Indigenous Rights in International Law FREE

Cher Weixia Chen, School of Integrative Studies, George Mason University

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Summary

Indigenous rights have been gaining traction in international law since World War II, as the indigenous peoples, previously classified under the scope of domestic law, have propelled their cause into the global arena. Indigenous societies are vastly heterogeneous, but they possess some common features, such as lack of statehood, economic and political marginalization, and cultural and racial discrimination. Scholars generally agree that one of the most important goals of the international indigenous movement is to advance indigenous rights under international law. Hence, there have since been several international institutions that seek to address indigenous rights. The Universal Declaration of Human Rights (UDHR) in 1948 is the first international document that recognizes the need to protect indigenous groups, though there are also actors and organizations specializing in the field, such as the Working Group on Indigenous Populations (WGIP). However, the majority of the indigenous rights scholarship only examines the policy on indigenous rights, rather than the broader contexts of indigenous rights or the rise of indigenous rights as a phenomenon. Therefore, if the ultimate political goal of the indigenous rights scholarship is to better the conditions of indigenous peoples, the study of the efficacy of international legal prescription of indigenous rights is imperative. Otherwise, the considerable efforts put forth by both the academic community and the international indigenous movement could only remain symbolic.

Keywords: indigenous rights, indigenous peoples, indigenous societies, international indigenous movement, indigenous rights under international law, indigenous rights scholarship, indigenous rights policies

Subjects: International Law

Introduction

Despite the lack of an agreed concept of indigenous rights, there has been a surge in the study of indigenous rights in international law that began after World War II and has continued to prosper since the 1970s (Oliveira, 2009). This field has contributed to a greater understanding of the struggles that indigenous people worldwide have faced and are still

facing. The following article will survey the existing scholarly literature in the field published in English and provide an overview on a number of common threads that shed light on the policy development of indigenous rights in contemporary international law. In general, the legal and policy process required to replace dispossession and marginalization are now evident, and are in various stages of negotiation or implementation. The concept of "indigenous rights" is gaining currency, even though there is still a considerable urgency related to this process, as indigenous peoples cannot afford to wait to have their human rights guaranteed and protected. However, a cohesive set of concepts and normative theories to disentangle indigenous rights in international law is seriously lacking, which makes indigenous rights vulnerable to challenge. Moreover, the focus in the field has remained consistently legal and mostly doctrinal and is in great demand for empirical works that offer explanatory and causal claims of the indigenous rights in international law.

Who are Indigenous Peoples? What are Indigenous Rights?

It is fair to say that prior to the 1970s in the Western developed countries, indigenous peoples occupied no significant role in the textbooks of international law. They were largely considered as just legal units of domestic law (Wiessner, 2008). As a response to the consciousness-raising efforts of indigenous peoples in the international forum, the 1970s started the global indigenous renascence (Hannum, 1988). Gordon Bennett's groundbreaking work in 1978 heralded a rising interest among Western legal scholars in indigenous rights under international law (Bennett, 1978). The scholarship of Russell Lawrence Barsh and Douglas Sanders helped sustain such interest in indigenous rights among the North American legal scholars in the 1980s (Barsh, 1983, 1986; Sanders, 1983). In his landmark 1990 book, *The American Indian in Western Legal Thought*, Robert Williams provided a historical survey of many of the writings and lectures of major European thinkers and religious figures and claimed that these theories provided a moral cover for the often brutal subjugation of indigenous peoples and for the taking of their lands. Building upon Williams's work, other writers such as S. James Anaya have expanded the filed to encompass a wide range of topics concerning indigenous issues under international law (Anaya, 1996).

Today, a diverse community of indigenous and non-indigenous legal and interdisciplinary scholars around the globe has produced a comprehensive program on indigenous rights in international law. Major figures of contemporary international law scholars have now paid attention to indigenous issues (Falk, 2000). Further, the adoption of the *Declaration on the Rights of Indigenous People* in 2007 has rekindled the indigenous rights scholarship, which covers the Declaration's scope, applicability, and implication on national law on indigenous rights (Mansell, 2011; Newcomb, 2011; Wiessner, 2008).

In general, the literature on indigenous rights in international law has largely focused on two main issues: the concept of indigenous peoples and the content of indigenous rights. While exploring the theoretical controversies surrounding these two issues, this section also addresses the corresponding policy struggles, as most indigenous rights scholarship also discusses the policy aspect of indigenous rights.

The Concept of “Indigenous Peoples”

In 1995, the Special Rapporteur to the UN on indigenous peoples, Erica-Irene Daes <*http://en.wikipedia.org/wiki/Erica-Irene_Daes*>, stated that a definition of indigenous peoples was unnecessary because “historically, indigenous peoples have suffered, from definitions imposed by others”(Daes, 1995). Indigenous representatives on several occasions have also expressed such a view before the UN Working Group on Indigenous Populations that “a definition of the concept of ‘indigenous people’ is not necessary or desirable” (Simpson, 1997).

