereignty after being characterized in the early years of settlement as “domestic, dependent, nations.”\(^78\) As a result, many tribes, particularly the larger nations such as the Navajo, have their own tribal legislatures and courts. However, Congress retains a “plenary power” to make laws that override Indian jurisdiction and it has significantly curtailed this jurisdiction.\(^79\)

In addition, it is clear that the United States resists the call for rectification of historical injustices relating to self-determination and territories. Instead, the United States sees the “redress” measures in the Declaration as directed primarily at providing indigenous

---


\(^{76}\) Ibid at para 90.

\(^{77}\) Ibid at para 52.

\(^{78}\) Cherokee Nation v Georgia, 30 US 1 (1831).

peoples with access to a legal remedy through the courts. The announcement of United States support for the Declaration noted that “the United States has a well-developed court system that provides a means of redress for many wrongs suffered by U.S. citizens, residents and others—including federally recognized tribes and indigenous individuals and groups.”

There was acceptance that in “appropriate circumstances” the United States Congress might provide redress. However, “The United States will interpret the redress provisions of the Declaration to be consistent with the existing system for legal redress in the United States.”

When the United States voted against the Declaration, it argued that the rectification measures were prospective and would not apply to wrongs committed prior to the General Assembly’s adoption of the Declaration. The United States did in fact establish a rectification process in 1946 – called the Indian Claims Commission – although this has been vilified by many indigenous leaders and scholars. In particular the Commission could only offer monetary compensation. The Commission had no mandate to restore land to the tribes. And many indigenous peoples struggled to have claims considered by the Commission.

### 3.4 New Zealand

Compared to Canada and Australia, there is comparatively little activity in New Zealand related to common law aboriginal rights. This is due to the fact that most customary title was extinguished quickly either by direct purchase by the Crown or confiscation.

---


81 Ibid.


83 See, Attorney-General v Ngati Apa, [2003] NZCA 117, 3 NZLR 643 (Ngati Apa recognized the possibility of the New Zealand foreshore and seabed being subject to Māori customary title. This being one of the few areas potentially subject to customary title.); Compare, Claire Charters & Andrew Erueti, eds, Maori Property in the Foreshore and Seabed: The Last Frontier (Wellington, New Zealand: Victoria University Press, 2008)(The New Zealand government prevented the development of case law by enacting legislation that set out the types of rights that could be claimed in the foreshore).
following conflict or conversion into freehold titles by the Maori Land Court. However, New Zealand remains the only country amongst the CANZUS states to adopt a comprehensive historical rectification process. Since the late 1980s New Zealand has engaged with Maori in addressing historical grievances under the mantle of the Treaty of Waitangi. Essential to this was the establishment of the Waitangi Tribunal in 1975, a commission of inquiry charged with investigating Crown actions that breached the “principles of the Treaty.” In 1985, its mandate was extended to inquire into violations dating back to the signing of the Treaty in 1840. Reports issued by the Waitangi Tribunal contain non-binding recommendations to the government which form the basis of direct negotiations between the tribal claimants and the government regarding redress in the form of settlements (sanctioned by statute). Redress normally takes the form of an apology; commercial redress; and cultural redress. The economic redress has had a profound impact on the Maori economy, estimated in 2013 to be worth $42 billion and growing by 1 billion each year.

The Crown has settled claims across the country relating to deep sea commercial and traditional fisheries; unjust land acquisitions; Maori interests in forestry; and aquaculture. Ngai Tahu is the largest private land owner in the South Island. Ngai Tahu and Waikato-Tainui received $170 million in reparations in 1993 but the value of their assets is now over $1 billion.

---

85 *Treaty of Waitangi Act 1975* (NZ), 1975/114, s 6(1).
86 Ibid.
Treaty settlements are novel and groundbreaking\(^{94}\) and clearly a response to the decolonization type arguments raised by Maori tribal leaders and young Maori activists.\(^{95}\) However, treaty settlements are directed at providing economic and cultural but not political redress. There is no recognition of the type of indigenous governance powers exercised in the US or Canada. Rather, New Zealand policy is directed at “self-management” – as we saw in the statements made by New Zealand in the Working Group on the Draft Declaration.\(^{96}\) This policy is based on the notion that sovereignty was clearly ceded by Maori to the British Crown. Recently, this view of the Treaty of Waitangi has been called into question. The Waitangi Tribunal has asserted that when the Treaty was signed Maori understood that it granted the Crown the power to govern British settlers and the right of Maori to govern their own.\(^ {97}\)

However, increasingly treaty settlements have provided for means of co-governance of particular resources of significance to tribes. And in the Tuhoe settlement, as we will see, there is potential for the delivery of social services to be devolved to tribes.

4 Redirecting towards the Decolonization Model in the North

Part of the problem with domestic advocacy in CANZUS is that many indigenous advocates no longer have political power as their main agenda. They have resiled from their original sovereignty-based positions. There is no longer the degree of emphasis there once was on the restoration of indigenous historical-political institutions and

---

\(^{94}\) NZ, “Waitangi Tribunal: The Petroleum Report (Wai 796)” May 2003 (However, it is not without its problems. Tribal claimants have objected to the inequality in bargaining power in negotiations and the take or leave it approach to what is on the negotiation table. Rights to water, precious minerals on Maori tribal lands or royalties resulting from their extraction cannot be included in settlements.); Craig Coxhead, “Where are the Negotiations in the Direct Negotiations of Treaty Settlements” (2002) 10 Waikato L Rev 13. (No private land can form part of a settlement. Given much of New Zealand is either in private ownership, most treaty settlements are comprised of monetary compensation.).

