
On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights

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Abstract

This article traces the development of the international human rights and international indigenous rights movements, with a particular eye towards their points of convergence and divergence and the extent to which each has influenced the other. Focusing on the United Nations Declaration on the Rights of Indigenous Peoples, it argues that the document, while apparently pushing the envelope in its articulation of self-determination and collective rights, also represents the continued power and persistence of an international human rights paradigm that eschews strong forms of indigenous self-determination and privileges individual civil and political rights. In this sense, it signifies the continued limitation of human rights, especially in terms of the recognition of collective rights, in a post-Cold War era in which a particular form of human rights has become the lingua franca of both state and non-state actors.

In September 2007, after over two decades of preparatory work and many false starts and stops, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹ The document has been lauded by many for its understanding and expansion of collective rights, of the right to culture, and of self-determination. But however progressive the declaration may appear at some level, it also contains significant compromises. Embedded in it are serious limitations to the very rights it is praised for containing.

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¹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 Sept. 2007 (UNDRIP). 129 countries voted in favour, 4 opposed, and 11 abstained.

In this article, I use the declaration and indigenous rights advocacy more generally to consider the relationship between international indigenous rights and international human rights. I do so by tracing the development of movements that have advocated for both, with a particular eye toward their points of convergence and divergence and the extent to which each has influenced the other.

Once sceptical of international human rights, indigenous rights advocates in the 1980s and 1990s began to articulate their claims in human rights terms, particularly the human right to culture. I have argued elsewhere that, even before the passage of the UNDRIP, the international indigenous rights movement had largely succeeded in achieving the recognition of cultural rights for indigenous peoples within various international and regional instruments and through the adjudicatory and quasi-adjudicatory mechanisms of international and regional institutions.² These hard-fought successes, however, resulted from a number of compromises along the way and largely displaced or deferred many of the very issues that initially motivated much of the advocacy: issues of economic dependency, structural discrimination, and lack of indigenous autonomy. In other words, the victories have brought with them (often unintended) limitations and downsides, which I have largely pinned on the reification of indigenous culture, alongside the rejection of self-determination claims and the acceptance of a cultural rights framework by international institutions. This right to culture, sometimes for individuals and sometimes for groups, fits quite comfortably with – and was perhaps even facilitated by – neoliberal development models.

The UNDRIP offers a contemporary example of both the alliances and tensions that emerged from the use of the right-to-culture frame for indigenous advocacy. I would contend that, on one hand, the UNDRIP challenges or at least pushes the liberal human rights paradigm by explicitly referring to the right to self-determination, embracing collective rights, and expressing an understanding of the interrelationship between rights to heritage, land, and development. On the other hand, it represents the continued power and persistence of an international human rights paradigm that eschews strong forms of indigenous self-determination³ and privileges individual civil and political rights. In this sense, I contend that the UNDRIP signifies both the possible expansion and continued limitation of human rights and the perpetuation of certain biases, including the suggestion that cultural rights – particularly in their collective form – are outside the domain of human rights.

I will begin by discussing the background and drafting of the UNDRIP, so that I may later place them in the larger context of human rights discourse in the late 20th and early 21st centuries. I will focus here on some of the limits on indigenous rights that were added to the declaration between 2006 and its passage in 2007, in

² See generally K. Engle, *The Elusive Promise of Indigenous Development* (2010).

³ By 'strong forms', I mean both external self-determination models and forms of self-determination that provide for significant autonomy for indigenous groups *vis-à-vis* the state. I hope to distinguish these models, which do not rely on human rights concepts, from the human right to self-determination that has arguably been more broadly recognized for indigenous peoples, including in the UNDRIP.

particular, limitations to the rights to self-determination and to collective rights, including collective forms of the right to culture. I will argue that while the declaration has made significant strides in the areas of the protection of cultural heritage, land rights, and development, it does so in ways that are potentially undermined by its end-of-the-day commitment to state sovereignty and to an especially individualistic and liberal form of human rights. I analyse the contemporary debates over the UNDRIP in some detail because they offer a lens through which to view legal and theoretical differences over the promises, limits, and threats of both the self-determination and human rights models that were proposed and deployed over the years for empowering indigenous individuals and groups. The passage and interpretation of the UNDRIP provides an opportunity for advocates to consider anew the structural biases and blind spots that have motivated indigenous peoples' demands for – to borrow a phrase from Nancy Fraser – both recognition and redistribution.⁴

Next, I will contextualize the limitations contained in the UNDRIP by exploring two different discursive and legal moments regarding the applicability of human rights to indigenous groups: first, the beginning of the transnational indigenous movement in the 1970s and 1980s, which was largely grounded in the language of self-determination and often eschewed human rights; and secondly, the explicit refusal by various international legal institutions to recognize the right to self-determination for indigenous peoples, along with a sometimes simultaneous recognition of a human right to culture. I will then consider the general dominance of human rights discourse post-1989 and consider how the development of that discourse – by becoming increasingly individualistic, supportive of various aspects of neoliberalism, and intent on placing limits on cultural rights – might be of limited use in supporting certain claims by indigenous peoples. Finally, I will call for a sustained historical and critical analysis of the UNDRIP, treating it as a space for considering the extent to which human rights is capable of attending to a variety of social injustices.

1 Final Drafting of the UNDRIP: Compromises

A Background

When the UN General Assembly adopted the UNDRIP in 2007, it did so after over two decades of negotiation between and among indigenous peoples and states, dating back to 1982 when the Working Group on the Rights of Indigenous Populations was established to prepare the draft of a declaration. After a decade of annual meetings, the Working Group produced a draft for internal consideration in 1993. In 1994, the United Nations declared 1995–2004 the International Decade of the World's Indigenous People (note the absence of the 's' on the end of 'People'), and made one of the decade's explicit aims the completion and 'adoption of the draft United Nations

⁴ Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age', 212 *New Left Review* (1995) 68, at 69.

Declaration on the Rights of Indigenous Peoples and the further development of international standards as well as national legislation for the protection and the promotion of indigenous people'.⁵ When the decade closed in 2004, however, it did so with having realized this aim.

In response to the Working Group's failure to reach an agreement on the declaration during these years, the United Nations declared a 'Second International Decade of the World's Indigenous People' (again, no 's'). The ensuing two and a half years brought a roller-coaster of hopes and disappointments for those advocating for the declaration. In 2006, in an effort to facilitate the adoption of the declaration at the first session of the newly formed Human Rights Council, the chair of the Working Group suggested a list of changes to the 1993 draft. A new draft including those changes was presented to the Council, which adopted the declaration during its first session in June 2006.⁶ The Council agreed to send the declaration to the General Assembly, in what was considered a moment of success both for the Council and for most indigenous peoples. Nevertheless, that version included key compromises that, as I discuss below, limited the right to self-determination as well as cultural and other collective rights.

These compromises, however, proved insufficient to guarantee the declaration's adoption by the General Assembly. In late November 2006, the Third Committee voted in favour of a non-action resolution on the declaration, deferring its consideration for a later date. The non-action resolution was formally proposed by Namibia on behalf of the African Union, in part on the ground that 'the vast majority of the peoples of Africa are indigenous to the African Continent',⁷ and that 'self-determination only applies to nations trying to free themselves from the yoke of colonialism'.⁸ In 2007, a number of additional compromises were made, the most significant of which were related to the right to self-determination.