Despite the opposition from some indigenous groups, considerable efforts have been made to define who exactly “indigenous peoples” are. This question, while controversial, has concerned not only the theorists of indigenous rights but the practitioners of international law, as a lot hinges on whether the group could be formally identified as indigenous in international law.

Scholars generally agree that indigenous societies are vastly heterogeneous, but they endure the remarkably similar experience such as lack of statehood, economic and political marginalization, and cultural and racial discrimination (Fliert, 1994; de la Cadena & Starn, 2007). Various terminologies are associated with, but refer to different aspects of “indigenous peoples”: native (a term that mostly refers to the origins of an individual); first nations that stem from the treaties made in the last centuries; autochthonous peoples (a French term referring to the ones residing in the same place from time immemorial); aboriginal that has been employed in Australia to deemphasize the condition of colonial-like dependence on a national state; and “indigenous,” a term commonly used in Anglo-Saxon literature that “carries strong connotations of authenticity, belonging and time-honored prescriptive rights” (Nesti, 2001). The mainstream postcolonial theory tends to use “indigeneity,” while some Native American scholars prefer the term “indigenousness” as a more authentic description of the status of indigenous groups in the Americas. As the term “indigeneity” commonly intersects with notions of race, marginality, imperialism, identity, as well as hybridity, essentialism, authenticity, diaspora, and the third world, it has become one of the most contentiously debated concepts in postcolonial studies (Ashcroft, Griffiths, & Tiffin, 1995).

In particular, the definitions of indigeneity have evolved over time to reflect the changing perceptions of the people, which have been featured by the constant struggle between the falsely asserted indigeneity of colonizers and that of indigenous peoples (Schwartz, 2005). Indigeneity is at once historically contingent and encompassing of the nonindigenous. For instance, during the colonial era, the concept was employed to refer to all non-European natives in European colonies. At the beginning of the post-colonial era, indigeneity was popularized as a concept referring to non-Europeans in countries that European descendants remained dominant. The last several decades have witnessed a reconceptualization of the notion of indigeneity itself. The primary impetus in reconsidering “indigeneity” comes from the post-colonial movements that examine the historical impact on populations by the European imperialism (United Nations, 2009).

As indicated, “indigeneity” is a socially constructed and politically contingent concept. This concept has been met with acceptances, rejections, and strategic use in the international indigenous movement. On one hand, some states including China, India, Myanmar, and

Indonesia have rejected the concept. The post-Soviet states have produced partial equivalents in the process of modifying their systems of ethnopolitical categorization. On the other hand, the states like the Philippines have etched the concept in their constitutional documents (Merlan, 2009).

In addition to “indigenous” or “indigeneity,” the concept of “peoples” has also been fiercely debated in international law. The debate centers on the question of whether “peoples” entail collective rights such as self-determination. Generally speaking, in international law, peoples have more rights than populations. “Peoples” not only have the rights of an individual, such as civil and political rights, but also those of collective entities such as self-determination. Indigenous peoples and some international organizations prefer to use “peoples” to “nations,” “tribes,” or “populations.” For example, the chairwoman of the UN Working Group on Indigenous Populations (Mrs. E. Daes) calls the title of her own Working Group a “relic of racism and racial discrimination” (Fliert, 1994). Some state governments oppose the use of the term “peoples” in regard to indigenous peoples because they fear its association with the right of secession and independent statehood. Those states would rather use the terms “tribes” or “populations” that may not have such associations. Some international legal documents have chosen to use “peoples” rather than “tribes” or “populations.” For example, the ILO abandoned the term “populations” by adopting the Convention 169 (on Indigenous and Tribal Peoples), which revised the ILO Convention 107 (on Indigenous and Tribal Populations). In the 2002 UN World Summit, the unqualified term “indigenous peoples” was adopted unconditionally for the first time in a UN official document (Jentoft, Minde, & Nilsen, 2003).

Several frameworks have been proposed as to what constitutes the necessary and sufficient criteria that identify, or should identify indigenous peoples (Scheinin, 2005). Nevertheless, none of these frameworks could claim to be universally acceptable, as they inevitably are either over-inclusive or under-inclusive. In 1972 the special UN rapporteur Mr. Martinez Cobo provided a frequently cited definition of “indigenous peoples”:

> Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant. (E/CN.4/Sub.2/1986/Add.4)

But this definition has been criticized as freezing “the identity of indigenous peoples in a historical-chronological axis,” oversimplifying “the indigenous culture, customs religion, society and history,” and failing to “explain the phenomena of survival of the ‘indigenous’ identity in the face of adversity” (Coates, 2004, p. 9), hence applying to “only a limited group of indigenous peoples in Americas, Australasia and the Pacific” (Fliert, 1994).

