Introduction

Indigenous rights are currently at the forefront of the international human rights agenda. It is widely recognised that indigenous peoples are among the most marginalised and vulnerable around the world and their human rights situation is in need of urgent attention. International bodies have undertaken the challenge to help improve the situation of these communities. However, opinions differ about the relevant policies of states, the measures that must be taken and, ultimately, the rights that must be recognised as vested in these communities. Should they be given special protection? And to what extent? Should they have the right to decide on matters that affect them, even when such decisions affect the wider population of the state? This book will look at the responses that current international law offers to such questions.

These questions are already the focus of an ongoing international discussion, a discussion in which indigenous peoples have managed to secure a strong voice. Although dispersed around the world, their common characteristics and common history of oppression, discrimination and disrespect have led to shared claims at the international level. These communities would seem in the first instance unlikely protagonists of an international movement, because of their vulnerability, their scarce resources and the often limited modes of communicating with other communities due to different languages and poor transport.[1] Yet, since 1977 when over 150 indigenous representatives attended a United Nations conference on discrimination against their communities, indigenous peoples have been increasingly active at the international level. Through cooperation, they have succeeded to bring the claims of their communities to the forefront of the international agenda and to actively involve international

organisations in their struggle. Anghie questions whether the post-colonial world can 'deploy for its own purposes the law which had enabled its suppression in the first place'.[2] This is exactly what indigenous peoples are trying to do. In their quest for justice, indigenous representatives have placed a lot of faith in the United Nations and its international law. Through tight cooperation, intense lobbying and deep knowledge of the system, they have used openings in the organisation and have created new opportunities for their participation and further influence of the decision-making processes. Grounding their demands on the existing applicable human rights principles, they have articulated a vision for their communities that is different from other actors; a vision they have firmly framed in the language of international law.[3] Although indigenous peoples have not been part of the creation of international law, they have refused to stand on its periphery and have been determined to become equal partners in its evolution. In a relatively short time they have managed to get their voices heard, have shifted attitudes and initiated a wave of intense international support for their claims.

This wave of support has been an important factor for the establishment of several United Nations fora on indigenous issues. The most enduring has been the Working Group on Indigenous Populations (WGIP), widely viewed as a great success of the United Nations system. Established by the Sub-Commission in 1982, just after the Cobo study reported that indigenous peoples are separate peoples who have been denied their rights, the WGIP has been the first body in the international arena entrusted to review developments pertaining to the human rights of indigenous peoples and to give attention to the evolution of standards concerning indigenous rights.[4] The discussions of the group have substantially contributed to the better understanding of past experiences and contemporary claims of these communities and have initiated meaningful exchange of opinions between indigenous representatives and states. Attendance has been monumental for a group of this kind; each session has been attracting up to 700 individuals. The WGIP has been the only United Nations working group where the interested party has shown such commitment and enthusiasm. The WGIP has become an institution and a 'training field' for indigenous peoples.[5] Their representatives have constantly been pushing the boundaries for greater participation in the deliberations of the group and with the help of very supportive chairpersons, not least Erica-Irene Daes, the WGIP Chairperson from mid-1980s until very recently, they have achieved almost equal rights to those of states. From 1985 to 1993,

the group has been working towards a draft Declaration on the Rights of Indigenous Peoples (draft Declaration). After the text was adopted by the Sub-Commission, another working group of the then Commission on Human Rights was created to further elaborate the draft Declaration (Commission Drafting Group). Since the establishment of the Commission Drafting Group, the future of the WGIP has been questioned. Some commentators believe that it has a permanent role to play in securing recognition and protection of indigenous rights; others view it as a medium-term forum to be replaced gradually by the Permanent Forum on Indigenous Issues.[6] The future of the Group is further challenged by the recent changes in the UN structure. Still, the WGIP has been an essential platform on the international stage for indigenous peoples from all around the world to come together, articulate their claims and further a common vision about their status.[7]

The Commission Drafting Group has been meeting since 1995 to further elaborate the draft Declaration.[8] The polarisation of positions on important aspects of the text has had a disastrous effect on progress in adopting the draft Declaration. Agreement on the Declaration has not been reached in 2006; the process has taken much longer than originally anticipated by many and doubts about its eventual success have been expressed during the last few years. Yet, one must not forget the positives that have emerged from the process: international law's need to protect these communities has been widely accepted; indigenous active participation in the formation and setting up of such protection has also been agreed. Procedurally, indigenous peoples have strengthened their position: after endless pressure, indigenous representatives have been given the floor as frequently as states; they have been given access to informal consultations with governments; and their proposals have been included in the annual reports to the Commission. These are great steps both in general and in terms of the specific, given the high status of the Commission within the previous UN hierarchy, let alone its political nature. In assessing the work of the Commission Drafting Group, the unexpected changes in the opinions of states on controversial rights must also not be forgotten; such changes can be attributed to a degree to the understanding of indigenous peoples' positions reached after intense and lengthy discussions during the meetings of the Working Group. Such discussions have also exposed the lacunae in current international law concerning the protection of indigenous peoples and have even challenged the existing system of international human rights. Since its creation the basis of discussion was the text agreed by the