B Recognizing and Limiting Self-Determination

Much of the controversy throughout negotiations regarding the draft and the final declaration revolved around Article 3 of the 1993 draft, which was retained in the adopted declaration. It reads, 'Indigenous 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.' This provision specifically applies common Article 1 of the two major covenants on human rights to indigenous peoples. Disagreements over the potential meaning of the term 'self-determination' and over

⁵ Programme of Activities for the International Decade of the World's Indigenous People, GA Res. 50/157, 21 Dec. 1995, Annex, at para. 6.

⁶ Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 Mar. 1995 on its eleventh session, Annex I, UN Doc. E/CN.4/2006/79 of 22 Mar. 2006.

⁷ For a copy of the resolution see Namibia: Amendments to Draft Resolution on Behalf of the African Union to Draft Resolution, UN Doc. A/C.3/61/L.57/Rev.1 (21 Nov. 2006).

⁸ Cherrington, 'United Nations General Assembly Declines Vote on Declaration on Indigenous Rights' (8 Dec. 2006), available at: www.culturalsurvival.org/news/mark-cherrington/united-nations-general-assembly-declines-vote-declaration-indigenous-rights.

various attempts to limit it through the addition of other language to the declaration were central to the failure of states and indigenous groups to agree upon a text for the declaration for many years. They were also key to the African Union's decision to oppose the declaration through the non-action resolution in 2006 and to the opposition to the declaration by the four states that voted against its final adoption – the United States, Canada, Australia, and New Zealand.⁹ These four states as well as many other countries along the way expressed concern that the right to self-determination might be read to include the right to statehood.

The 1993 draft of the declaration included an additional provision on the right to self-determination that listed the areas over which indigenous peoples would have control: 'culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members'.¹⁰ A change that was made for the Human Rights Council's consideration of the declaration and that remains in the adopted version arguably watered down that understanding of self-determination by instead stating that the right to self-determination guarantees 'the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.¹¹

Though this limitation seemed sufficient for the Human Rights Council, it did not prevent many African states from voting to defer consideration of the declaration through the non-action resolution. While support for the non-action resolution

⁹ All four of these states have since endorsed the UNDRIP, albeit to varying degrees. When Canada endorsed the UNDRIP in Nov. 2009, e.g., it made clear that 'the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws': Indian and Northern Affairs Canada, 'Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (12 Nov. 2010), available at: www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp (last accessed 28 Jan. 2011). The US expressed similar qualifications in Dec. of the same year, noting that the declaration, 'while not legally binding or a statement of current international law . . . has both moral and political force': US Department of State, 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples' (16 Dec. 2010) at 1, available at: www.state.gov/documents/organization/153223.pdf (last accessed 28 Jan. 2011). And while New Zealand acknowledged that the declaration is an 'affirmation of accepted international human rights', it added that the declaration 'also expresses new, and non-binding, aspirations': 'New Zealand Statement, Ninth Session of the United Nations Permanent Forum on Indigenous Issues' (19 Apr. 2010) at 5, available at: www.docip.org/gsd/collect/cendocdo/index/assoc/HASHe2c9/a6688410.dir/PF10pita007.PDF (last accessed 28 Jan. 2011). Australia's endorsement of the rights embodied in the UNDRIP was somewhat more positive, noting that while the declaration 'does not create new rights[,] . . . [it] elaborates upon existing international human rights norms and principles as they apply to Indigenous peoples': Australian Human Rights Commission, 'Questions and Answers on the UN Declaration on the Rights of Indigenous Peoples' (Apr. 2009), available at: www.hreoc.gov.au/social_justice/declaration/declaration_QA_2009.html (last accessed 28 Jan. 2011).

¹⁰ Draft Declaration on the Rights of Indigenous Peoples, in UN Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities, 45th Session, 'Report of the Working Group on Indigenous Populations on its Eleventh Session', UN Doc. E/CN.4/Sub.2/1993/29/Annex I (23 Aug. 1993), Art. 31.

¹¹ UNDRIP, *supra* note 1, at Art. 4.

reflected a reversal for many states that voted for it, and a number of observers suggested that African countries only proposed the non-action resolution due to pressure from the United States, Canada, New Zealand, and Australia, these African states remained resolute and united in their position. In late January 2007, the Assembly of the African Union expressed its support for deferral of the declaration's consideration, calling for further consultations on questions it considered to be 'of fundamental political and constitutional concern', including:

- (a) the definition of indigenous peoples;
- (b) self-determination;
- (c) ownership of land and resources;
- (d) establishment of distinct political and economic institutions; and
- (e) national and territorial integrity.¹²

The decision was based in large part on the concerns about the effect that a new wave of self-determination might have on Africa,¹³ but they were also echoed in the statements of others who opposed the declaration.¹⁴

Ultimately, African states were swayed by a new compromise, including the addition of Article 46(1), which makes clear that the declaration does not support external forms of self-determination. It states that the declaration should not be 'construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States'. This compromise language gave many indigenous peoples involved with the declaration significant pause, but most ultimately decided to support it with the assurance that other key provisions would remain intact, including those on land and resource rights and free and informed consent, which would in some sense protect 'indigenous peoples' territorial integrity'.¹⁵

¹² African Union Assembly, 8th Session, Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc. Assembly/AU/9 (VIII) Dec. 141 (30 Jan. 2007), at para. 6.

¹³ An early para. 'reaffirm[ed] Resolution AHG Res 17/1 of 1964 in which all Member States of the Organization of African Unity pledged to respect borders existing on their achievement of national independence': *ibid.*, at para. 2. Thus, the opposition by African states raised questions about the meaning of self-determination and the extent to which the international legal doctrine of *uti possidetis* (which had required that post-colonial boundaries in Africa followed those set up by colonial powers) could survive in the face of challenges by groups across the region claiming rights to self-determination.

¹⁴ The New Zealand representative, e.g., issued a statement on behalf of Australia, New Zealand, and the US expressing concern that '[s]elf-determination . . . could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States': Statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States, available at: www.australiaun.org/unny/Soc_161006.html (last accessed 1 Feb. 2001).

¹⁵ Global Indigenous Peoples' Caucus. Steering Committee, 'Report of the Global Indigenous Peoples' Caucus' (31 Aug. 2007), available at: www.hreoc.gov.au/social_justice/declaration/screport_070831.pdf (last accessed 1 Feb. 2011).

While the inclusion of language on the right to self-determination had long been considered non-negotiable for most indigenous groups, even the early drafts of the declaration were at best ambiguous on the right to external self-determination. It could be argued that indigenous rights advocates who made claims to strong forms of self-determination had never succeeded in having that position articulated in the declaration. In fact, as I will later demonstrate, advocates had been softening their stance for some time.