In 1983 the UN Working Group on Indigenous Populations expanded this definition, and in 1986 further added that the principle of self-identification, that is, any individual who identified himself or herself as indigenous and was accepted by the group or the community as one of its members, was to be regarded as an indigenous person. The ILO Convention 169 of 1989 (Art. I) provides a much broader definition but makes a distinction between tribal and indigenous peoples due to the pressures from different Asiatic countries (Nesti, 2001). The World Bank (operational 4.20, 1991) does not define the term but offers a more operational one. The Draft UN Declaration on the Rights of Indigenous Peoples 1993 includes neither a definition of indigenous peoples nor even a provision that would specify the scope of application of the instrument. This omission, according to the chairperson—Rapporteur of the UN Working Group Ms. Erica Irene Daes, is due to the fact that "historically, indigenous peoples have suffered, from definitions imposed by others" and as a result, in certain countries many indigenous peoples have been declassified (Bose, 1996; Daes, 1995). The 2007 UN Declaration on the Rights of Indigenous Peoples is also criticized as lacking a clear definition of indigenous peoples ("United States Joins Australia and New Zealand in Criticizing Proposed Declaration on Indigenous Peoples' Rights," 2007).

In general, both scholarly discussion and international legal policy have been struggling with finding an agreed definition of "indigenous peoples." This article defines "indigenous peoples" broadly as "the living descendants of pre-invasion inhabitants of lands now dominated by others" (Anaya, 2004). Nonetheless, despite the lack of a universally acceptable definition, the concept of "indigenous peoples" has, regardless, been gradually accepted. Like the concept of "indigenous peoples," the content of "indigenous rights" is also full of controversies.

The Content of "Indigenous Rights"

In the past several decades, the international indigenous movement has successfully drawn international attention to the struggles that almost all indigenous peoples have experienced and are still experiencing (Tennant & Turpel, 1990). As a response, the contemporary international law began to address indigenous rights. The Universal Declaration of Human Rights (UDHR) in 1948 is the first international document that recognizes the need to protect indigenous groups. But the Declaration only addresses individual rights of indigenous peoples. The ensuing International Covenant on Civil and Political Rights (ICCPR) as well as International Covenant on Economic, Social and Cultural Rights (ICESCR) also apply to indigenous rights, but they do not contain any articles specifically on indigenous peoples. The first international convention specifically on indigenous rights was the International Labor Organization Convention No. 107 of 1957. This convention affirmed states' obligations to respect the indigenous way of life. However, the Convention 107's approach was heavily criticized as "integrationist" with the aim of promoting the "modernization" and integration of such groups into existing societies. Accordingly, the Convention 107's provisions suggested that rights for indigenous people were only valid until they achieved full integration into colonizing societies. This approach treated indigenous peoples as individuals or subgroups within a larger society rather than a unique collective entity that has distinctive characteristics and therefore deserves special protection (International Labor Organization).

In 1971, work began on the first UN study concerning discrimination against indigenous peoples. The Martinez Cobo report in the late 1970s commissioned by the UN documented discrimination against indigenous people and appealed to an international community for the recognition of indigenous rights at both international and state levels. The 1980s started with the establishment of the UN Working Group on Indigenous Populations and ended with ILO No. 169, which replaced the Convention No. 107's integrationist strategy with increased respect for ethnic and cultural diversity. However, the Convention No. 169 is limited in its impact as it did not engage indigenous peoples during its drafting process and has not been widely ratified. The 1993 Draft Declaration further established the role of indigenous rights under international law (Guzman, 1996–1997). The most recent 2007 Declaration of Rights on Indigenous Peoples solidified the improved status of indigenous peoples in international legal forum.

These instruments have guaranteed important rights for indigenous peoples. Nevertheless, the question has remained as to whether these protections are enough to protect indigenous peoples, or whether a separately formulated response to their situation is necessary and/or appropriate. Scholars such as Patrick Thomberry, Benedict Kingsbury, and Siegfried Wiessner argue that indigenous voices will get lost under a generalist human rights system (Kingsbury, 2001; Thornberry, 2002; Wiessner, 1999). Richard Falk concurs and states that "indigenous peoples are in the situation where their claims for protection cannot be coherently understood except when treated separately" (Falk, 1988). Other scholars like Jeff Corntassel and Tomas Primeau believe that generalist human rights principles are sufficient to meet the needs of indigenous peoples (2006).

In addition to whether there should be a separate set of rights specifically for indigenous peoples, the following issues concerning the content of "indigenous rights" are also contentious: self-determination, economic, social and cultural rights, and collective rights.

Self-Determination

The concept of self-determination is among the most confusing and controversial with regard to indigenous rights in international law. It is very difficult to discern its various aspects, since it is confounded with questions regarding the definition of peoples as mentioned, collective rights, and autonomy. Scholars argue that the right to self-determination is clearly articulated in UDHR, and Common Art. 1 of both the ICCPR and the ICESCR, which states that: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." However, some states argue that demands for self-determination generate nationalist or separatist conflicts. Since the UN is formed by states that are primarily concerned with their self-interest, states quickly limit the extension of this principle to only cases of de-colonization. Scholars have challenged this limitation and questioned whether the right to self-determination can be really exercised if it can only be implemented following borders that have been settled by colonizing states (Nesti, 2001).

