Part I The UNDRIP’s Relationship to Existing International Law, Ch.1 Who Are ‘Indigenous Peoples’?: An Examination of Concepts Concerning Group Membership in the UNDRIP

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Chapter 1. Who Are ‘Indigenous Peoples’?

An Examination of Concepts Concerning Group Membership in the UNDRIP

1. Introduction

Judge Dillard famously stated that it is for ‘the people to determine the fate of the territory and not the territory the fate of the people’.1 Articulated in the context of an attempt to determine the fate of the Western Sahara (Rio del Oro and Saket el Hamra), the statement reflected a position in a long-held debate in public international law concerning the entitlement question of who the rights bearer of such an action may be.

This chapter seeks to examine this entitlement question in the context of specific groups which are now identified as Indigenous peoples. To this end, the chapter is divided into two principal sections. The first section will introduce and assess the use of the following terms concerning group rights in international law: ‘peoples’, ‘Indigenous peoples’, ‘tribal peoples’, and ‘minorities’. Each of these conceptual classes has its own particular, albeit fluid, meaning under international law, embodying a set of generally accepted group characteristics and a relatively well-defined corpus of group rights. However, rather than constituting hermeneutically sealed categories, to which particular groups exclusively and permanently pertain, the boundaries between these classes can be blurred, porous, and shifting. Addressing the entitlement question in the context of Indigenous peoples necessitates an examination of the concept of ‘peoples’ which the adjective ‘Indigenous’ qualifies. It is also fundamental to the debates pertaining to Indigenous peoples’ right to self-determination. An examination of the concept of minorities is equally necessary, as most Indigenous peoples are numerically inferior to the rest of the population in which they reside and share certain rights and characteristics with minority groups. In addition, in the absence of an alternative effective channel to address their claims, the minority rights framework has, on occasion, been invoked to uphold Indigenous peoples’ cultural rights. However, the application of the label ‘minority’ to these groups is problematic where its effect is to negate the implicit claims to peoplehood embodied in the concept of ‘Indigenous peoples’. Given this context, any effort to identify the main contours distinguishing Indigenous peoples from other contenders for group legitimacy in international law should begin with an exploration of the concepts underpinning the terms ‘peoples’ and ‘minorities’. The first section consequently commences with an introduction to the concept of ‘group rights’ before exploring each of the aforementioned conceptual categories.

The second section will then seek to focus on the extent to which the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as a document has made a contribution to the clarity of terminology concerning ‘Indigenous peoples’. It needs to be highlighted (p. 8) here that the UNDRIP has no specific Article or provision that defines Indigenous peoples. As a result, this commentary seeks to provide readers with the contextual background that underpins the definition debate, supporting the drafters’ argument that the definitional criteria under customary international law suffice.

The initial public international law debate pertaining to the entitlement question stemmed from statements and attempts made by US President Woodrow Wilson to seek to determine the political future of contested territories in Europe at the end of World War I.2 He famously stated that, ‘peoples may now be dominated and governed by their own consent’,3 and warned statesmen about the ‘perils’ associated with ignoring these aspirations. While this statement was seen as validating the aspirations of many sub-national groups living within sovereign States, Wilson in the same address did restrict the ambit of its
interpretation by suggesting that while ‘all national aspirations shall be accorded utmost satisfaction ... [this had to be achieved] ... without introducing new or perpetuating old elements of discord and antagonism’. It is generally accepted that Wilson’s vision was informed by his belief that democracy or ‘the democratic entitlement’ was fundamental to any governmental legitimacy. However, it is equally true that Wilson’s Fourteen Point Address raised questions concerning the issue of the entitlement under international law for the right to be considered a ‘self’ that could then determine its future. This brought to the fore valid questions as to how the 5,000 groups that Gurr tells us exist could be reasonably accommodated in the 200 sovereign States that exist.

As this chapter will demonstrate, the question of such ‘entitlement to self-determination’ has since arisen regularly in the context of seeking to determine ‘who’ the people were. This has spanned significant discussion about the nuances of ‘peoplehood’ and its precise constituents, and while it holds many intrinsic applications for Indigenous peoples, the regime(s) that had developed appeared to forestall Indigenous peoples from using the language of self-determination, in any other manifestation than ‘internal’ self-determination.

When the underlying purpose of self-determination is examined, it becomes clear that this discourse arose out of the yearning for freedom from oppression and subjugation. The primary argument that drove most movements over history was that for a group, however defined, to retain its culture and identity, they would need to govern themselves, rather than being governed by The Other, who failed to respect their mores and values. As various self-determination movements have articulated this concept, it has become a permanent fixture in the firmament of international society. Yet, when it has come to the application of this promise to Indigenous peoples, questions have been raised as to: (a) its applicability; (b) who exactly ought to be entitled to such a right; and (c) the impact that the exercise of such a right would have on State stability. The question of ownership and control of resources has also been an intrinsic element of these questions. As a result, (p. 9) any commentary on the UNDRIP would need to address the extent to which that document has contributed to greater clarity on the contours of the identity of various groups encompassed by the concept of Indigenous peoples. A segment of this question, namely that concerning self-determination, is addressed by Mark Weller, in Chapter 5 of this book. This particular chapter therefore has two specific aims: (a) a general exposé of the aforementioned terms that are prevalent in international law for identifying groups; and (b) to examine the extent to which the UNDRIP has contributed to greater clarity around these in the specific context of Indigenous peoples’ rights and their entitlement to claims of peoplehood.

2. The Quest for International Legal Personality: Peoples, Indigenous Peoples, and Minorities

The Universal Declaration of Human Rights unveiled in 1948 sought to identify a broad category of rights that would be available to protect every individual on the basis of their being part of the human community. The rights envisaged were purported to guarantee each individual’s inherent dignity and worth. However, as had been apparent in the centuries prior to the Declaration, there existed and continued to exist a fundamental difference between the de facto access to rights and their de jure articulation. In the context of the history of international law, the attempt to bridge this difference is visible in the many lex specialis regimes that have been created in order to protect specific categories of individuals who are classifiable as members of a definable group. Special regimes have been designed to protect women and children in the context of war and minorities regarded as particularly vulnerable owing to their location within States that did not fully represent them. The aim of such measures was to create an extra layer of protection in a bid to overcome the difficulties of access to rights faced by members of such groups. Despite the re-articulation of the modern agenda of human rights as rights
applying equally to every individual, the trend towards recognizing *lex specialis* has continued. Among the pantheon of such protection are instruments, which in addition to the UNDRIP\(^{15}\) pertain to minorities,\(^{16}\) women,\(^{17}\) children,\(^{18}\) migrant workers (documented and undocumented),\(^{19}\) refugees,\(^{20}\) and disabled people.\(^{21}\) In every instance, international instruments have been passed, and/or signed and ratified, containing a series of general human rights, a list of specific rights distinct to the class of persons in question, and, in some cases, an additional mechanism designed to overcome the problem of the groups’ lack of access to general rights.\(^{22}\) Most recently, the trend has also included the creation of *lex specialis* at the European level, for human rights defenders, on the grounds that their rights are particularly difficult to guarantee.\(^{23}\)

Despite this significant recognition of group rights (or more precisely, in most instances, of individual rights identified for a class of individuals), predominantly occurring (p. 11) within international human rights law, the persistent focus from the lens of international law that has arisen, mainly in the context of self-determination, are the key differentials among ‘peoples’, ‘Indigenous peoples’, sometimes including ‘tribal populations’, and ‘minorities’. It is to these differentiations that this section will now turn. It needs to be acknowledged that it does seem logical that arguments pertaining to Indigenous peoples’ rights start from the premise that their self-determination ought to be located within the context of decolonization,\(^{24}\) since colonial expansion was central to the dispossession of peoples and the measures seeking to gain greater representation were best articulated in the context of decolonization. Further, the ‘success’ of decolonization has resulted in new States coming to independence with full sovereign rights and an equal bargaining position at the high table of international society. Many minorities, too, argue that the treatment meted out to them necessitates an automatic trigger for the right of self-determination, drawing on a ‘right’ first expressed by Grotius as *jus secessionis ac resistendi*, or the right to secede as a form of resistance to oppression.\(^{25}\) While questions concerning the right to resistance remain extremely problematic in international law,\(^{26}\) elements of this idea can be seen in what some authors label the right to ‘remedial self-determination’.\(^{27}\) However, while many communities may allege that their treatment by an unrepresentative State may be unfair and quasi-colonial, the threshold for gaining the right to self-determination in international law has remained configured on the problematic grounds of ‘peoplehood’. The rest of this section will therefore examine three such groups:

(a) peoples, also referred to as ‘nations’ or ‘submerged nations’;

(b) minorities, also referred to as ‘ethnic, linguistic, or religious minorities’ or, more problematically in Europe, as ‘national minorities’;

(c) Indigenous peoples, also referred to as ‘first nations’ and ‘aborigines’, and usually considered to subsume ‘tribal peoples’.