\(^{95}\) Sharp, supra note 87 at 77–103 (There was support too from non-Maori activists and church groups. This activism was directed at Maori prior-sovereignty, commitments made in the Treaty of Waitangi of 1840 – in particular the guarantee of tino rangatiratanga (authority; chieftainship or sovereignty) over lands, villages and taonga (treasures) to Maori.).


traditional lands and resources. Indeed, the international indigenous advocates always represented the more “radical element” in domestic advocacy. As noted in Chapter 1, the Treaty Council has its origins in the occupation at the Pine Ridge Sioux reservation and the American Indian Movement. The more conservative federally-recognized tribes rarely participated in the international movement.

The lack of uptake on stronger forms of self-determination results from a sense of futility when calls for reforms fail to deliver substantive change and many indigenous advocates are simply locked into the day-to-day struggle of dealing with land claims and access to basic rights to health, education and livelihood. Yet, self-determination and political autonomy remain important to Northern indigenous peoples. For example, in Australia, there remains a strong call for a Treaty between aboriginal peoples and the state and sovereignty is clearly a high priority for aboriginal leaders. A survey conducted by the National Congress of Australia’s First Peoples in July 2011 – the national representative body for aboriginal peoples – reveals health, education and sovereignty as the three most important policy areas for Congress members. Eighty eight per cent of members identified constitutional recognition as a top priority.

And many indigenous advocates are simply not familiar with the story of the Declaration and the role of Northern indigenous advocates in securing the self-determination framework. They do not appreciate that the self-determination framework is a response to the particular decolonization type justifications that apply in their backyard. Advocates who arrive at the Declaration for the first time will simply assume it is to be read and applied in accordance with the human rights models.

101 Ibid at 6.
This is evident, I argue, from the case studies in the next section in relation to Canada and New Zealand. Both cases raised issues of self-determination and although references were made to the Declaration, with some exceptions advocates did not apply the decolonization model. In this section, I argue that Northern indigenous peoples need to reassert the connection between the self-determination framework and the decolonization model in local indigenous rights advocacy projects. Now that the Declaration has been adopted by the CANZUS states, there is an opportunity to reinforce these fundamental goals. Bringing the Declaration “back home” to the CANZUS states provides the means to revisit the motivations and arguments that initiated the international movement. The decolonization model applies in two ways. First at a meta-level it requires fundamental reform. States must engage with indigenous peoples about their terms of co-existence. Secondly, before this process is complete, the decolonization model imbues the right to self-determination with normative weight for the purpose of smaller-scale reforms, for example, in domestic litigation about the content of indigenous rights.

The first case study demonstrates how the decolonization and self-determination framework can influence judicial reasoning in a case concerning judicial recognition of aboriginal title in Canada. The second uses the decolonization model to highlight the consequences of the failure by the New Zealand state to recognize Maori rights to self-government. Maori seek recognition of their tribal customary law in the courts, but the courts set off on a search for reified, ancient traditions and values – which are deemed incapable of receiving legal recognition due to their divergence from the dominant legal system.

4.1 Proving Aboriginal Title in Canada

In Canada, the Supreme Court has recognized aboriginal rights to engage in specific activities like hunting and fishing but not aboriginal title to exclusive use and occupation of land until the recent decision of Tsilhqot’ in Nation v. British Columbia, 2014 SCC 44. The rules for recognition of aboriginal title were originally set out in the

\[102 R v Van der Peet, [1996] 2 SCR 507.\]
Supreme Court decision of *Delgamuukw v. British Columbia*, *(Delgamuukw)*. This decision recognized the possibility of aboriginal title. However, due to errors of fact made by the trial judge, the Supreme Court did not make an aboriginal title declaration but referred the case back to trial where ultimately the claimants settled their claims by negotiating the Nisga’a Treaty. The Supreme Court in *Delgamuukw* saw aboriginal title as arising out of aboriginal peoples’ *exclusive occupation* of the land prior to the assertion of sovereignty. According to Lamer CJ, aboriginal title is aimed at “the reconciliation of the *prior occupation* of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory.” The Supreme Court made no mention of *prior aboriginal sovereignty* and how this might provide an independent justificatory basis for aboriginal title.

The question of what factual circumstances amount to exclusive occupation, however, has been highly contentious. In *Delgamuukw*, the state had argued that the standard of occupation must be that set by the common law which implied the need for evidence of regular and intensive use of the lands. On the other hand, the aboriginal claimants argued aboriginal title must be established with reference to aboriginal patterns of land holdings. The motivation for this argument was that aboriginal land tenure systems at sovereignty did not always strictly conform to the types of occupation and use that would ordinarily qualify as occupation under the common law. In response, Lamer CJ decided that both common law and aboriginal “perspectives” – ie, aboriginal law or systems of law – must be taken into account when determining occupation and exclusivity. As a result, through this “dual approach,” aboriginal law is used to avoid ethnocentric application of the common law.

