**INDIGENOUS PEOPLES: FROM OBJECTS OF PROTECTION TO SUBJECTS OF RIGHTS**

**Felipe Gómez Isa**

1. **Introduction**

Indigenous peoples have lived through a process of invisibility and systematic exclusion practically ever since the era of conquest. The arrival of republican States in Latin America following the decolonization process did not involve a substantial change in the traditional relationship of subjection and submission endured by native peoples in the Americas. In the mid-twentieth century, the international community began to pay attention to the marginalized situation of indigenous peoples. The main objective was to integrate some peoples that were considered to be backward and in need of protection. It was within this paradigm that most of the interactions with indigenous peoples have occurred, such as the first international treaty adopted in this field, Convention No. 107 of the International Labour Organization (ILO, 1957). This situation began to change with the adoption of Convention No. 169 by the ILO in 1989, and especially with the recently adopted United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007). From this point onwards, indigenous peoples have moved from being considered as populations to be cared for and protected, to being regarded as peoples having their own particularities, with rights that deserve to be recognized and secured both domestically and internationally. This paper is aimed at analyzing this interesting albeit contradictory process of expansion of both norms and mechanisms to promote and protect indigenous peoples’ rights.

1. **Indigenous peoples under international law: from exclusion to inclusion**

Traditional international law has played a major role in the dramatic history of conquest, usurpation of indigenous peoples’ sovereignty, and dispossesion of their lands, territories and resources (Keal, 2003). The emerging international legal order in Europe became a powerful instrument in the hands of conquerors to dominate and subjugate indigenous peoples in the Americas (Anaya, 2004; Anghie, 2004). Since its inception, given the role played by the main European powers in its creation, and the subordinate position of indigenous peoples and other non-Western countries and societies, international law could be characterized as a hegemonic discourse and as a source of domination (Rajagopal, 2003). Accordingly, Elvira Pulitano (2012, 4) has referred to international law as “quintessentially Eurocentric”. At the same time, in a highly contradictory move, the so-called *Spanish School of International Law* (Scott, 1934), based on the Aristotelian and Thomist idea of the natural sociability and rationality of human beings, defended the essential humanity and freedom of the Indians in the context of the Spanish conquest of the Americas (Gómez Isa, 2015). The ideas of scholars such as Francisco de Vitoria or Bartolomé de las Casas opened the door to the consideration of the Indians as full human beings in need of protection (Carozza, 2003, 291). But, unfortunately, the Conquest of the Americas did not follow in practice the teachings of these precursors of contemporary human rights law.

This situation continued unaltered until very recently, when contemporary international law progressively changed its approach to indigenous peoples. But it is highly shocking that even in the first half of the twentieth century the West still believed that it was entrusted with a “civilizing mission” to save non-European peoples from ignorance and backwardness[[1]](#footnote-1). In line with this approach, the first international treaty adopted by the International Labour Organization (ILO) in 1957 to deal specifically with indigenous issues was still dominated by an assimilationist paradigm (Thornberry, 2002, 329-333). As stated in Article 2 of the Indigenous and Tribal Populations Convention (Convention No. 107, 1957), “Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their *progressive integration* into the life of their respective countries” [[2]](#footnote-2) (emphasis added).

The 1970s and the 1980s witnessed the so-called “indigenous emergence” (Bengoa, 2000; Brysk, 2000), and International law, particularly international human rights law, became a very powerful discursive resource for indigenous peoples to advance their demands both at domestic and at international fora. In Rhiannon Morgan’s view, “the global indigenous movement is just one example of a movement that has grasped the transformative, dynamic potential lodged in the discourse of human rights, drawing on its manipulability and malleability to foster the reform of human rights” (Morgan, 2011, 43). But the human rights discourse has also some inherent contradictions when approached from an indigenous perspective. We have to admit that the very idea of human rights has certain reminiscences of colonialism. Like colonialism, “human rights discourse contains implicit assumptions about the nature of civilized and backward societies… Concepts of civilization and savagery, rationality and passion, that were fundamental binaries of thinking during the imperialist era creep back into debates over human rights and social justice. The practice of human rights is burdened by a colonialist understanding of culture…” (Engle Merry, 2006, 226). Along the same lines, Makau Mutua (2009, 901) sees the way the most dominant proponents have constructed human rights as “part of the colonial project that forms the unbroken chain of the Christian missionary, the early merchant of capital, and the colonial administrator”.

At the same time, and as part of the process of empowerment of indigenous peoples, since the 1970s the United Nations has been increasingly receptive to the claims by indigenous peoples (Willemsen-Diaz, 2009, 16-31), opening institutional spaces and avenues for their participation and for the advance of their demands[[3]](#footnote-3). Indigenous peoples used the United Nations as a mobilizing structure to increase visibility of their marginalized position and to pursue some strategic goals in terms of recognition and protection (Bellier and Préaud, 2012, 474-488). In a sense, we witnessed a very promising process of *decolonisation* of both international law and the United Nations[[4]](#footnote-4). This process has allowed indigenous peoples to transform from solely victims to actors, and from objects of protection to subjects of rights, thus opening the door to their acquisition of some forms of international legal personality (Sambo Dorough, 2009, 265; Meijknecht, 2001). The culmination of this legal and institutional development is the creation of the UN Permanent Forum on Indigenous Issues in 2000, a unique body in which states and indigenous representatives participate on an equal footing (García-Alix, 2003), and, above all, the adoption of the UNDRIP in 2007. As the Committee on the Rights of Indigenous Peoples of the International Law Association has affirmed, all these developments demonstrate that “indigenous persons and peoples are back not only as fully entitled holders of individual human rights, but as collective actors with distinct rights and status under international law” (ILA, 2010, 2).

1. **Progressive recognition of indigenous people’s rights**

One of the most significant developments in the field of human rights in recent decades has been the gradual recognition of the rights of indigenous peoples, both in the domestic and in the international legal arenas. The ILO was the first international organisation to pay attention to the situation of marginalization and exclusion suffered by indigenous peoples. The adoption of ILO Convention 169 in 1989 substituting ILO Convention No. 107 (1957)[[5]](#footnote-5) was a relevant step forward for the recognition of indigenous rights (Rodríguez-Piñero, 2005), but states have been very reluctant to ratify it[[6]](#footnote-6). Against the background of the negative experience with the two existing ILO Conventions, the global indigenous movement established as a priority the adoption of a declaration of universal reach to recognize its rights. After a lengthy process of negotiation in which indigenous peoples themselves were the main drivers (Bellier, 2012), the UNDRIP was finally adopted on 13 September 2007 by the UN General Assembly by an overwhelming majority.

* 1. *The UNDRIP and historical injustices*

The adoption of the UNDRIP in 2007 reflects the deepest aspirations of the world’s indigenous peoples and their confidence in international law and human rights law as powerful tools to modify entrenched patterns of domination and exclusion that have affected indigenous peoples since colonial times (Glenn, 2011, 174). The very adoption of the UNDRIP can be interpreted as an attempt to repair historical wrongs suffered by indigenous peoples (Gómez Isa, 2011). Significantly, the wording of the Declaration includes an explicit reference to historical injustices. In the preamble of this Declaration, the General Assembly of the United Nations emphasized that

“indigenous peoples have suffered from *historic injustices* as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”[[7]](#footnote-7) (emphasis added).

In addition to the concern about historic injustices expressed by the General Assembly, we can also see a cause-effect link between colonization and the dispossession of land, territories and resources suffered by indigenous peoples in the past, and the inability to effectively exercise their right to development, the consequences of which are still being felt (Concha Malo, 2007, 321).

The substantive text of the Declaration contains a significant number of provisions on the right of redress for indigenous peoples, some of which have clear links to the past and to historical injustices. In this regard, Article 11 recognizes the right of indigenous peoples to “practise and revitalise their cultural traditions and customs”, which includes the right to “maintain, protect and develop the *past*, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies...” (emphasis added). Sometimes the enforcement of this right involves a process of restitution of property and objects that indigenous peoples were deprived of in the past. As stated in paragraph 2 of Article 11, “States shall provide redress through effective mechanisms, which may include restitution... with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”. Article 12, meanwhile, refers to the “repatriation of ceremonial objects and human remains” by the States that possess them.

Article 20 of the Declaration recognizes that “indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress”. Although this provision does not specify whether or not it refers to the hardship suffered by indigenous peoples in the past, it could be argued that past injustices largely explain the exclusions of the present and, therefore, indigenous peoples should be entitled to redress to that effect. In the same vein, Article 28.1 states that

“indigenous peoples have the right to redress, by means that can include restitution, or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or sued, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”.

Paragraph 2 of this provision details more types of redress that are relevant to the deprivation of land, territories and resources owned by indigenous peoples. Thus, “unless freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources in equal quality, size and legal status of monetary compensation or other appropriate redress”. As regards development projects related to lands, territories and other indigenous resources, Article 32.2 of the Declaration demands the “free and informed consent” of indigenous peoples before approval is given by the State, especially when a project involves “the use or exploitation of mineral, water or other resources”. In this context, paragraph 3 of Article 32 provides that “States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measure shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact”.

Another important provision from the point of view of the redress to which indigenous peoples are entitled is Article 15 of the Declaration, which deals with education and the media. As we have seen, in order to ensure that past abuses do not take place again, some aspects of indigenous cultures and worldviews have to be incorporated into the educational system and the media. In this regard, Article 15.1 states that “indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information”. To reinforce this right, “States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society”.

As has been seen, the right of indigenous peoples to compensation, including some key provisions to seek to ensure redress for historical injustices, is at the forefront of the UNDRIP, unlike other international instruments to protect indigenous peoples’ rights mentioned previously.

* 1. *The UNDRIP and existing International law*

To a great extent, many of the provisions embodied in the UNDRIP do not create new rights, but can be considered as a reaffirmation of existing customary international law (Anaya and Wiessner, 2007). As James Anaya (2008, 43), former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, has argued, the Declaration “reflects the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with, and expands upon, international developments, including the interpretations of other human rights instruments by international bodies and mechanisms”. The same conclusion can be found in a recent resolution adopted by the International Law Association (ILA, 2012, para. 2). According to this very authoritative opinion, “the 2007 UNDRIP as a whole cannot yet be considered as a statement of existing customary international law. However it includes several key provisions which correspond to existing state obligations under customary international law”. Among the norms of the UNDRIP that can be regarded as evidence of customary international law, the ILA included the following: the right of indigenous peoples to self-determination, autonomy and self-government; the right to participate in national decision-making with respect to decisions that may affect them; the right to free, prior and informed consent (FPIC) on projects significantly impacting their rights and ways of life; the right to cultural identity; the right to lands, territories and resources, including restitution of ancestral lands of which they have been deprived in the past; the right to establish their own educational institutions and media; and the right to reparation and redress for wrongs indigenous peoples have suffered.

This position was explicitly rejected by those states that voted against the UNDRIP (United States, Canada, Australia and New Zealand). The clearest opposition came from the United States (US), denying

“any possibility that this document is or can become customary international law... As this declaration does not describe current state practice or actions that states feel obliged to take as a matter of legal obligation, it cannot be cited as evidence of the evolution of customary international law” (United States, 2007).

The Canadian representative also shared this approach, when it stated that the Declaration “has no legal effect in Canada, and its provisions do not represent customary international”[[8]](#footnote-8). In the same vein, the Australian government emphasized that the UNDRIP “is an aspirational declaration with political and moral force but no legal force..., it is not intended itself to be legally binding or reflective of international law”[[9]](#footnote-9). While recognizing the relevance of the position of these states, we must underline that they “represent only a minority of states specially affected by the Declaration” (Barelli, 2009, 967). It seems quite clear that the position of these states would not be able to prevent the emergence of international customary law (Meza-Lopehandía, 2013, 466), but they probably could have been considered as persistent objectors, given that they opposed the text of the UNDRIP since the very early stages of its drafting. Although, fortunately for the cause of indigenous peoples, these 4 states have changed their official positions *vis-à-vis* the UNDRIP and have endorsed it, they have repeatedly reiterated that the Declaration is neither legally binding nor a statement of current international law. According to the US, “while not legally binding or a statement of current international law”, the Declaration “has both moral and political force”, and “expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples”[[10]](#footnote-10). Along the same lines, Australia declared that “while it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to”. And, more importantly from an international legal perspective, “Australia’s existing obligations under international human rights treaties are mirrored in the Declaration’s fundamental principles”[[11]](#footnote-11). Irrespective of the legal nuances expressed by these countries, we must recognize that these endorsements, an unprecedented move as regards an instrument of this nature, represents a clear signal of the growing acceptance of indigenous peoples’ rights as an integral part of the contemporary human rights regime[[12]](#footnote-12). In this sense, the words by the Minister of Maori Affairs of New Zealand when she announced its support to the UNDRIP are very illustrative: “New Zealand now adds its support to the Declaration both as an affirmation of fundamental rights and in its expression of new and widely supported aspirations”[[13]](#footnote-13).

* 1. *Legal Scope of the UNDRIP*

When trying to ascertain the legal value of the UNDRIP, three elements are of utmost importance: the circumstances of adoption of the instrument, the precision and normative nature of its content, and the existence of implementation mechanisms.

The adoption of the UNDRIP in 2007 is the result of more than twenty five years of intense and controversial negotiations in which indigenous peoples and their close allies achieved very significant levels of participation. We can affirm that the way in which this process was conducted, and the very positive outcomes, will eventually influence international norm-creation exercises in other areas of international law, in general, and international human rights law, in particular. H. Patrick Glenn (2011, 174) situates the Declaration as part of a broader movement of international law. In his view, the Declaration “would represent not simply a use or application of international law, in novel circumstances, but a major shift in the nature and direction of international law itself”. The inclusiveness of the process and the support from a number of bodies and instances within the UN, and from states themselves, provides the Declaration with high degrees of legitimacy that will definitely increase compliance.

The final vote on the UNDRIP at the UN General Assembly is also an indication of the international consensus around the document. As we know, 144 states voted in favour of the Declaration, 11 abstained[[14]](#footnote-14), and 4 voted against. An interesting evolution has taken place since 2007, and the 4 states that voted against have all endorsed the Declaration. Along the same lines, two of the abstaining states, Colombia and Samoa, have also made up their mind. This overwhelming support to the UNDRIP shows a clear commitment on the part of the international community to support the protection of the rights enshrined in the Declaration and promote compliance, and can be considered as a clear evidence of *opinio iuris* that, if accompanied by consistent state practice, may give rise to new rules of customary international law.

The final determining factor to calibrate the legal value of the UNDRIP is the existence of mechanisms for its implementation. The UNDRIP does not create specific follow-up mechanisms, but it relies on existing bodies both at international and at state level. The only body explicitly mentioned is the Permanent Forum on Indigenous Issues (PFII), thus placing it “at the forefront in ensuring the effective implementation of the Declaration” (Barelli, 2009, 978). In light of Article 42 of the Declaration,

“The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration”.

According to the interpretation developed by Luis Rodríguez-Piñero (2009,74-75), the main goal of this provision is “mainstreaming and operationalizing” the promotion of the rights enshrined in the Declaration within the activities of UN bodies, specialized agencies, regional organizations and states. Therefore, implementation measures of the UNDRIP will need to be taken at three parallel and inte-related levels: international, regional, and national.

At the *international level*, it must be acknowledged that a high number of UN bodies and specialized agencies are increasingly using the UNDRIP as a *parameter of reference* when interpreting international legal standards and their mandates. First of all, the mechanisms created to specifically address indigenous issues refer explicitly to the UNDRIP as an interpretive guide. Given the relevant coordinating role of the PFII aimed at mainstreaming indigenous issues throughout the whole UN system[[15]](#footnote-15), its position is key for the implementation of the UNDRIP. In its 2008 session, the PFII welcomed the adoption of the Declaration and stated that it will be “its legal framework” (UN Permanent Forum on Indigenous Issues, 2008)[[16]](#footnote-16). Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (SR) was also entrusted with the mandate of promoting the UNDRIP (Human Rights Council, 2007), and it has worked very hard to make it possible. As James Anaya (2008, para. 85), former SR, stated, the UNDRIP

“represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law… The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples”.

Finally, the recently created Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is also a body that can significantly contribute to the implementation of the UNDRIP. Given its technical and advisory function as a body composed by 5 independent experts, the EMRIP is in a “privileged position to contribute to promoting authoritative interpretations of the standards of the Declaration” (Rodríguez-Piñero, 2009, 334).

The UN human rights treaty bodies have also gradually interpreted the human rights conventions incorporating indigenous peoples’ rights (Thornberry, 2002, 116), and more recently they have referred explicitly to the UNDRIP as a parameter of reference when interpreting the international human rights legal standards. Along these lines, the recent World Conference on Indigenous Peoples invited the human rights treaty bodies “to consider the Declaration in accordance with their respective mandates”, and encouraged states “to include… information on the situation of the rights of indigenous peoples, including measures taken to pursue the objectives of the Declaration, in reports to those bodies” (World Conference on Indigenous Peoples, 2014, para 29).

At the *regional level*, both the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights[[17]](#footnote-17) are using the UNDRIP as one of the legal basis for their findings and decisions. The UNDRIP, and the positive vote by Suriname at the UN General Assembly, were used by the Inter-American Court of Human Rights in its judgement on *Saramaka People vs. Suriname[[18]](#footnote-18)*, a case in which the Court affirmed the indigenous peoples’ rights over land, territories and natural resources. The Court affirmed that states have the obligation “to obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories”[[19]](#footnote-19). This is a very far-reaching decision, since the Court is implicitly recognizing that these standards are operative principles of international law irrespective of the normative scope of the Declaration and despite the fact that the state involved in this specific case is not a party to ILO Convention 169.

The African Commission on Human and Peoples’ Rights (ACHPR) has also been open to incorporate the UNDRIP in the legal framework it has to apply. Just some two months after the approval of the UNDRIP, the ACHPR welcomed its adoption and stated that “the Declaration will become a very valuable tool and a point of reference for its efforts to ensure that promotion and protection of indigenous peoples’ rights on the African continent”[[20]](#footnote-20). In a memorable decision dated May 2009[[21]](#footnote-21), the African Commission stated that the forcible eviction of the Endorois people from their traditional lands near Lake Bogoria by the Government of Kenya without prior consultation and with no provision for compensation was a violation of a number of rights under the African Charter on Human and Peoples’ Rights (ACHPR) and under the UNDRIP (Borraz, 2013).

At the *national level*, indigenous peoples’ rights have also been gradually recognized both at the legislative and at the judicial level[[22]](#footnote-22), opening avenues for their effective implementation. First of all, many states, especially in Latin America, have gone through constitutional changes to incorporate indigenous peoples’ rights. The most significant development took place in Bolivia[[23]](#footnote-23), where a law[[24]](#footnote-24) was adopted to explicitly incorporate the UNDRIP in its domestic legal system. At the judicial level, both the Colombian Constitutional Court (Gómez Isa, 2014), the Constitutional Court of Peru[[25]](#footnote-25) and the Supreme Court of Belize have used the UNDRIP in some of their decisions. It is worth noting that the Supreme Court of Belize issued “the first court judgment ever to apply the UNDRIP… barely a month after its adoption” (Campbell and Anaya, 2008, 377). The Supreme Court referred specifically to Belize’s vote in favour of the UNDRIP as a clear commitment on future compliance in the *Case of the Maya Villages of Belize*. As stated by the Supreme Court, “General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them”[[26]](#footnote-26). And the Court continues emphasizing that “it is of some signal importance… that Belize voted in favour of the Declaration”[[27]](#footnote-27). Finally, the Court is of the view that Article 26 of the UNDRIP reflects “the growing consensus and the general principles of international law on indigenous peoples and their lands and resources”[[28]](#footnote-28).

In sum, there is a significant emerging practice at international, regional and domestic level that constitute a solid basis to defend that the UNDRIP has become a parameter of reference when interpreting and applying indigenous rights, and that at least some of the key provisions of the UNDRIP have already become customary international law, or are in the process of emerging as new rules of customary law.

1. **Conclusions and the way forward**

Indigenous peoples have used contemporary international law and international institutions as very close allies in their struggle for recognition and in their efforts to put an end to historically-rooted patterns of subjugation, dispossession and cultural assimilation. As part of this evolution, indigenous peoples have become subjects of rights under international law rather than objects of protection, thus becoming protagonists of a far-reaching process of expansion of human rights. The UNDRIP, adopted in 2007 by the UN General Assembly has to be seen as the culmination of a long and difficult journey in which indigenous peoples themselves and their representatives have been the driving force and key participants. Irrespective of the uncertain legal nature of the UNDRIP *per se*, one can conclude that it has become an unavoidable parameter of reference when dealing with indigenous peoples’ rights. The recent experience of UN bodies, specialized agencies, human rights treaty bodies, regional human rights courts and commissions, and some domestic courts, clearly shows the strong persuasive authority and the interpretive function of the UNDRIP. The challenge ahead is to systematically mainstream the provisions of the Declaration into the routines of those bodies, thus paving the way for its effective implementation both at the international and at domestic levels.

**References**

* Anaya, James (2004), *Indigenous Peoples in International Law,* Oxford: Oxford University Press.
* Anaya, James (2008), *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, UN Doc. A/HRC/9/9, 11 August.
* Anaya, James and Wiessner, Siegfried (2007), ‘The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowement’, *Jurist*, 3 October, in <http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>.
* Anghie, Antony (2004), *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press.
* Anna Meijknecht, Anna (2001), *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Oxford: Intersentia.
* Barelli, Mauro (2009), ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’, *International and Comparative Law Quarterly*, 58 (4), pp. 957-983.
* Barume, Albert (2009), ‘Responding to the Concerns of the African States’, in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work. The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen: IWGIA, pp. 170-183.
* Bellier, Irène (2012), ‘Les peuples autochtones aux Nations Unies: un nouvel acteur dans la fabrique des normes internationales’, *Critique Internationale*, 54 (1), pp. 61-80.
* Bellier, Irène and Préaud, Martin (2012), ‘Emerging Issues in indigenous rights: transformative effects of the recognition of indigenous peoples’, *The International Journal of Human Rights*, 16 (3), pp. 474-488.
* Bengoa, José (2000), *La emergencia indígena en América Latina*, México: Fondo de Cultura Económica.
* Borraz, Patricia (2013), ‘The Endorois case: Indigenous Peoples’ Rights in the African regional human rights system’, in Loreto Ferrer and Patricia Borraz (eds), *Indigenous Peoples’ Human Rights in Domestic Courts*, Madrid: Almaciga, pp. 211-216.
* Brysk, Alison (2000), *From Tribal Village to Global Village. Indian Rights and International relations in Latin America*, Stanford: Stanford University Press.
* Burger, Julian (2009), ‘Making the Declaration Work for Human Rights in the UN System’, in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work. The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen: IWGIA, pp. 304-313.
* Campbell, Maia and Anaya, James (2008), ‘The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights’, *Human Rights Law Review*, 8 (2), pp. 377-399.
* Carozza, Paolo G. (2003), ‘From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights’, *Human Rights Quarterly*, 25, pp. 281-313.
* Clavero, Bartolomé (2008), *Nota sobre el Alcance del Mandato contenido en el Artículo 42 de la Declaración sobre los Derechos de los Pueblos Indígenas y el Mejor Modo de Satisfacerlo por parte del Foro Permanente para las Cuestiones Indígenas*, UN Doc. E/C.19/2008/CRP.6, 26 March.
* Collingwood-Whittick, Sheila (2012), ‘Australia’s Northern Territory Intervention and indigenous rights on language, education and culture: an ethnocidal solution to Aboriginal ‘dysfunction’?’, in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration*, Cambridge: Cambridge University Press, pp. 110-142.
* Concha Malo, Miguel (2007), ‘Lucha por la dignidad y los derechos humanos individuales y colectivos de los pueblos de América Latina’, in Reyes Mate (ed), *Responsabilidad Histórica. Preguntas del nuevo al viejo mundo*, Barcelona: Anthropos, pp. 313-332.
* Engle Merry, Salle (2006), *Human Rights and Gender Violence. Translating International Law into Local Justice*, Chicago: The University of Chicago Press.

García-Alix, Lola (2003), *The Permanent Forum on Indigenous Issues*, Copenhagen: IWGIA.

* Glenn, Patrick (2011), ‘The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples’, in Stephen Allen and Alexandra Xanthaki (eds), Reflections on the UN Declaration on the Rights of Indigenous Peoples, Oxford: Hart Publishing, pp. 171-182.
* Gómez Isa, Felipe (2011), ‘Repairing Historical Injustices: Indigenous Peoples in Post-Conflict Scenarios’, in Gaby Oré Aguilar and Felipe Gómez Isa (eds), *Rethinking Transitions. Equality and Social Justice in Societies Emerging from Conflict*, Cambridge-Antwerp: Intersentia, pp. 265-300.
* Gómez Isa, Felipe (2014), ‘Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights’, *Human Rights Quarterly*, 36 (2), pp. 722-755.
* Gómez Isa, Felipe (2015), ‘The First Cry for Justice in the Americas-From Antonio de Montesinos to the Laws of Burgos (1512)’, in Markku Suksi *et al* (eds.), *First Fundamental Rights Documents in Europe. Commemorating 800 Years of Magna Carta*, Cambridge: Intersentia, pp. 93-105.
* Human Rights Council (2007), Resolution 6/12, 28 September.
* International Law Association (2012), Resolution No. 5/2012, 75th Conference of the ILA, Sofia, 26-30 August.
* International Law Association (2010), *Rights of Indigenous Peoples*, Report of the Hague Conference.
* International Law Association (2010), *Rights of Indigenous Peoples*, Interim Report, The Hague Conference.
* Keal, Paul (2003), *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, New York: Cambridge University Press.
* Meza-Lopehandía, Matías (2013), ‘El Derecho Internacional de los Derechos Humanos y los Pueblos Indígenas’, in José Aylwin (coord), *Los Pueblos Indígenas y el Derecho*, Santiago de Chile: LOM Ediciones, pp. 441-521.
* Morgan, Rhiannon (2011), *Transforming Law and Institution. Indigenous Peoples, the United Nations and Human Rights*, Farnham: Ashgate.
* Mukwiza Ndahinda, Felix (2011), *Indigenousness in Africa: A Contested Legal Framework for Empowerment of Marginalised Communities*, The Hague: Asser Press.
* Mutua, Makau (2009), ‘The Transformation of Africa. A Critique of the Rights Discourse’, in Felipe Gómez Isa and De Feyter (eds), *International Human Rights Law in a Global Context,* Bilbao: Deusto Univesity Press, pp. 899-924.

Pahuja, Sundhya (2011), *Decolonising international law. Development, economic growth and the politics of universality*, Cambridge: Cambridge University Press.

* Pulitano, Elvira (2012), ‘Indigenous rights and international law: an introduction’, in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration*, Cambridge: Cambridge University Press, pp. 1-25.
* Rajagopal, Balakrishnan (2003), *International Law from Below. Development, Social Movements and Third World Resistance*, Cambridge: Cambridge University Press.

Rodríguez-Piñero, Luis (2005), *Indigenous Peoples, Post-colonialism and International Law. The ILO Regime (1919-1989)*, Oxford: Oxford University Press.

* Rodríguez-Piñero, Luis (2009), ‘La ‘implementación’ de la Declaración: las implicaciones del Artículo 42’, in Natalia Álvarez; Daniel Oliva and Nieves Zúñiga (eds), *La Declaración sobre los derechos de los pueblos indígenas. Hacia un mundo intercultural y sostenible*, Madrid: Los Libros de la Catarata, pp. 65-106.
* Rodríguez-Piñero, Luis (2009), ‘Where Appropriate: Monitoring/Implementing of Indigenous Peoples’ Rights under the Declaration’, in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work. The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen: IWGIA, pp. 314-343.
* Sambo Dorough, Dalee (2009), ‘The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation’, in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work. The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen: IWGIA, pp. 264-279.

Schilling-Vacaflor, Almut and Kuppe, René (2012), ‘Plurinational Constitutionalism: A New Era of Indigenous-State Relations?’, in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices*, Farnham: Ashgate, pp. 347-370.

* Scott, James Brown (1934), *The Spanish origin of International Law: Francisco de Vitoria and his law of nations*, London: Clarendon Press.
* Thornberry, Patrick (2002), *Indigenous Peoples and Human Rights*, Manchester: Manchester University Press.
* UN Permanent Forum on Indigenous Issues (2008), “Report of the Seventh Session”, UN Doc. E/C.19/2008/23.

United States (2007), “Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples: Explanation of Vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly”, 13 September.

* Viljoen, Frans (2012), *International Human Rights Law in Africa*, Oxford: Oxford University Press.

Willemsen-Diaz, Augusto (2009), ‘How Indigenous Peoples’ Rights Reached the UN’, in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work. The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen: IWGIA, pp. 16-31.

* World Conference on Indigenous Peoples (2014), *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2, 22 September.

1. This is the essence of some provisions found in the *Covenant of the League of Nations* (1919), the constitutive treaty of the first international organization. According to Article 22, a provision that has to be read in a colonial context, “to those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by *peoples not yet able to stand by themselves* under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a *sacred trust of civilization*…” (emphasis added). [↑](#footnote-ref-1)
2. Besides, ILO Convention No. 107 refers to indigenous “populations” instead of peoples. The recognition as true peoples and nations is one of the main claims of the global indigenous movement. [↑](#footnote-ref-2)
3. A number of bodies were created to deal specifically with indigenous issues (Working Group on Indigenous Peoples; Working Group on a Draft Declaration on indigenous peoples’ rights; Permanent Forum on Indigenous Issues; Special Rapporteur on the rights of indigenous peoples, and Expert Mechanism on the Rights of Indigenous Peoples). The General Assembly of the UN also proclaimed two consecutive UN Decades on Indigenous Peoples (1994-2003, and 2005-2014). The UN Permanent Forum on Indigenous Issues has recently called for a Third International Decade of the World’s Indigenous Peoples. In its view, “over the course of the two Decades, we have seen some progress… However, we need to ensure and reinvigorate momentum to genuinely implement the UN Declaration… A Third Decade can provide a framework and consolidate clear milestones for the achievement of the UN Declaration…”, *A Third International Decade of the World’s Indigenous Peoples*, United Nations Permanent Forum on Indigenous Issues, Dalee Sambo Dorough, Chairperson, 7 November 2014, in http://www.un.org/esa/socdev/unpfii/documents/Communication-UNPFII%20Chair-3decade.pdf. [↑](#footnote-ref-3)
4. Post-1945 international law and institutions have been used by the West (an imagined community itself) to construct and impose a new set of rational truths based on particular values, norms and socio-political organizations that were defined as universal. Post-colonial studies have demonstrated that international law and institutions, among many other structures of power, were used by the West to maintain its hierarchies and modes of domination. Indigenous peoples’ struggles have aimed to decolonize both the theory and practice of the “ideological-institutional complex” known as international law. On this challenging processes see the illuminating essay by Sundhya Pahuja (2011). [↑](#footnote-ref-4)
5. 27 states ratified this convention. Since the adoption of ILO Convention 169, Convention 107 is no longer open for ratification. However, it is still in force in 18 countries that have not ratified yet Convention 169. [↑](#footnote-ref-5)
6. As of January 2016, only 22 states have ratified ILO Convention No. 169 (Argentina, Plurinational State of Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Bolivarian Republic of Venezuela), in http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\_INSTRUMENT\_ID:312314. [↑](#footnote-ref-6)
7. Paragraph 6 of the Preamble. [↑](#footnote-ref-7)
8. UN Doc. A/61/PV.107, 13. [↑](#footnote-ref-8)
9. Ibid, 12. [↑](#footnote-ref-9)
10. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, 16 December 2010, in <http://www.state.gov/documents/organization/184099.pdf>. A very similar position was expressed by the Canadian government. In its view, “… the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws… In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration… These concerns are well known and remain. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework”, *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, 12 November 2010, in http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142. [↑](#footnote-ref-10)
11. *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, in http://www.un.org/esa/socdev/unpfii/documents/Australia\_official\_statement\_endorsement\_UNDRIP.pdf [↑](#footnote-ref-11)
12. A less optimistic view has been expressed by some scholars. In relation to Australia’s endorsement, “it remains to be seen whether the international legislation underpinning the UNDRIP can be brought to bear on Australia, or whether the current government’s endorsement of UNDRIP is indeed little more than an empty gesture designed to enhance the country’s reputation in the eyes of the world” (Collingwood-Whittick, 2012, 136). [↑](#footnote-ref-12)
13. *Statement by Hon Dr Pita Sharples, Minister of Maori Affairs, Announcement of New Zealand’s support for the Declaration on the Rights of Indigenous Peoples*, 19 April 2010, in http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-19-April-2010.php. [↑](#footnote-ref-13)
14. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine. [↑](#footnote-ref-14)
15. In 2002, the *Inter-Agency Support Group on Indigenous Issues* (IASG) was created to support the PFII in the goal of promoting dialogue and cooperation between UN bodies and agencies dealing with indigenous issues. The IASG is composed by 31 bodies, departments, funds and agencies of the UN (Burger, 2009, 309-310). [↑](#footnote-ref-15)
16. Some members of the PFII have claimed that, given the special legitimacy and radical novelty of the UNDRIP, it should have some legally binding effects. This view has been expressed, among others, by Bartolomé Clavero (2008, 9), for whom “although the Declaration is not a treaty between states, it constitutes a convention or covenant between states and peoples, between the member states of the United Nations and indigenous peoples”. [↑](#footnote-ref-16)
17. On the conflicting emergence of indigenous peoples’ rights in the African context see Viljoen (2012) and Mukwiza Ndahinda (2011). On the position of African States *vis-à-vis* the process of adoption of the UNDRIP and the UNDRIP itself see Barume (2009). [↑](#footnote-ref-17)
18. Inter-American Court of Human Rights, *Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, Judgement of 28 November 2007, Series C No. 172, paras. 131 and 138. [↑](#footnote-ref-18)
19. Ibid, para 129. [↑](#footnote-ref-19)
20. ACHPR, Resolution 121 (XXXXII) on the UN Declaration on the Rights of Indigenous Peoples, 28 November 2007. [↑](#footnote-ref-20)
21. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003, para. 232. The African Commission relied to a great extent on the indigenous jurisprudence of the Inter-American Court of Human Rights, in a clear example of cross-fertilization between regional human rights systems. [↑](#footnote-ref-21)
22. Countries that have affirmed the right of indigenous peoples to their cultural identity, their cultural rights, land rights, right to autonomy and participatory rights include Argentina, Australia, Bangladesh, Botswana, Brazil, Cambodia, Canada, Chile, Colombia, Costa Rica, India, Laos, Malaysia, Mexico, New Zealand, Nicaragua, Norway, Paraguay, Peru, South Africa and Taiwan, among many others (ILA, 2010, 49-50). [↑](#footnote-ref-22)
23. The new Constitutions of Bolivia (2009) and Ecuador (2008) are leading examples of a new wave of constitutionalism known as *plurinational constitutionalism*. See Almut Schilling-Vacaflor and René Kuppe (2012). [↑](#footnote-ref-23)
24. *Ley 3760 de los derechos de los pueblos indígenas*, 7 November 2007. [↑](#footnote-ref-24)
25. The Constitutional Court of Peru has also referred to ILO Convention 169, the jurisprudence of the Inter-American Court of Human Rights and the UNDRIP to reaffirm the rights of indigenous peoples to their lands and territories in the *Tres Islas indigenous community Case*, Sentencia del Tribunal Constitucional, Exp. No. 01126-2011-HC/TC, 11 September 2012, para. 23. [↑](#footnote-ref-25)
26. *Manuel Coy, Maya Village of Conejo, Manuel Caal, Perfecto Makin, Melina Makin Claimants v. Attorney General of Belize, Minister of Natural Resources, and Environmental Defendants*, Supreme Court of Belize, 18 October 2007, para. 131. [↑](#footnote-ref-26)
27. Ibid. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)