

Kamrul Hossain¹:

Status of Indigenous Peoples in International Law

1. Introduction

The concept of the rights of 'indigenous peoples' has emerged relatively recently. At the end of the Second World War the strong influence of accepting human rights as a norm in international law saw adoption of number of international and regional documents that focus on human rights and fundamental freedom for all. The norm, however, did not see any presence of the precise terms 'indigenous peoples'. At some point there was utterance of minority rights which meant ethnic, religious and linguistic minority in a country.² However, the term - 'minority' is not defined anywhere in international law. As for indigenous peoples, in some few countries they form the majority whereas mostly they comprise small minorities in most of the other countries. To that extent one may argue that indigenous peoples belong to 'minority' revealed in the human rights documents. It is estimated that the number of indigenous peoples are around 300-500 million in all across the world. They embody and nurture 80% of the world's cultural and biological diversity, and occupy 20% of the World's land surface.³ Most identical amongst the indigenous peoples is that they are concerned with preserving land, protecting language and promoting culture. In addition, they also strive to preserve traditional ways of life. It is said that all indigenous peoples in the world have one thing in common - they share a history of injustice. They have been denied the right to participate in governing process of their own territories and resources. Conquest and colonization have attempted to steal their dignity and identity as indigenous peoples, as well as their fundamental right of self-determination.⁴

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² See Article 27 of the International Covenant on Civil and Political Rights.

³ See 'Study Guide: The Rights of Indigenous Peoples', University of Minnesota Human Rights Center (2003).

⁴ See *ibid.*

When indigenous peoples form a distinct community with their distinct identity than that of the other ethnic, minority, linguistic and/or religious groups they deserve to be entitled to have special attention in international law. Since 1980s they apparently came into existence with strong voices to be included in the international legal regime. Thus, the article investigates into the position of indigenous peoples in international law, first with defining who the indigenous peoples are. Secondly, the article looks into the norm of self-determination - which is an established principle in international law that ensures the existence of an entity in the international legal regime. In this part the article will also look into the concept of 'peoples' and whether indigenous peoples belong to the group termed as 'peoples'. At the same time, an interpretation of human rights treaty rules on self determination and the approaches taken by the Human Rights Committee (HRC) to that end will also be included in the discussion. But at the first place, who may claim to be belonging to the indigenous community is a decisive factor to deal with - that follows in the section below.

2. Defining Indigenous Peoples

Generally, the first nation of the territory is treated as indigenous community. The most cited definition, to understand who indigenous peoples are, has been introduced by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which states:

“Indigenous communities, peoples and nationals 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 on those territories, or parts of them. They form at present non-dominant sectors of 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 system.”⁵

The Cobo definition further continues to mean historical continuity as consisting of the presence of one or more of the following factors: a. occupation of ancestral lands, or at least of part of them; b. common ancestry with the original occupants of these lands; c. culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d. language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e. residence on certain parts of the country, or in certain regions of the world; f. other relevant factors. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.⁶

There have been two other definitions that arguably include 'indigenous peoples' while the 'people' as such forms the minority. Special Rapporteur Francesco Capotorti suggested the following: 'A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.'⁷ Another definition is that provided by Jules Deschenes, Special Rapporteur to the Commission on Human Rights (Resolution 1984/62): 'A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the

⁵ See 'The Concept of Indigenous Peoples', a background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues (2004), UN PFII/2004WS.1/3, available at: <http://www.un.org/esa/socdev/unpfi/documents/PFII%202004%20WS.1%203%20Definition.doc> (12.11.2006).

⁶ See 'Study of the Problem of Discrimination against Indigenous populations', Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379.

⁷ 'Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities', Sub-Commission on the Promotion and Protection of human Right, UN Doc. E/CN.4/ Sub.2/384/Rev.1 (1979).

population, having a sense of solidarity with one other, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law'.⁸

The longer history on the definition of indigenous peoples, however, has apparently been focused in the debate in International Labour Organization (ILO). The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) of 1989, which entered into force on 5 September 1991, in article 1 put forwarded the concept of 'indigenous and tribal peoples'.⁹ No formal definition of indigenous peoples, however, was invoked in the Convention.

