

## Indigenous Peoples' Right to Self-Determination in International Law

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The international human rights regime has proven to be fluid. Over time it has been shaped and reshaped to accommodate the demands of various groups as they gain international recognition. With a population of approximately 370 million people across more than seventy countries, indigenous peoples are an important part of this process.<sup>1</sup> Indigenous communities tend to live at the bottom of the social order, where they have been subject to discrimination and exploitation for centuries.<sup>2</sup> Since the 1970s, their demands have gained unprecedented international attention.<sup>3</sup> Throughout their struggles, indigenous peoples have based their claims on one principle: the right to self-determination.<sup>3</sup> This paper will show that indigenous peoples' right to self-determination, the very foundation of their rights in international law, has been contested by states that have equated it with a right to secession. Today, although more states have formally recognized indigenous self-determination, inconsistent implementation reveals a lack of consensus about what it entails.

### The Right to Self-Determination: An Evolution

The concept of self-determination did not evolve in the context of indigenous rights. It first gained international recognition immediately after the First World War, becoming especially relevant in the context of decolonization, ultimately leading to the emergence of multiple independent states.<sup>4</sup> Several international instruments, including the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Political Rights (ICESCR), have affirmed the right to self-determination.<sup>5</sup> It is widely considered a principle of customary international law, sometimes even a *jus cogens* norm.<sup>6</sup> Both the ICCPR and the ICESCR define self-

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<sup>1</sup> Siegfried Wiessner, "Indigenous self-determination, culture, and land: a reassessment in light of the 2007 UNDRIP," in *Indigenous Rights in the Age of the UN Declaration*, ed. Elvira Pulitano, 37.

<sup>2</sup> Prakash Louis, *Indigenous People's Struggles for Self-Determination* (New Delhi: Gyan Pub. House, 2012), 15. <sup>3</sup> Odette Mazel, "The Evolution of Rights: Indigenous Peoples and International Law," *Australian Indigenous Law Review* 13 (2009): 144.

<sup>3</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (Cambridge: Cambridge University Press, 2007), 8.

<sup>4</sup> Jennifer E. Dalton, *International Law and the Right of Indigenous Self-Determination* (Kingston: Queen's Institute of Intergovernmental Relations, 2005), 5.

<sup>5</sup> Mazel, 142-143.

<sup>6</sup> Isabelle Schulte-Tenckhoff, "Treaties, Peoplehood, and Self-determination," in *Indigenous Rights in the Age of the UN Declaration*, ed. Elvira Pulitano (Cambridge: Cambridge University Press, 2012), 77.

determination as a right of “all peoples.”<sup>7</sup> Yet it was initially difficult for indigenous peoples to take advantage of this right because interpretations applied it only to whole populations of states, whereas indigenous peoples generally form subpopulations.<sup>8</sup> Thus, for many decades the right to self-determination was inaccessible to indigenous peoples.

Over time, international law evolved to recognize indigenous peoples as beneficiaries of this right. Throughout the 1970s, as much of the decolonization process subsided, the international community contemplated whether the scope of the right to self-determination could be expanded.<sup>9</sup> In 1970, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations began to do so by applying it to people under “racist regimes.”<sup>10</sup> In 1989, the International Labour Organization (ILO) adopted the Convention on Indigenous and Tribal Peoples (Convention No. 169). Although it does not use the term ‘self-determination,’ the provisions of the Convention amount to a protection of this principle.<sup>12</sup> It was not until 2007, however, that self-determination was explicitly granted to indigenous peoples by a major international instrument: the United Nations Declaration on Indigenous Peoples (UNDRIP).<sup>11</sup> Article 3 of the Declaration states: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>12</sup> Gradually, indigenous self-determination became recognized under international law.

It also became increasingly common for traditional human rights instruments to be applied to indigenous peoples. The UN Human Rights Committee now examines government reports regarding indigenous policies in light of the ICCPR’s affirmation of self-determination in Article 1.<sup>15</sup> Furthermore, in these reports governments themselves use this article to assess their own policies towards indigenous peoples.<sup>16</sup> In addition to monitoring compliance, the Committee, along with the Inter-American Court on Human Rights, have heard indigenous peoples’ complaints on several occasions.<sup>13</sup> In the landmark case of the *Awás Tingni Community v. Nicaragua* in 2001, the Inter-American Court was the first to order a state to uphold the collective land and resource rights of indigenous peoples in a legally binding

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<sup>7</sup> Erica-Irene A. Daes, “The Right of Indigenous Peoples to “Self-Determination” in the Contemporary World Order,” in *Self-Determination: International Perspectives*, ed. Donald Clark and Robert Williamson (New York: St. Martin’s Press, 1996), 49.