---

103 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
104 *Nisga’a Final Agreement Act*, supra note 69; See also, *Tsawwassen First Nation Final Agreement Act*, supra note 69; see also, *Maa-nulth First Nations Final Agreement Act*, supra note 69.
105 *Delgamuukw v British Columbia*, supra note 103 at para 81 [emphasis added].
106 *Ibid* at paras 146–147.
107 *Ibid*.
108 *Ibid* at 147-148. The Aboriginal perspective could be gleaned in part, but not exclusively, from Aboriginal systems of law (including a land tenure system or laws governing land use).
Proving aboriginal title has been particularly controversial in relation to aboriginal peoples who were hunter-gatherer peoples at sovereignty. The *Marshall; Bernard*\(^{109}\) decision, decided shortly after *Delgamuukw*, concerned two separate appeals from criminal convictions for the logging of timber on state lands without authorization in the adjacent provinces of Nova Scotia and New Brunswick. In each case, the defendants were Mi’kmaq Indians who claimed a logging right on the specific tracts of lands for commercial purposes pursuant to aboriginal title. In the *Marshall* case, the trial evidence showed that at sovereignty the Mi’kmaq were “moderately nomadic” peoples who did not have permanent settlements and “moved with the seasons and circumstances to follow their resources.”\(^{110}\) Nonetheless, the trial judge found that the Mi’kmaq were familiar with their territory and considered all of Nova Scotia to be their territory. In the *Bernard* case, the trial evidence disclosed a similar nomadic existence and connection with territory for Mi’kmaq residing within New Brunswick. The central issues were whether the Mi’kmaq had satisfied the *Delgamuukw* tests of exclusive occupation. The trial courts in each case concluded that exclusive occupation required proof of intensive, regular use of the specific cutting sites and that this had not been established in evidence. This has been described by commentators as a “postage stamp” approach to proof of aboriginal title.\(^{111}\)

On appeal, both the Nova Scotia and New Brunswick Courts of Appeal ruled that these standards were too strict and that there was no need for the appellants to prove regular use of the cutting sites to establish aboriginal title. They applied what has been described as a “territorial approach” to proof of aboriginal title. In *Marshall*, the Appellate Court Cromwell JA noted:\(^{112}\)

> The question … is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established. Insistence on proof of acts of

---


\(^{110}\) Ibid at para 86.


occupation of the specific cutting sites within that territory is, in my opinion, not consistent with either the common law or the aboriginal perspective on occupation.

The Appellate Court in Bernard similarly regarded the aboriginal title claim of the Mi’kmaq as a claim to territory rather than as a claim to specific sites. It was only necessary to show that the Mi’kmaq had occupied an area near the cutting site, since “[t]his proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi’kmaq.”¹¹³

On appeal, in Marshall; Bernard, the Supreme Court said there was no evidence to support a finding of aboriginal title. According to McLachlin CJ, the “Court’s task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.”¹¹⁴ If the claim related to aboriginal title – conferring a right to exclusive use and occupation of land – then it was essential that the pre-sovereignty practice demonstrate some correlation with that right.¹¹⁵ This did not require “absolute congruity” provided “the practices engage the core idea of the modern right.”¹¹⁶ The aboriginal perspective, according to McLachlin CJ, would assist the Court in its assessment of the true nature of the pre-sovereignty right or practice. In relation to exclusivity, McLachlin CJ did not expressly refer to aboriginal perspectives and law. She said there was no need to produce evidence of overt acts of exclusion, but that there was a need to show “effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so.”¹¹⁷ Based on these propositions, McLachlin CJ concluded that both trial decisions had correctly ruled that

¹¹⁶ Ibid at para 96.
¹¹⁷ Ibid at para 65.
“[i]n each case, they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.”  

McLachlin CJ’s reasoning was heavily criticized for its approach to proof. According to Kent McNeil, instead of adopting the “dual approach” towards determining occupation, the Chief Justice focused on the common law approach to occupation, ignoring the aboriginal perspective based on aboriginal law:

[F]or Aboriginal title to be established, it appears to be McLachlin CJ’s view that Aboriginal practices in relation to land have to amount to the kind of exclusive occupation that would ground title at common law. While she stressed the importance of Aboriginal perspectives in evaluating Aboriginal practices, the Chief Justice did not explicitly consider Aboriginal law in her analysis.

As a result, McLachlin CJ adopted the “postage stamp” approach of the trial court judge; exclusive occupation required proof of intensive, regular use of the cutting sites and this had not been established in evidence.

The issue came before McLachlin CJ again in the decision of Tsilhqot’in Nation v. British Columbia, which involved a claim brought by the Tsilhqot’in Nation, a semi-nomadic grouping of six bands, in Northern British Columbia, to aboriginal title of a 1550 square km section of their traditional territory. Legal counsel for British Columbia had argued – citing Kent McNeil’s criticisms – that the Supreme Court in in R. v. Marshall; R. v. Bernard had rejected a territorial approach to title and applied a postage stamp approach that was inconsistent with the dual approach in Delgamuukw. In Tsilhqot’in Nation v. British Columbia, McLachlin CJ was at pains to stress that she had always applied a dual perspective to the question of occupation and exclusivity. As she

118 Ibid at para 72.
119 McNeil, supra note 111.
notes: “In fact, this Court in Marshall; Bernard did not reject a territorial approach, but held only that there must be ‘proof of sufficiently regular and exclusive use’ of the land in question, a requirement established in Delgamuukw.”122 In her view, the Tsilhqot’in Nation had established evidence of “sufficiently regular and exclusive use” of the land in question and was entitled to a declaration of aboriginal title.123

What are the implications of the decolonization model for this case? The decolonization model would first of all highlight how the law of aboriginal title downplays aboriginal sovereignty. Aboriginal title is not based on aboriginal law and sovereignty but on prior occupation. Aboriginal law is adopted as a tool to ensure that the common law tests of occupation are modified to accommodate different perspectives. It would also draw attention to the fact that aboriginal title is not just a proprietary right, it contains jurisdictional elements. There has to be some law-making function to determine how rights are regulated in relation to aboriginal title, and the obvious answer is aboriginal law.124 Indeed the decolonization model would also emphasize that aboriginal sovereignty – not just aboriginal law relating to administration of land – continued post assertion of Crown sovereignty over Canada, absent any extinguishment or treaty. This would provide greater support for the territorial approach than the notion of the continued existence of aboriginal law relating to land only. In addition, it would indicate another basis for asserting territorial rights – based on their own laws and the doctrine of continuity, rather than on the basis of common law aboriginal title.125

