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Indigenous Peoples under International Law: An Asian Perspective

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Indigenous Peoples under International Law: An Asian Perspective

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By

Tashi Phuntsok

Graduate Program in Law

A thesis submitted in partial fulfillment of the requirements
for the degree of Master of Laws

The School of Graduate and Postdoctoral Studies
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London, Ontario, Canada

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ABSTRACT

This thesis analyzes Asian understandings of the definition of indigenous peoples in international law. The rights of indigenous peoples have emerged strongly in the international domain, culminating in 2007 with the United Nations Declaration on the Rights of Indigenous Peoples. Yet, the question of definition and identity of indigenous peoples remains uncertain and indeterminate, at least from an Asian perspective. Traditionally indigenous peoples are understood to be those who were victims of European colonial settlements. It is the aim of this research to find out whether indigenous peoples exist in Asia by analyzing the approaches taken by select Asian states and non-state groups within these states who claim to be indigenous peoples. The thesis also examines whether there are any specific rights belonging to indigenous peoples which have attained the status of customary international law.

KEYWORDS

Indigenous peoples, minorities, self-determination, self-identification, international law, customary international law, tribal people.

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DEDICATION

This thesis is dedicated to the undying spirit (optimism and resistance) of all oppressed peoples around the world and their quest for justice and identity.

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Chapter 1: Methods and Literature Review

1.1. Introduction

This research examines the definition and status of indigenous peoples in international law, with the aim of uncovering whether there is a distinct non-western, and specifically Asian, understanding. The concept of indigenous peoples as a distinct legal identity has emerged strongly in the domain of international law, due largely to the explosion of indigenous peoples' movements across the globe in the last four decades. The recent United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ of 2007, a landmark event in history, has further raised the status of indigenous peoples in international law.

Historically, most of the scholars and writers on the subject tend to trace the concept of indigenous peoples from the period since World War II, especially in the aftermath of decolonization movements in the 1960s and 1970s. But in fact it can be traced back to the origin of international law itself, for the concept of indigenous peoples has evolved within international law's own evolution over centuries.

1.2. Objectives and Scope

The purpose of this research is to find out whether there is an alternative perspective on the definition of indigenous peoples in international law which is not western in its understanding, by examining cases in some Asian countries. Since there is

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res 61/295, UN Doc A/RES/61/295 (13 September 2007). See online: <http://www.un.org/documents/instruments/docs_en.asp>

currently little available literature on this particular aspect of the concept, this research intends to bring an alternative perspective on indigenous peoples into the realm of international legal scholarship.

There are two main objectives behind this research. Firstly, it will analyse whether there is an Asian understanding of the definition of indigenous peoples based on the practices of some Asian states, namely China, India, Bangladesh and the Philippines, which will be compared to the views of non-state Asian groups within these states on the definition and identity of indigenous peoples. It will show that there may be a vast difference between the views of Asian states and groups claiming to be indigenous on the question of definition. The aim of claimants could be to expand and universalize the concept of indigenous peoples in order to include their own situations and grievances, whereas the aim of Asian states may be to limit the application of such a concept strictly within the ambit of the classical colonial situation where there was an European settlement. Secondly, this thesis will examine whether there are any customary norms related to the question of definition and specific rights of indigenous peoples that may have achieved the status of customary international law.

The primary focus of this paper is on the definition and identity of indigenous peoples from the standpoint of international law. This research is strictly limited to the confines of public international law and it is beyond the scope of this study to look into domestic legal systems and practices with regard to indigenous peoples, aborigines, native or tribal peoples, except as necessary for determining state and non-state practice under customary international law. Accordingly, the following sections will introduce the sources of international law and then provide an account of the role that indigenous

peoples play in the formation of international law, before turning to the problematic question of the definition of indigenous peoples.

1.3. Sources of International Law

In the domestic legal system, the sources of law can be clearly found in the acts of a legislature created under a constitution as well as in common law or judicial precedents. So there is a “definite method of discovering what the law is.”² In international law, due to the lack of a central lawmaking authority or sovereign, there is no single body which creates laws that become binding for all nation states.³ Compared to the domestic legal system, international law faces the problem of discovering where exactly the law is to be found.⁴ This situation arises as a result of the “anarchic nature of world affairs and the clash of competing sovereignties.”⁵ Despite this problem, international law exists and is ascertainable. The most authoritative sources of international law are found in Article 38 (1) of the Statute of the International Court of Justice, which provides that:

[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;

² Malcolm Shaw, *International Law* (Cambridge University Press, 2003) 65. [Hereinafter Shaw]

³ *Ibid.*, at 66, para 2.

⁴ *Ibid.*

⁵ *Ibid.*

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁶

According to this provision, there are four different categories of sources, namely, treaties, customs, general principles of law and the subsidiary source of judicial decisions and the teachings of the most highly qualified publicists or scholars. The first three sources could be described as formal law-creating processes, whereas judicial decisions and academic writings are considered law-determining or law-finding sources.⁷

Treaties are one of the principal sources of international law and are defined as “international agreement[s] concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁸ They are written agreements between states that bind themselves legally to act in a certain agreed way. On the other hand, agreements between states and non-state entities such as corporations, non-governmental organizations and indigenous peoples are not considered to be treaties within international law.⁹ Treaties are known by different names such as conventions, international agreements, covenants, pacts and protocols. They are of different kinds, namely, ‘law-making’ treaties which are universal in scope and relevance, and ‘treaty-contracts’ which apply only between a few states. The fundamental principle behind

⁶ *The Statute of International Court of Justice*, annexed to the UN Charter 1945, online: < <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> >

⁷ *Ibid*, at 67. See also John Currie, *Public International Law* (Irwin Law Inc. 2001) 81 [Hereinafter Currie]

⁸ Article 2(1) of the Vienna Convention on the Law of Treaties, 1969. See UN Treaty, online: < http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf >

⁹ See Currie, *supra* note 7, at 109, para 1. For critical view on the agreement between states and indigenous peoples, see Anghie 1999, *infra* note 28.

treaty law is the rule of *pacta sunt servanda* which means pacts must be observed and performed in good faith.¹⁰

A customary norm in international law is said to arise when both components of ‘state practice’ and ‘*opinio juris*’¹¹ are present.¹² The requirement of state practice is an objective or material element which places emphasis on the actual behaviour of states.¹³ A state practice requires generality and uniformity. The generality of practice requires a large number of states following a certain normative practice, but need not necessarily be universal in order to satisfy the generality requirement.¹⁴ Thus as long as a sufficient number of states follow a given practice, a customary norm is said to emerge in international law.¹⁵ The requirement of uniformity refers “to the consistency or homogeneity of that practice among practicing states. In other words, it examines whether those states adopting the relevant practice remain constant in their adherence to it or whether they drift into and out of such conformity.”¹⁶ Nevertheless, state practice need not be consistent at all times as only a substantial uniformity is sufficient.¹⁷ The second element, referred to as *opinio juris*, is a psychological element, and it requires states’ belief that certain practices are legally binding upon them.¹⁸ The only exception to the rule of customary international law is the persistent objectors rule. In this case, a state may escape from legal liability if it has consistently and expressly objected to the rule of

¹⁰ See Shaw, *supra* note 2, at 811, para 3.

¹¹ “*Opinio juris*” is the subjective element, where states believe that certain customary rules have become binding in law.

¹² See Currie, *supra* note 7, at 163.

¹³ *Ibid.*

¹⁴ *Ibid.*, at 164.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 167, para 2.

¹⁷ *Ibid.*, para 3.

¹⁸ *Ibid.*, at 163, para 2.

customary international law in the course of its formation.¹⁹ Customary international law “does mirror the characteristics of the decentralized international system”²⁰ and reflects the spirit of democracy where all states equally share in the formulation of new international rules.²¹

Regarding the general principles of law as a source of international law, there are differing views as to whether it refers to these principles of law in international law or domestic law. Nevertheless the predominant view supports the claim that general principles of law means “general principles of domestic law” rather than “general principles of international law.”²² This particular source of law was inserted in the ICJ statute in order to “close the gap that might be uncovered in international law and solve this problem which is known legally as *non liquet*.”²³ It fulfills an important task when there may not be an immediate and obvious rule applicable to a certain international situation. Some of the general principles of law most commonly referred to include the principle of good faith²⁴ and the concept of equity.²⁵ Though article 38(1) (c) made an “atavistic”²⁶ or anachronistic reference to the word “civilized nations”, it must be considered as redundant²⁷ and understood in modern times to mean all nations.²⁸

With regard to judicial decisions and the writings of the publicists, the sources listed in Article 38(1)(d) were clearly “intended and are treated as merely a material

¹⁹ Ibid, at 176, para 1.

²⁰ See Shaw, *supra* note 2, at 70, para 2.

²¹ Ibid.

²² See Currie, *supra* note 7, at 86, para 1.

²³ See Shaw, *supra* note 2, at 93, para 2.

²⁴ Ibid, at 97.

²⁵ Ibid, at 99.

²⁶ See Currie, *supra* note 7, at 86, para 2.

²⁷ Leo Gross, “Sources of Universal International Law” in R.P. Anand, ed, *Asian States and the Development of Universal International Law* (Vikas Publications: New Delhi, 1972) 197, para 3.

²⁸ Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40:1 Harv Int’l LJ 67, para 2. [Hereinafter Anghie 1999]

source of international law.”²⁹ They are to be understood as discovering the content of international law rather than creating law.³⁰ Thus, the wording of said provision clearly points out that judicial decisions and scholarly writings are subsidiary means for determining the rules of international law which must be read together with Article 59. According to Article 59, the “decision of the Court has no binding force except between the parties and in respect of that particular case.”³¹ Though the doctrine of precedent does not apply to international law, states in disputes and scholars often quote judgements of the International Court of Justice (ICJ) as authoritative decisions and consider them as having normative value.³²

Regarding other possible sources of international law, the resolutions and declarations of the UN General Assembly often play an important part in the making of international law. Though most of these resolutions and declarations are merely recommendatory in nature and do not have the formal binding force of law, they do acquire in certain cases normative significance and contribute to the formation of binding international law.³³ Certain resolutions and declarations, having been endorsed by the overwhelming majority of the international community, do reflect a uniformity of state practice and understanding as to the law. For example, some of the declarations on the elimination of racial discrimination and the adoption of self-determination have achieved

²⁹ See Currie, *supra* note 7, at 91.

³⁰ *Ibid.*

³¹ See ICJ Statute, at *supra* note 6.

³² See Shaw, *supra* note 2, at 103, para 2.

³³ See Currie, *supra* note 7, at 99, para 3; See Shaw, *supra* note 2, at 108, para 1.

the status of international law³⁴ and are thus “binding upon the organs and member states of the United Nations.”³⁵

1.4. Theory of Indigenous Peoples as Participants in International Law

The thesis will also focus on the emergence of indigenous peoples as participants in the making of international law. The traditional account of international law considers only states and international organizations (to a limited extent) as the primary subjects and makers of international law.³⁶ So international law according to this view is produced only through state consent or agreements.³⁷ Non-state groups, such as minorities, indigenous and tribal groups, were historically mere objects who could not participate and influence the decision making in international law.³⁸ In the last two decades, “non-state actors have been expanding their say in international law-making processes and nowadays constitute an important ‘material source’ of law.”³⁹ Accordingly, international lawmaking has become understood as “a complex and dynamic process of decision-making that includes the participation of non-state actors.”⁴⁰ The non-state actors include wide variety of entities of supra-national, transnational and subnational categories.⁴¹ The supra-national entities include intergovernmental organizations such as the International Monetary Fund, the World Bank and the World Trade Organization. The transnational

³⁴ See Shaw, *supra* note 2, at 108-109.

³⁵ *Ibid*, at 108, para 1.

³⁶ *Ibid*, at 177.

³⁷ Lillian Aponte Miranda, “Indigenous Peoples as International Lawmakers” (2010) 32:1 U Pa J Int’l L 210. [Hereinafter Miranda]

³⁸ Russel Lawrence Barsh, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” (1994) 7 Harv Hum Rts J 33. [Hereinafter Barsh]

³⁹ Jean d’Aspremont, “International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?” in Math Noortmann & Cedric Ryngaert, eds, *Non-State Actor Dynamics in International Law* (Ashgate Publishing Limited, 2010) 175.

⁴⁰ Myres S McDougal & W. Michael Reisman, “The Prescribing Function in World Constitutive Process: How International Law is Made” (1980) 6 Yale Stud World Pub Ord. 249. As cited in Miranda, *supra* note 37, at 210.

⁴¹ See Miranda, *ibid*, at 211.

entities include non-governmental organizations (NGOs) and other civil society groups. The sub-national non-state entities include minorities, corporate actors, autonomous non-state groups, indigenous peoples, tribal people, individuals and many more.⁴²

Detailed discussion on the participation of all these non-state actors within international lawmaking is beyond the scope of this research. So I will discuss the role and participation of indigenous peoples in the making of international law. As will be discussed in greater detail in chapter 3, indigenous peoples have played an increasingly significant role in international law-making through participation in the construction of a distinct international legal identity and norms unique to their situation.⁴³ Indigenous peoples have engaged in both *bottom-up* and *top-down* approaches⁴⁴ to participation at various levels of international norm building, and through these engagements have identified core indigenous norms and values, and were able to establish a body of international human rights law specific to indigenous peoples. In terms of bottom-up approaches, they participated in various transnational networks and movements of indigenous peoples, produced knowledge on the issues concerning indigenous peoples and generated consensus on certain areas of norms related to them.⁴⁵ On the other hand, they have also engaged in the formal and institutionalized top-down approaches to decision making through advocacy before various international and regional human rights bodies and mechanisms.⁴⁶ As we will see, their participation in these formal and informal international processes has contributed significantly to the emergence of indigenous peoples as subjects and makers of international law concerning their rights.

⁴² Ibid, at 212.

⁴³ Ibid, at 205.

⁴⁴ Ibid, at 213, para 1.

⁴⁵ Ibid, at 228, para 2.

⁴⁶ Ibid, at 213, para 1.

1.5. Understanding the Problem of Definition in International Law

In the section, I will introduce the problem of the definition of indigenous peoples under international law based upon the various sources of international law discussed above. The question of the definition and identity of indigenous peoples largely remains uncertain in international law. There is no universally accepted definition of indigenous peoples, which in turn leads to varying interpretations by states. As a result, UNDRIP (2007), though regarded as an authoritative declaration on the rights of indigenous peoples, does not provide any form of formal definition of the term ‘indigenous peoples’. Nevertheless it does suggest that certain characteristics are common to all indigenous peoples such as: the experience of historic injustices as a result of colonization and dispossession of their lands and resources; the existence of a spiritual relationship with traditionally owned lands and resources; and the importance of the preservation of their distinct cultural heritage.⁴⁷ The details of these characteristics will be discussed in chapter 6.

When treaty law is examined for a formal legal definition of indigenous peoples, we see that Article 1 of the 1989 ILO Convention 169⁴⁸ provides that it applies to:

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

⁴⁷ See UNDRIP, *supra* note 1. See also Appendix, for the full text of UNDRIP.

⁴⁸ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382, (entered into force 5 September 1991) [ILO Convention No 169] See online: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>

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

Here indigenous peoples are defined as those peoples who are descendants of those populations which inhabited the region at the time of conquest or the establishment of the present state boundaries. The ILO definition clearly includes both historical disruptions caused by colonization and situations outside that context during the formation of the present state boundaries. This definition could apply to both European settler states as well as Asian or African states.

Nevertheless, according to treaty law, this definition is applicable only to those states who are party to the convention. As of June 2012, ILO Convention 169 has been ratified by only 22 countries and the only Asian state that is party to this Convention remains Nepal, which joined this treaty regime in the year 2007.⁴⁹ Therefore, this definition could not be termed as established within international law. At the most, it is applicable only to those states which are party to the convention.

Further, in the earlier ILO Convention 107 (1957),⁵⁰ Article 1(b) provided that:

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

⁴⁹ For ratifications of the C169, see International Labour Organization, online: < http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 >

⁵⁰ *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, (entered into force 02 June 1959) [ILO Convention No 107] See online: < http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312252 >

time of conquest or colonization 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.

Here the definition of indigenous clearly referred to populations who are descendants of those who inhabited the region at the time of colonization. The convention remains in force for only 17 countries including a few Asian countries such as India, Bangladesh and Pakistan.⁵¹ Therefore this definition could not be taken as standard within international law. At the most, it applies only to those who are party to the convention.

Another possible source for the definition of indigenous peoples that must be examined is the definition provided by the former UN Special Rapporteur of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, Martinez Cobo, in 1986. This definition states:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵²

⁵¹ Ibid.

⁵² Jose Martinez Cobo, Study of the Problem of Discrimination against indigenous populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para 379-80. As cited in Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, (1998) 92:3 AJIL 419. [Hereinafter Kingsbury]

Though this definition was the result of a comprehensive study conducted by the Special Rapporteur on the problem of discrimination against indigenous populations under the recommendation of the Sub-Commission, it was merely a recommendation report⁵³ submitted to the UN Working Group on Indigenous Populations and therefore could not be called a legal document. As shown in chapter 6, there is no apparent and uniform state practice and *opinio juris* concerning this definition; accordingly the definition of Martinez Cobo could not said to have attained the status of customary law.

According to Benedict Kingsbury,⁵⁴ Cobo's approach to the definition was controversial due to its requirement of "historical continuity with the pre-invasion and pre-colonial societies that developed on their territories."⁵⁵ This approach reflected the classical European case of colonial settlement in the western settler states such as the United States, Canada, Australia and New Zealand. As I will argue, this requirement did not reflect the reality in many Asian and African countries where there was no clear case of historical disruption by colonial settlement. The views of Asian states and groups (claiming to be indigenous) greatly differ from Cobo's definition of indigenous peoples. Many Asian states vehemently opposed the application of the concept of indigenous peoples within their territories and endorsed the definition laid down by Cobo. China, for example, agrees with Cobo's definition while claiming that "the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the world."⁵⁶ Here China affirmed the test of 'Salt-Water' colonialism,⁵⁷ which

⁵³ For Cobo's report, see *supra* note 52.

⁵⁴ Benedict Kingsbury is Murry and Ida Becker Professor of Law and Director of the Institute for International Law and Justice at New York University School of Law. He is one of the leading international law scholars in the field of the indigenous peoples' rights and status.

⁵⁵ See Kingsbury, *supra* note 52, at 420, para 2.

⁵⁶ Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/WG.15/2 (1995) As cited in Kingsbury, *ibid*, at 417-418.

was a standard test of determining ‘Colonialism’ during the time of decolonization and self-determination in the 1960s. India and Bangladesh also denied the status of indigenous peoples within their territories by claiming that “indigenous peoples are descendants of the original inhabitants who have suffered from conquest or invasion from outside.”⁵⁸ On the other hand, as shown in chapter 5, Asian groups continue to claim recognition and status of indigenous peoples within their countries despite strong oppositions from governments. Thus they tend to go beyond Cobo’s narrow definitional requirement of colonial disruption or conquest. As a result, there is no consensus on the definition laid down by Cobo.

Another draft definition preceded Martinez Cobo’s definition in the Working Group, which took a broader approach to the definition by giving the status of indigenous peoples to marginal and isolated groups who may not have suffered direct colonization if:

- (a) they are the descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origin arrived there,
- (b) precisely because of their isolation from other segments of the country’s population they have almost preserved intact the customs and traditions of their ancestors which are similar to those characterised as indigenous,
- (c) they are, even if only formally, placed under a state structure which incorporates national, social and cultural characteristics alien to their own.⁵⁹

Nevertheless this draft definition was not adopted as Martinez Cobo’s definition later became the working definition of the UN Working Group.⁶⁰ Even though this earlier

⁵⁷ See Kingsbury, *ibid*, at 434, para 2. Salt-Water colonialism means classical European colonial rule, or a situation in which a colonial power (European) is geographically separated from its colonies by ocean water.

⁵⁸ See Kingsbury, *supra* note 52, at 434, para 2. Government of India, Observations, UN Doc. E/CN.4/Sub.2/1984/2/Add.2; For Bangladesh, Report of the Working Group on indigenous populations on its fourteenth session, UN Doc. E/CN.4/Sub.2/1996/21, para. 34. As cited in Kingsbury, f 77.

⁵⁹ E/CN.4/Sub.2/1983/ 21 Add. Para. 379. As cited in Tapan K. Bose, “Definition and Delimitation of the Indigenous Peoples of Asia” in Christian Erni, ed, *Vines That Wont Bind: Indigenous Peoples of Asia* (Copenhagen: IWGIA Document No. 80, 1996) 46, para 1. [Hereinafter Bose]

definition is not legally binding, it can be said to have reflected the intent of the working group members at the time to make the concept of indigenous peoples more universal and applicable beyond classical western colonization. Alternately, one could also conclude that since this definition was replaced by the latter, it does not reflect the consensus of the group members.

With regard to general principles of law as a source of international law on the definition, there is no literature available presently that argues the possibility of any particular principle of law lending its force, in order to determine a definition of indigenous peoples. Likewise, judicial decisions and scholarly writings, as subsidiary means of determining law, do not point to the existence or emergence of a particular definition as established in international law. For example, in one of the leading international cases on the rights of indigenous peoples, the *Awes Tingni* case,⁶¹ there was no specific mention of the definition of indigenous peoples. Here, the Inter-American Court of Human Rights, though affirming the Mayagna community's ancestral right to lands⁶², did not need to define the term 'indigenous peoples' because the question was already determined in the Constitution of Nicaragua where Article 5 recognized the existence of indigenous peoples within the state.⁶³ In another example from the Supreme Court of Canada in *R v. Powley* (2003),⁶⁴ the question was how to define "Metis" under

⁶⁰ With Cobo's influential report, his definition therein too became commonly used and widely referred within the workings of the UN Working Group despite all its flaws.

⁶¹ *The Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua*, Inter-Am. C.H.R. (2001), reprinted in (2002) 19 *Ariz J Int'l & Comp L* 395.

⁶² *Ibid*, at 431, para 153.

⁶³ *Ibid*, at 421, para 116.

⁶⁴ *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207.

section 35 of the Constitution.⁶⁵ On 22nd October 1993, Steve and Roddy Powley (a father and son) killed a moose outside Sault Ste Marie, Ontario. They were charged by the Conservation officers for hunting moose without a license and contrary to Ontario's Game and Fish Act.⁶⁶ They appealed to the Ontario Court of Appeal and argued that they had a Metis traditional right to hunt as protected under section 35 of the Constitution Act, 1982. Finally, the Supreme Court of Canada, in a unanimous judgement, upheld all lower courts' decisions and said that the Powleys, as members of the Metis community, can exercise a Metis right to hunt as protected under section 35.⁶⁷ On the question of determining who Metis are, the court did not give a comprehensive definition of Metis people. Instead, it laid down a 10 part test which would identify and establish Metis rights.⁶⁸ One of the important tests, related to the identification of the Metis community, requires that the community must self-identify as a Metis community and there must be proof that the contemporary Metis community is a continuation of the historic Metis community.⁶⁹ Thus, for the purpose of the definition of Metis as indigenous, the main criterion according to the Supreme Court of Canada happens to be self-identification. Nevertheless, for the purpose of international law, it remains to be seen whether the *Powley* decision (especially on the self-identification question) has any impact that amounts to Canadian state practice or is reflective of general principles of law.

An additional source that provides a definition of indigenous peoples is the World Bank's *Operational Policy 4.10* on indigenous peoples from 2005, where it recognizes

⁶⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. Section 35 provides right of the aboriginal peoples of Canada. Section 35(2) clearly provides that "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada."

⁶⁶ See *supra* note 64, para 4, 5 & 6.

⁶⁷ *Ibid*, para 53.

⁶⁸ *Ibid*, para 16, 17 & 18.

⁶⁹ *Ibid*, para 31, 32.

that “indigenous peoples” could be referred to in different countries by such terms as “indigenous ethnic minorities”, “aboriginals”, “hill tribes”, “minority nationalities”, “scheduled tribes”, or “tribal groups”.⁷⁰ The policy goes on to claim that the term “indigenous peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing certain basic characteristics such as self-identification, a collective attachment to land, and a distinct culture and language.⁷¹ Nevertheless, this definition can also not be termed as binding in international law because the policies of the Bank are considered more of an internal policy guideline than a binding norm of international nature.⁷² Also, the application of the Bank policies are to be observed (in good faith) only by states funded by the Bank. Therefore, the World Bank definition of indigenous peoples could not be termed as binding in international law.

As established above, it is clear that there is no universally accepted and binding definition of the term “indigenous peoples” in international law. Moreover, as we shall see in chapters 4 and 5 with regard to the Asian context, there is no agreement among states and groups within these states claiming to be indigenous on the definition.

Apart from the definition, this paper will also examine the status of the rights of indigenous peoples in international law and find out whether there are any rights that have attained the status of customary international law. As discussed earlier, declarations of the UN General Assembly, per se, do not have the binding effect of law. Nevertheless the significance of the UNDRIP cannot be understated, as it was adopted after decades of

⁷⁰ *Operational Policy 4.10*. (para 3), online: The World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564187~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y_00.html>

⁷¹ *Ibid*, para 4.

⁷² Benedict Kingsbury, “Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples” in Guy S. Goodwin-Gill & Stefan Talmon, eds, *The Reality of International Law: Essays in Honor of Ian Brownlie* (Oxford University Press, 2000) 329, para 2.

consultation and participation from both state parties and indigenous peoples in a legitimate process of norm-building in the field of indigenous rights. Therefore, such a declaration, having been solemnly adopted by the majority of member states of the United Nations, may arguably have a formal status nearing that of the 1948 Universal Declaration of Human Rights.⁷³ According to Anaya:

it is possible, at least arguably, to understand the Declaration as related to legal obligation within standard categories of international law. First, the Declaration is a statement of rights proclaimed by the vast majority of U.N. member states, through the General Assembly, within the framework of the general human rights obligations established for states by the U.N. Charter, a multilateral treaty. With this status, the Declaration can be seen as embodying or providing an authoritative interpretation of norms that are already legally binding and found elsewhere in international human rights law, including in various human rights treaties.⁷⁴

According to Siegfried Wiessner and James Anaya, indigenous peoples' "right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used" has attained the status of customary international law.⁷⁵ Thus it is crucial to examine the customary status of these rights in order to understand the implications of their eventual application to a wider world of indigenous peoples.

1.6. Methodology

⁷³ James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers: New York, 2009) 79, para 2. [Hereinafter Anaya 2009]

⁷⁴ *Ibid*, para 4.

⁷⁵ James Anaya & Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment", online: (2007) *Jurist*, para 13 < <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> > [Hereinafter Anaya & Wiessner]

The first part of my analysis will examine the history and evolution of the concept of ‘indigenous peoples’ in international law from the early period of the natural law jurists (16th century), such as Francisco Vitoria and Bartolome de Las Casas, until the advent of modern international human rights law and indigenous peoples’ movements. Chapter 2 will critically examine the problematic relationship between the concept of indigenous peoples and international law, primarily based upon the European concepts and practice of sovereignty and colonialism which rendered non-European peoples (including indigenous peoples) objects, rather than subjects, of international law. This chapter will highlight the colonial origins of international law and its negative impact on the status of indigenous peoples.

Next I will focus on determining whether there is an Asian understanding of the term “indigenous peoples” in some Asian states, namely, China, India, Bangladesh and Philippines. The justification for choosing these four states is based upon three reasons. First, these states cover the geographical areas of South, South East and East Asia. Second, there are large numbers of groups claiming to be indigenous, tribal or native peoples living in these states. Third, a large number of cases related to the discrimination and subordination of indigenous peoples come from some of these states. In addition, these four states provide two different policy approaches to the question of indigenous peoples. On the one hand, the Philippines provide a perfect example of incorporating the international law concept of indigenous peoples within its national legal system. On the other hand, India, China and Bangladesh each deny the existence of any indigenous groups within their state boundaries.

This paper will examine the potential difference between the views of Asian states and groups claiming the status of indigenous peoples. Since there is very limited existing scholarly literature on this particular area, I will largely rely on primary materials such as government reports, submissions and statements made by these states at various international mechanisms related to indigenous peoples' rights and issues. These mechanisms will be described in Chapter 3, and include: the United Nations Working Group on Indigenous Populations; the Permanent Forum on Indigenous Issues; the Special Rapporteur on the Rights of Indigenous Peoples; the Expert Mechanism on the Rights of Indigenous Peoples; World Bank policies and mechanisms; and the International Labour Organization's deliberations on the rights of indigenous peoples.

In Chapter 4, I will analyse the statements and submissions put forward by these Asian states in various United Nations forums related to indigenous peoples. In Chapter 5, I will analyse the views put forward by many groups claiming to be indigenous groups from the same Asian states in the same United Nations forums identified above. These will help me to determine the existing state and non-state policies and opinions regarding the concept of indigenous peoples, particularly its definitional aspect. Further I will analyse secondary materials to confirm and corroborate the views determined above based on the primary sources. As a result of this analysis, I will determine the potential differences in views and perceptions of these two categories. This part of the research takes into account the potential limitations of the primary materials available in this area.

Chapter 6 will focus on customary international law related to the rights of indigenous peoples with the goal of discovering whether certain provisions in UNDRIP have achieved the status of customary international law. Here I will refer to both primary

and secondary sources on the subject. As discussed earlier, a customary norm in international law is said to arise when both components of ‘state practice’ and ‘*opinio juris*’,⁷⁶ are present. Here I will examine whether there is any consistent state practice and *opinio juris* with regard to certain rights of indigenous peoples. Further, this chapter will examine why UNDRIP matters, by analysing crucial indigenous peoples’ rights affirmed in the declaration. The chapter will end by examining the legitimacy of UNDRIP in international law.