The 2007 Declaration of Rights of Indigenous Peoples refers to self-determination as the full participation of indigenous peoples in decisions concerning them, and indigenous peoples making decisions about their own affairs, or having some form of territorial autonomy. Art. 4

provides that one way of exercising the right is through some form of autonomy or self-government for indigenous peoples in their internal affairs. To counter secession arguments put by some states, explicit reference was made in Art. 46 to safeguard territorial unity.

Most states have voted for the 2007 Declaration of Rights of Indigenous Peoples and accepted the right of self-determination for indigenous peoples provided that it does not threaten the territorial integrity of the state. However, certain countries including the United States, Australia, Canada, and New Zealand, which voted against the 2007 Declaration, have continued to oppose the right of self-determination.

Not only do the states and indigenous groups have different interpretations over the details of "self-determination" but indigenous peoples among themselves also have had disagreement over it (Fliert, 1994; Altman & Sanders, 1991; Stavenhagen, 1992; Torres, 1991). Even though the international indigenous movement collectively has as one of its main objectives to assert the right to self-determination, indigenous communities have varied preference as to how to exercise this right, from different degrees of autonomy within the nation-state to full sovereign independence (Assies & Koekema, 1994; Brosted et al., 1986). The Draft Declaration (1993) clearly affirms the right of self-determination of indigenous peoples, using the wording of Common Art. 1 of the two Covenants, but then seems to link this right to the right to autonomy or self-government in Art. 31. The United Nations (UN) Working Group on Indigenous Populations' report further complicates the issue, as its president, Mrs. Erica-Irene Daes, explains that the principle of self-determination was intended only in its internal sense instead of the formation of independent states (1993).

The issue of whether indigenous peoples have the right to self-determination has been directly addressed by only a few international bodies. The Committee on Human Rights has ruled that it does not possess the authority to determine collective claims of a people's right to self-determination, even though that Art. 1 of the ICCPR explicitly provides for such rights (Barsh, 1993). The Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS), in the so-called Case of the Miskitos of Nicaragua, held that the right to self-determination could never justify disrupting the territorial integrity of a sovereign state, but affirmed that special protection should be accorded, regardless, to Miskitos. This limits the indigenous people's right to self-determination to internal autonomy rather than external secession from their state (Nesti, 2001).

While indigenous peoples have less successful experience to bring their self-determination claims to the UN and regional bodies, they have won the attention of nonbinding, grassroots tribunals. For example, the Fourth Russell Tribunal during the 1980s heard 14 cases from the Indian peoples of the Americas and recognized many claims including the right to self-determination (van Vree, 1980).

The question of indigenous right to self-determination has been extensively studied and theorized throughout various disciplines and interdisciplinary communities. For example, works by authors such as Vine Deloria Jr. (1969), Winona LaDuke (1999), M. Annette Jaimes (1992), and Rudolph Ryser (1989), have critically assessed the federal policies governing native peoples in the United States. Wiessner (1999), in particular, has proposed the dichotomy between internal and external self-determination in the context of indigenous peoples:

(1)

"external" self-determination, that is, the right of peoples to freely determine their international status, including the option of political independence;

(2) "internal" self-determination, the right to determine freely their form of government and their individual participation in the processes of power (Wiessner, 1999).

Like Wiessner, Professor James Anaya has suggested a reconceptualization of self-determination. He differentiates "substantive aspects" of the right, which are in general and broad terms, and "remedial aspects," which mainly refer to what follows violation of the right and are much more limited and context specific (Anaya, 2004).

Regarding where exercise of self-determination could be considered acceptable, Kingsbury has suggested five categories: (1) mandated/trust territories; (2) distinct political geographic entities subject to gross failure of the duties of the state; (3) other territories where self-determination is applied by the parties; (4) highest level constituent units of a federal state in the fact of dissolution; and (5) formerly independent entities reasserting their independence with the tacit consent of the state, where their incorporation into the state was illegal or of dubious legality (Kingsbury, 2001).

As indicated by the works of Wiessner, Anaya, and Kingsbury, the contemporary scholarly conceptions of self-determination, particularly for indigenous peoples, do not necessarily include the right to separate from a state. However, the recent book *Ownership, Authority and Self-determination* by Burke A. Hendrix claims that indigenous peoples have the right to separate from the states presently ruling them and provides a theoretical foundation for why indigenous peoples in stable democratic societies have a right to separation, and it offers procedures for how such separations could take place (Hendrix, 2008).

In addition to the right to self-determination, the indigenous rights scholarship has also extensively discussed how to protect indigenous economic, social, and cultural rights. The next subsection examines various frameworks that have been proposed concerning the protection and promotion of indigenous peoples' economic, social, and cultural rights.

Economic, Social, and Cultural Rights

Traditionally, the debate on indigenous economic, social, and cultural rights had been focused on indigenous rights to their land and other natural resources. In particular, historical sovereignty and treaty rights have been proposed as the philosophical foundation for such entitlement.

The framework of historical sovereignty is well described by the UN Special Rapporteur Erica-Irene A. Daes in her report. In the 1970s, the beginning of the international indigenous movement, the debates focused on the importance of land and other natural resources to indigenous peoples and their historical sovereignty over these resources. The concept of "historical sovereignty" created during the decolonization movement after World War II was then applied to the indigenous issues and gradually gained currency (2005). This concept is affirmed by the 2007 UN Declaration on Rights of Indigenous Peoples: "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" (Art. 26).