Nor was any such definition found in the Proposed Organization of American States (OAS) Declaration on the Rights of Indigenous Peoples. Article I (1), however, states the target groups to whom the Declaration applies. It provides that the Declaration applies to indigenous peoples as well as peoples whose, social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.¹⁰

Working Group on Indigenous Peoples was not successful either to introduce any formal definition as such.¹¹ In the fifteenth session of the Working Group in 1997, it was concluded that definition of indigenous people was not at that time possible, and certainly was not

⁸ 'Proposal Concerning a Definition of the Term 'Minority', Sub-Commission on the Promotion and Protection of human Right', UN Doc. E/CN.4./Sub.2/985/31 (1985). For a general treatment, see Eyassu Gayim, *The Concept of Minority in International Law: A Critical Study of the Vital Elements*, 27 *Juridica Lapponica* (2001) 14.

⁹ Article 1 of the Convention (ILO Convention No. 169) states: 1. This Convention applies to: a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. See Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989), available at: <http://www.unhchr.ch/html/menu3/b/62.htm> (07.01.2007).

¹⁰ See Proposed American Declaration on the Rights of the Indigenous Peoples, Approved on 26 February 1997, available at: <http://www.cidh.oas.org/Indigenous.htm> (01.12.2006).

¹¹ Working Group on Indigenous Populations, however, includes specific reference to indigenous peoples' 'distinctive cultural characteristics which distinguish them from the prevailing society in which they live'. See UN ECOSOC, E/CN.4/Sub.2/AC.4/1995/3, 1995.

necessary for the adoption of the Draft Declaration on the Rights of Indigenous Peoples.¹² However, article 8 of the Draft Declaration stated that indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characters, including the right to identify themselves as indigenous and to be recognized as such. Despite the lack of formal definition there has been a steady evolution in normative development towards a greater recognition of indigenous rights that can be described as remarkable.

3. Self-Determination of Indigenous Peoples

Self-determination of indigenous peoples is connected with the term - 'peoples'.¹³ In international law only 'peoples' have the right to self-determination. To discuss more on the right to self-determination of indigenous peoples, an analysis of the concept of 'peoples' is worth mentioning here. Discussion is thus as follows:

a) Concept of 'Peoples' and the Indigenous Peoples

The notion of 'peoples', in line with the terms - 'indigenous' and 'minority', has also not been formally defined in international law.¹⁴ Generally, indigenous peoples use the term 'peoples' for themselves because of their association with inherent recognition of a distinct identity. Many of whom had their land occupied long before the colonised peoples of Africa and Asia, have started to demand that their right as 'peoples' to self-determination. The logic of decolonisation, which applies to most of the indigenous peoples, as they, too, have been colonised at various times. However, most states feel discomfort to recognise indigenous peoples as 'peoples' because of the fear that such recognition may help the indigenous peoples claim the right of secession and independent statehood.¹⁵ Those states would prefer the term

¹² Both observers from indigenous organizations and the governmental delegations were of this common position. See *supra* n. 4.

¹³ See for example, common article 1 of ICCPR and ICESCR (1966).

¹⁴ See John B. Henriksen, 'Oil and gas operation in Indigenous peoples lands and territories in the Arctic: A Human Rights perspective', 4 *Journal of Indigenous Peoples Rights* (2006) p. 26.

¹⁵ The political actions of both states and indigenous peoples have produced a new institutional framework through a reiterative and reflexive discourse. Within this framework, indigenous peoples must fit into these normative understandings of both 'indigenous' and 'people', to meet the requirements for self-determination and other rights under international law. See Scott Forrest, 'Indigenous Identity as a Strategy for Cultural Security', Arctic Center, available at http://www.nrf.is/Publications/The%20Resilient%20North/Plenary%204/3rd%20NRF_plenary%204_Forest_YR_paper.pdf (17.12.2006).

'tribes' or 'populations' to mean indigenous peoples.¹⁶ However, a widely used definition by the United Nations to identify 'peoples' is as follows:¹⁷

1. A group of individual human beings who enjoy some or all of the following common features: a) Common historical tradition; b) Racial or ethnic identity; c) Cultural homogeneity; d) Linguistic unity; e) Religious or ideological affinity; f) Territorial connection; g) Common economic life;
2. The group must be of a certain number which need not be large but which must be more than a mere association of individuals within a State;
3. The group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that group or some members of such groups, through sharing the foregoing characteristics may not have that will or consciousness; and possibly;
4. The group must have institutions or other means of expressing its common characteristics and will for identity.

The definition could be fit for indigenous people, and thus, could be interpreted that indigenous peoples are included within the meaning of 'peoples' since they form a distinct community with common historical and traditional community and/or with linguistic, religious and cultural community who have a territorial connection and common economic life. There have been, however, a debate emerged whether the 'peoples' should mean to understand the whole population of a particular state, or there might be several 'peoples' in a single state.¹⁸ If the latter assumption is upheld, would such peoples have the right to decide their state affiliation?¹⁹ In other words, do these peoples have right to 'absolute' self-determination (in

¹⁶ See *supra* n. 2.

¹⁷ See 'Final Report and Recommendations of the International Meeting of Experts on further study of the concept of the rights of peoples', Unesco, Paris 27-30 November 1989, available at: <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf> (22.01.2007).

¹⁸ Human Rights Committee considers that the right to dispose over natural resources as indicated in article 1(2) of ICCPR applies to peoples of multi-ethnic states, which means that one state may consist of several people. This view was adopted by the Committee when dealing with the country report from Canada when country's own Supreme Court had first affirmed that several 'peoples' may exist within one state. See Geir Ulfstein, 'Indigenous Peoples' Right to Land', 8 *Max Planck Yearbook of United Nations Law* (2004) p. 6; see also Martin Scheinin, 'Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights', Norwegian Centre for Human Rights (2004), available at: http://www.galdud.org/govat/doc/ind_peoples_land_rights.pdf (13.02.2007).

¹⁹ See Geir Ulfstein, *ibid* at 4.

other words right to claim sovereignty)?²⁰ Identification of self-determination is greatly complex. Despite the understanding of self-determination in the particular context of decolonization, the norm accounts for governments' concerns that recognizing a group's right to self-determination may legitimize secession.²¹ The fact is that self-determination may conceive both 'external' and 'internal' phenomena; 'external' – to enjoy political freedom, which may include absolute power in the decision making by the 'peoples' concerned, and 'internal' – to enjoy certain special rights connected to the resource belonging to the 'people' concerned.

Thus, the term self-determination accepts two concepts: one is the 'political dimension' with sovereign rights free from any outside interference, and the other is 'resource dimension' which establish the control over the resources attached to the territory. However, self-determination – whether it applies beyond the colonial context has been much discussed. The process of decolonisation – although it opened the way to self-determination of all peoples – was curtailed at the outset by stipulating physical distance from the home territory of the occupying power (the so called 'salt-water criterion') as the standard for defining the peoples that enjoy the right to self-determination. The only – and most important – thing with regard to the indigenous peoples is that most of them are located in the home territory of their occupier, which makes a difference here in terms of the decolonisation process.

However, the right to self-determination as described in the context of decolonization is not intended to be a right to which indigenous peoples would be entitled in separation from the rest of the population of the territories they inhabit.²² For indigenous peoples, their co-existence amongst the several other 'peoples' within a state would perhaps designate them as 'peoples' because of their distinct identity, and their historic and inherent rights would thus include the right to internal self-determination meaning the self-management of their

²⁰The debate remains the most contested issue in the discussion of the United Nations draft declaration on the rights of indigenous peoples. In that debate, two dimensions of this right have been clearly delineated: one external as the right to international personality and/or to secede from existing states, and another internal as the right to autonomy over local affairs and government, including land and natural resources. See Marcos A. Orellana, 'Indigenous peoples, Mining and International Law', available at: http://www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf (09.01.2007).

²¹ See Caroline E. Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples', 12 *European Journal of International Law* (2001) p.143. The language of self-determination has been employed in certain specific contexts: the self-determination of dependent or colonial peoples and of peoples under alien domination or foreign military occupation; the self-determination of racial groups suffering oppression in the nature of apartheid

²² *Ibid* at 145.

traditional resources and the customary ways of livelihood. As such, apparently the indigenous peoples themselves upheld two approaches in their legal argumentation. Firstly, they claim the status of 'nations' predating existing states, and thus trumping the sovereignty of states. Secondly, they accept the sovereignty of states, but argue for rights within the framework of international human rights law.²³ Therefore, conclusion could be drawn, taking two arguments as inter-twined, that historic rights of indigenous peoples predating the existing states may strengthen their human rights arguments as special within the sovereign states.²⁴

b) Human Rights Instruments on Self-determination

The international legal instruments refer to the right of self-determination that, the right belonging to 'all peoples'. It is embodied in the Charter of the United Nations and the two international Covenants adopted in 1966, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Political Rights (ICESCR). With regard to the right to self-determination belonging to indigenous peoples, the ICCPR is of particular importance, especially with respect to articles 1 and 27 of the Covenant. Article 1 common to both ICCPR and ICESCR states:

1. All 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.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

²³ Geir Ulfstein, *supra* n. 17 at 3.

²⁴ "Indigenous peoples have a very special relationship with their lands, territories and natural resources. The relationship with the land and all living things is often the core of indigenous societies." See Erica-Irene A. Daes, 'Indigenous Peoples' Rights to Land and Natural Resources', in *Minorities, Peoples and Self-Determination*, (eds.) Nazila Ghanea and Alexandra Zanthaki (2005); supportive argument may also be found in the formulation of the principle of self-determination in the United Nations Charter occurs in the context of the objectives of the organization, rather than in the context of decolonization. It must also be noted that United Nations General Assembly declarations and resolutions that address the issue of decolonization emphasize that the right to self-determination should not be used to disrupt the unity of the state or its territorial integrity. See Marcos A. Orellana, 'Indigenous peoples, Mining and International Law', available at: http://www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf (25.02.2007).

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Thus, article 1(1) affirms the political dimension of right of self-determination, whereas article 1(2) stipulates an economic or resource dimension that, people concerned may, for their own ends, freely dispose of their natural wealth and resources, and in no case may a people be deprived from its own means of subsistence. Article 27 of the ICCPR is to be addressed here as well. It is already established in the interpretation undertaken by the HRC that, groups identifying themselves as indigenous peoples generally fall under the protection of article 27 as 'minorities'. At least some of them constitute 'peoples' for the purposes of article 1 and are beneficiaries of the right of self-determination.²⁵ The practice of the Human Rights Committee accepted the view that since indigenous peoples are entitled to protection as minority under article 27 of the Covenant, these groups that are ethnically, linguistically, geographically, historically and politically – all things considered – sufficiently distinct from the dominant population to qualify as 'peoples' under public international law, are entitled to the right of self-determination under ICCPR article 1.²⁶ However, the ultimate form of exercising the right of self-determination - unilateral secession - is not available to indigenous peoples.²⁷

c. Stance taken by Human Rights Committee

The interpretation and opinion of the Human Rights Committee on indigenous peoples' right to self-determination under article 1 of the ICCPR have been expressed in many of its communications with regard to both country report submitted by the state concerned and the cases brought before it. The first optional protocol of 1966 to the Covenant, in article 1, states that the Committee receives and considers communication only from the individuals who are the victim of the violation of the rights under the ICCPR, in recent events however, the Committee has persistently undertaken the view that the indigenous peoples have collective

²⁵ See Martin Scheinin, *supra* n. 17.

²⁶ See *ibid.*

²⁷ *Ibid.*

right of self-determination within the meaning of article 1 of ICCPR; and at the same time article 27 of the Covenant provides that indigenous peoples as minority enjoy the traditional and cultural rights in community with other members of the group. The Committee while asking for the country report from the member states on the observance of the Covenant stated that it 'considers it highly desirable that States parties' reports should contain information on each paragraph of article 1',²⁸ which contains the right of self-determination. The Committee's pronouncements in the Concluding Observations based on the reports submitted by countries which reflect an understanding that at least certain indigenous groups qualify as 'peoples', under article 1.²⁹ This approach was first made explicit in the Committee's concluding observations on Canada.

The HRC, since 1999, commented on article 1 in connection with the mandatory country reporting under article 40 of the Covenant, which expresses its position that self-determination is of particular importance in order to guarantee protection, and the development of the individual and collective human rights. The Committee has expressed its concern, and provided with suggestions on the reports submitted by the states. For example, the Committee asked Canada after it has filed the periodic report in 1999, to report adequately on the implementation of article 1 of the Covenant, (which deals with right to self-determination of the peoples), in the next periodic report. The Committee has also been particularly concerned that Canada had not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP).

