

Ch 2

Indigenous Peoples
in International Law

S. James Anaya

New York Oxford
OXFORD UNIVERSITY PRESS
1996

150. 10 Institut de Droit International, *Annuaire* (1888–89) 203 (translation from Snow, *supra* note 115, at 174–75).

151. Covenant of the League of Nations art. 23(a).

152. Lindley, *supra* note 123, at 324–36. *But see* South West Africa (Phase 2), 1966 I.C.J. 61, 34–35 (declining to recognize the juridical character of such trusteeship obligations operative in the late nineteenth and early twentieth centuries, other than those arising directly from the League of Nations mandates system).

153. Lindley, *supra* note 123, at 324–27.

154. David A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis vs. Cultural Replacement* (1988); Luis N. Rivera, *A Violent Evangelism: The Political and Religious Conquest of the Americas* (1992); Watters, *supra* note 146.

2

Developments within the Modern Era of Human Rights

The preceding chapter demonstrated that the normative discourse and related patterns of official behavior in international law have long had implications for the status and rights of peoples who are indigenous to lands subject to colonization and its legacies. Shaped by Western perspectives and political power, international law developed a complicity with the often brutal forces that wrested lands from indigenous peoples, suppressed their cultures and institutions, and left them among the poorest of the poor.

Within this century, however, there have been significant advancements in the structure of world organization and shifts in attendant normative assumptions. These changes have engendered a reformed system of international law, and the reformed system, in turn, has provided fertile ground for social forces to further alter, and eventually reverse, the direction of international law where it concerns the indigenous peoples of today. This chapter begins by discussing briefly the contemporary international legal system, identifying its move away from state-centered positivism and its growing concern for individuals and groups upon precepts of world peace and human rights. The chapter goes on to describe developments within the modern human rights frame and their culmination in a new generation of conventional and customary international law concerning indigenous peoples.

The Contemporary International Legal System

The character of international law has evolved with shifts in the ordering of political power and the burgeoning of international institutions that constitute themselves on precepts of a peaceful and just world order. On one hand, the principles, norms, and procedures that fall within the rubric of international law remain substantially state-centered, and the rhetoric of state sovereignty continues as central to international legal discourse. On the other hand, the community of states whose sovereignty international law is deemed to uphold has extended far beyond the European “family.” International law has reacquired its presumptive universality and thus theoretic-

cally welcomes within the global community of states all those fulfilling the criteria of statehood. The constitutive theory of statehood, by which statehood for the purposes of international law depends upon positive recognition, has given way to a dominant declarative theory, by which statehood presumptively exists by virtue of certain objective criteria, independently of acts of recognition.¹

In practical terms, recognition by a preponderance of actors on the international plane remains crucial to a state's capacity to invoke or benefit from the principles and procedures of international law. Whether judged by the objective criteria of statehood or by the phenomenon of recognition, however, the international community of states has expanded such that the countries of Africa, Asia, Latin America, the Caribbean, and the Pacific, many of which were born within the last fifty years, now comprise a majority. With this embrace of non-European cultures and perspectives, Eurocentric precepts increasingly are undermined in global decision making. Also significant is the recent demise of the East-West cleavage that divided the world's states ideologically and politically, a cleavage that, like past perceived or actual rifts in humanity, undermined the very idea of a globally operative, politically neutral body of law.

In addition to achieving greater inclusiveness and an enhanced universalist posture in terms of states, international law increasingly addresses and is shaped by nonstate actors and perspectives. Individuals, international organizations, transnational corporations, labor unions, and other nongovernmental organizations participate in procedures that shape the normative content of international law.² In turn, individuals and certain associational entities have been made subjects of international norms or included as participants in treaty-governed international processes.³ Accordingly, international tribunals and publicists in general hold that "international personality" is no longer limited to states.

International law, furthermore, is ever more responsive to a burgeoning and influential transnational discourse concerned with achieving peace and a minimum of human suffering.⁴ This modern discourse of peace and human rights, which tempers positivism in international law, represents in significant measure the reemergence of classical-era naturalism, in which law was determined on the basis of visions of *what ought to be*, rather than simply on the basis of *what is*, and which contextualized the state as an instrument of humankind rather than its master.⁵ This discourse, carried out by scholars, advocates, and government representatives at various levels of decision extending into the international plane, and increasingly free from Western cultural biases, seeks to define norms not by mere assessment of state conduct but rather by the prescriptive articulation of the expectations and values of the *human* constituents of the world community. By directly addressing the concerns of human beings, moreover, this discourse expands the competency of international law over spheres previously reserved to the asserted sovereign prerogatives of states.

The United Nations and other international organizations that emerged in the aftermath of the two world wars have been both a manifestation of and an impetus for the changing character of international law. The multilateral treaties that are the constituent instruments of the world's major intergovernmental organizations largely

mark out the parameters for the contemporary international legal system. These parameters have both substantive and procedural aspects. In both, there are elements of the traditional state-centered framework as well as nonstatist, normative ones that influence the framework and work to reform it.

The United Nations Charter, most notably, embraces substantive statist precepts by including among the organization's founding principles respect for the "sovereign equality" and "territorial integrity" of member states and for nonintervention into their domestic affairs.⁶ By specifying that *member* states are the beneficiaries of sovereignty principles, furthermore, the Charter promotes a kind of constitutivism in the international legal framework. Although membership ostensibly is open to all "peace-loving states" willing and able to meet the obligations under the Charter,⁷ membership remains an act of positive recognition, and often a highly political one. Under the Charter, the sovereignty of member states is empowered and, necessarily, any claim of conflicting sovereignty on the part of some nonmember entity is undermined.

While affirming such elements of the state-centered framework, however, the Charter establishes among the organization's purposes the promotion of "equal rights and self-determination of peoples,"⁸ "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"⁹ and "conditions of economic and social progress and development."¹⁰ The Charter, moreover, emphasizes peace and world security as the organization's ultimate objectives.¹¹

In setting the procedural parameters for U.N. activity, the Charter upholds the state-centered system by limiting voting in the General Assembly and in the other major U.N. organs to member states,¹² and by limiting access to the International Court of Justice to states and certain designated U.N. organs and affiliate agencies acting with at least the acquiescence of member states.¹³ The Charter further bows to the *realpolitik* of world affairs of earlier times by designating five World War II-era superpowers as permanent members of the Security Council, whose membership is otherwise rotating, and by allowing each such permanent member veto power.¹⁴

The Charter, however, in addition to requiring that all member states be "peace loving," commits them to "take joint and separate action in co-operation with the Organization" for the achievement of the Charter's moral objectives.¹⁵ The mere existence of the General Assembly and other forums established or authorized by the Charter vastly encourages that cooperation. Further, although limiting formal U.N. membership to states, the Charter engenders meaningful levels and forms of nonstate participation in the organization's deliberative processes. The Charter allows for nongovernmental organizations to affiliate with the U.N. Economic and Social Council, the parent body of the United Nations' human rights and social policy organs.¹⁶ With such affiliation, numerous nongovernmental organizations have been permitted various forms of participation in U.N. forums concerning human rights and social issues.¹⁷ Lower-level U.N. policy-making organs, furthermore, include experts acting in their individual capacities. The U.N. Secretariat, which has significant powers of initiative under the Charter, itself provides an important source of nonstate influence, particularly in matters of human rights.¹⁸

Thus, through the pervasive U.N. system as well as through similarly devised organizations at the regional level, statist conceptions are upheld but are made to

contend with humanistic precepts and moral objectives in the authoritative multilateral processes that comprise and shape international law. And these processes are influenced not only by reformist tendencies among states but also by nonstate actors.

The humanistic precepts that are founding principles of the United Nations and other major international organizations have been grounds for the creation of an extensive and still developing body of norms concerned directly with the welfare of human beings. Under the rubric of "human rights," these norms and accompanying oversight procedures, established or reflected in multilateral treaties and other authoritative instruments such as U.N. General Assembly resolutions,¹⁹ more or less regulate *all* states as to their own citizens.²⁰ The international human rights movement, which has engaged states as well as nonstate actors, has taught that sustained and coordinated international concern over the safeguarding of particular human interests is capable of rendering state claims of exclusive sovereignty or jurisdiction over such interests with little force in today's international law.²¹

While the international human rights movement has been a leading factor in the expansion of international law's scope and in the moderation of the doctrine of sovereignty, it also has promoted the demise of international law's historical linkage to the pervasive individual/state perceptual dichotomy of human organization. Within Western thought since the eighteenth century, rights have been thought of and articulated mostly in terms of the *individual's* demands of freedom, equality, participation, and economic and physical security vis-à-vis the state, or in terms of the *state's* sovereign prerogatives.²² Although Western individualism and statism continue as pervasive forces, authoritative discussion of human rights has become increasingly attentive to values supportive of human beings' associational and cultural patterns that exist independently of state structures.²³ Accordingly, concepts of group or collective rights have begun to take hold in the articulation of human rights norms and in adjudicative or quasi-adjudicative procedures of international human rights organs.

In sum, international law—the body of principles, norms, and procedures that today function across national boundaries—remains state-centered, but it is increasingly pulled at by a discourse directly concerned with individuals and even groups. Notions of state sovereignty, although still very much alive in international law, are ever more yielding to an overarching normative trend defined by visions of world peace, stability, and human rights. This trend, promoted by modern international institutions and involving nonstate actors in multilateral settings, enhances international law's competency over matters at one time considered within states' exclusive domestic domain.

The expanding opening in international law for concern with nonstate entities on humanistic grounds in part entails a resurfacing of the naturalist framework that the early classical theorists invoked to enjoin sovereigns with regard to the treatment of indigenous peoples,²⁴ but it is an opening increasingly free of the bounds of Eurocentric perspectives. This opening, forged by the modern human rights movement, has been the basis for international law to revisit the subject of indigenous peoples and eventually become reformulated into a force in aid of indigenous peoples' own designs and aspirations.

The Initial Model within the Modern Human Rights Frame

The concern within the international system for peoples or populations identified as indigenous has arisen as part of a larger concern for those segments of humanity that have experienced histories of colonization and continued to suffer the legacies of those histories. In the post-U.N. Charter world of the middle part of this century, the political theory that supported colonialism by European powers had long been discredited and had faded in light of the major contending political theories of the time: Western democracy, Marxism, and various variations thereof. Despite the divergence of mid-twentieth-century political theory that until recently polarized geopolitical forces, the international community viewed colonialism and its legacies with certain shared precepts. Whether viewed through the lens of Marxism or Western democratic theory, colonial structures were regarded negatively for depriving people of self-government in favor of administration that was ultimately controlled by the peoples of the colonizing states for their own benefit.

At the close of World War II the international system had instituted the U.N. Charter and incorporated human rights precepts among its foundational elements. The reformed system joined the revolutionary movements that fought colonialism where it continued to exist in its classical form and urged self-government in its place.²⁵ The regime of decolonization prescriptions that were developed and promoted through the international system, however, largely bypassed indigenous patterns of association and political ordering that originated prior to European colonization. Instead, the population of a colonial territory as an integral whole, irrespective of precolonial political and cultural patterns, was deemed the beneficiary unit of decolonization prescriptions.