WGIP, but the text sent and adopted by the newly created Council of Human Rights in 2006 was diluted. The draft was not adopted by the General Assembly in November 2006. Indigenous suggestions for an alternative understanding of several principles of international law have caused profound discussions on issues concerning collective rights, special measures, land claims and restitution. At the core of the debate lies the right of self-determination and the question of whether indigenous peoples should enjoy it; its radical interpretation by indigenous groups has put into question the understanding of the right as well as its place in international law. These are the issues on which this book will focus, since they are the claims on which the transnational indigenous movement itself has chosen to focus.

Increasing awareness of indigenous issues strengthened the argument that a permanent platform for discussion and elaboration of indigenous issues was essential. The idea of a permanent forum, initiated by indigenous representatives, members of the WGIP and many member states of the United Nations, was put forward by the Vienna World Conference and was adopted by the United Nations General Assembly.[9] In April 2000, the Permanent Forum on Indigenous Issues (Permanent Forum) was established as a subsidiary body of the Economic and Social Council.[10] Contrary to both working groups, the Permanent Forum is a permanent body of the ECOSOC (thus very high in the United Nations hierarchy), whose mandate goes beyond human rights to include issues such as economic and social development, culture, the environment, education and health. The Forum has satisfied claims for sui generis status of indigenous peoples in the United Nations, claims justified on the basis of past injustices that such peoples have suffered[11] and the scale of their cultural differences measured against the populations living in the same states.[12] As indigenous peoples are not merely groups organised around particular issues, but long-standing communities with historically rooted cultures and distinct political and social institutions, it was argued that they should be entitled to have a presence in their own right in the international arena, rather than as representatives of a segment of the civil society.[13] The Permanent Forum consists of eight independent experts appointed by the governments and eight selected by indigenous peoples themselves;[14] this makes the Permanent Forum the first United Nations body whose membership extends beyond governments and independent experts. All these attributes create a valid argument for the Permanent Forum being the most significant step taken so far by the United

Nations to recognise indigenous peoples' real status.[15] Certainly, the Permanent Forum has made important recommendations on indigenous health; prior informed consent and participatory research guidelines; indigenous children and youth; collection of data; indigenous women; and matters related to poverty and development goals. However, it has been argued that the real difference this body could make would be in coordinating and evaluating all indigenous activities within the United Nations.[16] Such focus would address fears about duplication, conflicting programmes and waste of UN resources.[17]

The Permanent Forum works closely with the United Nations Special Rapporteur on the question of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen. Since the establishment of his post in 2001, the Special Rapporteur has reported on issues close to indigenous peoples' hearts. These include the impact of development projects; human rights issues in the administration of justice; education and language; and the implementation by member states of legislation related to indigenous peoples by the member states. Also, more so than in other fora, the Special Rapporteur has been able to address particular situations in countries, an opportunity linked to his several visits to member states.

The plethora of bodies on indigenous issues demonstrates the importance that the United Nations, and ultimately the international community, currently places on the protection of these communities. This is also reflected in the growing relevant academic literature that tackles indigenous issues in political theory,[18] specific regional indigenous situations and domestic indigenous cases.[19] In all such analyses, international law has been used to prove violations, to support arguments located in the realm of political theory, to analyse specific rights[20] and even to offer a radical vision of indigenous rights.[21] However, very few books engage in a comprehensive analysis of current international law standards relevant to indigenous claims.[22] This book contributes to this aspect of the debate. It evaluates the United Nations instruments that are devoted to the protection of indigenous peoples and assesses whether indigenous main claims, as recorded in the relevant United Nations fora, are consistent with current international standards. Several states and commentators argue that indigenous claims go beyond the existing standards and therefore cannot be accommodated. This book tests these views. It does not overlook that indigenous peoples have differing positions with respect to many issues; to claim otherwise would deny them their different cultures, histories and positions in the

world. However, in their variety of positions, indigenous peoples have agreed on some minimum rights that the international community must recognize. This book has tried to stay true to indigenous claims by widely using indigenous statements made in the United Nations fora.