### 2.1 Peoples

The concept of ‘Indigenous peoples’, and the debates pertaining to it in the drafting of the UNDRIP, cannot be understood without reflecting on the notion of ‘peoples’ which the adjective ‘Indigenous’ serves to qualify and contextualize. Defining a ‘people’ would be extremely difficult and while several efforts have been made to identify the constituent elements of ‘peoplehood’, these usually involve the conflation of the notion with the concept of ‘nationhood’.\(^{28}\) This interpretation is necessarily subjective and has little normative value in law. Thus, it is hard to see why *Indians* as a category may be considered (p. 12) a ‘people’, while *Kashmiris* might not; or similarly why the *Chinese* may be a people, but *Tibetans, Uighurs, or Mongolians* may not.\(^{29}\) The Chinese use of the term (*shaoshu minzu*), which equates in English to ‘minority nationalities’, suggests that the fifty-six groups that fall under this category are accepted as ‘nations’, but since fifty-five of them (ie not the Han, the majority) are numerically inferior to the Han, they are considered ‘minority’...
Discussions on the categorization of groups as ‘peoples’ inevitably involves either aggrandizing or belittling historically significant communities or nations by emphasizing or denying them the right to call themselves ‘peoples’ in the sense that may generate claims for self-determination. The literature around international law appears to accept the problematic reading of ‘peoples’ as consisting of ‘whole peoples’, language that subsumes historical discussions such as the ‘Belgian Thesis’ and the 1970 Declaration on Friendly Relations between States, accepted by many as articulating codified founding principles of international law. Yet, such a classification of ‘whole peoples’ pays much greater credence to the drawing of colonial boundaries delimiting entities rather than any congruence of cohesion in the communities that inhabit such a territory.

Thus, to go back and challenge the sentiment expressed by Judge Dillard, it puts the territory ahead of the people. This is another aspect that becomes particularly problematic in seeking to understand the constituent elements of ‘peoplehood’. The context of Abyssinia—the precursor to the State of Ethiopia—is a case in point. A portion of this ‘State’ of undetermined boundaries, namely Eritrea, came under the influence of Italy from 1889 onwards, with Britain gaining the mandate for the territory following World War II. The expansionist Emperor of Ethiopia, Haile Selassie I, attempted to integrate Eritrea back into Ethiopia using the argument that it had always been part of Abyssinia. As a compromise, an Anglo-American-supported federation was formed between Ethiopia and Eritrea, but antagonism grew, as did the self-determination claim within the Eritrean territory. The dismantling of Eritrean self-governing structures, and the 1970 abolition of the federal structure of the State, led to a fully fledged war of independence. Eritrea finally won that war in 1991 and became a State in 1993 through a UN-sponsored plebiscite. According to the literature, this was an instance of a ‘people’ successfully claiming the right to self-determination. However, the episode raised more questions than answers about the definition of that ‘peoplehood’. It has also enabled many of Gurr’s notional 5,000 groups to lay claim to being among the 200 that deserve recognition as a people followed by an entitlement to forge a new State. From the perspective of the two decades of debate that was to follow shortly thereafter in the United Nations with regard to Indigenous peoples’ entitlement to the right to self-determination, the mere prospect of any such peoples seeking independent statehood became an intractable issue which served to stall meaningful discussion and agreement on other important dimensions of Indigenous peoples’ right to self-determination.

Outside the politics of recognition of claims to peoplehood, there is considerable evidence for the support of the claims to peoplehood of the Palestinians, Tibetans, and Kurds, from State practice, unilateral acts of States, and General Assembly resolutions. The claims of others, such as the Basque, Kashmiris, Tamils, and Chechens, are processed and thought of differently, with the evidence more ambiguous. In any case, it ought to be made clear that the search for such evidence posits a declaratory approach to the recognition of peoplehood, rather than a constitutive one. This in itself is problematic since it brings the politics of vested interests into what, for some, is a more basic question of legitimate existence. In many instances, there are also discrepancies between how two communities or ‘nations’ within the same State are processed or perceived, such as the treatment of Uighurs and Tibetans. This inevitably highlights the subjective and highly politicized nature of the determination of ‘peoples’, and the extent to which claims made under this banner gain credence from the international community.

2.2 Minorities

The second category that it is necessary to consider before discussing the concept of ‘Indigenous peoples’ is that of ‘minorities’ and the international rights regime which has developed to protect those groups who fall within this category. Indigenous peoples are frequently numerically inferior to the populations of the societies in which they reside and consequently share certain characteristics with minorities. The international minority rights
regime preceded the contemporary international Indigenous peoples’ rights discourse. In some cases, the minority rights regime therefore provided the only effective opening into the UN human rights system in the context of petitions addressing violations of Indigenous peoples’ collective culturally based rights. Despite its utility in certain contexts for raising claims around abuses of Indigenous rights, the application of a minority rights framework to those groups who self-identify as Indigenous peoples remains contentious and potentially counterproductive. Definitional distinctions between the concepts of ‘minorities’ and ‘peoples’ have meant that the former label is regarded as highly problematic by Indigenous peoples if its usage serves to demote their entitlement to claim the status and rights embodied in the latter. An appreciation of the history, objectives, and limitations of the minority rights regime is consequently necessary in order to contextualize the discussion in relation to the concept of Indigenous peoples and how it was addressed during the drafting of the UNDRIP.

The idea of protecting the weak from the strong is a powerful concept that has inspired many sentiments and movements in human history. While much of this history can be defined in socio-legal terms as quests through which the powerful have erected structures to protect their own interests, there is a rich trend detectable of those who have sought to agitate for the interests of the weak in what was otherwise a relentless push for total dominance. The growth of minority rights as a discipline owes its heritage to those who struggled to create adequate standards of protection to safeguard the numerically inferior and non-dominant communities from the excesses and dominance of the majority. Minority rights issues provided an important axis along which public international law itself evolved, with early treaties such as the Promise of St Louis of France 1250 being instrumental in highlighting the condition of the Maronites as a legitimate concern of international society and not merely the territorial entity within which this community lived. The growth of the minority rights discourse as a collection of documents and various types of writings can be tracked back to a range of bilateral treaties throughout the seventeenth and eighteenth centuries, as regional rivals such as Greece and Turkey, Austria and Russia, and Austria and Turkey came to terms with how to address divided loyalties arising from populations swearing allegiance to one entity, but living as a numerically inferior population within the territory of another. These concerns paint a sophisticated perspective of minority rights within Europe, but also signal antagonisms between West and East, and clashes between Christianity and Islam, with the latter represented in the form of the Ottoman Empire.

The minority rights discourse sits at a tangent from the processes of colonization: while Europe was evolving modes of minority protection to look after specific communities which may have come under the aegis of another due to changing boundaries, this process remained hermeneutically sealed from Europe’s quest for dominance of non-European land and resources. Thus, evolving standards of minority rights protection, driven by the need to protect communities who were non-dominant, were not viewed as transferrable to the context of protecting those who came under European jurisdictions as a result of colonization. Colonial activities of European States were beyond the scrutiny of evolving standards at home, and are today often foreclosed by the inter-temporal rule of law. As a consequence, little was brought to bear on the manner in which territory was illegally acquired and demarcated in Latin America, Africa, Asia, and the Middle East.

The dominance of European perspectives within the minority rights discourse is striking, even though in reality one of the most sophisticated early sources of minority rights protection actually existed in the Ottoman Empire’s demarcation of religious autonomy. Yet, modern ‘minority rights’ as a concept, or ‘the rights of national minorities’ as it was more commonly written about, developed its conceptual bases in the experiences of communities that were affected by the break-up of the Austro-Hungarian Empire and the reconfiguration of ‘nation-States’ in Europe. By the time the League of Nations was
established, minority rights had taken a relatively central position in Central European politics, as reflected in its prominence within the heart of that institution’s mandate.\textsuperscript{54} The palpable failure of the League of Nations’ regime to deliver protection against and resistance to the Nazis, coupled with its failure to tackle Europe’s invidious discrimination against minorities, highlighted the paucity of commitment to enshrine protection. The events of World War II signalled its ultimate defeat, with the League unable to prevent the genocide of Jews and other minorities.

Under the UN auspices, protection of minorities is subject to two seemingly conflicting trends. First, the UN Charter placed emphasis on the prevention of inter-State conflict; and second, human rights were enshrined as part of the ‘hard-wiring’ of the new system. The former signalled that attention had moved away from how States behave toward their populations. The principle of State sovereignty, expressed as Article 2(7) of the Charter, drew a protective veil over issues considered as occurring within the domestic jurisdiction of States.\textsuperscript{55} Six decades of State practice under the UN era reveals that States avoid scrutiny of their records with regard to minorities by seeking refuge under the principle expressed in Article 2(7). This protects the State when faced with self-determination movements such as those of the Palestinians, Kurds, and Baluchis, who perceive themselves as submerged nations living as \textit{de facto} minorities on their own lands. The second trend emphasizes the inherent dignity and worth of all individuals, and began a process through which States were required to imbibe human rights protection within domestic law to uphold this tenet. With such all-encompassing protection, a \textit{lex specialis} for minorities or other groups became redundant.

While these developments at the United Nations stalled the development of ‘international’ minority rights law, its influence grew steadily as a range of post-colonial (p. 16) countries arrived at independence, as within the Middle East, with inherited populations that were the result of vested colonial boundary-line demarcations, rather than group cohesion.\textsuperscript{56} It soon became apparent that such boundary demarcations within post-colonial entities would ultimately determine whether a group existed as a minority or a majority within any given State.\textsuperscript{57} The extent to which the typical post-colonial State, consisting of competing nations and identities, could arrive at an inclusive model of protections brought minority issues to the forefront.

The literature that widely tackles the issues under consideration here is dominated by discussions as to the precise nature of ‘who’ a ‘minority’ or an ‘Indigenous people’ are.\textsuperscript{58} A working definition of who a minority is remains important, but rather than seeking to discuss the merits of such definition, it is proposed that the definition of Francesco Capotorti, framed in 1977, be accepted with all its conceptual weaknesses.\textsuperscript{59} Thus, for the purpose of this work a minority can be considered:

\begin{quote}
[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language.\textsuperscript{60}
\end{quote}

Two caveats of this definition need to be briefly addressed with regard to its suitability for this particular exercise. First, in the context of the issue of nationality, the restrictive approach of law would require that ‘minorities’ be nationals of a State. Thus, the prime focus of international minority rights law has often been concern regarding the treatment by a State of minority groups within it, based on the accepted principle that distinguishing between nationals and non-nationals is a prerogative of State sovereignty. The allowable differentiation of a State’s treatment of citizen and non-citizen is reflected in human rights law,\textsuperscript{61} but has subsequently been constricted.\textsuperscript{62} Further, the traditional definition of ‘national’ minorities has not been useful beyond the borders of Europe, since this only
accords status to groups living in one State with the nationality of another. While ‘national’ minorities are often as vulnerable as non-national minorities, the approach taken here is for a broader reading, to include non-national groups. This is particularly important since in the Middle Eastern context there are many individuals and communities (p. 17) who are either stateless due to a political motive, or who, as migrant workers, have no rights to nationality in the country in which they reside. Under the strict definition of ‘minority’, these groups could not be considered, even though the claim of the first is significantly stronger than that of the latter, who are treated in law as temporary workers with no rights to dominion.

Second, rather than validate this definition, it is re-articulated here to enable a basic understanding of the groups that would ostensibly come under the umbrella of protection afforded by international human rights law. The distinction between minority and majority, whether Indigenous or not, is better understood, in addition to a numerical aspect, as the distance between a community and sites of power.63

The academic writing on global minority rights law reflects its Western origins, and subsumes rich and complex discussions concerning nationalism,64 electoral reform,65 multiculturalism,66 accommodation,67 the role of the individual,68 and questions of individual versus collective protection.69 Such discussions are often underpinned by questions concerning ownership of resources.70 The literature includes models for ‘protection-oriented’ rights with great relevance derived in the recent growth of international criminal law and the codification of crimes against humanity, war crimes, and genocide as punishable under the Rome Statute of the International Criminal Court.

2.3 Indigenous Peoples

At a theoretical level, in contemporary society Indigenous peoples appear best placed for engaging the decolonization rhetoric and gaining tangible rights to self-determination. Indigenous peoples in general have had their territory occupied by settlers and, in many circumstances, have lived as quasi colonial subjects on their own land.71 In discussing the constituents of ‘Indigenous peoples’, one immediate question that arises is the value of the term ‘Indigenous’ itself. In other words, if the category of ‘peoples’ exists, why is it necessary to have a separate category of ‘Indigenous peoples’? This is particularly true when the notion of peoplehood is assessed against the hallmarks of ‘nationhood’. Waldron engages this issue when assessing the value of ‘first occupancy’, which seems to lie at the heart of the claim for ‘Indigenous’ status. While he accepts that the concept of indigeneity could be called upon to condemn colonization, he suggests that it ought not to be used to justify any revision to the status quo ante.72 Such a focus would, he argues, legitimise, (p. 18)

occupancy which is not disruptive of anyone else’s occupancy, but it puts too much weight on history and is insufficiently sensitive to subsequent change in circumstance and to the conditions that face us today.73

Of course, this sentiment would defeat many of the objectives of the Indigenous peoples’ movement, which are less geared towards returning to a status quo ante, but which rely on the fact that this status quo was achieved through subterfuge as a rallying call for a better and more sophisticated rights framework.74 In the context of such questions, it also needs to be asserted that had Indigenous peoples been treated as subjects rather than objects of law from the start,75 their general rights, and most specifically the rights to the territories on which they lived, would not have been abrogated in the dramatic manner that came to pass.76
In terms of the politics of international law, a question thus arises as to why Indigenous peoples are put into a separate category from peoples. To be able to address this, the constituents of what are deemed to be ‘Indigenous’ peoples need to be assessed closely. The most widely cited, albeit flawed, definition of ‘Indigenous peoples’ is as good a starting point as any other:

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

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

(a) occupation of ancestral lands, or at least of part of them;
(b) common ancestry with the original occupants of these lands;
(c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
(d) language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general, or normal language);
(e) residence in certain parts of the country, or in certain regions of the world;
(f) other relevant factors. 77

In articulating this definition as part of one of the first major UN studies of Indigenous peoples’ issues, José Martínez Cobo spent considerable time clarifying the importance of (p. 19) ‘self-identification’ or Indigenous group consciousness, a theme reflected years later in the approach taken by Committee on the Elimination of Racial Discrimination (CERD)78 the monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination.79 In more recent years, acceptance of groups as Indigenous peoples by other Indigenous peoples has inevitably become a crucial subjective factor in the definition. This facet is not merely a question of an individual’s right to determine their own status, but rather recognition of the sovereignty of the peoples in much the way that States’ recognition of each other plays a crucial role in fostering relations between them.80 Thus, it could be argued that contemporary practice among Indigenous peoples/nations operates in a guise similar to the declaratory principle of the recognition of States by their peers.

Despite various objections, it could be argued that this Martínez Cobo working definition, in addition to the element of recognition by other Indigenous peoples and a more nuanced conception of the requirement for historical continuity, reflects the customary practice vis-à-vis an understanding of the term ‘Indigenous peoples’, something germane to understand in the context of the failure to include a definition within the UNDRIP, as discussed in more detail in the final section of this chapter.
Two other institutions’ interpretations of the definition question are worth dwelling upon briefly, both because of the tremendous impact the organizations have had on the lives of Indigenous peoples. The International Labour Organization (ILO) could justifiably be called the first intergovernmental institution to focus on Indigenous peoples’ issues, though its first focused legal instrument on the issue in 1957 was deeply flawed. The ILO was concerned about the treatment of Indigenous peoples in a labour context, and began engaging this issue as early as 1936 when the notions of “Indigenous workers” and “descendants of aborigines” were used by the ILO in the context of culturally distinct groups in the Americas. By 1949, the ILO had published a report on the ‘Conditions of Life and Work of Indigenous Populations in Latin American Countries’, and in 1953 it published the report ‘Indigenous Peoples’, which focused on the Andean region and would form the basis of much of its subsequent work on Indigenous issues. In its 1956 report ‘Living and Working Conditions of Aboriginal Peoples in Independent Countries’, the ILO office expanded on the ‘Indigenous Peoples’ report, using information collected from research conducted in a subset of countries outside of the Americas.

The 1956 report therefore reflected the ILO’s move towards a more universal approach to Indigenous peoples’ issues. Together with government responses to an ILO (p. 20) questionnaire, it constituted the primary input for the discussions around the drafting of a new Convention addressing Indigenous peoples, and included a proposed definition of the category ‘Indigenous populations’ defined as ‘peoples’ with tribal or sub-tribal existence and structures. In response to concerns raised by Syria, Egypt, and Iran during the 1956 ILO session, the category ‘Indigenous populations’ was transformed into ‘Indigenous, tribal and semi-tribal populations’. A further proposal by India saw the term ‘peoples’ removed from the draft Convention text and replaced by ‘populations’, as reflected in the final Indigenous and Tribal Populations Convention, 1957 (No 107). The Convention’s distinction between ‘Indigenous’ and ‘tribal’ was grounded on the former’s descent from pre-colonial populations, while the distinction between ‘tribal’ and ‘semi-tribal’ hinged on the degree to which ‘tribal populations’ had been integrated into the national community. This concern with Indigenous peoples in independent countries emerged from the ILO’s focus on ‘Indigenous workers’ in dependent countries, and built on what is termed the ILO’s fundamental human rights standard, its Convention on Forced Labour (No 29), which also focused on what were termed ‘native populations’. As Lee Swepston puts it, this 1930 standard sought to build on the *Slavery Convention of 1926* and signalled:

[the] beginning of the ILO’s long-standing task of adopting international law concerning the situation of dependent peoples faced with pressure and even assimilation from external cultures. Before the Second World War, the ILO adopted several conventions (now considered outdated) relating to indigenous workers, all of them essentially focused on problems relating to labour contracting, or with issues synonymous to conditions of work on plantations.

Keeping in mind this history, the ILO’s significantly more diffused historical requirement is included in its own legal definition, which encompasses the addition of ‘tribal peoples’. In 1989, ILO Convention 107 was revised by ILO Convention 169, which in Article 1(1)—establishing the scope of the Convention concerning Indigenous and Tribal Peoples in Independent Countries—stipulates 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;

(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.

This definition differed from that of ILO Convention 107 in four important ways, all of which were reflective of the shift in anthropological thinking which had occurred in the intervening decades. First, the category of ‘semi-tribal’ was removed on the grounds of its racist connotations and assumption that Indigenous and tribal peoples were on a trajectory towards integration into the national community. Second, it replaced the term ‘populations’ with ‘peoples’, albeit with a qualification with regard to the implications of this term under international law. Third, ILO Convention 169 introduced the fundamental definitional criterion of self-identification. Finally, the problematic aspects of ILO Convention 107’s controversial notion of a requirement for historical continuity were addressed, with a significantly less stringent requirement introduced in ILO Convention 169.

By contrast, the World Bank avoids naming criteria based on ‘historical continuity’ or ‘anti-colonialism’, taking instead what Kingsbury describes as ‘a functional view’ of Indigenous peoples, as ‘groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged’. Contained in a 1989 document meant to facilitate the operations of the Bank, its Indigenous Peoples Policy (Operational Directive 4.20) stated:

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 process. For the purposes of this directive, ‘indigenous peoples’ is the term that will be used to refer to these groups.

Operational Directive 4.20 was replaced by Operational Policy 4.10 in 2005. The instrumental and pragmatic nature of this document is confirmed in its approach to how staff are required to identify the groups to whom the Policy is meant to apply. The document states:

Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of ‘Indigenous Peoples,’ this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as ‘Indigenous ethnic minorities,’ ‘aboriginals,’ ‘hill tribes,’ ‘minority nationalities,’ ‘scheduled tribes,’ or ‘tribal groups’.

For the purposes of this 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;
(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. 92

A group that has lost ‘collective attachment to geographically distinct habitats or ancestral territories in the project area’ (paragraph 4(b)) because of forced severance remains eligible for coverage under this policy.

The Policy document notes that a ‘technical judgment’ may be necessary in ascertaining if Indigenous peoples fall under the mandate of the policy. In this regard, it calls for the Bank to undertake a screening in which it ‘seeks the technical judgment of qualified social (p. 22) scientists with expertise on the social and cultural groups in the project area’ and requires it to consult with the Indigenous peoples concerned. This more than anything indicates the nature of the flexibility needed in understanding the definition of Indigenous peoples.

In seeking to create a cohesive understanding and global framework for Indigenous rights which included activism around the articulation of the UNDRIP, former Special Rapporteur on Indigenous Peoples Erica-Irene Daes sent out questionnaires to the 194 States that were members of the United Nations. She received very few responses, with African and Asian States insisting that the category ‘Indigenous peoples’ was inappropriate to their context, and that all the people who made up the decolonized State were ‘Indigenous’ to the territory.93 Despite this recalcitrance, Indigenous peoples have successfully agitated for a greater emphasis on issues that affect them. As Kingsbury states:

Over a very short period, the few decades since the early 1970s, ‘indigenous peoples’ has been transformed from a prosaic description without much significance in international law and politics, into a concept with considerable power as a basis for group mobilization, international standard setting, transnational networks and programmatic activity of intergovernmental and nongovernmental organizations.94

While accepting the inherent difficulties in gaining international consensus, Kingsbury attempted to substantiate some of the elements that were fundamental to understanding the concept through the lens of international law. He advocates for a ‘constructivist approach’ to understanding the concept, despite its drawbacks, describing this approach as taking the concept of Indigenous peoples:

not as one sharply defined by universally applicable criteria, but as embodying 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.95

In addressing how the discussions around the framing of the UNDRIP also sought to incorporate a definition, Kingsbury stated:

It will be argued that the constructivist approach to the concept better captures its functions and significance in global international institutions and normative instruments. In most cases the terminology and indicative definitions in global or regional instruments are too abstract and remote to provide a sufficient basis to resolve the infinite variety of questions that arise in specific cases, and it is misguided to expect that these global instruments can even purport to resolve all such detailed problems. These instruments often contain relevant principles and criteria abstracted from the specifics of past cases and debates, and each has stimulated a body of practice concerning its scope of application and the meaning of concepts it employs. But many specific problems as to the meaning of ‘indigenous
peoples’ and related concepts can be solved only in accordance with processes and criteria that vary among different societies and institutions.\(^{96}\)

As indicated, questions arose over the extent to which the concept of ‘Indigenous peoples’ is applicable in Africa and Asia. Kingsbury’s analysis focuses solely on Asia, eschewing Africa as having a distinct approach. His justification for including Asia, however, is in response to a phenomenon wherein:

(p. 23)

Following the pattern of group mobilization established in states dominated by European settlement—in the Americas, Australasia and the Nordic countries—groups based in different Asian states have more recently begun to participate in international institutions and gatherings of ‘indigenous peoples’, and transnational networks have been formed in Asia under the rubric ‘indigenous peoples’.\(^{97}\)

As a result of this willingness to use the concept of ‘Indigenous peoples’, ‘or its local cognates’, transnational activist networks have been forged that have linked groups that were only marginally connected, and has resulted in ‘politically unorganized’ access ‘to transnational sources of ideas, information, support, legitimacy and money’.\(^{98}\) Notable among these are policies framed and implemented by bodies such as the World Bank, referred to above, and also the Asian Development Bank.\(^{99}\)

Against this is the oft-cited quote from the Chinese Government made in the context of its participation in the drafting of the UNDRIP. This captures a sentiment on the notion of Indigenous peoples, which many would have considered almost Asia-wide, and as discussed in the final section also found echo in subsequent similar African objections, namely:

The Chinese Government believes that the question of indigenous peoples is the product of European countries’ recent pursuit of colonial policies in other parts of the world. Because of these policies, many indigenous peoples were dispossessed of their ancestral homes and lands, brutally oppressed, exploited and murdered, and in some cases even deliberately exterminated. To this day, many indigenous peoples still suffer from discrimination and diminished status ... As in the majority of Asian countries, the various nationalities in China have all lived for eons on Chinese territory. Although there is no indigenous peoples’ question in China, the Chinese Government and people have every sympathy with indigenous peoples’ historical woes and historical plight. China believes it absolutely essential to draft an international instrument to protect their rights and interests ... The special historical misfortunes of indigenous peoples set them apart from minority nationalities and ethnic groups in the ordinary sense. For this reason, the draft declaration must clearly define what indigenous peoples are, in order to guarantee that the special rights it establishes are accurately targeted at genuine communities of indigenous people and are not distorted, arbitrarily extended or muddled.\(^{100}\)

If one of the fundamental difficulties with Indigenous peoples’ treatment in international law is the fact that they have been treated as ‘objects’ and not ‘subjects’ of law, it would be remiss not to include a perspective from Indigenous peoples themselves on the question of definition. While it is clear that self-identification, participation, and acceptance by Indigenous peoples is probably the most compelling evidence of ‘Indigenous’ status, two historic documents can be called upon to demonstrate the gap between the multilateral view of Indigenous peoples and their own view of themselves. Kingsbury analyses one (p. 24) approach to definition, drawn from a preparatory meeting in 1974 to plan a conference in 1975 which established the World Council of Indigenous Peoples (WCIP). The purpose of
the definition at that stage was to determine who would qualify to attend the conference as a delegate. The working definition stated:

The term indigenous people refers to people living in countries which have a population composed of differing ethnic or racial groups who are descendants of the earliest populations living in the area and who do not as a group control the national government of the countries within which they live.