Thus the implementation of the U.N. Charter-based decolonization regime has not entailed a reversion to the status quo of political or social ordering prior to the historical processes that culminated in colonization. Rather, it led to the creation of altogether new institutional orders, viewed as appropriate to implementing self-government. General Assembly Resolution 1514 of 1960 confirms the norm of independent statehood for colonial territories with their colonial boundaries intact, regardless of the arbitrary character of most such boundaries.²⁶ Under the companion Resolution 1541 and related international practice, self-government is also deemed implemented for a former colonial territory if it is associated or integrated with an established independent state,²⁷ as long as the resulting arrangement entails a condition of equality for the people of the territory concerned and is upheld by their freely expressed wishes.²⁸

A corollary to the focus on the colonial territorial unit is what became known as the "blue water thesis," which developed effectively to preclude from decolonization procedures consideration of enclaves of indigenous or tribal peoples living within the external boundaries of independent states.²⁹ While state sovereignty over distant or external colonial territories was eroding in the face of normative precepts deployed internationally, it remained relatively steadfast over enclave indigenous groups and worked to keep them outside the realm of international concern. In 1949, the U.N. General Assembly adopted a resolution recommending that the Economic and

Social Council conduct a study on the "social problem of the aboriginal populations and other under-developed social groups of the American Continent."³⁰ Subsequent action within the Economic and Social Council, however, effectively barred any such study unless requested by affected states, and no request was made.³¹

A measure of international concern did eventually take hold, within the human rights frame and parallel to the decolonization movement, toward members of groups identified as indigenous and living within independent states. The major embodiment of the mid-twentieth-century deployment of the international human rights program in the specific context of indigenous populations is International Labour Organisation (ILO) Convention No. 107 of 1957.³² The ILO, a specialized agency predating but now affiliated with the United Nations, developed Convention No. 107 and its accompanying Recommendation 104³³ following a series of studies and expert meetings signaling the particular vulnerability of indigenous workers.³⁴ Although representing elements of nonstate influence within the international system, these studies and expert meetings proceeded with no apparent participation on the part of indigenous peoples' own designated representatives.

While identifying members of indigenous groups as in need of special measures for the protection of their human rights, Convention No. 107 reflects the premise of assimilation operative among dominant political elements in national and international circles at the time of the convention's adoption.³⁵ The universe of values that promoted the emancipation of colonial territories during the middle part of this century simultaneously promoted the assimilation of members of culturally distinctive indigenous groups into dominant political and social orders that engulfed them. Assimilation and rights of full citizenship were used to bring within the fold of self-government the indigenous groups living in independent and newly independent states. Precepts of self-government and human rights largely remained conditioned by a perceptual dichotomy between individual/state that had Western origins and by the attendant idea of a culturally homogenous independent nation-state.³⁶ Nation building was a corresponding policy (de facto if not in theory in the case of Marxist systems) of breaking down competing ethnic or cultural bonds, a policy engaged in even by, or perhaps especially by, newly independent states.³⁷ To the extent the international community valued cultural diversity, it was largely the diversity existing *among* the different states and colonial territories, not the diversity that might exist wholly *within* them.

The thrust of Convention No. 107 of 1957, accordingly, is to promote improved social and economic conditions for indigenous populations generally, but within a perceptual scheme that does not seem to envisage a place in the long term for robust, politically significant cultural and associational patterns of indigenous groups. Convention No. 107 is framed in terms of *members* of indigenous populations and their rights as equals within the larger society.³⁸ Indigenous *peoples* or *groups* as such are only secondarily, if at all, made beneficiaries of rights or protections. The convention does recognize indigenous customary laws and the right of collective land ownership. Such recognition, however, is posited as transitory and hence is overshadowed by a persistent deference and even preference for national programs of integration and noncoercive assimilation. The following provisions illustrate the convention's tenor and thrust:

Article 2

1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

....

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

....

Article 3

1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

2. Care shall be taken to ensure that such special measures of protection—

- (a) are not used as a means of creating or prolonging a state of segregation, and
- (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

The philosophy toward indigenous peoples reflected in Convention No. 107 also manifested itself at the international level in mid-twentieth-century programs promoted by the Inter-American Indian Institute, which was established in 1940.³⁹ The institute, now a specialized agency of the Organization of American States (OAS), has organized a series of periodic conferences and otherwise acted as an information and advisory resource for OAS member states. Like ILO Convention No. 107, the initial policy regime adopted by the institute embraced programs aimed at enhancing the economic welfare of indigenous groups and promoting their integration into the larger social and political order.⁴⁰

ILO Convention No. 107 and Inter-American Indian Institute programs that were developed within the international human rights frame of the middle part of this century have been much maligned for their assimilationist or integrationist elements. Nonetheless, with these programs the subject of people identified by their indigenousness vis-à-vis majority or dominant populations established a foothold in the international system through the conceptual and institutional medium of human rights. That foothold and the language of human rights became the basis for a much enhanced international concern for indigenous peoples and a reformed normative regime regarding them.

The Contemporary Indigenous Rights Movement

The international system's contemporary treatment of indigenous peoples is the result of activity over the last few decades. This activity has involved, and substantially been driven by, indigenous peoples themselves. Indigenous peoples have ceased to be mere objects of the discussion of their rights and have become real participants in an extensive multilateral dialogue that also has engaged states, nongovernmental organizations (NGOs), and independent experts, a dialogue facilitated by human rights organs of international institutions.

During the 1960s, armed with a new generation of men and women educated in the ways of the societies that had encroached upon them, indigenous peoples began drawing increased attention to demands for their continued survival as distinct communities with historically based cultures, political institutions, and entitlements to land.⁴¹ Indigenous peoples articulated a vision of themselves different from that previously advanced and acted upon by dominant sectors.⁴²

In the 1970s indigenous peoples extended their efforts internationally through a series of international conferences and direct appeals to international intergovernmental institutions.⁴³ These efforts coalesced into a veritable campaign, aided by concerned international nongovernmental organizations and an increase of supportive scholarly and popular writings from moral and sociological, as well as juridical, perspectives.⁴⁴ The proliferation of scholarly literature helped establish indigenous peoples' demands as legitimate among influential intellectual and elite circles. Among the major developments in this movement was the International Non-Governmental Organization Conference on Discrimination against Indigenous Populations in the Americas, in Geneva, which was organized as a project of the NGO Sub-Committee on Racism, Racial Discrimination, Apartheid and Colonialism. The 1977 Conference, attended by indigenous peoples' representatives from throughout the Western Hemisphere, contributed to forging a transnational indigenous identity that subsequently expanded to embrace indigenous peoples from other parts of the world. The conference also helped establish a pattern of coordination among indigenous peoples from throughout the world in the formulation and communication of their demands, a pattern that has continued through subsequent numerous international meetings.⁴⁵

Following the 1977 conference, indigenous peoples' representatives began appearing before U.N. human rights bodies in increasing numbers and with increasing frequency, grounding their demands in generally applicable human rights principles.⁴⁶ Indigenous peoples have enhanced their access to these bodies as several organizations representative of indigenous groups have achieved official consultative status with the U.N. Economic and Social Council, the parent body of the U.N. human rights machinery.⁴⁷ Indigenous peoples also have invoked procedures within the Organization of American States, particularly its Inter-American Commission on Human Rights.⁴⁸

Indigenous peoples' contemporary efforts internationally build on the initiative of the Council of the Iroquois Confederacy in the 1920s. Deskaheh, speaker of the council, led an attempt to have the League of Nations consider the Iroquois' longstanding dispute with Canada. Although Deskaheh found support among some League members, the League ultimately closed its door to the Iroquois, yielding to the position that the Iroquois grievances were a domestic concern of Canada and hence outside the League's competency.⁴⁹ In more recent years, however, benefiting from an international system in which assertions of domestic jurisdiction are less and less a barrier to international concern over issues of human rights, indigenous peoples have been successful in attracting an unprecedented amount of attention to their demands at the international level.

The heightened international concern over indigenous peoples generated through years of work was signaled by the U.N. General Assembly's designation of 1993 as

"The International Year of the World's Indigenous People"⁵⁰ followed by the proclaiming of an "International Decade" on the same theme.⁵¹ With this heightened concern has come a reformulated understanding of the contours of general human rights principles and their implications for indigenous peoples. And grounded upon this reformulated understanding there is a new—though still developing—body of international law concerning indigenous peoples.

ILO Convention No. 169 of 1989

The International Labour Organisation Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989,⁵² is, as of this writing, international law's most concrete manifestation of the growing responsiveness to indigenous peoples' demands. Convention No. 169 is a revision of the ILO's earlier Convention No. 107 of 1957, and it represents a marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier convention. With indigenous peoples increasingly taking charge of the international human rights agenda as it concerned them, Convention No. 107 of 1957 came to be regarded as anachronistic. In 1986, the ILO convened a "Meeting of Experts" which included representatives of the World Council of Indigenous Peoples, a loose confederation of indigenous groups from throughout the world. The meeting recommended the revision of Convention No. 107, concluding that

the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. In 1956 and 1957, when Convention No. 107 was being discussed, it was felt that integration into the dominant national society offered the best chance for these groups to be part of the development process of the countries in which they live. This had, however, resulted in a number of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society. The inclusion of this idea in the text of the Convention has also impeded indigenous and tribal peoples from taking full advantage of the strong protections offered in some parts of the Convention, because of the distrust its use has created among them. In this regard, it was recalled that the Sub-Commission's Special Rapporteur had stressed in his study. . . the necessity of adopting an approach which took account of the claims of indigenous populations. In his opinion, the policies of pluralism, self-sufficiency, self-management and ethno-development appeared to be those which would give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies.⁵³

The discussion on the revision of the convention proceeded at the 1988 and 1989 sessions of the International Labour Conference, the highest decision-making body of the ILO. The annual conference is comprised of representatives of worker and employer organizations as well as of states. Special arrangements were made to allow representatives of indigenous groups limited participation in the deliberations of the conference committee designated for the revision. At the close of the 1989 session, the full Labour Conference adopted the new Convention No. 169 and its shift

from the prior philosophical stand.⁵⁴ The convention came into force in 1991 with the ratifications by Norway and Mexico.⁵⁵

The basic theme of Convention No. 169 is indicated by the convention's preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."⁵⁶ Upon this premise, the convention includes provisions advancing indigenous cultural integrity,⁵⁷ land and resource rights,⁵⁸ and nondiscrimination in social welfare spheres;⁵⁹ and it generally enjoins states to respect indigenous peoples' aspirations in all decisions affecting them.⁶⁰

Upon adoption of Convention No. 169 by the International Labour Conference in 1989, several advocates of indigenous peoples' rights expressed dissatisfaction with language in Convention No. 169, viewing it as not sufficiently constraining of government conduct in relation to indigenous peoples' concerns.⁶¹ Criticism was leveled at several of the convention's provisions that contain caveats or appear in the form of recommendations, and at the underlying assumption of state authority over indigenous peoples.⁶² Much of this criticism, however, was couched in highly legalistic terms and worst-case scenario readings of the convention without much regard to overall context. The overriding reason for disappointment appeared to be a grounded simply in frustration over the inability to dictate a convention in terms more sweeping than those included in the final text.