The RCAP recommended that for aboriginal self-government, allocation of greater share in lands and resources is required. The Human Rights Committee has acknowledged the position and emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, paragraph 2). The Committee recommended that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation.³⁰ The Committee has also expressed great

²⁸ See General Comment No. 12 (1984) of the Human Rights Committee. See Geir Ulfstein, *supra* n. 17 at 5.

²⁹ See Martin Scheinin, *supra* n. 17.

³⁰ See Geir Ulfstein, *supra* n. 17 at 7; also See UN Doc. CCPR/C/79/Add.105, 7 April 1999, paragraph 7-8.

concern in its latest observations related to the fifth period report of Canada in 2005 that Canadian policies and development of modern treaties with indigenous peoples may in practice amount to an extinguishment of inherent indigenous rights, incompatible with article 1 of the Covenant. The Committee thus stated that Canada should re-examine its policy and practices to ensure that they do not result in extinguishment of inherent aboriginal rights.³¹

Among others, the Committee has also commented on the reports submitted by Finland,³² Norway³³ and Sweden³⁴ concerning right to self-determination of indigenous Sami people. In its observation on Finland, the Committee states that it regrets that, the government of Finland has not clearly responded in relation to the rights of indigenous Sami people in the light of article 1 of the Covenant.³⁵ The government and the Parliament of Norway have addressed the situation of the Sami in the framework of the right to self-determination, which have been stated in the fourth periodic report of Norway in 1999. In relation to the report, the Committee emphasized the resource dimension of the right to self-determination, and asks Norway to report on the Sami people's right to self-determination under article 1 of the Covenant, including paragraph 2 of that article.³⁶

The Committee's observation with regard to the report submitted by Sweden in 2002 is that, the Sami Parliament of Sweden should have a significant role in the decision making process on issues affecting the traditional lands and economic activities of the Sami indigenous peoples. The Committee did not make reference of article 1 only; it also provided reference of articles 25 and 27. The Committee also urged Sweden to take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence.³⁷ In addition, explicit references to article 1 on the notion of self determination have been made in the Committee's concluding observation on Australia,³⁸ Denmark³⁹ and Mexico.⁴⁰

³¹ See UN Doc. CCPR/C/CAN/CO/5, 2 November 2005, paragraph 8-9.

³² Concluding Observations of the Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add. 91 (1998).

³³ Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999).

³⁴ Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002).

³⁵ UN Doc. CCPR/CO/82/FIN 2 December 2004, paragraph 17.

³⁶ John B. Henriksen, *supra* n. 13 at 34.

³⁷ See Geir Ulfstein *supra* n. 17 at. 7; John B. Henriksen, *ibid* at 34.

³⁸ Concluding Observations on Australia, UN doc. CCPR/CO/69/AUS (2000).

³⁹ Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000).

Apart from the above mentioned observations, the Committee in *Apirana Mabuika* case,⁴¹ declared admissible in part the subject matter of a communication filed in respect of the New Zealand Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The signatories of the communication claim that the legislation denies them the right to freely determine their political status, and it interferes with their right to freely pursue economic, social and cultural development. The position of the Committee is understood as a breaking new ground on the subject of indigenous peoples' self-determination.⁴² Thus, in the *Apirana Mabuika* case, the Committee has recognized a link between article 27 and article 1 through the interpretive effect of the right of self-determination when addressing the application of article 27 in a case brought by indigenous authors.⁴³ This dimension of interdependence between article 1 and article 27 was already present in the *Lubicon Lake Band* case.⁴⁴ However, the Committee only pronounced formally the relevance of article 1 in addressing article 27 claims in the *Apirana Mabuika* case.

The above mentioned observations and discussions held by the Committee demonstrate that the right to self-determination – which once has been interpreted to understand the traditional decolonization – is now evolved to include indigenous peoples, at least to the extent as the enjoyment of traditional cultural and natural resources are concerned.

⁴⁰ Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999).

⁴¹ See *Apirana Mabuika* case, Communication no. 547/1993.

⁴² See supra n. 20 at 149. The Committee was in a position on its General Comment on article 27 that the Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. (HRI/GEN/1/Rev. 1).

⁴³ See *Apirana Mabuika* case, Communication no. 547/1993 at paragraph 9.2: 'the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.