At the same time, apart from highlighting these shortcomings relating to the proof of aboriginal title in Canada, the decolonization model has much potential for thinking about the future implications of the Supreme Court’s decision in Tsilhqot’in in terms of self-determination. As noted above, the judicial recognition of aboriginal title indicates

122 Ibid at para 43.
123 Ibid at para 66.
124 McNeil, supra note 111 at 293 (“Unlike fee simple lands, Aboriginal title lands are vested in communities that have laws pre-dating Crown sovereignty. Such communities have the legal personality necessary for them to have real property rights that are defined and protected externally by the common law, but that are governed internally by continuing Aboriginal law.”).
125 For argument based on this alternative basis to aboriginal title, see Mark D Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and under the Constitution Act, 1982” (1999) 44:3 McGill LJ 711.
that there must be a body of law to regulate the use and interests held under the title. The
decolonization model indicates that this law has to be aboriginal law. Aboriginal title thus
provides space for the development of aboriginal law making institutions.

Legal counsel for the Tsilhqot’in did not rely on international human rights law, let alone
the Declaration and the self-determination framework. However, interveners in the
litigation did. Amnesty International argued the court’s reasoning on aboriginal title had
to be consistent with international human rights law, particularly the Declaration. The
Amnesty submission cited the right to self-determination in the Declaration, although it
clearly applied a human rights model. Citing Anaya, the Declaration is said to be
“grounded in fundamental human rights principles such as non-discrimination, self-
determination and cultural integrity.” The only other reference by interveners to self-
determination in the Declaration was offered by the Assembly of First Nations. This
alone called for consideration of aboriginal title in the context of the decolonization
model:

The promise of the law of Aboriginal title is the recognition of First Nations,
both at the time of the assertion of sovereignty and in the present, as legal,
political and cultural nations with a right to self-determination. These
indigenous legal orders occupied, used and treated the land as their own. The
modern conception of Aboriginal title must not be diluted by concerns about
the impact today of recognizing the historical realities of First Nations and their
interactions with the Crown. There are many and varied ways that
reconciliation can be accomplished. But it must start with recognition and
respect for the rights of First Nations as distinct and sovereign peoples who
occupied their land and territories, in accordance with their own laws.

at para 12, online http://www.scc-csc.ca/WebDocuments-
DocumentsWeb/34986/FM085_Interveners_Amnesty-International-et-al.pdf
127 Tsilhqot’in Nation v British Columbia, (2014) SCC 44, Factum of the Intervener Assembly of First
Nations at para 3, online: <http://www.scc-csc.ca/WebDocuments-
DocumentsWeb/34986/FM130_Intervener_Amnesty-of-First-Nations.pdf>.

219
4.2 Takamore v Clarke – Tuhoe burial rights

The Takamore v Clarke\(^{128}\) decision resulted from a dispute about who had the final say on the burial of Mr James Takamore’s body (Takamore). Takamore was a member by descent of Ngāi Tūhoe, a relatively remote tribe in the rural, east coast of the North Island of New Zealand. It is an area heavily populated by members of the Ngāi Tuhoe iwi. Takamore died in 2007 in his 50s after spending 20 years of his adult life away from his Ngāi Tūhoe community, living in the South Island city of Christchurch with his non-Maori partner, Ms Denise Clarke, and their two children. The day after Takamore’s death, his mother and siblings (Taneatua family) arrived in Christchurch. There was a disagreement about the place of burial. The Taneatua family wanted him in Ngāi Tūhoe, Clarke wanted to bury him in Christchurch. The following day the Taneatua family took Takamore to Ngāi Tūhoe country without Clarke’s prior consent. Clarke obtained an interim injunction to restrain the burial, but Takamore was being buried by the time Police came to the urupa (burial ground).

After the burial, Clarke brought an action in the High Court. The case was cast as a conflict between two legal rules under the New Zealand common law (there being no statute to determine the matter). On the one hand, Clarke argued that under the common law as Takamore’s executor she should determine where he ought to be buried.\(^{129}\) The Taneatua family argued that if the deceased is Ngāi Tūhoe, Tuhoe custom law had priority which meant that the decision as to where to bury Takamore lay with the whanau pani (the wider bereaved family).\(^{130}\) The views of the wife and children (who participate as members of the whanau pani) are taken into account but there is a strong preference, based on the importance of whakapapa (genealogy), for the deceased to return to his/her iwi and hapu (sub-tribe) to be buried with those linked to the deceased by whakapapa.\(^{131}\) This decision could override the views of the deceased – it automatically applied to the deceased by virtue of his/her whakapapa links to Ngāi Tūhoe -- although the views of the

\(^{129}\) Clarke v Takamore, [2010] 2 NZLR 525 (NZHC).
\(^{130}\) Ibid.
\(^{131}\) Ibid.
deceased would ordinarily be taken into account by the whanau pani. While this was Ngāi Tūhoe custom, Takamore’s family argued that it could be recognized by the common law provided that it met the common law tests of recognition, that is, that it existed in fact; be long-standing; reasonable; and not supplanted by statute.

Ultimately, the New Zealand Supreme Court decided in favour of Clarke. However the path to this result demonstrated the fragility of claims grounded in Maori custom law. The High Court judge Fogarty J rejected the application of Tuhoe custom on the basis that it was “unreasonable” and thus the common law could not accommodate it. According to the judge, Takamore had rejected his Ngāi Tūhoe cultural heritage. He had called himself a “South island Maori”; had not spoken Maori to his children or expected them to speak Maori; and had only returned to Taneatua with his family twice. For Fogarty J, the imposition of the collective will of Ngāi Tūhoe custom was incompatible with the common law’s general presumption of individual freedom and autonomy. “The collective will of the Tuhoe” could not be imposed upon his executor and over his body unless he made it clear during his lifetime that he lived in accord with Tuhoe tikanga.