This view was refined by 1984, by which point the Martínez Cobo working definition, discussed above, had also been framed and accepted. This definition incorporates an emerging ‘collective political consciousness and confidence’ and was meant to be reflected in the draft International Covenant on the Rights of Indigenous Peoples which, however, was never passed. According to this definition:

An indigenous people is one:

(a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states or extended the jurisdiction of an existing state or states to include the territory, and

(b) who continue to live in the territory and who do not control the national government of the state or states within which they live.

This particular construction places heavy emphasis on the treatment of the territory of Indigenous peoples and on their exclusion from sites of power, seeking collective self-representation as a means to challenge conceptions around the State and nation of particular relevance to the earlier discussion concerning ‘peoples’.

3. The United Nations Declaration on the Rights of Indigenous Peoples and the Definition Question

Those studying the burgeoning importance of human rights and international human rights law justifiably feel that the discourse has become central to international law and politics and has faced an upward trajectory ever since the passage of the Universal Declaration of Human Rights (UDHR) in 1948. After steady growth over decades, the challenges posed by the events of 9/11 led to an over-emphasis on security which could have eroded human rights gains. Yet, the movement effectively challenged this emphasis on ‘State security’, and, despite failures such as Guantanamo Bay, the international human rights regime has, by and large, managed to dent the hysteria that followed the events of 9/11. The framing of principles of accountability through the growth in international criminal law is evidence of the progress made towards guaranteeing the dignity and worth of every individual, even in times of conflict. The relative incremental successes of the UN human rights treaty monitoring bodies working in tandem with UN Special Procedures coordinated by the Office of the High Commissioner for Human Rights, and the establishment of the Permanent Forum on Indigenous Issues, suggest a (p. 25) brighter outlook for the future of the human rights regime, especially for its more vulnerable members. The lack of an instrument with global reach to protect Indigenous peoples and minorities has thus exercised many minds in the last few decades.

More recently, the onus appears to have moved away from codification of regimes to more pressing questions of implementation and monitoring. The laboured passage of the UNDRIP indicates the difficulties around gaining consensus, and, now that it is a living document, emphasis has to move to where it is most merited, namely on the implementation and the monitoring of the extent to which international law is able to accommodate and protect the rights of Indigenous peoples. UN systems have, in general, been less concerned with groups in vulnerable positions (emphasizing protection of individual rights). The
regimes promoting the rights of women and children remain the exception and compare favourably to the lack of such treaties to protect minority and Indigenous rights.\textsuperscript{104}

From a political perspective, the global discourse of Indigeneity, when articulated clearly, has many advantages. It draws attention to the status of the ‘original discoverers’ of the land with inherent rights to it under natural law principles of occupation and \textit{usus} and public international law principles concerning the occupation of \textit{terra nullius} (unoccupied territory).\textsuperscript{105} Yet, discussions around Indigeneity inevitably raise complex questions of history that are difficult to unravel from this distance. Martínez Cobo’s loose definition continues to be problematic (as with Caportorti),\textsuperscript{106} but many accept this as the starting point. The negotiations for the UNDRIP were set against the general consensus that Indigenous peoples have all the rights that minorities have, but in addition may have the right to self-determination, with its attendant problems of interpretation and application.\textsuperscript{107}

Prior to Martínez Cobo’s important study, little attention was paid within the emerging human rights regime to Indigenous rights issues, and in previous periods ‘Indigenous peoples’ have been subsumed under the general conceptual banner of ‘minorities’, problematic as this may be. It is also true that there are instances where the distinction between minority and Indigenous peoples is blurred or where the minority rights regime may prove effective in articulating claims to certain rights. Non-sedentary peoples such as the Bedou and Saharawis, who reside far from sites of power, continue to traverse deserts in relatively unchanged lifestyles, show striking similarities to Indigenous peoples around the world, yet the minority rights framework could be more useful in instilling a platform for the articulation of their particular rights. Thus, negotiating a modern global document and including a definition within it which could tackle this diversity was always going to be a difficult, if not impossible, proposition. The failure to include such a definition should not detract from the UNDRIP. It has gained ringing endorsements from people such as Daes, who agitated for a global instrument for Indigenous rights for decades. She states:

\begin{quote}
The Declaration now constitutes a normative instrument of the UN that memorializes, and simultaneously extends, international consensus regarding individual and collective rights of \textit{(p. 26)} indigenous peoples as previously set out in several international instruments, including, first and foremost, ILO Convention 169.\textsuperscript{108}
\end{quote}

In outlining its normative substance, she emphasizes that Indigenous peoples are clearly ‘peoples’ within the meaning attributed under Article 1 of the Human Rights Covenants and suggests that:

\begin{quote}
International law can recognize a new subset of collective human rights that do not trump international individual human rights. In any event, once adopted, international collective rights supersede domestic law.\textsuperscript{109}
\end{quote}

The general challenges over drafting the document, especially with regard to self-determination, have been alluded to elsewhere, but there were equally fraught discussions concerning a definition to be included. As narrated above, the meaning of peoplehood has arisen at every attempt to agree universal standards guaranteeing Indigenous rights.\textsuperscript{110} The question of the inclusion, and the subsequent exclusion, of a definition of Indigenous peoples within the Declaration is symptomatic of one of the problematic strands responsible for its difficult passage through the UN system. The objections raised through the long drafting history eventually made it easier to avoid such pitfalls altogether. This is not to suggest that the scope of the Declaration is open, rather that there is a degree of confidence that Indigenous peoples are relatively well defined, as this section will seek to demonstrate. In order to do this, the first sub-section will cast some light on the process resulting in its exclusion from the final document, drawing on writings of individuals material to its framing. The second sub-section will seek to demonstrate that the lack of a
definition is relatively normal in this genre of document, drawing on four other precedents. The final sub-section argues that there is sufficient clarity in the text of the Declaration to enable key attributes of a definition to be extrapolated from the document, and that in addition the text also indicates reliance on definitions discussed in the previous section of this chapter.

3.1 The Declaration and the Definition Question

The question of who ought to be covered within the Declaration did exercise considerable influence over the process of drafting.\(^{111}\) It is equally clear that one of the major impediments to agreeing a definition was the clear emphasis on the word ‘peoples’ and its implications for self-determination, which States were keen to avoid. One insight, provided by Erica-Irene Daes, is revealing of how during the discussions one member explained his hesitance in using the term ‘Indigenous peoples’:

Toševski … expressed … some hesitation in using the term ‘indigenous peoples’. He said that the term ‘peoples’, as used in the UN Charter, related to all peoples, and new criteria establishing two different kinds of peoples should preferably not be introduced into international law. The political and legal use of the concept of ‘indigenousness’ would only cause confusion. With a unified (p. 27) approach to the term ‘people’, there was no need to specify special rights for indigenous peoples. Most indigenous peoples could be treated as minorities, and any attempted distinction between the two was nothing more than an artificial dilemma. He continued to state that the minority concept was a well-known quantitative concept in constitutional and international law. Taking into account the reality and historical political processes, it would be illusory to expect from the WGIP any recognition and definition in this regard.\(^{112}\)

While the previous section has hopefully demonstrated the long-lasting legacy in international law for the term ‘minority’, most Indigenous peoples would struggle to accept this as a descriptor for themselves, mainly due to the fact that minorities are determined in law not to have the right to self-determination,\(^{113}\) but also because their link to territorial rights would be questioned. The same delegate, however, in arguing against special rights for Indigenous peoples also tackled this second objection:

Likewise, according to Toševski, the right to land was important for every human being and group, and emphasis on indigenous peoples’ land rights was a misunderstanding as there was no specific need for ownership of land by cultural or ethnic identities. It was more important to clarify the functions of land in different societies. He concluded by saying the WGIP needed more time for further clarification of concepts before it could begin a drafting process of standards in this field.\(^{114}\)

The strong presence of land rights in the document will merit comment elsewhere, but from the context of definition it is instructive to note that this too was a facet against codification. Some governments, however, feared that the failure to codify would be dangerous, as narrated by Daes in the context of her own interventions in the discussion:

The observers for some … governments reiterated that the draft Declaration in its present form did not contain a definition of ‘indigenous peoples’. In particular the representative of Japan expressed the concern that this might give rise to subjective interpretations as to which groups were entitled to the rights contained in the Declaration. In this respect, I replied that for the purposes of the draft Declaration, the working definition of ‘indigenous peoples’ contained in the study by Martínez Cobo should be applied. Further, several representatives of indigenous peoples commented on the need to use the term ‘peoples’ in the plural, both in the draft
Declaration and in other documents, because the singular form was perceived by indigenous peoples as discriminatory, denying them rights available to other peoples.\textsuperscript{115}

Another significant stream of thought that impacted the inclusion of a definition was the fact that there was no necessity for it. This is also Daes's recollection of the process:

another member of the WGIP pointed out that the UN had managed 40 years without a definition of the term ‘people’ and that a definition of ‘indigenous peoples’ was unnecessary, at least for the purposes of the present standard-setting activities, especially as there were ample international precedents of the usage of the latter term.\textsuperscript{116}

Irrespective of whether governments were in favour of or against the inclusion of a definition, the notion of attributing a specific definition or attributes to the concept of (p. 28) ‘Indigenous peoples’ caused significant difficulties. Unsurprisingly, much emphasis was placed on these issues by African and Asian governments. As Henriksen writes:

The concept of ‘indigenous peoples’ was a significant hurdle for many governments to overcome in the early stages of the negotiations. African and Asian governments generally held the view that a definition of the term ‘indigenous peoples’ should be included in the text in order to identify the beneficiaries. It was clear that some of these states were more interested in obtaining a definition which would exclude indigenous peoples in their own countries from becoming beneficiaries of the Declaration. It was frequently stated by African and Asian states that they did not have any indigenous peoples in their countries and that everyone there was indigenous.\textsuperscript{117}

Three specific views appeared to dominate the discussion and were in the ascendancy at various points in the long drafting process. One concerned the idea, expressed in the statements above by Daes, that the existing Martínez Cobo working definition was adequate for these purposes and did not merit repeating. The second was the view that a strict definition would establish contours which could then be used to include/exclude certain groups, as indicated by Henriksen above. A third view which gained significant consensus and which by implication found its way into the Declaration (as discussed below) was the notion of self-identification. As stated by Willemsen-Diaz, another of the members of the WGIP, ‘the right to self-definition was claimed, combining subjective elements of self-identification and its complement, community acceptance’.\textsuperscript{118} With this in mind, an early draft of the Declaration even expressed self-identification as a route to the definitional question. However, as Chávez corroborates, this met with serious resistance from States, concerned that it would open up the discussion to a number of groups.\textsuperscript{119}

At the last minute, when the discussion on the definitional question appeared to have subsided, the African Group of States became agitated with the issue (along the lines of the Chinese governmental attitude described in the previous section), raising a host of concerns which commenced from the self-identification point, but also took into account concerns over self-determination, the creation of institutions, consent, and land rights.\textsuperscript{120} Many African States submitted a position paper entitled ‘Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples’ in 2006 which articulated these concerns alongside procedural elements such as the failure to adequately represent African perspectives in the discussion.\textsuperscript{121} At the root of the discussions were, as alluded to above by Henriksen, that the issue of State sovereignty was coming under question in view of both the procedural and substantive elements of the Declaration. This Aide Memoire drew a strong response from an African group of experts. Elaborating on the African Commission’s
2003 Working Group report on Indigenous populations, and the Commission’s 2007 Advisory opinion on the UNDRIP, the experts stated:

(p. 29)

in Africa, the term ‘indigenous peoples or communities’ is not aimed at protecting the rights of the ‘first inhabitants that were invaded by foreigners’. Nor does the concept aim to create hierarchy among national communities or set aside special rights for certain people. On the contrary, within the African context the term ‘indigenous peoples’ aims to guarantee equal enjoyment of rights and freedoms to some communities that have been left behind. This particular feature of the African continent explains why the term ‘indigenous peoples’ cannot be at the root of ethnic conflicts or of any breakdown of the Nation State.\textsuperscript{122}

The African Commission had also tried to engage the discussion by seeking to identify groups that would fall within the remit of the term ‘Indigenous peoples’ in Africa. Thus:

The following, for example, are considered indigenous peoples: the Pygmies of the Great Lakes Region, the San of South Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya, all hunter-gatherer peoples. Nomadic pastoralists include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Masai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamajong of Uganda, the Hindi of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger, along with the Amazigh of North Africa.\textsuperscript{123}

While not exhaustive, this list also indicated the vast difficulties in seeking to generalize the elements of the definition. It led Regino Montes and Torres Cisnero to conclude:

As the African Commission on Human and Peoples’ Rights indicates ( ... also perhaps applicable to Asian realities), a rigid definition of indigenous peoples is not possible, and perhaps neither necessary nor desirable. African indigenous peoples practise diverse economic systems that range from hunter-gathering to small-scale farming, not forgetting nomadic pastoralists. They are distinguished by their cultures, their social institutions and their religious systems. Their way of life differs considerably from that of the dominant society, and their culture is under threat, if not on the verge of extinction. A key feature of these peoples is that their specific means of subsistence depends directly on access and related rights to their traditional territories and the natural resources found therein. It is not the issue of ‘aboriginality’, who came first, that is a fundamental aspect of the definition of indigenous peoples, as suggested by the states, but rather the current relations of oppression within those African societies. Self-identification thus plays an essential role in defining indigenous peoples.\textsuperscript{124}

With so many difficulties raised on the definition, it became clear that no consensus would be reached. Thus, as Chávez, the last chairperson of the Working Group on the Draft Declaration, narrates:

a debate that started off as an impassioned one became watered down over time, to the point where—in the final sessions—nobody even raised the issue, thereby sending a clear message: attempts to find a definition were succumbing to the complexity of the issue, and precedent indicated that a (p. 30) declaration of this
kind was possible without a definition. The natural solution was therefore to remove this definitional article [article 8, as referred to above] from the draft.\textsuperscript{125}

With the document passed without a definition, S James Anaya reminds us that:

\textit{[T]he Declaration does not itself define ‘indigenous peoples’ but it makes clear who they are by emphasizing the common pattern of human rights violations they have suffered.}\textsuperscript{126}

As will be argued in the third sub-section below, despite this omission there are clear elements that can be extrapolated from the text that indicate who and what is covered under the Declaration. This is consistent with the understanding of the drafters, as Mattias Åhrén emphasizes:

The indigenous rights discourse operates with a few working definitions of the term ‘indigenous peoples’ … it is sufficient to note that, regardless of the definition used, particular emphasis is always placed on the requirement that a group—in order to constitute an indigenous people—must have occupied and used a fairly definable territory before present day state borders in the area were drawn. Indigenous peoples’ cultures are further marked by an intrinsic spiritual connection to that very territory, and the natural resources situated in such.\textsuperscript{127}

Having explored why the issue of definition was excluded, it is time to briefly examine three other documents that in similar contexts also omitted a definition.

\textbf{3.2 Of Declarations and Definitions in International Law}

It could be considered normal in law to clearly articulate the mandate and focus of a particular document. This gives it clarity, guarantees legal certainty, and prevents expansionism that could undermine the intent of the drafters and the common understanding of the signatories. It is also true that within international law there have been examples of Declarations that have failed to come into existence due to a failure to agree a definition.\textsuperscript{128} However, in the context of identity-oriented questions, especially those concerning group rights, there is clear precedent to articulate standards while leaving the question of who is covered to the variables of customary international law and national interpretation. Three Declarations which have attempted to enshrine similar kinds of protection in relatively similar contexts show this trend. They have been selected as each one touches on an element that could be considered to underpin the questions that have faced Indigenous peoples. The three also touch on the subject matter of this chapter, namely the configuration of ‘peoples’, ‘Indigenous peoples’, and ‘minorities’.

The Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960,\textsuperscript{129} is worth highlighting in the context of the earlier discussions concerning peoples. The objective of the Declaration was to ensure that the process of decolonization would have a clear basis, yet the definition of who ‘colonial country and peoples’ were was left open-ended. The failure to codify who fell under the rubric of the Declaration had a (p. 31) negative impact on Indigenous peoples, whose strong claims to inclusion within this rubric were ignored. When questions were raised, notably by Portugal, as to why its ‘overseas territories’ came within this Declaration,\textsuperscript{130} the United Nations was quick to clarify what self-determination was,\textsuperscript{131} while not tackling the question of what constituted ‘colonial’. The failure to codify in this context had the advantages of drawing attention to colonization and facilitating the process of UN decolonization to unfold across the globe.\textsuperscript{132} Against this it left several questions open at the time which continue to reverberate today, namely the status of Indigenous peoples’ access to self-determination as discussed, the relevance of self-determination to those subsumed within those already deemed peoples,\textsuperscript{133} the emphasis as to whether self-determination was a one-off right to be exercised,\textsuperscript{134} and
questions over how self-determination relates to the territorial integrity of States. This failure to codify has generated much academic writing, making this issue probably one of the most explored in the annals of public international law. On the other hand, it is not clear how any codification and definition could be achieved, keeping in mind States’ interests.

A similar difficulty that has since been overcome in the Race Convention referred to earlier is prevalent in the UN Declaration on the Elimination of All Forms of Racial Discrimination. Passed in the context of rising xenophobia in Europe, and with the support of many States keen to make a statement against apartheid South Africa and others determined to complain about the treatment of their nationals in States like the United States of America and the United Kingdom, this Declaration was adopted without any definition of what constituted ‘racial discrimination’. At the time of its passage, UNESCO was engaged in discussions concerning race which were not cross-referenced into the Declaration’s discussion. Only two years after the passage of the Declaration, the first UN human rights treaty on Racial Discrimination was passed, and contained a clear definition of what constituted ‘racial discrimination’, while the question of race, as a problematic term, has continued to go undefined, even in later UNESCO documents such as the Declaration on Race and Racial Prejudice, 1982. Interestingly, despite a clear definition of the ‘grounds’ of racial discrimination being defined in Article 1(1) of the International Convention for the Elimination of All Forms of Racial Discrimination, questions have nonetheless persisted concerning scope and reach, as most clearly demonstrated by the furore over the Committee’s use of ‘descent-based discrimination’ to cover the prevalence of caste.

The experience over the passage of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief presents an example in a similar vein. In that document, ‘religion’ or ‘belief’ is not defined, which would seem crucial to understanding questions as to what constitutes a religion and whether, for instance, this only applies to ‘traditional religions’ or belief systems. It would also help clarify whether the Falun Gong (China) fit within the protection afforded. In the context of this Declaration, there are definitions included. For instance, Article 2(2) defines what ‘intolerance and discrimination based on religion or belief’ constitutes, but this falls significantly short of identifying what a religion or belief is.

The document with which the UNDRIP probably merits closest comparison is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. Passed in 1993, there was much hope that it would eventually become a Convention. Unlike the UNDRIP, its passage was not as fraught, but the definition question there too was left vague. As indicated above, there is a relatively well-established, though problematic, definition of a minority, yet there was no reference made to this, and like in the UNDRIP there was a general understanding that this may be the framework that could be applied. The impact of the failure to include a definition is minimal, though it could be argued that the Declaration as a whole has had minimal impact. The discource has instead moved forward at programme and operational level through the instruments passed by the Council of Europe and the Organisation of Security and Cooperation in Europe, which constitute regional rather than international documents.

From these brief explorations, it could be concluded that the decision not to include a definition of Indigenous peoples within the UNDRIP has precedents. Seeking consensus would clearly have slowed the process down further, since many of the objections addressed in the previous sub-sections would not be easy to overcome. In any case, even had a definition been included, it is not clear that the document would have any greater salience since its implementation would still be dependent on States’ willingness to extend the letter...
and spirit of its principles to achieve legislative, administrative, and judicial changes to uphold the sentiments in the document.

3.3 The UNDRIP and the Definition Question: A Textual Interpretation

Putting all of these issues aside and looking at the plain meaning of the text, this final sub-section would like to argue that a definition of who Indigenous peoples are is intrinsic within the document. In order to draw this out, this final sub-section will focus on six elements in the Preamble and two specific Articles, which identify key attributes of Indigenous peoples as discussed below.

(p. 33) In any attempt to interpret a treaty in international law, much emphasis is placed on the teleological interpretation implicit in the document. Thus, the plain meaning of the words in conjunction with the intention of the drafters remains the best gauge to interpreting a treaty. It is important to note that Preambles to treaties can be considered an intrinsic part of the treaty since they lay the foundational context within which a treaty can be interpreted. A similar interpretive logic can be applied to other international legal instruments such as the UNDRIP. This is important since there are several key elements of the UNDRIP that on careful reading reveal the parameters for what constitute Indigenous peoples. For instance:

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 ...

This indicates a clear statement not only of equality, which could be argued is an underlying principle of law, but in addition this clause identifies the right to a different identity from the mainstream or other population that may reside within a State. This, then, provides the first ground for any definition, the recognition in law, or the right to personality, coupled with the guarantee that such collective personality is availed of on the same basis with ‘all peoples’. In addition to the frequent references to ‘self-determination’, this equation of Indigenous peoples to peoples is significant if not conclusive. Therefore, a first attribute of Indigenous peoples which is implicit in the UNDRIP is that they have a distinct identity and are vested with a right to a collective legal personality on a par with all other peoples.

Further,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.147

In identifying the value of ‘Indigenous’ identity as constituting part of the civilizational and cultural common heritage, an intrinsic value is attached to this identity, that elevates membership of the category to a plane higher than membership of other groups who may have as much legitimacy as a group, but who in their collective identity may not have contributed in such a manner to human history.

In articulating the standard clause concerning a statement over racial superiority, and in attaching a list of grounds on which such doctrine, policies, or practice may be based, the Declaration also gives what could be considered the ‘four corners’ of such identity.148 Thus:

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.

The second attribute therefore reflects the inherent value of their distinctive identities, and the fact that a failure to recognize their cultures as contributing to the common heritage of mankind represents a moral failing of the societies of which they form a part.

(p. 34) The issue of historical injustice and oppression that is reflected widely in all the definitions examined in the previous section also finds echo in the preamble with the following text:

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.

This third attribute is particularly rich, as not only does it embody the historical context of injustice and disposition, but it also contextualizes the interdependency between these and the group’s possession of lands, territories, and resources and their contemporary exercise of the right to development.

There are two elements that are common to the various definitions, which are clearly reflected in the two clauses below, but which also find echo in many different Articles within the text, namely with regard to ownership and control over land, territory, and resources which manifest themselves in distinct forms of property (including intellectual property) rights. These two elements, one tangible and the other intangible, form the legs on which Indigenous identity rests, but also form the basis for their progress in the future. The two elements are reflected in the preamble in the following text:

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 …

This fourth attribute is therefore the distinctive form and content of Indigenous identity, which is inseparable from the tangible and intangible resources through which it manifests itself and from which it emerges.

Another element that was identified in the general discussion around the term ‘Indigenous peoples’ in the previous section also finds an echo, namely the issue of self-identification coupled with an element of declaratory recognition afforded by Indigenous peoples of other aspirants to this category. Thus,

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 …

While not explicit in the form of words above, it can be regarded as recognition of a form of organization with the objective of bringing about the end of all forms of discrimination. Recognition by Indigenous peoples collectively of other Indigenous peoples is clearly a key
element to ensuring that the discrimination and oppression of the group can be overcome, by virtue of the rights contained within the UNDRIP.

Inherent in this fifth attribute of self-identification is the dynamic nature of Indigenous peoples, their interrelatedness, and their activities across spheres ranging from the local to the transnational.

A final clause from the preamble that is material to the extrapolation of a definition of Indigenous peoples lies in the final clause contained in this part of the UNDRIP:

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 ...

(p. 35) The substantive provisions of the UNDRIP contain many elements on self-determination and other Indigenous rights, including the associated duty to consult in order to obtain free, prior, and informed consent and the requirement to respect Indigenous peoples’ legal systems and their governing institutions, all of which provide a flavour of the protection needed, and in this sense explain and substantiate the existing Indigenous experience around the world.

Combined, these provisions could be regarded as corresponding to a sixth attribute, namely the manifestation of a particular *sui generis* mode of exercising the universal right of all peoples to self-determination. This aspect of Indigenous peoples goes to the core of the UNDRIP and helps explain, at least in part, why a static constraining definition of Indigenous peoples would have been at odds with an instrument which aims to breathe renewed life and vitality into a dynamic multifaceted concept, the precise meaning of which has to be decided by self-determining peoples.

In addition to these attributes which emerge from the preamble, there are two other Articles which could be specifically drawn into a discussion concerning definition, namely, Articles 37(1) and 46(3).

**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.

This particular Article does not show the expanded scope of Indigenous peoples, but it does clearly identify a long-standing group that are unquestionably covered, namely those that have been named by previous laws and agreements as constituting Indigenous peoples. While these groups are clearly deemed to exist in States such as the United States of America, Canada, New Zealand, and Australia, when interpreted more widely similar treaties and agreements could be found in Latin America and in contemporary discussions that are ongoing in several States in Africa (eg Kenya, Uganda, Mali, Botswana, South Africa, Nigeria) and Asia (India, Malaysia, Philippines). The Article in any case could be used as a call to research the nature of administrative agreements that have been made at the national level with groups that may be deemed ‘Indigenous’. The breadth of the scope identified is instructive, since rather than relying exclusively on treaties, it also includes agreements and ‘constructive arrangements’. Rather than being declaratory, this element of the definition could be deemed to be constitutive.