<sup>8</sup> Xanthaki, *UN Standards*, 137.

<sup>9</sup> *Ibid.*, 147.

<sup>10</sup> *Ibid.*, 138.

<sup>12</sup> Anaya, 48.

<sup>11</sup> Mazel, 147.

<sup>12</sup> UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc, A/RES/61/295 (2007), art 3.

<sup>15</sup> James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), 157. <sup>16</sup> Xanthaki, *UN Standards*, 173.

<sup>13</sup> Anaya, 163, 167.

decision.<sup>14</sup> Today, self-determination serves as the basis for all other indigenous rights in international law. Article 3 of UNDRIP has been referred to as the pillar upon which all indigenous rights rest.<sup>15</sup>

According to James Anaya, indigenous self-determination can be expanded into five categories of rights: non-discrimination, cultural integrity, lands and resources, social welfare and development, and self-government.<sup>16</sup> The first two categories are similar to the rights of minorities under international law, but indigenous peoples are typically considered to have more extensive rights than minorities in order to remedy their history of assimilation.<sup>17</sup> Each of these categories imposes obligations on states. The right to non-discrimination, considered “a minimum condition for the exercise of self-determination,” is affirmed by various human rights instruments and considered customary international law.<sup>18</sup> Convention No. 169 and UNDRIP require governments to take steps to eliminate discrimination towards indigenous peoples.<sup>19</sup> The right to cultural integrity, which includes language, religion, and property rights, has led the Human Rights Committee and the Inter-American Court of Human Rights to make several decisions favourable to indigenous peoples.<sup>20</sup> Land and resource rights are found in Articles 13 to 15 of the ILO Convention.<sup>21</sup> Social welfare and development rights, included in the ILO Convention and UNDRIP, require states to establish special projects to promote improvements in indigenous peoples’ living conditions.<sup>22</sup> Finally, the right to self-government requires states to provide spheres of governmental autonomy for indigenous communities while ensuring their participation in decisions affecting them.<sup>27</sup>

### **Internal versus External Self-Determination**

In the past, states have resisted granting the right to self-determination to indigenous peoples, fearing that it implied a right to secession.<sup>23</sup> When drafting UNDRIP, several states stressed the incompatibility of this right with the principle of territorial integrity,<sup>24</sup> and consequently the right to self-determination only applied to whole populations of states.<sup>25</sup> Some insisted that the right had a fixed

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<sup>14</sup> James S. Anaya and Claudio Grossman, “The Case of *Awas Tingni v. Nicaragua*” *Arizona Journal of International and Comparative Law* 19 (2002): 2.

<sup>15</sup> Xanthaki, *UN Standards*, 131.

<sup>16</sup> Anaya, 97.

<sup>17</sup> *Ibid.*, 100; Dalton, 12.

<sup>18</sup> Anaya, 97.

<sup>19</sup> *Ibid.*, 98.

<sup>20</sup> *Ibid.*, 100, 103.

<sup>21</sup> *Ibid.*, 105-106.

<sup>22</sup> *Ibid.*, 107.

<sup>27</sup> *Ibid.*, 110.

<sup>23</sup> *Ibid.*, 49.

<sup>24</sup> Xanthaki, *UN Standards*, 140.

<sup>25</sup> Alexandra Xanthaki, “Indigenous Rights in International Law Over the Last 10 Years and Future Developments,” *Melbourne Journal of International Law* 10.1 (2009): 30.

meaning in international law, namely political independence.<sup>26</sup> The Japanese government said that the right could not be applied outside the context of decolonization.<sup>27</sup> Evidently, interpreting self-determination as implying a right to secession has been the primary motivation for state denial of its application to indigenous peoples.<sup>28</sup>

Fear of secession has even made states reluctant to define indigenous communities as a ‘peoples.’<sup>29</sup> The term ‘peoples’ has no clear definition in international law.<sup>30</sup> While drafting Convention No. 169, some states argued that the term only applied to communities entitled to the full range of sovereign powers, including independent statehood.<sup>31</sup> Consequently, the UN Working Group on Indigenous Populations (WGIP) intentionally avoided using the term in its title.<sup>32</sup> The United States, for example, typically prefers using minority rights language in instruments regarding indigenous rights.<sup>33</sup> In 1990, ambiguity over the definition of ‘peoples’ allowed the Canadian government, in *Lubicon Lake Band v. Canada*, to successfully argue that the Lubicon Lake Band were not a people and could therefore not claim the right to self-determination (although the Human Rights Committee found the government to be in violation of various other indigenous rights).<sup>34</sup> States have thus used the ambiguity of what constitutes a ‘people’ to resist recognizing indigenous self-determination.

In reality, international law currently only recognizes indigenous peoples’ right to internal – not external – self-determination.<sup>35</sup> Whereas external self-determination is peoples’ right to freely determine their international status, including the option of political independence,<sup>36</sup> internal self-determination, on the other hand, is their right to freely determine their form of government and participation in the processes of power.<sup>37</sup> Secession, then, is just one remedy of self-determination.<sup>38</sup> International law generally recognizes the possibility of legitimate secession only under certain restrictive circumstances, including where internal self-determination is impossible.<sup>39</sup> In the particular case of indigenous self-determination, however, Anaya asserts that international law does not favour the formation of new

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<sup>26</sup> Xanthaki, *UN Standards*, 146.

<sup>27</sup> *Ibid.*

<sup>28</sup> Anaya, 49.

<sup>29</sup> Dalton, 7.

<sup>30</sup> *Ibid.*, 6.

<sup>31</sup> Anaya, 48.

<sup>32</sup> Mazel, 155.

<sup>33</sup> Xanthaki, *UN Standards*, 133.

<sup>34</sup> Anaya, 163-164.

<sup>35</sup> Dalton, 3.

<sup>36</sup> Mazel, 151.

<sup>37</sup> *Ibid.*

<sup>38</sup> Anaya, 80.

<sup>39</sup> Daes, 52.

states.<sup>40</sup> In the *Miskito Indians* case of 1982, the Inter-American Commission on Human Rights concluded that the indigenous right to self-determination could not be used to undermine territorial integrity.<sup>41</sup> Apparently, international law does not recognize a right to secession for indigenous peoples.

International instruments clearly state this limitation. Several states refused to agree to the self-determination provision in UNDRIP unless it came with an explicit reference to territorial integrity.<sup>47</sup> Accordingly, Article 46 of UNDRIP states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.<sup>42</sup>

Similarly, Convention No. 169 specifies: “The use of the term ‘peoples’ in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”<sup>43</sup> The inclusion of these provisions is intended to reassure states about their fear of secession.

Nonetheless, the law remains ambiguous enough to worry governments. Even if secession is only recognized under very limited circumstances, states know that using the term ‘self-determination’ makes the option more legitimate. Article 46 of UNDRIP arguably leaves the door open for secession as a legitimate remedy if an indigenous people are denied meaningful access to government.<sup>44</sup> There has not yet been a case in which an indigenous group has been granted a right to secession. The vast majority of indigenous peoples prefer to achieve self-determination internally.<sup>45</sup> However, events in the last few decades have shown that the international community does not rule out secession in all cases.<sup>46</sup> The breakup of Yugoslavia and the Supreme Court of Canada’s conclusions in the *Quebec Reference Case* indicate a trend towards increasing acceptance of this option.<sup>47</sup> It remains unclear whether an indigenous people could be entitled to independence as a remedy under any circumstances. Thus, despite a

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<sup>40</sup> Anaya, 80-81.

<sup>41</sup> H. Hannun, “The Protection of Indigenous Rights in the Inter-American System,” in *The Inter-American System of Human Rights*, ed. D.J. Harris and S. Livingstone (Oxford: Clarendon Press, 1998), 330.

<sup>47</sup> Xanthaki, *UN Standards*, 175-176.

<sup>42</sup> A/RES/61/295 (2007), art 46.

<sup>43</sup> ILO, *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 76th ILC, Geneva (1989), art. 1.

<sup>44</sup> Wiessner, 45.

<sup>45</sup> Mazel, 151.

<sup>46</sup> Daes, 53.

<sup>47</sup> *Ibid.*

willingness to grant indigenous peoples many of the rights associated with internal self-determination, states have preferred to avoid the term itself.

The *Miskito Indians* case shows that even international bodies have resisted using the term ‘self-determination’ in the context of indigenous peoples. In 1982, the Miskito peoples complained to the Inter-American Commission on Human Rights that the government of Nicaragua has violated their human rights, including their right to self-determination.<sup>48</sup> The Commission specifically denied them their right to self-determination, concluding that international law did not recognize any ethnic group as beneficiaries.<sup>49</sup> Notwithstanding, the Commission did recognize the Miskito peoples’ ability to develop freely in economic and cultural spheres.<sup>50</sup> Evidently, the Commission was prepared to affirm the indigenous right to internal self-determination, despite refusing to use the term itself. This shows the controversy surrounding self-determination as a result of its association with the right to independent statehood.

### **Recent Progress and New Challenges**

Today, most states have formally recognized indigenous peoples as beneficiaries of the right to self-determination.<sup>51</sup> UNDRIP has been accepted by 148 states. Australia, Canada, New Zealand, and the United States initially rejected the Declaration but have subsequently reversed their positions.<sup>52</sup> Government statements to WGIP and other bodies over the past two decades prove that states agree that indigenous peoples are entitled to control their economic, political, and social destinies.<sup>53</sup> In their statements at the 1993 World Conference on Human Rights in Vienna, Colombia, Finland, Russia, and others publicly recognized indigenous self-determination.<sup>54</sup> Such widespread acceptance demonstrates how fear of secession has largely been overridden by the increasingly powerful human rights movement. Although states may still worry about secession, they have at least moved to recognize the indigenous right to self-determination in principle.

Yet there remains no legal obligation on most states to implement it. Convention No. 169 is legally binding but has only been ratified by twenty-two countries (not including Canada, Australia, New

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<sup>48</sup> Anaya, 88.

<sup>49</sup> Xanthaki, *UN Standards*, 139.

<sup>50</sup> Anaya, 88.

<sup>51</sup> Mazel, 152.

<sup>52</sup> *Ibid.*

<sup>53</sup> Anaya, 147.

<sup>54</sup> *Ibid.*, 80-81.

Zealand, or the United States).<sup>55</sup> UNDRIP, although widely accepted by states, is not legally binding. Nor does the Declaration reflect customary international law in its entirety, since there is an evident lack of *opinio juris*. For example, when Canada accepted UNDRIP in 2010, its government stated that “the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws.”<sup>56</sup> Indigenous self-determination may be regarded as customary international law, but only to the extent that states accept that they have an obligation to provide *some minimum standards* of self-determination to indigenous peoples.<sup>57</sup> What exactly those standards are is contested.<sup>58</sup> The Canadian government is one of many that continues to express concerns with several UNDRIP provisions. Furthermore, the following paragraphs will show that there is also insufficient state practice to regard each of these provisions as international customs. Hence, even if states are legally bound to respect indigenous self-determination as a principle of customary international law, it is unclear what exactly that entails.

Although most states have incorporated indigenous self-determination into their domestic systems in some way, the degree of implementation varies significantly. Variation in government policies reflects a lack of consensus about precisely what obligations the right to indigenous self-determination imposes on states. In 2002, the governments of Canada, Australia, Russia, and New Zealand argued that they could not accept indigenous self-determination because they cannot consent to obligations that are not predetermined and clear.<sup>59</sup> Without legally binding standards, domestic implementation of indigenous self-determination is bound to vary. Concurrently, variation in state practice makes it clear that achieving agreement on binding international standards is, at the present moment, improbable.

Implementation of indigenous land rights is an example of the inconsistencies in state practice. Land is an integral part of indigenous peoples’ ability to achieve internal self-determination. According to Article 25 of UNDRIP, “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>60</sup> Anaya claims that certain minimum standards of indigenous land rights have become

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<sup>55</sup> ILO, “Ratifications of C169 - Indigenous and Tribal Peoples Convention,” accessed February 7, 2015, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314).

<sup>56</sup> Government of Canada. “Canada’s Statement of Support on the United Declaration on the Rights of Indigenous Peoples.”

<sup>57</sup> Anaya, 56.

<sup>58</sup> *Ibid.*, 82.

<sup>59</sup> Xanthaki, *UN Standards*, 151.

