The Limits of International Law's Current Dual Approach to Human Rights and Indigenous Rights: A case for the separation of the two frameworks.

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Abstract

Indigenous Peoples have suffered extreme loss in the face of the imperial mission of international law and colonisation. Indigenous Peoples have faced a direct assault on their sovereignty, language, culture, knowledge systems, lands, and resources. Imperial powers have used international law to justify the colonisation of Indigenous Peoples, and to exclude them from being subjects at international law. However, the Indigenous Rights movement of the 1970s is challenging the structure of international law. The gains of the Indigenous Rights movement have forced international law to recognise as legitimate the claims of Indigenous Peoples, thus, the Human Rights framework has evolved to address some of the claims of the Indigenous Rights movement. This challenge to international law has resulted in a dual approach to individual and collective rights within the Human Rights framework. However, there is an uneasiness with which Indigenous Rights claims sit within the Human Rights framework. This thesis argues the tensions between the Human Rights framework and the needs of Indigenous rights are fundamentally different and because of this, the Eurocentric nature of the Human Rights framework restricts the development of Indigenous Rights. Therefore, it is argued that Indigenous rights need to develop separated from the Human Rights framework.

Mihimihi

Ko tōku maunga tapu ko Aoraki, ko āna wai huka e rere nei i ngā kōawaawa o te motu pounamu ki ngā wai o Waitaiki e takoto mai ana i te Arahura pounamu ki a Tūhuru e tū mai nā hei ruruhau mō tātou, mo ngā uri a muri ake nei.

Kia pere atu rā hau ki Tūhua kia rongona i te takitaki o Te Tai Rāwhiti e haruru mai ana i Pukemaire ko Reporua e rere kau ana ki Te Auau āhuru te nohoanga o Porourangi e!

Kia pā-kūha ai ēnei kāwai ko te putanga ki te whai ao ki te ao mārama ko te whakamānawa me te mihi manahau atu i te tauira whakaiti o tōna rahi.

Kia eke ai te kōrero "ehara taku toa i te toa takitahi, engari rā, he toa takitini!"

Aoraki stands as a steadfast ancestor looking upon the waters of Waitaiki known as the Arahura, the pathway to pounamu. Here you will find the warmth and shelter of Tūhuru a house for one and a house for all. Housing the proverbial saying of my people "for us, and the generations after us"

I look to Tūhua, reminding me of our connection to the North and I hear the call of the Tai Rāwhiti; Pukemaire be the mountain and Reporua its waters taking me to Te Auau where you will find the descendants of Porourangi.

It is the marriage of these two distinct lineages that bares many thanks to the many people who have aided in the production of this thesis.

Firstly, I would like to acknowledge all those who have lived in service to their people. Who have in the face of great adversity taken the claims of their people to great lengths to ensure our voices are heard in a system that has historically been used against us. Without your dedication to advancing the aspirations of Indigenous Peoples, the Indigenous movement would not be as powerful as it is, and I am honoured to contribute in some way to the discourse such as this.

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I Introduction

For generations International law has been used and applied to Indigenous Peoples, not as subjects of international law, but as objects. International law has been the vehicle through which imperial forces have subjugated Indigenous populations. Indigenous Peoples have suffered a loss of rights, of their cultures, languages, territories, and resources, and have been subjected to forced assimilations. However, regardless of these assaults on Indigenous populations, Indigenous Peoples have shown great resilience and strength. Indigenous Peoples are rising up, to rebuild and to develop. While there have always been sites of resistance, the Indigenous Rights movement can be traced back to the early 1960s where Indigenous Peoples begun pan tribal movements, their share experiences as Indigenous Peoples bringing them together. Globally the Indigenous Rights movement begin to mobilise across international networks in the 1970s, thus Indigenous Peoples begun articulating their claims and aspirations in the context of international law. Indigenous Peoples have since made huge gains in international law, asserting claims and demanding these be recognised in existing frameworks, such as Human Rights. Indigenous Peoples have also pushed their claims and aspirations beyond existing frameworks, demanding new forms of rights be recognised, thus the *United Nations Declaration on the Rights of Indigenous Peoples* was borne. Regardless of these gains made at international law, the imperialism and Eurocentrism plague the Indigenous Rights movement, manifesting in limiting barriers restricting Indigenous development, and if left to continue unchecked, risk a continued undercurrent of assimilative forces.

The purpose of this thesis is to explore how international law has responded to the recognition of Indigenous claims at international law, and how the limitations of the current approach are detrimental to the overall aim of the Indigenous Rights movement. The aim is to identify how the Indigenous movement might overcome the challenges presented by limitations identified. In doing so, this thesis has identified an approach to Human Rights theory that argues that Human Rights have developed in direct response to pathologies of international law's own creation, and in addressing these pathologies have the ability to restrict sovereignty. This theory is used as a foundation to explore the potential advancement of Indigenous rights, by arguing that limits are manifest because the Eurocentric and imperial undertones of human rights restrict the development of Indigenous rights because of fundamental differences in the needs

of the two different sets of rights, and the fundamentally different harms the two sets of rights are responding to.

The expansion of the West in the 19th Century has had a profound impact on the formation and structure of International Law. In turn, imperialism has influenced the language and operation of principles, such as sovereignty, that govern the field of International Law. Global politics and the global legal order have continued the civilising mission of imperial Europe to the present day. The effect of this mission has been the silencing of the Indigenous voice at International Law.

The distributive effects of sovereignty have created pathologies at International Law and maintains a strong potential to create injustices for the individual within the modern civil state. Human rights have developed in response to these atrocities toward individuals committed by the institution of sovereigns, and the creation of minority groups by the distribution of sovereignty. The Human Rights framework has crystallised over time to monitor the structure and operation of the international legal order and the pathologies of its own making.

Human Rights, however, do not have the capacity to limit the effects of sovereignty vis-à-vis the needs and aspirations of Indigenous peoples and the pathologies of international law created by the colonial expansion of the West. This Indigenous Rights movement sits within the Human Rights framework uneasily, resulting in tensions and limitations that render the Indigenous Rights movement incapable of achieving its goals. The limitations present in the Human Rights framework that hinder the progress of Indigenous rights will be explored. Subsequently, the source of these limitations will be identified to make the case that for Indigenous rights to develop into a body of law capable of achieving the needs of the Indigenous Rights movement, Indigenous rights need to be pursued disentangled with the Human Rights framework.

Chapter II begins by exploring how Indigenous right are protected in international law. This thesis is first and foremost about protecting Indigenous rights and addressing Indigenous claims at International law, therefore, matter of how Indigenous Peoples are identified at international law must be then explored because of it. This chapter starts by examining the concept of indigeneity and how the concept of Indigenous Peoples has been used in international law. This chapter then goes on to précis how international law has developed to protect Indigenous rights

– that is, the mechanisms and the frameworks that have evolved to protect the rights of Indigenous Peoples. Two broad frameworks for the protections of Indigenous rights are identified in this chapter: Human Rights and Indigenous Rights. This chapter further describes how the Human Rights framework has extended in order to address some of the concerns of the Indigenous movement, and how an emergent framework of Indigenous Rights is developing using human rights as a springboard. This chapter notes that international law is responding to the needs of the Indigenous movement through the development of mechanisms that respond to Indigenous claims, seated primarily within the Human Rights framework.

Chapter III explores how Human Rights has been able to develop and respond to Indigenous claims. This chapter therefore explores Macklem's thesis, which argues that human rights have developed to ameliorate the harms produced by the structure of international law and operation of sovereignty, and in doing so are able to limit sovereignty. This thesis takes Macklem's thesis further by arguing that the body of Human Rights has been able to address some of the needs of the Indigenous Rights movement by placing limits on sovereignty, and that this has been made possible because sovereignty has always been a malleable concept.

By recognising that Indigenous rights have been able to develop within the Human Rights framework, chapter IV then explores whether the Human Rights framework is capable of addressing the needs of the Indigenous Rights movement. This chapter asks the question whether Indigenous rights should continue to be pursued within the Human Rights framework. In exploring this question, an uneasiness with which Indigenous rights sit within the Human Rights framework is identified by recognising a number of limits that restrict the development of Indigenous rights.

Having identified that limits are present and act upon the development of Indigenous rights within the Human Rights framework, chapter V argues that limits are present because there is a fundamental difference between human rights and Indigenous rights. This chapter argues that the limits identified in the previous chapter are manifest because human rights developed within a particular context in response to particular harms. The Human Rights framework is underpinned by Eurocentrism, imperialism, and the application of universalism from a post-Enlightenment philosophy. By contrast, this chapter argues that the Indigenous Rights movement has emerged from a different context, and is developing in response to different harms. Finally, this chapter will argue that because of the fundamental differences between the

Human Rights framework and the Indigenous Rights framework, Indigenous rights need to be pursued as a category disentangled from human rights. Making the case that by continuing to pursue Indigenous claims within the Human Rights framework, the limitations present in the Human Rights framework acting upon Indigenous rights will continue to water down the impact and potential advances of the Indigenous Rights movement.

For Indigenous rights to flourish, this thesis argues, Indigenous rights need to crystalise into their own body of international law. Disentangled from the Human Rights framework, Indigenous Peoples would have recourse to collective rights that respond directly to the pathologies created by the imperial mission inherent within the structure of international law and the operation of sovereignty. Indigenous rights would therefore be able to limit the operation of sovereignty, much like human rights do in recognition of the contingencies of history that resulted in the harms unique to Indigenous Peoples worldwide.

A. A note on Method and Approach

This research has aimed to transgress disciplinary boundaries, and therefore engages with a number of literary works, ideas, and theories from across disciplines. Inspiration has been taken from Gordon's notion of disciplinary decadence, whereby it is argued there is a colonial imposition at in discipline and method. That disciplines are decaying under the weight of their own commitment to, or 'fetishisation' of, method and the rules that constitute those boundaries.[1] This is in recognition of the impact the expansion of Western knowledge through colonisation has had on epistemological development and categorisation of knowledge. Therefore, while Fanon argues that methods have a way of devouring themselves,[2] and Gordon argues for a teleological suspension of method, this thesis takes a network approach to method as championed by Santos.[3]

[1] Lewis R. Gordon *Disciplinary decadence: living thought in trying times* (Paradigm Publishers, Boulder, CO, 2006).

[2] Frantz Fanon *Black skin, white masks* (Grove Press, New York, 1991).

[3] Boaventura de Sousa Santos "Beyond Abyssal Thinking: From Global Lines to an Ecology of Knowledge" 2007(78) Revista Critica de Ciencias Sociais.

A network of knowledge approach transgresses disciplinary boundaries. This recognises that language has been constructed in order to explain and describe, to understand. Where one concept does not exist in one discipline, and the decadence of that discipline limits the expressive ability to articulate and apply that concept, there is no need for the relationship between disciplinary ideas and knowledge to end there. By way of example, Wiredu, a Ghanian philosopher, argues that the Cartesian concept of *cogito ergo sum* 'I think, therefore I am' cannot be translated into his culture or language, because the term *cogito,* translated in English as 'to think', translated into his own native language would mean 'to measure'.[4] Regardless of such difficulties, Wiredu illustrates the continuation of the philosophical discussion on Cartesianism, and the alternative ideas it can express in such a way that Western philosophy, alone, cannot.[5] A network approach to recognises that there is an ecology of knowledge, and by engaging beyond disciplinary borders there becomes a more rich and deeper discussion and fosters a greater diversity of understanding.

Therefore, thesis is inter-disciplinary. Law does not exist in a vacuum and the experience of Indigenous Peoples is not merely legal but is also social and political. Ideas that have helped to shape this research have therefore been sourced from law, philosophy, postcolonialism, cultural studies and, sociology. Some of the philosophical theories from these disciplines have helped to understand and articulate some of the different and difficult phenomena this dissertation grapples with, such as concepts of diversity, difference, culture, and the assimilative nature of universalism.

This research primarily relies on a mix of primary and secondary sources. As the aim of this research is to analyse how international law has responded to the Indigenous Rights movement, there has been a review of primary legal texts and documents, such as case law, commentary by international juridical bodies, treaties, conventions, and declarations. In order to analyse these, some primary sources have been used, such as interviews with philosophers expounding on their ideas. However, the majority of analysis and production of new ideas has been supported through engaging with secondary texts, including books and journal articles that

[4] Kwasi Wiredu "Are there cultural universals?" 1990 4(2) Quest: An International African Journal of Philosophy.

[5] Kwasi Wiredu "African philosophy and inter-cultural dialogue" 1997 11(1-2) Quest: An International African Journal of Philosophy.

engage with ideas, and commentate on existing ideas and laws. Whilst noting a distinction between the between primary and secondary sources used, the network of knowledge approach that has been employed throughout this research blurs the lines between this distinction and the primary approach has been to apply a common critical lens to all sources.

Owing to the multitude of sources and disciplines engaged throughout this networked research, a mixed methodological approach has been necessary. Doctrinal research has been used to analyse and understand the current state of the law on a particular point. Literature review, has been used to critique and analyse the doctrinal research. The literature review has not been presented in the traditional form contained to a single section, but rather, owing to the expansive nature of this thesis and the difference areas of discourse within, the literature review has been engaged with when and where needed throughout this thesis. An extension of the literature review led to the identification of themes and common discourses, these were then analysed and critiqued. Owing to the evolving nature of international law, human rights, and, Indigenous rights this thesis has engaged in a historical legal research method in order to analyse the shifting nature of the law and its application over time. All of these methods have been used to engage and analyse the research, to apply theories and ideas from beyond single disciplines, in order to engage better with the aims and objectives of this thesis: to explore how international law has responded to the Indigenous Rights movement, and to identify the limitations of the current approach and international law.

B. A Note on Capitalisation

Throughout this essay capitalisation has been used in a considered manner. Where the words *Human Rights* and *Indigenous Rights* are capitalised, it is referring to either a framework, a body of law, or a movement. In contrast, where *human rights* and *Indigenous rights* are not capitalised, it refers to the rights, or individual rights, that form the framework, body of law, or movement. This helps to illustrate the crystallisation of Human Rights, and the corresponding crystallisation of Indigenous rights into an Indigenous Rights framework.

Capitalisation has also been used politically, in the case of Indigenous, and Indigenous Peoples. Firstly, the word *indigenous* can refer to any number of things as it references something that

has origins, roots, or has been born in a particular are or region.[6] Therefore, indigenous can refer to fauna and flora, and may even refer to an individual person. When capitalised, the term *Indigenous* recognises a distinct group of peoples who owing to colonisation have been exploited, displaced, categorised and stripped of their sovereignty. Because the work of this thesis is not intended to be situated within any particular Indigenous group, using the term '*Indigenous Peoples*' as a proper noun recognises the diversity of Indigenous tribes, nations, and sub-tribes, not specifically mentioned in this work. *Indigenous Peoples* therefore, recognises and pays homage to all Indigenous groups their shared experiences, triumphs and tribulations in the face of colonisation and imperialism.

[6] *See entry for "Indigenous" in* Robert K. Barnhart and Sol Steinmetz *The Barnhart dictionary of etymology* (H.W. Wilson Co, Bronx, N.Y., 1988) at 521.

II Indigenous Peoples and Human Rights

A. Who are Indigenous Peoples in International Law?

This this thesis explores the exclusion of Indigenous Peoples in International Law. Over time, International Law has evolved to respond to the needs of Indigenous Peoples, whilst at the same time maintaining the current world order and creating elusive promises of development for Indigenous Peoples.[7] Therefore, it is pertinent to firstly describe how International Law identifies Indigenous Peoples.

The Term 'Indigenous' itself, has specific meanings in different contexts. Whatever the context, the term has links or genesis in a particular locality. The word 'Indigenous' itself comes from the Latin word '*indigena*'. One etymology argues that the word is comprised of *indi',* meaning something within, while *'gen'* or *'genere'* means 'roots'.[8] Another analysis of the word breaks it down into *'indu'* (*indi, in)* indicating from within, while *'gen',* the root of *gignō* means 'to give birth to', effectively describes something that has origins or birth within a particular area.[9]

As International Law evolved alongside the colonial project of the West, the term 'Indigenous' begun to enter legal lexicon in the 20th century to refer to those peoples affected by the machinations of colonialism. The historical usage of the term 'Indigenous Peoples' has a long and tumultuous history, wrought with issues of application and identification as will be outlined below.

The term 'Indigenous' is now a readily accepted concept at International Law with a range of applicable rights attached to the International legal discourse. The first international legal document to include the term was the International Labour Organisation (ILO) Convention 50

[7] *See generally for discussion* Karen Engle *The elusive promise of indigenous development: rights, culture, strategy* (Duke University Press, Durham [NC], 2010).

[8] *See entry for "Indigenous" in* Barnhart and Steinmetz, above n 6 at 521.

[9] At 521.

Recruiting of Indigenous Peoples (1936).[10] Established in 1919, the ILO has had a particular concern for the labour conditions of Indigenous and Tribal populations. This conversation extends back to a draft resolution that was discussed at the Eighth International Labour Conference in Geneva, where the governing body was invited to undertake an inquiry into the conditions of 'coloured' and 'native' labour in Africa and America.[11] This particular topic had been sparked by a previous conversation concerning the collection of data relating to the conditions of labour in Asian colonies, protectorates, and mandated territories. In 1996, the topic was formally discussed for the first time within the United Nations (UN). Despite nine decades of history and increasingly frequent use, however, no definition of 'Indigenous Peoples' has been adopted by any UN-System body.[12]

While the early approach of the ILO regarding Indigenous and Tribal populations was considered progressive at the time, it remained essentially Eurocentric. ILO approaches were in line with the assimilationist notions of civilisation at International Law and principles of European Trusteeship that became central to the League of Nations,[13] and subsequently the UN decolonisation programmes. The wording of ILO *Convention 107 Indigenous and Tribal Populations* (1957) required states to coordinate action for the progressive integration of Indigenous Peoples into the national communities, life of their respective countries, and transition into the national or one of the official languages of the country.[14] Therefore, any definition of 'Indigenous', 'tribal', or 'native', along with any of the labour standards therein that were applied to these early definitions, were aimed at disciplining and civilising native labour.

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[10] The International Labour Organisation, *see generally Luis Rodríguez-Piñero Indigenous peoples, postcolonialism, and international law: the ILO regime, 1919-1989* (Oxford University Press, Oxford [England];New York;, 2005)*;* and ILO Convention 50 Recruiting of Indigenous Workers (adopted 20 June 1936, entered into force 8 September 1939, 40 UNTS 110).

[11] Daniel Maul *Human rights, development, and decolonization: the International Labour Organization, 1940-70* (Palgrave Macmillan, Houndmills, Basingstoke, Hampshire;New York, NY;Geneva, Switzerland;, 2012).

[12] UN-Document E/CN.4/Sub.2/AC.4/1996/2 "The Concept of Indigenous Peoples" Background paper prepared by the Secretariat of Permanent Forum on Indigenous Issues.

[13] The ILO Convention 107 was criticised for being assimilist in nature, *see* UN Permanent Forum on Indigeous Issues (UNFPII), *State of the World's Indigenous Peoples,* 14 Jan 2010, ST/ESA/328, at 2.

[14] ILO Convention 107 Protection and Integration of Indigenous an Other Tribal and Semi-Tribal Populations in Independant Countries (adopted 26 June 1957, entered into force 2 June 1959, 328 UNTS 247).

While the ILO's approach to identifying and creating so called protections for Indigenous and native peoples was problematic, it did begin an international conversation on the definition of Indigenous Peoples. The ILO's *Convention 107* (1957) focused on the economic integration of Indigenous Peoples in the workforce. According to Engle, the ILO work in this era along with the Indigismo in Latin America provide an important backdrop against which Indigenous Peoples eventually organised.[15] Effectively, the scope of the ILO definitions relating to Indigenous or Native peoples was broad and did not define Native populations as 'Indigenous' directly. Instead, the ILO had as its object 'tribal' and 'semi-tribal' peoples.

Early conventions were focused on Indigenous workers relating to contractual obligations, recruitment, and penal sanctions. These conventions defined Indigenous workers as including:[16]

> workers belonging to or assimilated to the indigenous populations of the dependent territories of Members of the Organisation and workers belonging to or assimilated to the dependent indigenous populations of the home territories of Members of the Organisation.

Later the ILO *Convention 107 Indigenous and Tribal Populations* took a more refined approach to defining Indigenous Peoples. As the name of the Convention suggests, this variation in defining Indigenous Peoples also included tribal and semi-tribal peoples. These definitions are set out in Article 1 of the Convention as follows:[17]

> (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

[15] Engle, above n 7.

[16] ILO Convention 50 Recruiting of Indigenous Workers (adopted 20 June 1936, entered into force 8 September 1939, 40 UNTS 110) at Art. 2(b).

[17] ILO Convention 107 Protection and Integration of Indigenous an Other Tribal and Semi-Tribal Populations in Independant Countries (adopted 26 June 1957, entered into force 2 June 1959, 328 UNTS 247) at Art. 1.

(b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

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

This shift originated in pressures from the Afro-Asian states many of whom were establishing their independence. Some newly independent Afro-Asian states asserted they had no Indigenous Peoples, whilst others maintained they were made up entirely of indigenous populations.[18]

The state-centric structure of international law has influenced how Indigenous Peoples are identified in international law, as well as state identification of Indigenous Peoples and how Indigenous Peoples identify as Indigenous themselves. As noted above, there were pressures from both African and Asian states to define the scope of the ILO away from the term 'Indigenous'. Decolonisation programmes had begun around the 1950s, returning independence to states with boundaries created by the colonial powers. While the African states chose to retain those state boundaries created by the Berlin Agreement of 1885, the pressures of the state-centric structures of International Law meant that each newly formed independent state had to choose between the territorial integrity of its government and the self-determination of its people. Neuberger notes that this dilemma has been the root cause of most of the wars, conflicts, and tensions within and between African states to date.[19]

With an increase in visibility of Indigenous issues at a pan-national level, efforts to address the failings of the International legal system on the protection of Indigenous Peoples begun to take

[18] Robert Hitchcock and Diana Vinding *Indigenous Peoples' Rights in Southern Africa* (IWGIA, Copenhagen, 2004).

[19] Ralph Benyamin Neuberger *National self-determination in postcolonial Africa* (L. Rienner publishers, Boulder, Colo, 1986) at 106.

shape. In 1970, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that a study on the problem of discrimination that affected Indigenous Peoples be undertaken. This study was undertaken in 1971/2 led by Special Rapporteur José R. Martínez Cobo. This work has been crucial to the identification of Indigenous Peoples at International law. Cobo's work has contributed to International legal discourse one of the most cited working definitions of 'indigenous communities, peoples and nations':[20]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:
>
> a) Occupation of ancestral lands, or at least of part of them;
> b) Common ancestry with the original occupants of these lands;
> c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc);
> d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
> e) Residence on certain parts of the country, or in certain regions of the world;
> f) Other relevant factors.
>
> On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

[20] UN Commission on Human Rights, *Final Report of the Special Rapporteur Martínez Cobo,* UN Doc 1982 E/CN.4/Sub.2/1982/Add.6.

Cobo's definition above is broad in scope, but interestingly maintains both objective and subjective criteria. By having a basis in objective elements, the scope of the definition is reduced to those main elements that are shared amongst most, if not all, colonised Indigenous groups. While Indigenous rights, as will be explored further in this section, have some basis in minority rights at international law, not all minorities are Indigenous.[21] The objective elements of Cobo's definitions helps to differentiate between minorities and Indigenous minorities.

The objective elements within the Cobo definition are a progressive move away from earlier, purely objective definitions of Indigenous Peoples. For example, the ILO *Convention 107* prescriptively defined Indigenous Peoples as being those tribal or semi-tribal peoples who "are at a less advanced stage" and who "descend from the populations which inhabited the country… at the time of conquest or colonisation… and live more in conformity with the social and cultural institutions of that time than with the institutions of the nation to which they belong."[22] The Cobo definition introduces the subjective element of self-identification. The subjective elements include peoples first considering themselves distinct from other sectors of society; and then secondly a subjective and bilateral consideration of individual identification of belonging to that distinct sector of society, and further, that community's acceptance of the individual. This is an important shift away from purely imposed definitions of indigeneity that prevailed prior to the Cobo report. The subjective nature of this definition allows Indigenous Peoples the autonomy to identify themselves as Indigenous and define the limits of their community according to their own customs, laws and social structures. Furthermore, the definition removes part of the test from state law and preserves for Indigenous Peoples some degree of identificational autonomy at international law, even in the absence of domestic recognition.

It must be further noted that this subjective element has been incorporated into all the major International Legal documents that identify and define Indigenous Peoples as bearing certain

[21] One should note that the UN Human Rights treaties refer to minorities, but not Indigenous peoples.

[22] ILO Convention 107 Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independant Countries (adopted 26 June 1957, entered into force 2 June 1959, 328 UNTS 247) at Art 1.

rights and obligations. The ILO *Convention 169 Indigenous and Tribal Peoples* (1989) at Art 1(2) states:[23]

> Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Meanwhile, Article 33 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) enshrines a similar subject element that incorporates all the elements of discussion in the previous paragraph:[24]

1. Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous Peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

While the definitions contained within this section are the most widely accepted definitions of Indigenous Peoples at international law, these, or any other definitions have never been formally adopted by any UN-system body (with the exception of the ILO *Convention 169*). This type of work, however, paved the way for the system of law that has developed at international law for the rights of Indigenous Peoples. While there are no binding standards at international law that specifically recognise specific rights of Indigenous Peoples, existing frameworks within International law have been adapted to extend to some of what are considered critical Indigenous rights. There are two main systems that have been extended or have developed in order to address and protect the rights of Indigenous Peoples. These are the Human Rights framework, and, the Rights of Indigenous Peoples framework.

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[23] *See* ILO Convention 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991, 1650 UNTS 383) at Art. 1(2).

[24] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007) at Art. 33.

B. Frameworks used for the Protection of Indigenous Rights

Two main frameworks have developed at international law for the protections of the rights of Indigenous Peoples. Some main mechanisms therein for the realisation of these protections are identified here. This is not an exhaustive description; it covers a small percentage of how these frameworks are being used in order to give an understanding of how International Law has extended to address Indigenous concerns. The extension of International Law has resulted in advances in many areas relating to the identification and protections of Indigenous Peoples collective rights.

Human rights have been used as a springboard for the advancement of Indigenous rights. While not originally intended for the collective nature of Indigenous rights, international discourse on Indigenous rights have influenced the way human rights principles, such as *pro homine*, have been able to recognise collective land rights and continuity of culture. For example, the *International Covenant on Civil and Political Rights* (1966) (ICCPR) has been influenced by the Indigenous Rights discourse,[25] while not explicitly recognising Indigenous rights, ICCPR has been used to recognise the internal self-determination of Indigenous Peoples. Further to the use of existing international law to give expression Indigenous rights protections, a body of law that can be termed an Indigenous Rights framework is also developing. A number of instruments have been created, for example, the ILO conventions and UNDRIP. These advancements have recognised Indigenous rights and protections in areas such as internal self-determination, right to ancestral land, culture, and participation.

The following sub sections will now explore both the Human Rights framework and the Indigenous Rights framework in turn. Within each subsection, some of the mechanisms and instruments that are used in the protection of Indigenous rights will be described. The Human Rights sub-section will briefly discuss the Human Rights Treaty system, with particular reference to the ICCPR, and go on to describe how the ICCPR has been used as a mechanism for the protection of Indigenous self-determination, a right-to-culture, and Indigenous property rights. This sub-section will then go on to describe how human rights in regional jurisprudence have been used for the protection of Indigenous rights, using the Inter-American System as a

[25] UN General Assembly, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (Opened for signature 16 December 1966, entered into force 23 March 1976).

case study. The Indigenous Rights sub-section will explore some of the developments in international law that have given rise to what could be termed an Indigenous Rights framework. This section will describe mechanisms that do not necessarily sit within the Human Rights framework, but may influence or influenced by human rights. This sub-section will describe the how the International Labour Organisation has contributed to the Indigenous Rights framework. This will be followed by a section on the United Nations Declaration on the Rights of Indigenous Peoples, and how this has emerged, as well as how it has been highly influential in regional jurisprudence, using the African Human Rights system as a case study.

1. Human Rights

It was not until the international upheavals caused by the World Wars that the wheels of change sparked yet another evolution in then international discourse on Indigenous Peoples. Indigenous movements begun to take root in the 1970s, yet the concerns and unfavourable conditions of Indigenous Peoples had been well known for years prior to Indigenous mobilisation and traction from Indigenous communities. This is evident in the work of the International Labour Organisation.

The decolonisation programmes that resulted in the independence of many Afro-Asian states contributed to an environment where Indigenous movements could begin to mobilise as they did in the 1970s. The effects of the First World War and the political upheaval that ensued created the perfect political opportunity to foster anti-colonial nationalistic sentiment and ideologies. Uptake of this political opportunity is evidenced by the coincidence of movement that began to take place during this time, especially in Southeast Asia during the First World War.[26] The newly independent states that emerged in the decolonisation process created a shift in balance of power within the UN after the Second World War. Membership of Third World countries increased dramatically, creating further support within the United Nations for decolonisation programmes and independence.

Self-determination was another element in the process leading what we now know as Indigenous rights. Engle notes self-determination discourse begins to appear in the interwar

[26] Clive J. Christie *A modern history of Southeast Asia: decolonization, nationalism, and separatism* (I.B. Tauris, London, 1996).

period.[27] The United States, closely followed by France and Britain, framed their aims during the First World War as a fight for the self-determination of all the peoples of Europe.[28] Christie argues the First World War led to a new ideological foundation emerging; newly sovereign states, along with the War itself, dented the innate sense of superiority of European civilisation which had previously reigned uncontested.[29] The League of Nations began to champion minority rights and oversaw cases of plebiscites whereby minority groups that straddled the borders of two newly created states were empowered to decide what state they would fall within. Wartime rhetoric fuelled the self-determination discourse. After the Second World War, the term 'self-determination' began to formally enter UN lexicon, with the 1945 UN Charter referencing self-determination twice. The UN Charter, however, omitted any reference to whom self-determination ought to apply; naturally, this fell to the state-centric confines of international law at the time through the application of the likes of the 1934 *Montevideo Convention on the Rights and Duties of States*.