Should all of these textual interpretations prove unconvincing, the presence of Article 46(3) brings us back to the opinion attributed to Daes in the opening section, namely that a
specific definition was unnecessary because the current understanding in customary law could be substituted. In the words of the Article:

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.

(4. Conclusion)

The duration of time spent on attempting to frame and adopt the UNDRIP is a direct result of some fundamental difficulties in gaining agreement over key elements required to ensure robust protection and promotion of Indigenous rights. While much writing has focused on the difficulties of gaining clear direction on the issue of self-determination, one of the battlegrounds on which this conflict was conducted was in determining ‘who’ Indigenous peoples are. A salient standard of law ought to have a clear articulation of its ambit and in this sense the UNDRIP has failed to provide a clear route through these difficulties of scope. This chapter has sought to demonstrate the reason for this, by shedding light on the fault-lines that exist between the categories ‘peoples’, ‘Indigenous peoples’, and minorities. The opening section aimed to illustrate that the status of Indigenous peoples in customary international law stands closer to peoples in the continuum between minorities and peoples. Minorities, while gaining the right to protection and promotion of their group identity, do not automatically gain the right to self-determination. Indigenous peoples ought to, but their rights towards this are constrained by State interests. The most cited definition among a range of others explored here is that of Martínez Cobo, which while not without its weaknesses, is still referred to in many contexts. The UNDRIP could have clarified the situation by articulating a specific definition; however, due to difficulties discussed in the second part of this chapter, that aspect of the Declaration drafting project was shelved early on in the process. The second section sought to demonstrate, however, that this failure to include a definition is not critical, with other similar Declarations also avoiding such questions. The second section also argued that when the plain meaning of the text is assessed, a definition of who is covered within the Declaration becomes relatively clear. In addition, there is clear guidance in the intention of the drafters and some of the text that the category ‘Indigenous peoples’ for the purposes of the Declaration is to be understood as that recognized in customary international law. On the latter point, this chapter has argued that the definition that has emerged concerning Indigenous peoples today, and on which the UNDRIP has also made a contribution, is that it includes the groups covered by a constructive interpretation of the Martínez Cobo working definition, with growing emphasis on the recognition of Indigenous status by other Indigenous nations. This common understanding is (p. 37) also reflected in the discussions that have been engaged upon within the International Law Association (ILA), which in a report from 2011 stated:
the indicia that should be used in order to ascertain whether or not a given community may be considered as an indigenous people are the following:

- **self-identification**: self-identification as both indigenous and as a people;
- **historical continuity**: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;
- **special relationship with ancestral lands**: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will usually form the basis of the cultural distinctiveness of indigenous peoples;
- **distinctiveness**: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- **non-dominance**: forming non-dominant groups within the society;
- **perpetuation**: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities. ¹⁵¹

¹Most of these elements cannot be considered as absolutely indispensable to qualify a group as an “Indigenous people” ¹⁵², and hence there remains a need for a relatively flexible approach. It would seem, however, that one way of ensuring that Indigenous rights thrive is to challenge the sole right of States to determine who the Indigenous peoples within their territory are, since very often the establishment of the formal State has come at the cost of sacrificing Indigenous rights and identity. It could be argued that the Declaration in its final form, intentionally bereft of an explicit definition, is well placed to play such a constructive role.

**Footnotes:**


⁴ ibid vol V, 231.


This sub-section on group rights is derived from an article that examines the arguments for the creation of lex specialis for whistleblowers as a class in international law. See D Lewis and J Castellino, ‘Establishing a Different Dimension on Citizen Security: The Case for Special Protection for Whistleblowers’ (2013) 4(4) Beijing LR 185–97.


Among the most famous ancient treaties that are cited is The Promise of St Louis of France, 1250. For more, see P Thornberry, International Law and the Rights of Minorities (Clarendon Press 1991) esp ch 1.


Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, GA Res 47/135, Annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).


J Castellino and E Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford University Press 2006) 113–17, noting that the latter is particularly difficult to accept since Mongolians in the State of Mongolia are clearly recognized as a people, while their kin across the border in the Chinese State of Inner Mongolia do not acquire similar treatment. The Chinese context is also complicated by the use in Chinese of a term (*shaoshu minzu*) which equates in English to ‘minority nationalities’.


J Castellino and S Allen, *Title to Territory in International Law: An Inter-Temporal Analysis* (Ashgate 2005).


See generally R Pankhurst (ed.), *Diary of a Journey to Abysinnia 1868: The Diary and Observations of William Simpson* (Newburyport Press 2002). See also A Sbacchi, *Ethiopia and Fascist Italy 1935–1941* (Red Sea Press 1997). One of the only countries in Africa not to have fallen under serious colonial influence, except for a brief period between 1936 and 1941, Abyssinia is situated over a significant part of North-East Africa between the Maghreb to the west of it and the ‘Middle East’.

R Pankhurst, *State and Land in Ethiopian History* (Haile Selassie I University 1966).


ibid.


See R McCorquodale and N Orosz (eds), *Tibet: The Position in International Law* (Serindia Publications 1994).


For a historical source that focuses on this and reflects the heritage of the discourse, see OI Janowsky, *Nationalities and National Minorities* (Macmillan 1945). See also C Macartney, *National States and National Minorities* (Oxford University Press 1934).

General background information on St Louis and the Treaty can be found on the website of the *Encyclopaedia Britannica*, <original.britannica.com> accessed 25 July 2012.


This issue is addressed in an article by LFE Goldie, ‘The Critical Date’ (1963) 12 *ICLQ* 1251–284. See also JA Andrews, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’ (1978) 94 LQR 408–27.


73 Ibid 56.


76 Castellino (n 56).


80 Martínez Cobo (n 77).


ibid 161.

ibid 163.

ILO Convention 107 Art 1.

Swepston (n 81) 54.

Doyle (n 71).

Kingsbury (n 24) 420. Kingsbury notes that the Martínez Cobo working definition’s historical continuity requirement is controversial and potentially limiting.


ibid para 4.


Kingsbury (n 24) 415.

ibid.

ibid.

ibid 416.

ibid 417.


Kingsbury (n 24) 417.

For a work that frames this challenge against its historical backdrop, see WA Schabas, *Unimaginable Atrocities* (Oxford University Press 2012).


Waldron (n 72).

Martínez Cobo (n 77).


ibid.


Charters and Stavenhagen (n 103).


CERD, General Recommendation XXI: Self-Determination UN Doc A/51/18 (23 August 1996); UN HRComm, CCPR General Comment 12: Article 1: Right to Self-Determination UN Doc HRI/GEN/1/Rev.6 (13 March 1984).

Daes (n 112) 54.

ibid. 68.

ibid 55.


A Willemsen-Diaz, ‘How Indigenous Peoples’ Rights Reached the UN’ in Charters and Stavenhagen (n 103) 16–31, 30.

L Enrique Chávez, ‘The Declaration on the Rights of Indigenous Peoples, Breaking the Impasse: The Middle Ground’ in Charters and Stavenhagen (n 103) 96–107, 103.

For a detailed discussion on the African perspective towards the UNDRIP, see A. Barume, ‘Responding to the Concerns of the African States’ in Charters and Stavenhagen (n 103) 170–83.


Enrique Chávez (n 119) 103.


See the UN Declaration on the Definition of Aggression, UN Doc/A/Res/29/3314 (14 December 1974). For commentary including hope that such a document could be passed, see B Ferencz, ‘Defining Aggression—the Last Mile’ (1973) 12 CJTL 430–63.

GA Res 1514 (XV), 15 UN GAOR Supp (No 16) at 66, UN Doc A/4684 (1961).


GA Res 1541 (XV), 15 UN GAOR Supp (No 16).


For a general reading on the issue of self-determination, see: Cassesse (n 7); Hannum (n 7); M Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 ICLQ 857.

UN GAOR 1904 (XVIII), UN Doc A/RES/18/1904 (20 November 1963).

D Keane, Caste-Based Discrimination in International Human Rights Law (Ashgate 2007) 159–211.

International Convention for the Elimination of All Forms of Racial Discrimination 1965, Art 1(1).


Keane (n 138) 213–51.


Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), Art 2(2).


For an overview, see P Thornberry and MA Martín Estébanez, Minority Rights in Europe (Council of Europe 2004).

UNDPRIP, Preamble.


Kingsbury (n 24).


ibid.