Essentially, this book attempts to find a balance between an understanding of international law that neglects its dynamic nature and a picture of international law in defiance of any set rules. Finding its way through these opposing approaches, it looks for an accurate and realistic picture of how indigenous claims fit or could fit into current international law. The analysis also hopes to highlight that the relationship between indigenous peoples and international law is a mutually beneficial one: international law can help indigenous peoples as much as they have helped the evolution of that law. As already mentioned, the indigenous debate has initiated a re-evaluation of human rights standards and has obliged the international community to take a closer look at other meanings and applications. Although it may be doubtful whether 'it is possible to create an international law that is not imperial',[23] the indigenous debate has through an analysis of current standards initiated a discussion on important questions that had been considered answered in international law. It has also strengthened the image and possibility of global civil society.[24] Indigenous peoples around the world have consciously decided to use the United Nations as the main forum for the improvement of their situation and to use international law for the accommodation of their claims, although it was not formulated with their participation. Indigenous belief in the United Nations and international law pushes hard for the restoration of the credibility of the United Nations and the use of international law.[25]

In its attempt to offer a comprehensive discussion of the main indigenous claims, the analysis is divided in two parts. The first part focuses on the foundations of the indigenous debate in international law. Chapter 1 discusses the normative foundations of the indigenous claims. The preservation of indigenous identity through their recognition as collectivities has met states' reluctance. The debate about non-state identities has its own place within wider debates on cultural membership and its importance in the post-national world. The chapter looks for the responses of international law to the arguments and fears in this discourse, placed mainly within the realm of political philosophy. I argue that the protection of the different loyalties of the individual is as important as the protection of the individual herself. The analysis demonstrates that, indeed, indigenous claims for collective

rights have solid foundations in international norms and, contrary to some arguments, they can and should be accommodated. Conflicts with individual rights and other interests cannot be used as an argument for not recognising collective rights.

Chapter 2 discusses the legal foundations of indigenous rights. Indigenous rights can be deduced from general human rights instruments as well as minority instruments. Both have been analysed in general and with specific reference to indigenous peoples. Notably, Thornberry analysed extensively the general human rights instruments and their effectiveness in protecting indigenous rights.[26] Although these standards will be liberally used throughout this book, chapter 2 specifically examines the less analysed legal instruments that are devoted to the protection of indigenous peoples. Authors usually briefly refer to the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, No. 169 and totally ignore the ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, No. 107. Chapter 2 also pays particular attention to the monitoring bodies of these instruments, which offer interesting insight into the interpretation of the texts. Critics would query the value of a detailed dissection of ILO Convention No. 107; however, one must not neglect the fact that Convention No. 107 is in some states with large indigenous communities (including Bangladesh, Cuba, El Salvador, Ghana, India, Mexico, Paraguay and Tunisia) the only binding instrument that sets out specific obligations with respect to their indigenous communities. Also, a quick look at the work of the monitoring bodies reveals that the Convention is interpreted very much in accordance with the spirit of ILO Convention No. 169. Some critics would suggest that the ILO conventions are not so important, as they have only been signed by a limited number of states. However, these texts show the actual standards that exist in current international law affecting indigenous peoples. Even if signed by a relatively small number of states, the conventions are for indigenous communities an important political weapon, when faced with the inactivity of the state towards the protection of their rights. Chapter 3 touches upon the emerging law: the draft Declaration on the Rights of Indigenous Peoples. The draft Declaration recognises controversial rights, such as prohibition of cultural genocide, reparation of indigenous cultural objects and control of natural resources, issues that current international law has not yet tackled. The chapter examines whether these and other provisions of the draft Declaration fall within

the existing standards of international law. Such a lengthy analysis of the draft Declaration can become the object of criticism; after all, critics may suggest, it is a mere text, not an instrument as such. However, this would overlook the importance of the draft Declaration for indigenous peoples as well as its importance for the evolution of human rights standards in general.

Part 2 of the book focuses on important clusters of claims; and there is none more important for indigenous peoples than the right to self-determination. Self-determination has been the basis of the trans-national indigenous movement. Chapter 4 places the indigenous claims within the wider debate on the meaning and beneficiaries of self-determination. The chapter highlights the fact that since the inclusion of self-determination in the UN Charter its meaning has been evolving according to the needs of each period: initially, it was equated to decolonisation, then it included liberation from racist regimes, and lately it has incorporated democratic governance. The next stage of the right is not clear; the plethora of claims based on self-determination, the fear of secession and vague and inconsistent practice have complicated its application even further. International law does not give a precise answer as to whether indigenous peoples are the beneficiaries of the right. What would the recognition of an unqualified right of self-determination practically mean to indigenous peoples and sub-national groups in general? And how realistic is the expectation for such recognition? The chapter discusses such issues, drawing widely on the statements of states to show existing state practice.