Additionally, treaty rights are also presented as an approach to protecting indigenous lands and other natural resources. During the 1700s and 1800s, numerous treaties were made between the indigenous communities and their colonial governments. However, since then the indigenous communities and their colonial governments have interpreted these treaties in a very different way. Many (if not most) of these treaty rights have been chipped away from the indigenous communities, the direct consequence of which is the vast lands and natural resources taken away from the indigenous groups. Recently indigenous peoples have been trying to use the treaties such as the Indian treaties and the Treaty of Guadalupe Hidalgo to support their claims for the natural resources including lands (Tsosie, 2000). But they have not been very successful. The 2007 UN Declaration of the Rights of Indigenous Peoples has also formally recognized the treaty rights of the indigenous peoples.

Before the 1990s the scholarly and policy discussion on indigenous rights essentially neglected indigenous cultural and social rights. The 1993 Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples is the first one of its kind that is exclusively dedicated to the protection of cultural and intellectual property of indigenous peoples. Since then, a fundamental change concerning the role of indigenous cultural and intellectual properties is taking place in international law. The consensus was reached as to the importance of indigenous cultural and intellectual properties during the discussions of the 1993 Draft Declaration on the Rights of Indigenous Peoples (Gray, 1996).

The first mechanism proposed to protect indigenous peoples' cultural and natural heritage is to utilize the existing intellectual property (IP) law and apply it to indigenous cultural and natural property. The commodification of intangible cultural and intellectual property such as music, motifs, prayers, ceremonies, and traditional knowledge has widely frustrated indigenous communities (Daes, 1995). The emerging issue of "biopiracy" that exploits the traditional knowledge of indigenous communities is even more disturbing (Bengwayan, 2003; Drahos, 2000; Sundaram, 2005). The present intellectual property legal frameworks for the most part have failed in protecting the indigenous cultural and intellectual properties (Paterson & Karjala, 2003). They commonly were designed without taking much consideration of the interests of indigenous peoples (Safrin, 2004). Scholars are calling for greater involvement of indigenous peoples in the decision making process (Goldberg & Badua, 2008). Some urge to reform and expand the current IP system to include communal and collective ownership (Carpenter, 2004; Ghosh, 2003; Huft, 1995; Sedjo, 1992); others propose to establish a more "globally harmonized IP regime" (Sundaram, 2005), to abandon the use of property rights to protect biocultural resources of indigenous peoples (Chen, 2001; Heald, 2003), to more actively engage the World Bank (Carlson, 1997), and to use more creative contractual provisions (Rubin & Fish, 1994).

The second mechanism to protect indigenous cultural and intellectual property focuses on cultural rights. The most widely accepted legally binding provision on cultural rights of indigenous peoples is Art. 27 of the ICCPR. Scholarly works on Art. 27 have touched on its applicability, its scope, and limits (Nowak, 1993; Thornberry, 2004). In general, the consensus is that the Committee on Human Rights has prepared to protect and promote individual indigenous cultural rights through the application of Art. 27 in various cases such as *Lovelace v. Canada* (Barsh, 1993).

However, some scholars have challenged the increasing assertion of cultural rights by indigenous peoples. Karen Engle's new book, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy,* questions the rising cultural claims used by indigenous advocates in international legal forum. She argues that the ascending focus on cultural rights has undermined the development of more transformative and sustainable bases for indigenous empowerment and development. This is a rare book-length work that places the evolution of indigenous rights in the broader political context, rather than as an exegesis of pertinent international law (Engle, 2010).

With the growing assertion of indigenous cultural rights, indigenous peoples' rights and knowledge have fundamentally influenced international environmental law. Whereas historically, international environmental law was state-centered and did not concern the rights and the role of indigenous communities regarding environmental issues, recently a number of debates have emerged touching on issues central to indigenous peoples. The academic community has exhibited the increased awareness of the symbiotic relationship between indigenous cultures and the natural environment, and the gradual realization that indigenous knowledge may provide solutions to environmental sustainability. The 1992 UN Conference on Environment and Development (also called the Earth Summit) represented a turning point in the promotion of indigenous people's rights relating to the environment. For the first time, indigenous communities are placed in the center stage of international environmental movement. Since then, the debates have embraced various parts of the lives of indigenous communities, such as cultural autonomy, traditional hunting and fishing practices, natural resources, and traditional knowledge (Firestone, Lilley, & Noronha, 2005; LaDuke, 1994; Mauro & Hardison, 2000; McGregor, 2004).

In terms of international legal policy on the relation between indigenous rights and their environment, both the Inter-American Court and the African Commission on Human and Peoples' Rights have especially focused on the rights of indigenous and tribal peoples affected by environmental degradation resulting from extraction activities and their forceful removal from their traditional lands (Analytical study on the relationship between human rights and the environment, A/HRC/19/34, 2011). Some international instruments such as International Declaration of Indigenous Peoples on Climate Change addressing indigenous peoples and their environment aims at more than just protecting indigenous cultures; rather, the focus has been shifted to how the non-indigenous population may learn about environmental protection and the value of natural resources from indigenous cultures (Manus, 2005).

