Indigenous Peoples in International Law

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DOI: 10.4000/books.gup.163
Publisher: Göttingen University Press
Place of publication: Göttingen University Press
Year of publication: 2013
Published on OpenEdition Books: 12 April 2017
Serie: Göttingen Studies in Cultural Property
Electronic ISBN: 9782821875487

http://books.openedition.org

Electronic reference
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Introduction

The subject of indigenous peoples in international law is an area of continuous development with many new and decisive developments having taken place over the past 30-40 years. One of the most prominent of these developments is the recognition of indigenous peoples as “peoples” and – as a result – the recognition of their inherent right to self-determination. The nature, scope and content of this right, however, remain highly disputed.

The aim of this paper is to provide an overview and analysis of the current and historic legal status of indigenous peoples in international law. To this end, the paper will be structured as follows: Firstly, the issue of a definition of the term “indigenous peoples” in international law will be discussed. Subsequently, an overview of the historical development of the rights and status of indigenous peoples and the current legal situation will be given. Ultimately, an appraisal of the position of indigenous peoples in international law will be offered.

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1 This publication expands upon the author’s previous work (Göcke 2010).
**Definition**

There is no universally accepted definition of the term “indigenous peoples”. Since several international rights and corresponding duties of states are directly linked to the status of indigeneity, the definition of the term is highly contentious, and international legal instruments concerning indigenous peoples generally do not define the term. The most widely accepted definition seems to be the one by UN Special Rapporteur on Discrimination against Indigenous Populations, Martínez Cobo, from 1983, who defines indigenous peoples as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²

(Martínez Cobo 1986:para. 379)

Although Cobo mentions several objective criteria, he stresses that, ultimately, self-identification is the key criteria (Cobo 1986:para. 369). The importance of self-identification has also been stressed in several subsequent international legal instruments regarding indigenous peoples and has been advocated by indigenous peoples themselves, who fear that a definition of the term would be used by states to exclude certain groups (Simpson 1997:22-23). Accordingly, the International Labour Organisation (ILO) in Art. 1 (2) of its Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) mentions that “[s]elf-identification as indigenous or tribal shall be regarded as fundamental criterion for determining the groups to which the provisions of this Convention apply”.³ Similarly, the World Bank recognises in its Operational Policy 4.10 that one universal definition of the term “indigenous peoples” could not grasp the diversity of indigenous peoples (World Bank 2005:para. 3).⁴ The statement made by Chairperson-Rapporteur of the UN Working Group on Indigenous Populations, Erica-Irene A. Daes, points in the same direction. She stated that “the concept of ‘indigenous’ is not capable of a precise,

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² The United Nations Economic and Social Council mandated the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1971 to prepare a study on the discrimination of indigenous groups and appropriate measures to remedy this discrimination (UN Economic and Social Council Res. 1589 (L), May 21, 1971). The study was published in 1986 (Martínez Cobo 1986).


⁴ “Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of ‘Indigenous Peoples’.”
inclusive definition which can be applied in the same manner to all regions of the world” (Daes 1996:para. 34). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)\textsuperscript{5} of 2007 also refrains from defining “indigenous peoples”, but instead places emphasis on the criterion of self-identification (see also Cole 2009:201-205).

To counter absurd claims by groups for indigenous status, international instruments generally list certain objective criteria which indigenous peoples typically possess, in addition to the subjective criterion of self-identification (Cobo 1986:paras. 379-380; Daes 1996; World Bank 2005:para. 4; International Law Association 2005:2-3; see also Kingsbury 1998:453-455). However, there is only one objective criterion which has repeatedly been mentioned to be essential in order for a group to be regarded as indigenous: the special and spiritual connection to ancestral lands (International Law Association 2005:3;\textsuperscript{6} ACommHPR\textsuperscript{7} 2005:89). This connection, which is also reflected etymologically in the original Latin word *indigena* – a fusion of the words *indu* (in, within) and the root of *gignere* (to beget) (Barnhart 2003:521) – is what defines indigenous peoples and distinguishes them from minorities.