⁴⁴ The decisive factor before the Human Rights Committee was, among others, whether the Lubicon Band is constitutive of 'people' within the meaning of article 1 of ICCPR, and whether band has any other enumerated rights. The Indian Act and Treaty of 1899 of Canada recognised the right of the Band with regard to hunt, trap and fish in traditional lands. Indeed these activities are essential to maintain the subsistence economy underpinning the Band's distinctive culture, spirituality and language. While the Committee did not pronounce upon the existence of 'people' under article 1, it however did find that the claim that the rights of person under article 27 of ICCPR to engage in economic and social activities which are a part of a culture of the community to which they belong, and individual may invoke minority rights under article 27. Thus, it could be concluded that hunting, trapping and fishing right of the indigenous people in the case have been guaranteed.

d) Self-Determination in General International Law

In addition to the approach undertaken by the HRC, the right to self-determination of peoples has been widely recognized as the norm of *jus cogens*, the norm which is peremptory in nature, and under international law no derogation from which is possible. The norm has got its recognition in article 53 of the Vienna Convention on the Law of Treaties. A treaty is void if it is in conflict with the norm of *jus cogens*. When article 1 of the Covenant is read together with article 27, it establishes that there exists the right of self-determination of indigenous peoples, which has a cultural manifestation that the self-determination of indigenous peoples includes a particular way of life associated with the use of land resources. As a result, self-determination of the indigenous peoples at least to the extent as 'resource dimension' is concerned, is argued to be guaranteed by both international customary and treaty law.

Apart from the HRC's interpretation of article 1, national governments also acknowledged the right to the self-determination of indigenous peoples. For example, Canada acknowledges indigenous peoples' inherent rights to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources.⁴⁵ Therefore, rights of indigenous peoples may include traditional activities such as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights requires legal measures of protection and measures to ensure the effective participation of members of indigenous communities in decisions which affect them.⁴⁶ Moreover, all Arctic states have acknowledged indigenous peoples' right to self-determination, at least in principle in the UN negotiations on a draft universal declaration on indigenous peoples' rights.⁴⁷ Thus, the right to self-determination of indigenous peoples concerning the self-management and enjoyment of its natural and cultural resources through traditional activities, and maintaining the traditional way of life including traditional commercial activities are now protected by international law.

⁴⁵ See 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government', available at: http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html (22.12.2006).

⁴⁶ See UN Human Rights Committee, General Comment No. 23 on ICCPR article 27, at para. 7.

⁴⁷ See John B. Henriksen, *supra* n. 13 at 33.

4. Where do indigenous peoples stand in International Law?

In 1949, in the *Reparation for Injuries* case⁴⁸ - in response to the claim whether the United Nations, as an International Organization, possess the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation when the government concerned is responsible under state responsibility in international law - the Court concluded that the United Nations is an entity possessing objective international personality and, thus, it has right to bring a claim against a state in breach of its international legal obligation under state responsibility. What is significant here is that, states are not the sole subject of international law. International Organizations have gained the status of secondary personality in international law. Over years there are many more, including even individual, who now claim personality in the international legal regime. International law is being more and more fragmented with so many subjects operating with so many legal issues.

For indigenous peoples, they form an absolutely separate and distinct community who now claim to be active in the domain of international law. Recent development evidences that a Declaration on the Rights of Indigenous peoples was almost going to be adopted by the year 2006.⁴⁹ However, due to the non-action resolution forwarded by Namibian delegation, which was supported by majority in the UN General Assembly's Third Committee, the Declaration came to a halt. But just very recently on 13 September 2007 General Assembly adopted Declaration on the Rights of the Indigenous Peoples.⁵⁰ Although the Declaration as such does not provide any binding obligation on states, it surely provides principles that would gain a substantive normative value, and indeed such normative importance would necessarily put pressure on states to safeguard the rights promulgated in it; and over the time formulation of multilateral treaty law will emerge taking the rights of the indigenous people as substantive. Moreover, some scholars have made the argument that these rights, or at least part thereof,

⁴⁸ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949), ICJ Rep. 1949. The question concerning reparation for injuries suffered in the service of the United Nations was referred to the Court by the General Assembly of the United Nations (Resolution of the General Assembly dated December 3rd, 1948).