In short, both academic works and policy concerning indigenous peoples' economic, social, and cultural rights have witnessed a paradigm shift from the right to land and other natural resources to indigenous cultural rights. In addition to indigenous economic, social, and cultural rights, collective rights that indigenous rights usually entail have also challenged the conventional international law, which is the focus of the following subsection.

Collective Rights vs. Individual Rights

Collective rights have historically been incompatible with international law that traditionally centered on individuals and states (Piechowiak, 2000). Indigenous rights, which include a set of collective rights, therefore have been an uneasy fit to international law. Nonetheless, with the emergence of “third-generation” rights, the international legal forum has grown to accept indigenous group claims.

Another difficulty with indigenous rights, like other collective rights, lies in the tension between collective rights and the rights of individual members of the groups. Collective indigenous rights, argued by some, undermine individual indigenous rights (Newman, 2006/2007). With regard to such tension, Kymlicka has offered a series of studies that sheds light on how to resolve this issue. He differentiates between good collective rights that involve intergroup relations and bad collective rights that are imposed by the groups upon intragroup relations (1995).

Similarly, Wiessner provides an explanation concerning the nature of indigenous collective rights: one’s clan, kinship, and family identities are vital parts of one’s personal identity; indigenous group consists of a network of personal relationships. In the mind of indigenous peoples, their communities are not, like a Western nation-state, entities with distinct Hegelian existence separate and apart from their individual members. Members of indigenous communities are closely connected to each other in a network of deeply committed horizontal relationships. Still, there are structures of authority within indigenous groups, and there is a process to form a common will. Such process of decision making and its cultural, geographic, social, and economic contexts should be protected and constitute the base of collective rights of indigenous peoples. As a result, collective rights are necessary in order to implement individual members’ rights. According to Weissner, collective rights and individual rights, to indigenous peoples, are supplemental rather than exclusive of each other (1999).

For indigenous peoples, collective rights are essential to secure their cultural survival. For example, Lowitja O’Donoghue acknowledges the necessary recognition of collective rights in that:

> it is precisely because the collective rights have not been acknowledged that the individual rights of indigenous persons, for example the right to equality of opportunity in the provision of education, employment and health care—have not been realized in any nation in the world. Only when our collective identities have been recognized will the appalling disadvantages that we suffer as individuals be redressed.
>
> (Thornberry, 2002)

In practice, collective rights have emerged and become increasingly acceptable under international law (Mazel, 2009). The important international human rights bodies, including the UN Committee of Human Rights, the UN Committee on the Elimination of Racial Discrimination (CERD), and the Inter-American Commission on Human Rights, have referred to indigenous “peoples” as holders or beneficiaries of rights. In particular, some recent decisions issued by the Inter-American human rights institutions in the cases of the Awas Tingni community in Nicaragua, the Western Shoshone people in the United States, and the

Maya people in Belize, explicitly uphold the collective rights of indigenous peoples over their lands and resources, which suggests a growing trend of acceptance of collective rights under international law (Anaya, 2006).

To summarize, the literature on indigenous rights in international law has addressed two fundamental issues (who are “indigenous peoples” and what are “indigenous rights”) among others that have plagued the further advancement of indigenous rights in international law. Even though there lacks an agreement over the concept of “indigenous peoples” and the content of “indigenous rights,” the indigenous rights scholarship has developed into a diverse area of study that has closely followed and informed the policy development of indigenous rights under international law.

Indigenous Rights and the Role of the UN and Indigenous NGOs

Scholars generally agree that one of the most important goals of international indigenous movement is to advance indigenous rights under international law (Morgan, 2007). Several key actors have played significant roles in this movement. Three UN bodies, namely, the Working Group on Indigenous Populations (WGIP), the Permanent Forum on Indigenous Rights, and the Special Rapporteur on the Rights of Indigenous Peoples, have been instrumental in setting norms on indigenous rights. Two UN conferences (the International NGO Conference on Discrimination Against Indigenous Populations in the Americas and the International NGO Conference on Indigenous Peoples and the Land (held in 1977 and 1981, respectively) provided an early forum for the indigenous voice and ignited the norms of human rights applied to indigenous peoples (Morgan, 2007).

Following these two conferences, the UN in 1982 established the Working Group on Indigenous Populations (WGIP) under the auspices of the Sub-Commission on Prevention of Discrimination and Protection of Minorities that is comprised of five independent experts, which solidified an institutional space within the UN to address indigenous issues and develop international standards on indigenous rights. As it is at the bottom of the UN hierarchy, such marginalization in a way has enabled the WGIP to become the most open body to indigenous peoples within the UN. In 1993 the WGIP formulated and adopted the UN Draft Declaration on the Rights of Indigenous Peoples that arguably has justly reflected the aspirations of indigenous peoples, in part due to the fact that the WGIP encouraged the participation of indigenous NGOs (Wilmer, 1993).

In addition, the UN Economic and Social Council adopted a resolution establishing the Permanent Forum on Indigenous Issues in 2000. As a high-level body within the UN system consisting of eight indigenous representatives and eight state representatives, the Permanent Forum has also actively engaged indigenous peoples. Unlike the Working Group on Indigenous Populations, this body is directly responsible to the Economic and Social Council and the General Assembly. In this sense, it supersedes the entire indigenous rights mechanism and reports directly to the UN and has the potential to further elevate the status of indigenous rights (Castellino, 2005).

Besides the WGIP and the Permanent Forum, the Special Rapporteurs also have contributed to the awareness raising of indigenous rights. In 1969 Special Rapporteur Hernan Santa Cruz submitted the preliminary report of the Special Study on Racial Discrimination in the Political,

Economic, Social, and Cultural Spheres to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Cruz concluded in his final report of 1971 by recommending an appropriate UN agency to conduct a comprehensive study on indigenous issues. Acting upon such proposal, the sub-commission appointed Jose R. Martinez Cobo as the special rapporteur to engage in the study, which signified that “indigenous populations” emerged as a distinct category different from “minorities” (Hanuum, 1988; Sanders, 1989).

Cobo’s study of the Problem of Discrimination against Indigenous Populations was completed in 1987. It covers a variety of topics with regard to the protection of indigenous peoples. In particular, as mentioned earlier, the definition of indigenous populations provided in this report has become a point of reference within the UN (Howard, 2003). This study has prompted the greater engagement of indigenous NGOs at the international level and stimulated wider international interest in indigenous rights (Hanuum, 1988). However, Sanders argued that this study is inaccessible, lengthy, and incomplete, and that because it was seriously outdated, it was less influential than expected (1989). The other comprehensive studies put forward by the Rapporteurs following Cobo have generated much less response and were generally ignored (Corntassel, 2007; International Indian Treaty Council, 2004).

Other UN agencies, such as the UN Voluntary Fund for Indigenous Populations established in 1985 and the Voluntary Fund for the UN International Decade of the World’s Indigenous Peoples established in 1996 have also facilitated the broad participation of indigenous organizations in the UN by providing financial assistance. The Office of the High Commissioner for Human Rights (OHCHR)’s Indigenous Peoples and Minorities Section (IPMS) seeks to improve human rights protection for indigenous peoples and minorities at the international and national levels and promote the UN Declaration on the Rights of Indigenous Peoples, among others. The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), established by the Human Rights Council, has worked with the Special Rapporteur on the Rights of Indigenous Peoples and the Permanent Forum on Indigenous Issues to convene the World Conference on Indigenous People in 2014 (www.ohchr.org *<http://www.ohchr.org>*). However, in general, the interagency cooperation on indigenous rights within the UN remains inadequate, ad hoc, and fragmented (Corntassel, 2007).

The emergence of indigenous rights within the UN was not an accident. Instead, it was a purposeful undertaking by a large number of indigenous NGOs (Morgan, 2007). The first international indigenous NGOs emerged in the late 1950s and the world witnessed a proliferation of indigenous NGOs in the United States and Canada during the 1970s (Corntassel, 2007). In 1975, the World Council of Indigenous Peoples commenced a global framework that interconnects the national and international networks of indigenous groups (Muehlebach, 2001). The indigenous NGOs have managed to convene several conferences that have raised the awareness of indigenous rights and issues, such as two Inuit Circumpolar Conferences and the First Congress of Indian Movements of South America (Hannum, 1988). However, despite their relative success at elevating indigenous rights within the UN, indigenous NGOs’ lack of access to the UN and the state-centric model of the UN has led some to question whether indigenous NGOs should continue to focus on utilizing the UN or seek an alternative global forum to advance indigenous rights (Corntassel, 2007).

In general, the relatively scant literature on the role of the UN and indigenous NGOs in international indigenous movement has shed some light on how indigenous rights have been advanced in international law. Nonetheless, more scholarship on the inner workings of various

actors and how they have worked with each other could significantly contribute to our understanding of the issues such as whether the conflicts among indigenous NGOs have hindered the advancement of indigenous rights and the overall process of international indigenous movement.

Going Beyond the Doctrinal

The area of indigenous rights in international law is both exciting and valuable in that the indigenous rights scholarship—like other emancipatory fields—has had its political purpose in heart, as a large portion of its scholars are also indigenous rights activists. However, such distinct political features also limit the scope of the literature. In general, the current indigenous rights scholarship is primarily on the international law-making process. Theoretically, it is mostly doctrinal. Methodologically, it is overwhelmingly legal. To ensure the healthy development of this field, it desperately needs to broaden its scope and expand its methods. The following section examines several elements that have been unexplored or underexplored.