While advocates largely backed the UNDRIP once it was passed, some admitted that the compromise was not a complete success. Indeed, the Indian Resource Center's press release at the time embodies much of the ambivalence that was experienced in the moment. On one hand, it quotes Robert 'Tim' Coulter, its executive director, stating that '[f]or the first time, indigenous peoples' rights to self-determination and control over their land, resources, cultures and languages are being formally recognized', and concluding that the declaration 'is a huge advance in the law of self-determination, the most important in 50 years. It is a tremendous advance in international human rights because collective rights of indigenous peoples are now recognized as human rights.'¹⁶ On the other hand, and without ever mentioning the last-minute compromise on self-determination, it quotes the director of its Washington, DC, office, Armstrong Wiggins – a Miskito leader who had long argued for autonomous territory for the Miskito within Nicaragua – as stating, 'It's not a perfect Declaration, but it is a good start. Our hope is that our children and our grandchildren will be able to make it better.'¹⁷

As indigenous rights advocates both inside and outside international organizations have begun to encourage states and international institutions to take seriously the UNDRIP, they have attempted to make the most of the self-determination language. Yet, something has been lost in the compromise. The declaration seals the deal: external forms of self-determination are off the table for indigenous peoples, and human rights will largely provide the model for economic and political justice for indigenous peoples.

Many have justified the declaration's rejection of external self-determination by insisting that indigenous peoples do not want statehood. A recent International Law Association report on the Rights of Indigenous Peoples, for example, contends that the *travaux préparatoires* on the declaration show that indigenous peoples 'were not really

¹⁶ Indian Law Resource Center, 'UN Adopts Declaration on the Rights of Indigenous Peoples' (13 Sept. 2007), available at: www.indianlaw.org/sites/indianlaw.org/files/UNDeclarationAdopted20070913.pdf (last accessed 29 Jan. 2011).

¹⁷ *Ibid.* Both these positions are a far cry from the Indian Law Resource Center's position in 1982 that '[i]ndigenous peoples qualify as peoples possessing a right of self-determination; hence, indigenous peoples have the right to self-determination, that is, to possess whatever degree of self-government in their territories the indigenous peoples may choose': Barsh, 'Indigenous Peoples: An Emerging Object of International Law', 80 *AJIL* (1986) 369, at 376.

concerned that the right to self-determination would include a right to secession'.¹⁸ The same report goes on to emphasize that for many indigenous peoples 'cultural' – rather than 'political' – self-determination is paramount.¹⁹

This assertion of such static views and desires of indigenous peoples, as I demonstrate in section 2, betrays much of the history of indigenous movements. Though many indigenous groups might not have called for their own states, the movement was relatively united for many years on the need to include the right to do so in the declaration. The report is correct that, by 2006, indigenous peoples had stepped back from insisting on the inclusion of a clear right to external forms of self-determination. But in that sense, the UNDRIP merely reflects a deal that had in fact been struck some time ago, when indigenous rights advocates began both to pursue and accept the human right to culture paradigm, particularly in the international legal arena.

C Recognizing and Limiting Collective Rights

The UNDRIP has been praised by many for its broad recognition of collective rights. Sometimes those rights include the right to self-determination, now taking the form of a collective human rights demand rather than a claim for statehood. As one recent commentator explained, the UNDRIP 'affirms a number of collective human rights specific to indigenous people, ranging from the right to self-determination and to lands, territories and resources, to recognition of treaties and the right not to be subjected to forced assimilation, destruction of culture, genocide or any other act of violence, to rights affirming indigenous spirituality, culture, education and social welfare'.²⁰ The UN Permanent Forum on Indigenous Issues states on its webpage that the UNDRIP gives 'prominence to collective rights to a degree unprecedented in international human rights law. The adoption of this instrument is the clearest indication yet that the international community is committing itself to the protection of the individual and collective rights of indigenous peoples'.²¹

What is rarely discussed, however, is that a number of provisions regarding collective rights, generally collective cultural rights, were dropped from the 1993 version of the draft in the series of compromises that led to the 2006 draft approved by the

¹⁸ International Law Association, 'Interim Report: The Hague Conference, Rights of Indigenous Peoples' (2010), at 10, available at: www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D (last accessed 28 Jan. 2011). The Report's support for this point is minimal. It cites a 2004 statement by a number of regional indigenous caucuses, in which the groups essentially assured states that, even without what later became Art. 46, states would be free to invoke their right to territorial integrity. Of course, the freedom to invoke a claim was not sufficient for many states, which is why they demanded an explicit statement on the limitation of the right.

¹⁹ *Ibid.*, at 11 (citing Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 *Vanderbilt J Transnat'l L* (2008) 1141, at 1176).

²⁰ Dourough, 'The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation', in C. Charters and R. Stavenhagen (eds), *Making the Declaration Work* (2009), at 264, 265.

²¹ UN Permanent Forum on Indigenous Issues, 'About UNPFII and a brief history of indigenous peoples and the international system' (2006), available at: www.un.org/esa/socdev/unpfii/en/history.html (last accessed 1 Feb. 2011).

Human Rights Council. Articles in the 1993 version, for example, included collective rights of indigenous peoples to 'maintain and develop their distinct identities' collectively and individually (Article 8), 'to determine their own citizenship in accordance with their customs and traditions' (Article 32), and 'to determine the responsibilities of individuals to their communities' (Article 34). The last, at least, arguably trumped individual rights. To the extent that the rights appear in the adopted declaration, they are no longer explicitly stated as collective rights.²²

The changes were made in the 2006 draft, largely because some states that opposed the declaration at that time (before the African Union had registered its concerns) saw collective rights as problematic. Many, however, remained unsatisfied with the amendments. The New Zealand ambassador and permanent representative to UN General Assembly's Third Committee, for example, complained on behalf of New Zealand, Australia, and the United States that the declaration did not respect the 'universality of human rights' and was 'potentially discriminatory':

It seems to be assumed that the human rights of all individuals, which are enshrined in international law, are a secondary consideration in this text. The intent of States participating in the Working Group was clear that, as has always been the case, human rights are universal and apply in equal measure to all individuals. This means that one group cannot have human rights that are denied to other groups within the same nation-state.²³

She also criticized the draft declaration for apparently conferring the power for sub-national groups to veto 'democratic' legislation and for recognizing indigenous claims to 'lands now lawfully owned by other citizens, both indigenous and non-indigenous'.²⁴

The New Zealand representative's statement shares a concern of many states, international and regional institutions, and even of human rights advocates. Might indigenous rights to culture and property (which are often intertwined) undermine individual rights, particularly if the former are recognized as collective rights? This concern, I would contend, has restricted the ability of indigenous cultural and collective rights to be recognized in a way that would challenge the persistence of the individual liberal rights paradigm of human rights. That is, the rights are ultimately defined by a human rights framework that is based on some of the very premises they are meant to challenge.

Though human rights advocates might, in the abstract, share the view expressed by New Zealand and others during the debate over the non-action resolution that collective rights should be subordinated to individual rights, they seemed to believe that the 2006 version had made that priority clear. Thus, a number of NGOs signed a public statement expressing their support for the declaration:

²² Art. 33 appears to have replaced Arts 8 and 32 of the 1993 draft, but with no explicit reference to collective rights. The new language in the provision reads: 'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.' Art. 35 of the adopted version includes language identical to that in Art. 34 of the 1993 version, but without the word 'collective' as an adjective to the right.

²³ Statement by H.E. Ms. Rosemary Banks, *supra* note 14.

²⁴ *Ibid.*

The debate in the Third Committee was marred by unfounded and alarmist claims about the potential impact of the Declaration. Statements by Australia, Canada, New Zealand and the USA that the Declaration would jeopardize the rights and interests of other sectors of society willfully ignored the fact that the Declaration can only be interpreted in relation to the full range of existing human rights protections and state obligations.²⁵

In other words, indigenous rights would not be permitted to stray outside the boundaries of ‘human rights protections’.