1.7. Literature Review

This paper will refer to both primary and secondary legal sources.

1.7.1. Primary Legal Sources

The most important primary source in this area of research is the UNDRIP,⁷⁷ the full text of which is reproduced in the Appendix of this thesis. This landmark soft law instrument, endorsed by the majority of states, marked the rise of indigenous peoples as subjects of international law. UNDRIP affirms the basic principles and rights of indigenous peoples in a number of areas such as right to self-determination; equality and non-discrimination; the right to cultural integrity; rights over lands, territories, and natural resources; the right to self-government and autonomy; the right to free, prior, and informed consent, and others.

⁷⁶ Subjective element where states believe that certain customary rules have become binding in law.

⁷⁷ See *supra* note 1.

The next important source is the ILO Convention No. 169,⁷⁸ which along with ILO Convention 107, remain the only international legally-binding treaties specifically governing the rights of indigenous peoples. The Convention 169 includes a number of provisions such as the right to consultation and participation in certain decision-making processes; rights over lands, territories and natural resources; labour and social rights, and others. Further, I will refer to the two international human rights covenants - namely the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966).⁷⁹ The provisions of these two international human rights treaties also apply to indigenous peoples, such as: the right to self-determination (common article 1); the rights of national, ethnic, and linguistic minorities (article 27 of ICCPR);⁸⁰ the right to education, food, housing, health, water and intellectual property rights.

This paper will also refer, to a limited extent, to the recent decision by Inter-American Court of Human Rights in the *Awas Tingni* case,⁸¹ which affirmed the existence of an indigenous peoples' collective right to its land. Further, it will look at the reports submitted by the UN Special Rapporteur on the Rights of Indigenous Peoples, as well as its Communication Reports, in order to determine the status and rights of indigenous peoples in Asia. They face similar patterns of suppression, marginalization and discrimination as are faced by other parts of the world. The reports deal with issues

⁷⁸ For ILO Convention No 169, see *supra* note 48.

⁷⁹ *International Covenant on Civil and Political Rights*, 16 December 1966, GA Res 2200A (XXI) (entered into force 23 March 1976) [ICCPR] See online: <<http://www2.ohchr.org/english/law/ccpr.htm>>
International Covenant on Economic, Social and Cultural Rights, 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976) [ICESCR] See online: <<http://www2.ohchr.org/english/law/cescr.htm>>

⁸⁰ Please see Chapter 6 for the detail on difference between the rights accorded to indigenous peoples and those accorded to minorities.

⁸¹ See *supra* note 61.

of special concern to the region, such as the deprivation of indigenous lands and resources; situations of internal conflict; and autonomy or self-governance. They also provide accounts of the communications between the Special Rapporteur and various state governments regarding certain specific issues of importance to indigenous peoples, and highlight some Asian states' official positions with regard to the concept of indigenous peoples.

1.7.2. Secondary Legal Sources

This literature review will highlight some of the key sources upon which I will rely in this thesis. My research will refer to James Anaya's work *Indigenous Peoples in International Law*,⁸² as it is one of the most authoritative books on the subject of indigenous peoples and international law. The central theme of the book is that "International law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples' demands."⁸³ Most writers on the subject tend to begin examining the concept of indigenous peoples from the period after World War II, especially in the aftermath of decolonization movements in the 1960s. However, in this book, Anaya traced the concept of indigenous peoples and their rights back to the origin of international law itself. Thus the concept of indigenous peoples has altered with international law's own evolution over centuries. Some of the limitations and shortcomings of this book are that it does not cover the process of defining indigenous peoples and the self-identification issue. The issue of self-identification deals with the validity and legality of indigenous or tribal groups

⁸² James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996). [Hereinafter Anaya]

⁸³ *Ibid*, at 4, para 3.

identifying and defining themselves as ‘indigenous peoples’ within the context of international law.

For Asian perspectives on the issue of defining indigenous peoples, I refer to Benedict Kingsbury’s article “*Indigenous Peoples*” in *International Law: A Constructivist Approach to the Asian Controversy*.⁸⁴ He lays down an alternative approach to deal with the problematic question of defining “Indigenous Peoples”, taking into account the views and arguments put forward by the Asian states. He rejects the ‘positivist approach’ to the definition because of its strong reliance on legal precision and its exclusivist tendency, which rules out many other variables that might form the criteria for defining indigenous peoples. On the other hand, he vigorously argues in favour of a more constructivist (inclusive) approach⁸⁵ that takes into account views, proposals and concerns of a large number of groups from across the globe. This approach is naturally more inclusive in nature, which renders the concept of indigenous peoples vague and less coherent, but nevertheless acceptable to a much larger group of claimants

On the question of the legitimacy of UNDRIP, I refer to Claire Charters’ *The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples*⁸⁶ where she discusses the question of what makes UNDRIP legitimate in the national and international legal domain. The basic argument of the paper is that the greater the perception of UNDRIP’s legitimacy, the greater likelihood of states’ compliance.⁸⁷ According to her, UNDRIP’s legitimacy has increased by the process of engagement by

⁸⁴ See Kingsbury, *supra* note 52.

⁸⁵ *Ibid*, at 415, para 2.

⁸⁶ Claire Charters, “The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples” in Claire Charters & Rodolfo Stavenhagen, eds, *Making The Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen, Denmark: IWGIA, 2009) 280.

⁸⁷ *Ibid*, at 280, para 2.

various international Organizations, states, non-state actors and Indigenous Peoples themselves.⁸⁸

The legitimacy of indigenous peoples' rights in international law is also determined by the emergence of customary norms on indigenous peoples. On this point, I will refer to Siegfried Wiessner's *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*.⁸⁹ This article provides a reassessment of the concept of indigenous peoples in international law taking into account the impact of UNDRIP. The author stresses the emergence of customary norms related to indigenous peoples' rights in state practices as well as in the decisions of international and regional human rights courts. I will also refer to James Anaya and Siegfried Wiessner, in *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*⁹⁰ on this issue.

For a critical perspective on indigenous peoples' rights in modern international law, I refer to Seth Gordon in *Indigenous Rights in Modern International Law from a Critical Third World Perspective*.⁹¹ According to Gordon, the international legal system continues to subjugate indigenous peoples, as the traces of old discriminatory systemic practice continue in the modern world.⁹² He identifies common features of the Third-World and indigenous peoples' experiences under such legal system, such as: self-identification, a shared historical experience of subordination, being victims of colonialism and continued subordination at the global level. The goal of this essay was to

⁸⁸ It was adopted by the majority of international community and there are currently 147 states who have signed the Declaration.

⁸⁹ Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples" (2008) 41 Vand J Transnat'l L 1156. [Hereinafter Wiessner]

⁹⁰ See Anaya & Wiessner, *supra* note 75.

⁹¹ Seth Gordon, "Indigenous Rights in Modern International Law from a Critical Third World Perspective" (2006/2007) 31:2 Am Indian L Rev 401. [Hereinafter Gordon]

⁹² *Ibid*, at 402, para 2.

analyse the ILO Conventions on the rights of indigenous peoples from Third-World Approaches to International Law (TWAAIL), and to demonstrate that the conventions fail to adequately effectuate indigenous peoples' rights. This is because the conventions are covered in the vocabulary of traditional international law.⁹³

Another important theme in this thesis is the significant role that non-state actors play in the processes of international lawmaking, as discussed above. According to Lillian Aponte Miranda, in *Indigenous Peoples as International Lawmakers*, indigenous peoples have emerged as distinct international legal category with rights because of their active assertion and participation in various international legal processes and significantly contributed to the creation of new norms and international standards. As a result, as we shall see, indigenous peoples have emerged as the makers of international law related to the indigenous peoples' rights.⁹⁴

Lastly, I will refer to International Work Group for Indigenous Affairs' (IWGIA) publication entitled "The Concept of Indigenous Peoples in Asia: A Resource Book" for various facts and figures and situations related to the groups (claiming to be indigenous) in many Asian states. The IWGIA is one of the largest international human rights organization staffed by "specialists and advisers on indigenous affairs."⁹⁵ It was founded in 1968 by group of anthropologists who were alarmed by the genocide of indigenous peoples in the Amazon and established a network of activists and researchers to document the situation and advocate for indigenous peoples' rights. It is based in

⁹³ Ibid, at 404, para 2.

⁹⁴ See Miranda, *supra* note 37, at 210.

⁹⁵ *International Work Group for Indigenous Affairs* (IWGIA), online: < <http://www.iwgia.org/iwgia/who-we-are-> >

Copenhagen (Denmark) and most of its projects and works are directed at indigenous communities in the south from Asia, Africa and Latin America.⁹⁶

1.8. Conclusion

As mentioned earlier, the purpose of this research is to uncover an alternative perspective on the concept which is not western in its understanding.

In the next chapter, I will trace the historical evolution of the concept and identity of indigenous peoples in international law from the period of early natural law jurists until modern international human rights law. Further I will argue that the concept of indigenous peoples has constantly evolved within international law's own normative changes.

⁹⁶ Ibid.

Chapter 2: Historical Evolution of the Concept of Indigenous Peoples in International Law

The history of indigenous peoples and international law has been one of a long, inconvenient and problematic relationship primarily based upon the European concept and practices of sovereignty and colonialism, which rendered non-European peoples (including indigenous peoples) as objects, rather than subjects, of international law.⁹⁷ Since the concept of indigenous peoples gained prominence and currency in the modern human rights movements and struggles (especially in the later 20th century), many scholars and writers on the subject tend to trace the concept from the period since World War II and decolonization. But, in fact, it can be traced back to the origin of international law itself. According to Antony Anghie, early natural law jurists of the 16th century reconceptualized the then existing doctrine of divine law (the Pope's universal jurisdiction by virtue of his mission to spread Christianity) and invented new ones on the basis of natural law, in order to deal with the new problem of the so-called discovered Indians in Americas. Anghie points out that, during that early period, international law as we understand it today did not precede and thus resolve the problem of European-Indian relations and encounters, but rather "international law was created out of the unique issues generated by the encounter between the Spanish [Europeans] and the Indians."⁹⁸ Thus, the concept of indigenous peoples evolved within international law's own evolution over centuries and bore first-hand witness to its tumultuous changes. In this chapter, I will describe the evolution of the concept of indigenous peoples in international

⁹⁷ Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton, British Columbia: Theytus Books Ltd, 1998) at 2, para 2 [Hereinafter Venne]. More commonly on this theme, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005). [Hereinafter Anghie]

⁹⁸ Anghie, *ibid*, at 15, para 1.

law from the early period of the natural law jurists until the modern international human rights movements.

2.1. Natural Law and Indigenous Peoples

The arrival of Christopher Columbus in the so-called new world of the Americas prompted the development of the doctrine of discovery by Spanish and other European explorers. According to this doctrine, the lands of the Americas were *terra nullius* – meaning vacant lands – and the natives of those lands were not peoples with rights because of their primitive culture and divergence from the Christian European cultural norms of religious belief and civilization.⁹⁹ Thus, it gave justification for the Spanish and Portuguese’ colonial patterns of rule in the new world by suppressing and taking away lands and resources from the natives by force and threat of war. Because of this belief in the inherent superiority of the European culture and polity, it set in motion the development of the Euro-centric legal norms in relation to peoples living in the new world.¹⁰⁰

In order for European sovereigns to assert their absolute rights to indigenous lands in the Americas, they had to rely on the Pope’s approval to establish their legitimacy.¹⁰¹ These sovereign rulers of Europe used religious authority in the secular sphere to legitimize their jurisdiction over some parts of the land against other sovereigns. For example, the Papal bull of 1493, known as *Inter Caetera divinae*, was issued in favour of Spain and, in the words of Venne, “helped to give legitimacy to the colonization of

⁹⁹ See Venne, *supra* note 97, at 3, para 1.

¹⁰⁰ *Ibid*, para 2.

¹⁰¹ *Ibid*, para 4.

indigenous America by declaring that non-Christians could not own land in the face of claims made by the Christian sovereigns.”¹⁰² This Papal bull suggested that:

[t]he Pope could place non-Christian peoples under the tutelage and guardianship of the first Christian nation discovering their lands as long as those peoples were reported by the discovering Christian nation to be “well disposed to embrace the Christian faith”.¹⁰³

It points out that the sovereign and church collaborated to deny indigenous peoples’ rights and unilaterally changed their legal status without any consultation with the natives. This resulted in the dispossession of lands and resources, colonial settlement by the Europeans, slavery, torture and other horrendous acts.

In the meantime, two prominent Spanish thinkers, Francisco de Vitoria (1486-1547) and Bartolome de Las Casas (1474-1566), who spent years in the American colonies, questioned the validity and legality of these brutal European settlement patterns and horrors, and confirmed the essential humanity of the Indians in the western hemisphere. In their works, these two thinkers “looked at colonization not only in accordance with the canons of church law, but they also examined the nature and dignity of the indigenous peoples being exploited and used.”¹⁰⁴ De La Casas wrote in his *History of the Indies*¹⁰⁵ that “it was the general rule among Spaniards to be cruel, not just cruel,

¹⁰² Ibid, at 4, para 5.

¹⁰³ Dr. Min-Chuan Ku, *A Comprehensive Handbook of the United Nations: A Documentary Presentation in Two Volumes*, (New York: Monarch Press, 1978) vol. 1 at 33-41. Cited in Venne, *supra* note 97, at 4, para 6.

¹⁰⁴ See Venne, *ibid*, at 5, para 2.

¹⁰⁵ Bartolome de las Casas, *History of the Indies: Selections* (Andree Collard ed. And trans., 1971). As cited in Anaya, *supra* note 82, at 10, para 1.

but extraordinarily cruel so that harsh and bitter treatment would prevent Indians from daring to think of themselves as human beings or having a minute to think at all.”¹⁰⁶

Francisco Vitoria, in *On the Indians Lately Discovered* (1532),¹⁰⁷ held that Indian tribes possessed certain original autonomous powers and entitlement to land, which the Europeans should respect. The dominant legal theory in medieval Europe of the 16th century was a synthesis of the Aristotelian view of natural law and the divine law of Christian theology.¹⁰⁸ So God was, according to Vitoria and other Spanish school theorists, a higher source of authority than the laws made by monarchs. This supreme normative order, based on the naturalist view (and divine law), applied across all levels of humanity. With this framework, the question of determining the rights and status of the Indians was whether they were rational human beings. To this, Vitoria affirmed that the Indians:

are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops and a system of exchange, all of which call for the use of reason; they also have a kind of religion.¹⁰⁹

By invoking precepts from the Holy Scripture, Vitoria held that Indians of the Americas were the true owners of their land, and neither Emperor nor Pope possessed

¹⁰⁶ D. W. Bowett, *The Law of International Institutions* (London: Stevens & Sons, 1982) at 141-142. As cited in Venne, *Supra* note 97, at 6, para 1.

¹⁰⁷ See Vitoria. *Infra* note 109.

¹⁰⁸ See Anaya, *supra* note 82, at 27, n 9.

¹⁰⁹ Published in Francisco de Vitoria, *De indis et de ivre belli relectiones* (Classics of International Law Series, 1917) (translation by J. Bate based on Jaques Boyer ed., 1557, Alonso Munez ed., 1565, & Johann G. Simon ed., 1696)(using the Latin version of his name, “Victoria”) [hereinafter *De indis*] at 127. As cited in Anaya, *ibid*, at 12, para 2.

lordship over the whole world.¹¹⁰ The notion that the Pope's grant of Indian lands to the Spanish monarch in the Papal bull established legal title to new world lands was rejected by Vitoria. Thus he rejected title by discovery (of Indian lands in America). Nevertheless, Vitoria maintained that "transgressions of the universally binding norms of the Law of Nations by the Indians might serve to justify a Christian nation's conquest and colonial empire of the Americas."¹¹¹ The transgressions that he referred to above were based on the rumours at the time that indigenous peoples ate human flesh, and he concluded that such acts violated the natural law.¹¹² Further, Vitoria constructed a theory of just war whereby Europeans could claim Indian lands in the absence of their consent. According to this view, Indians had the obligation to allow foreigners to travel to their lands and trade among them,¹¹³ and failure to do so could result in "just" war and conquest by the European colonizers.

Due to De las Casas' and Vitoria's passionate and reasoned arguments in favour of indigenous peoples' natural rights, the Spanish King launched an investigation by setting up the Council of the Indies in 1550 in order to determine the moral and legal rights of discovery.¹¹⁴ The Council consisted of 14 eminent jurists, and two jurists were selected among them to present each side of the argument. De las Casas defended indigenous peoples' rights as human beings, whereas Juan Gines de Sepulveda supported the Spanish conquest of the natives. At the end of the debate, it was proclaimed that the

¹¹⁰ *De indis*, at 127-28. See Anaya, *ibid*, at 11, para 3.

¹¹¹ Nicolas Valticos, *International Labour Law* (The Netherlands: Kluwer, 1979) at 44. As cited in Venne, *supra* note 97, at 6, para 3.

¹¹² See Venne, *ibid*, at 6, para 4.

¹¹³ *De indis*, at 153. See Anaya, *supra* note 82, at 12, para 2.

¹¹⁴ See Venne, *supra* note 97, at 6, para 4.

indigenous peoples were biological human beings but “were not seen as legitimate peoples in the eyes of the Spanish”¹¹⁵ and therefore denied legal status and rights.

Hugo Grotius, a Dutch legal theorist, also rejected title by discovery of lands inhabited by human beings and claimed that it should be rejected “even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.”¹¹⁶ His natural law theory was more secular in nature, dictated by right reason rather than the will of God. So Grotius asserted that just wars could not be waged due to the unwillingness of Indians to accept Christianity, which is a European belief system.¹¹⁷ Thus natural law, over all, supported a universal moral code for all human kind that also respected the existence and identity of indigenous peoples in the Americas. According to Grotius, there were only three broad justifiable causes for war, namely: defence, recovery of property, and punishment.¹¹⁸

2.2. Emergence of Modern State System

During the era of the early modern state system that emerged at the end of the Peace of Westphalia in 1648, a shift was taking place in legal theory from naturalist thinking to a more positivist one, where the international law was focused exclusively on states.

Emmerich de Vattel (1714-1769), a Swiss diplomat, in his treatise *The Law of Nations, or The Principle of Natural Law* (1758), described the law as something that

¹¹⁵ Anthony Alcock, *History of the International Labour Organization* (New York: Octagon Books, 1971) at 82-84. As cited in Venne, *ibid*, at 7, para 2.

¹¹⁶ Hugo Grotius, *The Law of War and Peace* 40 (Classics of International Law ed. 1925) (Francis W. Kelsey trans. of 1646 ed.) at 550. As cited in Anaya, *supra* note 82, at 12, para 4.

¹¹⁷ See Anaya, *ibid*, at 29, n 38.

¹¹⁸ See Grotius, *supra* note 116, at 171. As cited in Anaya, *ibid*, at 12, para 4.

was concerned exclusively with states. He defined the Law of Nations as “the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights.”¹¹⁹ Vattel also highlighted the centrality of the doctrine of “State Sovereignty” in a positivist framework of international law, with its ingredients: exclusive jurisdiction, territorial integrity and non-intervention in domestic affairs.¹²⁰ For Vattel, the state was free, independent and equal based upon the natural rights of its individual members. So, for any indigenous peoples or groups to enjoy rights as distinct communities, they must be first regarded as nations or states.

The concept of the nation-state in this post-Westphalian sense is based on “European models of political and social organization whose dominant defining characteristics are exclusivity of territorial domain and hierarchical, centralized authority.”¹²¹ In contrast, indigenous peoples’ societies were generally organized by tribal or kinship ties, having decentralized political structures with shared and overlapping territorial control. Since their system did not fit with the European standard, they automatically fell outside the state-centric “Law of Nations”. Furthermore, Vattel brought in a western theory of property rights (advanced earlier by John Locke) to determine the ownership of indigenous lands and resources whereby the cultivation of lands establishes a greater right to the land than hunting or gathering. Thus he advocated a Lockean natural law duty to cultivate the soil, according to which ownership of land is

¹¹⁹ Emmerich de Vattel, *The Law of Nations, or The Principles of Natural Law* (Classics of International Law Series, 1916) (Charles G. Fenwick trans. of 1758 ed.) at 3. As cited in Anaya, *ibid*, at 13, para 4.

¹²⁰ See J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 37-38 (6th ed. 1963) (linking the doctrine of state sovereignty to Vattel); Francis S. Ruddy, *International law in the Enlightenment: The Background of Emmerich de Vattel’s “Le Droit des gens”* 97-123 (1975), as cited in Anaya, *ibid*, at 15, para 1.

¹²¹ See J.H. Shennan, *Liberty and Order in Early Modern Europe: The Subject and the State, 1650-1800*, at 3 (1986); Stuart Hall, “The State in Question”, in *The Idea of the Modern State* 7-9 (Gregor McLennan et al. eds., 1984); Andrew Vincent, *Theories of the State* 45-47 (1987), as cited in Anaya, *ibid*, at 15, para 3. More broadly on this theme, see chapter 2 of Anghie, *supra* note 97.

established through labour, transforming the natural world into valuable and productive property.¹²² According to Anaya, Vattel clearly believed that “at least some non-European aboriginal peoples qualified as states or nations with rights as such.”¹²³

2.3. Positivist International Law and Indigenous Peoples

International law was in some measure sympathetic to indigenous peoples’ rights and existence. But soon it changed into a positivist state-centric system (strongly grounded in the western world view) that facilitated colonial practices of the European states and finally led to the downfall of indigenous peoples.¹²⁴

By the time of 19th century positivism, international law abandoned indigenous peoples as political bodies with rights under international law. As western colonization started taking firm root, international law became a legitimizing force for colonization and empire, rather than liberation for indigenous peoples.¹²⁵ In this positivist framework, a sovereign administered and enforced the law, as the law was the creation of sovereign will. Thus sovereign states became the foundation of international legal order, which rejected the naturalist notion that sovereign states were bound by an overarching natural law or supreme higher moral authority. Instead, the rules of international law were to be discovered by careful study of the actual behaviour of the sovereign states, its institutions and laws that they created.

According to the 19th century positivist school, there were four major premises of international law: (1) it was concerned only with rights and duties of states; (2) it upholds

¹²² See Anaya, *supra* 82, at 32, n 70.

¹²³ *Ibid*, at 15, para 4.

¹²⁴ *Ibid*, at 9, para 2. More broadly on this theme, see Anghie, *supra* note 97.

¹²⁵ *Ibid*, at 19, para 3.

the exclusive sovereignty of states; (3) international law was law between states, and not above states; and (4) the theory of recognition, under which statehood for the purpose of international law depended on recognition by 19th century European civilized states.¹²⁶ The end result of these premises was that the indigenous peoples, having not qualified as states, could not participate in the international law-making process.

One of the extreme forms of positivistic attitude came from John Westlake (1828-1913), who made a categorical distinction between “Civilized and Uncivilized” humanity, and viewed international society as only limited to the civilized one.¹²⁷ Thereby he effectively “admitted that international law was an instrument of the “white” and powerful colonizer. Not being among the “civilized” and powerful forces of colonization, indigenous peoples could not look to international law to thwart those forces.”¹²⁸

W. E. Hall (1835-1894) saw the exclusion of indigenous peoples from the subjects of international law as a result of the positivist conception of international law, and stated:

It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilized, such states only can be presumed to be subject to it as are inheritors of that civilization.¹²⁹

¹²⁶ Ibid, at 19, para 4.

¹²⁷ John Westlake, *Chapters on the Principals of International Law* 136-38 (1894), as cited in Anaya, *supra* note 82, at 20, para 3.

¹²⁸ See Anaya, *ibid*, at 20, para 5.

¹²⁹ William E. Hall, *A Treaties on International Law* 47 (Alexander P. Higgins ed., 8th ed. 1924). As cited in Anaya, *ibid*, at 21, para 3.

According to Henry Wheaton (1785-1848), international law was the exclusive province of civilized societies. He claimed that public law was limited only to the civilized and Christian people of Europe.¹³⁰ Therefore only European states could create international law. In the naturalist world, law was given as a set of naturally existing rules, but, in the positivist world, law was created by human societies and institutions.¹³¹ Accordingly, the connection between “law” and “institutions” was established and the positivists’ focus on the character of institutions ultimately “facilitated the racialization of law by delimiting the notion of law to very specific European institutions.”¹³²

As positivists insisted that sovereignty was the founding concept of the international system, the task of defining or determining the concept of sovereignty became important. In other words, what entities could be regarded as sovereign? Positivists claimed that sovereignty could be defined as “control over territory”.¹³³ An entity which does not have absolute control over a territory could not be called sovereign. But the problem was that many of the “uncivilized” Asian and African states, such as China, Turkey, Persia and Ethiopia, met this specific requirement of control over territory. In order to deal with this situation, the positivists relied on the concept of society.¹³⁴ Therefore, unless these Asian and African states fulfilled the criteria of membership of international society, they were deemed to be lacking in sovereignty. The non-European states were found lacking in sovereignty because “they [were] excluded from the family of nations.”¹³⁵ Thus, the issue of law and culture was linked together by

¹³⁰ Henry Wheaton, *Elements of International Law* (George Grafton Wilson ed., The Carnegie Institute of Washington photo. reprint 1964) (1866), p. 10. As cited in Anghie, *supra* note 97, at 53, para 1.

¹³¹ See Anghie, *ibid*, at 55, para 3.

¹³² *Ibid*.

¹³³ *Ibid*, at 57, para 3.

¹³⁴ *Ibid*, at 58, para 3.

¹³⁵ *Ibid*, at 59, para 2.

the positivists of the 19th century in order to determine sovereignty. They developed strategies to explain why the non-European world was excluded from the society of nations and international law, namely: that no law existed in certain non-European barbaric regions; and, although “certain societies may have had their own systems of law these were of such an alien character that no proper legal relations could develop between European and non-European states.”¹³⁶ As a result, non-European uncivilized societies had to follow the European society’s model if they wanted to progress¹³⁷ and become sovereign states in international law. As a result, they were effectively excluded from the realm of sovereignty, society, and law.

2.4. Deskaheh at the League of Nations, 1922-1924

In modern times, one of the first efforts to bring forward the question of indigenous peoples’ rights in the international arena was Levi General Deskaheh, Chief of the Younger Bear Clan of the Cayuga Nation and spokesman of the Six Nations of the Grand River Land near Brantford, Ontario. In the aftermath of World War I, with the establishment of the League of Nations, the principle of self-determination and the rights of minorities gained prominence in the area of international politics.¹³⁸ In 1923, Deskaheh made a significant effort in Geneva to obtain a hearing at the League of Nations concerning a dispute with Canada over the issue of tribal self-government.¹³⁹ He then made contacts with officials of the League, and sought to resolve the aboriginal

¹³⁶ Ibid, at 61, para 4.

¹³⁷ Ibid, at 62, para 1.

¹³⁸ See Antonio Cassese, *infra* note 457, chapter 2.

¹³⁹ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003) at 31, para 1. [Hereinafter Niezen]

peoples' problems, such as loss of sovereignty resulting from Band governance under the Indian Act of 1876.¹⁴⁰

This Act, having passed with the mindset of civilizing and integrating indigenous peoples within the state, brought into existence a new system of “self-government” in the form of elected band councils functioning under the Act. Its objective can be seen in Deputy Superintendent-General Duncan Campbell Scott’s 1920 expression where he mentioned that “our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department.”¹⁴¹ The Indian Act was specially designed to destabilize or remove those traditional governments which were not inclined to cooperate with the federal initiatives related to land transfers. Thus there was a tension between the reluctant Indians and the assertive Canadian authority over issues of assimilation and loss of traditional sovereignty or self-government.

Deskaheh, being a traditionalist from the Council of Hereditary Chiefs of the Six Nations, opposed formal integration of Indian nations with Canada and advocated for full self-government.¹⁴² He stated that:

The constituent members of the State of the Six Nations of the Iroquois, that is to say, the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora, now are and have been for many centuries, organized and self-governing peoples, respectively, within the domains of their own, and united in the oldest League of

¹⁴⁰ Ibid, para 2.

¹⁴¹ Leslie, John, and Ron Haguire, eds. 1978. *The Historical Development of the Indian Act*. 2d ed. Ottawa, Canada: Treaties and Historical Research Centre, Department of Indian and Northern Affairs, at 115. As cited in Niezen, *ibid*, at 31, para 3.

¹⁴² See Niezen, *ibid*, at 32, para 2.

Nations, the League of the Iroquois [formed in the 1500s], for the maintenance of mutual peace.¹⁴³

In his petition to the League of Nations, *The Red Man's Appeal to Justice* (1923), he pointed out that the escalation of the police (Royal Canadian Mounted Police) presence in native lands constituted an act of war against Six Nations, and was intended to:

destroy all de jure government of the Six Nations and of the constituent members thereof, and to fasten Canadian authority over all the Six Nations domain and to subjugate the Six Nations peoples, and these wrongful acts have resulted in a situation now constituting a menace to international peace.¹⁴⁴

In an earlier unsuccessful petition to the League of Nations, Deskaheh made a strong argument for the recognition of their right to self-government and stated that “[t]he Six Nations are ready to accept for the purpose of this dispute, if invited, the obligation of membership in the League of Nations upon such just conditions as the Council [League’s] may prescribe, having due regard to our slender resources.”¹⁴⁵ His claim to sovereignty was based upon the Haldimand Proclamation of 1784, in which King George III gave the Grand River land on the Canadian side of Lake Erie to those Iroquois who had fought on the side of the British during the war of American Revolution.¹⁴⁶ But the Canadian response was dismissive and claimed that the Six Nations had not been recognized as self-governing peoples and were subjects of the British Crown.¹⁴⁷

¹⁴³ Deskaheh, Levi General. 1923. *The Red Man's Appeal to Justice*. League of Nations doc. No. 11/30035/28075. Geneva, at 1-2. As cited in Niezen, *ibid*, at 33, para 1.