(a) The International Covenant on Civil and Political Rights

There is relatively little explicit mention of indigenous rights within the United Nations Human Rights Treaty system. The UN Treaty bodies tasked with the implementation, interpretation, and the making quasi-juridical findings with regards to individual complaints or their respective treaties, have been able in some cases to address Indigenous rights issues and create normative jurisprudence.[30] The Human Rights Committee (HRC) to date has been the most active in addressing Indigenous rights issues. The HRC has the mandate to monitor the International Covenant on Civil and Political Rights (ICCPR), which requires state parties to respect the civil and political rights of individuals. These rights and freedoms are: right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights, right to due process, and right to a fair trial.[31]

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[27] Engle, above n 7.

[28] Christie, above n 26.

[29] At Ch. 1.

[30] Please note, this is not jurisprudence in the traditional sense but in a normative declaratory sense available to the UN Human Rights Bodies and Commissions.

[31] UN General Assembly, *International Covenant on Civil and Political Rights* (16 Dec 1966, entered into force 23 Mar 1976) Treaty Series, Vol. 999, p. 171.

Human rights, which are traditionally attributed to the individual, have been at constant odds with the rights of Indigenous Peoples which are generally collective in nature. There is currently no comprehensive and formally binding system at international law that deals with the rights of Indigenous Peoples that also recognises the collective aspect of many Indigenous worldviews or contexts.[32] The ICCPR is no different and is primarily concerned with individual rights; therefore, the HRC is mandated to deal principally with civil and political rights of the individual. The commission has however responded over time to the increasing international appetite for Indigenous demands and has increasingly considered and applied rights contained within the ICCPR to collectives. Two main Indigenous rights to which the HRC has responded are the right to self-determination, and the right to participate in cultural life. These will be discussed in turn by way of the two main normative functions available to the HRC: state reporting, and views on individual complaints.

i. Self-determination

Article 1 of the ICCPR confirms that all peoples have the right to self-determination. That is, the right to freely determine one's own political status and to freely pursue one's own social and cultural development. While the HRC has confirmed the right of Indigenous peoples to self-determination, it has qualified this right to a high degree of internal self-determination or autonomy.[33] This form of self-determination available to Indigenous Peoples is qualified against the general principle of self-determination that exists at international law. It emerged broadly during the period encompassing both World Wars as a nationalistic rhetoric as well as a League of Nations initiative for the self-determination of those minorities straddling political boundaries who were empowered to choose what political jurisdiction to reside in.[34] The concept was further entrenched following the Second World War in the context of decolonisation as self-governing and independent.[35]

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[32] With the exception of ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries (1989); this convention is, however, limited by ratification, but does go some way in toward recognising Indigenous Rights.

[33] UN Human Rights Committee, 50th Session, CCPR General Comment No. 23, para. 3.2.

[34] *See generally* Matthew Craven "Statehood, Self-Determination, and Recognition" in *International law* (Fifth ed, Oxford University Press, Oxford, United Kingdom, 2018).

[35] General Assembly Resolution 1514 (14 Dec 1960); *see also* General Assembly Resolution 1541 (15 Dec 1960).

Article 1 states:

1. All people 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.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

A cursory reading would make Article 1 appear to provide a general right to self-determination. Recognising the collective nature of self-determination in Article 1(2) with the inclusion of the term 'peoples' allows a strong avenue for Indigenous Peoples to pursue self-determination. However, there is very little clarification on the object of the term 'peoples'. Carleton suggests that there may be scope for the term 'peoples' to be recognised through autochthony, which would recognise Indigenous collective rights as peoples under this Article.[36] According to the ambit of the Article as a whole, this may be a far-reaching form of self-determination with the inclusion of self-determination over political status and development,[37] as well as self-determination over natural wealth and the protection of subsistence ensuring an economic self-determination.[38]

The scope of Article 1 has been somewhat confined through HRC, and through domestic and regional jurisprudence. The first issue with self-determination is that it is notoriously broad and difficult to define. This difficulty in defining the limits of self-determination is partly due to, as indicated earlier, its long history of usage. The concept of self-determination has been a fixture of international law for so long through state declarations, international treaties and

[36] Alexandra Carleton "Defining Peoples under the ICCPR and African Charter: Identification of Collective Claims to Natural Mineral Wealth" 2014 21(2) International Journal on Minority and Group Rights.

[37] UN General Assembly, *International Covenant on Civil and Political Rights* (1966) at Art.1(1).

[38] At Art. 1(2).

other instruments, that it is now included as customary law, and according to McCorquodale, may even form part of *jus cogens.*[39] Adding to the concept's difficulty of application is also the inherent conflict the full ambit of the self-determination contained within Article 1 of the ICCPR has with the concept of state sovereignty; whereby the full political, economic, and resource self-determination could impinge upon state sovereignty as international law currently recognises it.

The applicability of the right of self-determination has been recognised in Observations by the HRC. The right of self-determination in relation to Indigenous Peoples has generally been articulated by the HRC in terms of land rights, in recognising the importance of land to cultural identity, but also recognising the place land and land based resources play in the ability of peoples to advance their economic and social development.[40] This has been confirmed in Canada where the commission articulated a strong link between land, economic development, political participation and self-determination in stating that "without a greater share of land and resources institutions of aboriginal self-governance will fail."[41]

An Individual Communication is a complaint process available to individuals where the state party to the Convention has allowed this process,[42] but has rarely been considered by the Commission in terms of self-determination. In *Chief Bernard Ominayak and Lubicon Lake Band v Canada (The Lubicon Lake Case),* Chief Ominayak, elected leader of the Cree First Nation at Lubicon Lake in Alberta, Canada, lodged a claim under the Optional Protocol alleging breaches under Article 1 of the ICCPR. The Court held the claim as inadmissible because Chief Ominayak was an individual and therefore could not bring a claim under Article 1. The Commission's decision was based on the right to self-determination protected by Article 1 is conferred upon 'peoples' and not individuals, and so many early individual complaints

[39] Robert McCorquodale "Self-determination: A human rights approach" 1994 43(4) International & Comparative Law Quarterly.

[40] *See generally* Ben Saul *Indigenous peoples and human rights: international and regional jurisprudence* (Hart Publishing, Oxford;Portland, Oregon;, 2016) at Ch. 2.

[41] Human Rights Commission, *Observation: Canada*, UN Doc A/54/40 (1999), vol. I, para 230.

[42] The individual complaints process is outlined in the First Optional Protocol to the ICCPR; *See* UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights* (19 Dec 1966, entered into force 23 Mar 1976) Treaty Series, vol. 999, p. 171.

lodged with the commission under the optional protocol were ruled inadmissible.[43] The Commission noted that an individual could not bring a complaint as an individual in the collective's public interest *action popularis,* but multiple individuals may make a communication should they all be similarly and individually affected by the breach. [44]

ii. Right-to-culture

Article 27 of the ICCPR confirms and protects minority rights to culture:

> 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 other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Whilst a minority protection, Article 27 has been applied as part of the growing recourse at International Law to protect Indigenous cultures and ways of life. The HRC recognised the application of Article 27 to explicitly include Indigenous Peoples within the ambit of this minority protection in General Comment 23.[45]

Jurisprudence, through HRC communications, have also elaborated on the extent of the right-to-culture under Article 27. In the *Lubicon Lake Case*,[46] the HRC also considered the application of Article 27 and declared that the right-to-culture extended to traditional hunting and fishing grounds against adverse encroachments, such as the exploitation of oil, gas, and timber. Economic activities of Indigenous peoples have also been recognised as cultural activities, and therefore, protected under Article 27. In *Ivan Kitok v Sweden* the HRC recognised traditional activities that constitute typical activity as falling within the ambit of

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[43] *See Chief Bernard Ominayak and Lubicon Lake Band v Canada*, HRC Communication No. 167/1984 (26 Mar 1990).

[44] *See Chief Bernard Ominayak and Lubicon Lake Band v Canada*, HRC Communication No. 167/1984 (26 Mar 1990); *and EP v Colombia,* HRC Communication No. 319/1988 (25 July 1990).

[45] *See* UN HRC, *General Comment 23: The Rights of Minorities (Article 27)*, UN Doc CCPR/C21/Rev.1 add.5 (26 April 1994) at paras. 3(2) and 7.

[46] *Chief Bernard Ominayak and Lubicon Lake Band v Canada*, HRC Communication No. 167/1984 (26 Mar 1990).

Article 27, and therefore protected.[47] This was further extended to include modern economic activities required to sustain Indigenous People's livelihoods in the *Lansman et al v Finland.*[48]

iii. Indigenous Property Rights

The ICCPR does not explicitly provide protections for Indigenous property rights. *Kéténguéré Ackla v Togo* explicitly confirmed that the property rights are not included in the ICCPR.[49] This is in direct contrast with many other International and regional Human Rights instruments. For example, the UDHR provides protects individual property rights in Article 17, and both the *American Convention on Human Rights* and the *European Convention on Human Rights* both contain similar property protections.[50]

ICCPR related jurisprudence suggests that protections of Indigenous property may exist. In concluding comments in the decision concerning *Apirana Mahuika et al v New Zealand (Mahuika)*[51], the HRC inextricably implicates native property rights in both the right to self-determination under Article 1, and a right-to-culture under Article 27. This case concerned Māori right to control and access natural resources, in this case, fisheries. The Commission noted that Article 1 right to self-determination may be relevant in the interpretation of other articles in the Convention. Therefore, Article 1 and Article 27 may be read together unlocking a potential protection for Indigenous property, where that property or resource and its usage is integral to the cultural identity of the peoples, and/or is linked with the economic or political dimensions of self-determination.

Taking both the jurisprudence on Article 1 self-determination and Article 27 Right to culture, there are grounds for protection of the right to property and the control of resources. Upon analysing the *Lubicon Lakes* case, Kingsbury suggests that Indigenous peoples may have

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[47] *Ivan Kitok v Sweden* (Communication No. 197/1985), Supplementary No. 40 A/50/40.

[48] *Kéténguéré Ackla v Togo* Communication No. 547/1992, UN Doc CCPR/C70/D/547/1993 (2000).

[49] *Lansman et al v Finland* (Communication No. 511/1992) UN Doc No. CCPR/C/52/D/511/1992 (1994).

[50] *See American Convention on Human Rights, "Pact of San Jose", Costa Rica* OAS (22 November 1969) Art. 21; and Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (20 March 1952, ETS 9) Art. 1.

[51] *Apirana Mahuika ert al v New Zealand* (Communication No. 547/1992) UN Doc. CCPR/C/70/D/547/1993 (2000).

recourse under the ICCPR for violations stemming from barriers to land ownership and the control of resources for the purposes of development and cultural activities.[52] This is even more potent when noting the fact that for many Indigenous Peoples the land and resources are intimately connected with their cultural expression. In line with the HRC's comments in the *Mahuika* case that Article 1, self-determination could be used to interpret other articles, in this case, Article 27, right to culture. This recognises the importance of control over resources for Indigenous economic development and cultural activities.

This approach is confirmed by HRC where the Commission recognised the importance of self-determination in the context of Indigenous land rights.[53] The Commission also highlighted the need for a greater share of land and resources in Article 1's self-determination principle by noting that without land and resources Indigenous government is doomed to fail. General Comment 23 further entrenches these approaches alongside Article 27.[54] Here the Commission recognises that culture manifests itself in different ways, including ways that implicate the use of land resources. The HRC stated that the enjoyment of the rights contained within Article 27 requires positive legal measures to protect and ensure the effective use and participation of members of minority communities.

While it is abjectly clear that the ICCPR does not contain any positive legal protections or recognition of Indigenous property rights, the HRC has gone some way in recognising the importance land and resources have to Indigenous peoples, and the importance of this to the principles of self-determination and culture contained within the ICCPR. The main focus of the HRC jurisprudence stemming from the ICCPR has been directed at property interests as a corollary to the expression of self-determination and cultural expression already contained within the Convention. The HRC is mainly concerned with states that fail to recognise Indigenous property rights, or do not accord the appropriate weight of Indigenous communities' interests or participation in decision affecting their land usage.

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[52] Benedict Kingsbury "Claims by non-state groups in international law" 1992 25 Cornell Int'l LJ.

[53] HRC, *Concluding Observations: Canada,* UN Doc A/54/40 (1999) vol I.

[54] UN HRC, *General Comment 23: The Rights of Minorities (Article 27)*, UN Doc CCPR/C21/Rev.1? Add. 5 (26 April 1994).

(a) Indigenous Human Rights in Regional Jurisprudence: The Inter-American System

Human Rights have emerged as an area of law that is deep rooted in our moral psyche as human beings, and as such the Human Rights system has emerged into layers to best protect the rights of humanity. This layered system includes the global, the United Nations Human Rights system, and the regional systems. The regional systems are split into the following: the Americas, Europe, and Africa. Regional systems are able to better elucidate the human rights norms with regard to regional values and experiences. The importance of the regional systems is they also create a plethora of jurisprudence that may have influence in systems both at the International level and the domestic.

The Inter-American Court of Human Rights (IACrtHR) has been progressive in the advancement of Indigenous rights within the Human Rights framework through revolutionary jurisprudence. The IACrtHR has developed jurisprudence to advance the rights of Indigenous Peoples in the following areas: collective property rights, right to life with dignity, and the right to free and prior consultation.[55] Notably, the IACrtHR has developed upon the *pro homine* approach to interpreting human rights *vis a vis* the rights of Indigenous peoples.

The *pro homine* principle has become a solid feature of International Law since the human rights atrocities of the Second World War, and has since become *jus cogens*.[56] This movement recognises individuals as having the capacity to hold certain rights at International Law, and moves away from the orthodox view of the absolute supremacy of the state as the holder of rights, obligations and duties. This shift is evidenced by the American Declaration on the Rights and Duties of Man, which declares that states must recognise that "essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality."[57] This approach, while recognising individual humanity

[55] *See generally for further discussion on these developments* Andrea Schettini "Toward a new paradigm of human rights protection for indigenous peoples: A critical analysis of the parameters established by the inter-american court of human rights" 2013 9(17) Sur.

[56] Valerio de Oliveira Mazzuoli and Dilton Ribeiro "The pro homine principle as an enshrined feature of international human rights law" 2016 3(1) Indonesian journal of international & comparative law.

[57] Organization of American States, *American Declaration of the Rights and Duties of man,* preamble, O.A.S. (adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948) [Hereinafter American Declaration of the Rights and Duties of Man].

and the diverse nature of humanity, assigns rights to individuals but does not implicitly recognise that for many Indigenous peoples, their individuality is defined and situated within the collective and often, situated within the environment. Thus, as declared by Judge Sergio Garcia Ramirez in the *Awas Tingni Case,* it has come to the courts to interpret the application of this principle, and must do so in a way that is "conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement."[58] This statement therefore creates the basis for the extension of the *pro homine* approach to include collective rights.

The extension of the *pro homine* principle to allow for the collective nature of individualism within Indigenous contexts and world views has been entrenched within the jurisprudence of the IACrtHR in *Maygba (Sumo) Awas Tingni Community v Nicaragua* (hereinafter the *Awas Tingni Case)*.[59] This case concerned the Indigenous Mayagna Sumo community called the Awas Tingni who reside in ancestral lands in the North Atlantic Coast Autonomous Region in Nicaragua. By a majority of seven to one, the IACrtHR bench decided that Nicaragua had violated Articles 25 (right to judicial protection), and 21 (right to property).[60] The Court unanimously determined that Nicaragua must adopt legislative measures to recognise traditional Indigenous land ownership in accordance with their customary law, and create mechanisms to ensure this is protected.[61] The importance of this case is that it linked the general application of human rights principles to Indigenous demands, thus integrating Indigenous rights within the Human Rights framework of the region in what was the first legally binding decision by an international tribunal on Indigenous rights.[62]

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[58] Sergio Garcia Ramirez, *Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment on the Merits and reperations in the "Mayagna (Suma) Awas Tingni Community Case,"* 19 Ariz. J. INT'L & COMP. L. 449, 449 (2002).

[59] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, 173 (Aug. 31, 2001).

[60] At [173].

[61] At [173].

[62] S. James Anaya and Luis Rodríguez-Piñero "Part 1 The UNDRIP's Relationship to Existing International Law, Ch.2 The Making of UNDRIP" in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) at 7.

The Court in the *Awas Tingni Case* took an expansive approach to interpreting the human rights of collective peoples under Article 29 of the *American Convention*.[63] Instead of focusing solely on the positive legal mechanisms of state creation, the Court looked to the purpose or the natural law in order to give effect to Indigenous people's ability to thrive, to achieve contentments that are important to them. In doing so, the court found that 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."[64]

The jurisprudence in the *Awas Tingni Case* was further confirmed in a subsequent IACrtHR case, *Yakye Indigenous Community v Paraguay* (hereinafter, the *Yakye Case*).[65] This case not only affirmed the approach in the *Awas Tingni Case,* but took it another step further by taking into consideration exogenous legal instruments as tools of interpretation. The *Yakye Case*, much like the *Awas Tingni Case*, did not find a barrier in a lack of positive legal instruments in order to give effect to Indigenous rights. This case, centring on the interpretation of Article 21 of the *American Convention*, extended the *pro homine* principle and noted, in line with the European Court of Human Rights, that human rights must be interpreted as though they are living instruments and must therefore go hand in hand with the evolution of International Law and the current living situations of those who hold rights under international Human Rights law.

Notably, in *The Yakye Case*, the IACrtHR also identified a radical new interpretation of the plurality of right that is actually embodied within Article 21 of the *American Convention*. On the one hand, the court found recognition of a traditional view of the right to private property, whilst at the same time, recognising the right of an Indigenous view to private property rights.[66] Interestingly, the court notes that there is no conflict in this duality of rights.

[63] American Declaration of the Rights and Duties of Man Above n 57; Enshrined within Art. 29 is the *pro homine* principle.

[64] Mayagna (Sumo) Awas Tingni Community v. Nicaragua at [149].

[65] Yakye Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, 2 (Jun. 17, 2005).

[66] Above.

This radical approach taken by the IACrtHR shows how Courts are taking Human Rights principles and extending them to apply to the growing area of Indigenous Rights at international law. By moving beyond the Eurocentric nature of human rights and the positive legal requirements necessitated by orthodox international law, the IACrtHR has been able to respond effectively with binding effect to the demands of Indigenous Peoples within the region in a binding manner. These developments are important developments in the area of Indigenous Rights extending traditional notions of land rights to include Indigenous relationships to land, and in doing so, recognising the Indigenous cultural rights.

2. Indigenous Rights

There have been a number of developments in International law with regards to what could be termed an Indigenous Rights framework. Protections for Indigenous Peoples have often been pursued through the Human Rights Framework, as an already existing and normative area of International Law. However, as noted in Subsection A, the deficiencies in the ability of human rights to cover the full range of rights required to protect the spectrum of Indigenous needs was realised. A body of law, norms, and soft law has therefore been developing that can be broadly termed Indigenous Rights.

(a) The International Labour Organisation

The International Labour Organisation (ILO) is the longest standing specialised agency. The ILO has its genesis during the League of Nations and has endured through to the creation of the United Nations. The ILO was created in 1919 with a mission to achieve social justice by advancing social progress and reducing social and economic conflict through cooperation and dialogue.[67] After the international upheaval of the First World War, the ILO recognised the important role the workforce played in the new world order and the lives of the individual, firms and societies, and how labour conditions could play a vital part in peace and harmony. The ILO is unique in that it is organised along a tripartite system of membership that makes up

[67] *See generally* International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO),* 1 April 1919 available at https://www.refworld.org/docid/3ddb5391a.html [accessed 27 December 2019], preamble; and Gerry Rogers and others *The International Labour Organization and the quest for social justice, 1919-2009* (International Labour Office, Geneva, 2009) at Ch. 1.

the Governing body, including government, employer, and employee (worker) representation.[68]

In 1957, the ILO turned its attention toward the labour conditions of minorities, including Indigenous and tribal peoples. Between the years 1936 and 1989 seven conventions were adopted regarding the labour standards of Indigenous and tribal peoples.[69] As indicated in the previous Section A., the early days of the ILO approach to Indigenous issues was paternalistic in nature. However, the evolution of *ILO Convention relating to Indigenous and Tribal Peoples rights* has responded to the Indigenous pressure, and to date, only ILO *Convention 169 Indigenous and Tribal Peoples in Independent Countries* is still in force.

It is important to note the ILO conventions pertaining to Indigenous Peoples, as they are not only normative instruments, but are also binding on signatory states. On the normative side, the ILO conventions have influenced the development of other areas of international law including Human Rights and the definition of Indigenous in other areas of the law.

(b) ILO Convention 169 Indigenous and Tribal Peoples 1989

The ILO's continued quest for social justice has responded to the Indigenous community's desires. The current *Convention 169* shows an explicit recognition of the assimilationist and

[68] International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO),* 1 April 1919 at Art. 7.

[69] ILO Convention 50 Recruiting of Indigenous Workers (adopted 20 June 1936, entered into force 8 September 1939, 40 UNTS 110); ILO Convention 64 Contracts of Employment (Indigenous Workers) (adopted 27 June 1939, entered into force 8 July 1948, 40 UNTS 282); ILO Convention 65 Penal Sanctions (Indigenous Workers) (adoped 27 June 1939, entered into force 8 July 1948, 40 UNTS 312); ILO Convention 86 Contracts of Employment (Indigenous Workers) (adopted 11 July 1947, entered into force 13 February 1953, 161 UNTS 114); ILO Convention 104 Abolition of Penal Sanctions (Indigenous Workers) (adopted21 June 1955, entered into force 7 June 1958, 305 UNTS 267); ILO Convention 107 Protection and Integration of Indigenous an Other Tribal and Semi-Tribal Populations in Independant Countries (adopted 26 June 1957, entered into force 2 June 1959, 328 UNTS 247); ILO Convention169 Indigenous and Tribal Peoples in Independent Countries (adopted27 June 1989, entered into force 5 September 1991, 1650 UNTS 383).

paternalistic nature of their previous efforts,[70] and a commitment to addressing these downfalls stating in the preamble of *Convention 169*:[71]

> Considering that the developments which have taken place in International Law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards …

The adoption of *Convention 169* showed a rapid departure from the status quo of the time at International Law, which as previously stated was aimed at assimilating Indigenous peoples into the dominant society. The new approach indicated by this Convention was formed through consultation with the World Council of Indigenous Peoples, and adopts a theme of self-determination:[72]

> Recognising the aspirations of these 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 …

While there is a recognition in the Preamble to self-determination, the Convention goes no further on the issue of self-determination as a principle.[73] The Convention does, however, provide elements that arguably lead to a manifestation of self-determination. These include participation,[74] consultation,[75] self-management,[76] and, determination over the articulation of own priorities.[77] To date, this Convention remains the only active Convention concerning

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[70] *See generally* S. James Anaya *Indigenous peoples in international law* (Oxford University Press, New York, 1996) at 47.

[71] ILO Convention169 Indigenous and Tribal Peoples in Independent Countries (adopted27 June 1989, entered into force 5 September 1991, 1650 UNTS 383) at Preamble.

[72] Above at Preamble.

[73] At Preamble.

[74] *See* ILO Convention 169 Arts. 2(1), 5(c), 7(2), 22(1)(2), 23(1).

[75] *See* ILO Convention 169 Arts. 6(2), 27(3), 28(1).

[76] INTERNATIONAL LABOUR OFFICE Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituent.

[77] At 116–127.

Indigenous and Tribal Peoples, and as described by Anaya, is the most concrete manifestation of the shift toward a more responsive attitude toward the demands of Indigenous peoples.[78]

Convention 169 creates binding obligations on states to develop coordinated and systematic action to protect the rights of Indigenous peoples contained within the Convention.[79] Article 2 of the Convention also sets out the purpose of government is to ensure equal footing of Indigenous and tribal peoples within national legal frameworks whilst also promoting their social, economic and cultural rights, and assisting Indigenous and tribal peoples to eliminate socio-economic gaps in such a way that is meaningful and aligns with each peoples way of life.[80] The Convention also affirms general rights and protections that Indigenous and tribal peoples shall enjoy under the Convention with the support of those governments of states party to the agreement. These include, broadly, an affirmation of the human rights and fundamental freedoms to be enjoyed without discrimination, the safeguarding of persons, institutions, labour, cultures and environment of Indigenous and tribal peoples under measure not contrary to the wishes of the peoples concerned, and finally a general requirement to develop measures with respect to these elements with the participation of Indigenous peoples.[81]

While the ratification of the ILO conventions cannot be made with reservations, the legal status of the Convention is up to the individual state government and may vary from country to country. However, once ratified, under international law the provisions of the treaty of convention must be implemented in good faith.[82] Although there is a good faith requirement at international law, the ILO does have a reporting requirement, whereby party states must report periodically on the measures they have taken with regard to the implementation of the convention as well as any ongoing problems or concerns encountered. While there may be a moral obligation to submit these to Indigenous and tribal communities for comment, there is

[78] Anaya, above n 70.

[79] At. 2

[80] Above.

[81] *See generally* ILO Convention no. 169 above At Part I. General Policy.

[82] United Nations, *Vienna Convention on the Law of Treaties* (23 May 1969, entered into force 27 January 1980) United Nations Treaty Series Vol. 1155 p. 331, at Art. 26.

only a binding requirement to submit reports to the representative workers' and employers' organisations.[83]

Complaints for non-compliance can be made under Article 24 of the *ILO Constitution* by either a workers' or employers' organisation. Individual complaints have only ever been received by nine countries, the majority of which were Latin American countries where the ILO has the most ratifications.[84] Complaints cannot be made by Indigenous individuals or peoples in and of themselves, as with other complaints, these must be championed and made as a representation under Article 24 on the behalf of the complainant by either a workers' organisation or an employers' organisation.

The ILO itself has a relatively low ratification number, with only twenty-two countries having signed and ratified the Convention with a majority of these countries from Latin America.[85] This relatively low number of ratifications should not be cause to under-estimate the reach the Convention has outside of party states and organisations. For example, the work of the ILO has been used as a blueprint or point of reference for national legislative changes, such as in the Russian Federation where the ILO is not enforceable but has been considered by the Duma with regards to Indigenous Peoples in Northern Russia.[86]

The ILO has had further significant influence in advancing elements of Indigenous rights that are common across both frameworks discussed in this section. These include self-identification and autonomy, consultation, customary land protections, and, culture. Many of these elements have been incorporated into constitutions within the Latin American and Caribbean regions where the ILO has the most ratifications.[87] In Bolivia and Colombia, the ILO Convention is used in some states as a constitutional block, whereby the Convention has been incorporated in such a way that all domestic rights enshrined within the country's constitution must be

[83] *See generally* International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO),* 1 April 1919.

[84] Saul, above n 40 at 30.

[85] Above.

[86] Alexandra Xanthaki *Indigenous rights and United Nations standards: self-determination, culture and land* (Cambridge University Press, Cambridge, UK;New York;, 2007) at 91.

[87] Christian Courtis "Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples" 2011 18(4) International Journal on Minority and Group Rights.

interpreted in such a way that takes into consideration international treaties such as the ILO *Convention 169*.[88] This approach is significant because it also employs the *pro homine* principle that has been extended by the IACrtHR in that such interpretations must extend rights taking into consideration the fullest protections of persons for the purposes of ensuring human dignity, which as concluded in *Aweas Tingni* by Judge Sergio Garcia Ramirez, includes advancing collective rights.[89]

As the ILO conventions create binding obligations on ratified states, the bulk of the jurisprudence relating to the ILO convention 196 is restricted to domestic courts.[90] As the IACrtHR is a regional court, its jurisdiction extends only to regional human rights instruments, however at the international level it has been used as an interpretative tool. Specifically, at the regional level the IACrtHR used the ILO Convention as an interpretive tool in the *Baena Ricardo et. Al. Case* involving the State of Panama. The Inter-American Court referenced the ILO Constitution and a number ILO conventions, including *Convention 169* when deciding there had been a violation under the *American Convention* Article 16, Freedom of Association.[91] This indicates a strong interpretive function of the ILO conventions and its associated jurisprudence. Baluarte argues that the ILO *Convention 169* ought to be considered by courts as an interpretive tool when deciding cases involving Indigenous rights to land under the *American Convention*.[92] This sort of usage by the IACrtHR has the result of extending the normative attributes of ILO *Convention 169*'s elements to countries that have not ratified the Convention. In the case of *Yakya,* the IACrtHR had to consider Indigenous property rights, and in doing so declared that where the Court is considering cases that involve Indigenous land and

[88] At 439.

[89] Sergio Garcia Ramirez, *Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment on the Merits and reparations in the "Mayagna (Suma) Awas Tingni Community Case,"* 19 Ariz. J. INT'L & COMP. L. 449, 449 (2002).

[90] *For further discussion on domestic and regional jurisprudence of the ILO Convention 169 see* Courtis, above n 87.

[91] *Case of Baena Ricardo et al v. Panama, Baena Ricardo and ors v. Panama, Merits, Reparations, and Costs*, Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2001)at para. 157.

[92] David C Baluarte "Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169" 2010 4(2) Sustainable Development Law & Policy.

protections the Court must refer to the ILO *Convention 169* in their interpretation.[93] On this matter, the ILO *Convention 196* at Article 13 states:[94]

> In applying the provisions of this Part of the Convention, governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands and territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

The obligation to consult is also contained within the ILO at multiple points throughout *Convention 169*. This obligation has been considered as jurisprudence created in both the IACrtHR and domestic systems. The ILO lays out this protection as the following:[95]

> 1. In applying the provisions of this Convention, governments shall:
>
> (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.

This Article protection was applied in a decision handed by the Constitutional Court of Colombia, whereby the Court held that the Ministry of Environment and Western Society of Colombia failed to adequately consult with the U'wa people prior to granting a license for oil exploration within the U'wa community's traditional territories.[96] Again, this case further exemplifies the extension of traditionally individual rights to the collectives that has become synonymous with the Inter-American region's *pro homine* approach to human rights interpretation.

The ILO has shown great application in both the identification of Indigenous Peoples as rights holders at International Law, and as the basis for legally binding jurisprudence in domestic courts and constitutions as well as a normative influence in regional jurisprudence as an

[93] Yakye Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, 2 (Jun. 17, 2005) at paras. 127 and 130.

[94] ILO Convention 169 Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991, 1650 UNTS 383) at Art. 13(1).

[95] ILO Convention 169 Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991, 1650 UNTS 383) at Art. 6.