Thematically, the indigenous rights scholarship needs to place the emergence of indigenous rights in the larger historical, legal, social, political, cultural, and economic contexts. Indigenous peoples have traditionally been seen as objects of international law and as targets for international legal recommendations. In contrast, their international efforts to advance, promote, and protect indigenous rights worldwide have garnered less attention. The recent changes, however, seem to indicate that indigenous peoples are playing, or have the potential for playing, increasingly prominent roles in international legal affairs (Barsh, 1986; Hannum, 1988; Torres, 1991; Williams, 1990). However, the majority of the indigenous rights scholarship only examines the policy on indigenous rights, rather than the broader contexts of indigenous rights, or the rise of indigenous rights as a phenomenon. Oguamanam in his work illustrates an attempt to disentangle the emergence of indigenous rights under international law and claims that it coincides with the return of natural law theory to international law (2004–2005).

Moreover, the current scholarship has heavily focused on how to ensure the position of indigenous rights under international law, and commonly overlooked the efficacy of these policies. In practice, states are generally supportive of international law on indigenous rights but reluctant to merge international with national law (Corntassel, 2007). For example, Norway has long been a champion of indigenous rights in international forums. It was instrumental in forming the ILO Convention 169 and was the first to ratify it. But its unwillingness of applying the ILO Convention 169 to the Sami community has been under heavy criticism (Jentoft, Minde, & Nilsen, 2003). Therefore, if the ultimate political goal of the indigenous rights scholarship is to better the conditions of indigenous peoples, the study of the efficacy of international legal prescription of indigenous rights is imperative; otherwise the considerable efforts put forth by both the academic community and international indigenous movement could only remain symbolic. Professor Anaya's work is a rare example that discusses the need for effective implementation of international norms to secure the survival of indigenous peoples (1991). Westra proposes a novel approach to implementing international norms on indigenous rights at the domestic setting that utilizes Alien Tort Claims Act of the United States (2008).

In terms of methodology, this field is still one dimensional. Siegfried Wiessner offers a much-needed global comparative analysis of indigenous rights (1999). More empirical work employing a wide range of methods that explores how the society at large responds to indigenous rights and the role of various actors in the indigenous movement would significantly enrich this line of inquiry. For instance, among various analyses of the recent 2007 Declaration on Rights of Indigenous Peoples, there is no quantitative treatment of the states' response to this Declaration that could offer a glimpse of the efficacy of international indigenous rights norms. Moreover, a detailed qualitative process tracing and historical analysis of the international legal decision making concerning indigenous rights could enhance our understanding of the factors that contribute to the final international legal pronouncements of indigenous rights.

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Links to Digital Materials

The Rights of Indigenous Peoples—University of Minnesota *<http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>*: This webpage contains useful basic information concerning indigenous rights under international law.

International Indigenous Law Research Guide *<https://web.law.asu.edu/library/RossBlakleyLawLibrary/ResearchNow/ResearchGuides/InternationalIndigenousLawResearchGuide.aspx>*: The webpage provides several links that are helpful for conducting research on international indigenous law.

United Nations Office of the High Commission for Human Rights *<http://www.ohchr.org/EN/Pages/WelcomePage.aspx>*: This website provides an extensive overview of indigenous peoples and the UN system. It also provides links to the Working Groups, the Permanent Forum, Special Rapporteur, UN documents, funding, and the UN system.

UN Guide for Indigenous Peoples *<https://www.un.org/development/desa/indigenouspeoples/guides.html>*: This website includes extensive information on indigenous peoples and the UN system, including Indigenous Peoples, the UN and Human Rights, Human Rights Treaty Bodies and Indigenous Peoples, Indigenous Children and Youth, and Indigenous Peoples and the Environment.

International Work Group for Indigenous Affairs *<http://www.iwgia.org/>*: Its publications, a yearbook named *The Indigenous World*, a quarterly journal named *Indigenous Affairs*, and some thematic books, offer comprehensive information on indigenous affairs.

European Union Human rights and Democratisation Policy—Promoting and Protecting the Rights of Indigenous Peoples *<https://ec.europa.eu/europeaid/sectors/human-rights-and-governance/democracy-and-human-rights/anti-discrimination-movements-1_en>*: The website has a link to the EU Council Resolution on Indigenous Peoples and lists names and e-mail addresses of relevant EU people and has links on international organizations and indigenous NGOs.

Inter-American Commission on Human Rights <http://www.oas.org/en/iachr/>: This is the website of the Human Rights Commission of the Organization of American States. Most information relates to human rights in general, but under the heading “Publications,” there is a link to the Proposed American Declaration on the Rights of Indigenous Peoples.

Center for the World’s Indigenous Peoples <http://www.cwis.org/>: The Center’s website contains information on education programs and conferences, publications, research, and domestic and international policy concerning indigenous peoples.

NativeWeb <http://www.nativeweb.com/>: Its online Resource Center includes a nations index, geographic regions index, news/events, legal issues, books, and music. Links at this site provide pathways to detailed information concerning a wide range of indigenous issues.

Indian Law Resource Center <http://indianlaw.org>: The Indian Law Resource Center engages in legal advocacy for the protection of indigenous peoples’ rights, cultures, and traditional lands. On the site are descriptions of the Center’s casework, archives to newsletters, and links to relevant organizations and documents. The Center deals with cases in North and Central America.

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