Whereas in Europe, the Americas, Australia, and New Zealand the question of who is indigenous is largely resolved, the situation is different in Asia and Africa, where several states claim that the entire population has to be regarded as indigenous since they were all already there at the time of colonisation (World Bank 1999:49; Kingsbury 1998:416-418; Sanders 1999:8-10). Colonisation, however, is not an essential prerequisite for a people to be regarded as indigenous. Hence, there can also be indigenous peoples in Africa and Asia, and several states in these regions which have in the past repeatedly denied the existence of indigenous peoples within their borders now begin to recognise their existence, such as, for example, Japan in respect of the Ainu.

According to estimations there are about 300-500 million individuals of indigenous origin living in approximately 3,000-5,000 different indigenous communities in more than 70 states. Hence, indigenous peoples represent approximately 5% of the world population (Cole 2009:194; Koivurova 2008:21; European Commission 1998; European Parliament 1994:A).\textsuperscript{9}

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\textsuperscript{5} UNGA Res. 61/295 (September 13, 2007).

\textsuperscript{6} “Only two of the listed criteria are to be considered as essential for a community to be considered as an indigenous people; these two criteria are self-identification – which should also be regarded as an essential element of the right to self-determination of indigenous peoples – and its special relationship with its ancestral lands.”

\textsuperscript{7} African Commission on Human and Peoples’ Rights.

\textsuperscript{8} “A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.”

\textsuperscript{9} However, the numbers vary; for instance, Alfredsson (1995:946) estimates the number of indigenous persons at 100-200 million, and Broms (1992:304) speaks of 250 million indigenous individuals.
Historic Overview and Current Legal Status

For many indigenous peoples, the preservation of their identity and culture is at stake, and indigenous peoples all over the world have to fight for their physical and cultural survival. Indigenous communities generally belong to the poorest and most marginalised groups in the world and generally have the least income, education, health, and life expectancy and the highest rate of infant mortality, alcoholism and crime within a society. Therefore, indigenous communities have been labelled “The Fourth World” or “The Third World in the First” (Young 1995).

History of the Indigenous Peoples’ Rights Movement

The cause of the indigenous peoples’ desolate situation is that for centuries, indigenous peoples have been dispossessed, disenfranchised and marginalised. Indigenous peoples were not only robbed of their ancestral lands but they were also regarded as backward societies, which for their own good, had to be assimilated into the mainstream society, hence cultural, linguistic, religious and ethnic particularities of indigenous groups were suppressed. This process, which started during colonisation in the 16th century, lasted well into the 20th century. Indigenous peoples were prohibited from speaking their own language, holding their rituals or wearing their traditional clothing. Up until the 1970s, indigenous children were taken out of their communities against their parents’ will and put into institutions far away to prevent the transmission of traditions to the next generation. Accordingly, the ILO Convention 107 concerning Indigenous and Tribal Populations of 1957 (ILO Convention 107), the first international instrument for the protection of indigenous peoples, still aims at protection and development of indigenous peoples through assimilation and integration into mainstream society.

10 The term “Fourth World” was coined by George Manuel and Michael Posluns (Manuel and Posluns 1974) and has increasingly been used since then to describe the situation of indigenous peoples; see also Iorns 1992:201-202.
11 See also with regard to the Inuit in Canada, Légaré 2008:350-361, and with regard to the Aboriginal Australians, Hocking/Hocking 1999:210-213.
12 See e.g. with regard to Canada, An Act Further to Amend “The Indian Act, 1880” S.C. 1884 (47 Vict.), c. 27, sec. 3, which banned the potlatch, a ritual festival practiced by Indian tribes of the Pacific Northwest Coast.
13 With regard to Australia, see Human Rights and Equal Opportunity Commission 1997, and with regard to Canada, see Milloy 2004; see also Buti 1999.
15 See, in particular, Arts. 2 and 3 ILO Convention 1957. Art. 2
(1) 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) […]
(3) The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.
Art. 3
Indigenous peoples have resisted this integration for centuries and have tried to draw attention to their desperate situation and to establish a fair cooperation between the indigenous and non-indigenous population. However, their rights and interests were ignored for a very long time – not only on the national but also on the international level. Since the treatment of indigenous peoples was regarded as an internal affair (domaine réservé) of the respective state, and indigenous peoples were not regarded as sovereign, the international community was of the opinion that, due to state sovereignty, no interference was allowed.16