⁴⁹ On 29 June 2006 the Human Rights Council adopted by a roll-call of 30 in favour to 2 against and 12 abstentions a resolution on the Declaration on the Rights of Indigenous Peoples. The Declaration was forwarded to the UN General Assembly for approval before the end of December 2006. Available at: www.iwgia.org/sw248.asp (31.01.2007).

⁵⁰ The Declaration was adopted with an overwhelming majority of 143 votes in favour and four votes against and, with eleven abstentions. See UNGA Sixty-first session, A/61/L.67, available at: <http://daccessdds.un.org/doc/UNDOC/LTD/N07/498/30/PDF/N0749830.pdf?OpenElement> (22.09.07).

have already achieved the status of customary international law and are therefore legally binding except towards persistent objectors.⁵¹

As far as article 27 of ICCPR is concerned, indigenous peoples are in many instances classified as both minority and indigenous at the same time, although indigenous rights as developed by the inter-governmental organization is far more extensive, stronger and detailed than minority rights.⁵² It is also argued that only those groups that have a connection to the territory before its colonization can be regarded as indigenous peoples. Therefore, it is possible to identify a body of law that may be termed specifically 'indigenous rights' as distinct from the rights that apply to persons belonging to racial, linguistic, religious and other minorities.⁵³ Moreover, indigenous rights have also been developed as collective rights, while enjoyment of indigenous rights is treated as right 'in community with other members'. Working Group on the Draft Declaration on rights of indigenous people thus describes these collective rights as 'inherent and essential element of indigenous rights'.⁵⁴ Therefore, the rights belonging to the indigenous people also redefine the legal terms of indigenous cultural survival and future development in so far they represent the legitimization and affirmation of the value of protecting indigenous peoples' way of life and cultures *per se*.⁵⁵

5. Conclusion

Today, the idea of self-determination may no longer be restricted to a right which is exercised once, at the point when colonial government comes to an end. Over time the idea has largely changed. Self-determination in the present setting may extend to a continuing right of a people to be governed by a representative government where indigenous peoples form a part.⁵⁶ The

⁵¹ See Anaya, S.J., *Indigenous Peoples in International Law* (1996) at 49-58.

⁵² See Rergus MacKay, *The Rights of Indigenous Peoples in International Law*, Berkely, California (1998), available at http://www.omced.org/cases/case_McKay.pdf 06.03.2007).

⁵³ See *ibid*.

⁵⁴ See 'Report of the Working Group' (1988) at para. 68.

⁵⁵ Williams, R.A., Encounters on the Frontiers in International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival, Duke L. J. (1990) at 687.

⁵⁶ See Caroline E. Foster, *supra* n. 20 at pp. 145-147. According to Foster, self-determination, which once is understood in the particular context of decolonization accounts for governments' concerns that recognizing a group's right to self-determination may legitimize secession, has become quite clear today that decolonization is not intended to be a right to which indigenous peoples would be entitled in separation from the rest of the population of the territories they inhabit.

right of secession is only possible in very exceptional emergency situations.⁵⁷ Although, it is argued that attempting to identify consistency in the application of self-determination is extraordinarily difficult,⁵⁸ it is now well established that people can exercise its self-determination through political participation both as groups and/or individual, for instance by gaining membership in the state delegation to international treaty participation, if the matters are of interest to these peoples.⁵⁹ Certainly, indigenous people are now being more and more involved in international treaty making where their interests are of concern. Their voices are effectively included in the negotiations of international law, particularly in the international environmental and human rights law. Thus, the status of indigenous peoples in international law is now well established.

⁵⁷ The state of international law is well manifested in the opinion of the Canadian Supreme Court on Quebec Secession. *Reference re Succession of Quebec from Canada* [1998] 2 SCR 217.

⁵⁸ See Koskenniemi, 'National Self-Determination Today: Problem of Legal Theory and Practice', 43 *International and Comparative Law Quarterly* (1994) 249.

⁵⁹ Foster argues that governments should focus on guaranteeing avenues for participation in public policy-making and implementation, including through degrees of autonomy in relevant areas in order to generate the understanding of self-determination. See Caroline E. Foster, *supra* n. 20 at p. 147; see also General Recommendation XXIII of the Committee on Elimination of Racial Discrimination (CERD), (Fifty-first session, 1997) UN Doc. A/52/18, annex V, where the Committee called on the governments to recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources. The Committee also stressed that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.