¹⁴⁴ Deskaheh, 1923, at 6. As cited in Niezen, *ibid*, at 33, para 2.

¹⁴⁵ Deskaheh, Levi General. 1922. *To the Government of Her Majesty the Queen of the Netherlands*. League of Nations doc. no. 11/29185/28075. Geneva, at 4. As cited in Niezen, *ibid*, at 33, para 2.

¹⁴⁶ Rostkowski, Joelle. 1995. “Deskaheh’s Shadow: Indians on the International Scene.” *Native American Studies* 9(2): 1. As cited in Niezen, *ibid*, at 33, para 2.

¹⁴⁷ See Niezen, *ibid*, at 34, para 2.

Deskaheh's attempt to present the grievances of the Six Nations before the Assembly of the League of Nations failed, as the League was not receptive to claims of sovereignty that conflicted with the interests of other states. Despite this failure, his presence in Geneva caused a minor sensation as he conducted informal public lectures and circulated his *The Red Man's Appeal to Justice*. The Six Nations were successful in gathering support for their cause from nations like Estonia, Netherlands, Ireland, Panama, Japan and Persia.¹⁴⁸ Further he also received favourable attention and sympathy from many humanitarian societies and organizations. But the negative response to his effort by the League of Nations was clearly summed up by one independent lobbyist present at the time, "The representative of the world's first League of Peace received no welcome from the world's newest."¹⁴⁹

In the fall of 1924, Deskaheh delivered his address to a meeting of friendly states at the City Hall in Geneva. On November 27, 1924, he was informed by Canada "that, following an election held among the Cayuga the previous October, a new tribal council had replaced the hereditary body he represented. In effect, he had lost his power and his mandate to lobby on behalf of the Six Nations."¹⁵⁰ He left Geneva at the end of 1924, dispirited by his failed effort to get a fair hearing, and died in the United States months later.¹⁵¹ Deskaheh's historic attempt to raise the question of indigenous peoples' rights and status at the international forum ultimately failed not from flaws of character or his argument, but primarily due to the League of Nations' positivistic state-centric outlook

¹⁴⁸ Ibid, at 35, para 2.

¹⁴⁹ League of Nations. 1924. La tribu indienne des Six Nations; petitions diverses. Doc. nos. 11/ 33687 and 11/ 33556. Geneva. As cited in Niezen, *ibid*, at 35, para 1.

¹⁵⁰ See Niezen, *ibid*, at 36, para 1.

¹⁵¹ *Ibid*.

towards international law and politics.¹⁵² In fact, his campaign in Geneva had all the signs of modern indigenous lobbying efforts, including: an appeal to public sympathy through media; lobbying individual state delegates; printing out summaries of his grievances; use of lawyers as advisors; and the use of the legal logic of statehood to oppose the encroachment of the state.¹⁵³

2.5. Indigenous Peoples and the United Nations

The system of international law underwent a huge shift after the adoption of the United Nations Charter in 1945 when the concept of indigenous peoples started re-emerging in the international domain. This time, the concept took the form of international human rights movements and the demand for self-determination. Even though human rights are primarily individual rights, modern international law increasingly took note of some group or collective rights.

In the United Nations, more favourable conditions emerged for the international recognition of the rights of indigenous peoples. Some of the key factors were: first, greater receptiveness at the international level for the protection of minorities (after the Nazi horrors against Jews) with standards intended to resist racism and discrimination.¹⁵⁴ This resulted in the advancement and emergence of international human rights norms. Secondly, the dismantling of European colonies¹⁵⁵ made the demand for self-determination more realistic and achievable. Third, assimilation policies used by colonial powers against natives/indigenous peoples had, by the mid-twentieth century, “clearly

¹⁵² Ibid, at 50, para 3.

¹⁵³ Ibid, para 3.

¹⁵⁴ Ibid, at 40, para 3.

¹⁵⁵ Ibid, at 41, para 2.

failed in their goal of eliminating all vestiges of attachment to tradition, while unintentionally contributing to intertribal identity, broader political unity, and the training of educated leaders.”¹⁵⁶ It led to the formation of new native groups and organisations that eventually turned into international indigenous lobbying movements.

Therefore, the creation of the United Nations “inspired indigenous peoples to press their claims in decolonization activities and human rights.”¹⁵⁷ The Charter of the United Nations affirmed the concept of peoplehood (rather than statehood)¹⁵⁸ which can be found in the first line of the Preamble “We the people of the United Nations ...”¹⁵⁹ and in Article 73’s declaration regarding non-self-governing territories, where it called for the responsibilities of UN members to administer territories whose peoples have not yet attained a full measure of self-government. The use of the term “peoples” evidenced a shift to a new legal category in international law and “infers the application of the principle of self-determination to indigenous peoples within the boundaries of independent or decolonizing states.”¹⁶⁰

The principle of self-determination became prominent during the era of decolonization where the colonies of former European powers in Asia and Africa were freed from their shackles and achieved independent statehood. In the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960),¹⁶¹ they condemned acts of colonialism in all its forms and manifestations. The Declaration called for the speedy and unconditional end to colonialism because the

¹⁵⁶ Ibid, para 3.

¹⁵⁷ James (Sa’ke’j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Limited, 2008) at 25, para 3. [Hereinafter Henderson]

¹⁵⁸ Ibid.

¹⁵⁹ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7. Also see online:

<<http://www.un.org/en/documents/charter/>>

¹⁶⁰ See Henderson, *supra* note 157, at 26, para 1.

¹⁶¹ UN General Assembly Res. 1514 (XV), 1960.

subjection of peoples to alien subjugation, domination and exploitation constituted a denial of fundamental human rights.¹⁶²

Despite all of the above-mentioned optimism, the decolonization process did not recognize the right to self-determination of colonized indigenous peoples.¹⁶³ As they were seen only as indigenous populations within larger political units, the decolonizing process did not include them. Dr. Erica-Irene Daes, Chairman of the Working Group on Indigenous Populations, explained that:

[w]ith few exceptions, indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making. In some countries they have been excluded by law or by force, but in many countries ... they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours. Whatever the reason, indigenous peoples in most countries have never been, and are not now, full partners in the political process and lack others' ability to use democratic means to defend their fundamental rights and freedom."¹⁶⁴

At the end of colonialism, many indigenous peoples were promised their own independent states, but these promises were never fulfilled.¹⁶⁵ The newly decolonized states continue to maintain rigid control over indigenous peoples' land and resources and deny their right to self-determination. Indigenous peoples were thrown from one form of classical colonialism into another, with the same conditions of marginalization and exploitation. Therefore the broken promises of decolonization became the basis for

¹⁶² Ibid, article 1.

¹⁶³ See Henderson, *supra* note 157, at 27, para 3.

¹⁶⁴ Ibid, at 111, n 55.

¹⁶⁵ Ibid, at 111, n 56

indigenous peoples' movements' shift from the discourse of sovereignty to international human rights.¹⁶⁶

The early 1970s saw changes in narrative, with the emergence of indigenous peoples renaissance movements across the world and the establishment of many organizations to promote indigenous rights such as the International Indian Treaty Council (IITC) and World Council of Indigenous Peoples (WCIP) in 1974. All these led to the creation of UN Working Group on Indigenous Populations in 1982 to look into indigenous matters and prepare the draft Declaration on the Rights of Indigenous Peoples. Indigenous peoples, for the first time in history, took active part in the deliberations of the international mechanisms to lay down rights and principles directly related to their communities.¹⁶⁷

Other organizations, including the International Labour Organization (ILO), engaged in the reform efforts, such as the reformed Convention on Indigenous Peoples' Rights (ILO Convention No. 169)¹⁶⁸ in 1989, which recognized indigenous peoples' rights in international law. The decade of the 1990s saw intense debate on the future declaration with the full participation of indigenous peoples. The year 1993 was recognised as the International Year for the World's Indigenous Peoples by the UN General Assembly¹⁶⁹ to strengthen international cooperation for the search for solutions to problems faced by indigenous communities in areas such as human rights, the environment, development, education and health.

¹⁶⁶ Ibid, at 27, para 5.

¹⁶⁷ See Anaya, *supra* note 82, at 52, para 2.

¹⁶⁸ For ILO Convention 169, see *supra* note 48. Cited in Wiessner, *supra* note 89, at 1156.

¹⁶⁹ *International Year of the World's Indigenous Peoples*, UNGA Res 47/75 at 47th Session, 1993. See online: < <http://www.un-documents.net/a47r75.htm> >

In the 2001 landmark decision of the Inter-American Court on Human Rights (the *Awas Tingni Case*),¹⁷⁰ indigenous peoples' land rights were, for the first time, recognised in international law (or perhaps for the first time since Vitoria and Grotius). In the year 2007, the UN General Assembly formally adopted UNDRIP, making it a watershed moment in the history of indigenous peoples' rights in international law. In the end, the right of self-determination was finally recognized as the guiding principle of indigenous peoples' rights.

2.6. Conclusion

This chapter has outlined the history and evolution of the concept of indigenous peoples from the time of the natural law thinkers and positivist international jurists to the modern international human rights movements and norms. It has traced the troubled relationship between indigenous peoples and international law, as the later underwent several normative changes and directly shaped the status of indigenous peoples accordingly. Despite initial recognition of the rights and status of indigenous peoples during the early natural law period, Euro-centric colonial international law of the 18th and 19th century, based upon the rigid concept of sovereignty, denied status of indigenous peoples in international law. In the 20th century, the status of indigenous peoples was raised once again within the framework of international human rights movements and norms, which ultimately resulted in the landmark adoption of UNDRIP in 2007.

¹⁷⁰ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. C.H.R. (2001), reprinted in *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 19 Ariz. J. Int'l & Comp. L. 148-149 (2002), as cited in Wiesner, *supra* note 89, at 1158.

The next chapter will outline in more detail the processes through which indigenous peoples have participated at the United Nations over the years leading up to the adoption of UNDRIP, as well as those which continue to welcome their involvement.

Chapter 3: Indigenous Peoples and the United Nations Processes

This chapter will introduce the role that indigenous peoples have played within the United Nations systems and its processes. It will reveal how far the rights of indigenous peoples have come in the last 30 years and the recognition and respect that has been accorded to them within the international arena. The study of these various institutional mechanisms is crucial in order to understand the views expressed by both states and non-state indigenous group claimants in these international fora. The views of selected states and groups will be examined in detail in the next two chapters in order to inform the definition or identification of the term ‘indigenous peoples’ from an Asian perspective under international law.

This chapter will distinguish between those UN institutions and processes directly related to the issues of indigenous peoples and those fora which are much larger in scope but somehow touch indigenous peoples’ concerns. The former category consists of fora such as the UN Working Group on Indigenous Populations; the Permanent Forum on Indigenous Issues; the Special Rapporteur mechanism; and The Expert Mechanism on the Rights of Indigenous Peoples. Other fora or institutions related to indigenous peoples’ rights and concerns are the International Labour Organization (ILO Convention 107 & 169) and the World Bank. While there are other significant UN forums, such as the Committee on the Elimination of Racial Discrimination (CERD) and the UN Human Rights Committee that have played a significant role with regard to the rights of indigenous peoples, it is beyond the scope of this thesis to examine submissions to these forums as well.

Before going into detailed descriptions of each mechanism and forum, it is important to understand the theoretical framework under which indigenous peoples could participate in the processes of norm creation and emerge as the makers of international law.

3.1. Emergence of Indigenous Peoples as International Lawmakers

Here, I will highlight how the multi-layered approaches taken by indigenous peoples as participants in the making of international law led to the successful identification of the core normative precepts that ultimately facilitated recognition of a distinct indigenous peoples' category in international legal sphere.

As noted in the Introduction, according to the traditional and positivist account, states and international organizations (to a limited extent) were the primary subjects and makers of international law.¹⁷¹ International law, according to this view, is produced only through state consent or agreements.¹⁷² Non-state groups, such as minorities, indigenous and tribal groups, were historically mere objects who could not participate and influence the decision-making in the international law.¹⁷³ On the other hand, indigenous peoples have played an increasingly significant role in international law-making through participation in the construction of a distinct international legal identity and norms unique to their situation.¹⁷⁴ According to Miranda, indigenous peoples engage in both *bottom-up* and *top-down* approaches to participation in order to identify core indigenous norms and

¹⁷¹ See Shaw, *supra* note 2, at 177. See generally John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Irwin Law Inc., 2007).

¹⁷² See Miranda, *supra* note 37, at 210. See Harlan Grant Cohen, Finding International Law: Rethinking the Doctrine of Sources, 93 Iowa L. Rev. 65, 83 (2007). [as cited in Miranda]

¹⁷³ See generally Barsh, *supra* note 38.

¹⁷⁴ See Miranda, *supra* note 37, at 205.

values which are distinct from other groups.¹⁷⁵ Using bottom-up approach, they participated in and organized transnational networks, movements and non-governmental organizations which were dedicated to produce knowledge on the issues concerning indigenous peoples and generate consensus on certain areas of norms related to them.¹⁷⁶ Examples of these institutions include the UN Working Group on Indigenous Populations, the UN Permanent Forum on Indigenous Issues, and the formation of the World Council of Indigenous Peoples.¹⁷⁷ On the other hand, they engaged in the formal and institutionalized top-down approach of decision making through advocacy before various international and regional human rights bodies and mechanisms.¹⁷⁸

Thus, they have “employed a multi-layered approach to international human rights lawmaking that includes participation in both informal mechanisms of knowledge production and norm-generation as well as more formal decision-making structures”¹⁷⁹ which, in the end, provides greater legitimacy to the lawmaking processes and norms which came out of those processes. It is important to note that such legitimate processes and the resulting normative outcomes are equally applicable to the issue of defining indigenous peoples in international law.

According to Miranda, there are four factors which contributed to the emergence of indigenous peoples as participants in international norm-building and decision-making processes, namely: (1) a change in the ideological conception of indigeneity; (2) globalization; (3) the emergence of participatory democracy; and (4) international

¹⁷⁵ Ibid, at 213, para 1.

¹⁷⁶ Ibid, at 228, para 2.

¹⁷⁷ See Chapter 2 for the historical narrative of indigenous peoples’ movements.

¹⁷⁸ See Miranda, *supra* note 37, at 213, para 1.

¹⁷⁹ Ibid, at 207, para 2.

advocacy by indigenous peoples.¹⁸⁰ First, the significant shift in the ideological conception of indigeneity took place in 1980s when the then existing idea of indigenous peoples as savage and inferior and in need of assimilation within the larger society was rejected. Instead, there was recognition of distinct indigenous cultural identity which rendered previous ideology as racist and discriminatory practices.¹⁸¹ For example, ILO Convention 107, which reflected assimilationist policies, was revised in the late 1980s and was normatively replaced by ILO Convention 169.¹⁸² However, there are critical TWAIL scholars such as Seth Gordon who argue that, though the latter convention was a big improvement, the vestiges of the old system still prevailed, namely a presumption of state authority over the indigenous peoples; and the relocation of native peoples when the state feels necessary.¹⁸³

Second, the process of globalization¹⁸⁴ enabled local groups and activities to achieve global repercussions and significance. It also offers different indigenous communities the opportunity to come together, share their common experiences and develop strategies to develop global indigenous norms. Thus non-state actors and transnational networks had opportunities to participate in global governance.¹⁸⁵ Further, international interests and acceptance of democratic global governance¹⁸⁶ helped

¹⁸⁰ Ibid, at 219, para 2.

¹⁸¹ Ibid, at 220, para 1.

¹⁸² Please see Chapter 1 (1.5) for the background on the ILO Convention 169. Further details on the said Convention are laid down in this and subsequent chapters. It is important to note here that the status of the Convention under international law and its norms are complex to fully comprehend, and further in-depth research is needed for that purpose.

¹⁸³ See Gordon, *supra* note 91, at 421, para 4.

¹⁸⁴ Julie Mertus, "From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society" (1999) 14 *Am U Int'l L Rev* 1335.

¹⁸⁵ See Miranda, *supra* note 37, at 222, para 2.

¹⁸⁶ Richard Falk, "The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society" (1997) 7 *Transnational Law and Contemporary Problems*, 334. As cited in Miranda, *ibid*, at 223.

recognize indigenous peoples' participatory role in international lawmaking.¹⁸⁷ Finally, strong and consistent advocacy by indigenous peoples at various levels of international and national decision-making bodies and forums led to greater recognition of their participatory rights.¹⁸⁸

Indigenous peoples have pursued their cause within the normative framework of human rights, which has provided legitimacy or helped translate indigenous claims into recognizable human rights.¹⁸⁹ Through their participation in the lawmaking processes, they were successful in identifying these distinctive claims as specifically applicable to them within the large corpus of international human rights law.¹⁹⁰ Some of the indigenous claims which received recognition within various declarations and treaties are their right to self-determination, the right to not be discriminated against, the right to cultural integrity, and the right to land and resources.¹⁹¹ Thus "indigenous peoples have contributed to the recognition of the legal category "indigenous peoples" and to the creation of a well-established body of international norms that specifically address [their] human rights."¹⁹² These norms may be classified as having formed either 'hard' and 'soft' international law regarding indigenous peoples' rights.¹⁹³ The hard law consists of binding international treaties and customary international law norms, whereas soft law

¹⁸⁷ See Miranda, *Ibid*, at 223.

¹⁸⁸ James Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources" (2005) 22 *Ariz J. Int'l & Comp L.* 7, 16; Erik B. Bluemel, "Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-making" (2005-2006) 20 *Am. Indian L. Rev.* 77-78. As cited Miranda, *ibid*, at 223.

¹⁸⁹ *Ibid*, at 217, para 2.

¹⁹⁰ *Ibid*, at 224, para 3.

¹⁹¹ See Chapter 6 for further details.

¹⁹² See Miranda, *supra* note 37, at 228, para 1.

¹⁹³ *Ibid*, para 2.

includes declarations, resolutions and other non-binding jurisprudence from human rights bodies.¹⁹⁴ According to Miranda:

With respect to the production of “hard law”, indigenous peoples participated, albeit in a limited manner, in the International Labour Organization’s (“ILO”) design of ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries. Although the ILO is not an international body strictly within the human rights regime, the ILO’s work has impacted the recognition and development of indigenous peoples’ human rights. In the context of “soft-law”, indigenous peoples have contributed to the standard-setting work of the United Nations Permanent Forum on Indigenous Issues, United Nations working groups dedicated to addressing indigenous peoples’ issues and rights, human rights treaty compliance bodies, and regional human rights commissions and courts.¹⁹⁵

As stated earlier, their participation in the norm-building and decision making processes contributed to the design of the legal category ‘indigenous peoples’ as well as the creation of a well-established body of international human rights specific to indigenous peoples. In this project, they have contributed to this new legal category in three different ways. First, they determined the scope of the term ‘indigenous’ by differentiating it from other group identities such as minorities. The main characteristics which determined the term ‘indigenous’ were: communal, religious and cultural ties to their ancestral lands and resources; assertion of collective rights and self-determination; and seeking institutional separateness within state sovereignty.¹⁹⁶ Secondly, indigenous peoples¹⁹⁷ advocated for the use of the term ‘peoples’ during the drafting of ILO

¹⁹⁴ Dinah Shelton, “Normative Hierarchy in International Law” (2006) 100 AJIL 319-23. See Miranda, *ibid*, at 233, para 2.

¹⁹⁵ See Miranda, *ibid*, at 233, para 3.

¹⁹⁶ *Ibid*, at 245, para 3.

¹⁹⁷ This will be discussed in greater detail in chapter 4.

Convention 169. They preferred using the term ‘peoples’ rather than ‘populations’ because the term ‘peoples’ was representative of collective rights such as right to self-determination.¹⁹⁸ Finally, indigenous peoples have contributed to the distinct legal category of ‘indigenous peoples’ by advocating an open ended meaning for the term, rather than a strict legal definition.¹⁹⁹ Thus, they have purposefully left the definition and identity of indigenous peoples in ambiguity²⁰⁰ and supported a process of self-identification and recognition among indigenous groups.²⁰¹

In the end, it is clear that indigenous peoples’ participation in these formal and informal international processes had contributed significantly to the emergence of indigenous peoples as subjects and makers of international law concerning their rights. As will be seen in below in Chapters 3 and 4, I have tried to research the definition of indigenous peoples within an Asian context by relying mainly on the materials and statements expressed under Miranda’s bottom-up approach. Before moving on, it is therefore important to better understand the United Nations and other international fora and mechanisms related to the rights of indigenous peoples.

3.2. UN Working Group on Indigenous Populations

As mentioned in the preceding chapters, due to the rapid increase in international indigenous peoples’ movements in the 1960s and 1970s, the Working Group on Indigenous Populations was created in 1982 by the UN Economic and Social Council (ECOSOC) as a subsidiary organ of the Sub-Commission on the Promotion and

¹⁹⁸ Ibid, at 246, para 2.

¹⁹⁹ Ibid, at 247, para 2.

²⁰⁰ See Niezen, *supra* note 139, at 18.

²⁰¹ See Miranda, *supra* note 37, at 247, para 2.

Protection of Human Rights. According to ECOSOC resolution 1982/34 of May 7, 1982, the Working Group had two mandates: (a) “to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples” and (b) “to give attention to the evolution of international standards concerning indigenous rights.”²⁰²

The establishment of this body opened doors to all indigenous peoples and their organizations to participate in the Working Group sessions and allowed oral and written submissions by them.²⁰³ According to Robert A. Williams, “the Working Group is a unique body within the institutional human rights structure of the United Nations. Its mandate as a forum devoted exclusively to the survival of indigenous peoples includes the urgent task of developing international legal standards for the protection of indigenous peoples’ human rights.”²⁰⁴ Its basic mandate was to draft standards on the rights of indigenous peoples and produce a formal declaration on it.²⁰⁵

The Working Group consisted of five independent experts and members of the Sub-Commission - one from each of the five regions of the world. The Norwegian member of the Sub-Commission, Asbjorn Eide, became the first chairman of the group.²⁰⁶ The five officially-recognized regions were Africa, Asia, Eastern Europe, Latin America, and ‘Western Europe and Others’ (WEOG) which included the United States,

²⁰² *Working Group on Indigenous Populations*, online: Office of the United Nations High Commissioner for Human Rights < <http://www2.ohchr.org/english/issues/indigenous/groups/wgip.htm#mandate> >

²⁰³ See Anaya 2009, *supra* note 73, at 17, para 3.

²⁰⁴ *Ibid.*, at 18, para 2. Robert A. Williams, Jr., “Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World” (1990) 4 Duke L.J. 676, para 4. [As cited by Anaya 2009]. Prof. Robert A. Williams is E. Thomas Sullivan Professor of Law and American Indian Studies at the University of Arizona and expert on the Indian law, international law and indigenous peoples’ rights.

²⁰⁵ Douglas Sanders, “The UN Working Group on Indigenous Populations” (1989) 11 Hum Rts Q 407, para 2. [Hereinafter Sanders]

²⁰⁶ *Ibid.*, at 408, para 1.

Canada, New Zealand and Australia. The Working Group was opened to all representatives of indigenous peoples and their communities and organizations. The annual meeting of the Working Group was highly structured and formalized, and all the interventions, reports and submissions (whether oral or written) were made to the five member working group.²⁰⁷ The Government reports generally focused on the progress the state had made towards securing indigenous peoples' rights, whereas reports by indigenous peoples and non-governmental organizations (NGOs) stressed the continuing lack of progress and implementation from governments.²⁰⁸

In such a public space, indigenous peoples or groups were allowed ten-minute oral interventions to the chair. The “interventions usually describe[d] government actions and policies affecting indigenous peoples' human rights” and “frequently detail[ed] gross abuses of indigenous peoples' most basic human rights, invasions of indigenous territories, assaults on cultural survival, and denial of self-governing autonomy...”²⁰⁹ According to Anaya, while states were not legally bound to comply with such reports, they were usually compelled to respond due to the expectations and the legitimacy of the entire process and deliberations.²¹⁰ Thus, the information gathered from all the relevant actors and the Working Group's own expertise on the area provided the primary materials to help initiate a draft text for the universal declaration on the rights of indigenous peoples. As a result, according to Douglas Sanders, “the working group became the most

²⁰⁷ See Anaya, *supra* note 82, at 154, para 1.

²⁰⁸ *Ibid.*

²⁰⁹ See Anaya 2009, *supra* note 73, at 18, para 4.

²¹⁰ See Anaya, *supra* note 82, at 154, para 2.

open body in the UN system. Everywhere else the right to speak [was] limited to states, intergovernmental agencies, and accredited nongovernmental organizations (NGOs).”²¹¹

In 1985, the Working Group began preparing a draft declaration on the rights of indigenous peoples, and took into account the comments and suggestions of the participants in its sessions, particularly representatives of indigenous peoples and governments.²¹² At its eleventh session, in July 1993, the Working Group agreed on a final text for the draft United Nations declaration on the rights of indigenous peoples and submitted it to the Sub-Commission.²¹³ The negotiations and discussions among states, NGOs and indigenous peoples’ groups on the draft declaration dragged on for more than a decade, finally resulting in the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. Perhaps, the significance of the Working Group could be summed up in the comment by Mick Dodson, then Australia’s Aboriginal and Torres Strait Islander Social Justice Commissioner:

The Working Group has become the focal point of our coming together as the world’s indigenous peoples. In a sense, the Working Group is all about what international law and the UN have neglected. It is about bringing indigenous peoples into the UN system where we have been marginalized and unnoticed. It is about forcing the UN system to face its responsibility as the body charged with protecting the rights of all peoples. It is about transforming the UN from a club serving the interests of its members, namely nations and their well-suited diplomats, to a body of peoples.²¹⁴

²¹¹ See Sanders, *supra* note 205, at 408, para 1.

²¹² *Ibid.*, at 408, para 2.

²¹³ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.

²¹⁴ Sarah Pritchard, “Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives” in Sarah Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (1998) 63. As cited in Odette Mazel, “The Evolution of Rights: Indigenous Peoples and International Law” (2009) 13 *Austl. Indigenous L. Rev.* 146.[Hereinafter Mazel]

In the year 2007, with the adoption of the UNDRIP, the Working Group was disbanded and replaced by the Expert Mechanism on the Rights of Indigenous Peoples, which was established by the newly formed UN Human Rights Council.²¹⁵

3.3. Permanent Forum on Indigenous Issues

The idea of creating a Permanent Forum on Indigenous Issues was first discussed at the 1993 World Conference on Human Rights and in its resulting document, the Vienna Declaration and Programme of Action.²¹⁶ The United Nations Permanent Forum on Indigenous Issues (UNPFII) was established by the UN Economic and Social Council (ECOSOC) by resolution number 2000/22 of the 28th July 2000 as a subsidiary organ of the Council consisting of sixteen members. Eight of these members are to be nominated by their governments and elected by the Council, and eight members are to be appointed by the President of the Council following formal consultation with the Bureau and the regional groups through their coordinators.²¹⁷ These sixteen experts function in their personal capacity and serve as members for a term of three years. They may be re-elected for one additional term. The independent experts represent all the regions recognized by the Forum, namely: Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific.²¹⁸

²¹⁵ HRC Resolution 6/36, adopted on December 14, 2007.

²¹⁶ See Anaya 2009, *supra* note 73, at 20, para 5. Vienna Declaration and Programme of Action, World Conference on Human Rights, June 14-25, 1993, pt. 2, para. 32, U.N. Doc. A/CONF.157/23 (1993). [as cited in Anaya 2009]

²¹⁷ E.S.C. Res. 2000/22. See Anaya 2009, *ibid*, at 21.

²¹⁸ *Membership of the Permanent Forum on Indigenous Issues*, online: UNPFII <<http://social.un.org/index/IndigenousPeoples/AboutUsMembers/MembersoftheForum.aspx>>

The names of some current forum members (2011-13) from Asia are: Ms. Paimanach Hasteh (Iran) and Mr. Raja Devasish Roy (Bangladesh). Some of the earlier relevant members from the Asian region were Ms. Victoria Tauli-Corpuz (2005-07/2008-10) from the Philippines and Mrs Qin Xiaomei (2002-04/2005-07) from China.²¹⁹

According to Article 2 of the resolution creating the UNPFII:

the Permanent Forum on Indigenous Issues shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights; in so doing the Permanent Forum shall:

- (a) provide expert advice and recommendations on indigenous issues to the Council as well as to programmes, funds and agencies of the United Nations, through the Council;
- (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system;
- (c) Prepare and disseminate information on indigenous issues.²²⁰

Accordingly, the resolution called upon the Permanent Forum to provide expert advice and recommendations on indigenous issues to the UN system through ECOSOC; to raise awareness and promote the integration and coordination of relevant activities within the UN system; and to prepare and disseminate information on indigenous issues.²²¹

The UNPFII met for the first time in May 2002 in New York, which has been the location of the annual meeting ever since. Its work is centered mainly on the review and coordination of the programs of various UN agencies and affiliates that concern indigenous peoples, and has been organised around the contemporary topical areas of

²¹⁹ Ibid.

²²⁰ Article 2, E.S.C. Res. 2000/22. Ibid, at 21.

²²¹ Ibid.

ECOSOC's work which are mentioned in the Council's resolution. The area of its mandate includes social and economic development, the environment, culture, education, health, and human rights.