<sup>60</sup> A/RES/61/295 (2007), art 25.

customary international law.<sup>61</sup> One would expect, then, that state practice demonstrate relative consensus on the need for effective indigenous access to traditional lands.

Yet the degree of domestic implementation of indigenous land rights is far from being uniform. Some states, like Vietnam, currently do not recognize land ownership for any groups within the state, preventing indigenous peoples from making land claims.<sup>62</sup> Others, such as Thailand, only allow individual ownership of land.<sup>63</sup> The Philippines, Cambodia, Russia, and Ecuador each recognize collective land ownership but have yet to establish systems of implementation.<sup>71</sup> Some states have mechanisms that, however inefficient, were created to help indigenous peoples claim traditional lands.<sup>64</sup> Panama, for example, established the National Directorate for Agrarian Reform for this purpose.<sup>65</sup> Such inconsistent state practice indicates that the minimum standards of indigenous land rights are far from being agreed upon.

Even the Nordic countries, which share the same indigenous community, the Sámi, lack a common system for securing land titles. In Norway, the Finnmark Act of 2005 successfully transferred ninety-five percent of the landmass of Finnmark County from the state to local ownership.<sup>66</sup> In contrast, Swedish courts make it extremely difficult for the Sámi to obtain ownership by requiring proof of a minimum of ninety consecutive years of use of that land.<sup>67</sup> Finally, in Finland, ninety percent of Sámi homeland is legally owned by the government.<sup>68</sup> Hence, even among similar countries, there is no consensus on what the minimum standards of indigenous land rights are.

The point here is not that all governments should adopt the same legislation. Differences in national policies may be partly a result of differences in political cultures, as well as differences in the situations of each indigenous population. On the other hand, many indigenous communities face similar problems. For instance, indigenous peoples in Panama, Scandinavia, and throughout Asia have all complained that hydroelectric projects have altered their traditional lands.<sup>69</sup> More importantly, it is the *degree of compliance* that varies. Some states have made extensive efforts to integrate indigenous rights

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<sup>61</sup> Anaya, 107.

<sup>62</sup> Xanthaki, *UN Standards*, 244.

<sup>63</sup> *Ibid.*, 245.

<sup>71</sup> *Ibid.*, 252.

<sup>64</sup> UN Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous Peoples: The status of indigenous peoples' rights in Panama*, UN Doc. A/HRC/27/52/Add.1 (2014), 10.

<sup>65</sup> *Ibid.*

<sup>66</sup> UN HRC, *Report of the Special Rapporteur on the rights of Indigenous Peoples: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*, UN Doc, A/HRC/18/35/Add.2 (2011), 13.

<sup>67</sup> *Ibid.*, 14.

<sup>68</sup> *Ibid.*, 15.

<sup>69</sup> *Ibid.*; UN HRC, *Report of the Special Rapporteur on the rights of Indigenous Peoples: Consultation on the situation of indigenous peoples in Asia*, UN Doc, A/HRC/24/41/Add.3 (2013), 8; A/HRC/27/52/Add.1, 11.

into their domestic legal systems. The Nordic countries, for example, have created Sámi Parliaments.<sup>70</sup> Others, like Namibia, still lack a coherent government policy regarding the protection of their indigenous peoples.<sup>71</sup> Clearly, even if states have agreed to indigenous self-determination in principle, there is no agreement on what specific obligations this entails.

In conclusion, a great deal of work must be done before indigenous peoples around the world are able to achieve the full realization of their right to self-determination. There is no question that they are far closer to that goal today than they were thirty years ago. Formally, most states have acknowledged indigenous self-determination, and many have also implemented various aspects of it domestically. The principle itself has even been considered customary international law. Yet there is also no denying that indigenous peoples continue to face marginalization in the territories in which they live. This paper has shown that states' fear of secession, which had previously been the principal obstacle for the transnational indigenous movement, has largely given way to greater acceptance of indigenous self-determination. Nevertheless, without a legally binding set of international standards, inconsistencies in state practice remain. Given the pace at which the international human rights regime has evolved, it would not be unreasonable to expect greater convergence in this regard.

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<sup>70</sup> A/HRC/18/35/Add.2, 11.

<sup>71</sup> UN HRC, *Report of the Special Rapporteur on the rights of Indigenous Peoples: The situation of indigenous peoples in Namibia*, UN Doc, A/HRC/ 24/41/Add.1 (2013), 7.

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