[96] Decision *SU-039/97,* 3 Feb 1997, Constitutional Court of Colombia.

interpretative tool. The ILO, which contains explicit provisions articulating a definition of Indigenous Peoples (as well as tribal and semi-tribal) that includes both the objective and subjective criteria that is now widely accepted within the Indigenous Rights discourse. The Convention has also been applied both domestically and regionally in jurisprudence in extending what are traditionally considered individual rights to the collective, in areas such as land rights, cultural rights, and consultation.

(c) The UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[97] is arguably the most current, positive legal representation of the growing framework of Indigenous Rights. As a document it elucidates the minimum standard of rights states should have regard to, and the minimum standard of Rights Indigenous Peoples have protected. UNDRIP declares a number of rights, both individual and collective.

Alongside the Human Rights movement of the 1970s, another movement mobilised in the 1970s and 1980s, often referred to as the 'Indigenous emergence'. The limitations of the Human Rights frame for the advancement of collective Indigenous rights was realised, but the potential opportunities to use the powerful Human Rights discourse proved to be a highly strategic vehicle to advance an Indigenous Rights agenda. In 1982 the United Nations Working Group on Indigenous Populations was created with the mandate to review developments related to the human rights and the fundamental freedoms of Indigenous peoples, and to give attention to the evolution of international Indigenous rights standards.[98] When Martínez Cobo completed his report in 1983, one of the recommendations was for the Working Group to 'Formulate a body of basic principles, based on those to be duly formulated in the text of a draft Declaration, and propose in due course a draft convention'.[99] Thus begun the long road to drafting the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[100] This declaration would

[97] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007).

[98] United Nations Human Rights Office of the High Commissioner "Mandate of the Working Group on Indigenous Populations" <https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx>.

[99] Third Part of the United Nations Economic and Social Council Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 Sep 1983) at para. 312.

[100] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007).

eventually become a great step forward for Indigenous Peoples and a positive affirmation of their rights at international law. This process resulted in over 100 Indigenous groups being able to participate in the formation of the drafting of a document that would ultimately be declaratory of their collective rights as Indigenous Peoples.[101]

After much negotiation diplomacy, UNDRIP was finally adopted by the General Assembly on 13 September 2007. UNDRIP received 143 positive votes from 143 UN Member States, with eleven abstentions and four votes against. However, even amongst those states who voted against the adoption, there was a general acceptance of the core principles contained within the Declaration.[102] Arguably, UNDRIP affirms a number of rights at International Law and codifies them into a declaration. Anaya states that UNDRIP "reflects the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with and expands upon international developments …".[103] In general it affirms the rights of Indigenous Peoples to cultural integrity, education, health, political participation, lands and natural resources, and, treaty rights. UNDRIP also contributes a range of new rights and recognitions to the growing corpus of law that is Indigenous Rights. Foremost amongst the new contributions to the Indigenous Rights framework that extend that of the Human Rights framework is the recognition of collective rights. Alongside the individual rights more traditionally recognised within the Human Rights framework, collective rights form an extension and clarification of the concept of self-determination that is available to Indigenous Peoples falling short of cession.

At international law a general principle of self-determination exists that protects the right of peoples to assert their independence. This principle, while appearing in the *United Nations Charter*,[104] formed the foundation for the decolonisation movement and whereby it was by the virtue of self-determination peoples have the right to freely determine their own political status,

[101] Xanthaki, above n 86 at 103.

[102] Anaya and Rodríguez-Piñero, above n 62 at 4.3.

[103] UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* (11 Aug 2008) A/HRC/9/9 at 43; this is also supported by International Law Association, Resolution No. 5/2012, 75th Conference of the ILA, Sofia (26-20 Aug 2012) at para. 2.

[104] Charter of the United Nations, arts 1(2) and 55.

and freely pursue their own economic, social and cultural development.[105] The principle of Self-determination has since been inserted into the *United Nations International Covenant on Cultural and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.[106] This right to self-determination has been qualified to exclude Indigenous Peoples from claiming cession. For further discussion, please refer to Section A on the general principle of self-determination.[107]

Furthermore, the Declaration creates a soft obligation on states to consult with and gain prior and informed consent from Indigenous peoples when making legislative or administrative changes that may affect them. This obligation in turn creates a foundation for more participation in state affairs, and therefore increases Indigenous involvement in national systems.

Having been adopted by the UN General Assembly as a resolution, UNDRIP became an instrument of soft law at International Law. As a soft law instrument, UNDRIP is technically not a source of international law.[108] While UNDRIP is not a treaty, and is therefore not an enforceable set of rights and obligations, it is a soft law tool of great import.[109] It is an immensely powerful normative tool that sets out and affirms the minimum standard of rights that Indigenous Peoples ought to enjoy and that states ought to respect. The very fact of the

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[105] *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514 (1960).

[106] UN General Assembly, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (Opened for signature 16 December 1966, entered into force 23 March 1976) art 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993 art 1.

[107] Felipe Gómez Isa "The UNDRIP: an increasingly robust legal parameter" 2019 23(1-2) The International Journal of Human Rights.

[108] United Nations, *Statute of the International Court of Justice* (18 Apr 1946) Art. 38(1) is now widely accepted as identifying the sources of International Law: a. international conventions whether general or particular, establishing rules expressly recognised by the contesting states; b. international custom, as evidence of general practice accepted as law; c. the general principles of law recognised by civilised nations; d. … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law.

[109] *See generally* Mauro Barelli "THE ROLE OF SOFT LAW IN THE INTERNATIONAL LEGAL SYSTEM: THE CASE OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES" 2009 58(4) International and Comparative Law Quarterly.

Declaration's existence can be said to be representative of a major shift in international law itself. The normative machinations of the declaration are somewhat indicated by the shift in support of the four states that voted against its adoption in the General Assembly have all since endorsed the Declaration.

(d) The UNDRIP in Regional Jurisprudence: The African Human Rights System

UNDRIP has not only been used as a normative tool alone, but has made its way into legal jurisprudence ad has had particular impact within the African Commission on Human and Peoples' Rights (ACHPR) and the Inter-American Court of Human Rights (IACrtHR) (note, discussion on the IACrtHR above in sub-section 1(b)). The ACHPR has had a longstanding commitment to advancing and protecting the rights of the Indigenous Peoples of Africa and played a vital role in the adoption of the Declaration by the African Group. This was achieved after the ACHPR adopted an advisory opinion on UNDRIP that it was wholly consistent with the rights enshrined within the African Charter and the general jurisprudence of the Commission itself.[110] The ACHPR then formally endorsed UNDRIP during its forty-second session along the same lines as their previous advisory opinion, further noting that the Declaration will become a valuable tool and point of reference.[111]

The UNDRIP was formally applied in formal ACHPR jurisprudence with the decision in the *Endorois Case.*[112] UNDRIP was then confirmed in the *Ogiek Case* by the African Court on Human and Peoples' Rights (ACtHPR).[113] These two cases are hugely significant with regard to the reach of the UNDRIP as Kenya had not endorsed the Declaration, nor had it ratified the ILO *Convention 169*, and its constitution was extremely weak in terms of Indigenous recognition and protection.[114] The *Endorois Case* was the first case in which the principles of

[110] Lucy Claridge "The approach to UNDRIP within the African Regional Human Rights System" 2019 23(1-2) The International Journal of Human Rights at 271.

[111] At 271.

[112] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ACHPR Communication 276/2003, 4 February 2010.

[113] *African Commission on Human and Peoples' Rights v Republic of Kenya* ACtHPR 006/2012, 26 May 2017.

[114] Claridge, above n 110.

UNDRIP were applied and confirmed their applicability within the African Human Rights system. The Commission also found that Indigenous rights such as free and prior consent, collective rights, cultural and religious as well as right to ancestral lands, all contained within the UNDRIP were protected by the African Charter.

In the *Ogiek Case*, the ACtHPR considered the approach in the *Endorois Case* in the applicants' submissions, and also explicitly affirmed the applicability of the UNDRIP when interpreting rights affirmed within the African Charter. The Court firstly identified a gap in the African Charter in that it did not define what an Indigenous population is. In deciding on this matter, the Court drew inspiration from the United Nations discourse on the growing corpus of Indigenous Rights law.[115] The Court considered that Article 22 of the African Charter, the right for all 'peoples' to development, must be interpreted in light of the UNDRIP Article 23. Furthermore, the Court affirmed that the Article 14 right to property in the African Charter was also a collective right when read in light of Article 26 in the UNDRIP.

C. Concluding Comments

Gayatri Spivak famously asked the question: "can the subaltern speak?" She asked this question in an essay where she uncompromisingly affirmed the relevance of Marxism, and the historical and ideological factors that create barriers for the subaltern[116] to be heard by a world where they apparently cannot save themselves.[117] The Western perspective, so well entrenched within the formulations of International Law, is reflected in the evolution of responses formed in International Law, as Indigenous voices begin to influence the early paternalistic approaches of the early ILO conventions right through to the development of the UNDRIP. International

[115] *African Commission on Human and Peoples' Rights v Republic of Kenya* ACtHPR 006/2012, 26 May 2017 para 106.

[116] The term 'subaltern' in this context is a term originating in the work of Gramsci; in critical theory and postcolonialism has come to refer to those populations which are socially, politically and geographically outside of the hegemonic power structure of the colony and of the colonial homeland. The subaltern is, therefore, often synonymous with Indigenous Peoples.

[117] *See* Gayatri Chakravorty Spivak "Can the Subaltern Speak?'in Marxism and the Interpretation of Culture, ed. Cary Nelson and Lawrence Grossberg (Urbana: University of Illinois Press, 1988), pp. 271–313, in" 1988 Deconstructing Historiography," in In Other Worlds: Essays in Cultural Politics.

law has struggled over time to respond to the pathologies of its own creation with regards Indigenous Peoples and aspirations.

This section has shown that the international community is responding to the needs and aspirations of Indigenous peoples, recognising the harms that have been created by colonisation; slowly, the subaltern is being heard. This is evidenced by the development of a burgeoning subset of the Human Rights framework, the Rights of Indigenous Peoples. The following chapter will discuss how the Human Rights framework has been able to accommodate the development of indigenous rights. This chapter will follow the work of Macklem, a human rights expert, who proposed a new theory of human rights that deviates from the current theories that argue specific rights exist based in law, morality or politics. Macklem posits a theory of human rights based in sovereignty, arguing that sovereignty and its operation and distribution has given rise to the need for certain rights.[118] This chapter argues that the Human Rights framework has been able to respond to the needs of the Indigenous Rights movement by limiting sovereignty, and has been able to do so because sovereignty is a malleable concept.

[118] Patrick Macklem *The sovereignty of human rights* (Oxford University Press, Oxford [UK];New York, NY;, 2015).

III Human Rights, Sovereignty and Indigenous Peoples

1. Introduction

The previous chapter has described how international law has developed over time in order to address the needs of Indigenous Peoples. International law has primarily evolved to address the needs of Indigenous Peoples through the recognition of rights within the Human Rights system. The needs of Indigenous Peoples, generally speaking, arise from the imperial mission of colonisation and the ongoing impacts of the operation of sovereignty. Human Rights have been able to address some of the needs of Indigenous Peoples by acting as a limit on the operation of sovereignty. Whilst sovereignty is often described in absolute terms, Human Rights is able to place limits on its operation because sovereignty has never been absolute; it has always been a malleable concept subject to limitations.

Now the concept of human rights and sovereignty are briefly defined and examined, followed by a description on how human rights operate to limit sovereignty, a thesis proposed by Macklem.[119]. The chapter will then describe the broad evolution of the concept of sovereignty, culminating in the conclusion that sovereignty is malleable, as is clear throughout its evolutionary history. It will then be established that sovereignty has been used and rearticulated throughout the ages in response to the needs of the time, and therefore has been a malleable concept that has always been subject to limitations. This section concludes by affirming Macklem's thesis that human rights have developed in order to address the downfalls of sovereignty, and now acts as a limit on the absoluteness of sovereignty.

A. The Sovereignty of Human Rights

1. Limiting Sovereignty: Macklem's thesis

This section explores Macklem's thesis that human rights have developed not from the starting point that protects essential features of what it means to be human, but has evolved to manage the adverse effects of the structural and operational impacts of international law and

[119] Above.

sovereignty. It discusses how Macklem positions the creation of human rights and the corresponding harms they mitigate. This leads into sovereignty, with a description of how human rights are able to mitigate sovereignty, and in doing so has created a space for the development of Indigenous rights.

International Law is a system of normative rules and principles that effectively govern and maintain a global legal order. While the legal and political space between recognised nation states has the potential to be chaotic, international law can bring order to international politics, law, and relations through principles that have developed over time to maintain peace amongst nations. The International legal order is bound up in the concept of sovereignty, an entitlement that recognises the authority of collectives as states. The sovereign state is therefore the base unit of the operation of international law and arguably constitutes that 'backbone' of the world order.[120] International law in turn confers legal validation of sovereignty on states, vesting in them the authority to exercise coercive authority both domestically and abroad.

Alongside others, Macklem argues that international law maintains a global order by recognising as valid sovereign authority for some, and refusing to do so for others. The impact of this is an ongoing distribution of sovereignty amongst a specific and somewhat exclusive club that constitute traditional actors at international law. Jackson argues that this club, or new world order, emerged in the 19th century, during the colonial expansion of Europe into Asia and Africa.[121] European colonisation exported the notion of a civil state and associated criteria for international personality to be recognised. Lines were drawn as Europe imposed notions of civility and civilisation throughout the world. This imposition and hierarchy in the international community was developed and entrenched with the European form of civil state firmly positioned as superior. This model has had enormous normative influence over the continued formation of international law and the organisation of global politics. As Jackson further notes,

[120] Marcel Brus "Bridging the Gap between State Sovereignty and International Governance: The Authority of Law" in Gerard Kreijen (ed) *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002) 3 - 24 at 3.

[121] Robert H Jackson *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge University Press, 1990).

countries never colonised by Europe, such as Japan, had to conform to the rules scripted by the West and assert statehood in these terms.[122]

Jackson refers to the international legal system as a game with constitutional rules denoted by sovereignty.[123] The rules of sovereignty set the playing field, who can play the game and who cannot, and how the game is to be played. Such rules range from the equality of states, and jurisdiction to rules of non-intervention, and the waging of just war. As indicated previously, Europe had a monopoly on the exclusive title of sovereign player in this game. While the rules of the game have been changed since the Second World War to allow non-European states admission to the playing table, the purpose of the game has not changed: the maintenance and preservation of the sovereign state's way of life.[124] In order to be admitted, however, you must first conform to the way of life posited by the rules first articulated by the early European players before the Second World War. The result of the constitutive rules of the sovereign game maintain the distribution of sovereignty and thus the global order. It is this distribution of sovereignty that Macklem's thesis is ultimately concerned with and the harms, or pathologies that this distribution creates.

For Maklem, the international legal order described above allocates and distributes sovereignty, which gives legal validity to the use of coercive authority over peoples and territory.[125] Beitz describes pathologies as those arising from the political structure that organises coercive authority and locates it in dispersed, autonomous, domestic authority that secures against external coercive authority; these units are known as the state[126]. Because sovereignty, the institution of coercive authority, is not subject to higher authority, pathologies inherent in the global state structure were regarded by framers of early human rights and advocates as being evidenced by World War II and associated events.[127] After the Second World War human rights were framed as a common set of standards to be implemented within

[122] Robert H Jackson "Quasi-States, Dual Regimes, and Neoclassical theory: International Jurisprudence and the Third World" in Beth A Simmons and Richard H Steinberg (eds) *International Law and International Relations: An International Organization Reader* (Cambridge University Press, 2007) at 220.

[123] Jackson, above n 121 at 34-47.

[124] At 129.

[125] See generally Macklem, above n 118 at Ch 2.

[126] Charles R. Beitz *The idea of human rights* (Oxford University Press, New York;Oxford;, 2009) at 129

[127] At Ch. 20.

an international framework as a way to repair the deficiencies of the pre-war international state system.[128]

Macklem builds upon Beitz's notion of pathologies of international law and the corresponding Human Rights response following the Second World War. Macklem situates sovereignty as the mechanism with which International Law creates pathologies through the distribution and recognition of sovereign authority of states. Macklem identifies the crucial difference: human rights vest in individuals and not the orthodox objects of international law: sovereign states. Human Rights vest rights in individuals, and obligations on states. They thus play a distinct role in international law; they create legal measures against which claims and acts of sovereignty power can be measured against and deemed to be legitimate at international law.

Macklem argues that human rights have developed in direct response to the pathologies present in International Law and aim to ameliorate the harms caused by the distribution and redistribution of sovereignty. Macklem has identified two key features in the structure and operation of international law that human rights have developed in response to. The first feature is the simple fact that the international legal order vests sovereign authority in the state, allowing sovereign institutions to exercise coercive authority in ways that harm the interests human rights have developed in response to. The second feature is the distributive function international law plays in distributing and re-distributing sovereign power among states.[129]

The notion that human rights limits sovereignty is not new and is not a difficult position to defend. Beitz positions human rights as a social practice that individuals are able to invoke and rely on to protect their interests where institutions have failed to protect conditions that are reasonably expected of them to protect.[130] Rawls positions the role of human rights within the state as a limiting force on the internal affairs.[131] While both Beitz and Rawls articulate human rights from a predominantly political perspective, Macklem positions human rights development in a positive legal context and as developing in direct response to identified harms

[128] *See generally* at Ch. 20.

[129] Macklem, above n 118 at 26.

[130] Beitz, above n 126 at 102-17, and 210.

[131] John Rawls *The law of peoples: with, the idea of public reason revisited* (Harvard University Press, 1999) at 79.

caused by the function and distribution of sovereignty and International Law. Regardless of the moral, political or legal conception of human rights, all have corresponding rights and obligations defined in terms of interests that are to be protected.[132]

In making his case, Macklem identifies positive Human Rights instruments and the corresponding harm they developed to ameliorate. These fall into the following categories: civil and political, and, social and economic, labour rights, special rights including minority rights, and, Indigenous rights, and finally, the right to development. Each of these is now discussed in turn.

Civil and political rights speak to a number of rights that protect individuals from the potential harms of the internal authority vested in states. One of the major harms identified that Civil and Political rights aim to ameliorate is inequality, including discrimination on various grounds, the right to justice, and participation on the political life of the state.[133] Social and economic rights aim to limit a similar potential harm as Civil and Political rights. International Law vests sovereign power in states, giving them authority to create and control the economy and other resources. Social and economic rights protect individuals' rights to a fair distribution of resources and creates a positive obligation on states to establish institutions that distribute wealth and basic social goods to the citizenship of the state.[134]

Labour rights are an interesting and dynamic set of rights that have developed into their own field of Human Rights. Macklem identifies labour rights as mitigating both the internal and external operation of sovereignty. The potential harm that labour rights aim to ameliorate is similar to that of the human rights identified in the previous paragraph: civil and political rights. Labour rights also aim to mitigate the potential social and economic harms caused by the authority structure of international law which vests sovereign power in the state. Furthermore, labour rights monitor the global economy and protect domestic labour by regulating

[132] See generally Joseph Raz *The morality of freedom* (Clarendon Press, New York;Oxford [Oxfordshire];, 1986).

[133] See Generally for Civil and Political Rights, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; and Macklem, above n 118 at Ch. 3

[134] See Generally UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; and Macklem, above n 118 at Ch. 3.

international competition.[135] International labour rights also have a dual internal and external normative influence. Macklem notes that international labour rights obligate a sovereign institution to not only respect the rights of workers domestically, but also place an obligation on the sovereign institution to respect the rights of workers in other jurisdictions.[136]

Human rights have been developed in response to the harms caused individuals owing to the redistribution of sovereignty. These are special rights, vested generally in certain peoples and not others. This is a major departure from the generally universal tone of Human Rights, and echoes a distinction posited by H.L.A Hart between general rights and special rights. General rights are those rights vested in all humankind *qua* humankind, while special rights may be vested in others by virtue of a special relationship or contract, or by virtue of being part of a particular social or political group.[137] Special rights in this sense evolved in response to particular contingencies of history and geography and vest in individuals within communities and not others.[138] Rights identified here are minority rights and the developing rights of Indigenous Peoples.

Sovereign institutions have the ability to make decisions at a macro level that impact on communities that have developed within their boundaries or have existed prior to the establishment of the modern state boundaries. International law allows manages the distribution and redistribution of sovereignty and manages the lines that delineate one nation state from another. These artificial shifts in sovereign territory can cleave communities into fractions spread across nation state boundaries thus creating minorities within a new legal order. On the face of it, minority rights exist in international law because the interests they protect are deemed to be certain universal attributes of human identity and therefore worthy of protection. These so-called key features of human identity include religious, cultural and linguistic affiliations, and are enshrined within Article 27 of the ICCPR.[139] Macklem offers an alternative justification for the development and legitimacy of minority protections. While acknowledging the long history of minority protections, Macklem identifies the interwar period

[135] For broad disussion on the role of labour rights internally and externally see Macklem, above n 118 at Ch. 4.

[136] Macklem, above n 118 at 100.

[137] See generally H. L. A. Hart "Are There Any Natural Rights?" 1955 64(2) The Philosophical Review.

[138] Macklem, above n 118 at 11.

[139] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

as being a formative period for this subset of Human Rights. The period following the First World War saw an extensive redistribution of sovereign authority creating minorities and majorities within new states. Macklem argues that the minority protections system that evolved during the interwar period monitors the justice of the distribution of sovereign power that international law performs in the quest for legal order within global politics.[140]

Besides minority rights, another subset of the Human Rights system that vests in some communities and not others is that of the burgeoning field of Indigenous Rights. This field of Human Rights is a recent recognition of Indigenous Peoples as international legal actors, and is a direct response to the adverse consequences of the dubious acquisition of sovereignty by colonial powers and international law's subsequent non-recognition of the status of Indigenous Peoples as international legal actors.[141] This field of rights has developed positive legal recognition during the interwar period and continues to develop. Such instruments have been described more fully in chapter II.B and include ILO *Conventions 107* and *167*, and UNDRIP. The legitimacy of the Right of Indigenous Peoples rests in contingencies of history, law and politics, and speaks to the consequences of recognising sovereign authority of states over Indigenous collectives.

The Rights of Indigenous Peoples can also be seen as an expression of the universal right to self-determination,[142] another right identified by Macklem as being developed to ameliorate the harms of the distribution of Sovereign power. The right to self-determination is summarised above in subsection II.B(1), and now operates to promote distributive justice of sovereignty by monitoring the efficacy of states (or more aptly, failed states). Self-determination both protects existing states and authorises the creation of new states when that state fails to give effect to internal political representation.[143] For Indigenous peoples, however, self-determination is limited to internal self-determination through varying degrees of self-governance, identification and freedom to engage in one's own culture, however, as a principle it has the potential to address the wrongs of colonisation.

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[140] Macklem, above n 118 at Ch. 5.

[141] At Ch. 6.

[142] Indigenous Rights are strongly connected with the right to self-determination, which is supported by the wording of the UNDRIP, *see also* S. James Anaya *Indigenous peoples in international law* (2nd ed, Oxford University Press, New York;Oxford;, 2004) at 99.

[143] Macklem, above n 118.

Finally, Macklem identifies the right to development and the mechanisms through which international law contributes to global property through the distribution and exercise of sovereign power. The corresponding right that has developed to monitor and ameliorate the harms of economic distribution is the right to Development, enshrined in soft law instruments, *The Declaration on the Right to Development*, and in binding instruments such as the ICESCR.[144] While there is no general right in International Law that positively obligates sovereign states to provide assistance to foreign sovereign states, it does however impose an obligation not to impose rules and policies that exasperate global poverty.

Macklem's thesis offers a new way of engaging with the purpose of Human Rights and the underlying issues that they protect recognising that the international law and sovereignty have evolved in such a way that both creates and has the potential to create harms to individuals. This reading of Human Rights articulates the development of human rights that protect interests of individuals within the coercive sphere of the sovereign institution. Sovereignty is seen as being dual-faced, on the one hand sovereignty is an omnipotent institution that has coercive jurisdiction within the domestic sphere; on the other hand, sovereignty also has a freedom from coercion through a right to non-intervention with other sovereign states, and at the international level an interdependence with other sovereign states that structure the legal global order.[145] However, the harms sovereignty has caused peoples it purports to hold authority over have highlighted the need for limits on the so-called absolute nature of sovereignty. Human rights have been able to evolve in response to these atrocities and are able to limit the operation of sovereignty and ameliorate the pathologies of international law because sovereignty has never been static, it has evolved over time and has been formed and moulded by the environment within which it operates. The proceeding section will explore the concept of sovereignty, in order to argue that human rights are able to limit it owing to its malleable nature, and consequently, has allowed the Human Rights framework to widen to include Indigenous rights.

[144] *Declaration on the Right to Development* GA Res 41/128 (1986); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[145] Hans Köchler "The Dual Face of Sovereignty: Contradictions of Coercion in International Law" 2020 The Global Community—Yearbook of International Law and Policy 2019.

B. Sovereignty

1. Sovereignty: The Concept

As the international community grew, and nations came into contact with other nations, a system was required to stabilise international relations while each nation maintained its own model of authority. Sovereignty as a model evolved as a way to maintain order amongst states without the need for an overarching macro-authority. Sovereignty is a multi-faceted construct that strives to maintain order and peace both on an international field through concepts of recognition and non-intervention, and internally as the conceptual highest authority within a territory conceptualised as the state. The foundation of and operation of international law rests on this elusive concept of sovereignty. Without the recognition of sovereignty, a state is not admitted to the international community as a full player, therefore the global order is dictated by the rules of sovereignty. Regardless of the importance of sovereignty to the operation of international law, modern sovereignty has been described as a myth. This is because while still couched in absolute terms, sovereign institutions are all extremely limited in the operation of their authority. Laterpacht summarises this position nicely in the following:[146]

> [W]ith regard to sovereignty on the international plane, that must be seen largely as a myth – except when it is used as a word to describe a State's title to territory. Whatever may have been the position in the nineteenth century and earlier, national sovereignty certainly does not now convey the idea of the same degree of power in the international sphere as possessed within Britain by Parliament. States have increasingly used their power to limit their power… But such limitations do not affect the quality of the State as such. The State remains a sovereign State in international law and continues to be able to guide its future destiny within the limits that is has itself accepted.

That sovereignty, while an absolute concept, is subject to limitations is important. This position, and the assertion that sovereignty is a malleable concept gives credence to Macklem's thesis that human rights is able to limit an absolute authority. Sovereignty may be articulated on the grounds of Ancient Roman popular sovereignty or the divine right of rulers. Elements

[146] Eli Lauterpacht "Sovereignty-Myth or Reality?" 1997 73(1) International Affairs (Royal Institute of International Affairs 1944-) at 149.

of both are woven throughout Bodin and Grotius's conceptualisations of sovereignty, and influence Hobbesian and Lockean articulations. Nevertheless, there have always been limits on sovereignty based on the scripts of morality of the time. In the Middle Ages, Christian morals were apparent as limiting factors of sovereignty, as understood through the rhetoric of divine natural law. From Grotius we see a slight shift toward the law of nations, somewhat akin to customary law through state practice, as limiting factors. From Hobbes and Locke, we begin to see a social contract or a rights basis to sovereignty, limited by an obligation to protect. At a base level, we have seen sovereignty limited by natural law, positive law, and social contract.

Sovereignty is an ambiguous and elusive concept. The discourse on sovereignty is broad and is elusive because it overlaps across diverse policy, academic, and political disciplines.[147] Regardless of where the discussion of sovereignty is located, it has remained an important feature of our conceptual understanding of authority, power and legitimacy. The construct itself, as old as time immemorial, has evolved over time as the environments within which it has existed have changed. Those who have contributed to the theory of sovereignty give some insight into the environments within which the concept has been melded with circumstance and the needs of the time.

The following subsection will describe the different iterations of sovereignty over time, although it must be noted that owing to the wide ground that sovereignty covers, this sub-section is only able to precis the characteristics of the main stages of the evolution of sovereignty. The purpose of this precis is to highlight the malleability of the concept of International Law, to support Macklem's thesis that human rights are capable of placing limits on an absolute authority.

2. Sovereignty: A History

Throughout the ages, sovereignty has been used, bent, and rearticulated in order to conform to the political agenda and needs of the time. It is a concept that has been deeply entrenched within

[147] *See generally* Hideaki Shinoda *Re-examining sovereignty: from classical theory to the global age* (Springer, 2000); Hent Kalmo and Quentin Skinner *Sovereignty in fragments: the past, present and future of a contested concept* (Cambridge University Press, 2010); Winston P. Nagan and Aitza M. Haddad "Sovereignty in theory and practice" 2012 13(2) San Diego International Law Journal.

the sphere of political thought and legitimises the power structures at hand. It has changed in response to its environment, and this is shown clearly throughout the ages. Whilst the exact genesis of the concept of sovereignty is debated, it is likely that the concept has roots in ancient Greece and Rome.[148] Sovereignty may be found in Aristotle's notions of supreme power,[149] whilst others find it in Cicero's state as a collection of men.[150] The concept of sovereignty during this time was understood in reference to the populace, the source of sovereignty, but expressed in a supreme authority. Supreme power was recognised as existing within a state.[151] This understanding was articulated during the Ancient Roman era (eighth century BC – fifth century AD). At the Roman Empire's helm was the Emperor, who held within his person all the powers of the state – military, judicial, executive, and legislative.[152] The Emperor was the representation of the sovereign of the people. The Emperor's power therefore originated within the populace, constituting the term 'popular sovereignty'.

The fall of Rome coincided with a period of change in the evolution of the concept of sovereignty. As Hinsley argues, the Roman concept of sovereignty also fell, only to be revived later in history.[153] The evolution of sovereignty was not broken – it continued through the concept of *imperium,* the power to command, through the Middle Ages.[154] The rise of the Catholic Church had a powerful influence throughout the west, and on the next iteration in the evolution of sovereignty. The Church reached almost into every part of medieval Europe and had a monopoly on almost every institution of this time, saturating the period with Christian

[148] Charles Edward Merriam and Inc ebrary *History of the theory of sovereignty since Rousseau* (Batoche, Kitchener, Ont, 2001).

[149] Franz Susemihl and R.D. Hicks *The Politics of Aristotle: A Revised Text, With Introduction, Analysis and Commentary* (Macmillan, London, 1894) at 381.

[150] Charles Howard McIlwain *The growth of political thought in the west: from the Greeks to the end of the middle ages* (Macmillan, New York, 1932) at 80-1.