3.4. The Expert Mechanism on the Rights of Indigenous Peoples

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established by the Human Rights Council, the UN's main human rights body, in 2007 under Resolution 6/36²²² as a subsidiary body of the Council. It replaced the UN Working Group on Indigenous Populations, which was a substructure of the disbanded United Nations Commission on Human Rights.

The mandate of the EMRIP mechanism is to provide the "Human Rights Council with thematic advice, in the form of studies and research, on the rights of indigenous peoples as directed by the Council. The Expert Mechanism may also suggest proposals to the Council for its consideration and approval."²²³ The EMRIP is made up of five independent experts on the rights of indigenous peoples. These experts are appointed by the Human Rights Council which gives due regard to experts of indigenous origin as well as to gender balance and geographic representation. It holds its annual session in July, in which representatives from states, indigenous peoples, indigenous peoples' organisations, civil society, inter-governmental organisations and scholars take part as observers. In addition, the Special Rapporteur on the Rights of Indigenous Peoples and a member of

²²² *UN Human Rights Council Resolution 6/36*, online: <
http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_36.pdf>

²²³ *The Expert Mechanism on the Rights of Indigenous Peoples*, online: OHCHR <
<http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>>

the UN Permanent Forum on Indigenous Issues are usually invited to attend the annual session of the Expert Mechanism to enhance coordination and cooperation between these mechanisms.²²⁴ Among the five present independent experts is Ms. Jannie Lasimbang (Malaysia).²²⁵

So far, the Expert Mechanism has completed two thorough studies on the subject of: (a) indigenous peoples' right to education, and (b) indigenous peoples' right to participate in decision making. Currently, they are "preparing a study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples."²²⁶

3.5. UN Special Rapporteur on the Rights of Indigenous Peoples

The increase in global attention to the human rights situation of indigenous peoples, and the adoption of draft declarations and principles with regard to the rights of indigenous peoples prompted the Commission on Human Rights to appoint, in 2001, a Special Rapporteur on the Rights of Indigenous Peoples. Dr. Rodolfo Stavenhagen (Mexico) became the first Special Rapporteur from the year 2001 to 2008, and was replaced by the current incumbent Special Rapporteur, Prof. James Anaya (United States). The mandate of this office was renewed in 2007, when the Human Rights Council replaced the Commission on Human Rights.²²⁷

According to Human Rights Council Resolution 15/14, the mandate of the office of the UN Special Rapporteur on the Rights of Indigenous Peoples includes:

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ *Special Rapporteur on the Rights on the Rights of Indigenous Peoples*, online: OHCHR <<http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>>

- (a) To examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples, in conformity with his/her mandate, and to identify, exchange and promote best practices;
- (b) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples;
- (c) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the rights of indigenous peoples; and
- (d) To work in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the Rights of Indigenous Peoples, relevant United Nations bodies, the treaty bodies, and regional human rights organizations.

In carrying out these different activities, the Special Rapporteur is required to work "in close cooperation with the Permanent Forum on Indigenous Issues and to participate in its annual session;" to "develop a regular cooperative dialogue with all relevant actors;" to pay "special attention to the situation of indigenous children and women;" to consider "relevant recommendations of the world conferences and treaty bodies on matters regarding his/her mandate;" and to "submit a report on the implementation of his/her mandate to the Council in accordance with its annual programme of work."²²⁸

The Special Rapporteur is also required to present an annual report to the UN Human Rights Council at one of its regular sessions in Geneva. The Special Rapporteur's annual reports include a description of the activities carried out during the year and also normally include discussion of specific themes or issues of particular relevance for the

²²⁸ *Mandate: Office of the High Commissioner for human rights*, online: < <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Mandate.aspx> >

rights of indigenous peoples. Apart from this, it also draws attention to special reports on different thematic studies, country reports, and communication reports on the communication between states and the special rapporteur office.²²⁹

One of the most important mechanisms associated with the office is the communications mechanism on alleged human rights violations. A complaint can be initiated by any indigenous peoples, their organizations and other sources, provided that the alleged violation is within the mandate and scope of the office. As part of his mandate, “the Special Rapporteur intervenes in response to alleged violations of the rights of indigenous peoples. The intervention can relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process, in general, involves the sending of a confidential communication to the concerned government requesting information, commenting on the allegation and suggesting that preventive or investigatory action be taken.”²³⁰

3.6. World Bank Policies

The World Bank,²³¹ along with International Monetary Fund (IMF), was established at the Bretton Woods Conference in the United States in July 1944.²³² These two international financial institutions were created as a result of economic hardships of

²²⁹ *Annual Reports: Office of the High Commissioner for human rights*, online: < <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/AnnualReports.aspx> >

²³⁰ *Communications: Special Rapporteur on the Rights of Indigenous Peoples*, online: < <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Communications.aspx> >

²³¹ The term ‘World Bank’ consists of five international organizations, namely: International Bank for Reconstruction and Development (IBRD); International Development Association (IDA); International Financial Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA); and the International Centre for Settlement of Investment Disputes (ICSID).

²³² Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Routledge, 2001) at 9. [Hereinafter Skogly]

the Great Depression (1930s) and the economic difficulties faced during World War II.²³³ During World War II, initiatives were taken by the allied states to prepare for the international economic regime of the post-war peace time situation.²³⁴ As a result, these two institutions were established with different mandates. The World Bank's primary tasks was the reconstruction of war-torn Europe and to facilitate economic resources in the developing world, whereas the Fund's mandate was to solve balance of payment problems and achieve international monetary cooperation among states.²³⁵

The World Bank became one of the first financial institutions to endorse separate policies and guidelines concerning indigenous peoples. It represents the main international institution that promotes development and financial reconstruction by giving loans to poor countries in need of funds for economic development. Since 1982, the Bank has set up policies and safeguard provisions (to protect indigenous peoples' interests) to be observed by the lending nations.

In February 1982, the World Bank adopted Operational Manual Statement 2.34 on *Tribal People in Bank-Financed Projects*.²³⁶ Though the Bank had taken into account tribal peoples' interests, its main focus was not safeguarding tribal peoples' rights. Statement 2.34 considered that "tribal peoples are more likely to be harmed than helped by development projects that are intended for beneficiaries other than themselves."²³⁷ The overall approach in this policy was integrationist, with the main objective "to ensure the

²³³ Ibid, at 15, para 1.

²³⁴ Ibid.

²³⁵ Ibid, para 2. For critical analysis, see B.S. Chimni, "International Financial Institutions and International Law: A Third World Perspective" in Daniel D. Bradlow & David Hunter (eds) *International Financial Institutions and International Law* (Kluwer Law International, 2010), Chapter 2.

²³⁶ Sia Spiliopoulou Akermark, "The World Bank and Indigenous Peoples" in Nazila Ghanea and Alexandra Xanthaki (eds) *Minorities, Peoples and Self-Determination* (Martinus Nijhoff Publishers, 2005) 95. [Hereinafter Akermark]

²³⁷ Operational Manual Statement (OMS) 2.34.

integration and adaptation of tribes into the wider political economies and rural societies of their country.”²³⁸ Thus, the policy was intended for projects where tribal peoples were not the direct beneficiaries, and the projects were not made directly applicable to them because the tribal peoples needed to go through ‘adequate time and conditions for acculturation’ which was slow and gradual.²³⁹ For all practical purposes, then, the Bank followed an integrationist policy towards tribal and indigenous peoples, rendering them beyond or outside the scope of Bank’s developmental projects.

Due to these drawbacks, a shift in the Bank’s policy towards indigenous peoples took place in September 1991 when it adopted a revised Directive on indigenous peoples, known as *Operational Directive 4.20*. In this new directive, indigenous peoples were ensured direct benefit from the development projects and recognition was given to indigenous peoples’ dignity, human rights and cultural uniqueness.²⁴⁰ The definitional criteria used to identify indigenous peoples were broader in this directive, where both the term tribal and indigenous peoples were expressly used and pointed out a number of characteristics. The term ‘indigenous peoples’ in Operational Directive 4.20 covers also indigenous ethnic minorities, tribal groups, and scheduled tribes.²⁴¹ The term was defined as “social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process.”²⁴² Some of the characteristics in this definition were: close attachment to ancestral territories and natural resources; self-identification and identification by others; indigenous language

²³⁸ S. Davis, *The World Bank and Indigenous Peoples*, Paper presented at the Denver Initiative Conference on Human Rights, University of Denver Law School, April, 1993, (Washington: World Bank). As cited in Akermark, *supra* note 236, at 97.

²³⁹ See Akermark, *ibid*, at 97.

²⁴⁰ OD 4.20., para 6. As cited in Akermark, *ibid*, at 99.

²⁴¹ Operation Directive 4.20. para 3-5.

²⁴² *Ibid*.

distinct from the national language; customary social and political institutions; and primary subsistence-oriented production.²⁴³

In 2005, a new *Operation Policy 4.10* (OP 4.10) was adopted and replaced the previous ones. Here the Bank recognizes that the distinct “identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend.”²⁴⁴ It requires client governments to seek broad community support of indigenous peoples through a process of free, prior, and informed consultation before deciding on development projects affecting indigenous Peoples. It ensures and “respects the dignity, human rights, economies and cultures of indigenous peoples.”²⁴⁵

OP 4.10 does not distinguish between indigenous peoples and other groups, noting that “indigenous peoples” could be referred to in different countries by such terms as “indigenous ethnic minorities”, “aboriginals”, “hill tribes”, “minority nationalities”, “scheduled tribes”, or “tribal groups”.²⁴⁶ According to para 4 of the policy:

The term “Indigenous Peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:

- (a) Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (b) Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;

²⁴³ Ibid.

²⁴⁴ *Operational Policy 4.10*. (para 2). Online: The World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564187~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html>>

²⁴⁵ Ibid, para 1.

²⁴⁶ Ibid, para 3.

- (c) Customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (d) An indigenous language, often different from the official language of the country or region.

The World Bank established ‘The Inspection Panel’ on September 22, 1993, and identified its jurisdiction over projects or operations supported by the International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA). The Inspection Panel provides a forum for people to bring their grievances and concerns to the highest level of decision-making. It is for those who believe that they may be adversely affected by Bank-financed operations. Thus, “the Panel determines whether the Bank is complying with its own policies and procedures, which are designed to ensure that Bank-financed operations provide social and environmental benefits and avoid harm to people and the environment.”²⁴⁷ Instead of taking a top-down approach for resolving disputes, it empowers common people who are directly and adversely affected by the Bank-funded projects within/around their natural environment. Further, it enhances institutional “accountability” and “transparency”, and ensures effectiveness to the Bank-funded operations.²⁴⁸

The World Bank Inspection Panel consists of three members who are appointed for five years by the Board of Executive Directors. They are selected on the basis of their ability to fairly deal with the requests brought to them, and their integrity and independence from Bank Management. In addition, an executive secretariat supports and

²⁴⁷ *The Inspection Panel*, online: The World Bank < <http://go.worldbank.org/Z7KI8UTFZ0>>

²⁴⁸ *Ibid.*

assists all Panel activities. One of the current panel members, Ms. Eimi Watanabe, belongs to Japan.²⁴⁹

Another mechanism related to the World Bank is the Compliance Advisor Ombudsperson (CAO) which is an independent recourse mechanism for projects supported by the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), which are private sector lending arms of the World Bank Group. The CAO responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground. Its goals are: to address the concerns of individuals or communities affected by IFC/MIGA projects; enhance the social and environmental outcomes of IFC/MIGA projects; and foster greater public accountability of IFC and MIGA.²⁵⁰ Furthermore, it has three different roles, namely, as ombudsman, compliance role and advisor. As ombudsman, the CAO responds to complaints by people affected by the social and environmental impacts of IFC/MIGA projects. It works with stakeholders to resolve grievances using a flexible problem-solving approach, and ideally improve outcomes on the ground.

3.7. International Labour Organization and Indigenous Peoples

The ILO, founded in 1919, is one of the first international organizations to deal with and oversee international labour standards and rights. According to ILO, it is the “only tripartite U.N. agency that brings together representatives of governments, employers and workers to jointly shape policies and programmes promoting Decent

²⁴⁹ Ibid.

²⁵⁰ *Compliance Advisor Ombudsperson*, online: < <http://www.cao-ombudsman.org/about/howweare/index.html> >

Work for all. This unique arrangement gives the ILO an edge in incorporating 'real world' knowledge about employment and work.²⁵¹ In 1921, the ILO began to address the conditions of the native workers in the overseas European colonies.²⁵² The indigenous workers, in these parts of the world, were most exploited and suppressed at their workplaces, and the least recognized category of peoples in terms of their labour rights and benefits.

After the creation of the United Nations, the ILO began to address and focus more on the issues pertaining to indigenous and tribal peoples, and participated in the deliberations of many other UN agencies and bodies. In the 1950s, the ILO worked on the *Indigenous and Tribal Populations Convention (No. 107)* which was finally adopted in 1957 as the first ever international treaty law on indigenous peoples' rights.²⁵³ The Convention was eventually ratified by 27 countries, but was later denounced by ten countries, namely – Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, Peru and Portugal.²⁵⁴ The present status of the Convention (as of June 2012) is that it remains in force for only 17 countries,²⁵⁵ including a few Asian states such as

²⁵¹ ILO's official website. See online: <<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>>

²⁵² History of ILO's Work, see online: <<http://www.ilo.org/indigenous/Aboutus/HistoryofILOswork/lang--en/index.htm>>

²⁵³ Ibid. The Convention came into force on 2nd June 1959, twelve months after the date on which the ratifications of two Members have been registered with the Director-General. See Article 31(2) of the ILO Convention 107, *supra* note 49.

²⁵⁴ *International Labour Organization*, online: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:312252>

²⁵⁵ They are Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syrian Arab Republic and Tunisia. See Ratifications of C107, online: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:4261508880459706::NO:11300:P11300_INSTRUMENT_ID:312252>

India, Bangladesh and Pakistan.²⁵⁶ But it no longer remains open for ratification²⁵⁷ due to the subsequent revised Convention 169 and reasons which will be discussed below.

The glory of Convention 107 was a short-lived one and the ILO was subsequently criticized and made to rethink some of its key points by many indigenous peoples' groups, activists and NGOs. The criticism was due to the underlying integrationist outlook and assumption in the Convention that the only possible future for indigenous and tribal peoples was integration into the larger society and that the state should make decisions on their development.²⁵⁸ This attitude could be clearly seen in the preamble and other provisions of the Convention, where "the adoption of general international standards on the subject will facilitate action to assure the protection of the populations [indigenous and tribal] concerned with their *progressive integration* [emphasis added] into their respective national communities and the improvement of their living and working conditions..."²⁵⁹

Further Article 2 of the said convention proclaims that:

1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.
2. Such action shall include measures for--
 - (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;

²⁵⁶ ILO Convention No 107, *supra* note 49. See *Convention No. 107*, online: ILO < <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm> >

²⁵⁷ See *Convention No. 107*, online: ILO < <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm> >

²⁵⁸ See Akermark, *supra* note 236.

²⁵⁹ ILO Convention No 107, *supra* note 49, Preamble, para 8.

(b) promoting the social, economic and cultural development of these populations and raising their standard of living;

(c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.

3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.

4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.²⁶⁰

For these reasons, a committee of experts was convened in 1986 by the ILO's governing body, and concluded that "the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world."²⁶¹ Therefore, in June 1989 the *Indigenous and Tribal Peoples Convention (No. 169)*²⁶² was adopted, and came into force on September 5, 1991 after two countries had ratified it.²⁶³ The new Convention is based on an attitude of respect for the cultures and ways of life of tribal and indigenous peoples, and they must be consulted and given a chance to participate in the decision-making processes at all levels. As of June 2012, it has been ratified by 22 countries and remains the only authoritative law on the rights and status of indigenous peoples in international law.²⁶⁴ However, the only Asian state that has ratified this Convention remains Nepal, who joined this treaty regime in the year 2007.

Moreover, even though the separate Convention 169 was based upon the revision²⁶⁵ of the previous Convention which makes it much more progressive and acceptable according to today's norms and standards, the irony is that it technically never replaced

²⁶⁰ Ibid, article 2.

²⁶¹ For history of ILO's work, see *supra* note 252.

²⁶² See ILO Convention 169, *supra* note 48.

²⁶³ Article 38 (2) of the Convention. Ibid.

²⁶⁴ It remains authoritative or standard setting in accordance with modern human rights law and is a legally binding treaty on the rights of indigenous peoples. Many of its principles were subsequently affirmed in the UNDRIP, such as those relating to land and cultural rights.

²⁶⁵ Para 3, 5 and 11 of the Preamble and Article 36 of the ILO Convention 169, *supra* note 48.

the Convention 107. Accordingly, the assimilationist provisions²⁶⁶ in Convention 107 continue to be in force for 17 state parties, including the Asian states listed above.²⁶⁷

With regard to the definition of indigenous peoples, as noted in the Introduction, Article 1 of ILO Convention 169 makes clear that it applies to:

- (c) *tribal peoples* in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (d) peoples in independent countries who are regarded as *indigenous* on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.²⁶⁸

Further, Article 1 (2) stressed the importance of self-identification in order for groups to emerge as indigenous peoples, and affirms that “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.”²⁶⁹

²⁶⁶ Para 6 and 8 of the Preamble, and Article 1(2), 2(1), 2(2)(c) and 22 of the Convention 107, *supra* note 49.

²⁶⁷ Though ILO categorized Convention 107 as “outdated instrument”, it still remains in force. See *List of instruments by subject and status*, online: < <http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO> >

²⁶⁸ See Convention 169, *supra* note 48.

²⁶⁹ *Ibid.*

The ILO supervisory system includes both ‘reporting’ and ‘complaint procedures’ applicable to all states which are parties to the conventions.²⁷⁰ The reporting mechanism is regulated by Article 22 of the ILO Constitution, and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) examines the application of ratified conventions by engaging in dialogue with concerned governments on the application and implementation of their treaty obligations. The ratifying states are required to send reports on treaty compliance to the Committee once every five years. The governments also must send copies of their reports to workers’ and employers’ organizations within their own country. The reports are then examined by the Committee (CEACR) which meets once a year, and makes comments if necessary. It can be either “direct requests” or “observations”. The former is less serious and preliminary and the comments are not published. In contrast, the “observations” are published as comments which appear in the annual reports of the committee and are submitted to the International Labour Conference for possible discussion. In the conference, the committee invites the representatives of the governments to explain the reasons behind any non-compliance to any treaty obligations.

In terms of complaints procedures, there are two different methods – one under Article 26 and the other Article 24 of the ILO constitution.²⁷¹ Under Article 26, any

²⁷⁰ Lee Swepston, “The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption” (1998). As cited in Anaya 2009, *supra* note 73, at 145. For details on the ILO supervision, see online: < <http://www.ilo.org/indigenous/Conventions/Supervision/lang--en/index.htm>>

²⁷¹ *ILO Constitution*, online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:62:4261508880459706::NO:62:P62_LIST_ENTRIE_ID:2453907:NO>; For critical view on the ILO and indigenous peoples, see Gordon, *supra* note 91. According to him, the Convention 169, despite many ‘laudable provisions’, reflected weakness in its ‘affirmation of traditional international [law] principles’ such as state and sovereignty. Thus the Convention ‘contains the presumption of state authority over the indigenous peoples’. One such example is Article 16(2) which contains ‘allowance of relocation of native populations when the state deem necessary.’ [See Gordon, at 421]

government, any delegate to the conference, or the governing body of the ILO may file a complaint alleging the violation of Convention norms by a state party to it, and establish a commission of inquiry which holds hearings on the case. Under Article 24, any workers' or employers' organization can file a "representation" alleging violations or failure to observe certain provisions of the Conventions. A tripartite Governing Body Committee is then appointed and decides the case, including cases related to the standards on indigenous peoples.

3.8. Conclusion

This chapter has introduced some of the important international fora that directly deal with the issues relating to the rights of indigenous peoples. These bodies or institutions, in the end, help protect, promote and create standards and norms relating to indigenous peoples in international law.

The next two chapters will relate the views of both select Asian states and indigenous group claimants on the definition of 'indigenous peoples'. These chapters will draw mainly on the views and submissions presented in these international forums and mechanisms.

Chapter 4: Asian State Views on the Definition and Identification of Indigenous Peoples

This chapter will explore Asian state-centric views on the definition and identification of indigenous peoples. I will analyse four Asian states, namely, India, China, the Philippines and Bangladesh. Since there is no single Asian perspective on the definition of indigenous peoples, it becomes important to study separately the formal positions taken by these states and the reasons behind them.

The chapter will begin by briefly highlighting different approaches to the definition of indigenous peoples and the problems associated with each approach. I will also briefly point out the difference between the principles of first and prior occupancy when determining the issue of indigeneity.

4.1. Problems and Approaches to the Definition and Identification

The question of definition and identity of indigenous peoples largely remains uncertain and indeterminate in international law. There is no universally accepted definition of indigenous peoples, which in turn leads to varying interpretations by states. According to Prof. Ronald Niezen (an anthropologist at McGill University) there are three basic approaches to the definition of indigenous peoples, namely: legal/analytical; practical/strategic; and collective/global.²⁷²

The *legal/analytical* approach seeks to find out distinct positive criteria identifying indigenous peoples, and creates a constructive identity based on those features. According to Niezen, this approach:

²⁷² See Niezen, *supra* note 139, at 19, para 3. See also Anaya 2009, *supra* note 73, chapter 1.

seeks to isolate those distinctive phenomena among the original inhabitants of given territories that coalesce into a global category. The exercise is frustrating because of the historical and social diversity of those who identify themselves as “indigenous”. The question of definition thus has the inherent effect of pitting analysis against identity; there will inevitably be a group, seeing itself as indigenous, that is excluded from the scholarly definition, its pride assaulted, its honor tarnished, and more to the point, its access to redress obstructed.²⁷³

As a result, this approach tends to exclude many such groups who identify themselves as “indigenous”, yet are outside the scope of any formal definition.

Several examples of formal definitions of indigenous peoples that would fit the legal/analytical approach were presented in the Introduction. One example is the definition adopted by the former UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Martinez Cobo in 1986. As discussed in the Introduction, according to Cobo:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²⁷⁴

This approach to definition is controversial because of its requirement of “historical continuity with the pre-invasion and pre-colonial societies that developed on their

²⁷³ Ibid, at 19, para 3.

²⁷⁴ See Cobo, *supra* note 52.

territories.”²⁷⁵ According to Professor Benedict Kingsbury, this typically reflected the classical European case of colonial settlement in the western settler states such as US, Canada, Australia and New Zealand. This requirement did not reflect the reality in many Asian and African countries where there was no clear case of historical disruption by colonial settlement.

A second example discussed previously is ILO Convention No. 169, which provided an additional category of “tribal peoples” to the definition in its article 1(1) and called for a more diffused historical requirement. This Convention applies to:

- (a) *tribal peoples* in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as *indigenous* on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.²⁷⁶

Here, the ILO clearly states that the disruptions caused by either colonialism or at the time of establishing present state boundaries are conditions for determining the identity of indigenous peoples. As we will see below, many Asian states disagreed with the view that indigenous peoples existed in Asia at the time of establishing present state boundaries and continue to claim indigenous peoples exist only in western settler states.

²⁷⁵ See Kingsbury, *supra* note 52, at 420, para 2.

²⁷⁶ See ILO Convention 169, *supra* note 48.

The second approach to the definition of indigenous peoples is a *practical/strategic* one. In order to avoid the deficiency of the formal legal approach, and as noted in the previous chapter, the “Working Group on Indigenous Populations has, since its inception in 1982, maintained an open-door policy toward participation in its annual two-week long gathering of indigenous peoples and organizations.”²⁷⁷ This approach aligns with Kingsbury’s less abstract and more constructivist (inclusive) approach that adopts “a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies.”²⁷⁸ This approach is taken by the United Nations and its institutions such as the Human Rights Committee, the Special Rapporteur on the Rights of Indigenous Peoples, and the World Bank. According to Anaya, this approach focuses on the “rubric of “indigenous peoples ... with an implicit understanding of what kind of groups fall within this rubric and consensus on many of the particular groups that are indigenous.”²⁷⁹ Therefore it is non-exhaustive with regard to its criteria, and does not attempt to arrive at a prescriptive definition of which groups should be considered indigenous. Further, it is more programmatic in its orientation and tends to make “the matter of definition more one of describing which groups in a practical sense are relevant to the programmatic focus ... rather than a matter of first prescribing abstractly which groups qualify as indigenous (and, implicitly, which ones do not) and then ascribing to them rights.”²⁸⁰

²⁷⁷ See Niezen, *supra* note 139, at 21, para 3.

²⁷⁸ See Kingsbury; *supra* note 52, at 415.

²⁷⁹ Anaya 2009, *supra* note 73, at 28, para 1.

²⁸⁰ *Ibid*, at 29, para 4.

The third approach to a definition of indigenous peoples is the *collective/global approach*, which is informal, never explicitly explained, and was developed and acted upon by indigenous peoples and their delegates.²⁸¹ This approach is based on the idea of self-identification by and among indigenous groups as “indigenous peoples” and carefully distinguishes their identity and experience from those of states. It usually begins with a sense of regional and global solidarity “with those who share similar ways of life and histories of colonial and state domination that then grows into the realization that others around the world [also] share the same experience.”²⁸² So this global aspect to indigenous identity ultimately acts as a basis for bringing indigenous peoples and groups together in international meetings and movements. The UN Working Group on Indigenous Populations was the main international platform where indigenous and tribal groups could collectively come together and affirm the concept of self-identification. This approach is similar and related to the second approach, but forms only a part of the later.

As will be shown below, the concept of indigenous peoples is inherently linked with issues relating to conflicts over lands, forests, natural resources and sovereignty. Many Asian states including China, India and Bangladesh opposed the application of the term “indigenous peoples” within their own territory. These states expressed strong opposition to the second and third approaches to the definition and identification of indigenous peoples, and were instead drawn to the legal analytical approach. The Philippines, on the other hand, was more inclined to both the practical/strategic and collective/global approaches.

²⁸¹ See Niezen, *supra* note 139, at 22, para 2.

²⁸² *Ibid.*

According to Kingsbury, the arguments made by Asian states which are opposed to the application of the international concept of indigenous peoples within their territory are largely three-fold: definitional; practical; and policy oriented.²⁸³ In terms of *definitional arguments*, many of these Asian states regard the issue of indigenous peoples as something bound up with European settler colonialism, and “the attempt to impose the concept of “indigenous peoples” upon various Asian states as a form of neo-colonialism.”²⁸⁴ According to the *practical argument*, the determination of who came first in order to find out indigeneity was practically impossible because of centuries of migration and absorption of different peoples or groups in various places.²⁸⁵ With regard to the *policy argument*, recognition of special rights on the basis of being original occupants might introduce chauvinistic claims by groups, which might in turn lead to ethnic or communal tensions and conflicts.²⁸⁶

The issue of indigeneity is at the heart of indigenous peoples’ identity and rights. In order to understand the issue of indigeneity, it is important to understand two principles, namely, the principle of first occupancy and the principle of prior occupancy.²⁸⁷ As shown below, it is the principle of prior occupancy that has emerged as the standard in international law to determine the question of indigeneity. When dealing with the issue of indigenesness, many people, including Niezen, often automatically assume the situation of original inhabitation or occupancy of that land,²⁸⁸ but they rarely

²⁸³ Benedict Kingsbury, “The Applicability of the International Legal Concept of “Indigenous Peoples” in Asia” in Joanne R. Bauer & Daniel A. Bell, eds, *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 350-53. [Hereinafter Kingsbury 1999]

²⁸⁴ *Ibid.*, at 351, para 3.

²⁸⁵ See Kingsbury, *supra* note 52, at 433, para 4.

²⁸⁶ *Ibid.*, at 435, para 3.

²⁸⁷ Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy” (2003) 1 NZJPIL 55. [Hereinafter Waldron]

²⁸⁸ *Ibid.* On this assumption, see Niezen, *supra* note 139, at 19, para 3.

differentiate between the principle of first occupancy and the principle of prior occupancy. Original inhabitation could either mean first occupancy or prior occupancy; the term does not automatically mean first occupancy. Accordingly, as discussed in the next chapter, even if some of the Asian groups might claim themselves to be the original inhabitants of the land, this should not necessarily be seen as supporting the first occupancy principle. Further, Kingsbury argued that in Asia, based on practical reasons, the determination of who came first in order to find out indigeneity was practically impossible due to centuries of migration and absorption of different peoples or groups in various places.²⁸⁹ It is important to make it clear that I have brought out the differences between the prior and first occupancy in order to better understand the issue of original inhabitation, which is sometimes viewed as the key to determining the question of indigeneity. Otherwise, the principle of prior occupancy has been accepted as standard in international law, as will be discussed below.²⁹⁰

According to the principle of *first occupancy*, a “people may be described as ‘indigenous’ in relation to a certain land or territory, meaning that they are its [first] original inhabitants.”²⁹¹ In the Asian context, it is extremely difficult to historically trace the first ever occupants of the continents in order to determine the identity of indigenous peoples. On the other hand, the principle of *prior occupancy* is a relative concept where ‘indigenous’ may be described in relation to some other people,²⁹² including the colonizers. Here, indigenous peoples need not necessarily be the first occupants of the

²⁸⁹ See Kingsbury 1999, *supra* note 283, at 350-353.

²⁹⁰ I have used Jeremy Waldron’s article on these issues only to outline the differences between prior and first occupancy principles and do not claim to endorse his views on the rights of indigenous peoples generally.

²⁹¹ See Waldron, *supra* note 287, at 62, para 2.

²⁹² *Ibid.*

land, but could be understood as those who lived in certain places for generations before the coming of the outside forces, whether they were European colonialists or other Asian “internal” colonial disruptions. So, for this definition, it is enough to show that indigenous peoples occupied and governed the territory at the time of colonization, and it does not matter whether they were the first inhabitants of the land. What matters is that they were the last to inhabit or be settled in it before historical disruptions caused by the events of European settlement or any other colonization processes.²⁹³ In international law, a consensus has emerged around the principle of prior occupancy as a means to understand the question of identifying indigenous peoples.²⁹⁴ Article 1.1(b) of the ILO Convention 169 expressly refers to the people inhabiting the country or a geographical region at the time of conquest or colonization. Further, Martinez Cobo’s UN working definition of ‘indigenous peoples’ also affirmed the prior occupancy principle by requiring “historical continuity with pre-invasion and pre-colonial societies that developed on their territories.”²⁹⁵ According to Jeremy Waldron:²⁹⁶

[The] prior Occupancy is a conservative principle, not a reactionary one. Its aim is to vindicate and preserve an established existent status quo, not delve into tangled historical questions about any status quo ante. It recognizes the opacity of the past, and it recognizes the dangers of holding existing systems hostage to legitimist inquiry ... Prior Occupancy refers to the human interest in stability, security, certainty, and peace, and for the sake of those values it prohibits overturning existing arrangements irrespective of how they were arrived at. Of course it cannot be an absolute principle:

²⁹³ Ibid, at 68, para 2.

²⁹⁴ Ibid, at 65, para 2. This principle seems to have attracted overarching consensus in international law that takes into account all different approaches to the definition, whether it is explicit *legal/analytical* or implicit *practical/strategic* or *collective/global* approach. Implicitly, the second and third approaches depends on self-identification and recognition based upon certain common characteristics, including historical disruptions (prior occupancy), whether colonial or otherwise.

²⁹⁵ See Cobo, *supra* note 52.

²⁹⁶ Maurice and Hilda Friedman Professor of Law, Columbia University.

there may be compelling reasons for overthrowing and reforming an existing regime ... Prior Occupancy is undoubtedly an appropriate basis for condemning the injustice that took place at the time of colonization. For in the lands that were colonized there was an existing social order; there was a flourishing political and customary-legal system; there were established rules of property, recognized titles of sovereignty and governance; there was an order, which had a claim to be respected, not on account of its antiquity, but on account of its existence ... The native order existed as a stable and flourishing system when you arrived on the scene, and it was entitled to recognition and respect as such.

In the Asian context, we must understand the concept of indigenous peoples through the prism of the prior occupancy principle, which became the recognized international standard to determine indigeneity, whether explicitly put into legal definition or otherwise. Due to long and complex historical migrations and displacements in Asia, it is impossible to determine first or original settlers of the land.²⁹⁷

4.2. The Asian Situation

In the Asian context, people with indigenous characteristics are known by different names, many of which are legally recognised by their concerned state governments. They are called ‘scheduled tribes’ or ‘adivasis’ in India, ‘tribes’ in Bangladesh, Nepal and Malaysia, ‘nationalities’ in China, and ‘cultural communities’ in the Philippines.²⁹⁸ Since it has been said that almost two-thirds of the world’s indigenous peoples live in different parts of Asia with high cultural diversity,²⁹⁹ making

²⁹⁷ See Kingsbury 1999, *supra* note 283.

²⁹⁸ See Bose, *supra* note 59, at 47.

²⁹⁹ Christian Erni, “Indigenous Peoples in South and Southeast Asia: Between 20th century Capitalism and Oriental Despotism” in Christian Erni, ed, *Vines That Wont Bind: Indigenous Peoples of Asia* (Copenhagen: IWGIA Document No. 80, 1996) 20, para 2. [Hereinafter Erni] For determining total number

generalisations about these people is likely to result in over-simplifying the situations of these complex and diverse peoples. According to Christian Erni, there can be four dimensions to understanding indigenous peoples of Asia, namely, geographical, economic, socio-political and ideological dimensions.³⁰⁰ In terms of geography, indigenous peoples of Southeast Asia such as the Philippines, Taiwan, Southwest China, Peninsular Malaysia and many areas in India are highlanders (hill peoples) as against lowlanders of the majority/dominant cultures. In Indonesia, indigenous people are inhabitants of the outer islands as against the inner majority cultural group islanders. In terms of the economy, they are mostly engaged in agriculture or hunting and gathering in the upland hill areas. In terms of socio-political organization, they lived in “comparably egalitarian band or segmentary societies, or in petty chiefdoms, in which villages were politically, and to a large extent economically, autonomous units.”³⁰¹ Finally, in terms of ideological or religious beliefs, indigenous peoples retained their own traditional belief systems, unlike the majority/dominant societies that followed traditions of Buddhism, Hinduism or Islam.³⁰²

According to Erni, for those peoples who claim to be indigenous peoples, “attempts of military subjugation by a foreign power were already a pre-western colonial reality...”³⁰³ The majority dominant societies or cultures had always invaded and taken control of the fertile portion of the lands and resources belonging to these peoples, and driven them far into the peripheries of the state in remote hills and forests. So in some

of indigenous peoples in Asia, the author appears to have used a *practical/strategic approach* to the definition. The International Work Group for Indigenous Affairs (IWGIA) is an international human rights organization founded in 1968 to document and advocate indigenous peoples affairs and rights. See *International Work Group for Indigenous Affairs*, online: < <http://www.iwgia.org/index.php> >

³⁰⁰ Ibid, at 22, para 4.

³⁰¹ Ibid, at 23, para 3.

³⁰² Ibid, para 4.

³⁰³ Ibid, at 26, para 1.

sense, many of these indigenous peoples of Asia were already colonized peoples before European colonization of Asia.³⁰⁴ But such acts of invasion are not recognized as a colonial project by the Asian states as they were not perpetrated by European powers. As will be seen below, these Asian states, having once lived under European colonialism and having refused to see their internal aggressions as colonial, continue to recognize Europe as the center and perpetrator of colonialism.

With the abovementioned theoretical perspectives in mind, and by combining Niezen's three approaches to definition with Kingsbury's arguments, we can assess which state is following which strategy when it determines or denies the identity of indigenous peoples within its jurisdiction. As discussed above, Niezen proposed three approaches to the definition of indigenous peoples, which are: the legal/analytical approach (identification of distinct positive criteria); the practical/strategic approach (inclusive approach based upon self-identification); and the collective/global approach (indigenous solidarity with self-identification). On the other hand, Kingsbury identified three arguments that are used by Asian states to deny the existence of indigenous peoples within the state, namely: a definitional argument (requirement of the European settler colonialism); practical argument (impossibility in determining the first occupants); and a policy argument (chauvinistic tendencies of certain original inhabitants).

4.3. India's view

³⁰⁴ Ibid, para 3.

In India, the people of indigenous characteristics are called Scheduled Tribes or Adivasi. The term Adivasi is commonly used to describe tribal people of India, which literally means ‘original inhabitants’.³⁰⁵ They do not form part of the larger Hindu social structure such as the caste system. They were often referred to as ‘jungles’ meaning wild people.³⁰⁶ They generally live in the northeast and central India tribal belt region with inaccessible terrain and highlands. According to the 2001 census, 84.32 million persons were classified as belonging to the Scheduled Tribes, which form around 8.32% of the total population of India.³⁰⁷ There are 622 different Scheduled Tribes in the country today.³⁰⁸ Article 342 of the Indian Constitution laid down the provisions for the recognition of Scheduled Tribes:

- (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.
- (2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save

³⁰⁵ See Bose, *supra* note 59, at 48, para 2.

³⁰⁶ Ratnaker Bhengra, “Indigenous Peoples’ Juridical Rights and their Relations to the State in India” in Christian Erni, ed, *Vines That Wont Bind: Indigenous Peoples of Asia* (Copenhagen: IWGIA Document No. 80, 1996) 123, para 1. [Hereinafter Bhengra]

³⁰⁷ Christian Erni, ed, *The Concept of Indigenous Peoples in Asia: A Resource Book* (IWGIA Document No. 123, 2008) 371. [Hereinafter Erni 2008]

³⁰⁸ *Ibid.*

as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.³⁰⁹

Articles 15(4) and 16(4) further enable the state to make advancements in the economic, social and educational field, and make preferential reservations for the scheduled tribes.³¹⁰ Articles 330 and 332 provide political reservations for the scheduled tribes in the House of People and in the state (provincial) legislative assembly. A tribal self-government or autonomy was enshrined in the 5th and 6th Schedules of the Constitution, in order to maintain their distinct customs and socioeconomic organisation, and to prevent their exploitation by the dominant people around them.³¹¹

Even though India does make efforts to maintain and protect its tribal peoples or Adivasis, India has never recognised the application of the international legal concept of ‘indigenous peoples’ within its territory. It denies the existence of particular indigenous groups within its boundaries by maintaining that it regards the entire population of the country at the time of its independence in 1947 and its successors as indigenous.³¹² Throughout the meetings of UN Working Group, India maintained the position that the concept of indigenous peoples does not apply within its boundaries.³¹³ It linked the concept to European colonialism, where India strongly argued that “indigenous peoples are descendants of the original inhabitants who have suffered from conquest or invasion

³⁰⁹ *The Constitution of India*, came into force on 26th January, 1950, online: Ministry of Law and Justice < <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm> >

³¹⁰ See Bhengra, *supra* note 306, at 127, para 1.

³¹¹ *Ibid*, at 136, para 2.

³¹² James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples* (A/HRC/15/37/Add.1, September 15, 2010) at 94, para 206.

³¹³ Lakshmi Puri, *Statement on Behalf of the Delegation of India to the United Nations Working Group on Indigenous Populations, 12 August 1983* (Geneva: U.N. files, mimeo). As cited in Kingsbury 1999; *supra* note 283, at 350, para 1.

from outside.”³¹⁴ Following a more practical and policy oriented argument, India claimed that it is impossible to determine who came first in its territories due to centuries of migration and absorption of different cultural groups. The representative of India in the Working Group (in 1991) further commented that “most of the tribes in India share ethnic, racial, and linguistic characteristics with other people in India ...”³¹⁵ and it could therefore be difficult to determine the indigenosity of the groups.

Furthermore, during the adoption of UNDRIP, Indian representative Mr. Ajai Malhotra stated that the right of indigenous peoples to self-determination does not apply to India. He argued that the provision on self-determination applies only to people under foreign domination and not to those living in independent states.³¹⁶

The UN Special Rapporteur (James Anaya), in response to India’s stand, clarified that:

in the Asian context, the term indigenous peoples is understood to refer to distinct cultural groups such as “tribal peoples”, “hill tribes”, “scheduled tribes” or “adivasis”, who are indigenous to the countries in which they live and have distinct identities and ways of life, and who face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and denial of cultural expression ...³¹⁷

With these facts in mind, we can say that the Government of India’s position on the definition of the term ‘indigenous peoples’ is reflective of Niezen’s *legal/analytical*

³¹⁴ See Kingsbury 1999, *ibid*, at 351. Author cited The Government of India, *Observations* (U.N. Doc. E/CN.4/Sub.2/1984/2/Add.2., 1984).

³¹⁵ *Ibid*, at 352, para 2. Author cited Prabhu Dayal, *Statement on Behalf of the Delegation of India to the United Nations Working Group on Indigenous Populations, 31 July 1991* (Geneva: U.N. files, mimeo).

³¹⁶ “General Assembly Adopts Declaration on Rights of Indigenous Peoples”, (GA/10612), 13 September, 2007, Department of Public Information, New York. As cited in Bengt G. Karlsson, “Asian Indigenousness: The Case of India” (2008) 3:4 *Indigenous Affairs* 26.

³¹⁷ See Report of the Special Rapporteur, James Anaya, *supra* note 312, at 96, para 213.

approach due its strict criteria that requires original inhabitancy and an act of colonization. Further, there is no evidence that suggests India's reliance on the other two approaches. India also makes definitional, practical and policy oriented arguments as proposed by Kingsbury to deny the application of the term within its jurisdiction. Also, I think India may be more comfortable relying on the term 'tribal people' within its system because the term 'tribal' has not been recognized as a legal category within international law.³¹⁸

4.4. China's view

The official position of the Chinese Government is that there are no indigenous peoples within the boundaries of Peoples Republic of China. According to Mr. Long Xuequn (advisor of the Chinese delegation at the 53rd session of the UN Commission on Human Rights, 1997):

As in the case of other Asian countries, the Chinese people of all ethnic groups have lived on our own land for generations. We suffered from invasion and occupation of colonialists and foreign aggressors. Fortunately, after arduous struggles of all ethnic groups, we drove away those colonialists and aggressors. In China, there are no indigenous peoples and therefore no indigenous issues.³¹⁹

In the deliberations of the UN Working Group, China maintained the policy of rejecting the existence of indigenous peoples within its territory by claiming that:

The Chinese Government believes that the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the

³¹⁸ See chapter 6.

³¹⁹ *China Concerned with Protection of Indigenous Peoples' Rights*, online: Embassy of the People's Republic of China in Switzerland < <http://ch.china-embassy.org/eng/ztnr/rqwt/t138829.htm> >

world ... As in the majority of Asian countries, the various nationalities in China have all lived for aeons on Chinese territory. Although there is no indigenous peoples' question in China, the Chinese Government and people have every sympathy with indigenous peoples' historical woes and historical plight ... The special historical misfortunes of indigenous peoples set them apart from minority nationalities and ethnic groups in the ordinary sense.³²⁰

According to China, there is no question of indigenous peoples within its own territory because the issue of indigenous peoples arises only in those states which are victims of former European colonialism and settlements. China is generally in favour of a more strict definitional approach so that the groups (e.g. Tibetans and Uighurs) within its territories are not given international rights of indigenous peoples. Thus, in its comment, "until a clear definition of indigenous peoples has been established, the Chinese Government cannot formulate specific opinions on individual clauses of the draft declaration."³²¹

Though China does not recognise indigenous peoples within its territory, it does recognize the existence of ethnic minorities or nationalities within its territory and claims that they are provided sufficient care and legal protection in the field of cultural, economic, social and political matters (autonomy). There are 56 officially recognised nationalities (*minzu*) in China, out of which 55 are considered minority nationalities (or ethnic minorities).³²² Each of these minority nationalities are given political autonomy by the establishment of five autonomous regions at the provincial level, 30 autonomous

³²⁰ *Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples* (U.N. Doc. E/CN.4/WG.15/2, October 10, 1995)

³²¹ *Ibid.*

³²² Tan Chee-Beng, "The Concept of Indigenous Peoples and its Application in China" in Christian Erni, ed, *The Concept of Indigenous Peoples in Asia: A Resource Book* (IWGIA Document No. 123, 2008) 244. [Hereinafter Tan Chee-Beng]

prefectures and 120 autonomous counties.³²³ The five autonomous regions are Inner Mongolian Autonomous Region (established in 1947), Xinjiang Uighur Autonomous Regions (1955), Guangxi Zhuang Autonomous Region (1958), Ningxia Hui Autonomous Region (1958) and Tibet Autonomous Region (1965).³²⁴ According to the last census of 2000, there are approximately 105 million people belonging to ethnic minority groups and they comprise 8.47 percent of the total population of China.³²⁵

Article 4 of the 1982 Constitution of China advocates equality of all nationalities within China and thus provides regional autonomy to all minority nationalities:

All nationalities in the People's Republic of China are equal. The state protects the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited. The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities. Regional autonomy is practised in areas where people of minority nationalities live in compact communities; in these areas organs of self- government are established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the People's Republic of China. The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs.³²⁶

³²³ PRC State Council 2005. "Zhongguo de minzu quyu zizhi (China's Minzu Autonomous Areas)". Document issued by the Department of Information, State Council, People's Republic of China, February, 2005. As cited in Tan Chee-Beng, *ibid*, at 244.

³²⁴ *Ibid*.

³²⁵ Kathrin Wessendorf, ed, *The Indigenous World 2011* (Copenhagen: IWGIA, 2011) 244. [Hereinafter Wessendorf]

³²⁶ *Constitution of the People's Republic of China*, adopted on December 4, 1982. Available online: <<http://english.people.com.cn/constitution/constitution.html>>

A separate law was also created in 1984 called the “Law on Regional Autonomy”³²⁷ in order to effectively implement the spirit of abovementioned provision. Although the system of autonomous self-governance by minority nationalities was set up in the 1950s, in reality, all major decisions are taken by the Communist Party and the state based on the principle of “democratic centralism” and influenced by the Han Chauvinism.³²⁸

Here, China’s strong tendency to deny the existence of indigenous peoples within its jurisdiction reflects Kingsbury’s definitional argument to reject them, and implicitly falls within Niezen’s *legal/analytical* approach to the definition. There is no evidence of China making policy oriented arguments against the identification of indigenous peoples in the country. Since China vehemently deny their existence within the state, it is highly unlikely that China will support Niezen’s practical/strategic and collective/global approaches due to their inclusive categorization and the requirement of self-identification.

4.5. Philippines’ View

In the long colonial history of the Philippines, first during the Spanish rule and later on with the American one, the population of the state was influenced heavily by the colonial forces and became Christian. Nevertheless, small groups of people, who were pushed into the remote corners of the state, have been able to maintain their own distinct pre-colonial culture and religious practices. According to Doaos, these indigenous groups have been subjected to discrimination, abuse and exploitation at the hands of colonising

³²⁷ *Regional Autonomy for Ethnic Minorities in China*, online: < http://english.gov.cn/official/2005-07/28/content_18127.htm >

³²⁸ Nicholas Tapp, “Minority Nationality in China: Policy and Practice”, in R.H. Barnes, Andrew Gray and Benedict Kingsbury, eds, *Indigenous Peoples of Asia* (The Association for Asian Studies, Inc. 1995) 195-220.

powers and later on under the Philippines state.³²⁹ One of the primary concerns of these groups was the right to ancestral domain or land. During the Spanish and American colonial rule, indigenous groups were dispossessed of their lands through different systems such as the Regalian Doctrine³³⁰ and later on the Torren titling system.³³¹ After gaining independence in 1946, indigenous cultural communities continued to suffer marginalization, exploitation and dispossession of their lands at the hand of the Marcos dictatorship.³³² Indigenous groups struggled and took active participation in the democratic movements within the country and advocated for the rights of their distinct indigenous culture and identity. Finally in the new 1987 Constitution, several provisions related to indigenous peoples were mentioned:

The State shall recognise, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies. (Art. XIV, Section 17)

The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain. (Article XII, Section 5)³³³

³²⁹ David A. Daoas, "The Rights of Cultural Communities in the Philippines" in Christian Erni, ed, *Vines That Wont Bind: Indigenous Peoples of Asia* (Copenhagen: IWGIA Document No. 80, 1996) 97, para 1.

³³⁰ Ibid. According to this doctrine, all lands (and resources) in the public domain belongs to the state. All lands not privately owned become the property of the state.

³³¹ Ibid, at 99.

³³² Ibid, at 100.

³³³ *Constitution of the Republic of Philippines*, online: <
http://www.philippinecountry.com/philippine_constitution/1987_constitution.html >

In 1997, the Indigenous Peoples' Rights Act³³⁴ (IPRA) was enacted by the government, which makes specific provisions governing indigenous peoples' rights based upon the Constitution. With the IPRA, the Philippines became only the third Asian state to recognise the concept of indigenous peoples in domestic law after Japan and Taiwan³³⁵. In the IPRA, the rights of Indigenous Cultural Communities/Indigenous Peoples (ICC/IP) were recognised and protected as follows:

Indigenous Cultural Communities/Indigenous Peoples – refer to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims for ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, become historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains. (Chapter II, Section 3)³³⁶

³³⁴ *The Indigenous Peoples' Rights Act*, 1997, online: World Intellectual Property Organization <<http://www.wipo.int/wipolex/en/details.jsp?id=5755>>

³³⁵ See Erni 2008, *supra* note 307, at 427.

³³⁶ *Ibid.*

Further, it also goes on to recognize indigenous peoples' right to land and resources; self-governance and empowerment; social justice and human rights; right to maintain and preserve cultural integrity; and self-determination.³³⁷

Accordingly, the government has identified 110 indigenous groups in Philippines with the population estimates ranging from 6.5 million to 12 million (between 10 and 15% of the total national population).³³⁸

The Philippines' approach to the definition primarily reflects adherence to both the *practical/strategic* and *collective/global approach* of Niezen. The practical/strategic approach is evident as the Philippines is more inclusive of the groups which need not necessarily descend from a pre-colonial period, and generally more in tune with the modern human rights rubric. The Philippines also reflects the collective/global approach due to the indigenous groups' successful decade long assertion of their identity and rights within state and across international forums which was finally accepted and legally recognized by the government of Philippines. Finally, with the legal recognition of 'indigenous peoples' in the IPRA, Philippines ends up affirming Niezen's legal/analytical approach to the definition. There is no evidence on any of Kingsbury's arguments denying recognition to indigenous groups.

4.6. Bangladesh's View

In Bangladesh, there are many marginalized groups which do not have the right to self-determination. According to Chakma, the majority of these tribal groups live in the Chittagong Hill Tracts (CHT) and they are commonly known as Jumma people. It is

³³⁷ Ibid, at 429, para 1.

³³⁸ Ibid, at 430.

derived from ‘jhum’, the local Bengali term for swidden agriculture.³³⁹ More details on the history and status of Jumma people will be discussed in the next chapter.

Officially, the government of Bangladesh rejected the use of the term ‘indigenous peoples’ within its territory. This fact could be clearly found in the reply of its representative to the UN Working Group in 1985:

... I would like to reiterate our well known stand that any attempt to define the people of Chittagong Hill Tracts as indigenous populations is not only erroneous but is also based on arguments having very scant respect for scientific reasoning. It is the considered view of my delegation that in defining the indigenous populations practical insight should be derived from the historical experience in those countries where racially distinct people coming from overseas established colonies and subjugated the indigenous populations.

No such situation ever existed in Bangladesh where the people coexisted through recorded history with complete communal harmony. The factual situation is that the entire population of Bangladesh falls under the category of autochthon and should be described as such in any objective analysis.³⁴⁰

According to the Chairperson-Rapporteur Ms. Erica-Irene A. Daes’s report:

The observer for Bangladesh said, inter alia, that a definition was an essential step in institutionalizing guarantees for safeguarding the rights of indigenous people. He also stated that ambiguity or absence of criteria could be a convenient cover for States to deny or grant recognition of indigenous status, since there would be no international standard to go by. He also referred to the opening statement of the Assistant Secretary-General for Human Rights who had spoken of an estimated 300 million indigenous people in the world and recalled his query made last year concerning the

³³⁹ Sanchay Chakma, “The Legal Rights situation of the Indigenous Peoples in Bangladesh” in Christian Erni, ed, *Vines That Wont Bind: Indigenous Peoples of Asia* (Copenhagen: IWGIA Document No. 80, 1996) 151.

³⁴⁰ The Bangladesh Presentation to the (United Nations) Working Group on Indigenous, on Friday 2 August 1985 in Geneva. In Reply to the Submissions made by The Anti-Slavery Society and the representative of the Chittagong Hill Tracts, Ven. Agga Vansa Mahathera. See online: < <http://cwis.org/GML/UnitedNationsDocuments/#wgip13> >

basis for the figure and the criteria on which it had been calculated. *He also stated that since Bangladesh's population of 120 million were all indigenous*, based on the quoted figure, the Secretariat only had to account for the remaining 180 million indigenous people.³⁴¹

Furthermore, according to a statement by Bangladesh's delegate to the 9th session of the UN Permanent Forum on Indigenous Issue in 2010:

Although Bangladesh does not have any 'indigenous' population, we follow the deliberations of the Permanent forum on Indigenous Issues as an 'observer'. At times references are made to certain cases of Bangladesh and hence we would like to clarify about the Government's position.

As I have just mentioned, there are no 'indigenous people' in Bangladesh but some tribal people or people of different ethnic minorities living in different parts of the country.³⁴²

Based on above statements, it is noteworthy here that there is inconsistency in the assertions of Bangladesh where, on one occasion, it states that all people in the country were indigenous, and, on the other hand, no indigenous peoples existed in Bangladesh.

According to Erni, Bangladesh's reluctance to recognize indigenous peoples within its territory is "largely politically motivated and has its roots in Bengali nationalism, which was the driving force in the struggle for independence from Pakistan."³⁴³ It views the concept and rights of indigenous peoples as applicable only to European colonies and settlements, and sees indigenous peoples' self-determination claims as a direct antithetical to its sovereignty and Bengali nationalism. Thus its

³⁴¹ *Report of the Working Group on Indigenous Populations on its Fourteenth Session* (U.N. Doc. E/CN.4/Sub.2/1996/21, August 16, 1996), para 34. Italicized emphasis added.

³⁴² *Statement by Bangladesh delegation*, 9th session of PFII (29th April 2010), online: < <http://pcjss-cht.org/UN%20&%20International%20Conference/PFII/9th%20Session-PFII-2010/PF10iqbal311.pdf> >

³⁴³ See Erni 2008, *supra* note 307, at 334, para 4.

approach to the definition undoubtedly reflects Niezen's strict *legal/analytical* approach requiring historical disruption by colonialism as a rigid criterion, and Kingsbury's definitional argument in order to deny existence of indigenous peoples within its territory. There is no evidence of its reliance on the other approaches and arguments.

4.7. Conclusion

In the end, we can conclude that, as far as these Asian states are concerned, there is no uniform approach to the issue of definition and identification of indigenous peoples within their territories. There is no overarching and common non-western Asian states' view on the identity of indigenous peoples in international law. There are various factors contributing to the diversity of views, namely, the nature of domestic politics, human rights standards, civil society movements, nationalism and the rule of law, etc.

However, it is equally important to know how non-state indigenous groups within these states perceive the definition and identification of 'indigenous peoples', and to discover whether their views differ from that of their state governments. This leads us to the next chapter which will describe how these non-state Asian indigenous groups perceive the definition and why they differ from the views expressed by the concerned state governments.

Chapter 5: Asian Group Views on the Definition and Identification of Indigenous Peoples

This chapter will examine the views of Asian groups claiming to be indigenous on the definition and identification of the term ‘indigenous peoples’. I will analyze the views of groups claiming to be indigenous peoples in four Asian states, namely, India, China, the Philippines and Bangladesh, and determine which approaches to the definition they subscribe to. Since there is a limited material available in this area, I have tried to use primary sources as far as possible.

Before going into the perspectives of the Asian groups claiming to be indigenous, it is important to understand the unique situation and context of Asia, namely, its complex history of migration; colonial and non-colonial (internal) disruptions; and the requirement of non-dominance as a crucial factor in determining the existence of indigenous peoples. It is also important to understand the overall discourse of human rights in order to determine the identity of indigenous peoples’ in Asia.

5.1. Asian Context

As we have seen in the preceding chapters, the notion of indigenous peoples was developed in the West based upon the historical disruption caused by European western colonialism. In this situation, there was a clear-cut series of historical events demarcating and identifying indigenous groups of peoples belonging to the territory as compared to the European settlers.³⁴⁴ But, in the Asian context, the historical requirements are much more complex due to a dual colonization process: namely, western colonization and

³⁴⁴ Baogang He, “The Contested Politics of Asian Responses to Indigenous Rights” (2011) 18 *International Journal on Minority and Group Rights* 461. [Hereinafter He]

internal Asian colonization.³⁴⁵ So, in Asia, like many other regions of the world, historic and present injustices suffered by the groups claiming to be indigenous continue and did not end with the demise of western colonialism.³⁴⁶ Here internal colonization means the colonization of the Asian groups by another dominant Asian ethnic group or society. In this form of colonialism, the dominant “ethnic group in control of a government systematically exploits resources of the regions occupied by minority ethnic groups, reducing the development of those regions to that of dependencies”³⁴⁷ and renders them marginal, non-dominant and subordinated to the rest of the society. According to Ahmad:

The basic feature of internal colonialism is that the more developed core of a country dominates the periphery politically and exploits it materially. Internal colonialism resembles colonial domination because the groups who dominate the peoples on the periphery belong to a different culture and the domination is based on racism.³⁴⁸ Internal colonialism condemns the peoples of the periphery to an instrumental role and legalizes metropolitan hegemony. The typical consequences of internal colonialism include inequitable distribution of national wealth, employment and educational opportunities. The local resources and income are used primarily to serve the interests of the dominant ethnic or religious groups wielding state power. Particularly indigenous peoples that were once externally colonized have continued to live on the periphery in the nation-states. Internal colonialism like classical colonialism is responsible for causing a number of factors like ... economic and political subordination, etc. which brought about the present state of non-dominance of the indigenous peoples.³⁴⁹

³⁴⁵ Ibid, at 462, para 2.

³⁴⁶ Kawser Ahmad, “Defining ‘Indigenous’ in Bangladesh: International Law in Domestic Context” (2010) 17 *International Journal on Minority and Group Rights* 55. [Hereinafter Ahmad]

³⁴⁷ See Ahmad, *ibid*, at 44, f 51.

³⁴⁸ R. Blauner, ‘Internal Colonialism and Ghetto Revolt’, 16 *Social Problems* (1968/1969) p. 396. As cited in Ahmad, *ibid*, at 56, para 1.

³⁴⁹ See Ahmad, *ibid*, at 54, para 1. See also M. Sornarajah, “Internal Colonialism and Humanitarian Intervention” (1981) 11 *Georgia Journal of International and Comparative Law* 299 (as cited in Ahmad).

Thus, the requirement of historical disruption caused by both the colonial and non-colonial or internal events is equally necessary and relevant in the context of Asia in order to determine the identity of indigenous peoples there.

The migration pattern in the Asian region has been “complicated by its [long] history of war ... and blending of different civilizations and populations”³⁵⁰ resulting in a complex situation where it is not easy to determine which group of people existed in a certain territory before the rest. To some extent, as shown in the previous chapter, it is this complex situation that prompted many Asian states to shy away from identifying certain marginal groups within their states as indigenous, instead proclaiming the entire population of the country as indigenous.

Next, it is important to note that the principle of self-identification is an accepted practice and standard in the international sphere for determining the identity of indigenous peoples.³⁵¹ It is a practice where groups claiming to be indigenous identify themselves as falling within the rubric of international human rights law’s distinct category of ‘indigenous peoples’ based upon certain common characteristics. As stated in the previous chapters, the principle was outlined as the fundamental element in most of the major international documents and treaties such as the World Bank Policies³⁵² and ILO Conventions 107 and 169.³⁵³ The indigenous peoples representatives had, on various occasions, expressed that a definition of the concept of indigenous peoples was

³⁵⁰ See He, *supra* note 344, at 463, para 1.

³⁵¹ Douglas E. Sanders, “Indigenous Peoples: Issues of Definition” (1999) 8:1 Int’l J Cult Prop 6, last para. [Hereinafter Sanders 1999] Further, see Chapter 3 for the detailed assertion of self-identification principle by various international bodies such as the World Bank, the ILO and the UN Working Group on Indigenous Populations.

³⁵² See Operational Policy 4.10 as discussed in the chapter 3.

³⁵³ See article 1(2) of the ILO Convention 169, as discussed in the chapter 3. See *supra* note 48.

not necessary or desirable.³⁵⁴ According to Erica-Irene Daes, the procedure to exercise the right of self-identification had to have the following characteristics:

first, they had to be operational in order to serve international objectives and in particular allow an understanding of the many different cultures;
 second, they had to be functional to allow participation of the indigenous peoples;
 third, they had to be flexible in order to be able to respond to new situations in the dynamic process of recognizing indigenous peoples' rights.³⁵⁵

The principle of self-identification cannot be practical without any recognition by others. But the texts of major international documents do not clearly specify who must give recognition to those groups for them to be firmly established as “indigenous peoples”. The principle can be viewed from two different perspectives. On the one hand, excessive use of self-identification could lead to a proliferation of the standard and thus might belittle the entire process.³⁵⁶ The fear of proliferation is an important argument on the parts of Asian states who wish to define ‘indigenous peoples’ strictly and in terms of legal certainty. On the other hand, the aims underpinning the project of defining the rights of indigenous peoples, such as human rights, justice and self-determination, might be jeopardized if recognition by states is made mandatory for a group to become indigenous people. To require recognition by the state means having an agreement between the powerful and the powerless, which might ultimately hamper the interests and aspirations of indigenous groups.³⁵⁷

Nevertheless, international practices on self-identification are made possible due to the legitimate recognition of the group claiming indigenous status by other non-state

³⁵⁴ *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, Working paper by the former Chairperson-Rapporteur Mrs. Erica-Irene A. Daes on the concept of “indigenous peoples”, at 12, para 35. (E/CN.4/Sub.2/AC.4/1996/2) See online: < [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/2b6e0fb1e9d7db0fc1256b3a003eb999/\\$FILE/G9612980.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/2b6e0fb1e9d7db0fc1256b3a003eb999/$FILE/G9612980.pdf) >

³⁵⁵ *Ibid.*, at 15, para 41.

³⁵⁶ See He, *supra* note 344, at 464, para 1.

³⁵⁷ *Ibid.*

indigenous groups in various international forums.³⁵⁸ Even though they do not provide formal and legal recognition, it does provide legitimate acceptance and assumptions in favour of the status of indigenous peoples. Where there was a clear misuse of the principle, indigenous groups and organizations did not fall short of criticizing and making sure the principle was observed and respected. For example, in 1994, when white groups from Namibia and South Africa came to the working group claiming indigenous status, indigenous delegates protested and criticized such misuse and misrepresentation of the principle of self-identification.³⁵⁹

Finally, the requirement of the state of non-dominance within larger society is also crucial in the context of Asia, where the majority cultures or dominant peoples also claim indigenous status. As stated in the previous chapter, many Asian states declared the entire population of the country as indigenous to the territory arguably undermining the whole discourse of the modern human rights of indigenous peoples in international law. Under the state of non-dominance, groups claiming to be indigenous continue to suffer threats to their distinct identities and basic human rights in ways not felt by dominant sections of society. In fact, the state of non-dominance, which is subordination and marginalization of a particular group,³⁶⁰ was a direct result of the historical disruption caused by either Western colonialism or Asian internal colonial practices, and thus constitutes justification for recognizing legal rights of indigenous peoples.³⁶¹ It is an important criterion because “no entrenchment of indigenous peoples’ rights would be necessary had there been no incidences of subordination of the indigenous peoples at the

³⁵⁸ See chapter 3 for the legitimacy and emergence of indigenous peoples as participants in international lawmaking. See Miranda, *supra* note 37, at 210.

³⁵⁹ See Sanders 1999, *supra* note 351, at 8, para 3.

³⁶⁰ See Ahmad, *supra* note 346, at 54, f 44.

³⁶¹ *Ibid*, at 54, para 1.

hands of a dominant social or political formation.”³⁶² Since the very purpose of the discourse of indigenous peoples’ rights is to overcome this non-domination, subordination and marginalization,³⁶³ claiming indigenous status in international law by majority dominant cultural groups within Asian states is antithetical to the very purpose for which it was formed.

With these themes in mind, I shall now turn to views expressed by various Asian groups claiming indigenous status from India, Bangladesh, China and Philippines on the definition and identification of indigenous peoples in international law.

5.2. Groups in India

As noted earlier, the peoples in India who claim to be indigenous are called Scheduled Tribes or Adivasi.³⁶⁴ They do not form part of the larger Hindu social structure such as the caste system. As of 2011, a population of 84.32 million was classified as belonging to the Scheduled Tribes, which forms around 8.32% of the total population of India.³⁶⁵ There are 461 groups officially recognized as Scheduled Tribes and these are considered to be India’s indigenous peoples according to the International Work Group of Indigenous Affairs (IWGIA).³⁶⁶ The largest numbers of Scheduled Tribes are found in the seven states of the north-east India³⁶⁷ and the central tribal belt region with inaccessible terrain and highlands.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ See Bose, *supra* note 59, at 48, para 2.

³⁶⁵ See Wessendorf, *supra* note 325, at 341.

³⁶⁶ Ibid.

³⁶⁷ They are Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura.

The first delegates of the groups claiming to be indigenous from India started to participate in the UN Working Group meetings in 1985 and advocated for indigenous status and rights for the adivasis and tribals of India.³⁶⁸ In 1987, a group of five adivasi delegates participated in the Working Group and expressed their solidarity with all the indigenous peoples of the world.³⁶⁹ They “challenged the [Indian] state’s position, saying that they were IPs and that since pre-historic times have remained distinct peoples, ‘reduced to a colonial situation’, subjugated by a ‘system of values and institutions maintained by the dominant ruling group.’”³⁷⁰ In the same year, the Indian Confederation of Indigenous and Tribal Peoples (ICITP) was formed representing almost all the regions of India where tribal peoples lived.

In the 1994 UN Working Group resolution on indigenous and tribal peoples in India, the indigenous participants rejected India’s position that the Scheduled Tribes of India were not indigenous peoples, and further argued that the UN definition at that time relied too much on the western experience of colonialism. They called upon the Working Group to “take note of the reality of the indigenous/tribal peoples of South Asia and South-east Asian countries and widen the scope of the definition of the indigenous peoples to give proper recognition to the indigenous/tribal peoples in this region.”³⁷¹ Further, they claimed that the tribal peoples in India are the descendants of the first settlers or residents who controlled the territory before being pushed into geographical isolation by outsiders and invaders.³⁷² Though they used the term ‘first settlers’, which is

³⁶⁸ Bengt G. Karlsson, “Anthropology and the ‘Indigenous Slot’: Claims to and Debates about Indigenous Peoples’ Status in India”, (2003) 23 *Critique of Anthropology* 407, para 2. [Hereinafter Karlsson]

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ E/CN.4/Sub.2/AC.4/1994/4/Add.1 of 21st June 1994. See *United Nations Documents and Submissions*, online: Center for World Indigenous Studies <<http://cwis.org/GML/UnitedNationsDocuments/#wgip12>>

³⁷² *Ibid.*

questionable historically, they adhered to the principle of prior occupancy by requiring the forces of outside invaders in order for groups to be counted as tribal peoples. As such, they were suffering from political, economic and social discrimination, and treated like colonies by the mainstream ruling elites.³⁷³ Thus they recommended the Working Group to take notice of the situation of colonialism in South Asia and accordingly widen the scope of the definition of indigenous peoples to include situations in South Asia.³⁷⁴ Furthermore, they developed criteria for defining tribal or indigenous peoples in India that include consideration of: (1) the relative geographical isolation of the community; (2) their reliance on forest, ancestral land and water bodies within their territory for food and other necessities; (3) the existence of a distinct culture; (4) the relative freedom of women within their society; and (5) the absence of a division of labour and caste system.³⁷⁵

Later, indigenous peoples representatives criticized the UN Special Rapporteur Miquel Alfonso Martinez's 1999 report,³⁷⁶ which claimed that the Asian and African situations did not qualify for the usage of the term 'indigenous peoples' because they were not victims of the European salt-water colonialism and settlements. The term 'indigenous peoples', according to him, referred only to those groups which were direct victims of the European settlements in countries such as US, Canada, Australia and New Zealand. According to Martinez, "in post-colonial Africa and Asia, autochthonous groups/minorities/ethnic groups/peoples cannot claim for themselves ... the 'indigenous' status in the United Nations context."³⁷⁷ He also suggested that cases relating to Asian

³⁷³ Ibid, para 4.

³⁷⁴ Ibid, para 9.

³⁷⁵ Ibid, para 10.

³⁷⁶ *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* (E/CN.2/Sub.2/1999/20).

³⁷⁷ Ibid, at 15, para 88.

and African states should be dealt outside the confines of the UN Working Group on Indigenous Populations³⁷⁸ and insisted on a clear-cut distinction between indigenous peoples and national or ethnic minorities. This report by Alfonso Martinez was heavily criticized by India's indigenous delegate Ram Dayal Munda (ICITP president), who claimed that "Martinez's 'selective view of the colonial background' has misled him to preclude the existence of indigenous peoples in Africa and Asia."³⁷⁹ Mr. Roy Laifungbam, of the Manipur indigenous organization, criticized Martinez's limited understanding of the colonial process. According to him, Martinez "has failed to grasp 'the process of re-colonization of indigenous peoples and nations by successors of European colonial governments in Asia and Africa.'"³⁸⁰ Further, Luigam Luithui, a representative of the Naga people, also criticized the Special Rapporteur for his limited understanding of colonization, which was strictly confined to the theory of salt-water colonialism, and thus "marginalize[d] a huge number of indigenous peoples who have been subjected to some of the worst forms of oppression in the world's history."³⁸¹ Thus India's tribal peoples have, at various forums, argued for a more flexible application of the term 'indigenous peoples', especially with regard to Asia and Africa.

The indigeneity of specific groups within India was also explicitly recognized at times. For example, with regard to the Boro³⁸² peoples' recognition as indigenous peoples, a collective statement was made in 2006 at the UN Permanent Forum for Indigenous Issues (UNPFII) by the Indian Confederation of Indigenous and Tribal Peoples (ICITP) which affirmed the indigeneity of the Boro people and declared that:

³⁷⁸ Ibid, at 16, para 90.

³⁷⁹ See Karlsson, *supra* note 368, at 412, para 1.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Boro or Bodo people lives in the present day Indian state/province of Assam.

Madam Chair, the Boro people is a suppressed Indigenous People who live in present day Assam, Nepal, North Bengal and scattered in different states/provinces of North Eastern part of present India. The Boro People lived as a free and independent nation with their distinct identity since the time immemorial in these regions. During the British rule some of the Boro Kingdom and Principalities retained their freedom as protectorate kingdom. After the British's departure, Indian forcibly occupied the Boro kingdoms and merged up them in to Indian domination and trampled down the Boro people's right to freedom.³⁸³

In the Haflong Declaration³⁸⁴ of 2007, the preamble of the document affirmed the self-identity of the groups therein as indigenous and declared that:

We, the indigenous peoples' leaders and activists representing 68 indigenous peoples organizations from Nepal, Bangladesh, Bhutan, Burma, and India, including indigenous leaders from all the seven sister states of the Eastern Himalaya region of India who are gathered here in Guwahati, Assam, India for the South Asia Regional Training on Conflict Resolution and Peace Building Capacity, under the aegis of Indian Confederation of Indigenous and Tribal Peoples, North East Zone and its member organizations and allies.³⁸⁵

The Naga tribal people from the state of Nagaland have been one of the most vocal advocates of the rights of indigenous peoples and self-determination. Its representative Mr. Isak Chishi Swu, Chairman of the National Socialist Council of Nagaland (NSCN) made a statement in the UN Working Group on Indigenous Population on 27th July 1994, where he affirmed the Naga peoples' commitment to the just cause of the indigenous peoples everywhere.³⁸⁶ In 2005, the Naga International Support Center (NISC), formed

³⁸³ *Indian Confederation of Indigenous and Tribal Peoples North East Zone*, online: <http://www.icitp-nez.org/Statement%20of%20ICITP-NEZ-UNPF_II_2006.html>

³⁸⁴ *Declaration of South Asia Regional Indigenous Peoples on Conflict and Peace*, Haflong, India, 31st March 2007. Online: ICITP-NEZ <<http://www.icitp-nez.org/Haflong%20Declaration.html>>

³⁸⁵ Ibid.

³⁸⁶ *Statement to UN Working Group on Indigenous Populations*, 12th session at Geneva, on 27th July 1994. See online: <<http://nscn.livejournal.com/73193.html>>

and based in Amsterdam, reaffirmed the commitment to the rights of indigenous peoples and demand for self-determination.³⁸⁷ In 2011, the World Parliament of Indigenous Peoples' First Round Table Conference held in Tumkur (India), members of 39 indigenous delegates from 10 countries attended the conference including representatives of the Naga and Manipuri tribal peoples of India.³⁸⁸ So, the Naga people have identified themselves as the 'indigenous people' within the context of international law and demanded indigenous rights, including self-determination.

Further, in 2011, in an appeal letter to the UN Special Rapporteur on the situation of human rights defenders, Mr. Jebra Ram Muchahary (President, ICITP-NEZ)³⁸⁹ highlighted the dire situation of the human rights of the tribal peoples in the north-east region and requested intervention in the following ways:

- (1) Intervention by the government of India to ensure the safety and security of life and properties of the human rights defenders in the country;
- (2) To stop the labeling of human rights defenders as anti-national and anti-national development, leading to discrimination, arbitrary arrests, unlawful detentions, torture and extrajudicial killings in the country;
- (3) To recommend the withdrawal of the AFSPA³⁹⁰ (1958) from the North Eastern region;

³⁸⁷ *Nagalim: New Solidarity Among Oppressed Peoples of India*, online: UNPO < <http://www.unpo.org/article/2161>>

³⁸⁸ *International: First Round table Statements – World Parliament of Indigenous Peoples*, online: < http://www.indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=8848:international-first-roundtable-statements-world-parliament-of-indigenous-peoples&catid=65:indigenous-peoples-general&Itemid=92>

³⁸⁹ Indian Confederation of Indigenous and Tribal Peoples – North Eastern Zone.

³⁹⁰ *The Armed Forces Special Powers Act, 1958*, which gives immunity to the army personal from prosecution in the conflict region of the North East India. The act was vehemently opposed by the people in the region for its human rights violations caused by the army.

- (4) To ensure the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in India;
- (5) To recommend the ratification of the ILO Convention 169 so as to improve the situation of indigenous peoples and their human rights defenders.³⁹¹

Finally, based on all abovementioned facts, one can say that the positions taken by groups claiming to be indigenous in India reflect both Niezen's second and third approaches to definition, namely, the *practical/strategic* approach and the *collective/global* approach. Their approach is practical/strategic because the groups argued in favour of a more inclusive and widened approach to the definition that includes the specific situations of South Asia. Further it is a collective/global approach because they have participated in various international indigenous peoples' forums and identified themselves as 'indigenous peoples' within the international law context.

5.3. Groups in Bangladesh

As shown in the previous chapter, the government of Bangladesh does not recognize the existence of indigenous peoples within its territory and claims that the concept of indigenous peoples was applicable only to European colonies and settlements. According to the government of Bangladesh, indigenous peoples' self-determination claims were directly antithetical to its sovereignty and majority Bengali nationalism. So its reluctance to recognize indigenous peoples within the state boundaries was largely

³⁹¹ *General Information on the Situation of Indigenous Peoples' Human Rights Defenders in the North East India*, online: Indian Confederation of Indigenous and Tribal Peoples – North East Zone < http://www.icitp-nez.org/Jebra_s_intervention_to_Ms.pdf >

politically motivated and had its roots in Bengali nationalism, which was the driving force in the struggle for independence from Pakistan.

According to the International Work Group for Indigenous Affairs (IWGIA), there are approximately 2.5 million indigenous people in Bangladesh belonging to 45 different ethnic groups.³⁹² The majority of these groups live in the Chittagong Hill Tracts (CHT) in the south-eastern part of the country and as noted earlier, they are commonly and collectively known as Jumma people. It was derived from the word ‘jhum’, the local Bengali term for swidden agriculture. They include groups such as the Bawm, Chakma, Khumi, Kiang, Lusshai, Marma, Mro/Mru, Pangkhua, Chak, Tangchangya, Tripura and Uchay.³⁹³ They differ from the majority Bengali people in culture, physical features, religion, language and social organization. According to Ahmed, since the formation of the nation-state of Bangladesh, these peoples remained one of the most persecuted, discriminated and marginalized groups in the state. They were denied constitutional recognition, culturally discriminated by the majority, and politically and economically marginalized in the society.³⁹⁴ As a result, these peoples in the CHT took up arms and started an insurgency in 1976 against the government of Bangladesh. After 25 years of insurgency and civil-war, the CHT Peace Accord was signed in 1997 between the Government and the Parbattya Chattagram Jana Samhati Samiti (PCJSS, United People’s Party) which led the resistance movement.³⁹⁵

Despite having suffered under the dominant Bengali people and non-recognition by the state as indigenous peoples, these groups have actively participated in the

³⁹² See Wessendorf, *supra* note 325, at 328.

³⁹³ See Erni 2008, *supra* note 307, at 337, para 2.

³⁹⁴ See Ahmed, *supra* note 346, at 72.

³⁹⁵ *Ibid*, at 333.

international forums and advocated their identity and right as indigenous peoples within the larger international context. They have also strived and advocated for the constitutional recognition of their identity and rights, and urged the government for the implementation of ILO Convention 107 (to which the Bangladesh is a party)³⁹⁶ and for implementation of the provisions in the CHT Peace Accord.

Mr. R S Dewan, Spokesperson for the Jana Samhati Samiti (Jumma people), on several occasions participated in the UN Working Group meetings,³⁹⁷ where he highlighted a deep sense of concern regarding the dire situation of Jumma people in Bangladesh. On other occasions, he expressed that “[t]he CHT is the traditional homeland of ten ethnic groups ... All these indigenous people are also popularly known as Jumma people or Jumma Nation. They are totally different from the majority community of Bangladesh in race, religion and culture.”³⁹⁸

According to Raja Devasish Roy’s³⁹⁹ report and intervention in the UN Permanent Forum on Indigenous Issues (PFII), tribal peoples in the CHT were clearly indigenous peoples within the mandate of the UNPFII:

The issue of the mandate of the Forum on ‘indigenous issues’ and the identity of indigenous peoples from different countries, including Bangladesh, perhaps needs to be clarified. The Permanent Forum deals with issues of indigenous peoples, but indigenous peoples on different countries may be known by names other than indigenous, including ‘tribes’ or ‘ethnic minority’, or otherwise. Despite the use of

³⁹⁶ Though ILO Convention 107 is, in parts, discriminatory and assimilationist, it includes provisions which recognize traditional land rights of indigenous peoples and seek to improve working conditions of indigenous peoples at the work places.

³⁹⁷ *Jumma Representative’s Statement on the precarious situation of the Jumma people of the Chittagong Hill Tracts Region of Bangladesh*, 1990, online: < <http://www.jpnu.org.uk/ramendu/preven.txt> >; For the *Statement made by Mr. Ramendu Shekhar Dewan on behalf of the Jumma Nation*, 1992, online: < <http://www.jpnu.org.uk/ramendu/rsdewan.txt> >

³⁹⁸ *Seminar: Human Rights in the Chittagong Hill Tracts*, 13 February, 1991 at the University of Oxford. See online: < <http://www.jpnu.org.uk/ramendu/rssemi.txt> >

³⁹⁹ Chief of the Chakma Administrative Circle and traditional raja (king) of the ethnic Chakma community.

such varied terminology, these peoples are, and will be regarded as ‘indigenous’ by the Permanent Forum within the meaning of its mandate on ‘indigenous issues’.

The ILO Conventions on Indigenous Peoples (Nos. 107 and 169) mentions both [sic] ‘indigenous’ and ‘tribal’ groups but clarifies that the provisions of both conventions apply equally to both groups, indigenous or tribal, equally. Therefore, the current regime of international human rights law (including the ILO Conventions and the UNDRIP) does not distinguish between tribal and indigenous peoples, with indigenous peoples being the currently accepted terminology. Therefore, the CHT Accord and issues of indigenous peoples in different countries (whether called ‘minorities’, ‘tribal’ or otherwise) are undeniably within the mandate of the Permanent Forum.⁴⁰⁰

Further, the Chittagong Hill Tracts Commission⁴⁰¹ had stated in its letter (dated 29th July 2011) to the President of the Economic and Social Council that:

... we know very well that the United Nations instead of defining ‘indigenous peoples’ understands them as those who fulfill certain criteria, which among others are, ‘self-identification as indigenous peoples at the individual level and accepted by the community as their member’, ‘strong link to territories and surrounding natural resources’, ‘distinct social, economic or political systems’, ‘distinct language, culture and beliefs’, ‘form non-dominant groups of society’, ‘resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities’. All these criteria are clearly fulfilled by the indigenous peoples from the CHT as well as the rest of the country. Moreover, these peoples also fulfill the criteria of indigenous populations as contained in the ILO Convention on Indigenous

⁴⁰⁰ *Unrepresented Nations and Peoples Organization (UNPO) documents*, online: <http://www.unpo.org/downloads/260.pdf> >

⁴⁰¹ The Commission was established in 1990, dissolved in 2000, and re-established in 2008 by IWGIA and the Organizing Committee CHT Campaign (OCCHTC) which comprised of members from both indigenous peoples and abroad.

and Tribal Populations of 1957 (Convention No. 107), which Bangladesh ratified in June, 1972.⁴⁰²

The Commission also sent a letter to the Prime Minister of Bangladesh on 12 July 2011, where it expressed serious concerns over the contents of the 15th amendment to the Constitution of Bangladesh where it was clearly mentioned that ‘the people of Bangladesh shall be known as Bangalees as a nation’, while denying recognition of other cultural groups. The letter stated that:

we strongly believe that the estimated 50-60 indigenous peoples living in the Chittagong Hill Tracts and in the plain lands all over the country should be rightfully recognized as ‘indigenous people’ in line with the United Nation’s modern understanding of the term based on self-identification, historical continuity with pre-colonial and/or pre-settler societies, strong link to territories and surrounding natural resources, distinct social, economic or political systems, distinct language, culture and beliefs, and their non-dominance in society ...

The estimated 50-60 indigenous peoples all over Bangladesh should be recognized as ‘indigenous’ (adibashi) by the Bangladesh constitution, in line with the recognition given by the United Nations and acknowledged by the Honourable Prime Minister and others.⁴⁰³

On November 29, 2011, a seminar was organized by the Bangladesh Indigenous Peoples Forum and the ILO on the topic “Implementing Indigenous Peoples’ Rights: Challenges and Opportunities.”⁴⁰⁴ Mr. Jyotirindra Bodhipriya Larma, the President of the Bangladesh Indigenous Peoples Forum, made a closing statement:

⁴⁰²Letter from the CHT Commission to the ECOSOC President, online:< <http://chtarchive.org/cht-news/3-announcements/78-letter-from-the-cht-commission-to-the-ecosoc-president> >

⁴⁰³ *Bangladesh: CHT Commissions Letter to Prime Minister*, online: < http://www.iwgia.org/news/search-news?news_id=317 >

⁴⁰⁴ *Bangladesh: One step closer to securing indigenous rights*, online: IWGIA <http://www.iwgia.org/news/search-news?news_id=399 >

In Bangladesh, there are at least 54 distinct indigenous peoples who have been living in the country for centuries and their number is approximately 3 million. Indigenous peoples of Bangladesh have an important role for the nation and society. Many indigenous people took part in our liberation war in 1971 and many of them had sacrificed their lives for the nation. But, it is a great regret that the Constitution of Bangladesh does not recognize the identity and rights of indigenous peoples properly. Denial of fundamental rights and identity of indigenous peoples in the newly amended Constitution has disappointed indigenous peoples.

With the 15th amendment of the Constitution, the very existence and identity of the indigenous peoples have been undermined by introducing the words: ‘the people of Bangladesh shall be known as Bangalees as a nation’. As citizen, no doubt we are Bangladeshi, but as nation we are not Bangalees. In fact, we are separate nations, such as, Tripura, Mro, Khasia, Chakma, Santal, Garo and so on ...

Bangladesh government has ratified the ILO Convention No. 107 on indigenous and tribal populations. The ILO Convention has recognized the traditional land rights of indigenous peoples. We do not see the implementation of ILO Convention in Bangladesh. Implementation of ILO Convention No. 107 can bring some good result in the life of indigenous peoples. We also demand for ratifying the ILO Convention 169.⁴⁰⁵

Therefore, the groups claiming to be indigenous in Bangladesh continue to struggle for their rights and identity as indigenous peoples and seek constitutional recognition from the state. In the process, they have made it amply clear that they are indigenous in the modern human rights and international law context. Finally, the definitional approach taken by the indigenous peoples in Bangladesh reflects both *practical/strategic* and *collective/global* approaches. It is practical/strategic approach because the groups in Bangladesh conforms to the modern international law practice and approach to the definition. It is also collective/global approach because they have taken part in various

⁴⁰⁵ Ibid.

international indigenous peoples' forums and formed alliances, self-identified themselves as indigenous and seek recognition from both non-state groups and the Bangladesh state as well.

5.4. Groups in China

As seen in the previous chapter, the Government of China does not recognize the existence of indigenous peoples within its territory as it believes that the issue of indigenous peoples arises only in states which are direct victims of former European colonialism and settlements. China has generally favored a more strict legal definitional approach so that the groups within its territories are not given the international rights of indigenous peoples. But China does recognize ethnic minorities or nationalities within its boundaries and claims that they are given sufficient care and protection for their political and cultural development. There are 56 officially recognized nationalities (*minzu*) in China, out of which 55 are considered minority nationalities (or ethnic minorities).⁴⁰⁶

Two of the minority nationalities have stood apart from the rest and claimed indigenous and ethnic autonomy rights: the Uyghur and Tibetan peoples. Their struggle against the state was traditionally more in line with the claims for ethnic autonomy and national sovereignty, but, more recently, claims have been made to their rights also as indigenous peoples within China.

The Uyghur Human Rights Project (UHRP), which is a human rights research, reporting and advocacy organization founded by the Uyghur American Association (UAA) in 2004, has claimed in its 2009 report that Uyghur people are indigenous peoples

⁴⁰⁶ See Tan Chee-Beng, *supra* note 322, at 244.

within the context of the UNDRIP.⁴⁰⁷ The report claimed that the People’s Republic of China voted for the UNDRIP in 2007 and as a result recognized existing indigenous persons within its jurisdiction.⁴⁰⁸ On the question of definition, the report pointed out that:

There is no universal definition of the term indigenous people, and attempts to define or identify what it means to be ‘indigenous’ have engendered much debate. Due to the historical and social diversity of groups identifying themselves as indigenous throughout the world, there has been much controversy over definitions of the term “indigenous”.

One broad definition of what it means to be indigenous that is generally agreed upon recognizes indigenes’ common features as “descent from original inhabitants of a region prior to the arrival of settlers who have since become the dominant population; maintenance of cultural differences, distinct from a dominant population; and political marginality resulting in poverty, limited access to services, and absence of protections against unwanted ‘development.’”³ This definition may be seen as the most applicable to the Uyghur case, because each feature contained in the definition is relevant to the Uyghur experience, as discussed below in this report.⁴⁰⁹

Contrary to the spirit and letter of the Declaration on the Rights of Indigenous Peoples, People’s Republic of China leaders have adopted a peculiar view: that East Turkestan, along with the rest of China, has no indigenous people.⁴¹⁰

⁴⁰⁷ UHRP report entitled “United Nations Declaration on the Rights of Indigenous People and the Uyghurs of East Turkestan”. See online: < <http://uhrp.org/press-releases-uaa-and-uhrp-reports/uyghurs-indigenous-people-new-uhrp-report-highlights-chinese-0> >

⁴⁰⁸ Ibid, at 4.

⁴⁰⁹ Ibid, at 5. Though they used the sentence “descent from original inhabitants of a region prior to the arrival of settlers”, the original inhabitation, here, does not necessarily point to the first occupancy principle. In fact, as discussed earlier, the term ‘original inhabitation’ could either mean first or prior occupancy. Thus in the present report they used original inhabitation within the context of “prior to the arrival of settlers”, meaning that the principle of prior occupancy is crucial factor determining the identity of the group. Therefore, it can be argued that the Uyghur people’s report conforms to the principle of prior occupancy.

⁴¹⁰ Ibid, at 6.

With regard to China's alleged violation of Uyghur people's rights, the report claimed that "the UN Declaration consists of eight basic parts [rights] ... In the case of Uyghurs of East Turkestan, the PRC is in violation of every part, and nearly every Article, of this Declaration."⁴¹¹

Turning to the case of Tibetan people, the main issue is an ongoing struggle for political and cultural autonomy and the right of self-determination based upon their long historical sovereignty and independent legal existence prior to 1950.⁴¹² With regard to the identity of Tibetans as indigenous peoples, in 1999, the International Campaign for Tibet, a Tibetan human rights advocacy group, requested the World Bank Inspection Panel to assess the compliance to the Bank's policies in the China Western Poverty Reduction Project.⁴¹³ It also stated that:

The Indigenous Tibetan and Mongol peoples in Dulan County will be materially and adversely harmed by the project, and this harm will be a direct result of the failure of the Bank to comply with its policy on Indigenous peoples. We strongly object to Bank staff's contention that no indigenous peoples development plan is necessary for this project.⁴¹⁴

Further on the question of definition, it stated that:

⁴¹¹ Ibid 20.

⁴¹² For more on legal and historical status of Tibet, please see R P Anand, "The Status of Tibet in International Law" in Anand's *Studies in International Law and History: An Asian Perspective* (Martinus Nijhoff Publishers, Leiden: Boston, 2004); Micheal Van Walt Praag, "Tibet and the Right to Self-Determination" (1979-1980) 26 Wayne L. Rev. 279; Charles Henry Alexandrowicz, "The Legal Position of Tibet" (1954) 48:2 AJIL 265-274; Micheal Van Walt Praag, *The Status of Tibet: History, Rights, and Prospects in International Law* (Westview Press/Boulder: Colorado, 1987)

⁴¹³ *China: Western Poverty Reduction Project (1999)*, online: The Inspection Panel <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:22515626~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>>

⁴¹⁴ *Request for Inspection: China Western Poverty Reduction Project*, submitted by the International Campaign for Tibet, June 28, 1999. Online: <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChinaRequest.pdf>, >

[World Bank Policy] OD 4.20, in its "Definitions" section, para 3, states, "The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development. The Mongol and Tibetan indigenous minorities affected by the project fit within this definition."⁴¹⁵

The official Central Tibetan Administration⁴¹⁶ (CTA) policy paper, entitled "Memorandum on Genuine Autonomy for the Tibetan People" (2008), points out that:

The Tibetan nationality lives in one contiguous area on the Tibetan plateau, which they have inhabited for millennia and to which they are therefore *indigenous*. For purposes of the constitutional principles of national regional autonomy Tibetans in the PRC in fact live as a single nationality all over the Tibetan plateau.

As a part of the multi-national state of the PRC, Tibetans can benefit greatly from the rapid economic and scientific development the country is experiencing. While wanting to actively participate and contribute to this development, we want to ensure that this happens without the people losing their Tibetan identity, culture and core values and without putting the distinct and fragile environment of the Tibetan plateau, to which Tibetans are *indigenous*, at risk.⁴¹⁷

Most minority nationalities that might claim to be indigenous peoples in China have been unable to actively participate in various international indigenous fora and deliberations because it is politically not possible for them to participate due to fear of suppression by the Chinese state. But, some of them were able to advocate and identify themselves as

⁴¹⁵ Ibid, at 6.

⁴¹⁶ CTA is unofficially and informally known as Tibetan Government in exile established under the leadership of HH Dalai Lama, located in Dharamsala (India).

⁴¹⁷ *Memorandum on Genuine Autonomy for the Tibetan people*, online: The Central Tibetan Administration < <http://tibet.net/important-issues/sino-tibetan-dialogue/memorandum-on-genuine-autonomy-for-the-tibetan-people/> >

indigenous within the context of international human rights law. Thus the definitional approach taken by Uyghur people seems to adhere to the *legal/analytical* approach to the definition which requires a strict legal definition for the term ‘indigenous peoples’. In contrast, the Tibetan peoples’ approach reflects Niezen’s *practical/strategic* one, where a more inclusive and less abstract definition was preferred and self-identification was undertaken of themselves as indigenous peoples within the rubric of human rights. Further, the approaches taken by both Uyghurs and the Tibetans do not reflect Niezen’s *collective/global* approach because they have so far not participated in the international indigenous peoples’ forums and other UN fora dealing with the rights of indigenous peoples.

5.5. Groups in the Philippines

As stated in the previous chapter, the Philippines became one of the few Asian states to actually recognize the concept of indigenous peoples within its territory. After years of indigenous peoples’ struggle for their rights and identity, the government finally took the decision to recognize the distinct cultural identity of indigenous cultural communities in the new 1987 Constitution. Article 17 proclaimed that “[t]he State shall recognise, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.”⁴¹⁸ Further, in the Indigenous Peoples’ Rights Act (IPRA)⁴¹⁹ of 1997, indigenous cultural communities (ICCs) were defined⁴²⁰ and made it clear that ICCs were the indigenous peoples of the country. The IPRA went on to

⁴¹⁸ The Constitution of Philippines. See *supra* note 333.

⁴¹⁹ The Indigenous Peoples’ Rights Act, 1997, see *supra* note 334.

⁴²⁰ Please see the previous chapter for the full definition.

recognize indigenous peoples' right to ancestral lands; inherent right to self-determination; supported autonomy arrangements in the Cordilleras and Mindanao; and the right to freely pursue cultural, economic and social development within the framework of the Philippines Constitution.⁴²¹

Accordingly, the government has identified 110 indigenous groups in Philippines with the population estimates ranging from 6.5 million to 12 million (between 10 and 15% of the total national population).⁴²² The indigenous groups in the northern mountains of Luzon (Cordillera) are collectively known as Igorot, and those on the southern island of Mindanao are called Lumad. The Igorot consists of groups such as Apayao, Tinggian, Kalinga, Bontok, Kankanaey, Ibaloi and Ifugao.⁴²³

In a 1984 report to the Working Group on Indigenous Populations, a representative of the Ibaloi people claimed that:

The Ibaloi people, together with other indigenous people inhabiting the Grand Cordillera mountain range in northern Luzon are known as the Igorot people. The Igorot number around 600,000 people and we are among the 6 1/2 million indigenous or tribal peoples living in the Philippines.

This is the first time that a member of an indigenous people from the Philippines will speak at a session of the UN Working Group on indigenous populations, and I wish to inform the working group about recent developments affecting the human rights and fundamental freedoms of my people.

Our experience and understanding of our oppression are showing us the way forward in articulating our rights which must be guaranteed and protected if we are to survive as distinct peoples.

⁴²¹ See Kingsbury, *supra* note 52, at 430.

⁴²² Erni 2008, *supra* note 307, at 430.

⁴²³ *Self-determination of indigenous peoples*, online: IWGIA < <http://www.iwgia.org/human-rights/self-determination> >

The Igorot people and other indigenous peoples in the Philippines were not colonized during the Spanish colonial period from the 16th to 19th century. We have successfully maintained our traditional homelands, our political institutions and our cultural traditions through the American, and Japanese periods from 1900 - 1945. And up to today, we still exhibit a high degree of self-reliance and independence.

...

Our people, the indigenous people do not enjoy equality under the Philippine state. Even if the Philippine Constitution provides that, “The State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies,” we suffer today from discrimination and national oppression, which has been our situation since the advent of colonization.

...

The non-recognition and violations of our rights as peoples – our land rights and our right to self-determination – has led to the steady deterioration and continuous worsening of our problems as a people.⁴²⁴

In 1987, the Federation of Indigenous Peoples of the Philippines was established, which was composed of 15 indigenous peoples’ organizations. These various ethno-linguistic groups make up the General Assembly, the Federation’s highest policy-making body. The National Council of Leaders is constituted by active leaders of the member organizations. It formulates policies/programs and organizes national campaigns approved by the General Assembly. The Federation represents indigenous groups such as the Igorots of the Cordillera Region in the North Central Island of Luzon; Agta of the Sierra Madre Mountain range (eastern part of Luzon island); the Aetas of the Central Plains of Luzon; the Mangyans of Mindoro island southern Luzon; the Bugkalots,

⁴²⁴ *United Nations Documents and Submissions*, online: Center for World Indigenous Studies (CWIS) < <http://cwis.org/GML/UnitedNationsDocuments/> >

Aggays and Kalinga, Kalanguyas of Cagayan Valley in the Northernmost region of Luzon; the Palawanis, Bataks and Tagbanuas of Palawan; the ethnic Tumandoks of Panay Island and the Lumads or indigenous peoples of Mindanao.⁴²⁵ The aim of the organization, which represented almost all indigenous groups within the state, was:

Facilitating the unity of different indigenous peoples organizations all over the Philippines;

Equipping the indigenous peoples with necessary skills and expertise to enable them to articulate their struggles and aspirations;

...

Advancing the issues and demands, aspirations and struggles of indigenous peoples of the Philippines;⁴²⁶

Thus, it is amply clear that groups in the Philippines identify themselves, and recognize each other as indigenous peoples of the places they belong to. Furthermore, due to strong cultural groups' movements and activism for indigenous rights within domestic political sphere, the government of the Philippines in the late 1980s, recognized the status of indigenous cultural communities (ICCs) as the indigenous peoples of the land. The definitional approaches taken by ICCs seem to reflect both of Niezen's *practical/strategic* and *collective/global* approaches. They have participated and contributed to the proceedings of the UN forums relating to indigenous peoples and helped create the separate international legal identity of 'indigenous peoples' and their rights. Thus, their approach to the definition is reflective of the UN's practical and strategic one where indigenous identities were constructed according to their participation

⁴²⁵ *Kalipunan ng mga Katutubong Mamamayan ng Pilipinas* (National Federation of Indigenous Peoples in the Philippines), online: < <http://katutubongmamamayan.org/node/9> >

⁴²⁶ Ibid.

in the lawmaking process with self-identification as a primary method of determining indigenesness.

5.6. Conclusion

In this chapter, I have highlighted non-western Asian groups' views and understandings on the question of definition and identity of indigenous peoples. I have also highlighted that the principle of prior occupancy, which became an accepted standard in international law, also should be applicable to the unique situations in Asia. This is due to the complex historical migrations and displacements in Asia which make it impossible and undesirable to trace the first occupants of the land. Further, I have also stressed how the issues of self-identification and non-dominance form important components in shaping the discourse of the rights of indigenous peoples in Asia. Lastly, I have outlined different views and approaches taken by non-western Asian groups towards the definition and identity of the term 'indigenous peoples', and shown that these views do not match up with approaches taken by non-western Asian states. Even though there is no single Asian approach to and understanding of the identity of the term indigenous peoples, there appear to be common approaches taken by many groups claiming to be indigenous peoples in international law.

In the next chapter, I will analyze whether there are any rights of indigenous peoples which attained the status of customary international law.

Chapter 6: Customary International Law and Indigenous Peoples

This chapter will analyze whether there are any rights of indigenous peoples which have attained the status of customary international law. The adoption of UNDRIP in 2007⁴²⁷ has raised the status and legitimacy of indigenous peoples in international law and affirmed their right to self-determination. Even though, technically, UNDRIP is a soft law instrument, there could be specific provisions relating to indigenous peoples that have attained a higher normative status in international law.

Before going into the detail, it is crucial here to outline why it matters whether groups are identified as indigenous in international law as compared to other collective identities such as tribal or minority. The answer to this query lies in what specific rights indigenous peoples enjoy (at least theoretically) in international law as affirmed in the UNDRIP. In the first part of the chapter, I will briefly outline those specific rights belonging to indigenous peoples with a specific focus on the right of self-determination.

6.1. Indigenous Peoples' Collective Rights

Collective rights in international law are those which belong exclusively and collectively to certain kind of peoples as a whole, and are generally different from individual human rights. Though collective rights were controversial in international law, due to contested or contradictory relations with understandings of state sovereignty, they were increasingly recognized in various international law instruments, especially in human rights discourse.⁴²⁸ Indigenous peoples' movements, since the 1960s, were

⁴²⁷ See UNDRIP, *supra* note 1.

⁴²⁸ See generally Philip Alston, ed, *Peoples' rights* (Oxford University Press, 2001) [Hereinafter Alston]; Douglas Sanders, "Collective Rights" (1991) 13 Hum Rts Q 368. [Hereinafter Sanders 1991]

organized in order to attain certain basic group rights such as self-determination and cultural preservation.⁴²⁹ Unlike minorities, which fall under the category of individual rights,⁴³⁰ the indigenous peoples' collective rights are recognized and came to fruition after a long period of struggle in the form of UNDRIP. There are conceptual differences between minorities and indigenous peoples' rights. According to the United Nations Declaration on the Minorities⁴³¹ of 1992, the term 'minorities' refers to those groups based on national or ethnic, cultural, religious and linguistic identity.⁴³² The rights enjoyed by the minorities are, to some extent, similar to indigenous peoples' rights, such as rights to equality, non-discrimination, protection and preservation of culture and identity, and meaningful and effective participation in all aspects of political, economic, social and cultural life of the country. But there are huge differences in terms of their rights where indigenous peoples seek traditional rights to land and resources, self-government and self-determination. Further, indigenous peoples are collective rights-holders in international law, whereas minorities are individual rights holders. The UN Declaration on Minorities did not use the term 'Peoples', instead it called them "Persons belonging to national or ethnic, religious and linguistic minorities"⁴³³ According to Will Kymlicka:

[there are] three basic differences between minorities and indigenous peoples: (a) minorities seek institutional integration while indigenous peoples seek to preserve a

⁴²⁹ See Chapter 1 for the history on the rights of indigenous peoples.

⁴³⁰ Will Kymlicka, "The internationalization of minority rights" (2008) 6:1 *International Journal of Constitutional Law* 4. [Hereinafter Kymlicka]; See also Patrick Thornberry, *Indigenous Peoples and human rights* (Manchester University Press, 2002) 307, para 2. [Hereinafter Thornberry]; See also Geoff Gilbert, "Individuals, Collectivities and Rights" in Nazila Ghanea & Alexandra Xanthaki, eds, *Minorities, Peoples and Self-Determination* (Leiden: Martinus Nijhoff Publishers, 2005) 148, para 1.

⁴³¹ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNGA Resolution 47/135 (18 December 1992). See online: <
http://www.un.org/documents/instruments/docs_en.asp?year=1990>

⁴³² Article 1, *ibid.*

⁴³³ Article 2.

degree of institutional separateness; (b) minorities seek to exercise individual rights while indigenous peoples seek to exercise collective rights; (c) minorities seek non-discrimination while indigenous peoples seek self-government.⁴³⁴

With regard to the difference between tribal and indigenous peoples in international law, I did not come across any material that describes their conceptual differences from an international law perspective. Though more research is needed in this area, it seems to me that the discourse and narrative of the indigenous peoples in international law also includes groups belonging to tribal people. Although the term ‘tribal’ was used in some of the international documents, such as the ILO Conventions, it seems that it was used primarily as a legal category of people within domestic law and jurisprudence. Unlike indigenous peoples and minorities, international law does not recognize tribal people as a distinct legal category bearing special rights.

The term ‘indigenous peoples’ today matters a lot in international law because the UNDRIP has outlined an array of tailor-made collective rights for indigenous peoples,⁴³⁵ namely: land and resources; cultural integrity; duty to consult and consent; equality and non-discrimination; right to participation in the national decision making; political autonomy; and self-determination. The term “tribal peoples” was not mentioned anywhere in the wordings of UNDRIP.

Article 1 of UNDRIP affirms that “indigenous peoples have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms...”⁴³⁶ Concerning their right to land and resources, Article 26 says that “indigenous peoples have the right to the lands, territories and resources which they have

⁴³⁴ See Kymlicka, *supra* note 430, at 4.

⁴³⁵ See Mazel, *supra* note 214, at 147.

⁴³⁶ Article 1, UNDRIP, *supra* note 1.

traditionally owned, occupied or otherwise used or acquired.”⁴³⁷ According to Gilbert and Doyle, it is important to note that “a profound cultural, social and spiritual relationship with their lands and territories is characteristic of indigenous peoples and fundamental to their survival.”⁴³⁸ The United Nations Permanent Forum on Indigenous Issues (UNPFII) has also observed that “[l]and is the foundation of the lives and cultures of indigenous peoples all over the world. Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples’ particular distinct culture is threatened.”⁴³⁹ Others have suggested that the special and spiritual relationship with the land and natural resources is at the “core of indigenous society”.⁴⁴⁰ According to Professor R. A. Williams, “indigenous peoples have emphasised that the spiritual and material foundations of their cultural identities are sustained by their unique relationship to the traditional territories.”⁴⁴¹ Further, this relationship is aptly illustrated by Professor James Sakej Henderson, who stated that:

the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource ... Their vision is of different realms enfolded into a sacred space ... it is fundamental to their identity, personality and

⁴³⁷ See UNDRIP, *ibid.*

⁴³⁸ Jeremie Gilbert and Cathal Doyle, “A New Dawn over the Land: Shedding Light on Collective Ownership and Consent” in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oregon: Hart Publishing, 2011) 289, para 1. [Hereinafter Doyle]

⁴³⁹ Permanent Forum on Indigenous Issues, Report on the Sixth Session (14-15 May 2007), Economic and Social Council Official Records Supplement No 23, UN Doc E/2007/43, E/C.19/2007/12, para 4. As cited in Doyle, *ibid.*, at 291, para 2.

⁴⁴⁰ Erica-Irene A. Daes, “Indigenous Peoples’ Rights to Land and Natural Resources” in Nazila Ghanea & Alexandra Xanthaki, eds, *Minorities, Peoples and Self-Determination* (Leiden: Martinus Nijhoff Publishers, 2005) 76, para 3. [Hereinafter Daes]

⁴⁴¹ R.A. Williams ‘Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples’ survival in the world’, 39 *Duke Law Journal* (1990), p. 681. As cited in Daes, *ibid.*, at 76, para 3.

humanity ...[the] notion of self does not end with their flesh, but continues with the reach of their senses into the land.⁴⁴²

Article 13 of the ILO Convention 169, while affirming this special relationship, provides that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”⁴⁴³

With regard to their cultural integrity and preservation, UNDRIP Article 11 affirms that “indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures ...”⁴⁴⁴ Further they have the right not to be subjected to any forced assimilation or destruction of their culture.⁴⁴⁵ The preamble and Article 2 make it clear that indigenous peoples are equal to all other peoples and have the right to be free from any kinds of discrimination.⁴⁴⁶ Likewise, their right to participate in the decision making processes of the state which would affect their rights and lives are also affirmed in the Article 18. Further, the duty of states to seek indigenous peoples’ consent was clearly affirmed in Article 19 and 32. Article 19 states that:

[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free,

⁴⁴² J.S. Henderson ‘Mikmaq tenure in Atlantic Canada’, 18.2. *Dalhousie Law Journal* (1995) p. 196. As cited in Daes, *ibid*, at 77, para 1.

⁴⁴³ See ILO Convention 169, *supra* note 48.

⁴⁴⁴ Article 11, UNDRIP, *supra* note 1.

⁴⁴⁵ Article 8, *ibid*.

⁴⁴⁶ Preamble and Article 2, *ibid*.

prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁴⁴⁷

The principle of ‘Free, Prior and Informed Consent’ (FPIC) remains crucial because the problem of expropriation of indigenous peoples’ lands and resources, in the name of economic development and without their consent, is severe and growing.⁴⁴⁸ This widespread problem was termed by indigenous peoples as ‘development aggression’.⁴⁴⁹ The spirit of the FPIC was recognized in the ILO Convention 169, where article 6 provided that “governments shall 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.”⁴⁵⁰ The principle was also affirmed in various human rights treaty bodies such as Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD). In the *Poma-Poma v Peru* case of 2009, HRC stated that for the effective participation of indigenous peoples in the decision-making, their FPIC was necessary.⁴⁵¹ Further CERD has, in its General Comment XXIII, stated that “no decisions directly relating to their [indigenous peoples] rights and interests are to be taken without their informed consent.”⁴⁵² At the regional level, the Inter-American Court of Human Rights,

⁴⁴⁷ Article 19, *ibid*.

⁴⁴⁸ E-I Daes, Indigenous Peoples’ Permanent Sovereignty over Natural Resources, E/CN.4/Sub.2/2004/30/Add.1, para 7. As cited in Doyle, *supra* note 438, at 304, para 1.

⁴⁴⁹ See Doyle, *ibid*, at 304.

⁴⁵⁰ See *supra* note 48.

⁴⁵¹ HRC *Poma-Poma v Peru* UN Doc CCPR/C/95/D/1457/2006 (24 April 2009), para 7.6. As cited in Doyle, *supra* note 438, at 306.

⁴⁵² CERD, General Comment XXIII (51) on the Rights of Indigenous Peoples (adopted at the Committee’s 1235th meeting, 18 August 1997) para 4(d). As cited in Doyle, *ibid*, at 307, para 1.

in its 2007 *Saramaka v Suriname case* decision, cited Article 32 of UNDRIP and reaffirmed the requirement for FPIC, where it stated that:

the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the state has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.⁴⁵³

At the national level, the Supreme Court of Canada, in the *Delgamuukw v British Columbia* case, affirmed government's duty to consult if aboriginal people hold title to their land. The court went on to state that:

[T]he fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a *duty of consultation*. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith ... In most cases, it will be significantly deeper than mere consultation. Some cases may even require the *full consent* of an aboriginal nation.⁴⁵⁴

UNDRIP goes even further and enshrines that “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs ...”⁴⁵⁵ Most importantly, the right to self-

⁴⁵³ Case of the Saramaka People v Suriname (Series C No 172) [2007] IACHR 5 (28 November 2007) para 134. As cited in Doyle, *ibid*, at 309, para 1.

⁴⁵⁴ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 168. [Emphasis added]

⁴⁵⁵ Article 4, UNDRIP, *supra* note 1.

determination forms the central part of all rights, without which all other provisions regarding indigenous peoples could not be realized. This is because the right to self-determination enables peoples, including indigenous peoples, to freely determine their future political status and to pursue their economic, social and cultural development based upon the equality of all peoples. Therefore, all indigenous peoples' rights enshrined in UNDRIP ultimately arise from this overarching principle of self-determination, which seeks to achieve equality, justice and emancipation in the international order. So, it is crucial to understand what is meant by indigenous self-determination, including its scope and limitations.

6.2. Right of Self-Determination

The principle of self-determination, which is closely linked with the territorial integrity of states, is one of the most controversial subjects of international law. Through history, scholars and nations were divided on the meaning and scope of the principle that ranges from: right of ethnic groups or nations to independent statehood; right of entire population of a state to its majority rule; and to the right of minority ethnic, linguistic and religious groups to internal democratic participatory right. Therefore, the right of self-determination lacks universal consensus in theory as well as in practice in international legal discourse.⁴⁵⁶ The prime reason for this lies in the very nature of the principle's in-built capabilities in influencing the very existence and disappearance of sovereign statehood in the international sphere.

⁴⁵⁶ See generally Cassese, *infra* note 457. Also see Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43: 2 ICLQ 249. [Hereinafter Koskenniemi]

The origin of the principle of self-determination can be traced back to the Enlightenment era's⁴⁵⁷ (18th century) most influential and powerful political ideas, namely, popular sovereignty and the consent of the governed.⁴⁵⁸ The concept of popular sovereignty ("sovereignty of the people")⁴⁵⁹ as propounded by Rousseau sought to understand the capacity of people to determine their own future and destiny. It implies that people should be free to choose their own state and to determine the territorial boundaries of that state. Therefore, it is the will of the people or the consent of the governed that makes a state legitimate. The strongest proponent of the principle in the 20th century, who made it a global political principle, was US President Woodrow Wilson during the Paris Peace Conference at the end of the World War I. Though he advocated self-determination as a guiding principle⁴⁶⁰ in the post-war international system, critics soon raised objections against his conception of self-determination for being too loose, indeterminate⁴⁶¹ and fatally ambiguous,⁴⁶² and for by encouraging unrealistic nationalist aspirations it would provoke violent conflicts.⁴⁶³ Subsequently, neither the Peace Treaties following the World War I nor the Covenant of the League of Nations upheld Wilson's ideas. Instead, the principle of territorial integrity was upheld in these international

⁴⁵⁷ Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, 1995) 327 [Hereinafter Cassese]; Guyora Binder, "The Case for Self-Determination" (1993) 29 *Stan J Int'l L* 223-270; Lea Brilmayer, "Secession and Self-determination: A Territorial Interpretation" (1991) 16 *Yale J Int'l L* 177-202; Ingrid Barnsley and Roland Bleiker, "Self-determination: from decolonization to deterritorialization" (2008) 20:2 *Global Change, Peace and Security* 121-136.

⁴⁵⁸ See Brilmayer, *ibid.*, at 180.

⁴⁵⁹ Aleksandar Pavkovic and Peter Radan, "In Pursuit Of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order" (2003) 3 *Macq Law J* 4.

⁴⁶⁰ Hurst Hannum, "Rethinking Self-Determination" (1993) 34 *Va J Int'l L* 3. [Hereinafter Hannum]

⁴⁶¹ *Ibid.*, at 22.

⁴⁶² See Binder, *supra* note 457, at 229.

⁴⁶³ *Ibid.*

initiatives⁴⁶⁴ to safeguard state sovereignty of existing states and maintain stability in international system.

With the adoption of the United Nations Charter, self-determination (then a political principle) formally became an international law principle. Thus, it became one of the main purposes of the UN which all its member states must observe in good faith. Article 1(2) of Charter provides that the UN is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” Initially, most European colonial powers resisted application of self-determination within their respective overseas colonial territories, but soon the momentum generated by the anti-colonialist movement (in Asia and Africa), supported by Socialist states, shifted the whole emphasis of the principle from ‘self-government’ to a right to independence from the colonial rule.⁴⁶⁵ Thus it de-legitimized the very existence of European rule over these colonies. In 1960, the UN General Assembly adopted Resolution 1514(XV), the *Declaration on the Granting of Independence to Colonial Countries and Peoples*⁴⁶⁶ with an overwhelming majority. It was seen as the “Magna Carta”⁴⁶⁷ of the decolonization process and was meant to eradicate colonialism which most states by late 1950s had recognized to be a palpable evil.⁴⁶⁸ Article 2 of the UNGA Resolution 1514 (XV) specifically provided that “all peoples have the right to self-determination; by virtue of

⁴⁶⁴ See Koskenniemi, *supra* note 456, at 253. Also see Hannum, *supra* note 460, at 7.

⁴⁶⁵ See Cassese, *supra* note 457, at 65-66.

⁴⁶⁶ UN General Assembly Resolution 1514 (XV) passed on 14 December 1960 by a vote of 89 to 0, with 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, UK, US.).

⁴⁶⁷ Gerry J. Simpson “The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age” (1996) 32 *Stan J Int’l L* 269. [Hereinafter Simpson]

⁴⁶⁸ Ved P. Nanda, “Self-Determination Under International Law: Validity of Claims to Secede” (1981) *Case W Res J Int’l L* 275. [Hereinafter Nanda]

that right they freely determine their political status and freely pursue their economic, social and cultural development”⁴⁶⁹ and the “subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations ...”⁴⁷⁰ Nevertheless, the meaning and definition of colonialism for the purpose of self-determination remains highly specific and limited based on the “theory of salt-water colonialism” where self-determination could only apply to territories which were separated from Europe by oceans or high seas.⁴⁷¹ Thus it described colonies as “geographically separate, and distinct ethnically and culturally from the country administering it.”⁴⁷² In this way, overland acquisitions and annexations of territories were excluded from consideration.

The principle of self-determination became part of international human rights law in 1966 with the adoption of two human rights covenants - the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁴⁷³ - where Common article 1 stated that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.” Further, judicial pronouncements by the International Court of Justice in a number of decisions, such as the *Namibia* case (1971)⁴⁷⁴ and the *Western Sahara* case (1975),⁴⁷⁵ firmly established self-determination as fundamental international legal right, especially

⁴⁶⁹ Article 2 of the UNGA Resolution 1514 (XV).

⁴⁷⁰ Article 1, *ibid*.

⁴⁷¹ See Simpson, *supra* note 467, at 272.

⁴⁷² *Ibid*, at 273.

⁴⁷³ For ICCPR and ICESCR, see *supra* note 79.

⁴⁷⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, 1971 ICJ 16 (June 21). As cited in Nathaniel Berman, “Sovereignty in Abeyance: Self-Determination and International Law” (1988) 7 *Wis Int'l J* 98.

⁴⁷⁵ *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16).

in the context of decolonization. In the *East Timor* case,⁴⁷⁶ the court noted that the principle of self-determination exists in positive international law and may even be viewed as having an *erga omnes* character.⁴⁷⁷ Nevertheless, self-determination remained obscure and indeterminate outside the decolonization context where it is associated with two basic faces⁴⁷⁸ namely: its classical, conservative or statist conception justifies the state-centric system of international law, which renders the entire state as one self-determining unit with the preservation of its territorial integrity; and its secessionist, Rousseauesque and nationalist approach⁴⁷⁹ that challenges the formal structures of statehood by looking deeper into national groups as an authentic community deserving the right to separate statehood. Thus, Martti Koskenniemi has pointed out that self-determination, in the end, “both supports and challenges statehood”⁴⁸⁰ and one is unable to consistently apply a right to self-determination precisely because one cannot distinguish, much less choose, between the two.⁴⁸¹ This lack of a consensual definition, understanding and its application has prompted James Crawford to critique the right as *lex obscura* or uncertain law.⁴⁸² So, outside the context of decolonization, the principle of territorial integrity of states prevails over the principle of self-determination in order to maintain international peace, security and territorial status quo.