Nevertheless, this began to change in the 1960s. In the course of decolonisation, the civil rights movement and the growing importance of human rights, a new generation of indigenous men and women, educated according to Western standards, began to use the mechanisms of the system forced upon them, and several national indigenous organisations were formed, particularly in Australia, Canada and the US (Anaya 2004a:56; Thornberry 2002:21).

A starting point of the international mobilisation of indigenous peoples was the 1977 UN Conference concerning the Discrimination of Indigenous Communities held in Geneva,17 which took place under the auspices of the UN Economic and Social Council and attracted more than 150 representatives of indigenous groups. This conference not only helped to form a common indigenous identity, but also laid the foundations for future close cooperation between indigenous peoples as regards the stipulation and claiming of their rights (Anaya 2004a:57). Through the establishment of contacts with indigenous communities and organisations in other countries, a worldwide network was established which allowed indigenous peoples to present their demands to a broad and international public, to lobby internationally for their rights, and to put pressure on their respective home states. As a result, their demands were increasingly taken up by the international community, and several international organisations began to advocate indigenous interests.

In this context, ILO Convention 169 of 1989 needs to be mentioned as the first international convention which abandoned the assimilation approach and, instead, established the protection of indigenous cultures as its objective (see e.g. Art. 5 ILO Convention 169; see also Anaya 2004a:58-59, with further references; Xanthaki

(1) So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

(2) Care shall be taken to ensure that such special measures of protection

(a) are not used as a means of creating or prolonging a state of segregation; and

(b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

See also Anaya 2004a:55-56.

16 For example, Chief Deskaheh, spokesman of the Iroquois Confederacy, failed in his attempt to persuade the League of Nations regarding the matter of Iroquois independence and sovereignty in 1923 (Anaya 2004a:57, with further references; Garrow 2008:341-342; Niezen 2003:31-36; Sanders 1998:73-74).

ILO Convention 169 was meant to replace ILO Convention 107. Although ILO Convention 107 remains in force for the time being for those 17 states which have ratified it, it has been closed for ratification since the adoption of ILO Convention 169.\(^{18}\) Besides the outdated ILO Convention 107, ILO Convention 169 remains the only binding international instrument regarding indigenous peoples to the present day.

However, only 22 states have ratified it so far; hence, it is directly binding only for these 22 states.\(^{19}\) Yet, its relevance goes beyond the mere number of ratifications. It is a strong statement of international law since it was adopted without a dissentient vote,\(^{20}\) and many national and international organisations and courts refer to the Convention when interpreting duties of states towards indigenous peoples, even if the respective state has not ratified the Convention (Anaya 2004b:40). This indicates that at least its central provisions nowadays constitute customary international law and are, therefore, binding even for those states that have not ratified the Convention (Anaya 2004a:61; Anaya 2004b:40).

ILO Convention 169 lays down several important rights of indigenous peoples, such as the right to culture (Arts. 4 and 23), preservation of language (Art. 28) and the right to ancestral lands and resources (Arts. 13-19). It also refers to indigenous peoples as “peoples” whereas before, indigenous peoples were referred to as “indigenous populations”. States generally refrain from labelling a group of individuals as “people” because – as a general principle of international law – all peoples have the right to self-determination. This is firmly entrenched in the UN Charter\(^{21}\) and in the two International Covenants on Human Rights,\(^{22}\) which together form the International Bill of Human Rights. Hence, out of fear for their territorial integrity, states have always been very reluctant to refer to indigenous peoples as “peoples”. Therefore changing “populations” to “peoples” seems like a big step. However, Art. 1 (3) of the ILO Conventions expressly states that “[t]he 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”, which was meant to deny indigenous peoples their right to self-determination (Iorns 1992:263-264). This and the fact that indigenous peoples had not been invited to participate in the elaboration of the Convention has been heavily criticised by indigenous representatives (Anaya 2004a:59, 64; Xanthaki 2007:68).