Convention No. 169 can be seen as a manifestation of the movement toward responsiveness to indigenous peoples demands through international law and, at the same time, the tension inherent in that movement. Indigenous peoples have demanded recognition of rights that are of a collective character, rights among whose beneficiaries are historically grounded communities rather than simply individuals or (inchoate) states. The conceptualization and articulation of such rights collides with the individual/state perceptual dichotomy that has lingered in dominant conceptions of human society and persisted in the shaping of international standards. The asserted collective rights, furthermore, challenge notions of state sovereignty, which are especially jealous of matters of social and political organization within the presumed sphere of state authority.

The resulting difficulties in the development of Convention No. 169 manifested themselves especially over the debate on the use of the term *peoples* to identify the beneficiaries of the convention. As in other international contexts in which indigenous rights have been discussed, advocates pressed for use of the term *peoples* over *populations* to identify the beneficiary groups.⁶³ The former is generally regarded as implying a greater and more positive recognition of group identity and corresponding attributes of community. State governments, however, resisted use of the term *peoples* because of its association with the term *self-determination* (e.g., the phrase "self-determination and equal rights of peoples" of the U.N. Charter) which in turn has been associated with a right of independent statehood. The issue was all the more complicated because indigenous peoples generally have invoked "a right of self-determination" as an expression of their desire to continue as distinct communities free from oppression, while in virtually all instances denying aspirations to independent statehood.⁶⁴

The peoples/populations controversy was in the end resolved by an unhappy compromise, which allowed use of the term *peoples* in the new convention, but with the following provision added to the text: "The use of the term 'peoples' in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."⁶⁵ Furthermore it was agreed that the following appear in the record of the committee proceedings leading to the convention: "It is understood by the Committee that the use of the term 'peoples' in this Convention has no implication as regards the right to self-determination as understood in international law."⁶⁶

The International Labour Office has taken the position that the qualifying language regarding the use of the term "peoples . . . did not limit the meaning of the term, in any way whatsoever" but rather simply was a means of leaving a decision on the implications of the usage of the term to procedures within the United Nations.⁶⁷ In any event, the qualifying language in the convention reflects an aversion on the part of numerous states to expressly acknowledge a right to self-determination for indigenous groups out of fear that it may imply an effective right of secession. Thus, while the development of Convention No. 169 promoted a reformed discourse on indigenous rights, express usage of the term *self-determination* in this connection continued to raise controversy.

It is nonetheless evident that the normative concept underlying indigenous peoples' self-determination rhetoric took hold to a substantial degree in Convention No. 169.⁶⁸ Even the qualified usage of the term *peoples* implies a certain affirmation of indigenous group identity and corresponding attributes of community. Whatever its shortcomings, moreover, Convention No. 169 succeeds in affirming the value of indigenous communities and cultures, and in setting forth a series of basic precepts in that regard. Although the convention "contains few absolute rules [it] fixes goals, priorities and minimal rights" that follow generally from indigenous peoples' articulated demands.⁶⁹ The convention, furthermore, is grounds for the invocation of international scrutiny over the particularized concerns of indigenous groups pursuant to the ILO's fairly well-developed mechanisms for implementing the standards expressed in ILO conventions.⁷⁰ Since the convention was adopted at the 1989 Labour Conference, indigenous peoples' organizations and their representatives increasingly have taken a pragmatic view and expressed support for the convention's ratification. Indigenous peoples' organizations from Central and South America have been especially active in pressing for ratification. Indigenous organizations from other regions that have expressed support for the convention include the Saami Council, the Inuit Circumpolar Conference, the World Council of Indigenous Peoples, and the National Indian Youth Council.

New and Emergent Customary International Law

ILO Convention No. 169 is significant to the extent it creates treaty obligations among ratifying states in line with current trends in thinking prompted by indigenous peoples' demands. The convention is further meaningful as part of a larger body of developments that can be understood as giving rise to new customary international law with

the same normative thrust. Since the 1970s, the demands of indigenous peoples have been addressed continuously in one way or another within the United Nations and other international venues of authoritative normative discourse. The extended multilateral discussion promoted through the international system has involved states, nongovernmental organizations, independent experts, and indigenous peoples themselves. It is now evident that states and other relevant actors have reached a certain new common ground about minimum standards that should govern behavior toward indigenous peoples, and it is also evident that the standards are already in fact guiding behavior. Under modern theory, such a controlling consensus, following as it does from widely shared values of human dignity, constitutes customary international law.

Norms of customary law arise—or to use the now much favored term *crystallize*—when a preponderance of states and other authoritative actors converge on a common understanding of the norms' contents and generally expect future behavior in conformity with those norms. As Professors McDougal, Laswell, and Chen describe it in their important study, customary law is “generally observed to include two key elements: a ‘material’ element in certain past uniformities in behavior and a ‘psychological’ element, or *opinio juris*, in certain subjectivities of ‘oughtness’ attending such uniformities in behavior.”⁷¹ The traditional points of reference for determining the existence of a customary norm are patterns of communicative behavior involving physical episodic conduct. Such episodic conduct is illustrated by Professor D’Amato:

[A] courier of state X delivers an unwelcome message to the king of state Y. The king imprisons the messenger. State X responds by sending another courier (obviously a reluctant one) who delivers the message that unless Y returns the first courier safe and sound X will sack and destroy the towns of Y. If Y releases the first courier with an apology and perhaps a payment of gold, a resolution of the issue in this manner will lead to a rule that official couriers are entitled to immunity against imprisonment.⁷²

Under traditional analysis, the content of the emergent rule and the required subjectivities of normative expectation (the so-called *opinio juris*) are inferred from the episodic conduct.

Today, however, interactive patterns around concrete events are not the only—or necessarily required—material elements constitutive of customary norms. With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a *pull toward compliance*—to use the terminology of Professor Thomas Franck⁷³—even in advance of a widespread corresponding pattern of physical conduct.⁷⁴ It is thus increasingly understood that explicit communication among authoritative actors, whether or not in association with concrete events, is a form of practice that builds customary rules.⁷⁵ Of course, conforming conduct will strengthen emergent customary rules by enhancing attendant subjectivities of expectation.⁷⁶

There has been a discernible movement toward a convergence of reformed normative understanding and expectation on the subject of indigenous peoples; under the theory just sketched, this movement is constitutive of customary international law. Relevant norm-building international practice, which has been substantially driven by indigenous peoples' own efforts, has entailed information gathering and evaluation, discussion and articulation of policies and norms, and the reporting of domestic initiatives against the backdrop of the developing norms.

A watershed in relevant United Nations activity was the 1971 resolution of the Economic and Social Council authorizing the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities to conduct a study on the “Problem of Discrimination against Indigenous Populations.”⁷⁷ The resulting multivolume work by special rapporteur José Martínez Cobo⁷⁸ was issued originally as a series of partial reports from 1981 to 1983.⁷⁹ It compiled extensive data on indigenous peoples worldwide and made a series of findings and recommendations generally supportive of indigenous peoples' demands.⁸⁰ The Martínez Cobo study became a standard reference for discussion of the subject of indigenous peoples within the United Nations system. Moreover, it initiated a pattern of further information gathering and evaluative work on the subject by experts working under the sponsorship of international organizations.

An example of such further expert work on the subject of indigenous peoples was the 1981 Conference of Specialists on Ethnocide and Ethnodevelopment in Latin America, sponsored by the United Nations Educational, Scientific and Cultural Organization. The conference, held in San José, Costa Rica, adopted a declaration affirming the “inalienable right of Indian groups” to consolidate their cultural identity and to “exercise . . . self-determination.”⁸¹ Later expert seminars convened by the United Nations on various aspects of indigenous peoples' concerns, and reaching conclusions emphasizing this same theme, have included the participation of persons named by indigenous peoples' organizations.⁸²

Upon the recommendation of the Martínez Cobo study and representatives of indigenous groups that attended the 1977 NGO Conference, the U.N. Human Rights Commission, and the Economic and Social Council approved in 1982 the establishment of the U.N. Working Group on Indigenous Populations.⁸³ The working group is an organ of the Subcommission on Prevention of Discrimination and Protection of Minorities, which is comprised of individuals who act in the capacity of independent human rights experts rather than government representatives. Since its creation, the working group has met annually in one or two week sessions. The working group's original mandate was to review developments concerning indigenous peoples and to work toward the development of corresponding international standards. The scope of the working group's activity subsequently was expanded to include a study on treaties between indigenous peoples and states and another on indigenous cultural and intellectual property. The working group is itself composed of five rotating members of the subcommission. Through its policy of open participation in its annual one- or two-week sessions, however, the working group has become an important platform for the dissemination of information and exchange of views among indigenous peoples, governments, nongovernmental organizations, and others.

The working group's most groundbreaking work has been pursuant to its standard-setting mandate, which was refined when in 1985 the subcommission approved the group's decision to draft a declaration on the rights of indigenous peoples for adoption by the U.N. General Assembly.⁸⁴ In 1988, the working group chair produced the first complete draft of the declaration, which substantially reflected proposals submitted by indigenous peoples' representatives.⁸⁵ Discussion of the declaration proceeded at subsequent sessions of the working group until it had completed, in 1993, its final revision of the draft for consideration by its parent bodies within the United Nations. In 1994 the subcommission adopted the working group draft and submitted it to the U.N. Commission on Human Rights.⁸⁶

Through the process of drafting a declaration, the subcommission's Working Group on Indigenous Populations engaged states, indigenous peoples, and others in an extended multilateral dialogue on the specific content of norms concerning indigenous peoples and their rights.⁸⁷ By welcoming commentary and proposals by indigenous peoples for over a decade, the working group provided an important means for indigenous peoples to promote their own conceptions about their rights within the international arena. As the drafting process proceeded in the group, more and more governments responded with their respective pronouncements on the content of indigenous peoples' rights. Virtually every state of the Western Hemisphere eventually came to participate in the working group discussion on the declaration. Canada, with its large indigenous population, took a leading role. States of other regions with significant indigenous populations also became active participants, especially Australia and New Zealand. The Philippines, Bangladesh, and India are just three of the other numerous states that at one time or another made oral or written submissions to the working group in connection with the drafting of the declaration.

The development of ILO Convention No. 169 was an effective extension of the standard-setting discussion in the working group, although indigenous groups participated less fully, given the formal ILO structure in which the drafting of Convention No. 169 took place.⁸⁸ Most of the states active in the working group's proceedings also took on visible roles in the committee of the International Labour Conference that drafted Convention No. 169. The United States, although it participated minimally in the working group's standard-setting activity, contributed notably to the ILO process.⁸⁹ Representatives of a total of thirty-nine governments participated in the conference committee, in addition to the worker and employee delegates that are part of the "tripartite" system of governance in the ILO.⁹⁰ The ILO treaty revision process accelerated the international discussion of indigenous peoples' rights by focusing it on the adoption of a normative instrument within a fairly short time frame.