The Court of Appeal disagreed with Fogarty J’s emphasis on Takamore’s individual autonomy. “Given that most Maori custom is based on the collective and duty to the collective, rather than on individual rights”, such an approach “would have the effect of negating Maori custom in most cases”. The Court was also more sensitive to the issue of urbanization of Maori and the notion of tribal members like Takamore retaining their identity and connection despite not living in their homeland. However, like the High Court, the Court of Appeal also found the Ngāi Tūhoe burial custom to be

---

132 Ibid.
133 Takamore v Clarke, supra note 129 at para 13.
134 Clarke v Takamore, supra note 129.
135 Ibid at para 88.
136 Ibid at para 15.
137 Ibid at para 188.
138 Ibid at para 88.
140 Ibid at paras 156–158.
unreasonable.\textsuperscript{141} Evidence at trial from two independent Māori experts on Ngāi Tūhoe burial custom indicated, if there was disagreement about burial, the body could be taken by one party without the consent of the other party.\textsuperscript{142} According to the Court of Appeal, this was “incompatible with the fundamental proposition in our law of ‘right not might’.”\textsuperscript{143} That meant the common law rule prevailed – the executor had final say, although she had to take custom into account when making a decision.\textsuperscript{144}

However, the Court went on to outline further problems with implementing Ngāi Tūhoe custom. There were difficulties with the lack of certainty and finality as “the custom does not allow for a clear allocation of legal rights to the body. Rather it provides a \textit{process} for debate and negotiation.”\textsuperscript{145} If compromise and negotiation failed who would make a determination?\textsuperscript{146} The Court also raised the appropriateness of extending Ngāi Tūhoe custom to Clarke, who was not a member of Ngāi Tūhoe and had no wish to be subject to their custom.\textsuperscript{147}

The Supreme Court majority took a different approach altogether. It did not see the issue as a conflict between Ngāi Tūhoe custom and a common law rule. Instead, it ignored custom law altogether and determined that there was a common law rule under which the executor has the exclusive right to determine burial.\textsuperscript{148} In considering how to exercise those rights, the majority saw Māori burial customs as being a “relevant consideration” to be weighed among other factors.\textsuperscript{149} As a result, Denise Clarke had the right to disinter Takamore and have his body re-buried in Christchurch.

\textsuperscript{141} \textit{Ibid.}
\textsuperscript{142} \textit{Ibid} at para 12.
\textsuperscript{143} \textit{Ibid} at para 165.
\textsuperscript{144} \textit{Ibid.}
\textsuperscript{145} \textit{Ibid} at para 167.
\textsuperscript{146} \textit{Ibid.}
\textsuperscript{147} \textit{Ibid} at para 15.
\textsuperscript{148} \textit{Takamore v. Clarke, supra} note 128.
\textsuperscript{149} \textit{Ibid} (But see the decision of Elias CJ, who did not see this as a conflict of laws case. In her view, there was no common law rule that dictated the executor had the final say and nor was there a definitive rule in Tuhoe custom. Rather, in cases of dispute the courts were required to weigh up competing considerations and make a decision.).
What role for the decolonization model in this case? In all three of the *Takamore* decisions, Maori customary law is downplayed and not taken seriously as law. And this in fact reflects the political reality that customary law has never been recognized by the state. The decolonization model draws attention to the political-historical context of the decision and to the need to give proper weight to Tuhoe’s assertion of political authority. That context is essential to understanding how the decision arose and the approach of the Courts. It also explains why customary law is so important to Tuhoe.

As noted in chapter 1, historically, in New Zealand, there were signs that Maori self-government could be accepted. According to the English version of the Treaty of Waitangi (signed in 1840), Maori ceded “sovereignty” to the Crown. However, under the Maori version tribes retained “tino rangatiratanga” (chieftainship) over their lands, which indicated that they retained their political independence. The New Zealand Constitution Act 1852, for example, allowed for “Māori districts” where the “laws, customs and usages” of Maori could be maintained for “the government of themselves.” In New Zealand, once the demographics shifted in favor of the settler population, the policy was, so far as was possible, to assimilate those Maori capable of becoming citizens of the new state.

As for Ngāi Tūhoe, the tribe remained in full control of their customary lands until 1865 when the settler-government confiscated much of their most productive land. More land was lost due to pressure from the settler government. For example, in 1875 the government induced Ngāi Tūhoe to sell a large area of land by threatening to confiscate their interests if they did not sell. Nevertheless, Ngāi Tūhoe continued to seek recognition of their political autonomy and territories. In 1896, the New Zealand Parliament enacted the Urewera District Native Reserve Act which provided for local self-government over a 656,000 acre reserve, and for decisions concerning land use to be made collectively and in accordance with Māori custom. However, the government failed to implement the self-government provisions of the Act. In 1954, the government established Te Urewera National Park which included most of Tuhoe’s remaining traditional lands including the reserve. The government did not consult Tuhoe about this, nor did it recognise Tūhoe as
having any special interest in the park or its management. With a diminished land base, many Tūhoe left the land. Today around 85% of Tuhoe members live outside their traditional homelands.\textsuperscript{150}

Despite this history, or because of it, Ngāi Tūhoe has a well-known reputation for asserting cultural difference and seeking self-determination. Tuhoe is considered to have suffered some of the worst injustices during colonization and settlement. Tūhoe never signed the Treaty of Waitangi,\textsuperscript{151} and claim that they never ceded sovereignty to the Crown.\textsuperscript{152} Several of New Zealand’s most well-known Maori activists are Tuhoe.\textsuperscript{153}

This history provides the context to the \textit{Takamore} decisions. It highlights the reality that, in New Zealand, tribes do not exercise jurisdiction. There is always potential for customary law to be recognized by the courts, though because the statutory law is so comprehensive and pervasive there is little room for customary laws to be asserted within the legal system.\textsuperscript{154} When a question of customary law arises in the courts, it usually relates to some area of custom law that is not expressly governed by the general law because it has been overlooked, as was the case in the \textit{Takamore} litigation.\textsuperscript{155}

\footnotesize

\begin{itemize}
  \item NZ, “Waitangi Tribunal: Te Uruwera Pre-Publication Part 1 (Wai 894)” April 2009 at 127.
  \item \textit{Ibid} at 129.
  \item This includes Tame Iti. Tame Iti was a member of the Nga Tamatoa, a major Māori protest group of the 1970s, that organised the historic 1975 Land March, led by Dame Whina Cooper, from the top of New Zealand’s North Island to Parliament in Wellington. Iti has taken part in a number of land occupations, and called for self-determination for Tuhoe. In 2012, Iti, along with 17 other activists, was arrested in a series of raids across Tuhoe carried out under the Terrorism Suppression Act and Firearms Act. The New Zealand government alleged that several radicals were plotting to commit acts of terror against the state. Iti and several others were convicted on firearms charges but other charges under the Terrorism statute were dropped. The police gave a formal apology for the raid but it has left a deep wound in Tuhoe territory.
  \item For example, if Maori appeal to customary law as a form of defence in cases of criminal prosecution, the courts simply assert that there is no scope for customary law because the matter is exhaustively determined by statute. See, \textit{R v Mason}, [2012] NZHC 1361, [2012] 2 NZLR 695 at para 28 and 37 (The High Court rejected an argument that the defendant be tried for a criminal offence under Maori customary law not the Crimes Act 1991. The court ruled once a statute had conferred jurisdiction on a Court to hear and determine a criminal case, it was impermissible for any other institution or tribunal to attempt to replicate those powers. Given the effect of the Crimes Act was to extinguish the customary system.).
  \item See, for example, \textit{Attorney-General v Ngati Apa}, \textit{supra} note 83 (customary property in the foreshore); \textit{McRitchie v Taranaki Fish and Game Council}, [1999] 2 NZLR 139 (NZCA) (traditional fishing rights); \textit{Public Trustee v Loasby}, (1908) 27 NZLR 801 (NZSC) (tangihanga (Maori funeral)).
\end{itemize}
if customary law does arise in the general legal system it is often because a statute expressly refers to a customary concept.\footnote{See, for example, \textit{Resource Management Act 1991} (NZ), 1991/69 (which requires local councils to consider the Treaty and customary concepts, like “kaitiakitanga” (Maori stewardship), when making a decision that may affect local iwi.).}

Whenever customary law does arise in the courts, there is a scramble to gather evidence about the content of the customary law. There is of course a set of customary rules and practices and a belief system. But no codification of custom, little shared knowledge of the content of many customary laws, and no clearly defined decision-making process. In the absence of this, customary law is often presented in reified terms by both Maori and the Courts as ancient law grounded in long-standing fundamental values.

This is how the courts in the \textit{Takamore} decisions, view customary law – as rooted in a prior, backward, ancient past. According to the High Court, Takamore had left the tribal world and stepped into the modern world where his rights as an individual would be protected against the imposition of Tuhoe will. For the Court of Appeal, based on the evidence given by only two Maori experts, Tuhoe custom on burial equates to “might is right.” Further, there is no decision-making process, and no final arbiter, i.e. a functioning Tuhoe legal system. Instead, “ancient values” are debated amongst Maori communities.\footnote{See, for example, NZ, “Law Commission Māori Custom and Values in New Zealand Law (NZLC SP9)” March 2001 at 28 (The values based approach to customary law is very popular in New Zealand and represents something of a default position in the absence of clearly defined customary laws. If there is no customary law, the argument goes, then one can be fashioned from the fundamental values. However, it is out of step with contemporary thinking about cultural groups and customary law. As we saw in the Introduction, this closed conception of culture has been rejected in favour of an understanding of cultural groups as in constant process of change and adaptation. The values based view of customary law simply perpetuates a reified conception of customary law.).} As a result, it would be problematic to apply customary law to another ethnic group who have a fundamentally different value system. The Supreme Court simply avoided considering custom law as a legal basis for determining burial rights and relegated custom to a factor to considered by an executor.

The emphasis on tradition and custom law results from the absence of tribal political authority. This lacuna requires that tribes and the courts conduct a search for ancient,
historical custom laws that prove incapable of legal recognition because of their
normative divergence from the “law.” The decolonization model and self-determination
framework would support a call for reform by the state to recognize and support Ngāi
Tuhoe’s political institutions and their customary laws so that there is a functioning legal
system capable of being recognized and applied to Maori and possibly non-Maori.