\(^{18}\) In the case where a state has ratified ILO Convention 107 as well as ILO Convention 169, ILO Convention 107 is completely replaced by ILO Convention 169.

\(^{19}\) The list of member states is available on [http://www.ilo.org/ilolex/cgi-lex/ratifce.pl](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169) <December 15, 2012>. Indonesia has not yet signed the Convention.

\(^{20}\) State representatives of 92 states have voted in favour of the adoption of the Convention with 20 abstentions (Anaya 2004a:64).

\(^{21}\) See Arts. 1 (2) and 55 UN Charter (adopted June 26, 1945, entered into force October 24, 1945) 1 UNTS 16.

Therefore, indigenous peoples pressed for the elaboration of another international legal instrument – this time in collaboration with indigenous peoples – and they insisted on the inclusion of the express recognition of their inherent right to self-determination.

States’ Attitude towards Indigenous Peoples’ Sovereignty and Self-Determination during the Age of Colonisation

In this context, it needs to be mentioned that the idea that indigenous peoples are not “peoples” and, therefore, do not have a right to self-determination is a relatively recent one. For centuries, indigenous peoples had been regarded as subjects of international law and holders of sovereignty. In the early days of colonisation, there was a general consensus that indigenous peoples had sovereignty over their territories since, from the point of view of the colonial powers, indigenous peoples fulfilled all aspects necessary for the recognition of sovereignty: some form of political organisation, a certain territory and independence (McNeil 2000:11). Hence, according to state practice, indigenous peoples’ territories could only be placed under one’s own sovereignty through conquest or voluntary subjection – not, however, via mere discovery and occupation (Lindley 1926:43-44). This is proven by the existence of countless “treaties” – defined as international agreements between two or more sovereigns – that were concluded between the colonial powers and indigenous peoples in the 16th-20th centuries. The US alone concluded more than 800 treaties with Indian tribes between 1776 and 1871 (Wiessner 1995:575, note 39). Contents of these treaties were the cession of territorial sovereignty and the transfer of ownership of land, extradition agreements, pledges of peace and amity, and agreements relating to the crossing of Indian lands. The ratification of these treaties was carried out in the same manner as the ratification of treaties with other states (Goldberg 2008:14). There were also more than 80 such treaties concluded with Indian tribes within Canada (Reiter 1996:Chapter V). The recognition of indigenous peoples’ sovereignty as regards the Maori of New Zealand is particularly evident. The British Colonial Secretary stated in a letter to the Governor of New Zealand in 1839 that the British Crown “acknowledge[s] New Zealand as a sovereign and independent state”,[23] and in 1840, the British Crown concluded a treaty with more than 540 Maori chiefs – the Treaty of Waitangi – in which the Maori expressly ceded sovereignty over New Zealand to the Crown.

The respective article in the English version reads:

The Chiefs [...] cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which [they] exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.24

(Art. 1 Treaty of Waitangi, 1840)

At the beginning of the 18th century, however, the attitude of the colonial powers began to change. They then increasingly took the view that indigenous peoples were too primitive to hold sovereignty. In addition, since the number of indigenous inhabitants had steadily decreased due to diseases being introduced, whereas the number of settlers had steadily grown, and since the territorial claims between the colonial powers had largely been settled, indigenous peoples were not considered serious military opponents or useful allies any more. Instead, they were increasingly regarded as obstacles to the modernisation and prosperity of the country. Consequently, especially with many indigenous peoples that were colonised later, no treaties were concluded and no acts of conquest took place. Instead, the existence of indigenous peoples was utterly ignored and their lands taken according to the so-called terra nullius doctrine. This was the case, for example, in Australia, the Northwest coast of North America, Alaska, the northern regions of Canada, and in Greenland. Furthermore, existing treaties were also no longer regarded as binding, on the grounds that indigenous peoples had never been subjects of international law and, therefore, had not had the legal capacity to conclude treaties (Gilbert 2006:47-48, with further references).25