With the increase in international attention to indigenous peoples' rights has come an expanding core of common opinion on the content of those rights, a core of opinion substantially shaped by indigenous peoples' contemporary demands and supported by years of official inquiry into the subject. This core of common opinion is reflected at least partly in the text of Convention No. 169, which was approved by the drafting committee by consensus⁹¹ and adopted by the full conference by an overwhelming majority of the voting delegates.⁹² None of the government delegates voted against adoption of the text, although a number abstained.⁹³ Government delegates who

abstained, however, expressed concern primarily about the wording of certain provisions or about perceived ambiguities in the text, while in many instances indicating support for the core precepts of the new convention.⁹⁴

Their trepidation about the text of Convention No. 169 was in large part a result of the limitations of language within the prevailing frame of international legal rhetoric. Within this prevailing frame, as indicated earlier,⁹⁵ words used to signify group identity or entitlements raise already heightened sensitivities about state sovereignty, often overshadowing the consensus on underlying normative precepts. For example, a number of states that abstained from voting in favor of adoption of Convention No. 169 at the 1989 Labour Conference expressed concern about the use of the term *territories* in the convention. The term *territories* is used there to signify indigenous peoples' interests in the total environment of the areas in which they live.⁹⁶ While not disagreeing with the specific meaning attached to the term in the convention, some governments expressed fear that its usage would imply a competing sovereignty, given the traditional usage of the term *territory* in association with independent statehood.⁹⁷ Yet despite such rhetorical sensitivities, which made a small minority of governments abstain from voting in favor of the convention, no government recorded outright rejection of the essential principles represented in the text. In fact, several of the abstaining governments indicated support for the convention's basic thrust by reporting domestic initiatives generally consistent with the convention.⁹⁸

Since the convention was adopted in 1989, government comments directed at developing an indigenous rights declaration in the U.N. subcommission working group, the subcommission itself, and the U.N. Commission on Human Rights generally have affirmed the basic precepts set forth in the convention, and indeed the comments indicate an emerging consensus that accords even more closely with indigenous peoples' demands.⁹⁹ The Draft United Nations Declaration on the Rights of Indigenous Peoples—developed by the working group and adopted by the full body of independent experts who comprise the subcommission—stands in its own right as an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles; and it is also a manifestation of the movement in a corresponding consensual nexus of opinion on the subject among relevant actors. The extensive deliberations leading to the draft declaration, in which indigenous peoples themselves played a leading role, enhance the authoritativeness and legitimacy of the draft.

The draft U.N. declaration goes beyond Convention No. 169, especially in its bold statements in areas of indigenous self-determination,¹⁰⁰ land and resource rights,¹⁰¹ and rights of political autonomy.¹⁰² It is clear that not *all* are satisfied with *all* aspects of the draft declaration developed by the subcommission working group. Some indigenous peoples' representatives have criticized the draft for not going far enough, while governments typically have held that it goes too far. Nonetheless, a new common ground of opinion exists among experts, indigenous peoples, and governments about indigenous peoples' rights and attendant standards of government behavior, and that widening common ground is in some measure reflected in the subcommission draft.

This common ground also is reflected in government and other authoritative statements made in the context of ongoing parallel efforts to develop a declaration or

convention on indigenous peoples' rights within the Organization of American States. In 1989, the OAS General Assembly resolved to "request the Inter-American Commission on Human Rights to prepare a juridical instrument relative to the rights of indigenous peoples."¹⁰³ Pursuant to this task, the Inter-American Commission on Human Rights has collected commentary from governments and indigenous peoples from throughout the Americas on the nature and content of the rights to be included in the proposed instrument.¹⁰⁴ Although reflecting a range of views over multiple areas of concern to indigenous peoples, the commentary substantially confirms the core of consensus evident in the procedures leading to the draft U.N. declaration and ILO Convention No. 169.

Other international initiatives, as well as already developed normative instruments, contribute to a new generation of international consensus on indigenous peoples' rights.¹⁰⁵ In 1989 the state parties to the Amazonian Cooperation Treaty agreed to establish a Special Commission on Indigenous Affairs with the objective of "[e]nsuring the effective participation by each Amazonian Country's indigenous populations in all phases of the characterization of indigenous affairs," especially in regard to development programs.¹⁰⁶ The commission subsequently adopted a work plan giving priority to the recognition and protection of indigenous land and resource rights. A larger segment of the indigenous peoples of the Western Hemisphere benefit by the creation of an Indigenous Peoples' Fund, pursuant to a convention signed at the Second Summit Meeting of Ibero-American Heads of State in 1992.¹⁰⁷ The fund is to address the development needs of indigenous peoples in countries of Latin America and the Caribbean, in accordance with decision-making procedures that include representative indigenous organizations.

In 1991 the World Bank adopted a revised policy directive in view of the pervasive role the bank plays in financing development projects in less-developed countries where many of the world's indigenous people live.¹⁰⁸ Much of the discussion within international institutions about indigenous peoples has focused not just on the potential benefits of development programs aimed specifically at indigenous groups, but also on the damaging effects of many industrial development projects that have taken place in areas traditionally occupied by indigenous groups.¹⁰⁹ The World Bank adopted Operational Directive 4.20 after a period of expert study that helped reshape attitudes within the bank toward greater programmatic action concerning indigenous peoples affected by bank-funded projects, action in line with contemporary trends in thinking about their rights.¹¹⁰

Resolutions adopted at the 1992 United Nations Conference on Environmental Development include provisions on indigenous people and their communities. The Rio Declaration,¹¹¹ and the more detailed environmental program and policy statement known as Agenda 21,¹¹² reiterate precepts of indigenous peoples' rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development.¹¹³ The Program of Action adopted by 1994 U.N. Conference on Population and Development similarly includes a part on indigenous people and affirms prevailing normative assumptions in this regard.¹¹⁴

In its 1989 resolution "on the Position of the World's Indians," the European Parliament expressed its concern over the conditions faced by indigenous peoples and called on governments to secure indigenous land rights and enter consultations

with indigenous groups to develop specific measures to protect their rights.¹¹⁵ Elaborating upon these and related themes, the European Parliament adopted another resolution in 1994, on "Measures Required Internationally to Provide Effective Protection for Indigenous Peoples."¹¹⁶ The 1994 resolution holds that indigenous peoples have the "right to determine their own destiny by choosing their institutions, their political status and that of their territory."¹¹⁷

More generally emphasizing the underlying need for international attention and cooperation to secure indigenous peoples in the full enjoyment of their rights are the following: the 1972 resolution of the Inter-American Commission on Human Rights identifying patterns of discrimination against indigenous peoples and stating that "special protection for indigenous populations constitutes a sacred commitment of the States;"¹¹⁸ the Helsinki Document 1992—The Challenge of Change, adopted by the Conference on Security and Cooperation in Europe, which includes a provision "[n]oting that persons belonging to indigenous populations may have special problems in exercising their rights;"¹¹⁹ and parts of the Vienna Declaration and Programme of Action adopted by the 1993 United Nations Conference on Human Rights, urging greater focus on indigenous peoples' concerns within the U.N. system.¹²⁰

Thus, there is a substantial level of international concern for indigenous peoples, and with this concern there is a certain convergence of international opinion about the content of indigenous peoples' rights. This convergence of opinion carries subjectivities of obligation and expectation attendant upon the rights, regardless of any treaty ratification or other formal act of assent to the norms articulated. The discussion of indigenous peoples and their rights as promoted through international institutions and conferences has proceeded in response to demands that indigenous groups have made over several years and upon an extensive record of justification.¹²¹ The pervasive assumption has been that the articulation of norms concerning indigenous peoples is an exercise in identifying standards of conduct that are *required* to uphold widely shared values of human dignity. Accordingly, indigenous peoples' rights typically are regarded as, and can be demonstrated to be,¹²² derivative of previously accepted, generally applicable human rights principles. The multilateral processes that build a common understanding of the content of indigenous peoples' rights, therefore, also build expectations that the rights will be upheld.

Furthermore, the sense of obligation that attaches to newly articulated norms concerning indigenous peoples is properly viewed as being of a legal and not just moral character. Traditionally, there has been a distinction between subjectivities of *moral* as opposed to *legal* obligation or expectation, with only the latter qualifying as *opinio juris*, the essential psychological component of customary law. This distinction between moral and legal obligation is a product of the positivist thinking that prevailed in international legal discourse at the turn of the century. Under such thinking, it was possible for a state to violate widely shared and followed moral precepts while not infringing international law.¹²³ However, contemporary international law now includes broad moral precepts among its constitutional elements, particularly within the rubric of human rights. The U.N. Charter and the constituent texts of the major regional inter-governmental organizations, along with an infusion of normative discourse within authoritative processes of decision over the last several decades, have firmly estab-

lished an obligation to uphold human rights as a matter of general international law.¹²⁴ The legal character of the obligation can thus be seen to attach to all the subjectivities of obligation that surface within the realm of human rights.¹²⁵

The consequent demise of the traditional distinction between moral and legal subjectivities for the purposes of identifying customary law is evident in contemporary jurisprudential studies. For Miguel D'Estéfano, state practice builds customary law where it is a response to "an idea of justice and humanity."¹²⁶ Professor Meron finds *opinio juris* in a subjective belief that a practice follows from "compelling principles of humanity."¹²⁷ Similarly, Professors McDougal, Laswell, and Chen hold that "subjectivities of oughtness [*opinio juris*] required to attend . . . uniformities of behaviour may relate to many different systems of norms, such as prior authority, natural law, reason, morality, or religion."¹²⁸

Thus, insofar as there is both a pattern of communicative behavior regarding the content of indigenous peoples' rights and a convergence of attendant subjectivities of obligation or expectation, as is evident in recent developments, there is customary international law. The claim here is not that each of the authoritative documents referred to can be taken in its entirety as articulating customary law, but that the documents represent core precepts that are widely accepted and, to that extent, are indicative of customary law.

The existence of customary norms concerning indigenous peoples and their pull toward compliance is confirmed especially by statements that governments make about relevant domestic policies and initiatives before international bodies concerned with promoting indigenous peoples' rights. The government practice of reporting on domestic policies and initiatives has been a regular feature of the U.N. subcommission working group's activity under its mandate "to review developments pertaining to . . . the human rights and fundamental freedoms of indigenous populations."¹²⁹ Additionally, several governments made statements on domestic developments during the negotiation of ILO Convention No. 169 and upon its submission for a record vote.¹³⁰ Within these and other contexts of international multilateral discourse,¹³¹ more and more states have entered the discussion of developments concerning indigenous peoples, affirming a pattern of responsiveness to indigenous peoples' demands.¹³²

The written and oral statements of governments reporting domestic initiatives to international bodies are doubly indicative of customary norms. First, the accounts of government conduct provide evidence of behavioral trends by which the contours of underlying standards can be discerned or confirmed, notwithstanding the difficulties in agreement on normative language for inclusion in written texts. Secondly, because the reports are made to international audiences concerned with promoting indigenous peoples' rights, they provide strong indication of subjectivities of obligation and expectation attendant upon the discernible standards.

Illustrative are the following statements to the 1993 World Conference on Human Rights in Vienna under the agenda item "Commemoration of the International Year of the World's Indigenous People."

Statement of Colombia on Behalf of the Latin American and Caribbean Group:

In Latin America there exists a process of recognizing the role played by indigenous cultures in the definition of our identity, a process which takes the form of

State measures, through constitutional and legislative means, to accord respect to indigenous cultures, the return of indigenous lands, indigenous administration of justice and participation in the definition of government affairs, especially as concerns their communities.