The assurance for these NGOs was probably the deletion of the collective rights I have already mentioned, along with the provisions in the UNDRIP that were added in 2006 to what was then Article 45, but which now form a part of the final declaration’s Article 46. That Article not only restricts the meaning of self-determination, but also potentially affects the meaning and application of all the rights contained in the declaration. Paragraph 2 reads in part, ‘The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations.’²⁶ Paragraph 3 calls for the interpretation of rights in the declaration ‘in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith’.

In these provisions what does the term ‘human rights’ mean? If in fact the declaration intends to expand the recognition of human rights to include collective rights and the right to culture, could it be limited by the same? Is the insistence on equality and non-discrimination a denial of rights that might be considered special or attach to a single culture? Are the provisions an acknowledgment or denial of conflict between human rights and indigenous rights, or are they productive of a distinction between the two?

2 Looking Back: Two Discursive and Legal Moments for Indigenous Rights Advocacy

The debates that led to the ultimate compromises to ensure the passage of the UNDRIP were not new. Rather, they were simply the most recent manifestation of

²⁵ International Work Group for Indigenous Affairs, ‘UN Declaration on the Rights of Indigenous Peoples: Human rights organizations condemn efforts to block vital human rights instrument’ (30 Nov. 2006), available at: www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/NGOStatementonDeclarationNov302006.htm (last accessed 1 Feb. 2011). The human rights groups that signed the statement were: Amnesty International, Canadian Friends Service Committee (Quakers), International Service for Human Rights, International Work Group for Indigenous Affairs (IWGIA), Kairos: Canadian Ecumenical Justice Initiatives, Netherlands Centre for Indigenous Peoples (NCIV), and Rights & Democracy.

²⁶ A number of human rights instruments make clear that some or all of the rights they embody are subject ‘only to such limitations as are determined by law’, but they do not, as in the UNDRIP, subject them to ‘international human rights obligations’, given that the instruments themselves are meant to recognize or even create such obligations. See, e.g., Universal Declaration of Human Rights, GA Res. 217 (III), 10 Dec. 1948, Art. 29 (‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others’); International Covenant on Economic, Social, and Cultural Rights, GA Res. 2200A (XXI), 3 Jan. 1976, Art. 5 (‘[T]he State may subject such rights only to such limitations as are determined by law only in so far as . . . compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’).

tensions – both explicit and implicit – that had been simmering inside the Working Group for some time. Indeed, these issues were not new to indigenous advocacy in general, which has long had a complex relationship with human rights law.

Though by the time the UNDRIP was passed, human rights seemed to be the clearly appropriate avenue through which to pursue indigenous rights, it had not always been the preferred model. Indeed, from the beginning, many indigenous rights advocates were wary of what they saw as the assimilationist tendencies of human rights, which allowed for neither strong forms of self-determination nor collective cultural rights. Over time, however, many indigenous rights advocates increasingly framed their claims in human rights terms. The development of the human right to culture both facilitated and was enhanced by this move. In this section, I briefly trace this change in indigenous advocacy, which was affected by international institutions that tended to reject self-determination arguments and accept indigenous rights under the human rights rubrics of culture and property. Though some of the institutions have been more open than others to collective rights, such rights are often tempered in ways that foreshadow the limitations set out in Article 46 of the UNDRIP.

A Rejection of Human Rights in the 1970s and 1980s

When, in the 1970s and early 1980s, indigenous peoples began to engage in pan-indigenous and transnational organization and eventually turn to international law, human rights was not an obvious forum for their struggles, even though it had become a significant tool for dissident political groups, especially in Latin America and Eastern Europe. For indigenous rights advocates, human rights was often seen as inseparable from the civilizing mission of colonial days or the globalizing or liberalizing mission of neocolonialism. As such, it was considered to offer little (but a site of resistance) to those whose aim was to reject assimilation.

The principal tactic indigenous rights advocates pursued at that time – at least in former British colonies – was external self-determination, which included the right of statehood. In North America, indigenous peoples began a ‘Fourth World movement’, in which they both identified with and distinguished themselves from the decolonized or decolonizing Third World. They saw themselves as ‘nations’ that maintain a distinct culture but are unrecognized, ‘deprived of the right to their own territories and its riches’.²⁷ In Latin America, the focus was often on autonomy. Where indigenous peoples constituted the majority of the population (as in Bolivia), control of the nation – not secession – was sometimes the aim. As with the anticolonialist movement that had come before them, indigenous movements used an international legal frame that was distinct from human rights.²⁸

The right to self-determination in these forms constituted the dominant political and legal strategy for indigenous peoples through much of the 1980s. Indeed, when Bernadette Kelly Roy and Gudmundur Alfredsson published a review of indigenous

²⁷ G. Manuel and M. Posluns, *The Fourth World: An Indian Reality* (1974), at 40.

²⁸ For a historical account that specifically distinguishes the anticolonial and human rights movements see S. Moyn, *The Last Utopia* (2010), at 84–119.

rights literature in 1987 (albeit focused on literature in English, and therefore largely from indigenous groups and advocates within the global North), self-determination strains of advocacy – which generally included the possibility of secession or statehood – were prominent, if not dominant. Self-determination claims continued to be asserted despite and even against a human rights model that was beginning to make headway. Roy and Alfredsson wrote at the time that an ‘area of concern to many commentators is the shift away from the basic self-determination issues to a potential role for international human rights law in the prevention of discrimination and protection of indigenous peoples’.²⁹

Roy and Alfredsson then identified two difficulties with human rights: its failure to address the political rights of self-determination and its focus on the individual rather than the group. Thus, they concluded that ‘it should come as no surprise when many indigenous leaders speak in terms of decolonization or self-determination and eschew human rights’.³⁰ Douglas Sanders concurred, but with an even broader understanding of human rights in mind: ‘[t]he framework of human rights and minority rights seems unable to deal with the issues of a distinctive land base or of collective political rights. For these reasons indigenous leaders speak in terms of decolonization and self-determination.’³¹

B Move to Human Rights in the mid-1980s and early 1990s

Despite the above-mentioned concerns about human rights, in the late 1980s and early 1990s a number of indigenous rights advocates began to turn to human rights law as a site for legal and political struggle. In short, these indigenous rights advocates simultaneously softened their stance on self-determination and attempted to broaden the general, liberal model of human rights so as to incorporate a collective right to culture and allow for difference within an equality model. This move was both supported and encouraged by international and regional institutions that explicitly rejected attempts to conceive of indigenous rights in the context of self-determination (external or internal), even while acknowledging the application of a human right to culture, if at times only for individuals.

A decision by the Inter-American Commission on Human Rights in 1983, the Human Rights Committee’s interpretation of the International Covenant on Civil and Political Rights (ICCPR) in its early years, and the language ultimately agreed upon for International Labour Organization Convention No. 169 provide three examples of this double move. That is, each represents an explicit rejection of the applicability of the right to self-determination to indigenous peoples and sets the stage for a human-rights-centred approach to indigenous rights. I will discuss each of these briefly to

²⁹ Roy and Alfredsson, ‘Indigenous Rights: The Literature Explosion’, 13 *Transnat’l Perspectives* (1987) 19, at 21.

³⁰ *Ibid.*

³¹ Sanders, ‘The Re-Emergence of Indigenous Questions in International Law’, 3 *Canadian Human Rts Yrbk* (1983) 3, at 25.

give a sense of the extent to which self-determination was rejected as a legal doctrine applicable to or enforceable by indigenous peoples and to describe the way in which a particular human rights model centred on the protection of culture began to be framed and recognized in its stead.

1 *The Inter-American System of Human Rights*

In the early 1980s, conflicts arose in Nicaragua between Miskito Indians and the Sandinista government, in large part over the government's new agrarian reform programme. The Miskito believed the programme failed to take into account Indian ownership of many lands to be redistributed under the programme. The Miskito brought a claim before the Inter-American Commission, arguing that the group should be guaranteed the right to the natural resources of the territory and the right to self-determination. One of the Miskito's advocates, Armstrong Wiggins of the Indian Law Resource Center (whom I mentioned in section 1), identified the Indian peoples of Nicaragua as evincing the qualities of states: '[t]he right to self-determination applies to all peoples, including the Indian population of Nicaragua, which possesses territory with defined borders, a permanent population, a government and the capacity to establish external relations'.³²

In response, the Commission acknowledged that international law recognizes the right of self-determination of peoples, but denied its applicability to the Miskito, insisting that 'this does not mean . . . that it recognizes the right to self-determination of any ethnic group as such'.³³ Nevertheless, the Commission made it clear that lack of rights to either political autonomy or self-determination did not mean that Nicaragua had 'an unrestricted right to impose complete assimilation on those Indians'.³⁴ Rather, using various rights under the American Convention on Human Rights and Article 27 of the ICCPR, to which Nicaragua was also a party, the Commission concluded that 'special legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity . . . which includes, among other things, the issue of the ancestral and communal lands'.³⁵

It was not altogether clear whether the Commission conceived of these rights as applying only to individuals (versus groups); arguably that decision was left for another day. But the human right to culture became the basis for the Commission's application of international human rights law to the Miskito. To the extent that it recognized that other rights were concerned, such rights were implicated in large part toward the aim of preserving culture. In more recent years, the Inter-American Court of Human Rights has continued to focus on the preservation of culture, though

³² Organization of American States, Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin' (1983), at Part II, B(8), describing the position articulated by Wiggins.

³³ *Ibid.*, at Part II, B(9).

³⁴ *Ibid.*, at Part II, B(11).

³⁵ *Ibid.*, at Part II, B(15).

it has used the right to the ‘use and enjoyment’ of property, found in Article 21 of the American Convention, as its principal rubric to protect culture in land claims.³⁶

2 *The Human Rights Committee*

Although the Inter-American Commission used Article 27 of the ICCPR in its consideration of that convention’s application to indigenous rights, the ICCPR does contain another arguably relevant provision. Article 1, which recognizes the right of ‘all peoples’ to self-determination, has formed the basis of claims by some indigenous groups and individuals (on behalf of the group) before the Human Rights Committee.³⁷ Without explicitly denying that the right might apply to indigenous peoples, the Human Rights Committee made a decision relatively early on to consider cases brought under the Optional Protocol using Article 27 rather than Article 1.

In a series of cases beginning in 1988, the Committee denied the admissibility of Article 1 claims on the grounds that the Optional Protocol under which complaints are brought recognizes only individual rights and that self-determination is a collective right, the violation of which individuals cannot be victims.³⁸ Thus, in *Kitok v. Sweden*, the Committee never addressed the state’s argument that the Sami did not constitute a people under Article 1,³⁹ in part because it found that Article 1 did not pertain to Kitok’s individual application.⁴⁰ In the *Lubicon Lake Band* case, decided two years later, the Committee reiterated this position when it denied the applicability of Article 1 in a claim brought by an indigenous band in Canada. The Committee determined that the question whether the band constituted a people was not before it because the claim had been brought by the band’s chief who, as an individual, ‘could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination’.⁴¹

To the extent that the Committee has considered the applicability of Article 1’s right to self-determination, it has simply acknowledged that Article 1 may at times aid in the interpretation of other articles, particularly Article 27. In its Concluding Observations

³⁶ See, e.g., Inter-American Court of Human Rights: *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79, 10 IHRR 758 (2001), at para. 149; Inter-American Court of Human Rights: *Moiwana Community v. Suriname*, IACtHR Series C 124 (2005), 14 IHRR 454 (2007), at paras 155, 173; Inter-American Court of Human Rights: *Saramaka People v. Suriname*, IACtHR Series C No. 172, 13 IHRR 933, at para. 126.

³⁷ Art. 1, which the convention shares in common with the International Covenant on Economic, Social and Cultural Rights (ICESCR), states, ‘All 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’.

³⁸ Scheinin, ‘The Right to Self-Determination under the Covenant on Civil and Political Rights’, in P. Aikio and M. Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (2000), at 179, 179–80.

³⁹ *Kitok v. Sweden*, Communication No. 197/1985, Views of the Human Rights Committee adopted on 10 Aug. 1988, UN Doc. CCPR/C/33/D/197/1985, at para. 4.1.

⁴⁰ *Ibid.*, at para. 6.3.

⁴¹ *Lubicon Lake Band v. Canada*, Communication No. 167/1984, Views of the Human Rights Committee adopted on 26 Mar. 1990, UN Doc. Supp. No. 40 (A/45/40), at para. 13.3.

regarding states' reports, the Committee has occasionally reminded states of their obligation to report on their implementation of Article 1, but has done little more than that.⁴²

At the same time, the Human Rights Committee has been open to individual complaints under Article 27, beginning soon after the ICCPR entered into force. In 1977, Sandra Lovelace, born a Maliseet Indian, brought a complaint under the Optional Protocol against Canada because, after marrying a non-Indian man, she lost her tribal status under Canada's Indian Act. Though much of her claim focused on the fact that Indian men who married non-Indian women were entitled to keep their status, the Committee decided the case under Article 27, finding that the Act, which Canada claimed was in line with indigenous custom, violated Lovelace's right 'to access to her native culture and language "in community with the other members" of her group'.⁴³ Thus the right to culture meant that she, as an individual, had a right to 'her' culture.

Lovelace was the first in a series of cases to find Article 27 applicable to individual indigenous claims. Although Kitok was not ultimately successful in his claim that Sweden had violated his individual right to culture as an indigenous person by deferring to Sami rules over membership that resulted in his losing full membership rights in his village, the committee did find that Article 27, not Article 1, was the proper provision under which to consider his claim.⁴⁴ In *Lubicon Lake Band*, the committee *sua sponte* applied Article 27 in its determination that the band chief and other group members had, as individuals, been affected by the state's actions of which the band complained.⁴⁵

In each of these cases, an individual right potentially trumped a potential collective right, even about membership of the collective. Many advocates have nevertheless seen the Committee's approach to Article 27 as a positive application of the right to culture of indigenous people, if not peoples. They have been particularly encouraged by the Committee's indication in its General Comment 23 that the right to culture for indigenous peoples might support 'a way of life which is closely associated with territory and use of resources'.⁴⁶ That language in the recommendation, however, follows a paragraph explicitly distinguishing the right to culture from the right to

⁴² See Scheinin, *supra* note 38, at 192.

⁴³ *Lovelace v. Canada*, Communication No. 24/1977, Views of the Human Rights Committee adopted on 30 July 1980, UN Doc. No. CCPR/C/13/D/24/1977, at para. 15.

⁴⁴ The committee determined that Kitok's lack of membership of the tribe did not infringe upon his right to culture because it did not significantly affect his ability to participate in reindeer herding on Sami land: *Kitok v. Sweden*, *supra* note 39, at paras 4.1 and 6.3.

⁴⁵ Though the group could not bring a claim under the Optional Protocol, the committee did indicate that '[t]here is no objection to a group of individuals, who claim to be similarly affected, collectively . . . submit[ting] a communication about alleged breaches of their rights': *Lubicon Lake Band v. Canada*, *supra* note 41, at para. 32.1.

⁴⁶ UN Human Rights Committee, CCPR General Comment No. 23: The Rights of Minorities (Art. 27), at para. 3.2, UN doc. CCPR/C/21/Rev.1/Add.5, 1994. See also *ibid.*, at para. 7 ('culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples').

self-determination,⁴⁷ and a sentence foreshadowing Article 46(1) of the UNDRIP, indicating that the right to culture ‘does not prejudice the sovereignty and territorial integrity of a State party’.⁴⁸

3 *International Labour Organization*

In 1989, the ILO revised its 1957 Convention on Indigenous Peoples (Convention No. 107),⁴⁹ which had largely been aimed at integrating indigenous people into industrialized, modern societies and had been highly criticized by indigenous rights advocates over the years. It did so through Convention No. 169, which provided new international standards meant to ‘remov[e] the assimilationist orientation of the earlier standards’.⁵⁰

A major source of controversy during the drafting of the convention was whether indigenous peoples were entitled to self-determination. The issue arose in part over whether to include the term ‘peoples’ instead of either ‘people’ or ‘populations’, the latter of which had been used in Convention No. 107.⁵¹ Indigenous participants’ insistence on the term ‘peoples’ blocked the convention’s adoption at one point, leading to two years of negotiation and an eventual compromise, after which the term ‘peoples’ was finally included, but alongside a provision that disclaimed the attachment of any international rights to the term. Specifically, ‘[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which might attach under international law’.⁵²

This explicit rejection of self-determination as recognized in international law received a negative response from many indigenous advocates at the time. As one commentator noted then:

The indigenous peoples’ representatives were furious that, of all the peoples of the world, they alone should be cut off from enjoying the same rights as other peoples as defined under international law. Cristobal Naikiai, a Shuar Indian from Ecuador and Vice-president of the Coordinator of Indigenous Organisations of the Amazon Basin, likened the process at the International Labour Conference to the infamous conference in the 16th century when the church in Spain had debated on whether Indian people had souls or not.⁵³

⁴⁷ *Ibid.*, at para. 3.1.

⁴⁸ *Ibid.*, at para. 3.2.

⁴⁹ International Labour Organization, Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No. 107), 26 June 1957.

⁵⁰ International Labour Organization, Indigenous and Tribal Peoples Convention (No. 169), 27 June 1989, preamble.

⁵¹ For mention of this debate, as well as a general discussion of the international legal treatment of ‘peoples’ and self-determination, see Myntti, ‘The Right of Indigenous Peoples to Self-Determination and Effective Participation’, in Aikio and Scheinin (eds), *supra* note 38, at, at 85.

⁵² International Labour Organization, No. 169, *supra* note 50, Art. 1(3). For further discussion of this provision see Daes, ‘The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples’, in Aikio and Scheinin (eds.), *supra* note 38, at 67.

⁵³ Colchester, ‘Indigenous Peoples and the International Labour Organization’, 4 *Interights Bulletin* (1989) 43, at 43.

Other indigenous leaders protested as well. Leonard Crate, for example, the representative of the International Organisation of Indigenous Resource Development, asked the Committee, 'What is the difference between our claim and the claim of oppressed colonial peoples who want to live in their homelands?'.⁵⁴

Though the convention avoided use of the term 'self-determination', the inclusion of the term 'peoples' and other language in the document arguably indicates that certain indigenous rights might accrue to the group, not simply to individuals. Article 5 of the convention, for example, states that 'the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals'.⁵⁵

Much of the memory of this early dissatisfaction with the rejection of the right to self-determination seems to have been lost over time. Many indigenous rights advocates, at least in states that have signed the convention, have embraced ILO Convention No. 169 as the only legally binding instrument specifically focused on indigenous rights. They have attempted, with mixed success, to compel states that have signed it to guarantee a wide range of indigenous rights, including the right to prior consultation by the state on development initiatives that affect lands they use or occupy.⁵⁶

3 The Human Rights Paradigm: After 1989

As the last section demonstrated, indigenous rights advocacy aimed at self-determination, particularly external forms of self-determination, had largely failed in terms of recognition by international instruments and the bodies that created and interpreted them. At the same time, those bodies proved to be open to some, particularly but not

⁵⁴ International Labour Conference, 76th Session, 1989, *Record of Proceedings*, 31/6. Another indigenous leader, Sharon Venne, a Cree from the Treaty Six territory in western Canada and a representative of the International Work Group for Indigenous Affairs, stated that 'it is unfair and racially discriminatory to limit our rights as peoples under international law': *ibid.*, at 31/7.

⁵⁵ International Labour Organization, No. 169, *supra* note 50, Art. 5(a). The convention also calls upon governments to 'respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use, and in particular the collective aspects of this relationship': *ibid.*, at Art. 13(1).

⁵⁶ Even while attempting to use this language, indigenous peoples have long advocated for something stronger than the right to consultation – the right to 'free, prior and informed consent'. While some supporters of the UNDRIP claim that such a right is included in the declaration, once again what was achieved was less than what was called for. Art. 32(2) states that '[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain* their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources' (emphasis added). Consent is thus only the goal in the UNDRIP. The 1993 version of the declaration recognized the right of indigenous peoples to require that states acquire their consent: Draft Declaration on the Rights of Indigenous Peoples, in UN Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities, 45th Session, 'Report of the Working Group on Indigenous Populations on its Eleventh Session', UN Doc. E/CN.4/Sub.2/1993/29/Annex I, (23 Aug. 1993), Art. 30.

exclusively individually-based, indigenous rights claims made under the rubric of the human right to culture. As advocates began to advocate and articulate human rights for indigenous peoples over the ensuing years, they did so within a new landscape for the development of human rights more generally. In this section, I consider this broad human rights landscape after 1989 to begin to understand how it both opened possibilities and posed limits for the articulation of indigenous peoples' claims.

Particularly since the end of the Cold War, human rights has become the *lingua franca* of both states and social movements, from the left to the right. With regard to the former, states claim to intervene – even militarily – in other states to protect human rights, and states resist such intervention in the name of human rights. Social movements of all stripes also frame their claims in human rights terms. Even arguments for significant redistribution of wealth and resources are largely made in the name of (economic and social) human rights. Moreover, states and social movements have participated in the expansion of both soft and hard international legal mechanisms for human rights, evidenced in part by the increase in number, scope, and power of regional and international instruments. In this sense, the developments in indigenous rights advocacy and jurisprudence described in section 2 simply present a microcosm of what has happened in human rights in the post-Cold War era. There are few legal and discursive spaces wholly outside the human rights framework.

Yet, like indigenous rights advocates who were sceptical of human rights for some time, the political left has a history of ambivalence toward human rights. Not unconnected to concerns about its civilizing mission, the left has long identified human rights as inextricably (and problematically) linked to capitalism and forms of liberal democracy that were seen to facilitate it. Arguably, the Cold War kept alive both the uneasiness with liberal, individualistic human rights and support for a different understanding of human rights that depended upon an active role for the state and emphasized redistribution over individual rights, especially individual property rights.

In the context of the drafting of the Universal Declaration of Human Rights, for example, political theorist and past chair of the British Labour Party, Harold Laski, presented a Marxist-informed critique of rights. He warned that, even when proclaimed to be universal, declarations of rights had 'in fact been attempts to give special sanctity to rights which some given ruling class at some given time in the life of a political society it controlled felt to be of peculiar importance to the members of that class'.⁵⁷ 'In the post-war world in which we find ourselves', he continued, 'important internal and external factors have combined to make the satisfaction of capitalist need for profit easily compatible with the realization of human rights at the level of expectation which the workers, in any well-organised trade union movement, deem adequate. The contrast between capitalist need and democratic demand has become outstanding and momentous.'⁵⁸

⁵⁷ Laski, 'Towards a Universal Declaration of Human Rights', in UNESCO (ed.), *Human Rights: Comments and Interpretation: A Symposium Edited by UNESCO* (1949), at 78, 86.

⁵⁸ *Ibid.*, at 87.

Laski was not necessarily opposed to a declaration on human rights, but he argued that such a declaration should attend to alternative formulations of human rights that were ‘struggling to be born’⁵⁹ at the time. Such formulations would require a strong state (especially in planning) that would, among other things, significantly restrict the right to private property, particularly with regard to the means of production.⁶⁰ Ultimately, for Laski, the substance was more important than the existence of a declaration: ‘[i]t would be better to have no declaration than one that was half-hearted and lacking in precision, or one which sought an uneasy compromise between irreconcilable principles of social action’.⁶¹

While many would disagree about the extent to which the alternative view of human rights suggested by Laski ever had significant traction in international law or institutions, I think most would agree that any reasonable prospect of it fell with the Berlin wall. As Wendy Brown puts it in her response to Michael Ignatieff’s self-proclaimed ‘minimalist’ argument in favour of ‘a defensible core of rights’ and against the specific recognition of collective and economic and social rights, ‘the formulation of collective rights in the absence of individual ones in the post-Communist world seems something of a straw man’.⁶² In a way that resonates with Laski’s consideration in the 1940s of the relationship between capitalism and dominant conceptions of human rights, Brown demonstrates how Ignatieff’s conception of human rights, rather than being minimalist, in fact provides a way to ensure that ‘individual rights[,] especially those basic to free enterprise and free trade[,]’ are not limited.⁶³ She concludes that ‘through a tortured historiography and a terribly vulnerable set of ontological claims, Ignatieff argues for human rights as the essential precondition for a free-market order and for the market itself as the vehicle of individual social and economic security’.⁶⁴

Although many disagree with Ignatieff’s approach to human rights and would like to see greater attention given to economic and social rights and to collective rights, it seems difficult in the post-Cold War era to do little more than tame the (post-)neoliberal economic and political model that dominates the world. Neoliberalism has

⁵⁹ *Ibid.*, at 92.

⁶⁰ See, e.g., *ibid.*, at 88: ‘a declaration of rights which aims at assisting the victory of social justice. . . must take account of the fact that the private ownership of at least the vital means of production makes it increasingly impossible to maintain either freedom or democracy’: *ibid.*

⁶¹ *Ibid.*

⁶² Brown, “‘The Most We Can Hope For. . .’: Human Rights and the Politics of Fatalism”, 103 *South Atlantic Quarterly* (2004) 451, at 457. Brown explains:

Ignatieff claims that ‘rights inflation – the tendency to define anything desirable as a right – ends up eroding the legitimacy of a defensible core of rights’ (90). This ‘defensible core’ is defined as those rights ‘that are strictly necessary to the enjoyment of any life whatever’ (90). Although it is hard to see what could be more necessary than food and shelter to such enjoyment, Ignatieff goes in the other direction, insisting that ‘civil and political freedoms are the necessary condition for the eventual attainment of social and economic security’ (90).

⁶³ *Ibid.* She attributes this position to Ignatieff by identifying his resistance to the right to food and shelter as a concern about a ‘metonymic slide’ into the land of socialism, where free enterprise would be limited.

⁶⁴ *Ibid.*, at 458.

been ‘chastened’, as David Kennedy puts it,⁶⁵ in part by human rights. And it has also arguably been legitimated by that same process.⁶⁶

Judging from the discourse of most states and international institutions since 1989, conceptions of rights that would challenge the liberal, individual, free-market model of human rights have had surprisingly little traction. A UN-sponsored website-based quiz on human rights called ‘Know Your Rights 2008’,⁶⁷ produced as part of the celebration of the 60th anniversary of the UDHR, is illustrative of the ways in which the human rights that have become accepted over the past 20 years are largely the same ones that could be found in the very western constitutions and declarations of independence on which some feared the UDHR was modelled, even while Laski and others in the ensuing years of the Cold War had tried to imagine a different type of rights. The website includes a quiz with 41 questions, ranging from when and where and by whom the UDHR was signed to today’s UN institutional structures on human rights.

Question 18 of the quiz asks, ‘To whom does the Universal Declaration of Human Rights apply?’. The three possible answers are:

- A. To each individual, regardless of gender, race, religion or cultural background.
- B. To everyone over the age of 18
- C. To all citizens of the European Union

There is no ‘all of the above’ option, and the website identifies answer A as the correct answer. The other 40 questions cover a number of treaties and conventions, issues ranging from disability and lesbian and gay rights to sex trafficking, and numerous institutions, including the Human Rights Council and the Human Rights Committee. Not one question, however, refers to the right to culture, collective rights, indigenous rights, or minority rights. As with the answer to question 18, rights adhere to individuals.

4 (Re)reading Indigenous Rights Advocacy after 1989

I now return to the question I have raised in a number of ways throughout this article: how might we explain the persistence of individual, liberal rights alongside the growing use and apparent acceptance of cultural and collective rights by indigenous peoples?

⁶⁵ See Kennedy, ‘The “Rule of Law,” Political Choices and Development Common Sense’, in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006), at 95.

⁶⁶ Anthropologist Charles Hale demonstrates, in the context of Guatemala, that neoliberal modernization and indigenous cultural rights often fit quite comfortably together in what he terms ‘neoliberal multiculturalism’: see Hale, ‘Does Multiculturalism Menace: Governance, Cultural Rights and the Politics of Identity in Guatemala’, 34 *J Latin American Studies* (2002) 485.

⁶⁷ ‘Universal Declaration of Human Rights: Take the Quiz’, available at: <http://html.knowyourrights2008.org/en/universal-declaration-of-human-rights/take-the-quiz.html> (last accessed 1 Feb. 2011).

I hope the narrative I have woven has suggested some responses. As the resistance by international institutions to recognizing the right to self-determination of indigenous peoples demonstrates, human rights seems less threatening to states and international institutions than external forms of self-determination. Though states allowed the language of self-determination in the UNDRIP, they did so only by ensuring that it would pose no threat to their territorial integrity.