The concept that lands inhabited by indigenous peoples were terra nullius – i.e. no man’s land – was approved by the Permanent Court of International Justice in 1933 in its decision regarding Eastern Greenland.26 The case was brought before the Court by Denmark and Norway, who had a dispute over the question which of these two states held territorial sovereignty over Greenland. The Court decided that Denmark held sovereignty because it had peacefully and continuously exercised public authority

24 The Treaty of Waitangi was drafted in English and Maori. However, the English and Maori versions differ significantly. The Maori version of the Treaty translated the term “sovereignty” as kawanatanga. The exact translation of this term is disputed (Tiemann 1999:26-27). It seems to be predominantly translated as “governorship” or “government” (Kawharu 1989:319-321; Walker 1989:263). Yet, the vast majority of scholars agree that kawanatanga means less than full sovereignty (Tiemann 1999:26-27). See also Waitangi Tribunal 1985:111: “In the Maori text the chiefs ceded to the Queen ‘kawanatanga’. We think this is something less than the sovereignty (or absolute authority) ceded in the English text”; Waitangi Tribunal 1987:para. 11.11.4 (a): “In the Maori text the chiefs ceded to the Queen ‘kawanatanga’. This is less than the sovereignty ceded in the English text, and means the authority to make laws for the good order and security of the country but subject to the protection of Maori interests.”

25 See also Wi Parata v. The Bishop of Wellington (1877) 3 N.Z.Jur. (N.S.) 72, in which Chief Justice Prendergast refers to the Treaty of Waitangi as “a simple nullity” (78).

26 Legal Status of Eastern Greenland (1933) P.C.I.J. (Ser. A/B) No. 53:22.
during the last years by undertaking explorations, mapping the region and formulating fishing laws.\textsuperscript{27} That the Inuit had in fact lived in Greenland for thousands of years and had their own traditional hunting and fishing laws was not taken into consideration by the Court, which thus impliedly stated that indigenous peoples were not subjects of international law and could not hold territorial sovereignty. So, whereas indigenous peoples’ sovereignty was taken for granted in the early days of colonisation, it was not until quite recently that their status as subjects of international law has been disregarded.

Recognition of Indigenous Peoples’ Right to Self-Determination under the Current International Legal Regime

This attitude began to change once again in the 1970s in the course of the indigenous peoples’ international mobilisation. In 1975, the International Court of Justice expressly rejected the decision of its predecessor in the \textit{Eastern Greenland Case} when it decided that the region of the Western Sahara, which at the time of colonisation was inhabited by nomadic people, could not be regarded as \textit{terra nullius} because, despite their nomadic lifestyle, the tribes were socially and politically organised and thus held sovereignty over their lands.\textsuperscript{28}

The \textit{terra nullius} doctrine was also rejected by more and more national courts. The decision of the High Court of Australia in the \textit{Mabo Case} in 1992, in which the Court decided that the idea that Australia at the time of colonisation was no man’s land and open to occupation, was “false in fact and unacceptable in [the Australian] society”\textsuperscript{29} is generally regarded as the fall of the last fortress of the \textit{terra nullius} doctrine (Gilbert 2006:29).

However, these decisions only recognised that indigenous peoples once held sovereignty and thus legal personality. They did not, however, state that they still held sovereignty as a people, and thus, had an inherent right to self-determination. Instead, many states continued to deny the existence of indigenous peoples’ parallel sovereignty within the state’s territory, and thus, of an inherent right to self-determination.

Despite the fierce opposition by many states, indigenous peoples celebrated their biggest success so far in the protection and enforcement of their rights when the UN General Assembly on September 13, 2007, after more than 20 years of preparatory work, adopted the Declaration on the Rights of Indigenous Peoples with only four dissenting votes.\textsuperscript{30} All of the objectors have in the meanwhile reversed their decision and declared their support for the UNDRIP (UN News Centre 2010). Indigenous peoples were able to decisively participate in the elaboration of this Declaration (Barelli 2009:970; Charters 2007:122) and, after years of negotiations, they ultimately managed

\textsuperscript{27} Ibid:62-64.