⁴⁷⁶ *East Timor (Portugal v. Australia)*, 1995 I.C.J. 102 (30 June).

⁴⁷⁷ *Ibid.*, at 29. The *erga omnes* norms in international law refer to those rights/obligations owed by states towards the community of states as a whole. Examples of *erga omnes* norms include genocide, torture, slavery, piracy, etc.

⁴⁷⁸ See Koskenniemi, *supra* note 456, at 249.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ Jan Klabbers, “The Right to be Taken Seriously: Self-Determination in International Law” (2006) 28 *Hum Rts Q* 188. [Hereinafter Klabbers]

⁴⁸² James Crawford, “The Right of Self-Determination in International Law: Its Development and Future”, in Philip Alston, ed, *People’s Rights*, (Oxford University Press, 2001) 7- 67. As cited in Amy Maguire, “Law Protecting Rights: Restoring the law of self-determination in the neo-colonial world” (2008) 12 *Law Text Culture* 15.

6.3. Indigenous Self-determination

The struggle of indigenous peoples, since the beginning of the 20th century, was driven primarily by the demand for sovereignty and self-determination. Thus, they actively participated in the struggles for self-determination during the period of decolonization. But, as stated earlier, the right of self-determination was provided only to the colonies as a whole and not to groups within them. With the use of ‘*uti possidetis*’⁴⁸³ and ‘salt-water theory’, indigenous peoples were effectively denied their demands for self-determination and sovereignty. The only route that remained available to them was through the mechanisms of international human rights law.

The emergence of new international indigenous peoples’ movements in the 1970s led to advocacy for indigenous peoples’ cultural, economic, administrative, land and resources rights within the framework of state’s territorial boundaries. Since indigenous peoples face cultural, economic and political marginalization, they started demanding more participatory rights of self-government or autonomy within the larger state structure. Internationally, they started forming international networks of indigenous peoples who shared common experiences of marginalization and dispossession at the hands of the states, and pushed for a draft declaration on the rights of indigenous peoples. In the landmark 2007 UNDRIP, which was a result of decades of indigenous peoples’ struggle and international activism, their right to self-determination was finally affirmed.

Article 3 states that:

⁴⁸³ *Uti Possidetis* is a Latin word which means “as you possess”. This international law doctrine requires that only people in the rigid colonial boundaries (no matter how arbitrarily it was initially drawn by the colonial powers) in Africa and other places would get right to self-determination. Thus former colonial boundaries were turned into international state boundaries after the process of self-determination.

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.

Article 4, further, stated that:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

But the scope and limitation of indigenous peoples' right to self-determination was curbed by the provision of article 46 (1) of UNDRIP. According to this article:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the *territorial integrity*⁴⁸⁴ or political unity of sovereign and independent States.

A similar provision against the disruption of states' territorial integrity was also affirmed in the 1970 Friendly Relations Declaration,⁴⁸⁵ which is considered one of the landmark restatements of international law since the adoption of UN Charter. Here it was clearly stated that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."⁴⁸⁶ Therefore, outside the context of decolonization, positive international law affirms the territorial integrity of

⁴⁸⁴ Italicized emphasis added.

⁴⁸⁵ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations*, UNGA Resolution 2625 (XXV), adopted in 24 October 1970. See United Nations Document, online: <
http://www.un.org/documents/instruments/docs_en.asp?year=1970>

⁴⁸⁶ Ibid.

states over the principle of self-determination. At what moment self-determination trumps over territorial integrity, in this context, is a matter of fact and politics rather than law.

According to James Anaya, the wording of Article 3 of UNDRIP, which affirmed indigenous peoples' right to self-determination is the same as those mentioned in UNGA Resolution 1514 and Common Article 1 in the two human rights covenants.⁴⁸⁷ The present UNDRIP supports the extension of a universal concept or right of self-determination to indigenous peoples. But Anaya suggests that, even though the scope of this right is universal in nature, it does not entail the right to independent statehood in the classical colonial sense.⁴⁸⁸ Accordingly, indigenous peoples' right to self-determination is based on human rights values. International law today does not deal only with states, but also with human beings in their individual capacity as well as collectively. As a result, self-determination may arise from this human rights framework rather than the traditional state framework.⁴⁸⁹ The term "Peoples' in this context refers to those human beings who hold and exercise the right of self-determination collectively in relation to the "bonds of community or solidarity that typify human existence."⁴⁹⁰ Thus, "the Declaration now identifies indigenous peoples as self-determining "peoples" ... within a framework that is one of human rights as opposed to states' rights".⁴⁹¹ Further, Anaya highlights that UNDRIP's self-determination and other rights, though collective in nature, are in the end

⁴⁸⁷ James Anaya, "The Rights of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters & Rodolfo Stavenhagen, eds, *Making The Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen, Denmark: IWGIA, 2009) 185. [Hereinafter *Anaya Self-determination*]

⁴⁸⁸ *Ibid*, para 3.

⁴⁸⁹ *Ibid*, at 186, para 1.

⁴⁹⁰ *Ibid*, para 3.

⁴⁹¹ *Ibid*, para 4.

human rights.⁴⁹² This is because indigenous peoples' rights are, in the end, formulated within the human rights discourse and processes. Indeed, according to Vine Deloria, Jr., the term 'indigenous sovereignty', in this modern human rights sense, is more a cultural integrity rather than strictly political one.⁴⁹³ With regard to other groups such as minorities and tribal people, no international law texts or documents provide self-determination to these groups of people, as they are not considered collective right holders in international law.

6.4. Customary International Law

As discussed earlier, Article 38(1) (b) of the Statute of International Court of Justice⁴⁹⁴ pronounced "international custom, as evidence of a general practice accepted as law" as one of the sources of public international law. A customary norm in international law is said to arise when both components of 'state practice' and 'opinio juris'⁴⁹⁵ are present.⁴⁹⁶ The requirement of the state practice is an objective or material element which places emphasis on the actual behavior of states⁴⁹⁷ and normally requires generality⁴⁹⁸ and uniformity.⁴⁹⁹ The second element, referred to as *opinio juris*, is a psychological element, and it requires states' belief that certain practices are legally binding upon

⁴⁹² Ibid, at 187, para 1.

⁴⁹³ See Wiessner, *supra* note 89, at 1170, para 2.

⁴⁹⁴ ICJ Statute, see *supra* note 6.

⁴⁹⁵ Subjective element where states believe that certain customary rules have become binding in law.

⁴⁹⁶ See Currie, *supra* note 7, at 163.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid, at 164.

⁴⁹⁹ Ibid, at 167, para 2.

them.⁵⁰⁰ The only exception to the rule of customary international law is the persistent objectors rule.⁵⁰¹

Coming back to the rights of indigenous peoples and customary international law, though UNDRIP is not a legally binding instrument, some scholars argued that the key provisions within UNDRIP seem to reflect characteristics of customary international law.⁵⁰² According to Siegfried Wiessner, two important provisions which could be expressive of customary international law are: (a) ‘right to maintain, develop and preserve distinct cultural identity, spirituality and traditional way of life’; and (b) ‘right to the lands and resources they have traditionally owned or occupied’.⁵⁰³ The right to preserve distinct identity of indigenous peoples appeared much before the Declaration and was the main reason behind the revision of ILO Convention 107, which was based upon the obsolete principle of assimilation and integration of indigenous groups into the larger society. Due to normative development and consensus in the 1970s and 80s on the need to change assimilationist approach, ILO Convention 169 was created and affirmed indigenous peoples’ right to cultural integrity and maintenance of distinct identity.⁵⁰⁴

The UNDRIP was adopted in 2007 by a landslide affirmative vote of 144 states, and initially objected to by only four states, namely the US, Canada, Australia and New Zealand. According to Prof. James Anaya and Siegfried Wiessner, the “Declaration appears to give it a more solemn ring, and takes it closer to most important policy statements of the organized world community – into the vicinity of instruments such as the 1948 Universal Declaration of Human Rights. While these documents are clearly not

⁵⁰⁰ Ibid, at 163, para 2.

⁵⁰¹ Ibid, at 176, para 1.

⁵⁰² See generally Wiessner, *supra* note 89. Also see Anaya & Wiessner, *supra* note 75.

⁵⁰³ See Wiessner, *supra* note 89, at 1156.

⁵⁰⁴ Please see Chapter 3 for the details.

binding as treaties, individual component prescriptions of them might have become binding if they can be categorized as reflective or generative of customary international law.”⁵⁰⁵ Even though the US initially objected to UNDRIP, the authors explained that the “US government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples.”⁵⁰⁶ So, the US government, in the domestic context, recognized and promoted tribal self-government. Further, in its Observation on the Declaration, the US mentioned that it only objected to the broad language over the land rights.⁵⁰⁷ Thus, the United States’ objection was a matter of limiting interpretation of certain provisions, not a denial of the right itself.⁵⁰⁸ Canada, though recognizing aboriginal or indigenous rights and freedoms in its 1982 Constitution,⁵⁰⁹ also argued that it agreed with the overarching principles of the UNDRIP, but rejected the Declaration based on the actual text of UNDRIP. It has outlined area of concerns within the text of the UNDRIP such as lands, territories and resources; and free, prior and informed consent.⁵¹⁰ At the time of its negative vote in the General Assembly, the Canadian Representative, Ambassador McNee, stated that:

Canada has long demonstrated our commitment to actively advancing indigenous rights at home and internationally. We recognize that the situation of indigenous peoples around the world warrants concerted and concrete international action. Canada continues to make further progress at home, working within constitutional guarantees for aboriginal and treaty rights, and with negotiated self-government and land claims agreements with several aboriginal groups in Canada. Canada also

⁵⁰⁵ See Anaya & Wiessner, *supra* note 75, para 5.

⁵⁰⁶ *Ibid*, para 9.

⁵⁰⁷ *Ibid*, para 12.

⁵⁰⁸ *Ibid*.

⁵⁰⁹ Part II, Rights of the Aboriginal Peoples of Canada, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁵¹⁰ *Aboriginal Affairs and Northern Development Canada*, online: <<http://www.aadnc-aandc.gc.ca/eng/1309374807748>>

intends to continue active international engagement, both multilaterally and bilaterally. It is therefore with disappointment that we find ourselves having to vote against the adoption of this Declaration as drafted ... However, the text that was presented at the Human Rights Council in June 2006 did not meet expectations and did not address some of our concerns. That is why Canada voted against it ... Canada's position has remained consistent and based on principle. We have stated publicly that Canada has significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member states and third parties ... [T]he provisions in the Declaration on lands, territories and resources are overly broad and unclear and are susceptible of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have already been settled by treaty in Canada. Similarly, some of the provisions dealing with the concept of free, prior and informed consent are unduly restrictive. Provisions such as article 19 provide that the State cannot act on any legislative or administrative matter that may affect indigenous peoples without obtaining their consent. While there are already strong consultation processes in place, and while Canadian courts have reinforced these as a matter of law, the establishment of a complete veto power over legislative and administrative action for a particular group would be fundamentally incompatible with Canada's parliamentary system ... By voting against the adoption of this text, Canada puts on record its disappointment with both the text's substance and the process leading to it. For clarity, we also underline our understanding that this Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.⁵¹¹

It is clear from the above statement that Canada objected to a number of provisions in the UNDRIP and did not consider it having any legal effect within its jurisdiction and

⁵¹¹ U.N. Docs. A/61/PV. 107. As cited in Anaya 2009, *supra* note 73, at 84-86.

expressly denied any status of customary international law therein. Similar views was also taken by the representative of Australia while casting his negative vote: he expressed concerns over some key provisions in the Declaration such as self-determination, lands and resources, and the requirement of FPIC.⁵¹² On the question of customary international law, the Australian representative, Mr. Hill, stated that:

With regard customary law, Australia is also concerned that the declaration places indigenous customary law in a superior position to national law. Customary law is not law in the sense that modern democracies use the term; it is based on culture and tradition. It should not override national laws and should not be used selectively to permit the exercise of practices by certain indigenous communities that would be unacceptable in the rest of the community.... In conclusion, with regard to the nature of the declaration, it is the clear intention of all states that it be an aspirational declaration with political and moral force but not legal force. It is not intended itself to be legally binding or reflective of international law. As this declaration does not describe current State practice or actions State consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law.⁵¹³

It is clear from the above statement that Australia, like Canada, affirmed the Declaration's moral force but expressly denied any legal obligations arising from UNDRIP, much less having any status of customary international law. Likewise, the representative of Bangladesh, while abstaining from the vote, stated that:

... the Declaration on the Rights of Indigenous Peoples, in its present form, retains some ambiguities. In particular, indigenous peoples have not been defined or identified in clear terms. We had also hoped that this political Declaration would be able to enjoy consensus among Member States, but unfortunately that has not been

⁵¹² Ibid, as cited in Anaya 2009, at 83-84.

⁵¹³ Ibid.

the case. Under those circumstances, Bangladesh was obliged to abstain in the vote on the draft resolution.⁵¹⁴

Bangladesh, while abstaining from the vote, raised concerns over the lack of definition of indigenous peoples in the declaration and implicitly denied legal status to UNDRIP by calling it a mere ‘political Declaration’. As discussed earlier, despite India and China’s objections to the lack of definition, they, along with Philippines, voted in favor of UNDRIP and upheld its strong legitimacy. But, it is important to note here that Canada and Australia’s strong objections to the legality of the declaration might very well put them into the category of persistent objectors.

Nevertheless, on 3rd April 2009, Australia formally adopted the declaration and was followed by the United States, Canada and New Zealand in 2010.⁵¹⁵ Though Australia later endorsed the Declaration, it clarified that the Declaration remains aspirational and non-binding and does not affect existing Australian laws. Further, it claimed that provisions on indigenous land rights and FPIC cannot be used to impair Australia’s territorial integrity or political unity.⁵¹⁶ On November 12, 2010, Canada, in its statement of support on UNDRIP, reaffirmed that the Declaration is an aspirational and “non-legally binding document that does not reflect customary international law nor change Canadian laws.”⁵¹⁷ It also reaffirmed the concerns raised by Canada in its 2007 statement on certain provisions such as land rights and FPIC, and stated that the

⁵¹⁴ Ibid, as cited in Anaya 2009, at 90, para 1.

⁵¹⁵ *United Nations Permanent Forum on Indigenous Issues*, online: < <http://social.un.org/index/IndigenousPeoples.aspx> >

⁵¹⁶ See Anaya 2009, *supra* note 73, at 97.

⁵¹⁷ *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, online: Aboriginal Affairs and Northern Development Canada < <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> >

principles expressed in the declaration must be interpreted in a manner that is consistent with the Canadian Constitution and legal framework.⁵¹⁸

On the other hand, international and regional human rights courts have played a significant role in affirming indigenous peoples' rights. The Inter-American Court of Human Rights, in the *Awás Tingni* judgement of 2001, affirmed the existence of an indigenous peoples' collective right to its land⁵¹⁹ and thus seemed to be expressive of customary international law.⁵²⁰ Similarly, the Belize Supreme Court also recognized the customary international legal character of indigenous peoples' right to land and resources.⁵²¹

In the end, we can conclude that there appear to be some provisions related to the rights of indigenous peoples which are reflective of customary international law. Those are the 'right to land and resources' and the 'right to cultural integrity, preservation and self-governance'. But there is no certainty at this point of time whether they are indeed customary norms of international law. The scholars and experts cautiously used the term such as 'reflective' and 'expressive' when they define the legal status of such rights. Most of the states have also not come up at this point of time to expressly (whether through practice or *opinio juris*) determine whether such rights are indeed customary laws. Though there appears to be increasing respect and acceptance of UNDRIP in theory, it is not clear whether these form a part of *opinio juris* with its complex psychological requirement of legal obligations. Further there appears to be lack of

⁵¹⁸ Ibid, para 13.

⁵¹⁹ See Wiesner, *supra* note 89, at 1158.

⁵²⁰ James Anaya & Claudio Grossman, "The Case of *Awás Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples", (2002) 19:1 *Ariz J Int'l & Comp L* 15.

⁵²¹ See Wiesner, *supra* note 89, at 1159, para 1.

uniform state practices on the rights of indigenous peoples, which render any scope and possibility of there being a customary of international law remote. Nevertheless, it is beyond the scope of this thesis to examine the depth of state practices concerning the question of customary international law.

Regarding the question of definition of indigenous peoples, it is clear that there is no consensus at this moment among states and groups claiming to be indigenous peoples in international law. Nevertheless, international law-making in the last 30 years related to indigenous peoples had shown that groups (claiming to be indigenous) play a significant role in the process of norm creation. Through the development of bodies such as the Working Group and the Permanent Forum in the UN structure, indigenous peoples have emerged as subjects and makers of international law.⁵²² Through their sustained efforts, they have “ceased to be mere objects in the discussion of their rights and become real participants in an extensive multilateral dialogue.”⁵²³ Due to these reasons, the legitimacy of the UNDRIP has been raised significantly and accepted universally.

6.5. Legitimacy of UNDRIP in International Law

Though the UNDRIP is not a legally binding document, its strong legitimacy in international law cannot be avoided. According to Claire Charters, the likelihood of states’ compliance will be greater if the perception of legitimacy of the Declaration is higher.⁵²⁴ According to her, legitimacy in this context means “the quality in international law norms that leads states to internalise a pull to voluntarily and habitually obey those

⁵²² See Mazel, *supra* note 214, at 146.

⁵²³ See Anaya, *supra* note 82, at 56.

⁵²⁴ See Charters, *supra* note 86, at 280, para 2.

norms.”⁵²⁵ There are basically three factors⁵²⁶ which determine the legitimacy of any international instruments or norms, namely: (1) the quality of the *process* that leads to the establishment of certain norms; (2) *content* legitimacy - meaning substantive authority of a norm. It includes fairness, coherence and determinacy of norms; and (3) *engagement* legitimacy – meaning the extent to which states, international organizations, non-state groups, indigenous peoples and others engage with a norm after its establishment.⁵²⁷

In the specific case of UNDRIP, it is clear that the process of drafting the declaration was transparent, orderly, and under the watch of a UN institution with the full inputs and participation of various groups of indigenous peoples from across the world. Due to strong indigenous peoples’ movements in 1970s, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (which works under the Commission on Human Rights) created the Working Group on Indigenous Populations in 1982⁵²⁸ to “review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations.”⁵²⁹ The Working Group began the process of standard-setting with full participation from indigenous peoples’ representatives. Along with states, indigenous peoples equally took part and influenced drafting articles for the draft declaration.⁵³⁰ They met every year for a week from 1985-1993 and the text of the Working Group grew in scope and size. The final addition to the

⁵²⁵ Ibid, at 281, para 3.

⁵²⁶ Ibid, para 4.

⁵²⁷ Ibid.

⁵²⁸ Kenneth Deer, “Reflection on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples”, in Paul Joffe & Jennifer Preston, eds, *Realizing The UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, And Action* (Purich Publishing Ltd, 2010) 19 [Hereinafter Deer]; See also Chapter 2 for the historical analysis.

⁵²⁹ *Study of the problem of discrimination against indigenous populations*, ESC Res. 1982/34, UN ESCOR, 1982, Supp. No. 1, UN Doc. E/1982/82, 26 at 26 – 27. As cited in Deer, *ibid*, at 219, f 4.

⁵³⁰ See Deer, *ibid*, at 20.

text from indigenous peoples was article 3 regarding the right to self-determination.⁵³¹ The draft declaration was adopted by the Sub-Commission and went to the Commission of Human Rights, where many states opposed the draft text. So, in 1995, the Commission on Human Rights created an open-ended inter-sessional working group to further consider the draft text.⁵³² In this forum, indigenous peoples were initially excluded from the process, but they fought hard and got themselves back on the negotiating table and worked towards the inclusion of the term ‘peoples’ in the text. Despite strong resistance from states on the various aspects of the text, such as self-determination, land and resources, indigenous peoples adopted a policy of “No Change”.⁵³³ By 2006, after a long process of negotiation, a consensus emerged between state and indigenous peoples on the draft declaration, which recognized indigenous peoples’ collective rights such as self-determination, traditional right to land and resources, and the term ‘Peoples’ was accepted.⁵³⁴ Finally, after more than two decades of negotiations, the text was adopted by the UN General Assembly in 2007 and became a landmark event in the history of world’s indigenous peoples.

In terms of UNDRIP’s substantive legitimacy, it certainly illustrates the requirement of *fairness* whose main underlying themes are equality and non-discrimination. UNDRIP addressed the injustices done against the indigenous peoples in the past, and recognized them as a “Peoples” having the right to self-determination. In terms of *coherence*, indigenous peoples’ rights are not completely coherent as its conceptual understanding rests on various premises such as minority rights, human rights,

⁵³¹ Ibid.

⁵³² Ibid.

⁵³³ Ibid, at 21.

⁵³⁴ Ibid, at 22.

self-determination, historical sovereignty and sui generic claims.⁵³⁵ Nevertheless UNDRIP does provide a basic degree of clarity regarding what Indigenous Peoples' rights are. In case of *determinacy*, the UNDRIP provided clear determinable rights of the Indigenous Peoples such as the right to self-determination, autonomy or self-government, consultation requirements and others. Finally the Declaration's legitimacy had increased by the process of engagement by various international, states, non-state actors and Indigenous Peoples themselves. Therefore even though it is not legally binding, states are bound to accept and comply more of the norms laid down in the Declaration.

6.6. Conclusion

In the end, we can conclude that at the moment there appears to be lack of consensus among scholars, states and courts over the customary international law status of some provisions, despite UNDRIP's near universal acceptance and strong legitimacy in international law.

⁵³⁵ See Charters, *supra* note 86, at 289, para 2.

Chapter 7: Conclusion

In this concluding chapter, I will highlight the key findings of the research, along with the limitations in my analysis and suggestions for the future research. There are four key findings, namely (a) the emergence of indigenous peoples as international lawmakers; (b) there is no single and uniform Asian perspective on the term ‘indigenous peoples’; (c) there are common approaches taken by Asian groups claiming to be indigenous; and (d) there is not sufficient evidence at the moment on customary international law regarding rights of indigenous peoples.

First, despite traditional positivist understanding of international law where states were the only and primary subjects of international law, indigenous peoples have been able to assert their identity and participate in various international norm-creating processes related to their rights, such as UN Working Group. They have also taken a multi-layered approach to the indigenous norm creating process, including both bottom-up and top-down approaches. They started their rights activism and movements from the bottom-up approach by creating indigenous peoples’ organizations and conferences, which helped to create and spread knowledge of the indigenous issues, aspirations and rights. Then they took part in the UN bodies and helped create a consensual draft declaration on the rights of indigenous peoples which was finally adopted by the UN General Assembly. In terms of a top-down approach, indigenous peoples have approached various treaty bodies and mechanisms and seek compliance from states. Due to these sustained efforts, indigenous peoples were able to identify core normative precepts which facilitated the recognition of a distinct legal category of ‘indigenous

peoples' in international law. Thus, they finally emerged as participants and makers of international human rights law.⁵³⁶

Second, as shown in the Chapter 4 and 5, there was no single Asian perspective on the definition and identity of indigenous peoples in international law. The views of the Asian states, such as China, India and Bangladesh, suggest opposition to the use of the term within their jurisdiction based in part on the claim that all people within these states were indigenous to the land. Whereas the Philippines, following Japan and Taiwan in Asia, constitutionally recognized their cultural groups (who claimed such status) as indigenous to the land they belong.⁵³⁷ The views of the Asian groups differ from the states' views, as the groups primarily rely on the internationally accepted principle of self-identification and seek recognition from other indigenous peoples and organizations.⁵³⁸ In the case of the Uyghur and Tibetan peoples, they have not been able to participate and seek recognition from other indigenous groups around the world.

Third, most of the Asian groups take a common approach to the definition and identification of indigenous peoples. As mentioned in chapter 4, there are three broad approaches namely, *legal/analytical*, *practical/strategic* and *collective/global* approaches. The legal/analytical approach seeks to find out strict legal requirements or criteria for the definition of indigenous peoples, which automatically leaves out many groups identifying themselves as indigenous peoples. The practical/strategic approach to definition, which is endorsed by the UN system, seeks to bring indigenous peoples' identity within the rubric of human rights. This approach provides opportunity for groups claiming to be

⁵³⁶ See chapter 3 for details. The argument for this framework is drawn mainly from Miranda's work. See Miranda, *supra* note 37.

⁵³⁷ See chapter 4 for detail analysis.

⁵³⁸ See chapter 5 for the principle of self-identification and views expressed by Asian groups.

indigenous to self-identify themselves and seek recognition from states and indigenous groups and organizations. The collective/global approach, which is informally based on indigenous global solidarity, also endorses self-identification as a legitimate process within international law. Where most of the Asian states follow legal/analytical approach, Asian groups tend to follow practical/strategic and collective/global approaches to definition. Most of the Asian groups such as Jummas, Nagas, Boros, Chakmas, Tibetans, Uyghurs and others take common approach to the definition and identification of indigenous peoples.⁵³⁹ Further, they have, following on the footsteps of international indigenous peoples' movements, self-identified as indigenous peoples at various international forums dealing with issues concerning indigenous peoples. Thus these groups can be said to fall within the distinct international legal category of 'indigenous peoples'. Within the modern international human rights law framework where indigenous peoples have emerged as makers of international law, the approaches taken by Asian groups on the definition and identification conform to global movement of indigenous peoples as makers of international law. The question of definition and identity of 'indigenous peoples' in Asia cannot be determined without taking into account the views and aspirations of groups therein. To this end, I conclude that the views and aspirations of Asian groups should and must matter when determining definition and identity of indigenous peoples in Asia.

Fourth, there is little evidence at the moment on the question of customary international law concerning indigenous peoples' rights. Though scholars argue in favour of some indigenous rights attaining the status of customary norm, there is no clear and uniform evidence of state practice and *opinio juris* on these matters. As indigenous

⁵³⁹ See chapter 5 for detail accounts of Asian groups' views.

peoples are increasingly playing significant participatory role in the lawmaking, it remains to be seen to what extent they play a role in the formation of customary international law. To that end, there is need for further in-depth research into this matter.

Regarding self-identification and recognition, it is clear that the process of defining indigenous peoples in international law cannot proceed without the role played by groups claiming to be indigenous. Though traditional international law provides space and voice only to the states, the trend has appeared in the last 30 years particularly in relation to the rights of indigenous peoples that indigenous peoples are equally makers of international law. Thus indigenous voices related to the definition of the term 'indigenous peoples' are indispensable and shall be taken into account. In support of this proposition, and as discussed earlier, the principle of self-identification has emerged as standard practice for determining the identity of indigenous peoples. Often recognition from the states/governments to groups' self-identifications was not forthcoming and in the process those groups (claiming to be indigenous) ends up deprived of their indigenous rights. Nevertheless, seeking recognition from other indigenous groups is a legitimate and important element in the process of self-identification, therefore such recognition are usually provided by other groups on the basis of some basic and common characteristics unique to the situation of indigenous peoples. These common characteristics or indicators for the process of self-identification could be found within UNDRIP and ILO Convention 169's indigenous rights provisions, namely: traditional and spiritual connection to lands and natural resources (Article 25, 26 of UNDRIP/Article 13 of Convention 169); historical disruption caused by either colonialism or at the time of establishing present state boundaries (Para 6 of UNDRIP's Preamble/Article 1(1)(b) of Convention 169); non-

dominance within the state; distinct social, economic and political system (Article 5, 34 and 20 of UNDRIP); right to maintain their distinct cultural integrity (Article 11 of UNDRIP); right to consultation and consent (Article 10, 19 and 32 of UNDRIP/Article 6 of Convention 169); right to self-determination (Article 3 of UNDRIP); and indigenous peoples' status as collective right holders (Article 1 of UNDRIP). Here it is important to note that further in-depth research is needed on the principle of self-identification, its requirements and processes. Even though these provisions (indicators) may play a part in the process of self-identification and recognition, they themselves represent rights of already determined indigenous peoples. Thus more study is needed to understand this complex relationship between self-identification and recognition.

Coming to the limitations of the research findings, I have relied mainly on the views of the states and Asian groups from their statements and submissions to the UN mechanisms and the World Bank mechanism. I was unable to search for court cases, decisions and jurisprudence within these Asian states, which might have shown me further evidence on the question of definition and identity of indigenous peoples had I looked into it. Likewise, I have not relied on other international human rights mechanisms that are not focused on indigenous peoples.

Further, I would like to suggest that there is a need for thorough and in-depth research on the question of definition and identification of indigenous peoples in Asia. For that purpose, the study and analysis of each Asian states and groups on their stand on the definition is extremely crucial in order for the norms of indigenous peoples to realize true universality. It is also important to do thorough research on the question of customary international law regarding the rights of indigenous peoples. An in-depth study

of the state practice and *opinio juris* of states who endorsed UNDRIP is also necessary. As discussed in above, more in-depth research is also needed on the principle of self-identification, recognition and their requirements and processes.

APPENDIX

United Nations Declaration on the Rights of Indigenous Peoples

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights⁵⁴⁰ and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of Action,⁵⁴¹ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

⁵⁴⁰ See resolution 2200 A (XXI), annex.

⁵⁴¹ A/CONF.157/24 (Part I), chap. III.

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁵⁴² and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

⁵⁴² Resolution 217 A (III).

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.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance

with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

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.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions

of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. 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 limitations as are determined by law and in

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

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

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