Indeed reforms are afoot in Tuhoe as parallel to the Takamore litigation the tribe was
engaged with negotiations over its treaty settlement. The settlement contains the usual
formula of Crown apology, commercial ($170 million) and cultural redress. But it
contains two innovations. First, an aspect of the settlement that is not in the final statutory
settlement is the “Social Services Management Plan” (SMP).158 This is an agreement
negotiated between the ministries responsible for housing, health and education and
social welfare. The aim is to improve the delivery of these social services to Ngāi Tūhoe
with a focus on those living within the Ngāi Tūhoe rohe. As the agreement notes, it is “a
plan for the transformation of the social circumstances of the people of Ngāi Tūhoe.” It is
expected that under the SMP, decisions over housing, health and education and social
welfare will be devolved to Tuhoe. The Minister responsible for the Ngāi Tūhoe deal,
Treaty of Waitangi Negotiations Minister Chris Finlayson has ruled out any idea that the
settlement could lead to self-governance. It's not about creating a new “mini state” he’s
assured the media.159 However, Ngai Tuhoe leader Tamati Kruger has spoken about its
real potential to give Ngai Tuhoe mana motuhake.160

The second innovation is the co-governance of Te Urewera National Park. This
represents a recent shift in government policy in recognizing co-governance for specific
resources of significance to tribes. The settlement provides that Te Urewera will no
longer be a national park. Under Te Urewera Act 2014, Te Urewera is vested with legal
personality so that it “has all the rights, powers, duties, and liabilities of a legal

158 Tūhoe and Te Uru Taumatu and the Crown: Whāriki /
159 “Tuhoe eye long-term Autonomy” Radio New Zealand (12 September 2012) online:
160 “Feature Guest – Tamati Kruger” Radio New Zealand (25 June 2013) online:
A Board is established to act for Te Urewera and to govern it. In the first three years (establishment period) the Board will consist of four Tūhoe and four Crown appointees. Following the establishment period, the membership of Te Urewera Board adjusts automatically to six Tūhoe members and three Crown members. Ultimately it is expected that the government will leave the board and it will be controlled by Ngāi Tūhoe.

These reforms are a step in the right direction. They indicate that ultimately what is required is a more open and good faith discussion between government and tribes about legal recognition of iwi political authority (either through legislative reform or negotiated Treaty settlements).

5 Conclusion

The Declaration is an embodiment of the political movements of both the North and South. Indigenous peoples of the South can appeal to the human rights in the Declaration because – as they continually asserted in the Declaration negotiations – these rights address their specific needs and reflect their particular historical and contemporary experience. The mixed-model also benefits the Southern movement by addressing Southern states’ security concerns with self-determination while emphasizing the political legitimacy of the human rights model for the South. For the North, the decolonization model illustrates the continuing gap between local reforms and the self-determination framework in the Declaration. But what is needed is greater emphasis on the decolonization model.

161 Te Urewera Act 2014 (NZ), 2014/51, s 11.
162 Ibid, s 17.
CHAPTER 6
CONCLUSION

In a sort of stock-taking at the local level, a 2016 symposium on international indigenous rights highlights the limitations of the Declaration for the development of domestic law and policy on indigenous rights. While the Declaration has received much attention and while international, universalized propositions on the rights of indigenous peoples may present important ideals, the symposium’s editor, Dwight Newman, notes:¹

… the reality remains that the implementation of Indigenous rights must take place in particular circumstances in particular states … the pragmatic futures of Indigenous communities and individuals may well depend on more detailed, particularistic determinations within domestic legal systems, wrestling with different interests, working through economic consequences of different positions for all the communities within the state, and trying to find ways of implementing Indigenous rights successfully rather than just theoretically.

Dealing respectively with themes of aboriginal land rights,² impact benefit agreements between indigenous peoples and extractive industry,³ and relocation of aboriginal communities in rural Australia,⁴ the contributors discuss the importance of domestic agreement-making between indigenous peoples and the state. The Declaration may provide “important ideals” to guide agreement-making but little more.

In this dissertation, I champion the potential of the international movement for fundamental domestic reforms and, accordingly, it is important to respond to this recent analytical turn to

the local. I make two points in response. First, the essays in the symposium downplay the distinctive role that international law has had in all of these thematic areas. Secondly, and more fundamentally for the purpose of my argument, the essays overlook the implications of the mixed-model for implementing indigenous rights – further evidence that the mixed model and the decolonization model in particular have been lost from view.

On the first point, Newman, who writes about aboriginal rights in Canada, is correct to say that the Declaration has not played a large role in the development of aboriginal rights jurisprudence. The common law courts have instead focused on traditional property concepts and inquiries into whether indigenous rights have been legally extinguished by “inconsistent rights” or become defunct. And while all of the common law nations have developed aboriginal rights law, they vary in approach reflecting differences of local histories and constitutional arrangements. But that is not to say that international law has not been used in aboriginal rights jurisprudence within CANZUS states. In *Mabo v. Queensland (No.2)*, the leading judgment of Brennan J expressly relies on the International Court of Justice’s decision in *Advisory Opinion on Western Sahara* to justify the reversal of the 200 year old legal rule that Australia was *terra nullius* when annexed by Great Britain. In his words, “the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law.” International law thus affirmed the prior occupation rights of the aboriginal peoples of Australia.

Furthermore, land rights are consistently raised and responded to in the particulars at the international level: in international meetings of United Nations and regional human rights

---

5 See, for example, *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (In Canada, aboriginal title is based on “exclusive occupation”).
9 *Mabo v Queensland (No 2)*, *supra* note 7 (“If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be ‘so low in the scale of social organization’ that it is ‘idle to impute to such people some shadow of the rights known to our law’... can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination” at para 41); See also, *ibid*. See also the judgment of Toohey J.
10 *Mabo v Queensland (No 2)*, *supra* note 7 at para 42.
treaty bodies, and the UN indigenous-specific mechanisms. In virtually all of his reports, James Anaya, in his capacity as UN Special Rapporteur on the Rights of Indigenous Peoples, speaks at length about the need for states to recognize indigenous peoples’ land rights. UN and regional treaty bodies elaborate on the content of indigenous rights. All of this sits alongside the development of specific local laws. While Newman is right to say that particularization has to occur locally, the broader picture reveals an ongoing interactive process of argument about indigenous property – although much of the international advocacy is directed at government rather than the courts. The same point could be made about the other essays in the symposium. The Australian homelands movement has received much attention in international indigenous rights contexts, as has agreement-making between indigenous peoples and extractive industry – which was one of Anaya’s special projects as Special Rapporteur.