\textsuperscript{28} Western Sahara Advisory Opinion (1975) I.C.J. Reports 1975 12: paras 80-82.

\textsuperscript{29} High Court of Australia, \textit{Mabo v. Queensland (No. 2)} (1992) 175 C.L.R. 1:para. 39.

\textsuperscript{30} In the General Assembly, 143 states voted in favour and four against the UNDRIP and 11 states abstained. Thirty-four states did not participate in the vote. The four states voting against were Australia, Canada, New Zealand, and the USA.
to have the one provision included in the document which they regarded as its key provision – Art. 3, which 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.

(Art. 3 UNDRIP)

As a General Assembly resolution, the Declaration is not per se binding but merely constitutes “soft law” (Arts. 10 and 11 UN Charter). The adoption of a General Assembly resolution is neither evidence of existing legal rules, nor does it immediately create new customary international law (Voyiakis 2011:209-223). However, the fact that the Declaration is one of the most discussed texts in the history of the UN (Barelli 2009:969-970) and has been supported by a broad majority of states indicates that many of the aspects laid down in the Declaration have now to be considered as customary international law (Barelli 2009:966-967; Charters 2007:123).

The assumption that indigenous peoples have an inherent right to self-determination under international law is supported by the fact that several UN institutions, such as the Human Rights Committee31 and the Committee on Economic, Social and Cultural Rights32 – the treaty monitoring bodies of the International Covenants on Human Rights – as well as regional human rights courts, such as the African Court of Human and Peoples’ Rights,33 have, in the meantime, also expressly recognised indigenous peoples’ inherent right to self-determination as a peremptory norm of customary international law.

Based on this inherent right to self-determination, indigenous peoples can claim many other rights as inherent to their status as peoples, e.g. the rights to own and live on their ancestral lands, to use their own language and to live according to their own traditions. States are no longer regarded as rights-granting entities that transfer

derivative rights to indigenous peoples out of goodwill, but are now viewed as being obliged to recognise and protect the inherent rights of indigenous peoples. States have tried to install a safeguard to protect their territorial integrity by insisting on the inclusion of Art. 46, which 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.

(Art. 46 UNDRIP)

However, since the right to self-determination is an inherent right that belongs to indigenous peoples in their capacity as peoples, states cannot restrict it. The UNDRIP does not create the right, but merely recognises its existence. Hence, under the same condition as other peoples may claim a right to secession, indigenous peoples also have a right to external self-determination. Nevertheless, only on very rare occasions does the right to self-determination encompass a right to secession, since secession runs counter to the principle of territorial integrity – a fundamental principle of the international legal regime (see Art. 2 No. 4 UN Charter). Therefore, although the right to self-determination generally consists of an internal/defensive and an external/offensive element, its entire range is not applicable in every situation (Cole 2009:347-349). Instead, in most cases, the right to self-determination will be limited to a right to internal self-determination. A right to external self-determination is only permissible in absolutely exceptional cases, in particular when there are widespread and systematic human rights violations or a total exclusion of a certain group from the decision-making process (Cole 2009:125, with further references; Tomuschat 1993:9).

The treatment of indigenous peoples from the 16th to the mid-20th centuries would – without any doubt – have exceeded this threshold. Indigenous peoples were disenfranchised; they were without justification killed by soldiers in great numbers or not protected against violent attacks by third parties; they were denied essential basic services, such as sufficient food, health services and education; indigenous children were taken away from their communities without their parents’ consent; indigenous persons were barred from exercising their culture; and they were completely excluded from the political decision-making process. Since the states’ actions back then would have constituted genocide according to Art. II of the Genocide Convention, such actions would – if they took place today – give indigenous peoples a right to secede.

34 See also Supreme Court of Canada, Case concerning Certain Questions relating to Secession of Quebec from Canada (1998) 2 S.C.R. 217:paras. 111-139.
However, in recent years, states have increasingly tried to improve the situation of indigenous peoples and to reconcile past injustices. Assimilation of indigenous peoples into the majority society no longer constitutes a goal of government actions. Instead, states recognise that indigenous cultures should be preserved for their own sake. Land restitutions also constitute decisive concessions from states towards indigenous peoples. Furthermore, indigenous peoples have access to national and international courts and tribunals to enforce their rights against the respective governments. It is true that many of the concessions continue to be insufficient, and indigenous peoples are still discriminated against. Nevertheless, positive trends are clearly discernible. Since, in practice, secession is only accepted as \textit{ultima ratio}, i.e. after all available national and international mechanisms have been exhausted, and usually only following long and violent conflicts (Titanji 2009:63; Skaale 2004:161), it must be assumed that indigenous peoples do not generally have a right to external self-determination.

However, there are hardly any indigenous peoples that want external self-determination in the form of secession. What most indigenous peoples want is internal self-determination, i.e. the right to determine their own political status and their economic, social and cultural development within existing state borders.\footnote{Secession was, however, the goal of the indigenous peoples of East Timor and is strived for by the indigenous people of Western Sahara.}

In recent years, such a right to inherent self-determination has been increasingly recognised and implemented by several states. Canada, for example, adopted an Inherent Right of Self-Government Policy in 1995 and created the Inuit-governed Nunavut Territory, which came into being in 1999 with the splitting of the Northwest Territories into two separate units. In the US, under the heading of “tribal sovereignty”, Indian tribes may – to a certain degree – formulate their own civil and criminal laws, establish their own courts and government institutions, and enjoy special rights on reservations (e.g. tax benefits and exemptions or the right to run casinos). In Greenland, which forms an integral part of the Danish Realm but has enjoyed home rule since 1979,\footnote{See Greenland Home Rule Act, Act No. 577 (enacted November 29, 1978, entered into force May 1, 1979).} a successful referendum was held in November 2008, which led to the enactment of the Act on Greenland Self-Government in 2009\footnote{Act on Greenland Self-Government, Act No. 473 (enacted June 12, 2009, entered into force June 21, 2009).} establishing a new form of self-government. Under the new legal regime, the Inuit may expand their competences to almost all areas that are usually under state jurisdiction.\footnote{See Arts. 2-4 Act on Greenland Self-Government.} Furthermore, the Act on Greenland Self-Government expressly recognises the people of Greenland as a people\footnote{Preamble to the Act on Greenland Self-Government.} and even stipulates their right to secede from Denmark and form an independent state.\footnote{Art. 21 Act on Greenland Self-Government.}
Appraisal

The new developments in international law and state practice show that states are becoming increasingly aware of their historic responsibilities towards indigenous peoples. The current state practice, along with international court decisions and statements by the UN and other international organisations, indicate that the right of indigenous peoples to self-determination and – attached to this right, their rights to land, resources and the maintenance of their culture – are, nowadays, widely recognised on the national and international level, and can be classified as customary international law. This recognition of indigenous peoples’ right to self-determination, and thus, the recognition of their – partial – sovereignty and international legal subjectivity constitutes, however, not a new development in international law, but a return to a previous state of affairs. The recognition of indigenous peoples’ right to self-determination has to be regarded as the reinstatement of a status of which indigenous peoples have unlawfully been deprived of a long time ago and denied for centuries.\(^{42}\) Therefore, the indigenous peoples’ right to self-determination cannot be classified as derivative right given to them by states out of goodwill, but it constitutes an inherent right held by them in their capacity as peoples. Under the international law doctrine of reversion, the indigenous peoples’ right to self-determination has never been extinguished, but has only lain dormant awaiting restoration (Cassidy 1998:69). Hence, the right to self-determination, which cannot be restricted or interfered with by states, enables indigenous peoples, who have always regarded themselves as sovereign nations and holders of a right to self-determination, to recapture their previous position within the international community (Dahm et al. 2002:294).

\(^{42}\) Regarding the illegality of the disenfranchisement of indigenous peoples under international law at that time, see e.g. Gilbert 2006:15-20; Cassidy 1998:88-99; Oppenheim 1992:para. 253.