The history of indigenous resistance also shows, however, that a simple application of individual civil and political rights to indigenous people (not peoples) would be insufficient. Thus, indigenous peoples argued early on for human rights that would ensure the group some forms of economic and political control; they largely did so through advocating for the right to culture or to collective property based on their cultural connection to it. As I hope to have demonstrated in sections 1 and 2, indigenous rights advocates had some victories but also some losses with this strategy.

To the extent that they have been successful, I would contend (and have argued in detail elsewhere) that advocates have often aided in the production of indigenous subjectivities that are limited in terms of whom they actually cover and in terms of what rights they permit.⁶⁸ Perhaps more importantly, however, indigenous rights advocates have often not been very successful in terms of gaining the recognition of rights that are in real tension with liberal, individual rights. That is, the former is nearly always subordinated to the latter.

Examples of this subordination can be seen in the same forums we have already considered. Recall that the Human Rights Committee, for example, has had a difficult time recognizing – or at least adjudicating on – anything more than an individual right to culture. Moreover, it has generally chosen the rights of individuals over groups when confronted with a conflict or even potential conflict between them.

Beyond subordinating collective rights to individual rights, the international law on indigenous rights has defined certain indigenous claims *out* of human rights. The Human Rights Committee's General Comment 23, for example, indicates that, for the most part, special provisions granted under Article 27 'must respect the [non-discrimination] provisions of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population'.⁶⁹ Similarly, ILO Convention No. 169, after setting out indigenous peoples' right to culture, attaches a proviso in an Article dealing with indigenous custom by granting indigenous peoples 'the right to retain their own

⁶⁸ I have discussed in detail the dark sides of the protection of culture as heritage, land, and development in Engle, *supra* note 2, at 148–161, 168–182, and 196–220.

⁶⁹ UN Human Rights Committee, CCPR General Comment No. 23, *supra* note 46, at para. 6.2.

customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights'.⁷⁰

Indigenous rights are thus defined, explicitly or implicitly, with what the literature on colonial law refers to as the 'repugnancy clause'. As Leon Sheleff explains, this clause was not presented 'merely, or even mainly, as being some sort of compromise between conflicting value-systems and their normative rulings, but as being an expression of minimum standards being applied as a qualification to the toleration being accorded (by recognition) to the basically unacceptable norms of "backward" communities'.⁷¹ Elizabeth Povinelli has discussed the contemporary resonances of this clause in Australian law's treatment of customary law, identifying an 'invisible asterisk' that 'hovers above every enunciation of indigenous customary law'.⁷²

Paragraphs (2) and (3) of Article 46 of the UNDRIP, as I suggested in section 1, threaten to function in the same way as the repugnancy clause. By subjecting the rights contained in the declaration to the vague standards of 'international human rights obligations' and 'justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith', the provisions offer states a way to define certain indigenous claims out of these categories, and to deny them accordingly.⁷³ In attempting to reconcile human rights and indigenous rights, they also reinforce the tensions between them.

Conclusion

Recall Harold Laski's 1947 statement that '[i]t would be better to have no declaration than one that was half-hearted and lacking in precision, or one which sought an uneasy compromise between irreconcilable principles of social action'.⁷⁴ He was, of

⁷⁰ International Labour Organization, Convention No. 169, *supra* note 50, Art. 8(2). The Inter-American Court has engaged in similar analysis. *Aloeboetoe v. Suriname*, e.g., is often cited as an example of the Court's jurisprudence respecting culture and local custom because the Court decided to 'take Saramaka custom into account' in defining the terms 'children', 'spouse', and 'ascendants' for the purpose of determining who would receive reparations for human rights violations. The decision includes a caveat, however: 'to the degree that it does not contradict the American Convention'. Thus, the Court determined that 'in referring to "ascendants," the court shall make no distinction as to sex, even if that might be contrary to Saramaka custom': Inter-American Court of Human Rights, *Aloeboetoe v. Suriname*, IACtHR Series C No 15, 1.2 IHRR 208 (1994), at para. 62.

⁷¹ L. Sheleff, *The Future of Tradition* (1999), at 123.

⁷² E. Povinelli, *The Cunning of Recognition* (2002), at 12.

⁷³ The 2010 International Law Association Report, *supra* note 18, at 11, sees it as obvious that 'cultural self-determination' would be limited by human rights. The examples it offers are not the ones likely to be at issue, however, making it unclear what it envisages as the scope of the exception: '[o]f course, cultural self-determination must be exercised in accordance with human rights standards as recognized by international law, especially those which – having attained the status of *ius cogens* (e.g., prohibition of torture or similar practices, enslavement, etc.) – are absolutely predominant even over the interests of the community at large'. Thus, like the UNDRIP itself, the report skirts the issue.

⁷⁴ Laski, *supra* note 57, at 92.

course, speaking of the UDHR, but he was also pointing to the deep ideological conflicts at the time (primarily in the context of the Cold War) that he argued needed to be confronted in the drafting of the declaration.

Arguably, the UDHR settled on the very uneasy compromise Laski decried, the legacy of which I would contend can be seen in the construction of indigenous rights. It is not surprising that human rights for indigenous peoples had their ascendancy after 1989, and that the paradigm within which they were framed was both enormously popular – making it hard to resist, particularly with the lack of state support for a strong form of self-determination – and apparently constrained.

Might we also apply Laski's words to the UNDRIP? I have indeed attempted to suggest that it has reached 'an uneasy compromise between irreconcilable principles of social action'. I also hope I have shown that the UNDRIP does not definitively resolve, but at best temporarily mediates, multiple tensions.

Most of the work that has been done on the declaration since its passage has been far from critical. It has attempted to bury old disagreements and focus on the implementation – through international legal and institutional mechanisms and domestic law – of the rights that it is seen to recognize.⁷⁵ Relatedly, while some argue that the declaration goes beyond other international legal instruments in terms of recognizing indigenous rights,⁷⁶ others insist that the declaration adds no new rights but rather is simply a statement of what already exists in customary international law.⁷⁷

I have on a number of occasions been encouraged to participate in the liberal interpretation project – to read the rights in the UNDRIP as broadly as possible, rather than recall the conflicts and tensions from the past. Indeed, one colleague told me directly that now is not the time for critique, as there is a need to shore up the 'fragile architecture' of the UNDRIP. I think his analogy is apt, given that fragile architecture suggests a flawed foundation. But I would argue that now is the time to expose, not hide or reinforce, that foundation. If we are willing to examine it critically, the UNDRIP may have the potential to become an important site for the ongoing struggle over the meaning of human rights, the dominance of human rights as the basis of justice, and the extent to which it might be mined or abandoned for alternative, transformative strategies.

⁷⁵ See, e.g., *Making the Declaration Work*, *supra* note 20; International Law Association, Committee on Rights of Indigenous Peoples, Interim Report (2010), *supra* note 18.

⁷⁶ See, e.g., *supra* text accompanying notes 16 and 21.

⁷⁷ See, e.g., Montes and Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, States and Societies' in *Making the Declaration Work*, *supra* note 20, 138, at 155 ('It is important to reiterate that the Declaration did not necessarily create new principles of international law but that it repeated and re-affirmed those already existing, which had already been recognised in international case law, in international instruments and in customary international law'); Anaya and Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist* (2007), available at: <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> (last accessed 1 Feb. 2011).