Within the framework of State unity, this process is characterized by the consecration in some constitutions of the multiethnic character of our societies.¹³³

Statement on Behalf of the Delegations of Finland, Sweden and Norway:

In the Nordic countries, the Sami people and their culture have made most valuable contributions to our societies. Strengthening the Sami culture and identity is a common goal for the Nordic governments. Towards this end, elected bodies in the form of Sami Assemblies, have been established to secure Sami participation in the decision making process in questions affecting them. Cross border cooperation both between Sami organizations and between local governments in the region has also provided a fruitful basis for increasing awareness and development of Sami culture.¹³⁴

Statement by the Delegation of the Russian Federation:

[W]e have drawn up a stage-by-stage plan of work.

At the first stage we elaborated the draft law entitled "Fundamentals of the Russian legislation on the legal status of small indigenous peoples" which was adopted by the Parliament on June 11, 1993.

This Law reflects . . . collective rights of small peoples in bodies of state power and administration, in local representative bodies and local administration; legitimized ownership rights for land and natural resources in regions where such peoples traditionally live; guarantees for the preservation of language and culture.

The next stage consists in elaborating the specific mechanism for the implementation of this law. Work is underway on draft laws on family communities and nature use.¹³⁵

The foregoing statements, made without reference to any treaty obligation, manifest the existence of customary norms. Evident in each of these statements is the implied acceptance of certain normative precepts grounded in general human rights principles. And because the developments reported in these statements are independently verifiable, despite continuing problems not reflected in the government accounts, it is evident that the underlying standards are in fact guiding or influencing behavior. The specific contours of these norms are still evolving and remain somewhat ambiguous. Yet the core elements of a new generation of internationally operative norms increasingly are confirmed and reflected in the extensive multilateral dialogue and processes of decision focused on indigenous peoples and their rights.

The new and emergent international law of indigenous peoples, which includes ILO Convention No. 169 and customary law, is a dramatic manifestation of the mobilization of social forces through the human rights frame of the contemporary international system. Indigenous peoples themselves have been at the helm of a movement that has challenged state-centered structures and precepts which have continued within international law and global organization. This movement, although fraught with tension, has resulted in a heightened international concern over indig-

enous peoples and a constellation of internationally accepted norms generally in line with indigenous peoples' own demands and aspirations.

Notes

1. See generally Ian Brownlie, *Principles of Public International Law* 88–91 (4th ed. 1990) (discussing theories of recognition of statehood).
2. See generally Jonathan I. Charney, "Transnational Corporations and Developing Public International Law," 1983 *Duke L.J.* 748; W. Feld, *Nongovernmental Forces and World Politics: A Study of Business, Labor and Political Groups* (1972); Krysztof Skubiszewski, "Forms of Participation of International Organizations in the Law-Making Process," 18 *Int'l Org.* 790 (1964); Nigel S. Rodley, "The Work of Non-Governmental Organizations in the World Wide Promotion and Protection of Human Rights," *United Nations Bulletin of Human Rights*, No. 90/1 (1991), at 90–93.
3. See Wolfgang Friedmann, *The Changing Structure of International Law* (1964); Manuel Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations," 44 *Brit. Y.B. Int'l L.* 111 (1970); *Restatement of the Law (Third): The Foreign Relations Law of the United States*, sec. 101, at 22 (regarding international law's applicability to individuals); *id.* sec. 219, at 140 (legal status of international organizations).
4. See generally *Human Rights in the World Community: Issues and Action* (Richard P. Claude & Burns H. Weston eds., 2d ed. 1992); *New Directions in Human Rights* (Ellen Lutz et al. eds., 1989); Vernon Van Dyke, *Human Rights, Ethnicity, and Discrimination* (1985). This discourse is encouraged by a reassertion of naturalist theory in modern jurisprudence concerning both international and domestic processes of decision. See generally George W. Paton, *A Text-book of Jurisprudence* 106–17 (3d ed. 1964) (surveying modern natural law theories). Examples of contemporary, influential naturalist theory are Ronald Dworkin, *Law's Empire* (1986), and Lon Fuller, *The Morality of Law* (2d ed. 1969).
5. See *supra* chapter 1, notes 1–42 and accompanying text (discussing natural law theorists of the late Middle Ages and early Renaissance).
6. U.N. Charter art. 2, paras. 1, 4, 7.
7. *Id.* art. 4.
8. *Id.* art. 1, para. 2.
9. *Id.* art. 1, para. 3.
10. *Id.* art. 55.
11. See *id.* art. 1, para. 1; preamble.
12. See *id.* arts. 18 (General Assembly), 27 (Security Council), 67 (Economic and Social Council), 89 (Trusteeship Council).
13. See *id.* arts. 93, 96; Statute of the International Court of Justice, June 26, 1945, arts. 34, 35, 65 T.S. No. 993, 3 *Bevans* 1179.
14. See U.N. Charter art. 23, para. 1.
15. *Id.* art. 56.
16. *Id.* art. 71.
17. See generally Pei-heng Chiang, *Non-governmental Organizations at the United Nations: Identity, Role, and Function* (1981); Philip Taylor, *Nonstate Actors in International Politics: From Transregional to Substate Organizations* (1984).
18. See David Bowett, *The Law of International Institutions* 87 (4th ed. 1982).
19. For a compilation of human rights instruments developed through U.N. and related processes, see United Nations, *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev.4, U.N. Sales No. E.93.XIV.1 (vol. 1, pts. 1 & 2) (1993). Extensive

international human rights regimes also have been developed through the Organization of American States, the Council of Europe and the Organization of African Unity. These regimes are summarized in Burns Weston, Robin Lukes, & Kelly Hnatt "Regional Human Rights Regimes: A Comparison and Appraisal," in *Human Rights in the World Community*, *supra* note 4, at 244.

20. It is generally agreed that there is now a minimal corpus of human rights guarantees that is binding on all states as a matter of customary international law. Mark W. Janis, *An Introduction to International Law* 247–49 (2d ed. 1993); Tom J. Farer, "The United Nations and Human Rights: More Than a Whimper, Less Than a Roar" 9 *Hum. Rts. Q.* 550 (1987). See also *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (right against torture as customary international law). For a description of the methodology and institutions for the enforcement of human rights norms, see *Guide to International Human Rights Practice* (Hurst Hannum ed., 2d ed. 1992). See also chapters 5 and 6, *infra* (discussing implementation procedures for human rights norms for the benefit of indigenous peoples).

21. See *Human Rights in the World Community*, *supra* note 4, at 3–5; Mark Janis, *supra* note 20, at 227–72; Erica-Irene Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection, and Restoration of Human Rights at the National, Regional, and International Levels*, U.N. Sales No. E.91.XIV.3, at 21 (1992).

22. See *supra* chapter 1, notes 51–53 and accompanying text.

23. See generally *The Rights of Peoples* (James Crawford ed., 1988) (an anthology of perspectives on peoples' and group rights within the international human rights frame). The burgeoning attention to groups and group rights in international legal discourse is highlighted by the *International Journal on Group Rights*, published by Martinus Nijhoff Publishers.

24. See *supra* chapter 1, notes 10–14 and accompanying text.

25. Chapters XII and XIII of the U.N. Charter created a trusteeship system similar to but with results more effective than the system of mandates under the League of Nations, the failed attempt at world organization that preceded the U.N. at the close of World War I. U.N. trusteeship was established for the territories detached from the powers defeated in World War II with the objective of moving the territories to self-governing or independent status. Of far greater scope and impact has been the program pursuant to Chapter XI of the Charter, entitled "Declaration on Non-Self-Governing Territories," establishing special duties for U.N. members "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government." U.N. Charter art. 73. Under article 73 of Chapter XI, such members commit themselves:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . .

. . . .

- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible.

Id. The General Assembly created a list of territories subject to the reporting requirement of article 73(e) of Chapter XI and developed a committee structure to deliberate upon the reports with a view toward promoting Chapter XI policies. After a period of resistance

by colonial powers, the General Assembly became increasingly engaged in promoting decolonization on the basis of Chapter XI and related Charter principles. See Robert E. Riggs & Jack C. Plano, *The United Nations: International Organization and World Politics* 193–98 (2d ed. 1994) (discussing U.N. procedures under Chapter XI).

26. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV), Dec. 14, 1960, para. 5, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) (“Immediate steps shall be taken, in . . . Non-Self-Governing Territories. . . to transfer all powers to the peoples of those territories.”); Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* 93 (1986) (discussing the arbitrary character of colonial boundaries in Africa in terms of the ethnic composition of the indigenous populations, boundaries that were left intact through decolonization).

27. Under Resolution 1541, a territory ceases to be non-self-governing by “(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State.” Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations (Declaration on Non-Self-Governing Territories), G.A. Res. 1541(XV), Dec. 15, 1960, principle 6, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1961). Ofuately-Kodjoe concludes that G.A. Res. 1541 is generally reflective of international practice in the application of the principle of self-determination to the colonial territories. W. Ofuately-Kodjoe, *The Principle of Self-Determination in International Law* 115–28 (1977).

28. See G.A. Res. 1541, *supra* note 27 (“Free association should be the result of a free and voluntary choice by the peoples of the territory concerned.”).

29. The blue water, or salt water, thesis was developed in opposition to efforts by certain colonial powers (particularly Belgium and France) to expand the scope of the obligations and procedures of Chapter XI of the U.N. Charter, which concerns non-self-governing territories, to include enclave indigenous populations. Ofuately-Kodjoe, *supra* note 27, at 119. These states argued that the “primitive” communities living within the frontiers of many states were in relevant respects indistinguishable from the peoples living in colonial territories, an argument apparently advanced for self-serving ends to diffuse the political momentum coalescing against colonialism. Gordon Bennett, *Aboriginal Rights in International Law* 12–13 (1978). Latin American states especially opposed the expansive interpretation of Chapter XI and eventually prevailed in securing the more restrictive interpretation which effectively limited Chapter XI procedures to overseas colonial territories. *Id.* The blue water thesis was incorporated into G.A. Res. 1541, *supra* note 27, which states in relevant part:

Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature.

30. G.A. Res. 275(III) (1949).

31. See U.N. ESCOR, 11th Sess., 397th mtg., July 24, 1950, U.N. Doc. E/SR.397 (1950). The initiative for a study foundered in the face of opposition by affected states. See *id.* See also Hurst Hannum, “New Developments in Indigenous Rights,” 28 *Va. J. Int’l L.* 649, 657–58 (1988).

32. Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 U.N.T.S. 247 (entered into force June 2, 1959) [hereinafter ILO Convention No. 107].

33. Recommendation (No. 104) Concerning the Protection of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Conference, June 26, 1957, *International Labour Conventions and Recommendations, 1919–1991*, at 636 (1992).

34. Professor Hannum recounts the history of ILO activity leading to the adoption of ILO Convention No. 107 as follows:

As early as 1921, the ILO carried out a series of studies on indigenous workers. In 1926, it established a Committee of Experts on Native Labour, whose work led to the adoption of a number of conventions and recommendations concerning forced labor and recruitment practices of indigenous groups. A second Committee of Experts on Indigenous Labour first met in 1951. It encouraged states to extend legislative provisions to all segments of their population, including indigenous communities, and called for improved education, vocational training, social security, and protection in the field of labor for indigenous peoples. Finally, in 1953, the ILO published a comprehensive reference book, entitled *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries*, which provided a survey of indigenous populations throughout the world and a summary of national and international action to aid these groups.

Hannum, *supra* note 31, at 652–53 (footnotes omitted).

35. The adoption of ILO Convention No. 107, for example, corresponds to the “termination” period in the United States during which federal policy was to promote the assimilation of Indian cultures by terminating federal recognition of their tribal status. See generally David H. Getches et al., *Federal Indian Law: Cases and Materials* 229–251 (3d ed. 1993).

36. This perceptual dichotomy and its historical implications for indigenous peoples is discussed in chapter 1, *supra* notes 43–71 and accompanying text.

37. See Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* 5–6, U.N. Sales No. E.90.III.A.9 (1990).

38. The first article of the convention states: “This Convention applies to . . . members of tribal or semi-tribal populations.” Convention No. 107 art. 1, para. 1 (emphasis added).

39. See Convention Providing for the Creation of an Inter-American Indian Institute, Nov. 1, 1940, T.S. No. 978, 3 Bevans 661.

40. Rodolfo Stavenhagen characterizes the periodic conferences sponsored by the institute as establishing the parameters for an ideology justifying the assimilationist policies that many governments vigorously pursued. Rodolfo Stavenhagen, “La Situación y los derechos de los pueblos indígenas de América,” 52 *América Indígena*, Nos. 1–2, at 89 (1992).

41. In the United States, for example, several young Indians, among them college graduates, appeared uninvited at the 1961 Conference on Indian Policy organized with the help of the University of Chicago Anthropology Department. They issued a statement declaring “the inherent right of self-government” of Indian people and that they “mean to hold the scraps and parcels [of their lands] as earnestly as any small nation or ethnic group was ever determined to hold on to identity and survival.” Moreover, the young activists used the conference as a springboard for the creation of the National Indian Youth Council and with it a new form of Indian advocacy connected with the larger civil rights movement. Later developments included the formation of other Indian activist organizations, including the American Indian Movement and its international arm, the International Indian Treaty Council.

42. Important elements of this process included widely read works by indigenous authors, e.g., Vine Deloria Jr., *Custer Died for Your Sins* (1969) (Vine Deloria is Standing Rock Sioux); Ramiro Reinaga, *Ideología y Raza en América Latina* (1972) (Ramiro Reinaga is Quechua).

43. An extensive, analytical account of indigenous peoples' efforts internationally beginning in the 1970s is in Bice Maiguashca's paper, "The Role of Ideas in a Changing World Order: The Case of the International Indigenous Movement, 1975–91," which was delivered at the conference, Changing World Order and the United Nations System, in Yokohama, Japan, March 24–27, 1992. See also Franke Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (1993).

44. See generally Kelly Roy & Gudmundur Alfredsson, "Indigenous Rights: The Literature Explosion," 13 *Transnat'l Persp.* 19 (1987).

45. Indigenous peoples' representatives at the conference drafted and circulated a draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere. The declaration, reprinted in the appendix, *infra*, became an early benchmark for indigenous peoples' demands upon the international community. Other important international conferences in the 1970s and eighties were the periodic conferences of the Inuit Circumpolar Conference and the World Council of Indigenous Peoples. The Fourth General Assembly of the World Council of Indigenous Peoples, held in Panama in 1984, developed a declaration of principles which is reproduced in the *Report of the Working on Indigenous Populations at its Fourth Session*, Annex 3, U.N. Doc. E/CN.4/Sub.2/1985/22 (1985) [hereinafter *1985 Working Group Report*], and also in the appendix, *infra*. Bice Maiguashca identifies this declaration and the declaration produced at the 1977 NGO conference in Geneva as constituting the core of "the indigenous counter-hegemonic project." Maiguashca, *supra* note 43, at 16. Another important declaration was the one produced and signed by indigenous NGOs from throughout the world in attendance at the 1985 and 1987 sessions of the United Nations Working Group on Indigenous Populations, which declaration appears in U.N. Doc. E/CN.4/Sub.2/1987/22, Annex 5 (1987), and in the appendix, *infra*. See also Proposed Universal Declaration on Indigenous Rights by the Assembly of First Nations (Canada), reprinted in U.N. Doc. E/CN.4/Sub.2/AC.4/1989/5 (1989). With increasing frequency over the last several years, indigenous peoples have organized international conferences on an *ad hoc* basis or in association with other international events. One such conference was the World Conference of Indigenous Peoples on Territory, Environment and Development, held in Kari-Oca village, Brazil, in May 1992, in anticipation of the U.N.-sponsored World Conference on Environment and Development. The Kari-Oca conference produced a multifaceted declaration on development strategies; culture, science, and intellectual property; and on indigenous rights generally.

46. See generally *Rethinking Indian Law* 139–76 (National Lawyers Guild ed., 1982) (discussing indigenous peoples' efforts of the late 1970s—early 80s within the U.N. Human Rights Commission and its Subcommission on Prevention of Discrimination and Protection of Minorities). See also *infra* notes 83–88 and accompanying text (discussing indigenous peoples' participation in the U.N. Working Group on Indigenous Populations, which was created in 1982); *infra* chapter 6, notes 87–100 and accompanying text (discussing cases involving indigenous individuals and groups before the U.N. Human Rights Committee pursuant to the complaint procedures of the Optional Protocol to the International Covenant on Civil and Political Rights).

47. These organizations today include the Consejo Indio de Sud-América (CISA), Four Directions Council, Grand Council of the Crees (of Québec), Indian Law Resource Center, Indigenous World Association, International Indian Treaty Council, International Organization of Indigenous Resources Development, Inuit Circumpolar Conference, National Aborigi-

nal and Islander Legal Services Secretariat, National Indian Youth Council, the Saami Council, and the World Council of Indigenous Peoples. Standards for formal accreditation with the Economic and Social Council are specified in *Arrangements for Consultation with Non-Governmental Organizations*, E.S.C. Res. 1296(XLIV), May 23, 1968, U.N. ESCOR, 44th Sess., Annex, U.N. Doc. E/4485 (1968).

48. See *infra* chapter 6, notes 116–37 and accompanying text (discussing cases brought by or on behalf of indigenous peoples before the Inter-American Commission on Human Rights). The use of international human rights procedures by indigenous peoples was encouraged by the publication in 1984 of *Indian Rights, Human Rights: Handbook for Indians on International Human Rights Complaint Procedures*, a small book written with the nonlawyer in mind. This publication by the Indian Law Resource Center (which now has offices in Helena, Montana, and Washington, D.C.) was subsequently published in Spanish and widely distributed throughout the Americas.

49. See Akwesasne Mohawk Counselor Organization, *Deskaheh: Iroquois Statesman and Patriot* (1984).

50. G.A. Res. 45/164 (Dec. 18, 1990). See generally "Inauguration of the 'International Year of the World's Indigenous People,'" 3 *Transnat'l L. & Contemp. Probs.* 165 (1993) (a compilation of related statements before the U.N. General Assembly by the U.N. secretary-general, indigenous peoples' representatives, and others).

51. G.A. Res. 48/163 (Dec. 21, 1993) (proclaiming the "International Decade of the World's Indigenous People" commencing Dec. 10, 1994).

52. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, (entered into force Sept. 5, 1991), reprinted in the appendix, *infra* [hereinafter ILO Convention No. 169].

53. *Report of the Meeting of Experts*, para. 46, reprinted in part in *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report 6(1), International Labour Conference, 75th Sess. at 100–18 (1988). The study of the special rapporteur referred to is the study of José Martínez Cobo conducted under the auspices of the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, which is discussed *infra* notes 78–80 and accompanying text.

54. For detailed descriptions of the process leading to the adoption of ILO Convention No. 169 and analyses of the convention's provisions, see Lee Swepton, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989," 15 *Okla. City U. L. Rev.* 677 (1990); Russell L. Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples," 15 *Okla. City U. L. Rev.* 209 (1990).

55. Subsequent ratifications include those of Bolivia, Colombia, Costa Rica, Honduras, Paraguay, and Peru.

56. Convention No. 169, *supra* note 52, fifth preambular para. The principal aspects of the convention are described further in chapters 3 and 4, *infra*, in a synthesis of conventional and customary international norms concerning indigenous peoples.

57. E.g., *id.* art. 5 ("[T]he social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected."). See also *infra* chapter 4, notes 14–65 and accompanying text (discussing the norm of indigenous cultural integrity as reflected, *inter alia*, in Convention No. 169).

58. Convention No. 169, *supra* note 52, pt. 2 (land). The principal land rights provisions of ILO Convention No. 169 are discussed *infra* chapter 4, at text accompanying notes 76–86.

59. *Id.* pt. 3 ("Recruitment and Conditions of Employment"), pt. 4 ("Vocational Training, Handicrafts and Rural Industries"), pt. 5 ("Social Security and Health"), pt. 6 ("Education and Means of Communication"). See also *infra* chapter 4, notes 92–105 and accompanying text (discussing the rights of social welfare and development).

60. *E.g., id.*, art. 7(1):

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

61. Representatives of indigenous peoples' organizations expressed such dissatisfaction to the International Labour Conference upon completion of the drafting of Convention No. 169. *See* Statement of Ms. Venne, representative of the International Working Group for Indigenous Affairs (speaking on behalf of indigenous peoples from North and South America, the Nordic countries, Japan, Australia, and Greenland), International Labour Conference, Provisional Record 31, 76th Sess. at 31/6 (1989) [hereinafter 1989 ILO Provisional Record 31].

62. *E.g.,* Convention No. 169, *supra* note 52, art. 8(1) ("In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws"); art. 9(1) ("To the extent compatible with the national legal system and with internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected."); art. 10(1) ("In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.") (emphasis added).

63. *See, e.g.,* comments of the Indigenous Peoples' Working Group of Canada, in International Labour Office, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report 4(2A), International Labour Conference, 76th Sess. at 9, (1989) ("Indigenous and tribal peoples are distinct societies that must be referred to in a precise and acceptable manner. Continued use of the term 'populations' would unfairly deny them their true status and identity as indigenous peoples."). The position in favor of use of the term *peoples* was advanced by the worker delegates in the committee deliberations leading to Convention No. 169. *See Report of the Committee on Convention 107*, International Labour Conference, Provisional Record 25, 76th Sess. at 25/6-8 (1989) [hereinafter 1989 ILO Provisional Record 25]. An example of indigenous peoples' advocacy in this regard in other international settings is the Statement by the Inuit Circumpolar Conference presented to the 1989 session of the U.N. Working Group on Indigenous Populations, Aug. 1, 1989, at 1, stating that "Inuit and other indigenous peoples worldwide are not and have never been mere 'populations.'"

64. *See, e.g.,* Statement by the National Coalition of Aboriginal Organizations, Australia, during the 75th session of the International Labour Conference, June 13, 1988, at 2:

[W]e define our rights in terms of self-determination. We are not looking to dismember your States and you know it. But we do insist on the right to control our territories, our resources, the organisation of our societies, our own decision-making institutions, and the maintenance of our own cultures and ways of life.

65. Convention No. 169, *supra* note 52, art. 1(3).

66. 1989 ILO Provisional Record 25, *supra* note 63, at 25/7, para. 31. Some government representatives, however, continued to express reservations about even the qualified use of what they perceived to be a term of art that might be read to undermine the territorial integrity of a state with indigenous communities dwelling within its exterior borders. *Id.* at 25/7-8, paras. 36-42.

67. Statement of Lee Swepton of the International Labour Office to the U.N. Working Group on Indigenous Populations, July 31, 1989.

68. *See generally infra* chapter 3 (discussing the principle of self-determination and its application in the context of indigenous peoples).

69. Swepton, *A New Step*, *supra* note 54, at 689.

70. For a description of the ILO's norm implementation machinery, see *infra* chapter 6, notes 18-24, 62-75, and accompanying text.

71. Myres McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* 269 (1980) (footnote omitted). *Cf.* article 38(1)(a) of the Statute of the International Court of Justice describing "international custom, as evidence of a general practice accepted as law."

72. Anthony D'Amato, "The Concept of Human Rights in International Law," 82 *Colum. L. Rev.* 1110, 1130 (1982).

73. *See* Thomas M. Franck, "Legitimacy in the International System," 82 *Am. J. Int'l L.* 705 (1988) (a jurisprudential study concerned with identifying the elements that establish in international norms the "compliance pull").

74. *See* McDougal et al., *supra* note 71, at 272 ("[I]t is easily observable that such organizations, especially the United Nations and affiliated agencies, play an increasingly important role as forums for the flow of explicit communications and acts of collaboration which create peoples' expectations about authoritative community policy.").

75. *See id.* at 272-73; Bin Cheng, "United Nations Resolutions on Outer Space: Instant International Customary Law?" 5 *Indian J. Int'l L.* 23, 45 (1965) (stating that the common belief of states that they are bound to a rule is the "only one single constitutive element" and conforming actual conduct merely provides evidence of the rule's existence); H.W.A. Thirlway, *International Customary Law and Codification* 56 (1972) ("The *opinio necessitatis* in the early stages is sufficient to create a rule of law, but its continued existence is dependent upon subsequent practice accompanied by *opinio juris*, failing which the new-born rule will prove a sickly infant and fail to survive for long."). Accordingly, Professor Brownlie defines the "material sources of custom" to include "diplomatic correspondence, policy statements, press releases . . . comments by governments on drafts produced by the International Law Commission, . . . recitals in treaties and other international instruments, a pattern of treaties in the same form, practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly." *Supra* note 1, at 5.

The International Court of Justice, in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27), relied primarily on United Nations resolutions to discern the applicable rules of customary international law. *See also* *TOPCO/CALASIATIC v. Libyan Arab Republic*, International Arbitration Tribunal, Merits (1977), 17 *I.L.M.* 1 (1978) (René Dupuy, arbitrator) (finding applicable customary law in part on the basis of patterns of voting on U.N. General Assembly resolutions). For an insightful analysis of the relationship between resolutions by international institutions and customary international law, see Rosalyn Higgins, "The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System," in *International Law and the International System* 21 (W. Butler ed., 1987).

Professor Sohn observes that government practice in negotiating the text of an international instrument may itself generate customary law, even in advance of formal adoption or ratification of the instrument: "The Court is thus willing to pay attention not only to a text that codifies preexisting principles of international law but also to one that crystallizes an 'emergent rule of customary law.'" Louis B. Sohn, "'Generally Accepted' International Rules," 61 *Wash. L. Rev.* 1073, 1077 (1986), citing *Continental Shelf Case (Tunisia/Libyan Arab*

Jamahiriya), 1982 I.C.J. 18, 38. See also Louis B. Sohn, "Unratified Treaties as a Source of Customary International Law," in *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagan* 231 (A. Bos & H. Siblesz eds., 1986); Michael Akehurst, "Custom as a Source of International Law," 47 *Brit. Y.B. Int'l L.* 1, 15-16 (1974-75); Jorge Castañeda, *Legal Effects of United Nations Resolutions* 169-77 (Alba Amoia trans., 1969); Grigorii Ivanovich Tunkin, *Theory of International Law* 114-15 (1974) (William Butler trans., 1974); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 41 (1989).

76. See generally Joseph Gabriel Starke, *Introduction to International Law* 38-39 (10th ed. 1989) (describing how the recurrence of a usage develops *opinio juris*, that is, "an expectation that, in similar future situations, the same conduct or the abstention therefrom will be repeated").

77. E.S.C. Res. 1589(L), May 21, 1971, U.N. ESCOR, 50th Sess., Supp. No. 1, at 16, U.N. Doc. E/5044 (1971).

78. U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1-4 (1986) (José Martínez Cobo, special rapporteur) [hereinafter *Martínez Cobo Study*].

79. The original documents comprising the study are, in order of publication: U.N. Docs. E/CN.4/Sub.2/476/Add.1-6 (1981); E/CN.4/Sub.2/1982/2/Add.1-7 (1982); and E/CN.4/Sub.2/1983/21/Add.1-7 (1983).

80. See *Martínez Cobo Study*, *supra* note 78, Add. 4, U.N. Sales No. E.86.XIV.3 (vol. 5: *Conclusions and Recommendations*).

81. Declaration of San José, UNESCO Latin American Conference, Dec. 11, 1981, paras. 2, 3, UNESCO Doc. FS 82/WF.32 (1982), reprinted in the appendix, *infra*.

82. These include seminars organized by the U.N. Technical Advisory Services on racism and indigenous-state relations (Geneva, 1989), indigenous self-government (Greenland, 1991), and the role of indigenous peoples in sustainable development (Chile, 1992). The reports of these seminars are, respectively, in *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, U.N. Doc. E/CN.4/1989/22, HR/PUB/89/5 (1989) (Ted Moses, special rapporteur); *Report of the Meeting of Experts to Review the Experience of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Peoples*, U.N. Doc. E/CN.4/1992/42 (1991); *Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1992/31 (1992).

83. Human Rights Commission Res. 1982/19 (Mar. 10, 1982); E.S.C. Res. 1982/34, May 7, 1982, U.N. ESCOR, 1982, Supp. No. 1, at 26, U.N. Doc. E/1982/82 (1982).

84. Subcommission on Prevention of Discrimination and Protection of Minorities Res. 1985/22 (Aug. 29, 1985).

85. Universal Declaration on Indigenous Rights: A Set of Preambular Paragraphs and Principles, U.N. Doc. E/CN.4/Sub.2/1988/25, at 2 (1988). After comments by governments and indigenous peoples' representatives, the chair revised the draft in 1989. See First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989).

86. The working group's final draft was published in an annex to the *Report of the Working Group on Indigenous Populations on Its Eleventh Session*. U.N. Doc. E/CN.4/Sub.2/1993/29, Annex 1 (1993) [hereinafter *1993 Working Group Report*]. After the draft was submitted to a technical review, see *Technical Review of the Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2 (1994), it was adopted without changes by the full subcommission by its resolution 1994/45 of August 26, 1994. The

draft declaration appears in an annex to the subcommission resolution as the "Draft United Nations Declaration on the Rights of Indigenous Peoples," U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994) [hereinafter *Draft United Nations Declaration*], and it is reprinted in the appendix, *infra*. By the same resolution 1994/45 the subcommission submitted the draft declaration to the Commission on Human Rights for its consideration. The commission, by its resolution 1995/32 of March 3, 1995, decided

to establish, as a matter of priority and from within existing overall United Nations resources, an open-ended inter-sessional working group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Subcommission on Prevention of Discrimination and Protection of Minorities, entitled draft "United Nations declaration on the rights of indigenous peoples" for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People.

An annex to the commission's resolution 1995/32 establishes a procedure for "organizations of indigenous people" to be accredited to participate in the commission's drafting working group. Although the procedure is designed to provide for greater participation by individuals and groups than that ordinarily allowed in the commission's proceedings, it will likely result in a lower level of access to the drafting process than that which indigenous peoples have enjoyed in the subcommission's working group. The latter working group has allowed virtually any person who attends its meetings to participate in its deliberations, without prior accreditation.

87. A listing of the participants at the working group meetings and a summary of the discussion is included in the reports that correspond to each of the annual working group sessions. See, e.g., *Report of the Working Group on Indigenous Populations on Its Twelfth Session*, U.N. Doc. E/CN.4/Sub.2/1994/30, at 4-8 (1994) [hereinafter *1994 Working Group Report*]; *1993 Working Group Report*, *supra* note 86, at 4-7.

88. See Swepston, *A New Step*, *supra* note 54, at 684-85 (discussing indigenous participation in the drafting procedures). For a description of the International Labour Organisation's system of governance, see Bowett, *supra* note 18, at 140-43 (4th ed. 1982); Nicolas Valticos, *International Labor Law* 27-42 (1979).

89. See generally government statements summarized in *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record 32, 75th Sess. (1988); 1989 ILO Provisional Record 25, *supra* note 63.

90. 1989 ILO Provisional Record 25, *supra* note 63, at 25/1, n.1.

91. *Id.* at 25/24-25/25.

92. The vote was 328 in favor, 1 against, with 49 abstentions. The opposing vote was cast by the employer delegate from the Netherlands. International Labour Conference, Provisional Record 32, 76th Sess. at 32/17-32/19 (1989) [hereinafter 1989 ILO Provisional Record 32].

93. Among the delegates recording votes in favor of the convention were representatives of the governments of ninety-two states; the government delegations of twenty states recorded abstentions. *Id.*

94. Peru's statement is typical of the views expressed by the abstaining governments:

Given the importance of this subject for Peru, our delegation participated actively in the revision of Convention No. 107 with a view to updating the text and improving it on a multilateral basis to promote the rights of indigenous and native populations and to guarantee these rights in the various countries. We also wished to ensure that, within the international community these populations would be able to develop fully and transmit their cultural heritage.

In my country, there is very progressive legislation along these lines and I must highlight the fact that most of the criteria laid down in the new Convention are already contained in our legal instruments. However, the work which has taken place within this tripartite forum—at an international level—has been of considerable significance and receives our full support.

In this context, after the prolonged negotiations which led to a consensus text, our delegation nevertheless felt bound to express reservations with respect to the use in the Convention of some terms which could lead to ambiguous interpretations and create difficulties with our laws in force, on some points of the highest importance. These reservations are laid down in paragraph 156 of the report of the Committee.

Id. at 32/12. The part of the committee report cited reflects Peru's concern over the use of the term "territories" and other language that "might imply the right to accord or deny approval and thereby lead to concepts of sovereignty outside the Constitution." 1989 ILO Provisional Record 25, *supra* note 63, at 25/22. *See also, e.g.*, Statement of the Government Delegate of Argentina, 1989 ILO Provisional Record 32, *supra* note 92, at 32/12 (concurring in the "pluralistic view of the new Convention" and endorsing "national legislation which recognises the cultural and social identity of indigenous peoples and the granting of land" to them, while at the same time expressing difficulty with use of the term "peoples" to refer to the subject groups and with the inclusion of the words "consent" and "agreement" in art. 6, para. 2).

95. *See* notes 63–68 *supra* and accompanying text.

96. ILO Convention No. 169, *supra* note 52, art. 13, para. 2.

97. *See e.g.*, Statement of the government delegate of Peru, 1989 ILO Provisional Record 32, *supra* note 92, at 32/12 (stressing "the fact that most of the criteria laid down in the new Convention are already contained in [Peru's] legal instruments," while emphasizing earlier statement expressing concern over use of the term "territories"). Notably, despite the initial position of its government on Convention No. 169, Peru subsequently ratified the convention. Additionally, in Argentina—another state that abstained in the vote on Convention No. 169 at the 1989 Labour Conference—the national legislature has approved a measure to ratify the convention, although as of this writing the executive has not taken the steps necessary to consummate ratification.

98. *See infra* note 130.

99. Summaries of government comments delivered orally at the 1989, 1990, 1991, 1992, 1993, and 1994 sessions of the U.N. Working Group appear, respectively, in *Report of the Working Group on Indigenous Populations on Its Seventh Session*, U.N. Doc. E/CN.4/Sub.2/1989/36 (1989); *Report of the Working Group on Indigenous Populations on Its Eighth Session*, U.N. Doc. E/CN.4/Sub.2/1990/42 (1990); *Report of the Working Group on Indigenous Populations on Its Ninth Session*, U.N. Doc. E/CN.4/Sub.2/1991/40 (1991); *Report of the Working Group on Indigenous Populations on Its Tenth Session*, E/CN.4/Sub.2/1992/33 (1992); *1993 Working Group Report*, *supra* note 86; *1994 Working Group Report*, *supra* note 87. Written comments on the proposed declaration appear verbatim or are summarized in *Analytical Compilation of Observations and Comments Received Pursuant to Subcommission Resolution 1988/18*, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1–3 (1989); *Analytical Commentary on the Draft Principles Contained in the First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1 & Add.1–3 (1990); *Revised Working Paper Submitted by the Chairperson/Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1991/36 (1991).

100. *See* Draft United Nations Declaration, *supra* note 86, art. 3 (discussed *infra* chapter 3, notes 78–84 and accompanying text).

101. *Id.* arts. 25–30. *See infra* chapter 4, note 88 and accompanying text (government commentary on land rights in connection with working group procedures).

102. *Id.* arts. 31–38. *See infra* chapter 4, notes 122–23 and accompanying text (discussing the "right to autonomy or self-government" articulated in article 31 of the draft declaration).

103. AG/RES.1022(XIX-0/89). The proposal for a new OAS legal instrument on indigenous rights is described in *Annual Report of the Inter-American Commission on Human Rights, 1988–89*, O.A.S. Doc. OEA/Ser.L/V/II.76, Doc. 10, at 245–51 (1989).

104. This commentary is summarized in *Report on the First Round of Consultations Concerning the Future Inter-American Legal Instrument on Indigenous Rights*, published in *Annual Report of the Inter-American Commission on Human Rights, 1992–1993*, O.A.S. Doc. OEA/Ser.L/V/II.83, Doc. 14, corr. 1, at 263 (1993).

105. For a detailed discussion of measures adopted by international and regional institutions concerning indigenous peoples, see Russel Lawrence Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" 7 *Harv. Hum. Rts. J.* 33, 43–74 (1994).

106. Resolution of the Third Meeting of Ministers for Foreign Affairs of the State Parties to the Treaty for Amazonian Co-Operation Setting Up a Special Commission in Indigenous Affairs, Mar. 7, 1989.

107. Convenio Constitutivo del Fondo para el Desarrollo de los Pueblos Indígenas de América Latina y el Caribe, concluded at the Summit Meeting of Ibero-American Heads of State, Madrid, 24 Jul., 1992.

108. *See generally* Shelton Davis & William Partridge, "Promoting the Development of Indigenous People in Latin America," *Finance and Development*, Mar. 1994, at 38, 39 (discussing the role of the World Bank and other international financial agencies).

109. *See* Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples 1–5* (1987) (discussing the impact of development projects on indigenous lands, especially in parts of the developing world).

110. A discussion of the dynamics leading to the adoption of World Bank Operational Directive 4.20 is in Michael Cernea, *Sociologists in a Development Agency: Experiences from the World Bank 19–21* (World Bank Environment Department, May 1993, Washington, D.C.). The following provisions of Operational Directive 4.20 indicate its essential thrust:

6. The bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. . . .

. . .

8. The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the *informed participation* of indigenous peoples themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources. (Emphasis added.)

111. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, principle 22, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1 (1992).

112. Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, U.N. Doc. A/CONF.151/26 (vols. 1, 2 & 3), Annex 2 (1992).

113. Especially pertinent is Chapter 26 of Agenda 21, *id.*, vol. 3, at 16, reprinted in the appendix, *infra*. Chapter 26 is phrased in nonmandatory terms; nonetheless, it carries forward normative precepts concerning indigenous peoples and hence contributes to the crystallization of consensus on indigenous peoples' rights. Chapter 26 emphasizes indigenous peoples' "historical relationship with their lands" and advocates international and national efforts to "recognize, accommodate, promote and strengthen" the role of indigenous peoples in development activities. *Id.*, art. 26.1.

114. Programme of Action adopted at the International Conference on Population and Development, Cairo, Sept. 5–13, 1994, paras. 6.21–6.27, U.N. Doc. ST/ESA/SER.A/149, U.N. Sales No. E.95.XIII.7 (1995).

115. Resolution on the Position of the World's Indians, European Parliament, 1989, reprinted in *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms on Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/3, at 7 (1989).

116. Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Feb. 9, 1994, Eur. Parl. Doc. PV 58(II) (1994), reprinted in the appendix, *infra*.

117. *Id.*, para. 2.

118. Resolution on Special Protection for Indigenous Populations, Inter-American Commission on Human Rights, Dec. 28, 1972, O.A.S. Doc. OEA/Ser.P/AG/doc.305/73, rev. 1, at 90–91 (1973).

119. Helsinki Document 1992—The Challenges of Change, July 10, 1992, para. 6(29), reprinted in U.N. GAOR, 47th Sess., at 65, U.N. Doc. A/47/361 (1992).

120. Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 25, 1993, pt. 1, para. 20; pt. 2, paras. 28–32, U.N. Doc. A/CONF.157/23 (1993).

121. See *supra* notes 41–51, 77–90, and accompanying text.

122. See *infra* chapters 3 and 4.

123. See *supra* chapter 1, notes 100–06 and accompanying text (discussing the character of international law under late-nineteenth–early-twentieth-century positivist school).

124. See *supra* notes 8–11, 19–21.

125. See *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d. Cir. 1980) (United States court of appeals decision holding that U.N. Charter obligation to uphold human rights applies to those human rights whose content is generally understood).

126. Miguel A. D'Estéfano, 1 *Esquemas del derecho internacional público: Primera parte* 13 (1986) (translation from Spanish is my own).

127. Meron, *supra* note 75, at 53.

128. McDougal et al., *supra* note 71, at 269. See also Brownlie, *supra* note 1, at 298 (discussing considerations of humanity that may function as a source of law).

129. E.S.C. Res. 1982/34, *supra* note 83. See discussion of "Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations," which appears in reports of the U.N. subcommission working group, which reports from the years 1982–1993 (except 1986 when the working group did not meet) are, respectively, in U.N. Doc. E/CN.4/Sub.2/1982/33 (1982); U.N. Doc. E/CN.4/Sub.2/1983/22 (1983); U.N. Doc. E/CN.4/Sub.2/1984/20 (1984); U.N. Doc. E/CN.4/Sub.2/1985/22 (1985); U.N. Doc. E/CN.4/Sub.2/1987/22 (1987); U.N. Doc. E/CN.4/Sub.2/1988/24 (1988); 1989 Working Group Report, *supra* note 99; 1990 Working Group Report, *supra* note 99; 1991 Working Group Report, *supra* note 99; 1992 Working Group Report, *supra* note 99; 1993 Working Group Report, *supra* note 86; see also various statements of governments given orally at the working group sessions, on file at the U.N. Human Rights Center in Geneva. Written government submissions on domestic developments appear, *inter alia*, in U.N. Doc.

E/CN.4/Sub.2/AC.4/1989/2 & Add.1 (1989) (information received from Australia, Brazil, Canada, and Venezuela); U.N. Doc. E/CN.4/Sub.2/AC.4/1990/4 (1990) (information received from Bangladesh); U.N. Doc. E/CN.4/Sub.2/AC.4/1991/4 (1991) (information received from Colombia).

130. See, e.g., government statements made to the conference committee that drafted Convention No.169, summarized in 1989 ILO Provisional Record 25, *supra* note 63, at 25/2–25/3; government statements to the plenary of the Labour Conference upon the convention's submission for a vote in 1989 ILO Provisional Record 31, *supra* note 61, at 31/12–31/17; 1989 ILO Provisional Record 32, *supra* note 92, at 32/11–32/12. The statements reflect a clear trend of programmatic reforms generally in line with the convention, even among states whose governments abstained from voting in favor of its adoption. See *id.* "Several Government members referred to recent enactments of legislation. . . and noted that their legislation went beyond the provisions contained in the proposed Convention." 1989 ILO Provisional Record 25, *supra* note 63, at 25/2. Among the abstaining governments that reported on such domestic developments were the governments of Bangladesh, Brazil, Argentina, and Peru. 1989 ILO Provisional Record 32, *supra* note 92, at 32/11–32/12. The government delegate from Bangladesh, for example, even while expressing reservations about the need to revise the ILO Convention, reported on "recent legislation passed by the Parliament with a view to further strengthening the rights of tribal peoples and the machinery to enable them to manage their own affairs and preserve their socio-cultural heritage and separate identity." *Id.*

131. Such other contexts include the U.N. General Assembly at the inauguration of the International Year of the World's Indigenous People in December 1992 and at the inauguration of the International Decade in December 1994; the U.N.-sponsored World Conference on Human Rights in Vienna, June 14–25, 1993, particularly under its agenda item, "Commemoration of the International Year of the World's Indigenous People"; and, increasingly, the annual sessions of the U.N. Human Rights Commission and its Subcommission on Prevention of Discrimination and Protection of Minorities.

132. For example, the report of the 1991 session of the working group, *supra* note 99, at 12, states:

Several Governments reported that their countries had experienced political changes and indigenous peoples have benefitted from the new constitutional reforms and enactment of legislation. Indigenous representatives participated in the drafting process or were consulted. As some indigenous representatives stated, even at this stage, new laws are being proposed or have been adopted which recognize the right to self-determination of indigenous peoples and their right to land, acknowledge the jurisdiction of indigenous peoples in their own territories, suggest mechanisms for dealing with the settlement of land claims, and recognize the right to education and health care.

133. Declaración de Colombia en Nombre del Grupo Latinoamericano y del Caribe en la Conmemoración del Año Internacional de las Poblaciones Indígenas (Tema 8), Conferencia Mundial de Derechos Humanos (June 18, 1993) (translation from Spanish is my own).

134. H. E. Ambassador Haakon B. Hjelde, Head of the Norwegian Delegation, Statement on Behalf of the Delegations of Finland, Sweden and Norway to the World Conference on Human Rights in Vienna (June 18, 1993).

135. Z. A. Kornilova, Statement by Member of the Delegation of the Russian Federation at the World Conference on Human Rights on Agenda Item 8, "International Year of the World's Indigenous People" (June 18, 1993).