The second broader limitation is that the essays all focus on the North and assume international indigenous rights are universalized rights. In contrast, I argue that the Declaration contains both universal (human rights) and particular (self-determination framework) rights. Understanding the Declaration as a mixed-model cannot, of course, offer specific answers to the minutiae of policy and law raised by, say, Canada aboriginal rights law. But it does improve on the Declaration as provider of the ultimate benchmark for evaluating domestic indigenous rights reforms in the North. And this is one of the main points made in this dissertation – both the North and the South negotiated the Declaration so as to ensure there was a meta-standard by which to judge local reforms, given their frustration with the absence of meta-standards in their home states. For the South, this was human rights and equality, and for the North, political sovereignty. They also sought international monitoring of

---

11 See, for example, Petition to the Inter-American Commission on Human Rights submitted by the Hul’qumi’num Treaty Group against Canada, 10 May 2007 online: <https://law2.arizona.edu/iplp/outreach/htg/documents/HTG%20Petition%20-%2005-09-07.pdf> (Frustration with aboriginal title litigation led the Hul’qumi’num Treaty Group of British Columbia to bring a petition to the Inter-American Human Rights Commission claiming violation of their human right to property.).
12 See, for example, Saramaka People v Suriname (2007), Inter-Am Ct HR (Ser C ), No. 172 (elaborating on the content of the right to FPIC).
13 See, for example, Amnesty International - Australia, “‘The land holds us:’ Aboriginal Peoples' right to traditional homelands in the Northern Territory” (2011) online: <http://www.amnesty.org.au/indigenous-rights/comments/26216>.
these standards. This is not a new phenomenon. We saw in Chapter 1 how indigenous leaders Deskaheh and Ratana approached the League of Nations in Geneva seeking a remedy for the injustices occurring within their traditional territories: that is, standards that would move Canada and New Zealand to do more to restore sovereignty and return traditional lands.\textsuperscript{15}

To start with this point about the South, African and Asian indigenous peoples participated in the international movement because they had few domestic opportunities to seek recognition of basic human rights.\textsuperscript{16} Instead these movements sought to join the international movement centered in the UN Declaration negotiations.\textsuperscript{17} This marks a departure from the typical “boomerang pattern” of transnational advocacy whereby activists faced with a state’s opposition to reforms may activate a transnational network that lobbies other states and international organizations to exert pressure on the original state at the global level.\textsuperscript{18} Rather than establish a transnational movement, African and Asian indigenous advocates directly engaged with international organizations, principally the UN via the Declaration negotiations.\textsuperscript{19} Latin America indigenous advocates reached out to other movements throughout the Americas, but the UN Declaration negotiations provided a safe and high-profile setting to criticize local governments. In the South, most indigenous peoples remain on the margins of social life and there remain few means to assert human rights. The Southern indigenous movements need the UN and the human rights model in the Declaration. They need access to international institutions, including indigenous UN-specific mechanisms.

As for the North, the struggle was directed at basic human rights but also political rights, and international oversight. They were the founders of the movement forged by their sovereignty-

\textsuperscript{17} Ibid (In Africa’s case, the African Commission on Human and Peoples Rights was also a site of advocacy. But this regional-based strategy was adopted after the movement first engaged with the UN.).
\textsuperscript{18} See, Margaret E Keck & Kathryn Sikkink, Activists beyond Borders: Advocacy Networks in International Politics (Cornell University Press, 2014) at 107 (This pattern may describe the strategies of human rights movements in the Americas in the 1970s and 1980s. Keck and Sikkink see the human rights movement in Argentina as a classic example of the boomerang pattern, that underlines the fact that “international pressures [do] not work independently, but rather in coordination with national actors”).
\textsuperscript{19} There are strong regional organisations in Asia and Africa. However, I would argue that these movements would have had little local traction without their participation in the international meetings. They gained strength and support after local advocates effective participation in the international meetings.
based activism in their home states. They approached the UN during a time of local reform. Compared with the South, CANZUS states are old liberal democracies that provide the opportunity to address indigenous rights through the judicial, political and legislative arms of the state. However, these reforms did not address their claims of greater political autonomy and territory. And this remains a gap in the indigenous rights architecture of the CANZUS states. As Cree scholar Douglas Sanderson notes, the Canadian government focuses on land rights and not the rejuvenation of political institutions. New Zealand treaty settlements deliver commercial and cultural redress, not political autonomy. The Northern indigenous movement thus needs to access to the self-determination framework in the Declaration.

In his contribution to the recent symposium, Newman raises the limitation of international law in development of land rights in Canadian law by focusing on the Canadian Supreme Court aboriginal title decision of *Tsilhqot’in Nation v British Columbia*:

> Working out the practical effects of particular forms of property rights within a particular legal system may well be a particularistic exercise, somewhat removed from universalized statements concerning Indigenous property rights across the world. Indeed, circumstances may even differ internally across different parts of a state.

In contrast, in the context of *Tsilhqot’in*, the mixed-model interpretation of the Declaration proposed in this dissertation makes available a decolonization model that would draw attention to how Aboriginal title provides potential space for the development of aboriginal law-making institutions. Aboriginal title is about Aboriginal sovereignty not land rights.

These two grand narratives of human rights and decolonization provide the context for the application of the Declaration in domestic states. They are grounded in the fullness of the political history of the Declaration negotiations and are legally and politically justified by the

---

21 Newman, supra note 2.
uniquely equal manner in which the Declaration was negotiated. And they offer the hope of providing indigenous peoples with the elusive reforms they have always sought.