[151] F. H. Hinsley *Sovereignty* (2nd ed, Cambridge University Press, New York; Cambridge [Cambridgeshire], 1986) at 43. The source of this philosophy can be attributed to the *lex regina* doctrine, which describes that although power is held by the ruler, the source of that power has to have been transferred by the populace.

[152] David Starkey *Crown and country: A history of England through the monarchy* (HarperCollins UK, 2010) at 5.

[153] Hinsley, above n 151 at 33

[154] At Ch. 3.

values.[155] As the Bishop of Rome and the head of the Roman See, the Pope had extreme influence and had authority over both the divine and the secular aspects of earthly affairs. This resulted in a period of secular-religious conflict during the High Middle Ages. The main issue of political thought was the relationship between kingship and the priesthood. Because of this influence, secular rulers took umbrage at the Church's influence over them, triggering large scale conflict as the Church moved to restrain the authority of secular rulers, in opposition to secular rulers attempting to legitimise their own authority at the expense of the Church.[156]

The fall of Rome and rise of the Church spurred two figures to contribute to the evolving shape of sovereignty: St. Augustine of Hippo and Pope Gregory VIII. St. Augustine of Hippo contributed to the theory of authority and control, or more simply, the role and responsibility of the state, which was conceived as an institution for the maintenance of God's earthly peace.[157] Augustine's work laid the foundation for the next iteration of medieval political thought. This formative period was brought about by the Gregorian Revolution of the 11th century, considered by some to be the first European Revolution.[158] Still plagued by religious-secular tension, Pope Gregory VII's reforms brought about an atavistic resurgence of papal doctrine harking back to Pope Gelasius. These reforms reinforced the centrality of the Catholic Church, which included a supremacy over human structures, such as the secular state. Within these reforms, emerged what became known as the Two Sword Doctrine of Authority.[159] This

[155] Samuel E Finer *The History of Government from the Earliest Times: Ancient monarchies and empires* (Oxford University Press, USA, 1997) at 857.

[156] Jørgen Møller "Medieval origins of the rule of law: The Gregorian reforms as critical juncture?" 2017 9(2) Hague Journal on the Rule of Law.

[157] Frederick W. Loetscher "St. Augustine's Conception of the State" 1935 4(1) Church History: Studies in Christianity and Culture.

[158] R. I. Moore *The first European revolution, c. 970-1215* (Blackwell, Oxford, UK;Malden, Mass;, 2000).

[159] The Two Sword doctrine declared by Pope Gelasius, draws on Augustine's writing and in response to the Byzantine Emperor's move on the authority of the Church in the year 410: "Two there are, August Emperor, by which the world is chiefly ruled, the sacred authority of the priesthood and the royal power. Of these the responsibility of the priest is more weighty insofar as they will answer for the kings of men themselves at the divine judgment." Cited from Brian Tierney and Sidney Painter *Western Europe in the Middle Ages, 300-1475* (new york: Knopf, 1970) at 76.

theory further entrenched within medieval political thought the absolute primacy of the Catholic Church and by *de facto* that of the Pope.[160]

From this base, the question of sovereign authority continued in a duality of ecclesiastical authority and the ruler's temporal authority until the 17th century. The political turmoil of England during this time contained different catalytic environments that further spurred the evolution of sovereignty. While the meaning of sovereignty did not change dramatically, it still articulated the right to reign or embodied the concept of a supreme ruler, what did change was the subject of sovereignty. Before the Glorious Revolution of 1689, sovereignty was understood as the divine right to rule, an absolutism. The only higher authority than the Monarch was divine or natural law – that is, God himself. However, the Protestant Reformation of the 16th century caused political turmoil during the 16th century, which in turn influenced the next change in sovereignty spurred in turn by the works of Bodin.

The term sovereignty as we use it today was coined in the 13th century by the French monarchy to legitimise its centralisation.[161] The term 'sovereignty' was used in reference to the absolute nature of the political rule, which, was in this way analogous to God's sovereignty. Previously, Roman descriptions fell short of an absolute, and was rather described in terms of the 'highest ruling authority' of which held no overt connotation of absolute power over state and subject.[162] It was not until the 16th century philosopher Jean Bodin that a systematic analysis of the concept of sovereignty appeared.

Bodin's work on the notion of sovereignty was undoubtedly influenced by the political turmoil through which he lived. The order of Europe was crumbling, and Protestant Reformation of the 16th century was eroding the old ideas of Christian universality and the Holy Roman Empire.[163] The diminishing sense of Christian universality in Europe and the religious wars that followed left Europe in a sense of limbo. The resultant social dislocation and anarchy was

[160] Delane E Clark "The Two Swords controversy and the roots of modern political thoery" 1989 AIRFORCE INST OF TECH WRIGHT-PATTERSON AFB OH at 12–13.

[161] Paul R DeHart "Leviathan leashed: The incoherence of absolute sovereign power" 2013 25(1) Critical Review at 2–3.

[162] At 3.

[163] *See generally on the Reformation:* Euan Cameron *The European Reformation* (2nd ed, Oxford University Press, Oxford, 2013).

for Bodin a matter that universalism was in no position to remedy.[164] Bodin's sovereignty centralised authority and sought out the establishment of a hierarchy that would remedy the sense of anarchy that the events of the 16th century had caused. So as to achieve sustained order, Bodin effectively concentrated power within the monarchy: to him, princes were the most fitting reciprocal for supreme, centralised authority.[165] For Bodin, the person or institution that is held to be sovereign is absolute. Because no other institution or human is greater, the sovereign is therefore not bound by any other such institution or human; not even the law.[166] Bodin however, was by no means committed to completely unfettered absolutism. In his definition of sovereignty, the term absolute is taken from the Roman Law of Uplian *legus solutus,* which is taken to mean "not bound by laws".[167] In this sense, the sovereign is not bound by the laws of man, civil or positive law. There are, however, restraints on the sovereign within the domain of natural and divine law.[168]

Events of the 17th century moulded two further philosophical shifts to the evolution of sovereignty: that of Grotius and Hobbes. It is within the commentary of these two theorists that we begin to note a crossroads with concepts of property and ownership. Grotius' work on sovereignty was formed against the backdrop of his native Netherlands and its war for independence against Spanish colonialism.[169] Whilst Grotius' contributions to sovereignty have come to influence international law and state-to-state relations, the underlying rhetoric of his commentary starts with the nation. It is here that we begin to see flickers of a conceptualisation of the modern state. Stripped back, Grotius' sovereignty differs from previous forms of sovereignty through the identification of further limits to its supremacy. In addition to Bodin's divine and natural law limits, Grotius' identifies the law of nations as

[164] Nagan and Haddad, above n 147 at 441.

[165] Howell A. Lloyd "SOVEREIGNTY : BODIN, HOBBES, ROUSSEAU" 1991 45(179 (4)) Revue internationale de philosophie.

[166] At 356 – 361.

[167] And also "*Legibus sumptis desinentibus, lege naturae utendum est"* "When laws imposed by the state fail, we must act by the law of nature.".

[168] Nagan and Haddad, above n 147 at 441.

[169] *See generally* Martine Julia van Ittersum "Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies, 1595–1615" (ProQuest Dissertations Publishing, 2002).

another limit to sovereignty, along with those limits agreed to between the ruled and the ruler.[170]

Hobbes' sovereignty was influenced by the constant conflict between the English crown and Parliament. Hobbes argues that sovereignty and authority emerge from conflict. Hobbes theorises that we are all in a constant state of war of all against all,[171] where every man's right reaches only as far as his might allows.[172] It is from this state of anarchy that government develops through a compact amongst the people. Much like Grotius' sovereignty, in which sovereignty is likened to property rights, Hobbes' sovereignty is also formed through the surrendering of rights. The sovereign governing institution is created through natural contract as people surrender certain rights to either person or institution.[173]

Hobbes' sovereignty, while absolute, is conceptually different to that of Bodin. Throughout Hobbes's work there runs a dichotomous thread that creates balance through tension within the notion of sovereignty. On the one hand there is an absolute authority, while on the other hand there is a conditional obligation of protection. This is effectively a conditional limiting factor to the absoluteness of power: the central factor is whether the sovereign can discharge their obligation to protect those who have consented to obedience.[174] Hallenbrook argues that a natural right which makes up the foundation of a sovereign's obligation to the subjects' lives is not just a narrow-construed definition of a right to the protection of life, but that of the ability to live commodiously.[175] Thus, if this natural right is not protected, the sovereign ceases to be sovereign and the subjects are returned to a state of nature, or anarchy, through which, the process resumed. This process is founded on Hobbes' view of human nature as being inherently selfish and greedy, whereby subjugation to a higher authority is the only way to create peaceable balance.[176]

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[170] Charles Edward Merriam *History of the Theory of Sovereignty since Rousseau* (Columbia University Press, 1900).

[171] *Bellum omnium contra omnes.*

[172] Merriam, above n 170.

[173] *See generally* George Shelton *Morality and Sovereignty in the Philosophy of Hobbes* (Springer, 2016).

[174] *See* David Dyzenhaus "Hobbes and the Legitimacy of Law" 2001 20(5) Law and philosophy.

[175] Christopher R Hallenbrook "Leviathan No More: The Right of Nature and the Limits of Sovereignty in Hobbes" 2016 78(2) The Review of Politics.

[176] Nagan and Haddad, above n 147.

Locke, anther English theorist, contributed to the evolution of sovereignty in the 17th century. Again, this theory was created in the furnace of the political upheaval of the English Revolution of 1688, and emerged as a champion of the Whig Faction. The importance of Locke's articulation of sovereignty was that it succeeded as the foundation for the justifications used to overthrow the Stuarts, and later found expression in the American Revolution.[177] Locke's theory starts with a state of nature. In contrast to Hobbe's theory, this is not a state of war, but a condition where individual rights are imperfectly secured. Locke's notion of sovereignty is attached to property rights, influencing Hegalian dialectic and subsequently Marx's and Engle's musings that any state of society must necessarily be the negation of what immediately preceded it.[178] For Locke, this means that if a society does not have laws that conceptually resemble private property and individual ownership rights, that society must be in a more primitive, communistic phase of development. For Locke,[179] the most basic level of society suggests that man, by virtue of being born, has a natural right to their own preservation. This is a right to those elements provided by God's earth for man's substance.[180] In pre-political organisations, man has a common right to resources. This common right transfers to a common good as society progress, so that a guarantee may be obtained through the establishment of a civil or political society or political society, and then a government: the sovereign institution.[181] To this sovereign institution, or government, every man surrenders to the community his natural rights in so far as necessary for the common good – but no further.[182]

The evolution of the above theories ought not be assessed in isolation from the practical world of diplomacy of the 17th century. The Peace of Westphalia of 1648 must be mentioned when undertaking any study of the formation of modern sovereignty. This event is one of the most important diplomatic and consequently juridical events of the 17th century. The Protestant

[177] Merriam, above n 170 at 16.

[178] Raymond Firth *Primitive economics of the New Zealand Maori* (Routledge, Abingdon, Oxon;New York;, 2011).

[179] It is noted that the sexist gendered language in this paragraph is a reflection of its time and is taken in context of Locke's work, it is not a reflection of the author.

[180] John Locke and Peter Laslett *Two treatises of government: a critical edition with an introduction and apparatus criticus by Peter Laslett* (Cambridge University Press, Cambridge, 1960).

[181] At sec. 129–30.

[182] At sec. 129–30.

Reformation, the initiation of which is commonly associated with the publication of Martin Luther's 95 theses, caused a religious schism with the Catholic Church. The religious intolerance that followed became a feature of the 17th century, the defining feature of this period being religious conflict culminating in the Thirty Years War.[183] Peace was finally established with the signing of the treaties of Osnabrück and Münster, now known as the Peace of Westphalia. This has proved relevant not only to the evolution of international law and diplomacy, but also to political relations and sovereignty.

The Peace of Westphalia established peace during a period of religious conflict by consecrating the principle of toleration by establishing an equality of religion between Protestant and Catholic states. The importance of this is that it effectively judicialised the idea of an international society based on the authority of religious non-interference inter-state. It recognised that a European body politic would be a decentralised sovereignty-dominated body politic.[184]The Peace of Westphalia, although it established a foundation, had nothing to do with conventional notions of sovereignty.[185] In fact, the Peace of Westphalia was concerned with creating an internationally recognised regime for religious tolerance within regions, rather than the justification for the authority of princes to reign as sovereign authority within their lands.[186] The importance lies in the notion of tolerance, and has effectively come to represent the notion of non-interference of sovereign states.

The environment within which sovereignty operates is constantly evolving. The question remains whether sovereignty is able to evolve in order to keep up with the demands of our changing world that is committed to international law and human rights, one that is increasingly

[183] Leo Gross "The peace of Westphalia, 1648–1948" 1948 42(1) American Journal of International Law

[184] Nagan and Haddad, above n 147 at 427.

[185] It was not until the work of Vattel and Wolff that we see the fruition of the concept of the connections between the Peace of Westphalia and conventional notions of state sovereignty. In the later part of the 18th century the legal theorists Emer de Vattel and Christian Wolff entrenched the principle of state non-intervention in sovereign state and domestic affairs – this concept has now become a pillar of our international system, and our understanding of modern state sovereignty. Vattel later extended the principle to apply to all states, European and non-European, claiming that "the Spaniards violated all the rules when they set themselves up as judges of the Inca Athualpa. If the prince had violated the law of nations with respect to them, they would have had a right to punish him." in Emer De Vattel *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson, 1835) at 155.

[186] Stephen D Krasner "Abiding sovereignty" 2001 22(3) International political science review at 232.

linked in a web of global Independence. Delving into the history of sovereignty shows that as a concept it has constantly evolved over time in response to the changing pressures of the environment within which it has exist have changed. Theorists described in this chapter who have contributed to the theory of sovereignty give some insight into the environments within which the concept has melded with circumstance and the needs of the time. The history shows that sovereignty has been used, bent, contorted, and rearticulated in order to conform to the political agenda and needs of the time, and the needs of Europe and its imperial efforts.

This section has shown that sovereignty as a concept has not remained static. At its most basic, the notion of sovereignty has retained its purpose as the highest authority or power within a territory. However, territory has been conceptualised flexibly, as tribal territory, a nation, a state, a nation-state, or even a state-nation. Regardless of its status as being the most supreme or absolute authority, there have always been limits and caveats on the exercise of sovereignty, whether that be natural law, positive law or social contract.

C. Sovereignty and Malleability

If sovereignty is stripped down to its most basic and fundamental nature, it is founded on notions of authority and power. Sovereignty is the conceptual framework within which authority and power are understood, distributed and legitimised by the mechanisms of International Law. Sovereignty throughout the ages has been described as the highest authority or power within a territory, regardless of how that territory has been conceptualised. Regardless of its status as the most supreme or absolute authority, sovereignty has proved to be somewhat of a misnomer. There have always been caveats on the operation of sovereignty, whether that be natural law, positive law, or social contract.

Sovereignty in modernity is arguably at its most constrained. Inherent within sovereignty must be an obligation to those over whom the sovereign purports to hold authority. With the growing emphasis on restraining potential pathologies within the structure and operation of international law, human rights have developed in order to monitor the legal order and the operation of sovereignty creating a new environment within which sovereignty operates. Human rights are able to do this because of the malleable nature of the concept and operation of sovereignty. Macklem's thesis articulates the significance of human rights in this new environment, within

which sovereign institutions must mete out their obligations in both domestic and international spheres.

Macklem's thesis also recognises that colonisation has impacted on the distribution of sovereignty to the detriment of Indigenous peoples. This is supported by the work of both Jackson and Anghie, who argue that the sovereign playing field was articulated by European players, effectively excluding non-European states from the game.[187] For non-European nations to achieve sovereignty, they had to be first recognised by European standards of statehood thus preserving the object of the status quo. This is intimately connected with colonisation, as Indigenous Nations have been and continue to be excluded from international legal sovereignty, relegated to being the subjects of sovereign states. The operation of international law and the role it plays in the distribution of sovereignty continually reinforces the harms of the imperial agenda. Macklem's thesis has articulated a space where Indigenous rights have been able to develop toward limiting the harms sovereignty has on Indigenous Peoples.

D. Concluding Comments

The historical development of International law has been dominated by a Western perspective. The development of both the structure and operation of International law and sovereignty has been dominated by Western players. Within this system, some have the power to speak, while others are empowered by the current structures to speak for those who cannot. This becomes abundantly clear within the modern international legal sphere, through which there is a privileging of the state-centric voice. Human rights have developed, in part, in response to this privileging of the state structure and the authority international law and the vesting of sovereignty bestows upon the state. Because human rights are able to respond to the direct harms and pathologies and limit the operation of sovereignty, this has allowed for the slow development of Indigenous rights.

As the subalterns clear the dust of colonisation and subjugation from their throats, they are being heard, slowly but surely. The voices of Indigenous Peoples have created a profound shift

[187] Antony Anghie *Imperialism, sovereignty, and the making of international law* (Cambridge University Press, Cambridge 2007); and Jackson, above n 121

in International law, from early paternalistic ILO conventions, to the UNDRIP, a declaration contributed to and formed around the voices of Indigenous Peoples around the globe. Regardless of these advances, the voice of the subaltern is still muffled. Structural limits in International Law must still be overcome for the Rights of Indigenous Peoples to truly respond to the pathologies of International Law and sovereignty.

IV Relationships between Human Rights and Indigenous Rights

The previous sections have discussed how Indigenous protections are recognised, and how they have developed within the Human Rights Framework. Furthermore, Macklem's thesis has been discussed, showing how human rights have developed in response to harms created by the structure of international law and the operation of sovereignty. In doing so, human rights have developed to ameliorate harms to individuals by limiting the exercise of sovereignty. This has been made possible by the malleable nature of sovereignty: while absolute in nature, sovereignty is limited by factors and contexts of the time. By limiting sovereignty, the field of Human Rights has become a space for the development of an Indigenous Rights framework. As argued above, international law has taken large strides in recognising the rights of Indigenous Peoples, due to the tireless work of Indigenous Peoples. However, there are limits to the current structure that need to be addressed.

This section will explore the question of whether the Human Rights framework can address the concerns of Indigenous Peoples, the limits for Indigenous Peoples that may arise from pursuing Indigenous rights within the Human Rights framework, and the harms associated with the current framework of recognition and protection at international law.

A. Should Indigenous Rights be Pursued within the Human Rights Framework?

The Human Rights framework has offered a rights-based avenue for the Indigenous Rights movement. However, there are several obvious discords between Indigenous rights and human rights. Gaining momentum during the decolonisation movements in Africa and Asia in the 1950s and 1960s, the Indigenous Rights movement is based on collective solidarity, aiming to ameliorate harms and grievances caused by colonisation. These common goals help Indigenous peoples to articulate their aspirations and claims in the only moral and legal framework available to them at International Law: Human Rights.[188] There are, however, a number of challenges and fundamental limits that the Indigenous Rights movements face within the Human Rights framework. The most cited limit is the individual focus of human rights and the

[188] Allen Buchanan "The role of collective rights in the theory of indigenous peoples' rights" 1993 3(1) Transnational law & contemporary problems.

need for collective rights required by the Indigenous Rights movement.[189] Another is the special rights status of Indigenous Peoples within the Human Rights framework; whereby special rights are vested in certain people (or groups of people) and not others. Such a selective approach contradicts the principle of universalism so entrenched in the Human Rights Framework.[190]

The limits identified above are a non-exhaustive list of the some of the sites of dissonance between the needs of the Indigenous Rights movement and the already established modern Human Rights framework. This dissonance raises the question of whether the Human Rights Framework is capable of addressing the needs of the Indigenous Rights movement, begging the question of whether the Human Rights framework is an appropriate field within which to pursue Indigenous rights claims.

Scholars, such as Anaya, Corntassel, Primeau, and Gilbert among others, have engaged with the question of whether the Human Rights framework is capable and appropriate to subsume the emerging body of Indigenous Rights, or if Indigenous rights need to develop into a separate branch of International law forming a new framework for the recognition of Indigenous rights and therefore address harms specific to Indigenous Peoples.[191] The questions centre on whether the limitations present can be mitigated or avoided within the current Human Rights framework in advancing Indigenous rights.

Indigenous rights have undoubtedly been developing in strong alignment with the Human Rights framework. Some scholars suggest that this framework is responsive to and capable of addressing the needs of the Indigenous Rights movement. Corntassel and Primeau suggest that the Human Rights framework is an appropriate avenue for strategically achieving the aims and objectives of the Indigenous movement.[192] The basis of this claim is akin to a 'path of least resistant' argument. The argument is that strategies for the advancement of Indigenous claims based on self-determination, sovereignty, or, autonomy are going to be met with resistance

[189] Above.

[190] Macklem, above n 118; Buchanan, above n 188.

[191] Jérémie Gilbert "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples" 2007 14(2-3) International Journal on Minority and Group Rights.

[192] Tomas Hopkins Primeau and Jeff Corntassel "Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"" 1995 17(2) Human rights quarterly.

from the current state structure, and therefore, the most appropriate strategy is to focus Indigenous claims on existing human rights.

In Macklem's thesis, human rights have developed in response to harms and pathologies present in international law.[193] Based on Macklem's argument, the harms encountered by Indigenous Peoples ought to have also been ameliorated by human rights. Corntassel and Primeau suggest that the modern Human Rights framework is adequate to address the claims of Indigenous Peoples. In doing so, the modern Human Rights framework ameliorates the harms that form the base cause of Indigenous claims.[194] Their reasoning does not focus on the ability of the Human Rights framework to adequately address the claims of Indigenous Peoples, but rather focuses primarily on the strategic concerns of basing Indigenous claims on principles of self-determination and sovereignty. This approach can question the political and territorial integrity of a state may create hostility.[195] Strategies suggested include shifting the language of Indigenous claims from "self-determination" and "sovereignty" to a stronger focus on state mechanisms guaranteeing "cultural integrity". Such strategies, while having the benefit of maintaining relationships between Indigenous nations and the host state, are ultimately based on notions of cultural continuity and the whims of the state majority thus maintaining the status quo.

Other arguments, such as that advanced by Anaya, claim that the modern Human Rights framework is responding to the growing awareness of Indigenous claims. Anaya goes further than Corntassel and Primeau in articulating how exactly Indigenous claims are being dealt with within the modern Human Rights framework.[196] Anaya argues that the international system as a whole has focused on the unique problems central to the claims of Indigenous Peoples, and that ultimately, these processes have revealed a contemporary body of international Human Rights law. This assessment is reflective of the frameworks described in the chapter II above. Mechanisms within the modern Human Rights framework have developed to attend to Indigenous claims, such as general principles of non-discrimination, cultural integrity, and a

[193] Macklem, above n 118.

[194] Primeau and Corntassel, above n 192

[195] Above.

[196] S. James Anaya "International human rights and indigenous peoples: the move toward the multicultural state" 2004 21(1) Arizona journal of international and comparative law.

right to property. These principles have been highly influential within Human Rights frameworks, including UNDRIP and ILO.

Another school of thought argues that human rights strengthen Indigenous rights claims. Buchanan explores the discord between the individual nature of the Human Rights framework and the collective needs of the Indigenous Rights movement, noting that the focus of Indigenous rights on collective rights constitutes a fundamental challenge to international law.[197] The Indigenous Rights movement challenges the assumption that the individualistic Human Rights framework is sufficient for maintaining justice within the international legal order.[198] Following Macklem's reasoning, this would suggest that the harms created by the structure and operation of the international legal order and the injustices this has created through the distribution of sovereignty are not being fully addressed, thus, lending support to the justification of Indigenous rights. Whilst there may be a challenge to the normative assumption of international law that individual human rights can address the pathologies of international law, Indigenous rights sit uneasily within the modern Human Rights framework, owing in part to the abstract and individualistic character of human rights.[199] Regardless of this uneasiness, Buchanan disagrees that collective Indigenous rights are incompatible with the doctrine of individual human rights. Buchanan instead posits that by locating collective rights within the individual Human Rights system, risks associated with collective rights will be mitigated through the operation of individual rights.[200]

While there is a strong discourse that argues that Indigenous rights should continue to be pursued within the Human Rights field, such a discourse should be approached with caution. The efficacy of the Indigenous Rights movement must be explored with reference to any limitations placed on Indigenous rights.

[197] Buchanan, above n 188.

[198] At 91.

[199] At 92.

[200] At 107–8.

B. Limitations of the Current Framework

Despite the discourse that the Human Rights framework can address the needs of Indigenous rights claims, Indigenous rights still sit uneasily within the Human Rights framework. This unease suggest limitations are present acting upon Indigenous rights. This section analyses the current framework and the limits present that act upon the expression and development of Indigenous rights. First the limitations placed on the development of the Indigenous Rights movement by the structural exclusion of Indigenous Peoples at international law are explored, followed by a discussion of the exclusion of Indigenous Peoples within the Human Rights framework.

Due to the interconnected nature of the limits and the mechanisms that give rise to, or are sources, of the limits discussed in this section, the discussion will take a holistic approach to identifying and discussing each limit. Therefore, some mechanisms or sources will appear throughout this chapter in a discussion of different but related limits. This section will conclude by critiquing the discourse that the Human Rights framework can address the needs of the Indigenous Rights movement.

1. The Structural Exclusion of Indigenous Peoples from International Law

International law has evolved over time in such a way that contributes to the exclusion of Indigenous Peoples. As described above, the sovereignty 'game' was an old boys' club made up of a membership of European states.[201] Despite the decolonisation programmes in Africa and Asia, the normative nature of the European club required newly independent states to continue to look and act like the other members of the club. As a result, Indigenous Peoples have had a long history of active exclusion from International Law, that continues even today and is embedded within the structure of International law itself.

Over time, natural law, as the source of law, began to shift toward a more state-centric underpinning of law. Up until the Classical Age (c. 1600–1815) the body of law that made up International Law was underpinned primarily by notions of natural law. From the 14th century

[201] For a description of the 'Game' theory of sovereignty and Jackson's 'Old Game' and 'New Game' articulation *see generally* Jackson, above n 121 at ch. 2.

onwards, natural law acted as the basis for justifications of colonial expansion as European nations begun explorations of the New World. The Spanish used natural law to justify their conquest of the New World Indians – on the grounds that the Indians had attempted to unlawfully exclude Spanish traders from their kingdoms.[202] Moving into the Classical Age, there was a shift toward greater recognition of state practice as a true source of law This movement to a state-centric view of International Law was championed by Grotius, whereby he transformed the concept of *jus gentium* into what he called the *law of nations.*[203] The *law of nations* transformed the old *jus gentium* into a common law of sorts held between states.

With this shift toward state practice as the source of law, Indigenous collectives were not recognised as sources of law. Therefore, the evolution of international law occurred with little to no influence from a legal theory outside the Western world. Western legal authority was thus extended and privileged in international law through a combination of papal authority, natural law and reasoning, and academic writing, thus creating a corpus of *jus gentium*.[204] Indigenous Peoples developed their own forms of law without reference to the influence of those states. This precluded Indigenous collectives that did not resemble the nation-state form that the international system privileges, and thus such collectives have been excluded. Consequently, states were for the West and 'civilised' peoples, while tribes were for the subaltern.

International law has evolved to define its own field of application according to Western ideals of what an advanced society is and ought to be, and the civilising mission inherent in international law.[205] The ongoing purpose of international law is as an ongoing means to regulate those collectives known now by the western conceptualisation of the 'state'. This has had the ongoing effect of excluding the voice of all other human social collectives that do not meet the formal requirements of statehood at international law. The effect of this has been the

[202] Stephen Neff "A short History of International Law" in Malcom Evans (ed) *International Law* (3 ed, Oxford University Press, Oxfird, 2010) at 8.

[203] At 9.

[204] H Patrick Glenn "The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011) 171-182.

[205] See Generally Hinsley, above n 151, for a discussion relating to the development of society – from stateless to the most advanced form of society, the Nation-State.

exclusion of indigenous collectives from a seat at the international 'round table' of sovereign states, whom international law has validated as having sovereign status over Indigenous Peoples. This is in complete disregard of the political and legal autonomy that Indigenous Peoples have held and always asserted. Anghie articulates the civilising mission inherent within international law clearly:[206]

> [T]he extension and universalism of the European experience, which is achieved by transmuting it into the major theoretical problem of the discipline [international law], has the effect of suppressing and subordinating other histories of international law and the people to who it has applied. Within the axiomatic framework of positivism, which decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world, and this the positivists proceed to do: it is a history of the civilizing mission, the process by which peoples in Africa, Asia, the Americas, and the Pacific were finally assimilated into a European international law.

This status quo of exclusion is maintained by the structure of international law through what Santos describes as abyssal lines.[207] Modern Western thinking, according to Santos, is underpinned by abyssal logic. Abyssal logic is "a system of visible and invisible distinctions, the invisible ones being the foundations of the visible ones".[208] By creating distinctions, radical lines are formed between what is reality backed up by knowledge and reason on one side, whilst on the other side reality becomes non-existent. The abyssal lines become clear in the above example, where international law has declared as sovereign only those states that take the form recognisable to European state form; anything else is uncivilised and unsuitable for sovereignty. Santos adroitly describes this structure and how it is maintained when he states that:[209]

> In the field of modern law, this side of the line is determined by what counts as legal or illegal according to the official state or international law. The legal and illegal are the only two relevant forms of existing before the law and, for that reason, the distinction between the two is a universal distinction.

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[206] Antony Anghie "Finding the peripheries: sovereignty and colonialism in nineteenth-century international law" 1999 40(1) Harvard International Law Journal at 7.

[207] *See generally* Santos, above n 3.

[208] At 45.

[209] At 48

Because international law has been predominantly historically written by the West, the script has been skewed in accordance.[210] Pope Paul III's *Sublimis Deus* of 1537 declared the Indigenous soul to be an empty receptacle, an *anima nullius.*[211] This formed the basis for the West's justification of their universal abyssal thinking, whereby the laws of civil nations where applicable over the third world. This justification follows closely other colonial justifications at International law of the maintenance of the abyssal line, namely, *terra nullius.*[212] The structure of International Law is still influenced by a similar epistemological philosophy, which continues to operate on abyssal lines, radical lines that still operate within the structure of International law to exclude Indigenous peoples. These lines continue to divide modern 'civil' society and the subaltern, done in such a way that does not compromise the 'universal' human practices by those on this side of the line. Along these lines, Santos argues that the division between the coloniser and the colonised is still being demarcated, with the Western side of the line maintaining the status quo of exclusion via regulation, coercive rule, and emancipation.[213]

As a result of the exclusionary nature of the civilising mission, it is not hard to see why Glenn argues that the use of international law as a vehicle to further the aspirations of Indigenous Peoples is an inherent irony.[214] Glenn argues that an irony is "the expression of one's meaning by language of the opposite to which was sought to be expressed."[215] Glenn contends that international law has played a crucial part in the destruction of Indigenous culture, and has evolved to exclude Indigenous Peoples, as described earlier. In doing so, international law continuously privileges Western culture theory over Indigenous culture theory. For Glenn, the irony appears partly located in the use of international law that was once used to justify colonisation and exclusion of Indigenous Peoples from being international actors, and the modern use of international law for advancing the aspirations of Indigenous Peoples.[216]

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[210] The script is the underlying code that underpins the logic, reasoning and morals of any given schema.

[211] Pope Paul III "Sublimis Dei: On the Enslavement and Evangelization of Indians" (20 Feb 2020, 1537) Papal Encyclicals Online <https://www.papalencyclicals.net/Paul03/p3subli.htm>.

[212] Land belonging to no one.

[213] *See generally* Santos, above n 3.

[214] *See* Generally Glenn, above n 204.

[215] At 172.

[216] *See generally* Glenn, above.

Glenn also notes that the inherent irony in juxtaposing different ideas, truths, and alternative ways of understanding the world invariably leads to interrogation, mutual understanding, and mutual influence. The inherent irony is that this convergence of ideas can invariably move ideas forward. In this sense, the field of international law has been monopolised by Western legal theory. This has formed the structure of international law to the exclusion of a structure created of, or contributed to, by non-western legal thought. As space slowly opens up within the dominant Eurocentric structure of international law for the voices of Indigenous Peoples, it still does so in an international legal field within structures created and maintained by a Western legal structure.

2. Limitation of Human Rights and the Rights of Indigenous Peoples

Indigenous Peoples have been excluded from contributing to the evolution and structure of international law. Therefore, it is no huge leap to extend this argument with the statement that Indigenous Peoples, non-Western peoples, have had little contribution to the development of the Human Rights framework. This section argues that the Human Rights framework is rooted in Eurocentrism: because Indigenous Peoples have not had the opportunity to contribute to the development of human rights, this Eurocentrism has been universalised and has become a limiting factor in the development of Indigenous Rights. This section further argues that the civilising mission implicit in the Eurocentric foundations of the Human Rights framework, is shown in the Cartesian logic evident in the metaphor of savage, victim, and saviour. This Eurocentric universalism is further reified and entrenched through the normative mechanism of language, and finally, that these limits render the Indigenous Rights movements unsuitable for the Human Rights framework.

The orthodox approach to human rights has roots in natural law, the basic notion was that all human rights exist independent of positive law. Natural law locates rights in both human agency and those rights that appear in nature or have divine origin.[217] The contradictory irony inherent in this approach is that natural rights are common to humankind, and need to be positively declared as such. This is clearly evident in the two French Declarations of the *Rights of Man and the Citizen*, which coincidentally heavily influenced the modern 1948 *Universal*

[217] Marie-Benedicte Dembour "Critiques" in Daniel Moeckli and others (eds) *International human rights law* (Third ed, Oxford University Press, Oxford, United Kingdom, 2018) 41-59.

Declaration of Human Rights (UDHR).[218] Those who author the declarations do so from their particular worldview.

Even if we move from the old orthodox to a more deliberative new orthodox approach to human rights, we still encounter the same issues. The new orthodoxy, or the deliberative approach is where human rights are conceived of as agreed upon values and principles.[219] Again, these agreed-upon values are underlined by the assumption that those contributing to the formation of those agreed upon rights have a voice and are heard. As indigenous peoples have been continually excluded from making contributions in such arenas, the moral script inherent within the Human Rights framework has remained deeply rooted within a Eurocentric frame.

This exclusion of Indigenous Peoples from international law, and therefore from the development of human rights, has roots in imperialism and colonial biases, and thus continues the civilising mission therein reflected in human rights Eurocentric universalism. The UDHR, the foremost positive document that declares the moral script underpinning human rights, has universalised and entrenched Eurocentric norms and values. Mutua locates the Human Rights movement and discourse firmly within the historical western continuum of Eurocentrism and the West's civilising mission, noting that the catalyst for the modern Human Rights movement was a Western response to Western atrocities.[220] Kennedy notes the tainted origins of human rights, stating that while one might locate concepts that might fit within the Human Rights framework from many different cultural traditions throughout history, these have a particular cultural and contextual genesis in time and place.[221] Modern human rights are different, with a genesis rooted in a particular Western, post-enlightenment, rationalist and secular tradition, and articulated from this cultural paradigm in universalist terms within an international Legal framework from which other traditions have been structurally excluded.

Echoes of the civilising mission of imperialism have been identified in a compelling argument by Mutua. These echoes are brought to light by the damning metaphor of savages, victims, and

[218] At 43-6.

[219] At 41.

[220] *See generally* Makau Mutua and Inc ebrary *Human rights: a political and cultural critique* (University of Pennsylvania Press, Philadelphia, 2002).

[221] David Kennedy "International human rights movement: part of the problem?" 2002 15 Harv. Hum. Rts. J. at 114.

saviours.[222] This metaphor conjures images of barbarism, civilisation, good and evil, and the redeemer, all of which are present in the civilising mission of colonial movements. This metaphor positions the savage as the evil working in contravention of the so-called universal moral code championed by human rights. Mutua adroitly argues that while the state is the obvious target of international law, it is in fact the underlying culture of the state that influences public power that is the true savage within the Human Rights paradigm. It is this underlying culture that is the true target of Human Rights; therefore, making difference the underlying object of the human rights saviour.[223]

The victim and the individual sit together at the centre of Human Rights. As Mutua notes, without the victim there is neither savage nor saviour.[224] The Human Rights discourse sees the victim as a helpless bystander who needs to be saved and protected, and arguably speaks to a relationship between human rights and the colonial project where the colonial narrative paints a picture of a weak, lazy, powerless and inferior 'other' that needs to be saved through the civilising mission of the West.[225] Furthermore, the victim is often seen as non-white, an assertion backed up by quantitative data; Human Rights reports found that in the United States an overwhelming majority of Human Rights victims were non-white minorities.[226] These studies showed an exception: reports on violations of religious liberty, freedom of expression, and sex discrimination did not focus on peoples of colour. This is not surprising, given that these rights are generally located within a Western liberal frame.[227]

Finally, the metaphor concludes with the saviour.[228] The saviour highlights the Enlightenment, Eurocentric ideals that give rise to the universalism inherent within the Human Rights

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[222] Makau Mutua "Savages, Victims, and Saviors: The Metaphor of Human Rights" 2001 42 Harv. Int'l L. J.

[223] At 219–27.

[224] At 227–33.

[225] Ward Churchill *Kill the Indian, save the man: The genocidal impact of American Indian residential schools* (City Lights San Francisco, CA, 2004); Albert Memmi "Mythical portrait of the colonized" in *The Colonizer and the Colonized* (Routledge, 2013) 123-133.

[226] *See* Amnesty International *United States of America: Race, Rights and Police Brutality* (1999);American Civil Liberties Union and Human Rights Watch *Human Rights Violations in The United States: A report on U.S. compliance with The International Covenant on Civil and Political Rights* (1993).

[227] *See* Amnesty International, above; American Civil Liberties Union and Human Rights Watch, above.

[228] Mutua, above n 222 at 233–42.

discourse. This further entrenches the position that the Human Rights movement sits firmly on the continuum of the Eurocentric civilising mission. Enlightenment ideals of liberty, equality and fraternity became emancipatory ideals with the aim to improve all of humanity according to Western ideals. These universal ideals have therefore become the underlying logics that underpin the norms that aim to create the perfect society. This further entrenches the solipsist nature of the Human Rights Framework that continually confirms its own universal rationality.

The savage, victim, saviour metaphor clearly illuminates Enlightenment ideals and Cartesian universalism. Descartes, arguably the father of modern philosophy and an important Enlightenment figure precipitated a thought revolution with the famous words "*Cogito, ergo sum*" or "I think, therefore I am", forming the basis of Cartesian universalism. Descartes's philosophy understands universality as eternal knowledge that exists beyond the individual. He replaces God as the centre of knowledge with the language of the ego as the Cartesian subject.[229] The separation of the ego from the temporal and spatial, from body and territory, allows for a universal truth not tied to time and space.[230] The Cartesian subject is the location of universal knowledge, a set of essential and universal laws, or metaphysics, that underscore logic and reasoning of man, this is a reflection of the Enlightened rational man.[231] If we apply the Cartesian model to the Human Rights model using the savage, victim, saviour metaphor, the Cartesian subject would view human rights as modelled of this same universal logic: the norms contained within the Human Rights framework are common to all humanity. The Cartesian object is the product of the universal logics declared in the Human Rights Framework.[232] Therefore, the universal and normative logics of human rights render the Cartesian object in the image of the enlightened man. This logic is evident in the savage, victim, and saviour metaphor detailed above. The savage also exhibits difference or deviance to the underscoring metaphysical logic that undergirds the norms of human rights. The Saviour is

[229] Ramón Grosfoguel "Decolonizing Western Uni-versalisms: Decolonial Pluri-versalism from Aimé Césaire to the Zapatistas" 2012 1(3) Transmodernity.

[230] *See* Grosfuguel, above.

[231] Enrique Dussel "Modernity, Eurocentricism, and Trans-Modernity: In Dialogue with Charles Taylor" in Eduardo Mendieta (ed) *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (Humanities Press, New Jersey, 1996) 129-159.

[232] Logics throughout this thesis refer to the metaphysics that underpin the process by which an individual understands the known world around them. That is the set of underlying principles that influence reasoning within a particular episteme.

seen as the archetype of the norm, the civilised man. The victim is seen as the empty vessel, under the negative influence of the savage, one that can be saved by the universal truth.

(a) Cartesian dualism and universalism

The normative nature of the universalism of human rights arising from the mechanisms of Cartesian dualism cannot be understated. The Eurocentric epistemological foundation of Human Rights' universalism forms the individual in its image, and relates to the Cartesian object. Cartesian dualism separates mind from body and constructs the object as an empty vessel to be filled with rational thought and reason. This creates an empty 'human' that is filled with the normative trappings of what the Human Rights framework deems to be the essence of a person. If an individual is able to form themselves using the same language, then they too may acquire rights and become an object of the modern Human Rights Framework. It can then be concluded, in the words of Douzina "human rights do not belong to humans and do not follow the dictates of humanity; they construct humans. A human being is someone who can successfully claim human rights"[233]

One consequence of the Cartesian dualism is that in effect, the normative function of the Human Rights framework creates a system where humans of different ontology cannot exist unless there is a resignification[234] to fit within the modern Human Rights paradigm.[235] This effectively limits how Indigenous Peoples can engage with Human Rights framework. Mutua contends that the mere participation of non-European states in the modern Human Rights framework does not universalise human rights. Rather, he notes that the simple fact is the essence of the rights within the modern Human Rights framework have either been imposed on or assimilated by non-European societies. This further highlights the normative influence of the Human Rights framework on other ways of being.[236] The current model for human rights has been dominated by a particular institutional hegemony that has articulated access to rights

[233] Costas Douzinas "The end(s) of human rights" 2002 26(2) Melbourne University law review at 457.

[234] Resignification is the process of giving new significance to context, language, technology, or artefact.

[235] For a discussion on ontology, ways of being, and decolonial theory *see generally* Nelson Maldonado-Torres "ON THE COLONIALITY OF BEING: Contributions to the development of a concept1" 2007 21(2-3) Cultural Studies.

[236] Mutua, above n 222 see footnote 14.

in a particular way, underpinned by the Cartesian ideals of universalism, therefore limiting access or forcing Indigenous alterities to assimilate and conform to the boundaries of the language.

(b) Language as a normative mechanism

As a normative mechanism, the language of human rights is also a factor to be considered when addressing the limiting factors inherent within the Human Rights framework. The language of human rights further entrenches the Eurocentric and universal ideals evident within the system. The normative nature of the language of human rights is a vehicle for the exclusion or assimilation of other ontologies, or ways of being. The language and corresponding universal logics of human rights has created a hegemony of allocation.

Language itself is a normative mechanism, it has long been settled that there is a strong link between language and culture and that one informs that other, and vice versa.[237] Language is the vehicle for expressing a culture, yet can have a profound impact on differing worldview. Emmet and Pollick argue that people who are raised in one behavioural or cultural setting, yet speak a different or multiple language are more likely to develop a different worldview.[238] The language of human rights and the corresponding practice further entrenches the European and Enlightenment origins of the framework. While the language of the modern Human Rights framework is not necessarily inappropriate in and of itself, it does however limit development of the rights of Indigenous Peoples.

Gelman and Roberts argue that category labels play a central role in the transmission and evolution of categories, which in turn support cultural stability.[239] Category labels can identify concepts as diverse as dogs, gold, women, and for the purposes of this paper, rights. Labels themselves are fundamentally normative, a device that is unavoidable in any framework. The Human Rights framework is underpinned by category labels such as rights, rights holders, civil

[237] Susan A. Gelman and Steven O. Roberts "How language shapes the cultural inheritance of categories" 2017 114(30) Proceedings of the National Academy of Sciences – PNAS.

[238] Marie Emmitt and John Pollock *Language and learning: an introduction for teaching* (2nd ed, Oxford University Press, Melbourne, 1997).

[239] Gelman and Roberts, above n 237.

and political, cultural rights. The normative mechanisms of this Cartesianism requires individuals to position themselves within the language of the Human Rights framework to claim their human rights. By categorising rights according to corresponding identities, individuals must reframe their existence sometimes in contravention to their shared cultural and collective experiences and worldviews. Cartesian universalism located within the current Human Rights framework, normalises an abstract, one-size-fits-all idea about people and identity.[240]

3. The Limits of the Human Rights Universalist Frame

As demonstrated, the very foundation of the Human Rights framework is one of universalism, and in general it aims to protect those essential features of what it means to be human and therefore, is universal in nature. Articulations of the moral and political purposes of human rights have included describing them as rights "belonging to man by virtue of his humanity".[241] Tasioulas,[242] Simmonds,[243] and Donnelly[244] also describe human rights in a similar vein – as a universal virtue of humanity. Owing to the universal nature of the Human Rights framework, there is a criticism that the Human Rights framework fails, or at least struggles, to take account of cultural diversity.[245] It also argues that the universalist framing of the Human Rights framework is yet another normative mechanism to further assimilate and place limits on the expression of Indigenous rights. This section argues that while the Human Rights framework purports to account for diversity within the current universalist frame, it is unable to do so because it is culturally situated within a Western cultural context and is only able to account for diversity within that context and not cultural difference.

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[240] Kennedy, above n 221.

[241] Immanuel Kant and Mary J. Gregor *Practical philosophy* (Cambridge University Press, Cambridge;New York;, 1996) at 6:23.

[242] John Tasioulas "The Moral Reality of Human Rights" in Thomas Pogge (ed) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press, Oxford, 2007) 75-101.

[243] Simmonds A. John *Justification and Legitimacy: Essays on Rights and Obligation* (Cambridge University Press, Cambridge, 2001).

[244] Jack Donnelly *Universal Human Rights in theory and Practice* (2 ed, Cornell University Press, Ithaca, 2003)

[245] The Executive Board American Anthr Association "Statement on Human Rights" 1947 49(4) American anthropologist.

(a) Attempting to account for diversity in International Law

The Human Rights framework itself has attempted to account for diversity of difference[246] through articles 22–29 of UDHR, the *Economic, Social and Cultural Rights Covenants*, and what some have termed the third generation of human rights.[247] Arguably, the third-generation rights sometimes termed rights of solidarity, developed in response to deficiencies that the first and second generation were not able to address. Vasak, the main proponent of this line of discourse, argued that the third-generation rights addressed the culture of individualism and social isolation that the first two generations of rights promoted.[248] Regardless of this attempt to address cultural concerns and the promotion of diversity, cultural rights have received less attention within the Human Rights framework and are consequently less developed than the civil, political, economic and social rights.[249] This indicates an unwillingness, or an inability of the Human Rights framework to account for cultural diversity within the current framework.

Other areas of international law have developed in an attempt to protect diversity of difference. For example, the United Nation Educational, Scientific and Cultural Organisation (UNESCO), has a mandate "to contribute to peace and security by promoting education, science and culture."[250] UNESCO has been described as the 'international system's pulse for cultural policy and development.[251] While the organisation is not a rights-granting institution, it has proven to be a persuasive body in terms of development. During the late 1990s, increasing pressures between international trade and services agreements and treaties, and cultural goods and services begun to mount. In response UNESCO developed the *Convention on the Protection*

[246] Diversity here refers to the individual and collective diversity that naturally occurs within a worldview or culture. Diversity of difference, for the purposes of this argument, refers to the heterogeneity of worldviews and the difference and diversity between worldviews. Diversity of difference will be explored further in sub-section (b).

[247] *Universal Declaration of Human Rights* GA Res 217A (1948);UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[248] Macklem, above n 118.

[249] Y. Donders "Do cultural diversity and human rights make a good match?" 2010 61(199) International social science journal.

[250] *Constitution of the United Nations Educational, Scientific and Cultural Organisation* (16 November 1945), Art. 1(1).

[251] Sean Goggin "Is UNESCO Clouding the International Culture Landscape: Legal Clarity?" 2012 9(1) International Organizations Law Review at 122.

and Promotion of the Diversity of Cultural Expressions (2005) (known as the *Convention on Diversity*) with a view to separate trade in cultural goods and services from international trade agreements and to place the adjudication of disputes in the hands of cultural experts as opposed to trade experts.[252]

While UNESCO and the *Convention on Diversity* sit outside the Human Rights Framework, they expressly support and promote the principles of human rights. The *Convention on Diversity*, a compelling legally binding instrument, was created in response to the World Trade Organisation's influence in global trade and the need to protect diversity through tangible cultural heritage. The Convention is therefore a targeted response of the international community to carve out cultural goods and services from international trade agreements,[253] and is not a rights-based development of Indigenous rights. Furthermore, the protections contained within the *Convention on Diversity* (a state-centric unilateral, legally, binding treaty) place discretionary obligations on the state to achieve rights contained in the agreement; in doing so the Convention uses discretionary terms such as 'parties may' and 'parties shall'.

The discretionary focus of the *Convention on Diversity* is also indicative of the general lacklustre approach to culture and diversity seen elsewhere in international law. The language in the convention is discretionary, rather than obligatory, as are the dispute resolution mechanisms. Where the language is discretionary and states are empowered to define the challenges to diversity, and subsequently to respond or not, the lack of obligation to respond in a certain way means there can be no dispute for failing to act.[254] Compare this approach with the approach of the World Trade Organisation (WTO) agreements, to which the *Convention on Diversity* was partially responding. The WTO agreements strength lies in the obligatory commitments that states make to one another, and the enforceable dispute resolution mechanisms.[255] This again, highlights the point made earlier that states are unwilling to make a strong commitment to protecting diversity.

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[252] *See* Garry Neil "Assessing the effectiveness of UNESCO's new Convention on cultural diversity" 2006 2(2) Global media and communication; Convention on the Protection and Promotion of the Diversity of Cultural Expression 2440 UNTS 311 (opened for signature 20 October 2004, entered into force 18 March 2007).

[253] Neil, above.

[254] At 260.

[255] At 260.

(b) Universalism: a barrier to recognising diversity of difference

Universalism has the ability to account for diversity but fails to account for the range of difference in the metaphysical influences of inner logics of different cultures outside of Western cultural contexts. This results in a particular and restrictive acknowledgment of cultural diversity contained to the Western Enlightenment constraints that underpin the modern Human Rights framework. While international law and our modern 'cosmopolitan' states all espouse their multiculturalism and wear the title of 'cultural diversity' as a badge, there is no real change to the status quo.[256] Bhabha notes that while the practice of endorsing cultural diversity is now commonplace, the flipside is a corresponding containment of diversity and difference.[257] This argument fits with the thread of this discussion, as it exemplifies the issues that Indigenous peoples face under the pathologies created by colonialism and the normative mechanisms of sovereignty founded on the civilising mission of the expansion of the West.[258] The result is a qualified right to practice culture within our modern states for indigenous populations, but only if those cultures, or aspects of those cultures, can be located on the dominant cultural grid. It is this selective endorsement of cultural norms that comes from a containment of diversity and difference.[259]

To understand the distinction between difference and diversity, logics must be understood. The term 'logics' is used here to refer to the metaphysics that underpins that underpin the process by which individuals understand the known world around them. Logics is used in the plural because of the multiplicity of rules of inference used to draw conclusions about the world that are underpinned by learned assumptions specific to a worldview. Difference acknowledges the gap between worldviews and the difference in logics and thus difference in knowledge.

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[256] Bhabha notes that "the sign of the 'cultured' or the 'civilised' attitude is the ability to appreciate cultures in a kind of *musée imaginaire,* as though one should be able to collect and appreciate them." Jonathan Rutherford "The Third Space: Interview with Homi Bhabha" in Jonathan Rutherford (ed) *Identity: Community, Culture, Difference* (Lawrence and Wishart, London, 1990) 207-221 at 208; this will be further explored in Subsection D with reference to the right-to-culture discurse.

[257] See generally Homi K. Bhabha *The location of culture* (Routledge, London; New York; 2004).

[258] See generally Anghie, above n 187.

[259] This is intimately connected with the containment of culture via the right-to-culture discourse and will be further explored in subsection D. For further description of cultural difference versus cultural diversity *see generally* Rutherford, above n 256.

Diversity, on the other hand, describes the variance that is contained within a worldview, but is still underpinned and contained with reference to the same logics. By conceptualising culture in terms of difference and diversity, one is better able to understand the universalist and normative mechanisms of only describing knowledge as universal and common to all mankind, and by disregarding difference and thereby conceptualising diversity as encompassing both Indigenous worldviews and that of the hegemonic worldview.

This gives rise to the universalism versus relativism debate. The universal nature of the Human Rights framework has been discussed at length above and speaks to those rights, norms and essences that are said to be so fundamental to human existence that they ought to be universally applicable.[260] The relativist critique points out that as a matter of fact, moral codes exist and are defined within different cultural contexts.[261] Cultural relativists often object to the cultural imperialism and western biases inherent within the Human Rights framework, arguing that the universal nature of Human Rights norms are incapable of implementation in the face of cultural diversity.[262]

Because the universal notions of the Human Rights system impose norms for all humankind, the cultural relativist arguments in opposition of universalism often centre on how this may interfere with state-situated legal frameworks and approaches. Donoho attempts to reconcile the application of cultural diversity within the universalist frame by arguing that while relativism is fundamentally inconsistent with the founding principles of international system of law, it is partially reflected in state's obligations and responsibilities. Donoho clarifies that relativism is further reflected in the international system's monitoring and interpretive mechanisms. This approach is underpinned by the assumption that cultural diversity is defined and contained within state boundaries and fails to consider cultural traditions that exists within the state boundaries at a sub-state level.[263] These recommendations rely on domestic systems applying a diverse range of cultural interpretive frameworks.

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[260] Macklem, above n 118 at 6.

[261] Melford E. Spiro "Cultural Relativism and the Future of Anthropology" 1986 1(3) Cultural anthropology

[262] *See generally for a discussion on the Relativism versus Universalism debate* Douglas Lee Donoho "Relativism versus universalism in human rights: the search for meaningful standards" 1991 27(2) Stanford Journal of International Law.

[263] Above.

This is another perfect example of international law's containment of diversity, whereby diversity is recognised, but only within the grid of the cultural dominator.[264] Donoho argues that owing to nation state diversity vis-à-vis other nation states at international law, relativism is present within the Human Rights universalist framework. Noting the holistic and interconnected nature of the mechanisms that give rise to limits, the abyssal lines already described above and the normative nature of state sovereignty also operate to reify a continued containment of diversity at international law through the above example of relativism limited to state mechanisms. The radical lines drawn at international law recognise on the one side what can contribute as culture and law, and on the other side, what does not count. Therefore, the cultural contexts to be taken into consideration at the national level, and therefore the international level, will be limited to those dominant cultural features of the state hegemony. There may be examples where on the face of it, cultural aspects from outside the cultural hegemony are taken into consideration within state confines. Because of abyssal thinking, these cultural aspects will only be recognised if and where they can be located in the cultural grid of the dominant culture. What effectively occurs is a containment of diversity to the dominant cultural hegemony of each state, effectively rendering the praxis of this critique unfit for purpose.

The problem is not that universalism is not attainable across different cultures, but that the current approach is in fact the construction of a cultural relativist approach that has been deemed to have universal application; again, an example of abyssal logic. Too often relativism and universalism are seen as incapable of co-existing. Therefore, the question should not be approached from either a cultural relativist or a universalist approach, but ought to start with the provocation that all cultures are in some way related to one another, not based on the features of that culture or the logics that underpin reasoning, not because of the contents of culture, but on a broader meta-level that links cultures. For example, all cultures are symbol-

[264] Homi K. Bhabha *The location of culture* (Routledge, London;New York;, 2004).

forming and subject-constituting, interpellative[265] practices that give significance to practice.[266] This universalism contained within relativism can be seen as universal in that statement that where culture is everywhere, it is nowhere. That is, a dominant culture does not have to justify itself as a cultural practice because it is and is accepted as such. There is no need for that culture to translate itself in relation to itself. Culture exists in the face of difference, Bhabha articulates this point:[267]

> … no culture is full unto itself, no culture is plainly plenitudinous, not only because other are other cultures, which contradict its authority but also because its own symbol-forming activity, its own interpellation in the process of representation, language, signification and meaning-making, always underscores the claim to an originary, holistic, organic identity.

This problem with the universality of the Human Rights Framework is the abyssal thinking that underscores the structure, interpretation and development of international law; thinking that refuses to acknowledge a co-existence of the other side of the line. The Human Rights framework, while espousing a universality of norms, is universal within a particular cultural context. These norms were created and modelled from the archetype of the perfect human, the enlightened man, within a western cultural framework; this man was created without any contribution from other cultural traditions. The UDHR, for example, the first positive legal document declaring the universal Human Rights norms, is a Western construct developed with very little contribution from non-Western scholars and those non-Western countries who were present were arguably heavily indoctrinated and educated within Western institutions giving rise to the cultural relativist perception that the Human Rights framework is a Western

[265] Interpellation (or as Bhabha refers to in his work as ideological interpellation) is an Althusserian structuralist approach to Marxism whereby Althusser argues that ideology is realised in practice and behaviours and governs individual identity by a process of 'hailing' or interpellation. Therefore, there is no individual, only a subject of the ideology embodied within a society, this governs the individual's identity within society through social interactions. *See generally* Louis Althusser *Lenin and philosophy, and other essays* (New Left Books, London, 1971).

[266] Rutherford, above n 256 at 3

[267] Bhabha, cited in above at 210.

enterprise.[268] The critique then is the current framework's incorrect assumption of universalism resulting in a *de facto* application of cultural relativism.

4. Problematic Focus on a Right-to-Culture

The previous subsection has explored the limits associated with the universalist frame of the Human Rights framework, and how international law has attempted to account for diversity of difference. The continuing attempt to account for diversity of difference within the universalist frame of human rights gives rise to yet another normalising concept, that of a right-to-culture as a basis for Indigenous rights.

This sub-section argues that the shift in discourse toward a right-to-culture is problematic. The focus on a right-to-culture as the basis for access to Indigenous rights has a number of dark sides that include an essentialisation of culture, a commodification of culture and creates a heavy onus on Indigenous Peoples to prove their indigeneity. This section argues that while the understanding of culture has moved past static notions of authenticity and tradition, the Human Rights system has typically maintained a traditional and static bent, as identified in international law's linking of cultural rights to notions of tradition. This is further supported by domestic jurisprudence, where access to settled Indigenous rights, such as the right to land and resources, is tempered by the right-to-culture, without taking into account the processes of colonisation and the impact this has had on traditional uses of land. Furthermore, this section argues that the right-to-culture is always limited and qualified by an invisible asterisk that limits cultural rights to those practices that can be endorsed by dominant cultural frameworks both internationally and domestically.

(a) Indigenous Peoples and culture

The Indigenous Rights discourse has shifted within the last few decades from external self-determination movements to rights-based movements entrenched in notions of culture.[269] This

[268] Lea Brilmayer and Tian Huang "The Illogic of Cultural Relativism in Global Human Rights Debate" in *The Global Community Yearbook of International Law and Jurisprudence 2014* (Oxford University Press, New York, 2015).

[269] *See generally* Engle, above n 7 at Part 1.

shift is accompanied by a number of limitations to the development and expression of the Rights of Indigenous peoples. Protections of Indigenous rights at international law and within the Human Rights framework is heavily founded on notions of a right-to-culture, or a right to practice culture and religion. Such a strong focus on cultural rights as the basis of protections protects culture as an activity rather than a good, lived experience. This focus can lead to an essentialisation of culture, and culture as a performative experience as indigenous peoples struggle to achieve standards of authenticity that state and international law frameworks demand.[270]

The concept of culture is expansive, with a myriad of different examples and definitions across a range of disciplines. Yengoyan noted that the term 'culture' "has so many definitions and facets that any overlap in this myriad of definitions might actually be absent".[271] Early conceptions of culture were entrenched in otherness as a way for Western knowledge systems to come to terms with difference. These early conceptions of culture understood culture as fixed and static, born from fields of study where Western scholars would position themselves as experts on the other, and trinkets and artifacts were collected to marvel and appreciate at the otherworldliness of the less civilised.[272] From the 1970s, perceptions of culture and the 'other' begun to change, theorists such as Edward Said and Homi Bhabha challenged the static notions of culture and set in motion revolution within the discourse.[273]

At an international level, huge strides have been made to recognise as equal Indigenous cultural rights, there, are however, still barriers to accessing a full and meaningful expression of rights that are founded on culture. The UNDRIP, at Article 8(1), sets the minimum standard for the importance of culture at international law, and the right to a cultural existence free from destruction and assimilation, whilst Article 8(2) articulates state obligations to ensure cultural

[270] Richardson defines essentialism as "…the idea that a thing possesses an essence consisting of a defining set of properties." Angelique Richardson "Introduction: Essentialism in science and culture" 2011 53(4) The Critical quarterly. For Indigenous cultures, essentialism plays into notions of authenticity, both internal and external conceptions of what society deems to be those essences of a particular culture.

[271] John R. Baldwin and Inc ebrary *Redefining culture: perspectives across the disciplines* (Lawrence Erlbaum Associates, Mahwah, N.J, 2006) citing Yenegoyan at 4.

[272] *See generally* Edward W. Said *Orientalism* (25th Anniversary ed, Vintage Books, New York, 2003); and Bhabha, above n 257.

[273] Said, above; Bhabha, above 257.

integrity.[274] This exemplifies the Human Rights movement shift away from calls for independent nationhood toward broader recognition at the state level.[275] While the UNRIP articulates this minimum standard, there are huge gaps in the standard articulated in the UNDRIP and national implementation. Any implementation of cultural rights at the national level is often subject to biases inherent within the dominant cultural framework.[276]

(b) Indigenous culture and the Human Rights framework

Regardless of the changing tides in the culture discourse, now recognising the complex and dynamic contours of culture, the Human Rights framework has yet to catch up completely and still uses culture in such a way that freezes culture in time.[277] This reading of culture has been reflected in jurisprudence that calls into question cultural continuity, and also highlights the problematic focus that culture has on accessing rights. The term 'culture' therefore still conjures notions of tradition, continual and repetitive social actions that give phenotypical expression to a community bounded by a collective frame resonance, and therefore authenticity. Such a conception requires culture to remain static, where in fact with so many social and environmental variables, culture is not an immoveable artefact giving expression to imagined communities.

Within the Human Rights Framework, the right-to-culture discourse has retained a traditional bent. The United Nations Human Rights Committee (HRC) has had great normative influence on the right-to-culture discourse through the one of the few legally binding norms within the framework, Article 27 of the ICCPR,[278] which ensures ethnic, religious or linguistic minorities

[274] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007) Arts. 8(1) and (2).

[275] *See generally* Engle, above n 7.

[276] UN Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* (16 Feb 2006) E/CN.4/2006/78 at [5].

[277] Sean Goggin "Human rights and 'primitive' culture: misrepresentations of indigenous life" 2011 15(6) The International Journal of Human Rights.

[278] *See also* UN General Assembly, *International Covenant on Economic, Social and Cultural Rights,* 993 UNTS 12 (opened for signature 16 December 1966, entered into force 3 January 1976), art 15.

the right to enjoy their own cultural distinctiveness.[279] While early jurisprudence was positive, showing a willingness to use the concept of culture and tradition in a fluid way,[280] subsequent comments by the HRC reframed the culture discourse in ways that effectively romanticises traditional culture by linking it to notions of tradition as a continuation of authentic activities such as hunting and gathering, the HRC articulated this point by clearly emphasising traditional and nature-based connections to culture in the following comment:[281]

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the face of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

Engle argues broadly that this shift in discourse toward a right-to-culture language is problematic and has a 'dark side'.[282] Broadly, the language of right-to-culture is manifest in international instruments at the expense of sovereignty language, for example the language of UNDRIP embodies a resistance to incorporating sovereignty language into Indigenous rights. The dark side to the right-to-culture strategy allows hegemonic state regimes to maintain a normative control over the expression of culture, and further essentialises and marginalises Indigenous Peoples. On the matter of Indigenous rights, the impact of the right-to-culture discourse creates a basis for what Povinelli calls an 'invisible asterisk': a proviso that interprets cultural practices against the 'skeletal structure of state law' and whether the practice is abhorrent and would therefore be against state alterity.[283] The consequences of this right-to-culture movement has included both an alienation and commodification of culture, and a continued burden on Indigenous Peoples to prove their authenticity in order to claim rights,

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[279] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 at art. 27.

[280] *See Ilmari Länsman et al. V Finland* (Communication No. 511/1992) UN Doc CCPR/C/52/D/511/1992 (1994).

[281] UN HRC, *General Comment 23: The Rights of Minorities (Article 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at [7].

[282] Engle, above n 7.

[283] Elizabeth A. Povinelli *The cunning of recognition: indigenous alterities and the making of Australian multiculturalism* (Duke University Press, Durham, 2002) at 176.

furthermore, the culture discourse has undermined and limited indigenous rights claims to land, property and political autonomy using static concepts of culture.[284]

At an international level, the invisible asterisk manifests in the HRC's comments on Article 27. The Committee, in General Comment 23, addressed the extent to which cultural rights have vis-à-vis other rights contained within the covenant. The Committee sets out the subordinate relationship cultural rights protected by Article 27 have in relation to other rights in the following comment:[285]

> The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

This comment sets out a positive manifestation of the importance ascribed to cultural rights within the Human Rights framework, and a perfect example of the limits placed on Indigenous recourse to their so-called cultural rights. The invisible asterisk is the qualification that cultural rights are only legitimate insofar as they are consistent and can be located on the dominant cultural grid of the Human Rights system.

At a national level, the praxis of the invisible asterisk and the limiting of Indigenous claims to notions of tradition, culture and authenticity as a yardstick can be clearly seen in the following case. In Australia, *Mabo and Others v Queensland* (Mabo Case) recognised native title under common law had not been extinguished by the acquisition of British sovereignty on the grounds of *terra nullius*, a legal principle indicating unoccupied land.[286] The subsequent case of *Members of the Yorta Yorta Aboriginal Community v Victoria*,[287] however, qualified the criteria to claim native title and severely limited the accessibility of the right. At trial, Olney J. applied the 'occupation by traditional society' as expounded in the Mabo Case by Toohey J.:[288]

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[284] Engle, above n 7 at Part 2.

[285] UN HRC, *General Comment 23: The Rights of Minorities (Article 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at [8].

[286] *Mabo and Others v Queensland* [1992] HCA 23

[287] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

[288] *Mabo and Others v Queensland* [1992] HCA 23 at [51] per Toohey J.

> Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life.

At first, this reading is responsive to the contours and changes to culture; however, it places an undue burden on the Indigenous society to maintain connection to that land in the face of colonisation. In the case in question, Olney J applied the above test by stating:[289]

> It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim; and the dispossession of the original inhabitants and their descendants has continued through to the present time. Although many of the claimant group reside within the claim area, many do not. No group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it. The claimant group clearly fails the Toohey J's test of occupation by a traditional society now and at the time of annexation (*Mabo [No 2], at 192)* a state of affairs which has existed for over a century. Notwithstanding the genuine efforts of members of the claimant group to revive the lost culture of their ancestors, native title rights and interests once lost are not capable of revival.

This application of the 'occupation by a traditional society' placed a heavy reliance on cultural customs, and appeared to place a heavy onus on the claimants to prove both a continued connection with the land and in a traditional way, as the laws and customs were in 1788.[290] The Court also places a heavy onus on the indigenous community to prove that they maintained both connection to the land and having maintained an unnatural and undeveloped culture as at 1788. However, the Court abysmally refused to acknowledge the weight of traditional oral evidence from the claimants themselves, and preferred to rely on the written records of a squatter, noting:[291]

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[289] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [121].

[290] Richard Bartlett "An obsession with traditional laws and customs creates difficulty establishing native title claims in the south : Yorta Yorta" 2003 31(1) University of Western Australia law review.

[291] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [106].

> The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than to the information recorded by [the squatter].

By refusing to acknowledge oral evidence, the Court indicated either an absolute inability or refusal to acknowledge the nature of cultural transmission. This further exemplifies arguments made it this thesis about abyssal thinking, whereby on the one side there is a recognition of knowledge as being true and correct, while on the other side, it falls into nothingness.[292]

On appeal, it was argued that the Federal Court's approach was tantamount to a 'frozen in time' approach to the test, and wrongly equated native title to the existence of a traditional society.[293] The majority, Branson and Katz JJ. refused to definitively settle whether Olney J. had erred in adopting such an approach, while also noting that if he had, he was wrong to do so; the majority also refused to disturb the conclusion of the trial judge.[294] In December 2002, the High Court concluded the battle for indigenous land title, and entrenched the restrictive test as declared by the primary judge.[295]

The jurisprudence at both domestic and international level has shown a reluctance to move away from static notions of culture. While the right-to-culture has been legally established since 1976 and has been the basis of legitimate strategy employed by Indigenous Peoples to gain rights, the use of culture within both international and domestic systems has been inconsistent and highlights the tenuous and problematic relationship between culture and Human Rights.[296]

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[292] *See generally* Santos, above n 3.

[293] *Members of the Yorta Yorta Aboriginal Community v Victoria and others* [2001] FCA 0045.

[294] Per Branson and Katz JJ.

[295] *Members of the Yorta Yorta Aboriginal Community v Victoria and others* [2002] HCA 58.

[296] Sean Goggin "Incorporating cultural dynamism into international human rights law: A solution from anthropology" 2013 13(1) Global jurist.

Culture stems from the social constructions of reality of a collective and the structures formed around them.[297] Instead of individual action being secondary to a society guided by functional prerequisites, society is inward looking from the perspective of the individual. Therefore, structures are constantly negotiated and renegotiated symbolic constructs, created by individuals within the collective through idea, meaning and language. With this in mind, a right-to-culture must not be the primary focus of international or state protections of Indigenous rights, nor the basis of self-determination. Culture needs to develop organically as a secondary result, not as the main focus of self-determination. For culture to thrive and grow, the rights of Indigenous Peoples, including self-determination, must effectively limit state sovereignty.

5. Indigenous Self-Determination, or Empty Promises?

The 1990s saw a recognition at international law of the shift in strategy from Indigenous emancipation grounded in self-determination rhetoric to cultural rights advocacy based on a right to self-determination. This section will describe the limits to the recognition of self-determination at international law, and the connection between the right-to-culture discourse and self-determination and the problems associated with this.

During the 1980s and 1990s the self-determination discussion begun to shift squarely into the Human Rights framework.[298] Self-Determination is located within many different instruments at international law, however most legal claims for self-determination by Indigenous Peoples are based primarily on Article 1 of both ICCPR and ICESCR. For Indigenous Peoples, however, there are historical barriers to using self-determination in these instruments owing to a lack of clear recognition of indigenous Peoples firstly, as peoples at international law, and secondly, as beneficiaries of the self-determination articles in both covenants. While UNDRIP Art 3 has recognised that Indigenous Peoples have the right to self-determination,[299] prior to this declaration the term 'peoples' in Articles 1 of each covenant did not extend to Indigenous Peoples, nor did it extend to minorities.[300] Minorities, are however explicitly dealt with in

[297] For discussion on this theory, please see Peter L. Berger and Thomas Luckmann *The social construction of reality: a treatise in the sociology of knowledge* (Penguin P, London, 1967).

[298] Engle, above n 7 at Ch. 4.

[299] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007) at Art 3.

[300] Xanthaki, above n 86 at 133–40.

Article 27 of the ICCPR. Whilst it has been widely accepted in legal discourse that Indigenous Peoples are not 'minorities',[301] it did present a limited avenue for Indigenous Peoples to pin their self-determination aspirations to. Being forced to use minority rights to access the right of self-determination is indicative of the ongoing exclusion of Indigenous Peoples at international law. Minority rights could however act as a catch-all article to secure some Indigenous rights.

While it is generally settled at international law that Indigenous Peoples have the right to self-determination, there are limits to the extent to which this right is available to Indigenous Peoples, and the right is coloured by the right-to-culture discourse. For Indigenous Peoples, the right to self-determination is often conflated with the right to practice culture, a link that is problematic and can hinder culture expression and development. Alfredsson notes that there is no solid basis for the linkage of culture claims to self-determination, it adds nothing to the body of law and effectively disempowers the interpretation and evolution of cultural protections.[302] Article 3 of UNDRIP both recognises the right to self-determination, but also links it with the right-to-culture discourse:[303]

> 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.

Emphatically articulating a clear right to the self-determination of Indigenous Peoples. This right to self-determination is, however, heavily limited and is heavily circumscribed by the power of the right-to-culture discourse. This so-called right to self-determination is recognised, but only as far as those affairs concerning the domains of spirituality and collective identity,

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[301] See Patrick Thornberry *Indigenous peoples and human rights* (Juris Pub, Manchester;United States;, 2002) at 52–5; Ian Brownlie "The Rights of Peoples in Modern International Law" in James Crawford (ed) *The Rights of People* (Clarendon Press, Oxford [England];New York;, 1988) at 1-16.

[302] Gudmundur Alfredsson "Different Forms of and Claims to the Right of Self-Determination" in Donald Clarke and Robert Williamson (eds) *Self-Determination: International Perspectives* (Macmillan Press, Basingstoke, Hampshire;New York, N.Y;, 1996) at 75-6.

[303] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007).

those performative and essentialist features of Indigenous culture.[304] This may in part be owing to the right impact the right-to-culture has had on self-determination, whereby there is a history of an explicit refusal by international legal institutions to recognise the right to self-determination often in favour of a right-to-culture. Since the explicit recognition of self-determination in UNDRIP, the discourse has continued to be controlled by states. For example, a report in 2010 argues that Indigenous Peoples themselves were "not really concerned that the right to self-determination would include a right to secession."[305] Engle notes, however, that this point was poorly supported, indicating a state-centric bias.[306] This report further entrenches the notion that self-determination is inextricably concerned with culture as paramount, rather than political self-determination, [307] thus limiting self-determination to the realms of spirituality and collective identity as Indigenous Peoples use self-determination as:[308]

> the right to recapture their identity, to reinvigorate their ways of life, to reconnect with the Earth, to regain their traditional lands, to protect their heritage, to revitalize their languages and manifest their culture…

This keeps intact those affairs that colonial structures covet that most: the sovereign institution's monopoly in power, governance, and resource control.[309] Furthermore, Engle argues, following the rhetoric of the 'invisible asterisk' and the 'repugnancy clause'[310] that these limits relating to deference of Indigenous culture and traditions are built into Indigenous legal protection, another manifestation, she argues, of Western paternalism.

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[304] Ronald Niezen "The indigenous claim for recognition in the international public sphere" 2005 17(3) Florida international law journal at 583.

[305] International Law Association *Interim Report: The Hague Conference, Rights of Indigenous Peoples* (2010) at 10.

[306] K. Engle "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" 2011 22(1) European journal of international law.

[307]International Law Association, above n 305 at 11.

[308] Siegfried Wiessner "Indigenous sovereignty: a reassessment in light of the UN Declaration on the Rights of Indigenous Peoples" 2008 41(4) Vanderbilt journal of transnational law at 1176.

[309] Niezen, above n 304 at 583.

[310] The repugnancy clause is the expression of minimum standards of the toleration being accorded to Indigenous cultural rights, whereby, the yardstick is whether the cultural aspect is repugnant to mainstream culture. *See* Leon Shaskolsky Sheleff *The future of tradition: customary law, common law, and legal pluralism* (Frank Cass, London;Portland, OR;, 2000) at 123.

Attempts to bring Indigenous Peoples under the legal purview of self-determination at international law have consistently been frustrated. The HRC in *Mahuika v New Zealand* (1995) confirmed the position that the examination of the right to Self-Determination was not within its mandate. The HRC also noted, however, that Article 1 of the ICCPR could be used as an interpretive tool in deciding the scope of other rights protected in the Covenant, with particular emphasis on Article 27, thus linking internal self-determination for Indigenous Peoples with a right-to-culture.[311] This inextricably links elements of self-determination with achieving and participating with culture.

With the self-determination discourse now situated within the Human Rights framework the language of advocacy for self-determination also changed. Earlier efforts for internal and external self-determination, for autonomy over heritage, land and development largely disappeared and gave way to strategies that leveraged the universal rights contained within the Human Rights framework, with a particular focus on the right-to-culture.[312] While arguments for legal self-determination still remain, the international institutions and adjudicatory bodies have preferred to support right-to-culture arguments.

C. Concluding Comments

Whilst there is no denying that Indigenous rights have been advancing, the breadth of limits present in the Human Rights framework cannot be ignored. Chapter one described the gains that the Indigenous Rights movement has made at international law both within the Human Rights framework and without. These gains, however, highlight the uneasy fit that the Human Rights framework offers the Indigenous Rights movement. Currently, the strength of the normative mechanisms of Human Rights have the potential to stunt the advancements made for Indigenous rights if not appropriately addressed. However, the strength of the arguments for pursuing Indigenous rights within the Human Rights framework noted at the beginning of this chapter fall short of establishing a strong position in light of the limitations canvased above.

[311] *Mahuika v New Zealand* (Communication No. 547/1932) UN Doc CCPR/C/55/D/547/1993 (1995).

[312] Engle, above n 7.

Corntassel and Primeau's discussion fails to address the limitations and barriers to achieving collective rights within the Human Rights framework, furthermore, the limitations and barriers present within their strategy further entrench the limitations discussed here. By pursuing a strategy relying on internal state mechanisms, as suggested by Corntassel and Primeau, the advancement of Indigenous development is placed in the realm of the sovereign institution, where there is often a lack of Indigenous representation. This strategy eschews claims based on sovereignty, self-determination and autonomy owing to concerns of secession. The argument is that such concerns would enflame relationships and thus harm development. Such issues should not be cause for alarm, jurisprudentially, it is a symptom of the harms caused to Indigenous Peoples by colonisation and a corresponding lack of political representation.[313] Advocating on a Human Rights approach to advance Indigenous claims without changing the current Human Rights Framework risks reifying the inherent limitations implicit within the modern Human Rights framework as discussed in the previous chapter. Such limitations create strong barriers to the advancement of collective rights under the modern Human Rights Framework.

The Human rights framework has developed over time to limit the operation of sovereignty and has created opportunity and space for the development of Indigenous rights within the Human Rights framework. Therefore, the subaltern can speak, but the question becomes: can the subaltern be heard? The subaltern has for so long been excluded from the development and operation of international law that the structures in place to interpret and declare international law are deaf to the diversely different and unique contours of subaltern voices.

Indigenous rights that have developed within the Human Rights system, to some extent, operate as a counterweight that guards against state decisions that may be against Indigenous interests, thus limiting the sovereignty of states. However, the extent and effectiveness of these rights are severely limited. This is due to the Eurocentric universalism inherent within both the international system itself and within the Human Rights framework that operate to limit the effectiveness of Indigenous rights. This risks a homogenisation of ontology attempting to access rights, and an inability to account for diversity of difference. This is evident in an ambivalence in domestic legal systems toward minority and Indigenous rights, and a

[313]"Are Indigenous Peoples entitled to International Juridicial Personality: Discussion" 1985 79 American Society of International Law Procedure 204.

harpooning to a right-to-culture discourse. This effectively colours access to rights for Indigenous Peoples to the development of culture linked to authenticity tradition. The current system for recognising Indigenous rights developing within the Human Rights framework allows states to apply their own cultural limitations on the expression of Indigenous rights.

Universal human rights such as civil, political, social, and labour rights, and to an extent minority rights, developed to ameliorate very different harms than those harms that Indigenous rights seek to address. Indigenous harms stem from the colonial mission of imperialism, the imposition and (re)distribution of sovereignty via an international legal structure. Indigenous Peoples still face the harms of an ongoing process of exclusion. While there is some overlap, the collective needs of Indigenous Peoples are not fully met by the current Human Rights framework.

V. Why are Limits Present?

As has been stated previously, the human rights have developed in order to ameliorate harms resulting from the structure of international law and the operation and distribution of sovereignty. Sovereignty is in large part responsible for the pathologies that have been created at international law. The Human Rights framework has developed in order address these pathologies. By human rights limiting sovereignty, Indigenous rights have had the opportunity to emerge. This has resulted in the development of Indigenous rights at international law, centred heavily within, and influenced by, the modern Human Rights framework. The emerging field of Indigenous Rights within the Human Rights field, however, has resulted in the manifestation of number of identifiable limits that impair the ability for the Indigenous Rights movement to develop.

This chapter will argue that the limits present, as identified in the previous chapter, are in fact symptoms of a structural discord between Indigenous rights and human rights. It will be argued that the limits flow from the fundamental differences between human rights and Indigenous rights. These limitations manifest because human rights have developed within a legal philosophy, sourced in Eurocentric post-enlightenment contexts, and have evolved in order to respond to a particular set of harms. The Indigenous Rights movement, however, is born of a difference source, for different needs, to ameliorate harms unique to Indigenous Peoples and the contingencies of history that have resulted in the subjugation of Indigenous Peoples by the operation of sovereignty. To make this case, this section will trace the development of the Human Rights movement until its crystallisation into a distinct body of international law.

Previously it has been identified that many limitations that restrict the development of Indigenous rights are present within international law and particularly within the Human Rights framework. These limits stem from Eurocentrism, imperialism and the application of universalism from an Enlightenment philosophy. This is because the metadata that underpins the structure of international law has been provided by Western legal philosophy, this in turn has come to define the limits of international law's own application to the exclusion of other epistemes through the concept of universalism. The extension of this is a universalisation of

the European experience and applying this to those who international law has applied.[314] This exemplifies the exclusionary nature of the civilising mission inherent within international law through universal application of Western legal assumptions and principals over Indigenous Peoples, whereby international law was primarily concerned with rights over Indigenous Peoples and not the rights of Indigenous Peoples.[315] Human Rights has a similar genesis and has benefited from the same metadata that underscores the current structure of international law, therefore the development of Human Rights has roots in imperialism and colonial biases that continue the civilising mission flowing from Eurocentrism and universalism.

Flowing from Eurocentrism and Universalism, these limitations have developed in several ways to place barriers on the development of Indigenous rights. These include: the structural exclusion of Indigenous peoples; the entrenched solipsist nature of the Human Rights framework that continually confirms its own universal rationality; the inability to recognise diversity of difference and therefore the multiplicity of ontologies; and the conditions, asterisks and repugnancy clauses of the right-to-culture. These mechanisms and the influences they have on the expression of Indigenous self-determination are all present in the Human Rights framework that limit the expression and development of Indigenous rights within the current frameworks.

These limits are present owing to the specific developmental context of the Human Rights Framework, and manifest in direct response to the co-presence of Indigenous rights. The modern Human Rights Framework is underpinned by metadata that has developed in response to stimulus and context, and has therefore developed in such a way to respond to specific harms. The result has been that the modern Human Rights framework has developed in a particular way, entrenched within Eurocentrism, with roots in Western legal positivism and post-Enlightenment ideals of universalism.

[316] Andrew Geddis "The philosophical underpinnings of human rights" 2017 International human rights law in Aotearoa New Zealand at 33.

[316] Andrew Geddis "The philosophical underpinnings of human rights" 2017 International human rights law in Aotearoa New Zealand at 33.

A. The Crystallisation of Human Rights: A European Context

The body of law now known as 'Human Rights' is a relatively recent phenomenon. While there may be glimpses of Human Rights that protect individual freedoms and dignity features in historical or ancient legal systems, the universal or omnipresent concept of human rights that now an important fixture of our international, regional, and domestic legal systems only started to slowly pervade in earnest our modern legal thought in the last 70 years.[316] Previously, there was no consensus that human rights formed a discrete area of international law outside small pockets.[317]

While it is difficult to pinpoint the exact starting point for a discussion on the evolution of Human Rights, the most commonly cited starting point tends to begin in the 18th century BC with the Code of Hammurabi.[318] If one is to look hard enough, ideas and practices that align with modern Human Rights can be found throughout the ages. However, there is disagreement as to the evolutionary contributions of these earlier concepts on the development of what we know today as modern Human Rights. Whether these early concepts contributed in a linear fashion, or whether they ought to be considered as separate to modern Human Rights, but perhaps as influential, is up for debate.

There is an abundance of academic literature that supports a chronological development of Human Rights. Within the chronological development of the Human Rights discourse, there are different themes. Some articulate development in terms of generations,[319] some discuss the

[316] Andrew Geddis "The philosophical underpinnings of human rights" 2017 International human rights law in Aotearoa New Zealand at 33.

[317] At 33.

[318] Daniel Moeckli and others *International human rights law* (Third ed, Oxford University Press, Oxford, United Kingdom, 2018) at 4.

[319] Karel Vasak "A Thirty Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration on Human Rights" UNESCO Courier, Nov. 1977, at 29, 32, cited in Stephen P. Marks "Emerging Human Rights: A New Generation for the 1980s?" 1981 33 Rutgers L. Rev; Karel Vasak "A 30-year struggle; the sustained efforts to give force of law to the Universal Declaration of Human Rights" 1977 30(11) UNESCO Courier 28-29,32.

development of human rights in terms of the philosophical changes,[320] others focus on the events that coincide with the philosophical developments.[321]

The quest to trace the chronological development of human rights must invariably start somewhere. There are moral precepts, ideas, and systems that on the face of it appear to be human rights if one looks deep enough into the realms of the past, elements of different societies, religions, and philosophers. Elements are identified in Ancient Mesopotamia codified within the Hummarabi text, the Old Testament's Ten Commandments, the Quran and Buddhism, the the works of Socrates and Plato, and of course Roman thinkers such as Cicero and the Stoics.[322] While not necessarily Human Rights as we know it today, these Western and non-Western, modern and pre-modern accounts of morality and justice all contribute in some way to the ethical foundations of the moral script on which the modern Human Rights system rests.[323]

Reliance on contributions to modern Human Rights from ancient cultures through to pre- 18th century has been heavily criticised. Howard takes the position that traditional societies do not take a Human Rights approach to social justice, but take an approach whereby principles of social justice are based on unequal social statutes and on the intermixture of privilege and responsibility.[324] Afshari, while making it clear that contributions by the likes of Lauren are significant, argues that these works over represent the contributions of these early so-called ethical contributions to Human Rights, claiming that in doing so one is in danger of attributing historical incidence to contexts that do not fully appreciate the unique and revolutionary nature of modern human rights.[325] Furthermore, Whelan argues that while there is a history to the evolution of Human Rights, there is no need to take it back to antiquity.[326] Whelan takes the

[320] Micheline Ishay *The history of human rights: from ancient times to the globalization era* (University of California Press, Berkeley, 2004).

[321] Paul Gordon Lauren *The evolution of international human rights: visions seen* (3rd;3; ed, University of Pennsylvania Press, Philadelphia, 2011).

[322] Ishay, above n 320 at 1–14

[323] At Ch 1 -14; Lauren, above n 321.

[324] Rhoda E. Howard "Human Rights and the Search for Community" 1995 32(1) Journal of Peace Research.

[325] Lauren, above n 321.

[326] Daniel J. Whelan "On Reza Afshari's "On Historiography of Human Rights"" 2019 41(1) Human Rights Quarterly.

position that the language of Human Rights arose alongside the formation of the modern nation-state and capitalism.[327]

Broadly speaking, beyond the early ethical contributions, the most consistently cited evolutionary phases can be broken down into the following: premodern, 18th century, 19th century, and 20th century. Each of these centuries has provided sharp shifts in the discourse around Human Rights. During the 17th and 18th centuries, a philosophical shift occurred, known as the Enlightenment period. Thinkers of this time began to question the religious dogma that formed the basis of reason and turned to thinking about the natural world and a scientific understanding of humanity-rooted experience, not theological authority.[328] The contributions of thinkers such as Samuel Pufendorf, Hugo Grotius, Emmerick de Vattel, and René Descartes initiated a shift from divine law to natural and humanistic notions of law.[329] It is argued that these Enlightenment thinkers begun to construct the language of Human Rights.[330] Concepts such as the 'rights of man', or the 'dignity of the person' begun to take on a powerful political and legal tool,[331] especially in the abolitionist and women's rights movements yet to come.

The abolitionist movement begun on the back of the Enlightenment philosophy, beginning in the 18th century and continuing into the 19th century. The movement was fuelled in part by Enlightenment ideals of liberty. The normative value of freedom was developed in the movements to end slavery, which set in motion a number of humanistic shifts of the time. Abolitionists turned to advocating for the freed slaves and the exploited. The abolition of slavery brought with it a new social context for freed slaves who now experienced other forms of prejudice. The notion of 'equality of man' was beginning to take root. This was then in turn taken up by the feminist movements of the 19th century, which fought for gender equality, and then finally equality for all humanity.[332]

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[327] Above.

[328] *See generally* Charles W. J. Withers *Placing the Enlightenment: thinking geographically about the age of reason* (University of Chicago Press, Chicago, 2007) at Ch. 1

[329] Ishay, above n 320 at 8.

[330] At 8.

[331] Vincenzo Ferrone "The Rights of History: Enlightenment and Human Rights" 2017 39(1) Human Rights Quarterly.

[332] Lauren, above n 320 at 55–66.

Where the influences of the 18th century reached into the 19th century, so too do the ripple effects of the Industrial Revolution that begun in the late 18th century. This period contributed the foundation for political, social and economic equality to the Human Rights discourse. The Industrial Period began around 1760 and peaked in the 19th century. It was a period of immense social and economic change caused by technical innovation including gas-making, the chemical industry, the canal and railway transport industries and textiles.[333] The technological advances and the resulting increase in production created a suite of social and economic disparities, rural to urban drift toward industrial centres and increased concentrations of urban poverty.[334] The disparities between rich and poor also grew. These growing social hardships sparked rebellions and movements that yet again brought new life to the development of the Human Rights discourse.[335]

The climate fostered during the industrial period cultivated rebellion, revolts, and revolutions that also added to the evolutionary trends of the Human Rights discourse. With increased industry, capitalism also progressed. Alongside capitalism and the Enlightenment discourse on civil rights, also came socialism and a growing concern for the oppressive nature of the capitalist system. Industrialism also fuelled the 1848 revolutions, socialist militancy, and the devastation of the American Civil War.[336] Industrialisation transformed warfare through the mechanisation of war. Railways and steamships increased mobility while artillery increased range, increasing the traditional battlefield to a magnitude not experienced before.[337] This environment acted as a catalyst for further ethical developments to the Human Rights discourse. The ever-increasing devastation of war and the resulting mass deaths, spurred a movement to protect the wounded. Organisations such as the Sisters of Mary of the Crimean War and the Red Cross developed, and through their work humanitarian principles evolved.[338]

Although the contributions of the 18th and 19th Centuries may align with values and concepts that underpin our current Human Rights system, Human Rights as a fully-formed concept did

[333] T. S. Ashton *The industrial revolution, 1760-1830* (Oxford University Press, London;New York; , 1948).

[334] Lauren, above n 321

[335] Ishay, above n 320 at Ch 3.

[336] At Ch 121.

[337] Lauren, above n 321 at 67–66.

[338] At 67–66.

not crystalise until the 20th century. During the 20th century a boom of events that affected the entire globe caused an explosion of international activity in the Human Rights field. The creation of the League of Nations at the conclusion of the First World War, and the creation of the United Nations at the conclusion of the Second World War united these disparate strands of the human rights-based discourse and set about mobilising them at an international level. Each of these organisations set about addressing the concerns created by fascism, militarism, and Nazism. The field was now set for the creation of a system that declared the universal rights of humankind in the quest for world peace which now included fundamental human, civil and political rights.

The events and shifts outlined above are not intended as a true chronology; there is overlap between events and the ripple effects of those events and the philosophical discourses. Regardless, the main thrust of this linear argument of development is that Human Rights norms have evolved primarily in response to events, such as war, revolution, and crisis. As posited by Lauren, shifts in the Human Rights discourse have evolved primarily in response to events such as war, revolution and crisis. Moving into the 20th century, the crystallisation of Human Rights really begins to occur in response to mass outrage toward the tyranny of power spurring an unpreceded boom of development at the international level and the formation of a global rights-based movement.

Regardless of the position one takes with regards to the historical starting point in the evolution of Human Rights, there appears to be a clear consensus that modern Human Rights began to evolve at a particular historical juncture. Lauren indicates the formative years of modern human rights occurred in the 20th century alongside the World Wars. Ishay, while following a similar timeline to Lauren, focused less on the events and more on the corresponding philosophical contributions, which led to the codification of the UDHR. Moyn argues that the modern Human Rights system as we know it today is distinctly separate to the 'rights of man' articulated during the Enlightenment era, proposing that modern international Human Rights did not crystallise and gain political and legal salience until the 1970s, well after the UDHR was adopted in 1948.[339] It is clear that while the evolution and exact contributions to the modern Human Rights system is heavily contested, there appears to be standard cross-over with regards to the moral,

[339] Samuel Moyn *The last utopia: human rights in history* (Belknap Press of Harvard University Press, Cambridge, Mass, 2010) at 3.

philosophical and ethical contributions to the human-based rights discourse that begin to form and crystallise into the modern system during the atrocities of the 20th century, culminating in the codification of these contributions in the UDHR and the development of the modern United Nations Human Rights system.

What is clear from this discussion on the evolution and development of human rights into the modern Human Rights framework, is that the context and stimuli that the modern human rights responded too were situated primarily within the European experience. The third world is conspicuously absent, and while there are arguments in support of ethical contributions from traditions outside of the western legal tradition, the context in which these early 'so called' human rights developed is fundamentally different, for different purposes. And therefore, ought not be considered Human Rights.

Similarly, Indigenous rights ought to be considered in light of their purpose and context, and what the movement is attempting to respond to. Therefore, the following sub-section will argue the case that Indigenous rights are fundamentally different to human rights, and should therefore be considered separately.

1. Responding to Fundamentally Different Harms

While space has emerged within the Human Rights framework for the development of rights of Indigenous Peoples, the normative mechanisms of Human Rights place limits on the extent and form of development available to Indigenous rights. The current Human Rights framework that Indigenous rights are forced to operate within relies on essentialist metaphysical, Eurocentric, and individualistic conceptions of the human condition. It is a framework that is unable to avoid either overly expansive or overly minimal accounts of what rights should be deemed human rights,[340] therefore limiting diversity and difference of the human experience. This is identified by Kennedy when he writes:[341]

[340] *See* discussion in Jean L. Cohen *Globalization and sovereignty: rethinking legality, legitimacy and constitutionalism* (Cambridge University Press, Cambridge, 2012) at 159–78.

[341] Kennedy, above n 221.

> [The] vocabulary and institutional practice of human rights promotion propagates an unduly abstract idea about people, politics and society. A one-size-fits-all emancipatory practice underrecognizes and reduces the instance and possibility for particularity and variation.

This effectively limits the discussion of diversity and difference in the rights-based discourse; it limits concepts of being, or ontology, to align with the universal moral ideals entrenched within the Human Rights framework and reduces the discussion to individuals while simultaneously ignoring how individuals exist and see themselves within the collective.

To create spaces for Indigenous rights, Human Rights has developed what Macklem identifies as 'special rights'. Special rights are those rights that vest in some communities and not others.[342] A moral conception locates special rights based on an anti-discrimination frame, and thereby adhering to the universal nature of Human Rights as all humans have a right to be fully included, participate, and benefit fully from the rights enjoyed by the other members of the state.[343] Macklem argues that such an articulation of special rights misses some of the fundamental rights that are developing for Indigenous Peoples, namely, rights to autonomy and self-government, that do not fit easily into the anti-discrimination and equal inclusion frame.[344] Macklem's justification of Indigenous rights on a practical level are that they are vested in certain communities or groups and not in others because of contingencies of history and geography and the distribution of sovereignty.[345] This articulation of Indigenous rights is better equipped to argue for a limiting of sovereign authority. Indigenous rights can highlight the historical injustices caused by the international system through colonisation and the system's refusal to ascribe legal sovereignty to Indigenous nations in favour of their colonisers.[346]

Macklem's argument centres on the development of human rights in direct response to the harms caused by international law and the operation and distribution of sovereignty, the development of the special rights of indigenous Peoples too, following this reasoning, must be developing to ameliorate harms. The harms felt by Indigenous Peoples have developed as a

[342] *See generally* Hart, above n 137.

[343] Jean L. Cohen "The uses and limits of legalism: On patrick macklem's the sovereignty of human rights" 2017 67(4) University of Toronto Law Journal at 520.

[344] Macklem, above n 118 at 156–62.

[345] At 160–2.

[346] Cohen, above n 343.

direct result of colonisation, elements of which are still implicate within the genesis and structure of the modern Human Rights Framework. The harms that catalysed the development of Indigenous rights, however, are fundamentally different to those harms associated with the Human Rights framework at large. The Human Rights framework was never designed to respond to the ills of colonialism, however Indigenous rights are forced to respond to harms specific to Indigenous Peoples within the Human Rights framework.[347]

Stephen Young also recognises the limits to Macklem's thesis on the distributive effects of human rights on justice. Young highlights the normative impact human rights have on the articulation of justice, noting that human rights, while distributing justice, also have the effect of re-validating international law's Western-centric conception of state sovereignty and a monopoly of what counts as justice. While Macklem focuses a large part of his argument on Indigenous rights and the associated harms, Indigenous rights entrenched within the Human Rights framework do not provide a forum for Indigenous Peoples to articulate what justice is for them, and how to build on their aspirations through the limits placed on sovereignty. There is the real danger that Indigenous rights within the Human Rights frame may actually "advance, reproduce and re-legitimise the hegemonic project of international law as well as shift its pathologies elsewhere."[348]

As has been outlined above, the modern Human Rights framework has developed within a particular legal tradition. The Human Rights framework as we know it today has been coded by the underlying logics of a Western, post-Enlightenment, rationalist and secular tradition. Such a tradition thinks in universalist terms rooted within an international legal framework from which other epistemes have been structurally excluded. The result is also the exclusion of other forms of ontology that do not perform in a way recognisable to the Human Rights framework. Furthermore, the Cartesian universalism inherent within the Human Rights framework means the Cartesian object (the Human Rights framework) only recognises those universal essences or norms that are located within the metaphysical data supplied by the

[347] Stephen Allen "The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publisher, Portland, Oregon; Oxford, 2011) 225-256.

[348] Stephen Young "Pathologies and positivism in The Sovereignty of Human Rights, by Patrick Macklem, New York: Oxford University Press, 2015, 259 pp., £57.00 (hardcover), ISBN 978-0-19-026731-5" 2018 24(2) Australian Journal of Human Rights 249

Eurocentric, Enlightenment programming of its genesis. The Cartesian object is created in the image of the subject without any meaningful grasp of the inner logics of other cultural and historical contexts. This again, is evident in the savage, victim, and, saviour metaphor previously described.

B. Concluding Comments

The limitations on the development and advancement of Indigenous rights present within the modern Human Rights framework are symptoms of a more structural pathology. The harms faced by Indigenous Peoples are fundamentally different to those the Human Rights framework developed in response to. The Human Rights framework developed in response to specific harms as a result of the rise of capitalism, the nation-state, and the distribution of sovereign authority and the potential harms this may cause individuals.[349] The development of the framework that evolved to respond to these harms sourced metadata from the Western legal tradition, drawing on code from post-Enlightenment positivism and universalism, and inherent imperialism.[350] Indigenous rights are developing in order to respond to harms unique to Indigenous Peoples or Nations; such harms are not the original intent of the modern Human Rights framework, and those driving the development of Indigenous rights are from a diverse range of legal traditions and ontologies that the current Human Rights Framework is incapable of responding to. The ongoing impacts of the imperial mission inherent within the structure of international law, the exclusion of Indigenous Peoples from international law, and the consequences of the international legal order allowing for the denial of Indigenous sovereignty in favour of colonial actors, has created harms that are unique to Indigenous Peoples. These harms are unique to the Indigenous, and, although felt at an individual level, are collective in nature. Therefore, without change the limitations present in the modern Human Rights framework will continue to prove problematic.

The limits on the development of Indigenous rights within the Human Rights framework are so entrenched that the Human Rights framework is not an ideal site to pursue Indigenous rights. By attempting to splice the Indigenous Rights movement into the already crystalised and formed Human Rights framework, the source coding and metadata that underpin the Human

[349] Whelan, above n 326.

[350] Anghie, above n 187.

Rights framework creates tensions with the needs of the Indigenous Rights movement. The modern Human Rights Framework is underpinned by metadata that has developed in response to stimulus and context, and has therefore developed in such a way to respond to specific harms. The result has been an evolution of the modern Human Rights framework that is entrenched within Eurocentrism, with roots in Western legal positivism and post-Enlightenment ideals of universalism. The insertion of Indigenous rights has caused tensions within the Human Rights framework that work in opposition to the needs of the Indigenous Rights movement. Therefore, the Indigenous Rights movement needs to develop disentangled from the Human Rights framework.

VI The Future of the Rights of Indigenous Peoples

The Human Rights framework has been the main vehicle for the development of Indigenous rights. However, Chapter IV has outlined how international law, especially the Human Rights framework, has placed limits on Indigenous rights. Because of the presence of these limits, Chapter V then argues that the Human Rights Framework is not an ideal field in which to pursue Indigenous rights. It has been argued that owing to the Eurocentric origins of the Human Rights framework, and the particular contexts within which modern Human Rights have been forged, limits are present because the insertion of the Indigenous Rights movement is attempting to respond to harms separate to those the Human Rights movement has developed in response to. Therefore, in order for the Indigenous Rights movement to develop in such a way that responds to the harms unique to the Indigenous contexts, Indigenous rights need to be pursued independently from the Human Rights framework.

This chapter will argue that by continuing to pursue Indigenous rights claims within the Human Rights field, the limitations identified will continue to hinder the full potential of the Indigenous Rights movement. The current dual nature of the Human Rights framework will be explored as it attempts to respond to the needs of the Indigenous Rights movement. UNDRIP, as a fundamental cornerstone of Indigenous rights recognition, will then be analysed to support the argument that the current dual focus of pursued is limiting and continues the Eurocentric imperial mission inherent within the Human Rights framework.

A. The Current Dual Approach to Rights

International law has attempted to ambulate alongside the changing needs of the times. The development of the modern Human Rights framework is one prime example. International law has also attempted to respond to the growing concerns of Indigenous Peoples globally. As the Indigenous Rights movement began to take hold in the 1970s, through the self-determination claims of the 1980s, and finally the cultural rights advocacy in the 1990s, international law has attempted to evolve to accommodate the collective needs of Indigenous rights.[351] Whilst the constant change in strategy may very well be indicative of the uneasiness with which

[351] Engle, above n 7.

Indigenous rights sit with the imperial undertones inherent within international law, the Human Rights framework has shown some ability to evolve to accommodate the Indigenous Rights movement, to a very limited extent.

As Chapter II outlines, there have been great gains in terms of the recognition of Indigenous Peoples at international law and the development of approaches to recognise their claims. Two main interconnected frameworks have developed or extended to address Indigenous concerns: a Human Rights framework, and an Indigenous Rights framework. Firstly, the Human Rights framework has become an important avenue for Indigenous protections. While not originally intended as a framework for collective Indigenous protections, the Human Rights framework has been used as a springboard to advance Indigenous rights. For example, the ICCPR, while not explicitly recognising Indigenous rights, has been used to protect Indigenous internal self-determination, and Article 27 has been used extensively to protect Indigenous cultural rights. Human rights have also been heavily influenced by Indigenous Rights discourse, resulting in evolutionary approaches to extending a rights-based framework that does not naturally extend to certain Indigenous rights. This can be seen in the *pro homine* approach of the Inter-American Court of Human Rights. There is also a burgeoning area of international law specific to Indigenous rights, what might be termed an Indigenous Rights framework. The culmination of this Indigenous Rights specific area of international law is UNDRIP.

The accommodation of the Indigenous Rights movement within the Human Rights framework has required a fundamental challenge to the individualistic bent of the Human Rights framework. Indigenous rights, which advocate for rights that are vested in a collective for the benefit of the collective, sit in contrast with traditional human rights, which are vested in the individual. This challenge has resulted in a fundamental shift, whereby international law, particularly within the Human Rights framework, has evolved in some ways to recognise the collective rights of Indigenous Peoples. This has resulted in an extension of existing human rights principles beyond individual application, such as the right of non-discrimination, which protects the right of Indigenous groups to pursue and maintain their own distinct cultural identities. The justification for this extension of the non-discrimination right is founded on a recognition of the contingencies of history that have resulted in the harms unique to Indigenous

Peoples; this is emphasised in a General Recommendation by the U.N Committee on the Elimination of Racial Discrimination (CERD):[352]

> [I]n many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.

This right to non-discrimination protecting distinct cultural identity has been reinforced and heavily pursued by way of ICCPR Article 27.[353] This article originally intended to protect the cultural integrity of minorities, has made some attempts to flex and accommodate the needs of the Indigenous Rights movement. Indigenous Peoples have attempted to argue that Indigenous Peoples are separate from minorities, and would thus be entitled to separate protections befitting their status as Indigenous Peoples.[354] Such a distinction has not been formalised, nor endorsed. However, there is a recognition that minority rights overlap considerably with Indigenous cultural rights. Therefore Article 27 must be read in view of a collective, for without a collective there is no culture.[355] Thus, Article 27 has been extended to cover the collective needs of the Indigenous Rights movement.

This is one example of how contemporary Human Rights have evolved in order to address the growing concerns of the Indigenous Rights movement. This shows one way in which Human Rights have evolved a dual approach to rights, whereby traditional rights are, where possible, being reinterpreted to allow for collective application. While there may be some tensions between Indigenous rights and human rights, Indigenous People have been able, to some extent, to pursue to claims in the Human Rights field, and the Human Rights framework has shown flex in accommodating a dual thrust. According to Anaya, this dual thrust shows an

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[352] U.N Committee on the Elimination of Racial Discrimination (1997) *General Recommendation XXIII: Indigenous Peoples,* U.N. Doc. CERD/C/51/misc 13/Rev 4., at 3.

[353] UN General Assembly, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (Opened for signature 16 December 1966, entered into force 23 March 1976) at Art 27.

[354] Mikmaq Tribal Society v Canada, Communication No. 78/1980 (30 September 1980) UN Doc U.N. Doc. Supp. No. 40 (A/39/40) at 200.

[355] Anaya, above n 196 at 21–22.

acknowledgement of the emergence of a multicultural state that recognises Indigenous collective identity as well as individual identity.[356]

As the Indigenous Rights movement has grown, debate has also grown around whether Indigenous rights are developing into a specific branch of international law. The current approach would suggest that while there have been advances in the development of specific approaches to Indigenous rights, these developments still remain firmly within the Human Rights framework. This is supported by the Inter-American Court's approach to Indigenous rights, whereby the position is that Human Rights are capable of adapting to the specific needs of Indigenous claims. While there is an emergence of an Indigenous Rights framework, this framework merely compliments, and is subject to the principles and norms of the general Human Rights framework.[357]

Anaya reflects that the modern Human Rights framework has a dual thrust, supporting the assertion above that the Human Rights framework has evolved to include traditional individual rights and contemporary collective rights.[358] On the one hand, there is an attempt to acknowledge and protect the cultural distinctiveness of Indigenous Peoples, while on the other hand, a recognition that Indigenous Peoples are not to be considered *a priori* distinct from the dominant political and social structures of the host state.[359] The argument that the dual thrust of the modern Human Rights framework strengthens specific Indigenous rights such as cultural integrity as well as participatory engagement with the dominant state structures is supported in the literature. Buchanan argues similarly that Human Rights in fact strengthen and mitigate potential harms of Indigenous collective rights when imbedded firmly within the Human Rights framework noting that individual Human Rights would keep the harms associated with collective rights 'within tolerable limits'.[360] This effectively, reifies the victim, savage, saviour metaphor explored in chapter IV, whereby Human Rights are protecting the tyranny of potential Indigenous collective rights. Buchanan uses the argument that there is the potential for Indigenous communities to use their collective rights to violate Individual Rights. The

[356] Above.

[357] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, 173 (Aug. 31, 2001).

[358] Anaya, above n 196.

[359] At 60.

[360] Buchanan, above n 188 at 107.

concern is that these may be norms that are repugnant to the western Eurocentric moral script that underpins the Human Rights framework.

1. UNDRIP: Dark Sides of the Dual Approach

The impact Human Rights has on the Indigenous Rights movement is highlighted by UNDRIP. Duality is reflected in the drafting of UNDRIP whereby there is an attempt to position rights unique to Indigenous Peoples within the modern Human Rights framework, articulating both collective rights and individual rights,[361] which are both emancipatory and have echoes of assimilist sentiments. This duality appears to be a concerted effort to entrench Indigenous rights within the Human Rights Framework, however, the juxtaposition of both points to a cross-purpose. For example, while the UNDRIP clearly protects the collective right to self-determination,[362] it also protects individual rights that appear to protect a right to assimilate. For example, Article 14(2) protects the right of a child to mainstream education within the state, while Article 6 protects the individual right to a nationality, and Article 5 protects the right of the individual "to participate fully, if they choose, in the political, economic, social and cultural life of the state."[363] While on the face of it protections of these rights reflect a protection of equality and a right to access within the host state, the placement of such rights in UNDRIP are oxymoronic, both protecting the right to Indigenous distinctiveness while at the same time creating mechanisms to become normalised within the social, economic and political structures of the dominant society.

While UNDRIP has been lauded as principal amongst the efforts to create mechanisms to advance the Indigenous Rights movement, it also cements the Indigenous Rights movement within the Human Rights framework. However, this duality may not be the most appropriate format for advancing Indigenous claims. By creating a dual approach within UNDRIP, the bifurcated set of rights clashes at cross-purposes.[364] On the one side there is a protection of

[361] *See for example, United Nations Declaration on the Rights of Indigenous Peoples GA Res A/RES/61/295 (2007)* at Art. 1.

[362] UNDRIP at art. 4

[363] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007) Arts. 5, 6, 14(2).

[364] Robert B Porter "Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples" 2002 5 Yale Hum. Rts. & Dev. LJ.

individual autonomy, which does not directly ameliorate the harms of colonisation unique to Indigenous Peoples, but harms more generally. On the other hand, there is a strengthening of collective indigenous identity, autonomy, and, cultural identity that respond directly to the harms unique to Indigenous Peoples. The co-presence of these divergent sets of rights have the impact of incorporating limits arising from the Eurocentric, universalism and imperialism that have developed within the Human Rights context, into a mechanism that is attempting to ameliorate Indigenous harms that have developed in a different context. The resultant declaration is one aimed at strengthening Indigenous identity, autonomy and development. It is, however, a continuation of the Cartesian influences, universalism, and assimilative forces of the modern Human Rights framework. These Human Rights influences are all the more potent because they are neatly incorporated into a declaration articulated to have a close contextual fit for Indigenous Peoples, making the declaration and attractive document, while watering down and stunting the Declaration's elusive promises of Indigenous collective development.

Engle describes the ever-shifting nature and unpredictability of strategy, along with the dark sides present in the successes of current strategies. Engle also notes that the Human Rights framework continues to adjudicate Indigenous claims. Here again, this reflects the unpredictability of strategy, as one day, adjudication will be based on a right-to-culture, the next day it may be based on self-determination, and yet is unable to provide equivocally positive results. Therefore, the Human Rights framework continues to provide sites of struggles for Indigenous Peoples owing to the uneasiness in which the Indigenous Rights movement sits within the Human Rights framework. She queries why legal and political victories do not result in the major transformation that Indigenous Peoples desire. This thesis would argue that the reason for an absence of major change, is due to the covert way in which the Human Rights framework dulls the potential of Indigenous rights. There is no real change to the current structures in place at international law for the protection of Indigenous rights at a metaphysical level, and while Indigenous rights continue to be seated firmly within the Human Rights framework, this will continue. Therefore, in order for the Rights of Indigenous Peoples to begin to meaningfully attend to the harms, caused by contingencies of history, unique to Indigenous Peoples, Indigenous rights need to be pursued disentangled from the Human Rights framework.

UNDRIP is also illustrative of the significant compromises the Indigenous Rights movement must make whilst situated within the Human Rights framework in order to make incremental

and often elusive advances. Engle, while acknowledging the monumental victory that the adoption of UNDRIP represents for the Indigenous movement, argues that there were significant compromises that Indigenous advocates had to make in order for the declaration to be adopted.[365] These compromises, she argues, embed significant limitations on the Indigenous rights the declaration is purported to be declaring.[366] These compromises include the right to self-determination; this was one of the main barriers in the drafting of the declaration as there were concerns that it might be used as justification for the cession of Indigenous Peoples from the state.[367] In further compromises, a number of collective rights were removed before the final declaration was adopted. The removal of these rights occurred partly due to opposition by a number of states who saw collective rights as problematic. This opposition was articulated by New Zealand ambassador and permanent member to the UN General Assembly's Third Committee H.E. Ms. Rosemary Banks, whereby it was stated that the collective rights protected by the 1993 UNDRIP Draft were potentially discriminatory and offended the human rights principle of universality.[368] These compromises illustrate the limits the Human Rights framework continues to place on the development of Indigenous rights by an inability to recognise the co-presence of Indigenous rights with individualistic and liberal forms of human rights. These compromises ultimately watered down the potential of Indigenous rights, by subjecting them to the assimilative influences of the Human Rights regime.

The concluding article within UNDRIP, Article 46, is perhaps the most limiting factor in the development of Indigenous rights; it both formalises the entrenchment of Indigenous rights within the Human Rights framework, but also subordinates Indigenous rights to individual human rights and principles. A public statement, endorsed by Human Rights Non-Governmental Organisations (NGOs), stated that:[369]

[365] Engle, above n 306.

[366] At 141.

[367] At 144–48.

[368] At 149.

[369] International Work Group for Indigenous Affairs "UN Declaration on the Rights of Indigenous Peoples: Human rights organizations condemn efforts to block vital human rights instrument" (20 November 2006 2006) <https://www.dd-rd.ca/un-declaration-on-the-rights-of-indigenous-peoples-human-rights-organizations-condemn-efforts-to-block-vital-human-rights-instrument/>.

> The debate in the Third Committee was marred by unfounded and alarmist claims about the potential impact of the Declaration. Statements by Australia, Canada, New Zealand and the USA that the Declaration would jeopardize the rights and interests of other sectors of society wilfully ignored the fact that the Declaration can only be interpreted in relation to the full range of existing human rights protections and state obligations.

This statement is echoed by Article 46 of UNDRIP, whereby Indigenous rights are formally subordinated to existing Human Rights principles. Article 46(2) states that:[370]

> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limits as are determined by law and in accordance with international human rights obligations.

While collective Indigenous rights are being declared by UNDRIP, they are subject to the existing body of individual rights. The result is both a recognition of collective rights but also a corresponding limiting of collective rights and a reification of the limitations the Human Rights framework places on Indigenous rights development.

While there is no doubt that there is a strong desire for the Indigenous Rights movement to develop in order to attend to the harms unique to Indigenous Peoples, the Indigenous Rights movement need not be located within the Human Rights framework, and it need not be a debate about one set of rights versus another. Gilbert argues that both human rights and Indigenous rights are equally important paths for the protection of Indigenous Peoples.[371] This line of thought is consistent with the developments within the Inter-American Court of Human Rights, whereby it recognised as part of the *pro homine* approach that the interpretation of Human Rights instruments must evolve and adapt to the evolution of the time.[372] The evolution is the increased recognition of the validity of Indigenous claims, and the lack of a clear Indigenous Rights framework. Such an approach, however, relies on the scaffolding of an existing human right, and the parallel development of a specific regime of protection. Gilbert, does however, argue that UNDRIP is the first step in recognising a specific Indigenous Rights framework and

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[370] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007) Art.46(2).

[371] Gilbert, above n 191.

[372] At 211.

strikes a fine balance between individual and collective rights. Presumably this dual thrust illustrates the notion that collective rights do not necessarily amount to a denial of the rights of individuals.

B. Human Rights and Indigenous Rights, not Human Rights' Indigenous Rights

There is no identifiable reason that the existence of an individual focused Human Rights framework and a collective focused Indigenous Rights frame should result in a denial of one another. The discourse that the two sets of rights may in fact benefit one another may also be supported. However, by locating Indigenous collective rights within the Human Rights framework, the normative nature of the Human Rights framework will continue to suppress Indigenous development. Therefore, a separation of Indigenous Rights into its own body of international law, disentangled with and separate to the Human Rights framework should also not be precluded based on the argument that individual rights and collective rights may result in the denial of the other. In the case of UNDRIP, while the dual thrust created a 'frame resonance' between new collective rights and an existing body of international law, Human Rights, therefore creating a more palatable declaration, the individual protections safeguarded in UNDRIP are already settled rights at international law. Entrenching them in UNDRIP merely enforces a redundant notion that Indigenous Peoples 'also' have individual rights, another example of the saviour complex of the Human Rights framework. Separating the settled individual rights that already exist within the Human Rights framework from UNDRIP would not have the effect of excluding Indigenous individuals from individual human rights. A separation of individual rights from UNDRIP would allow Indigenous collective rights to evolve unimpeded by the limits of the Human Rights framework, and crystalise into a distinct Indigenous Rights framework.

Indigenous rights may already be beginning to develop into its own distinct body of international law. Berman argues that Indigenous rights are pre-existing, and exist outside of the positive law system in that they have developed, *sui generis*, from contingencies of history in response to the condition of Indigenous Peoples as distinct societies that have aspirations to remain as such.[373] Of course, read in conjunction with Kingsbury, who identifies the five main foundations for Indigenous claims, the special rights attributed to Indigenous Peoples can only

[373] Are Indigenous Peoples entitled to International Juridicial Personality: Discussion, above n 373, per Berman.

be justified and identified as separate to minority rights, by the presence of historical sovereignty.[374] UNDRIP is perhaps the most compelling piece of positive law as evidence supporting the statement that Indigenous rights are beginning to crystalise, in a similar manner to which human rights have. The modern Human Rights framework was formalised around the 1948 *Universal Declaration on Human Rights*, and then begun to crystalise into its own distinct body of law.

UNDRIP is the most formal piece of international law that centralises and declares as close as possible the natural law already existing in international law that applies to Indigenous Peoples. The language that was available at the time of drafting UNDRIP, was however, the language of human rights. It is therefore no surprise that UNDRIP was articulated in similar terms to the UDHR. However, as the Indigenous Rights movement begins to formalise, it must withdraw from the Human Rights framework in order to stand on its own. It must evolve in order to respond to the harms felt by Indigenous collectives, in order to limit the operation of sovereignty, as the Human Rights framework has. Therefore, human rights will retain universality in terms of applying to all human beings, including Indigenous individuals. Indigenous Rights will operate in its own field of international law, separate but complimentary of the Human Rights framework, and will attribute rights to Indigenous Collectives.

Mutua, whilst acknowledging the role that human rights play, and ought to continue to play, argues for the need of a new Human Rights movement that overcomes the Eurocentrism entrenched with the current Human Rights Framework.[375] It is the contention of this thesis that locating Indigenous rights within the Human Rights framework will result in a continuation of the status quo. Should Indigenous rights be pursued disentangled from the Human Rights framework and allowed to crystallise, Macklem's theory that human rights developed to limit sovereignty would apply to the body of Indigenous Rights. This would recognise the harms that sovereignty does, and continues to do, to Indigenous Peoples worldwide. If the Rights of Indigenous Peoples are to be meaningful, and legitimately limit the coercive authority of the sovereign state, this body of law must become separate to the Human Rights framework. The framework must stand on its own to address the pathologies unique to Indigenous Peoples. It

[374] Benedict Kingsbury "Reconciling five competing conceptual structures of indigenous peoples' claims in international and comparative law" 2001 34(1) New York University journal of international law & politics.

[375] Mutua, above n 222 at 207.

is important to note, that human rights developed in response to events as symptoms of the pathologies of international law and sovereignty, but these atrocious events were European in nature.[376] Indigenous rights too, ought to develop in response to events and harms that are Indigenous in nature.

VII Conclusions

There have been huge gains in the Indigenous Rights movement since it began in earnest in the 1970s. The indigenous Rights movement has forced international legal systems to respond to their needs, collective rights to land, resources, development, culture, and self-determination have been recognised, resulting in a strong challenge to the orthodox assumptions of international law and human rights. UNDRIP entrenched these gains in a historic declaration, indicating the beginning of an Indigenous Rights framework. However, the question has been posed "can the subaltern speak?", this is a post-colonial critique by Spivak whereby she describes the inherent limitations within western discourse and argues for its inability to interact with disparate cultures.[377] While Spivak is concerned mainly with how western knowledge through literature engages with the subaltern, her contention is that western knowledge is constructed to protect Western interests, and that historical and ideological factors limit the ability of those who exist in the periphery to be heard. This is mirrored in the structure and operation of international law with regards Indigenous Populations, or in this sense, the subaltern. While human rights have evolved to apparently address the needs of Indigenous Peoples, Indigenous Peoples remain at the periphery. Not quite able to access the full force of the rights-based protections within the Human Rights framework. This is due to the limits inherent within the framework, that flow from the Eurocentric foundations of the framework.

The impact of the limitations present within the Human Rights framework that restrict the development of Indigenous rights are explored by Engle. Engle argues that there are a number of compromises that the Indigenous Rights movement has had to make in order to advance the Indigenous aspirations.[378] These compromises reflect Spivak's contention that there are limits

[376] At 209–19.

[377] Gayatri Chakravorty Spivak and Rosalind C. Morris *Can the subaltern speak?: reflections on the history of an idea* (Columbia University Press, New York, 2010).

[378] Engle, above n 7.

placed on those who exist at the periphery of a discourse. Indigenous Peoples, as this thesis has demonstrated, have been excluded from the development of international law, and in turn, the development of the Human Rights framework. As Engle's argument progresses, we begin to see that whilst Indigenous Peoples have existed at the periphery, great gains have been made at international law. This is evident in the passing of UNDRIP, made even more so significant as a gain as it was formed in the structure of international law that has a history of resistance to recognise the unique needs of the Indigenous Rights movement. The importance of these gains ought not be negated by the compromises the Indigenous Rights movement had to make in order to establish UNDRIP. However, it must not be the end of the conversation.

This thesis has shown that international law has been capable of flexing in order to address the needs of the Indigenous Rights movement. This is evident in the accommodating of Indigenous claims within the Human Rights framework, and the development of a dual approach to Indigenous Rights as established by UNDRIP. Human Rights have developed in response to harms created by the operation of international law and the distribution of sovereignty, in the same way Indigenous rights claims are attempting to address harms owing to contingencies of history and the application of sovereignty. Both Human Rights and Indigenous rights have been able to develop because sovereignty, whilst articulated in absolute terms, is in fact a malleable concept, and can therefore be subject to human rights, and the growing body of Indigenous Rights.

However, there are dark sides to these developments as they currently stand at international law. Limitations that restrict the development and expression of Indigenous rights have been identified, these limitations, it has been shown, are symptoms of the uneasiness in which Indigenous rights sit within the Human Rights framework. The case has been made that these limitations flow from the fundamental differences between the Human Rights framework and Indigenous rights. These limitations are present because the Human Rights framework has developed in a particular context, underpinned by Eurocentrism, imperialism, and Western legal philosophies sourced from Enlightenment ideals, and as such, have influenced the form and nature of the rights developed in order to respond to harms specific to this context. Indigenous rights, are born of a different context, in response to harms separate to those which human rights have developed to ameliorate.

It has been shown that because of the fundamental differences between the Human Rights framework, and the needs of the Indigenous rights claims, the Human Rights framework is not an appropriate field to continue to pursue Indigenous rights claims. If Indigenous rights are continued to be pursued within the Human Rights framework, the limitations present in the Human Rights framework acting upon Indigenous rights will continue to water down the impact and potential advances of the Indigenous Rights movement. The primacy of the Human Rights framework will continue to subjugate the Indigenous Rights movement through cover assimilist mechanisms masquerading as universalism. To illustrate this point, the current dual thrust approach of international law for the protection of Indigenous Rights is analysed, using UNDRIP a case study in order to show the impact of the Human Rights framework on the development of Indigenous Rights. Through this analysis, it is shown that many of the individual rights enshrined in UNDRIP are in fact already protected by established Human Rights principles, and therefore, need not form part of the body of collective rights declared by UNDRIP.

Therefore, this thesis argues that for Indigenous rights to flourish, and develop in such a way that ameliorates the harms unique to Indigenous Peoples, the current dual thrust of the Human rights and Indigenous rights framework are inadequate. The gains achieved at international law for the recognition of Indigenous rights now need to advance in such a way that disentangles the Indigenous Rights framework from the Human Rights framework. By doing so, Indigenous Peoples, as collectives, tribes, sub-tribes, and nations contained the states imposed on them by international law, will be able to restrict sovereignty and begin to address the harms and pathologies the imperial mission of international law and the operation and distribution of sovereignty have created. Such an approach does not preclude Indigenous individuals from accessing human rights, it is not a one set of rights or another argument. Nor does such an approach necessarily impact upon the territorial integrity of the nation-state, as the harms produced by the sovereign institution of the state will be able to be tempered by the Indigenous Rights framework.

The overall aim of this research has been to add to the growing Indigenous Rights discourse, the hope is that there is application across disciplines that can add richness to the conversation on the development of Indigenous rights. This research has discussed the limits of the current approach international law has for the protection of Indigenous rights, and has made the case that Indigenous rights need to separate from the Human Rights framework and crystalise into

a distinct body of international law. This research, however, has not discussed how this might be achieved. Further research is needed to further develop this idea, and explore potential strategies and avenues for the separation of Indigenous rights from the Human Rights framework. One potential for further research is looking at how UNDRIP might be advanced in order to achieve these goals, this builds on the potential UNDRIP already has as an evolutionary step toward crystalising Indigenous rights into a distinct body of International law.

Bibliography

Cases

Australia

Mabo and Others v Queensland [1992] HCA 23.

Members of the Yorta Yorta Aboriginal Community v Victoria and others [2001] FCA 0045.

Colombia

Decision *SU-039/97,* 3 Feb 1997, Constitutional Court of Colombia.

Inter-Am. Ct. H.R

Case of Baena Ricardo et al v. Panama, Baena Ricardo and ors v. Panama, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2001).

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, 173 (Aug. 31, 2001).

Yakye Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, 2 (Jun. 17, 2005).

African Commission on Human and Peoples' Rights

African Commission on Human and Peoples' Rights v Republic of Kenya ACtHPR 006/2012, 26 May 2017.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya ACHPR Communication 276/2003, 4 February 2010.

Human Rights Committee

Apirana Mahuika ert al v New Zealand (Communication No. 547/1992) UN Doc. CCPR/C/70/D/547/1993 (2000).

Chief Bernard Ominayak and Lubicon Lake Band v Canada, HRC Communication No. 167/1984 (26 Mar 1990).

E. P. et al. v. Colombia (Communication No. 319/1988) UN Doc CCPR/C/39/D/318/1988 (990).

Ilmari Länsman et al. V Finland (Communication No. 511/1992) UN Doc CCPR/C/52/D/511/1992 (1994).

Ivan Kitok v Sweden (Communication No. 197/1985), Supplementary No. 40 A/50/40.

Kéténguéré Ackla v Togo (Communication No. 547/1992) UN Doc CCPR/C70/D/547/1993 (2000).

Mahuika v New Zealand (Communication No. 547/1932) UN Doc CCPR/C/55/D/547/1993 (1995).

Mikmaq Tribal Society v Canada (Communication No. 78/1980) UN Doc U.N. Doc. Supp. No. 40 (A/39/40) at 200 (1980).

Treaties, Conventions and Declarations

Conventions

Convention on the Protection and Promotion of the Diversity of Cultural Expression 2440 UNTS 311 (opened for signature 20 October 2004, entered into force 18 March 2007).

Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (20 March 1952) ETS 9.

ILO Convention 50 Recruiting of Indigenous Workers 40 UNTS 110 (adopted 20 June 1936, entered into force 8 September 1939).

ILO Convention 64 Contracts of Employment (Indigenous Workers) 40 UNTS 282 (adopted 27 June 1939, entered into force 8 July 1948).

ILO Convention 65 Penal Sanctions (Indigenous Workers) 40 UNTS 312 (adopted 27 June 1939, entered into force 8 July 1948).

ILO Convention 86 Contracts of Employment (Indigenous Workers) 161 UNTS 114 (adopted 11 July 1947, entered into force 13 February 1953).

ILO Convention 104 Abolition of Penal Sanctions (Indigenous Workers) 305 UNTS 267 (adopted 21 June 1955, entered into force 7 June 1958).

ILO Convention 107 Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 328 UNTS 247 (adopted 26 June 1957, entered into force 2 June 1959).

ILO Convention 169 Indigenous and Tribal Peoples in Independent Countries 1650 UNTS 383 (adopted 27 June 1989, entered into force 5 September 1991).

United Nations, *Vienna Convention on the Law of Treaties* 1155 UNTS 331 (23 May 1969, entered into force 27 January 1980).

Covenants

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

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 12 (opened for signature 16 December 1966, entered into force 3 January 1976).

UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights* 999 UNTS 171 (19 December 1966, entered into force 23 Mar 1976).

Declarations

American Declaration of the Rights and Duties of man OAS (adopted by the Ninth International Conference of American States, Bogotá, Colombia 1948).

American Convention on Human Rights, "Pact of San Jose", Costa Rica, OAS (22 November 1969.

Declaration on the Right to Development GA Res 41/128 (1986).

Declaration on the Granting of Independence to Colonial Countries and Peoples GA Res 1514 (1960).

Universal Declaration of Human Rights GA Res 217A (1948).

United Nations Declaration on the Rights of Indigenous Peoples GA Res A/RES/61/295 (2007).

Constitutions

Constitution of the International Labour Organisation (adopted 1 April 1919).

Constitution of the United Nations Educational, Scientific and Cultural Organisation (adopted 16 November 1945).

Other: UN Documents and Reports

UN Commission on Human Rights, *Study of the problem of discrimination against indigenous populations* E/CN.4/RES/1986/35 (1986).

UN Commission on Human Rights, *Final Report of the Special Rapporteur Martínez Cobo,* UN Doc 1982 E/CN.4/Sub.2/1982/Add.6.

UN Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* (16 Feb 2006) E/CN.4/2006/78.

U.N Committee on the Elimination of Racial Discrimination (1997) *General Recommendation XXIII: Indigenous Peoples,* U.N. Doc. CERD/C/51/misc 13/Rev 4.

UN Economic and Social Council Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 Sep 1983).

UN General Assembly, *International Decade of the World's Indigenous People* Gen Res 49/214 (1995).

UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* (11 Aug 2008) A/HRC/9/9.

Human Rights Commission, *Observation: Canada*, UN Doc A/54/40 (1999), vol. I.

UN Human Rights Committee, *Concluding Observations: Canada,* UN Doc A/54/40 (1999) vol I.

UN Human Rights Committee, *General Comment 23: The Rights of Minorities (Article 27)*, UN Doc CCPR/C21/Rev.1?Add.5 (8 April 1994).

UN Human Rights Committee, *50th Session, CCPR General Comment No. 23.*

UN General Assembly *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 (15 Dec 1960).

UN Permanent Forum on Indigenous Issues (UNFPII), *State of the World's Indigenous Peoples,* 14 Jan 2010, ST/ESA/328.

UN Permanent Forum on Indigenous Issues (UNFPII)*"The Concept of Indigenous Peoples" Background paper prepared by the Secretariat of Permanent Forum on Indigenous Issues* UN-Document E/CN.4/Sub.2/AC.4/1996/2.

Books and Chapters in Books

Albert Memmi "Mythical portrait of the colonized" in *The Colonizer and the Colonized* (Routledge, 2013) 123-133.

Alexandra Xanthaki *Indigenous rights and United Nations standards: self-determination, culture and land* (Cambridge University Press, Cambridge, UK;New York;, 2007).

Antony Anghie *Imperialism, sovereignty, and the making of international law* (Cambridge University Press, Cambridge 2007).

Ben Saul *Indigenous peoples and human rights: international and regional jurisprudence* (Hart Publishing, Oxford;Portland, Oregon;, 2016).

Brian Tierney and Sidney Painter *Western Europe in the Middle Ages, 300-1475* (new york: Knopf, 1970).

Charles Edward Merriam *History of the Theory of Sovereignty since Rousseau* (Columbia University Press, 1900).

Charles Howard McIlwain *The growth of political thought in the west: from the Greeks to the end of the middle ages* (Macmillan, New York, 1932).

Charles R. Beitz *The idea of human rights* (Oxford University Press, New York;Oxford;, 2009).

Charles W. J. Withers *Placing the Enlightenment: thinking geographically about the age of reason* (University of Chicago Press, Chicago, 2007).

Clive J. Christie *A modern history of Southeast Asia: decolonization, nationalism, and separatism* (I.B. Tauris, London, 1996).

Daniel Maul *Human rights, development, and decolonization: the International Labour Organization, 1940-70* (Palgrave Macmillan, Houndmills, Basingstoke, Hampshire;New York, NY;Geneva, Switzerland;, 2012).

Daniel Moeckli and others *International human rights law* (Third ed, Oxford University Press, Oxford, United Kingdom, 2018).

David Starkey *Crown and country: A history of England through the monarchy* (HarperCollins UK, 2010).

Edward W. Said *Orientalism* (25th Anniversary ed, Vintage Books, New York, 2003).

Elizabeth A. Povinelli *The cunning of recognition: indigenous alterities and the making of Australian multiculturalism* (Duke University Press, Durham, 2002).

Emer De Vattel *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson, 1835).

Enrique Dussel "Modernity, Eurocentricism, and Trans-Modernity: In Dialogue with Charles Taylor" in Eduardo Mendieta (ed) *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (Humanities Press, New Jersey, 1996) 129-159.

Euan Cameron *The European Reformation* (2nd ed, Oxford University Press, Oxford, 2013).

F. H. Hinsley *Sovereignty* (2nd ed, Cambridge University Press, New York; Cambridge [Cambridgeshire], 1986).

Frantz Fanon *Black skin, white masks* (Grove Press, New York, 1991).

Franz Susemihl and R.D. Hicks *The Politics of Aristotle: A Revised Text, With Introduction, Analysis and Commentary* (Macmillan, London, 1894).

Gayatri Chakravorty Spivak "Can the Subaltern Speak?'in Marxism and the Interpretation of Culture, ed. Cary Nelson and Lawrence Grossberg (Urbana: University of Illinois Press, 1988), pp. 271–313, in" 1988 Deconstructing Historiography," in In Other Worlds: Essays in Cultural Politics.

Gayatri Chakravorty Spivak and Rosalind C. Morris *Can the subaltern speak?: reflections on the history of an idea* (Columbia University Press, New York, 2010).

George Shelton *Morality and Sovereignty in the Philosophy of Hobbes* (Springer, 2016).

Gudmundur Alfredsson "Different Forms of and Claims to the Right of Self-Determination" in Donald Clarke and Robert Williamson (eds) *Self-Determination: International Perspectives* (Macmillan Press, Basingstoke, Hampshire;New York, N.Y;, 1996).

Hent Kalmo and Quentin Skinner *Sovereignty in fragments: the past, present and future of a contested concept* (Cambridge University Press, 2010).

Hideaki Shinoda *Re-examining sovereignty: from classical theory to the global age* (Springer, 2000).

Homi K. Bhabha *The location of culture* (Routledge, London;New York;, 2004).

H Patrick Glenn "The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, Hart Publishing, 2011) 171-182.

Ian Brownlie "The Rights of Peoples in Modern International Law" in James Crawford (ed) *The Rights of People* (Clarendon Press, Oxford [England];New York;, 1988) 1-16.

Immanuel Kant and Mary J. Gregor *Practical philosophy* (Cambridge University Press, Cambridge;New York;, 1996).

Jack Donnelly *Universal Human Rights in theory and Practice* (2 ed, Cornell University Press, Ithaca, 2003).

Jean L. Cohen *Globalization and sovereignty: rethinking legality, legitimacy and constitutionalism* (Cambridge University Press, Cambridge, 2012).

John Locke and Peter Laslett *Two treatises of government: a critical edition with an introduction and apparatus criticus by Peter Laslett* (Cambridge University Press, Cambridge, 1960).

John Rawls *The law of peoples: with, the idea of public reason revisited* (Harvard University Press, 1999).

John R. Baldwin and Inc ebrary *Redefining culture: perspectives across the disciplines* (Lawrence Erlbaum Associates, Mahwah, N.J, 2006).

John Tasioulas "The Moral Reality of Human Rights" in Thomas Pogge (ed) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press, Oxford, 2007) 75-101.

Jonathan Rutherford "The Third Space: Interview with Homi Bhabha" in Jonathan Rutherford (ed) *Identity: Community, Culture, Difference* (Lawrence and Wishart, London, 1990) 207-221.

Joseph Raz *The morality of freedom* (Clarendon Press, New York;Oxford [Oxfordshire];, 1986).

Karen Engle *The elusive promise of indigenous development: rights, culture, strategy* (Duke University Press, Durham [NC], 2010).

Lea Brilmayer and Tian Huang "The Illogic of Cultural Relativism in Global Human Rights Debate" in *The Global Community Yearbook of International Law and Jurisprudence 2014* (Oxford University Press, New York, 2015).

Leon Shaskolsky Sheleff *The future of tradition: customary law, common law, and legal pluralism* (Frank Cass, London;Portland, OR;, 2000).

Lewis R. Gordon *Disciplinary decadence: living thought in trying times* (Paradigm Publishers, Boulder, CO, 2006).

Louis Althusser *Lenin and philosophy, and other essays* (New Left Books, London, 1971).

Luis Rodríguez-Piñero *Indigenous peoples, postcolonialism, and international law: the ILO regime, 1919-1989* (Oxford University Press, Oxford [England];New York;, 2005).

Makau Mutua and Inc ebrary *Human rights: a political and cultural critique* (University of Pennsylvania Press, Philadelphia, 2002).

Marcel Brus "Bridging the Gap between State Sovereignty and International Governance: The Authority of Law" in Gerard Kreijen (ed) *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002) 3 - 24.

Marie-Benedicte Dembour "Critiques" in Daniel Moeckli and others (eds) *International human rights law* (Third ed, Oxford University Press, Oxford, United Kingdom, 2018) 41-59.

Marie Emmitt and John Pollock *Language and learning: an introduction for teaching* (2nd ed, Oxford University Press, Melbourne, 1997).

Martine Julia van Ittersum "Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies, 1595–1615" (ProQuest Dissertations Publishing, 2002).

Matthew Craven "Statehood, Self-Determination, and Recognition" in *International law* (Fifth ed, Oxford University Press, Oxford, United Kingdom, 2018).

Micheline Ishay *The history of human rights: from ancient times to the globalization era* (University of California Press, Berkeley, 2004).

Patrick Macklem *The sovereignty of human rights* (Oxford University Press, Oxford [UK];New York, NY;, 2015).

Patrick Thornberry *Indigenous peoples and human rights* (Juris Pub, Manchester;United States;, 2002).

Paul Gordon Lauren *The evolution of international human rights: visions seen* (3rd;3; ed, University of Pennsylvania Press, Philadelphia, 2011).

Peter L. Berger and Thomas Luckmann *The social construction of reality: a treatise in the sociology of knowledge* (Penguin P, London, 1967).

Ralph Benyamin Neuberger *National self-determination in postcolonial Africa* (L. Rienner publishers, Boulder, Colo, 1986).

Raymond Firth *Primitive economics of the New Zealand Maori* (Routledge, Abingdon, Oxon;New York;, 2011).

R. I. Moore *The first European revolution, c. 970-1215* (Blackwell, Oxford, UK;Malden, Mass;, 2000).

Robert H Jackson "Quasi-States, Dual Regimes, and Neoclassical theory: International Jurisprudence and the Third World" in Beth A Simmons and Richard H Steinberg (eds) *International Law and International Relations: An International Organization Reader* (Cambridge University Press, 2007).

Robert H Jackson *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge University Press, 1990).

Robert Hitchcock and Diana Vinding *Indigenous Peoples' Rights in Southern Africa* (IWGIA, Copenhagen, 2004).

Robert K. Barnhart and Sol Steinmetz *The Barnhart dictionary of etymology* (H.W. Wilson Co, Bronx, N.Y., 1988).

Samuel E Finer *The History of Government from the Earliest Times: Ancient monarchies and empires* (Oxford University Press, USA, 1997).

Samuel Moyn *The last utopia: human rights in history* (Belknap Press of Harvard University Press, Cambridge, Mass, 2010).

Stephen Allen "The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publisher, Portland, Oregon; Oxford, 2011) 225-256.

Stephen Neff "A short History of International Law" in Malcom Evans (ed) *International Law* (3 ed, Oxford University Press, Oxfird, 2010).

Simmonds A. John *Justification and Legitimacy: Essays on Rights and Obligation* (Cambridge University Press, Cambridge, 2001).

S. James Anaya *Indigenous peoples in international law* (Oxford University Press, New York, 1996).

S. James Anaya *Indigenous peoples in international law* (2nd ed, Oxford University Press, New York;Oxford;, 2004).

S. James Anaya and Luis Rodríguez-Piñero "Part 1 The UNDRIP's Relationship to Existing International Law, Ch.2 The Making of UNDRIP" in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018).

T. S. Ashton *The industrial revolution, 1760-1830* (Oxford University Press, London;New York; , 1948).

Ward Churchill *Kill the Indian, save the man: The genocidal impact of American Indian residential schools* (City Lights San Francisco, CA, 2004).

Journal Articles

"Are Indigenous Peoples entitled to International Juridicial Personality: Discussion" 1985 79 American Society of International Law Procedure 204.

Alexandra Carleton "Defining Peoples under the ICCPR and African Charter: Identification of Collective Claims to Natural Mineral Wealth" 2014 21(2) International Journal on Minority and Group Rights.

Allen Buchanan “The role of collective rights in the theory of indigenous peoples' rights” 1993 3(1) Transnational law & contemporary problems.

Andrea Schettini “Toward a new paradigm of human rights protection for indigenous peoples: A critical analysis of the parameters established by the inter-american court of human rights” 2013 9(17) Sur-*Int'l J. on Hum Rts.*

Andrew Geddis “The philosophical underpinnings of human rights” 2017 International human rights law in Aotearoa New Zealand.

Angelique Richardson “Introduction: Essentialism in science and culture” 2011 53(4) The Critical quarterly.

Antony Anghie “Finding the peripheries: sovereignty and colonialism in nineteenth-century international law” 1999 40(1) Harvard International Law Journal.

Benedict Kingsbury “Reconciling five competing conceptual structures of indigenous peoples' claims in international and comparative law” 2001 34(1) New York University journal of international law & politics.

Benedict Kingsbury “Claims by non-state groups in international law” 1992 25 Cornell Int'l LJ.

Boaventura de Sousa Santos “Beyond Abyssal Thinking: From Global Lines to an Ecology of Knowledge” 2007(78) Revista Critica de Ciencias Sociais.

Christian Courtis “Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples” 2011 18(4) International Journal on Minority and Group Rights.

Christopher R Hallenbrook “Leviathan No More: The Right of Nature and the Limits of Sovereignty in Hobbes” 2016 78(2) The Review of Politics.

Costas Douzinas “The end(s) of human rights” 2002 26(2) Melbourne University law review.

Daniel J. Whelan “On Reza Afshari's "On Historiography of Human Rights"” 2019 41(1) Human Rights Quarterly.

David C Baluarte “Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169” 2010 4(2) Sustainable Development Law & Policy.

David Dyzenhaus “Hobbes and the Legitimacy of Law” 2001 20(5) Law and philosophy.

David Kennedy “International human rights movement: part of the problem?” 2002 15 Harv. Hum. Rts. J.

Douglas Lee Donoho “Relativism versus universalism in human rights: the search for meaningful standards” 1991 27(2) Stanford Journal of International Law.

Eli Lauterpacht “Sovereignty-Myth or Reality?” 1997 73(1) International Affairs (Royal Institute of International Affairs 1944-).

Felipe Gómez Isa “The UNDRIP: an increasingly robust legal parameter” 2019 23(1-2) The International Journal of Human Rights.

Frederick W. Loetscher “St. Augustine's Conception of the State” 1935 4(1) Church History: Studies in Christianity and Culture.

Garry Neil “Assessing the effectiveness of UNESCO's new Convention on cultural diversity” 2006 2(2) Global media and communication.

Hans Köchler “The Dual Face of Sovereignty: Contradictions of Coercion in International Law” 2020 The Global Community—Yearbook of International Law and Policy 2019.

H. L. A. Hart “Are There Any Natural Rights?” 1955 64(2) The Philosophical Review.

Howell A. Lloyd “SOVEREIGNTY : BODIN, HOBBES, ROUSSEAU” 1991 45(179 (4)) Revue internationale de philosophie.

Jean L. Cohen “The uses and limits of legalism: On patrick macklem's the sovereignty of human rights” 2017 67(4) University of Toronto Law Journal.

Jérémie Gilbert “Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples” 2007 14(2-3) International Journal on Minority and Group Rights.

Jørgen Møller “Medieval origins of the rule of law: The Gregorian reforms as critical juncture?” 2017 9(2) Hague Journal on the Rule of Law.

Karel Vasak “A 30-year struggle; the sustained efforts to give force of law to the Universal Declaration of Human Rights” 1977 30(11) UNESCO Courier 28-29,32.

Karel Vasak “A Thirty Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration on Human Rights, UNESCO Courier, Nov. 1977, at 29, 32, cited in Stephen P. Marks, Emerging Human Rights: A New Generation for the 1980s?” 1981 33 Rutgers L. Rev.

K. Engle “On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights” 2011 22(1) European journal of international law.

Kwasi Wiredu “African philosophy and inter-cultural dialogue” 1997 11(1-2) Quest: An International African Journal of Philosophy.

Kwasi Wiredu “Are there cultural universals?” 1990 4(2) Quest: An International African Journal of Philosophy.

Leo Gross “The peace of Westphalia, 1648–1948” 1948 42(1) American Journal of International Law.

Lucy Claridge “The approach to UNDRIP within the African Regional Human Rights System” 2019 23(1-2) The International Journal of Human Rights.

Makau Mutua “Savages, Victims, and Saviors: The Metaphor of Human Rights” 2001 42 Harv. Int'l L. J.

Mauro Barelli “THE ROLE OF SOFT LAW IN THE INTERNATIONAL LEGAL SYSTEM: THE CASE OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES” 2009 58(4) International and Comparative Law Quarterly.

Melford E. Spiro “Cultural Relativism and the Future of Anthropology” 1986 1(3) Cultural anthropology.

Nelson Maldonado-Torres “ON THE COLONIALITY OF BEING: Contributions to the development of a concept1” 2007 21(2-3) Cultural Studies.

Paul R DeHart “Leviathan leashed: The incoherence of absolute sovereign power” 2013 25(1) Critical Review.

Ramón Grosfoguel “Decolonizing Western Uni-versalisms: Decolonial Pluri-versalism from Aimé Césaire to the Zapatistas” 2012 1(3) Transmodernity.

Rhoda E. Howard “Human Rights and the Search for Community” 1995 32(1) Journal of Peace Research.

Richard Bartlett “An obsession with traditional laws and customs creates difficulty establishing native title claims in the south : Yorta Yorta” 2003 31(1) University of Western Australia law review.

Robert B Porter “Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples” 2002 5 Yale Hum. Rts. & Dev. LJ.

Robert McCorquodale “Self-determination: A human rights approach” 1994 43(4) International & Comparative Law Quarterly.

Ronald Niezen “The indigenous claim for recognition in the international public sphere” 2005 17(3) Florida international law journal.

Sean Goggin “Human rights and 'primitive' culture: misrepresentations of indigenous life” 2011 15(6) The International Journal of Human Rights.

Sean Goggin “Incorporating cultural dynamism into international human rights law: A solution from anthropology” 2013 13(1) Global jurist.

Sean Goggin “Is UNESCO Clouding the International Culture Landscape: Legal Clarity?” 2012 9(1) International Organizations Law Review.

Sergio Garcia Ramirez, *Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment on the Merits and reparations in the "Mayagna (Suma) Awas Tingni Community Case,"* 19 Ariz. J. INT'L & COMP. L. 449, 449 (2002).

Siegfried Wiessner "Indigenous sovereignty: a reassessment in light of the UN Declaration on the Rights of Indigenous Peoples" 2008 41(4) Vanderbilt journal of transnational law.

S. James Anaya "International human rights and indigenous peoples: the move toward the multicultural state" 2004 21(1) Arizona journal of international and comparative law.

Stephen D Krasner "Abiding sovereignty" 2001 22(3) International political science review.

Stephen Young "Pathologies and positivism in The Sovereignty of Human Rights, by Patrick Macklem, New York: Oxford University Press, 2015, 259 pp., £57.00 (hardcover), ISBN 978-0-19-026731-5" 2018 24(2) Australian Journal of Human Rights.

Susan A. Gelman and Steven O. Roberts "How language shapes the cultural inheritance of categories" 2017 114(30) Proceedings of the National Academy of Sciences - PNAS.

Tomas Hopkins Primeau and Jeff Corntassel "Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"" 1995 17(2) Human rights quarterly.

Valerio de Oliveira Mazzuoli and Dilton Ribeiro "The pro homine principle as an enshrined feature of international human rights law" 2016 3(1) Indonesian journal of international & comparative law.

Vincenzo Ferrone "The Rights of History: Enlightenment and Human Rights" 2017 39(1) Human Rights Quarterly.

Winston P. Nagan and Aitza M. Haddad "Sovereignty in theory and practice" 2012 13(2) San Diego International Law Journal.

Y. Donders "Do cultural diversity and human rights make a good match?" 2010 61(199) International social science journal.

Reports

American Civil Liberties Union and Human Rights Watch *Human Rights Violations in The United States: A report on U.S. compliance with The International Covenant on Civil and Political Rights* (1993).

Amnesty International *United States of America: Race, Rights and Police Brutality* (1999).

Gerry Rogers and others *The International Labour Organization and the quest for social justice, 1919-2009* (International Labour Office, Geneva, 2009).

International Law Association *Interim Report: The Hague Conference, Rights of Indigenous Peoples* (2010).

The Executive Board American Anthr Association "Statement on Human Rights" 1947 49(4) American anthropologist.

Dissertations

Delane E Clark "The Two Swords controversy and the roots of modern political thoery" 1989 AIRFORCE INST OF TECH WRIGHT-PATTERSON AFB OH.

Internet Sources

International Work Group for Indigenous Affairs "UN Declaration on the Rights of Indigenous Peoples: Human rights organizations condemn efforts to block vital human rights instrument" (20 November 2006 2006) <https://www.dd-rd.ca/un-declaration-on-the-rights-of-indigenous-peoples-human-rights-organizations-condemn-efforts-to-block-vital-human-rights-instrument/>.

Pope Paul III "Sublimis Dei: On the Enslavement and Evangelization of Indians" (20 Feb 2020, 1537) Papal Encyclicals Online <https://www.papalencyclicals.net/Paul03/p3subli.htm>.

United Nations Human Rights Office of the High Commissioner "Mandate of the Working Group on Indigenous Populations" <https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx>.

Other Soures

INTERNATIONAL LABOUR OFFICE Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituent.

International Law Association, Resolution No. 5/2012, 75th Conference of the ILA, Sofia (26-20 Aug 2012).

Programme to promote ILO convention no. 169 and International Labour Standards Department *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention, Number 169* (International Labour Organization, 2009).