Chapter 5 turns to the study of indigenous cultural rights; it first examines the existing protection of cultural rights in international law and then analyses issues that are of particular importance to indigenous peoples. Problems arise from the discrepancy between the indigenous understanding of culture as a way of life and the non-indigenous perception of culture as capital. Another challenge for international law poses the communal focus of indigenous claims for the protection of their culture and its clash with the individualistic approach of international law in protecting cultural objects. The chapter attempts to see whether there is some common ground and discusses the misappropriation and misuse of indigenous cultural heritage, the reparation of indigenous cultural objects and biodiversity rights.

In analysing indigenous land rights, chapter 6 draws from earlier chapters. As international human rights are very vague on property rights, indigenous land claims often use the right of self-determination,

or their right to culture or prohibition of discrimination as the legal basis for land rights. The chapter discusses these directions and uses national case law to highlight relevant state practice. The rights of indigenous peoples to collectively own land, to participate in decisions about their lands, to manage and use lands they have been living in and their rights to natural resources are discussed in depth; national practice is particularly essential in this theme.

Before embarking on the analysis, the scope of this book has to be defined. The definition of indigenous peoples is a controversial matter. States deny the indigenousness of some groups, as a way to avoid fulfilling their obligations towards them. Even though definitions have been advanced by international organizations, among others the International Labour Organisation (ILO)[27] and the World Bank,[28] there is no universally accepted definition of indigenous peoples. In fact, it is questionable whether a formal definition would be desirable. Historically, indigenous peoples have been subjected to multiple definitions and classifications imposed by others; they stress that their right to define themselves, rather than be defined by others, must be respected.[29] Indeed, self-determination has always been the fundamental criterion of identifying minorities and indigenous peoples. Apart from undesirable, a formal definition would also be futile.[30] International law refrains from sharp and tight definitions that may limit the flexibility of applying instruments to different circumstances.[31] For practical reasons and with the consent of indigenous representatives, the United Nations have adopted a working definition put forward by Martinez Cobo.[32] According to it:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of the society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[33]

The Cobo definition, which will be followed in this book, allows for some fluidity and lack of precision; indigenous peoples are recognised through a cluster of associated factors. Elements of indigenousness include: historical continuity with pre-invasion and pre-colonial societies; distinctiveness from the other sectors of the society;

non-dominance in the society; and determination to preserve, develop and transmit to future generations its ancestral territories and ethnic identity, in accordance with the group's cultural, social and legal systems. The historical continuity criterion requires: an extended period of occupation of ancestral lands reaching to the present; common ancestry with the original occupants of these lands; culture and/or specific manifestations, such as religion, history, oral traditions, customs; language; and other relevant factors.[34] Historical continuity is widely preferred to historical priority, as the latter would eliminate many groups in need of indigenous protection. This has been accepted by the United Nations which urges 'a broad geographical representation'[35] in indigenous activities 'in all the areas where indigenous peoples live ... Latin American countries, North America, Australia, Nordic countries, and Asian and Pacific countries'.[36] It is noteworthy that recent years have seen the participation of several African indigenous groups.

The recognition of indigenous rights is essential for the further survival and development of these communities. The subject is a large one that touches upon several disciplines and many different geographical areas. My hope is that this analysis contributes to the promotion of indigenous rights and the further evolution of international law away from its colonial and Eurocentric past towards a more inclusive and, ultimately, fairer international community.

Notes

1. A. Brysk, 'Turning Weakness into Strength: The Internationalization of Indian Rights' (1996) 32 *Latin American Perspectives* 38–57.
2. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), p. 8.
3. R. Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and its Impact on the Normative Development of International Law' (2004) 13 *Social and Legal Studies* 481–500.
4. ECOSOC Resolution 1982/34, 7 May 1982.
5. J. Scott, 'Indigenous Peoples and the Creation of an Inclusive International Legal System', Paper delivered at Carnegie Council on Ethics and International Affairs, New York, 14 April 2004.
6. See 'Future Role of the Working Group', Working paper submitted by Miguel Alfonso Martinez, Member of the Working Group, UN Doc. E/CN.4/Sub.2/AC.4/1993/10.
7. M. Dodson, 'Comment' in S. Pritchard, 'Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives'