

# A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples

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## INTRODUCTION

The concept of the interdependence and indivisibility of human rights, as originally conceived, refutes any suggestion of a hierarchy of rights.<sup>1</sup> At a time when attention at the international level tended to focus on civil and political rights, its emergence served as an important reminder of the need to protect and promote economic, social and cultural rights with equal vigor.<sup>2</sup> At its core, it suggests that there is a mutually reinforcing dynamic between different categories of rights in the sense that the effective implementation of one category of rights can contribute to the effective implementation of other categories of rights and vice versa. As one human rights lawyer observed,

[W]e cannot enjoy civil and political rights unless we enjoy economic, cultural and social rights, any [ ] more than we can insure our economic, social and cultural rights, unless we can exercise our civil and political rights. True, a hungry man does not have much freedom of choice. But equally true, when a well-fed man does not have freedom of choice, he cannot protect himself against going hungry.<sup>3</sup>

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1. For present purposes, the term “hierarchy of rights” refers to the idea that certain categories of human rights are more important than others. It was very much in evidence during the Cold War when Western societies tended to stress the importance of civil and political rights while socialist and developing societies tended to attach primary importance to economic, social and cultural rights. See, e.g., JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 27–33 (2d ed. 2003); GARY TEEPLE, *THE RIDDLE OF HUMAN RIGHTS* 24 (2004); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 *AM. J. INT’L. L.* 1, 2 (1986); James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights*, 30 *HUM. RTS. Q.* 984, 985 (2008).

2. See, e.g., MICHAEL FREEMAN, *HUMAN RIGHTS* 41, 148, 172 (2002); Nickel, *supra* note 1; Onuma Yasuaki, *Towards an Intercivilizational Approach to Human Rights*, 7 *ASIAN Y.B. INT’L L.* 21, 55–56 (1997).

3. Jose W. Diokno, *Human Rights Make Man Human* (Sept. 5, 1981) (transcript on file with author). This relationship is also recognized in, for example, Organization of African Unity, *African Charter on*

This captures the essence of the concept of interdependence and indivisibility of human rights, specifically, that these rights are mutually reinforcing<sup>4</sup> and equally important. Beyond this, the concept escapes precise definition.

To date, the emphasis in the international practice has been on how human rights are interdependent and indivisible in terms of their *implementation* and *importance*. This is asserted as a self-evident principle without any reference to a theoretical or other justificatory basis for it.<sup>5</sup> Similarly, no attempt is made to distinguish between the “interdependence” and the “indivisibility” of human rights.<sup>6</sup> Instead, one finds that the two terms have been used interchangeably.<sup>7</sup> Over time, the tendency has been to refer to human rights being “indivisible *and* interdependent”<sup>8</sup> as a fundamental principle requiring the international community to “treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”<sup>9</sup> This is the traditional understanding of the concept. It is still

Human and Peoples' Rights, June 27, 1981, preamble ¶ 7, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); see also DONNELLY, *supra* note 1, at 27; HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 69–70 (2d ed. 1996); Pablo Gilabert, *The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel*, 32 HUM. RTS. Q. 425, 426 (2010); Yasuaki, *supra* note 2, at 56.

4. The term “intersupport” is also used in a similar sense. Both terms convey the same meaning, namely, that “the effective implementation of one family of rights helps with the implementation of some or all of the others. . . . Mutual support exists, in varying degrees of strength, between all of the families of rights.” JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 104 (2d ed. 2007).

5. See, for example, one of earliest references to the concept where the U.N. General Assembly simply asserted the “interdependence” of human rights without elaborating on it other than to comment that “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the idea of the free man.” Preparation of Two Drafts International Covenants on Human Rights, preamble, ¶ 2, G.A. Res. 543 (VI) (Feb. 5, 1952), available at <http://www.un.org/documents/ga/res/6/ares6.htm> [hereinafter G.A. Res. 543 (VI)]. The assertion was made in the context of the General Assembly having to abandon its original proposal to transform the principles contained in the Universal Declaration of Human Rights into a single International Human Rights Covenant due to different perceptions of the nature and significance of difference categories of human rights among Western, socialist and developing States. See, e.g., DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 6–7, 11–12 (1994); Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTRALIAN Y.B. INT'L L. 1, 2, 27–30 (1994). These differences necessitated the adoption of two separate Covenants, one to protect civil and political rights, the other to protect economic, social and cultural rights. It is against this backdrop that the concept of interdependence and indivisibility emerged.

6. There has been some attempt in the literature to distinguish between the two based, for example, on the extent to which one category of rights is either “useful” or “indispensable” for the implementation of other categories of rights. See Nickel, *supra* note 1, at 990; see also Gilabert, *supra* note 3, at 429–30.

7. See, e.g., G.A. Res. 543 (VI), *supra* note 5; International Conference on Human Rights, Tehran, Iran, Apr. 22–May 13, 1968, *Proclamation of Tebran, Final Act of the International Conference on Human Rights*, ch. 2, ¶ 13, U.N. Doc. A/CONF.32/41 (1968) [hereinafter Proclamation of Tehran] (making no reference to “interdependence” but asserting that “[s]ince human rights . . . are *indivisible*, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible”) (emphasis added).

8. See, e.g., World Conference on Human Rights, Vienna, Austria, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (emphasis added).

9. *Id.*

the prevailing understanding of the interdependence and indivisibility of human rights today.

The present Article analyzes recent developments concerning the rights of indigenous peoples, which suggest a further dimension to the interdependence and indivisibility of human rights. These developments suggest that human rights are interdependent and indivisible not only in terms of mutual reinforcement and equal importance, but also in terms of the actual *content*<sup>10</sup> of these rights. A good illustration of this is participatory rights. As the Article will demonstrate, it is now possible for indigenous peoples to invoke participatory rights by virtue of the right to effective participation in public life, the right to respect for their identity, and the right to self-determination. In this respect, one can see the emergence of a certain interdependence and indivisibility in terms of the content of these different human rights.

These developments are not confined to indigenous peoples' rights. There has been some discussion in the literature of the tendency among international bodies to interpret civil and political rights so as to comprise aspects of economic, social, and cultural rights.<sup>11</sup> The right to life in the International Covenant on Civil and Political Rights ("ICCPR"), for example, has been interpreted in an expansive manner so as to raise concerns about the food situation in particular States even though there is no right to food in the Covenant.<sup>12</sup> However, the emphasis in the existing literature has been on how the international bodies have used the concept of interdependence and indivisibility to fill the gaps that arise from the absence of economic, social, and cultural rights in the ICCPR and other human rights instruments or, more generally, to address issues of justiciability associated with these rights.<sup>13</sup> The focus throughout continues to be on interdependence and indivisibility in terms of the effective *implementation* of human rights rather than in terms of the *content* of these rights.

The approach adopted in this Article is somewhat different. It asserts the need to focus more explicitly on the interdependence and indivisibility that is emerging in relation to the content of human rights. By raising the prospect that a particular right, such as the right to effective participation, can fall simultaneously under separate and distinct recognized human rights, recent developments call into question the traditional boundaries between

10. That is, the scope or meaning of a particular human right.

11. See, e.g., Evadne Grant, *Accountability for human rights abuses: Taking the universality, indivisibility, interdependence and interrelatedness of human rights seriously*, 32 S. AFR. Y. B. INT'L L. 158 (2007); Ida E. Koch, *The Justiciability of Indivisible Rights*, 72 NORDIC J. INT'L L. 3 (2003); Theo van Boven, *Categories of Rights*, in INTERNATIONAL HUMAN RIGHTS LAW 173, 179 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2010).

12. See, e.g., Concluding observations of the Human Rights Comm., N. Korea, ¶ 12, U.N. Doc. CCPR/CO/72/PRK (Aug. 27, 2001) ("Given the State party's obligation . . . to protect the life of its citizens . . . the Committee remains seriously concerned about the lack of measures by the State party to deal with the food and nutrition situation" in its territory).

13. See sources cited *supra* note 11.

the content of these human rights.<sup>14</sup> The resulting overlap in the content of these rights highlights the need for a coherent approach to their interpretation and implementation and especially to the application of restrictions on them.

In the specific context of indigenous peoples, this overlap also calls into question the longstanding dichotomy between a “people” and a “minority” in international law.<sup>15</sup> Although neither term has been the subject of an internationally agreed-upon definition,<sup>16</sup> the international community continues to distinguish between the two largely for pragmatic reasons. These stem from the fact that only a “people” has a right to self-determination.

14. See *infra* Part I.A.

15. On the existence of this dichotomy, see, for example, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 327–28 (1995); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 124–25 (1994); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 486–87 (1993). Admittedly, there is considerable support in the literature for departing from this dichotomy. See, e.g., Ian Brownlie, *The Rights of Peoples in International Law*, in THE RIGHTS OF PEOPLES 1, 5–6 (James Crawford ed., 1992); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 125–27, 141–42 (2nd ed. 2006); Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 776–77 (1998); Robert McCorquodale, *Rights of Peoples and Minorities*, in INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 11, at 365, 369–371. However, there is limited explicit support in State practice for abandoning the dichotomy. This is evident from the fact that State practice demonstrates a general adherence to the concept of a “people” as the *entire* population of a territory irrespective of ethnic, linguistic or religious differences. This would suggest a clear distinction between a “people” and ethnic, linguistic or religious minorities within States. See, e.g., Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 I.C.L.Q. 537 (1988) (discussing State practice) [hereinafter Quane, *The U.N. and the Evolving Right to Self-Determination*]; Helen Quane, *Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies*, 47 VA. J. INT’L L. 463, 472–75, 477–81 (2007) [hereinafter Quane, *Rights in Conflict?*]. This position may be evolving. In 2009, 36 States submitted written statements during the course of the Advisory proceedings in the *Kosovo* case. Of the States that addressed the issue of self-determination, approximately twelve seemed to accept a right to some form of self-determination for groups within States thereby suggesting that these groups, which would normally be regarded as minorities, could qualify as “peoples.” See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for an Advisory Opinion), Written Statements of Estonia, Latvia, Finland, Germany, Netherlands, Poland, Slovenia, Denmark, Switzerland, Ireland (April 2009) and Written Statements of Albania, Bolivia (July 2009), <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>. At the same time, one has to be cautious about the significance of this practice given its limited and geographically restricted nature. Indeed, the International Court of Justice itself noted the considerable divergence of opinion that currently exists on whether a part of the population of a State can invoke the right to self-determination and, by implication, constitute a “people.” See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 82 (July 22). At the very least, the Court’s comments cast doubt on whether the distinction between a “people” and a “minority” has been abandoned in international law at least in terms of the application of the politically sensitive right to self-determination.

16. On the concept of a “minority,” see Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1991); Rainer Hofmann, *The Framework Convention for the Protection of National Minorities: An Introduction*, in THE RIGHTS OF MINORITIES 1, 16–18 (Marc Weller ed., 2005); see also John Packer, *On the Definition of Minorities*, in THE PROTECTION OF ETHNIC AND LINGUISTIC MINORITIES IN EUROPE 23–65 (John Packer & Kristian Myntti eds., 1993); Louis B. Sohn, *The Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS 270, 276–280 (Louis Henkin ed., 1981); NOWAK, *supra* note 15, at 487–494. On the concept of a “people,” see Brownlie, *supra* note 15, at 5–6; CRAWFORD, *supra* note 15, at 126–127, 141–142; Hannum, *supra* note 15, at 776–77; Quane, *Rights in Conflict?*, *supra* note 15, at 472–75.

As the right to self-determination is often equated with a right to independence,<sup>17</sup> an expansive interpretation of a “people” would raise the prospect of encouraging secessionist claims, the break up of States, and fragmentation within the international community.<sup>18</sup> This explains why the international community has traditionally adopted a narrow, territorial concept of a “people”<sup>19</sup> and why it is reluctant to extend this status to every distinct ethnic, linguistic, or religious group within a State. Instead, the latter tend to be regarded as a “minority” with a range of identity rights that must be respected, and which do not call into question the sovereignty or territorial integrity of the State in which they reside.<sup>20</sup> This longstanding dichotomy is now being called into question by recent developments concerning the rights of indigenous peoples. The overlap that is emerging in terms of the content of their rights suggests that indigenous peoples may be simultaneously a “people” and a “minority.”

This overlap also has important practical consequences, not all of which have been explored in the existing literature. For example, the concurrent, dual classification of indigenous peoples as a “people” and a “minority” can have certain procedural implications in terms of accessing and utilizing global mechanisms for rights protection. A “people,” for instance, cannot submit a communication complaining of a violation of their rights under the ICCPR but individuals and persons belonging to minorities can.<sup>21</sup> Depending on whether their rights are classified as peoples’ rights or minority rights, indigenous peoples may or may not be able to file communications concerning the violation of certain rights under key human rights treaties.<sup>22</sup>

The possibility of classifying indigenous peoples as a “people” and/or as a “minority” also raises the prospect of different approaches emerging to protect their rights both within and between different international human rights regimes. As the present Article will demonstrate, some States regard indigenous peoples as “minorities,” while others regard them as “peoples,” even with respect to the same human rights treaty. Given that distinct rights are granted depending on whether a particular group is regarded as a “people” or a “minority,” this inconsistency can have implications not only for indigenous peoples but also for the internal coherence of the global system for rights protection.

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17. See, e.g., Quane, *The U.N. and the Evolving Right to Self-Determination*, *supra* note 15, at 543–544, 550, 553, 554, 560, 563.

18. See, e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 215 (1991); CASSESE, *supra* note 15, at 328, 339; Quane, *Rights in Conflict?*, *supra* note 15, at 471.

19. See Quane, *The U.N. and the Evolving Right to Self-Determination*, *supra* note 15; Quane, *Rights in Conflict?*, *supra* note 15.

20. See U.N. Human Rights Comm., General Comments Under Article 40, Paragraph 4, of the Covenant, General Comment No. 23: The Rights of Minorities (Art. 27), ¶ 3.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

21. See Rep. of the Human Rights Comm., Vol. II, ¶ 32.1, U.N. Doc. A/45/40; GAOR, 45th Sess., Supp. No. 40 (1990).

22. See *infra* Part I.D.; see also *infra* notes 141–142 and accompanying text.

The catalyst for these developments is multifaceted. One finds that they are not driven solely by the need to accord parity of treatment to all categories of human rights or to address difficulties associated with the justiciability of economic, social, and cultural rights. While concerns about ensuring the effective implementation of human rights are clearly a significant factor in these developments, they are not the only ones. By tracking their evolution one can see other factors at play, such as the manner in which normative human rights approaches have evolved over time,<sup>23</sup> the impact of the multiplicity of international mechanisms in place to protect human rights, and the interplay between global and national human rights initiatives. Analyzing these developments can provide some tentative insights not only into the concept of the interdependence and indivisibility of rights but also into the complex processes of interaction that can contribute to the formation of global human rights.

This Article analyzes the developments in international indigenous rights law within the framework of two separate human rights regimes: the U.N. Human Rights Treaty Monitoring System and the U.N. Charter-Based System. Part I of the Article begins by analyzing developments within the U.N. Human Rights Treaty Monitoring System, focusing in particular on the International Covenant on Civil and Political Rights. It analyzes the rights of particular significance to indigenous peoples in the ICCPR, namely, the right to self-determination, the right to respect for identity, and the right to effective participation. What emerges from this analysis is that the boundaries that traditionally existed between the content of these rights have gradually eroded. In their place a certain degree of interdependence and indivisibility has grown up with respect to the content of these human rights. This development is not unique to the ICCPR, as is evidenced by an overview of current trends within the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) and the Convention on the Elimination of all Forms of Racial Discrimination (“CERD”). Nor is it confined to the U.N. Human Rights Treaty Monitoring System. In Part II, developments within the U.N. Charter-Based System are analyzed with particular reference to the U.N. Declaration on the Rights of Indigenous Peoples. What emerges from this analysis is clear evi-

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23. For example, the approach to indigenous peoples' rights has evolved in an incremental and somewhat fragmented manner in international law. Originally conceived within the individual human rights framework that prevailed in the post-World War II period, they came to include additional rights in the form of rights of persons belonging to minorities. See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 496 (1987). Today, there is a growing consensus that they comprise collective as well as individual rights, the content of which can be found in the increasing number of international instruments that are concerned solely with the rights of indigenous peoples. See U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see also International Labour Organization Convention on Indigenous and Tribal Peoples, 1650 U.N.T.S. 383 (Jun. 27, 1989) [hereinafter ILO Convention 169]. This evolutionary process has had important implications in terms of the nature and content of these rights as well as the relationship between them.

dence of interdependence and indivisibility in the content of a whole range of indigenous peoples' rights. It follows that this particular form of interdependence and indivisibility is not confined to a specific human rights treaty or regime but reflects a more general trend within the international system for the protection of human rights. The Article concludes in Part III with a detailed analysis of the significance of this trend not only for the rights of indigenous peoples but also for international human rights law more generally.

## I. THE U.N. HUMAN RIGHTS TREATY MONITORING SYSTEM

The U.N. Human Rights Treaty Monitoring System is concerned with the implementation of the core international human rights treaties.<sup>24</sup> In the present context, attention focuses primarily on the International Covenant on Civil and Political Rights, given the significance of many of its provisions for indigenous peoples. Of particular significance are Articles 1, 25, and 27, concerning the right to self-determination, the right to participate in public life, and the right to respect for one's ethnic, linguistic and religious identity, respectively. An examination of the drafting history of these provisions and their subsequent interpretation suggests that the sharp demarcations that originally existed between the content of these rights may be eroding, giving new meaning to the concept of the interdependence and indivisibility of rights and raising conceptual and practical questions that must be explicitly recognized and addressed.

The present Part begins by analyzing the relevant provisions of the ICCPR in accordance with their ordinary meaning and in context.<sup>25</sup> Reference is also made to the drafting history of the Covenant and to subsequent practice as supplementary means of interpretation.<sup>26</sup> In terms of the latter, this Part focuses specifically on three types of subsequent practice. The first are the General Comments issued by the Human Rights Committee, the body responsible for monitoring and promoting compliance with the Covenant.<sup>27</sup> Although the General Comments are not legally binding, they are

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24. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611.

25. See Vienna Convention on the Law of Treaties art. 31 May 23, 1969, 1155 U.N.T.S. 331.

26. *Id.* art. 32.

27. See ICCPR, *supra* note 24, arts. 28–45.

considered to be authoritative interpretations of the ICCPR.<sup>28</sup> The second is the jurisprudence of the Committee. The third, and arguably the most significant, is the evidence of State practice generated by the reporting process under Article 40 of the Covenant.<sup>29</sup> The present study gives particular attention to the survey undertaken by its author of the Committee's Concluding Observations and Recommendations on the State reports submitted between 1977 and 2011.

This systematic and largely chronological analysis will highlight the evolution that has taken place in the interpretation of these provisions. It will demonstrate that the boundaries that traditionally existed between the rights in terms of their nature, content, and beneficiaries no longer hold. Instead, the content of these rights exhibits some degree of interdependence and indivisibility. A review of recent practice under other core human rights treaties demonstrates that this development is not confined to the ICCPR but represents a trend within the U.N. Human Rights Treaty Monitoring System more generally. Throughout the discussion the reasons for the emergence of this trend are explored with a view to understanding not only why it has occurred, but also to assess the prospects for its future development. The present Part also identifies some of the principal implications of the trend, which are then explored in some depth in the Article's concluding section.

A. *The traditional boundaries between the right to self-determination, the right to respect for identity, and the right to effective participation in public life in the ICCPR*

To appreciate the boundaries that traditionally existed between Articles 1, 25, and 27 of the ICCPR, one needs to interpret these provisions in accordance with their ordinary meaning, in context, and in light of their drafting history. It is useful to begin by outlining the salient features of each provision. Article 1 provides that “[a]ll 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>30</sup> It also provides that a people have the right to freely dispose of their natural wealth and resources and not to be deprived of their own means of subsistence.<sup>31</sup> Article 25 provides that citizens have the right, without distinction of any kind, “(a) [t]o take part in the conduct of public affairs, directly or through freely chosen representatives; (b) [t]o vote and to be elected at genuine periodic elections . . . (c) to have access, on general terms of equal-

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28. See, e.g., van Boven, *supra* note 11, at 409.

29. ICCPR, *supra* note 24, art. 40 (“The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . .”).

30. *Id.* ¶ 1.

31. *Id.* ¶ 2.



ity, to public service in his country.”<sup>32</sup> Finally, Article 27 provides that persons belonging to “ethnic, religious or linguistic minorities . . . shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>33</sup>

The difference between these rights is readily apparent from even a cursory reading of the provisions. Relying purely on a literal interpretation of the provisions, it seems that Article 1 is concerned primarily with the right to self-government, if not independence, while Article 25 is concerned with a limited number of quite specific rights designed to ensure non-discriminatory participation in public life. There appears to be no obvious overlap between the participatory rights in Article 25 and the right set out in Article 27. The latter seems to be concerned simply with preserving the freedom of the individual in matters of culture, language and religion. While this may suggest some form of autonomy for the individuals concerned, the absence of any clear duty on the State to adopt measures to facilitate the more effective enjoyment of the Article 27 right<sup>34</sup> suggests that this autonomy is confined largely to the private sphere. In this respect, one can identify an important difference between this right and the right to self-determination set out in Article 1. The difference is reinforced by a contextual analysis of the provisions. The fact that the right to self-determination is contained in Part I of the Covenant while the other rights, including the right to respect for identity, are contained in Part III suggests that these rights were regarded as separate and distinct from one another.

There are other differences between all three provisions, notably, concerning the nature and beneficiaries of the rights. The right to self-determination is conferred on peoples and, as such, is a collective human right. The remaining rights are individual in nature, but even here there are differences between them in terms of their beneficiaries. While the rights in Article 25 are confined to citizens, the rights enshrined in Article 27 apply to all individuals belonging to ethnic, linguistic or religious minorities whether or not they are citizens of the State in which they reside. It follows from the ordinary meaning of the language used in these provisions that there are important differences between all three rights in terms of their content, nature and beneficiaries.

These differences are also borne out by the drafting history of the ICCPR. During the drafting of the Covenant there was considerable discussion of the meaning of the term “people” in Article 1, although attempts to define it proved unsuccessful.<sup>35</sup> The discussion is illuminating, nevertheless, because it demonstrates that the drafters were keen to distinguish between a

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32. *Id.* art. 25.

33. *Id.* art. 27.

34. *See id.* art. 27 (using the phrase “shall not be denied,” suggesting that the emphasis is on imposing negative rather than positive obligations on the State).

35. BOSSUYT, *supra* note 23, at 21, 32, 35.

“people” in Article 1 and a “minority” in Article 27, no doubt due to concerns about potential secessionist claims. These concerns are evident in the statements of a considerable number of States to the effect that Article 1 “was not concerned with minorities or the right of secession, and the terms ‘peoples’ and ‘nations’ were not intended to cover such questions.”<sup>36</sup> Instead, the general view seems to have been that the rights of minorities were “a separate problem of great complexity”<sup>37</sup> and one that was dealt with under what ultimately became Article 27 of the Covenant.<sup>38</sup> This shows that, for the drafters of the Covenant, the rights of peoples under Article 1 were regarded as separate and distinct from the rights of minorities under Article 27.<sup>39</sup>

The drafting history also shows that the content of all three rights was regarded as being markedly different. The right to self-determination was equated primarily with a right to independence for colonial territories.<sup>40</sup> The right to respect for identity was seen as the freedom to use one’s language, enjoy one’s culture, and practice one’s religion without undue interference by the State.<sup>41</sup> The right to participate in public life was interpreted largely as a right to vote and stand for election without discrimination.<sup>42</sup> Admittedly, there were references to the right to self-determination being “essential for the enjoyment of all other human rights.”<sup>43</sup> While this represents an early acknowledgement of the interdependence and indivisibility of human rights, it is only in the traditional sense that the rights were regarded as mutually reinforcing. However, what emerges from the subsequent interpretation of these provisions is that this interdependence and indivisibility takes on a new form relating to the actual content of the rights, challenging many of the traditional boundaries between these rights and highlighting the need to reconceptualize the relationship between them.

*B. The gradual erosion of the traditional boundaries between the right to self-determination, the right to respect for identity, and the right to effective participation in public life in the ICCPR*

The Human Rights Committee has interpreted Articles 1, 25, and 27 in an evolutionary manner, which has had the effect of calling into question

36. *Id.* at 27.

37. *Id.* at 32.

38. *Id.* at 46.

39. On the interpretation of the term “people” in Art. 1, see, THORNBERRY, *supra* note 18, at 215; CASSESE, *supra* note 15, at 59–61; Quane, *The U.N. and the Evolving Right to Self-Determination*, *supra* note 15, at 559–60.

40. BOSSUYT, *supra* note 23, at 27, 45.

41. *Id.* at 494–97.

42. *Id.* at 472–75.

43. *Id.* at 25. According to this view, it was not possible to enjoy individual rights unless peoples could enjoy the right to self-determination.

the boundaries that traditionally existed between the content of these rights. This much is evident from a comparison of the Committee's General Comments<sup>44</sup> on the three articles with its more recent observations and jurisprudence. The General Comments tend to echo the views of the original drafters of the Covenant by maintaining boundaries between the rights while recognizing the mutually reinforcing nature of the relationship between them.<sup>45</sup> For example, in terms of the relationship between the right to self-determination and the right to participate in public life, the Committee noted that by virtue of the former a *people* can choose their own system of government including the modalities of participation in the conduct of public affairs, while under the latter *individuals* can participate in those modalities without discrimination.<sup>46</sup> Similarly, a distinction was drawn between the right to self-determination and the rights of persons belonging to minorities based on the nature and content of the rights.<sup>47</sup> As the Committee observed, the "Covenant draws a distinction between the right to self-determination and the rights protected under article 27" with the former expressed as a right of peoples and the latter as rights conferred on individuals.<sup>48</sup> Further, while it acknowledged that aspects of the Article 27 rights, such as the right to enjoy a particular culture, may consist of a way of life closely associated with territory and use of its resources, these rights did not prejudice the sovereignty and territorial integrity of the State.<sup>49</sup> In terms of the relationship between the rights set out in Articles 25 and 27 of the Covenant, the Committee noted that the latter establishes rights for persons belonging to minorities that are "distinct from . . . all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy" under the ICCPR.<sup>50</sup> These statements of the Human Rights Committee suggest firm boundaries not only between the different categories of individual and collective rights but also within the category of individual rights.

There has, however, been some erosion of these boundaries, initially between Articles 25 and 27 and more recently between Articles 1 and 27. In relation to Articles 25 and 27, it is possible to observe some tentative convergence between these rights even in the General Comments. In the Gen-

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44. The Committee publishes its interpretation of the content of the human rights provisions in the form of General Comments.

45. See U.N. Human Rights Comm., General Comments Under Article 40, Paragraph 4, of the Covenant, General Comment No. 12: The right to self-determination of peoples (Art. 1), ¶¶ 1–2, U.N. Doc. CCPR/C/21/Add.4 (Mar. 13, 1984); U.N. Human Rights Comm., General Comments Under Article 40, Paragraph 4, of the Covenant, General Comment No. 25: The right to participate in public affairs, voting and the right of equal access to public service (Art. 25), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996); U.N. Human Rights Comm., General Comment No. 23, Apr. 1994, *supra* note 20, ¶¶ 2–3.

46. U.N. Human Rights Comm., General Comment No. 25, July 1996, *supra* note 45, ¶¶ 2, 5.

47. U.N. Human Rights Comm., General Comment No. 23, Apr. 1994, *supra* note 20, ¶ 3.

48. *Id.* ¶ 3.1.

49. *Id.* ¶ 3.2.

50. *Id.* ¶ 1.

eral Comment on Article 25, for example, the right to participate in the conduct of public affairs is deemed to apply to “all aspects of public administration, and the *formulation and implementation of policy* at international, national, regional and local levels.”<sup>51</sup> In the General Comment on cultural rights under Article 27, the Committee observed that culture can manifest itself in different forms such as a traditional way of life “associated with the use of land resources . . . [which] may include such traditional activities as fishing or hunting and the right to live in reserves protected by law,” especially for indigenous peoples.<sup>52</sup> Significantly, it went on to note that the effective enjoyment of these rights “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>53</sup> This suggests that certain participatory rights may be inferred from Article 27. It highlights the potential for some overlap in terms of the content of the rights in Articles 25 and 27 at least to the extent that both may entail certain participatory rights concerning the formulation and implementation of State policy.<sup>54</sup>

Notwithstanding this potential overlap, the jurisprudence makes clear that the participation of indigenous peoples in decisions that specifically affect them is derived from Article 27 rather than Article 25 of the Covenant. In *Marshall v. Canada*,<sup>55</sup> for example, the refusal to allow the Mikmaq people to participate in a constitutional conference on aboriginal matters was not regarded as a violation of Article 25. According to the Committee, Article 25 had not given any directly affected group “the unconditional right to choose the modalities of participation in the conduct of public affairs.”<sup>56</sup> Instead, it was for the legal and constitutional system of each State to determine the modalities of participation.<sup>57</sup> Consequently, where

51. U.N. Human Rights Comm., General Comment No. 25, July 1996, *supra* note 45, ¶ 5 (emphasis added).

52. U.N. Human Rights Comm., General Comment No. 23, April 1994, *supra* note 20, ¶ 7.

53. *Id.*

54. Of course, it may be argued that the participatory measures referred to in the General Comment on Article 27 reflect not so much a right of indigenous peoples but one aspect of the obligation on States to ensure the effective enjoyment of cultural rights. In this respect, one has to acknowledge that not every State obligation translates into a right for individuals. However, it is significant that the Committee is increasingly stipulating that indigenous people must be able to participate in decisions affecting them. Indeed, in *Communication No. 1457/2006*, the Human Rights Committee stated that “the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities” of indigenous people “depends on whether [they] have had the opportunity to participate in the decision-making process in relation to these measures” and went so far as to state that this participation “must be effective, which requires not mere consultation but the free, prior and informed consent” of the indigenous people concerned. U.N. Human Rights Comm., *Communication No. 1457/2006*, *Ángela Poma Poma v. Peru*, ¶¶ 7.6–7.7 U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009).

55. U.N. Human Rights Comm., *Communication No. 205/1986*, ¶ 4.1, U.N. Doc. CCPR/C/43/D/205/1986 (Dec. 3, 1991).

56. *Id.* ¶ 5.5.

57. *Id.* ¶ 5.4.

consultations are held with directly affected groups it is by virtue of the law of the particular State or the public policy that has evolved in that State rather than any right flowing from Article 25.<sup>58</sup> This interpretation effectively rules out the possibility of indigenous peoples successfully invoking Article 25 in order to ensure they can participate even in the most fundamental decisions affecting their lands and traditional way of life. Read in conjunction with the Committee's General Comments,<sup>59</sup> it suggests that any rights that indigenous peoples may have to participate in decisions affecting their specific interests are derived not from Article 25 but from other provisions such as Article 27. This demonstrates the overlap that is emerging in the content of the rights under Articles 25 and 27, in that both provisions now contain some form of participatory rights. Significantly, this development is different in nature from the international practice discussed in much of the existing literature on the interdependence and indivisibility of rights.<sup>60</sup> Here, the Committee is not interpreting an existing right<sup>61</sup> in an expansive manner to meet the exigencies of a particular situation; rather, it is carving a similar right out of another that is separate and distinct.<sup>62</sup>

Such blurring of the boundaries between rights is even more apparent in relation to the right to self-determination in Article 1 and the rights of persons belonging to minorities in Article 27 of the Covenant. This is evident from the present author's survey of the Committee's Concluding Observations and Recommendations on the State reports submitted under Article 40 of the ICCPR. The survey reveals that there has been a discernible shift in how the rights of indigenous peoples are perceived under the Covenant. From 1977 until 1998, the rights of indigenous peoples were generally dealt with under Article 27.<sup>63</sup> However, from 1998 to the pre-

58. See *id.* ¶ 5.5.

59. See *supra* note 53 and accompanying text.

60. See *supra* note 11 and accompanying text.

61. See ICCPR, *supra* note 24, art. 25 (describing the right to effective participation).

62. See ICCPR, *supra* note 24, art. 27 (describing the right to respect for identity).

63. This is seen in the sections of the Human Rights Committee's annual reports to the General Assembly on its consideration of the State Reports submitted by State parties under Article 40 of the Covenant. See, e.g., Rep. of the Human Rights Comm., U.N. Doc. A/32/44; GAOR, 32d Sess., Supp. No. 44 (1977); Rep. of the Human Rights Comm., U.N. Doc. A/39/40; GAOR, 39th Sess., Supp. No. 40, at 73 (1984) (Panama); Rep. of the Human Rights Comm., U.N. Doc. A/41/40; GAOR, 41st Sess., Supp. No. 40, at 33, 46 (1986) (Sweden, Finland); Rep. of the Human Rights Comm., U.N. Doc. A/43/40; GAOR, 43d Sess., Supp. No. 40, at 80–81, 107–08, 127–28 (1988) (Ecuador, Australia, Colombia); Rep. of the Human Rights Comm., U.N. Doc. A/44/40; GAOR, 44th Sess., Supp. No. 40, at 20, 30, 75, 92, 98 (1989) (Norway, Mexico, Philippines, New Zealand, Bolivia); Rep. of the Human Rights Comm., U.N. Doc. A/45/40; GAOR, 45th Sess., Supp. No. 40, at 48, 52, 95 (1990) (Chile, Argentina, Nicaragua); Rep. of the Human Rights Comm., U.N. Doc. A/46/40; GAOR, 46th Sess., Supp. No. 40, at 22, 25, 33, 85 (1991) (Canada, Finland, Sweden); Rep. of the Human Rights Comm., U.N. Doc. A/47/40; GAOR 47th Sess., Supp. No. 40, at 59–60, 76, 90–91 (1994) (Ecuador, Peru, Colombia); Rep. of the Human Rights Comm., U.N. Doc. A/51/40; GAOR, 51st Sess., Supp. No. 40, at 19, 35, 37, 48, 49 (1997) (Sweden, Guatemala, Brazil, Peru); Rep. of the Human Rights Comm., U.N. Doc. A/51/40; GAOR, 51st Sess., Supp. No. 40, at 38, 47, 49 (1997) (Bolivia, Colombia); Rep. of the Human Rights Comm., U.N. Doc. A/53/40; GAOR, 53d Sess., Supp. No. 40, at 45 (1998) (Ecu-

sent, there has been a growing tendency for the Committee to refer to Articles 1 *and* 27 in its Concluding Observations and Recommendations concerning indigenous peoples.<sup>64</sup> Significantly, these are not isolated references. To the contrary, the references were made in nearly one third of all reports submitted during this period by States with indigenous peoples.<sup>65</sup>

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dor). However, individual members of the Committee occasionally questioned States in very general terms about their position on self-determination and the rights of indigenous peoples. *See* Rep. of the Human Rights Comm., U.N. Doc. A/35/40; GAOR, 35th Sess., Supp. No. 40, at 35, 58 (1980) (Canada, Colombia); Rep. of the Human Rights Comm., U.N. Doc. A/36/40; GAOR, 36th Sess., Supp. No. 40, at 20 (1981) (Denmark); Rep. of the Human Rights Comm., U.N. Doc. A/38/40; GAOR, 38th Sess., Supp. No. 40, at 32, 53 (1983) (Australia, Nicaragua); Rep. of the Human Rights Comm., U.N. Doc. A/40/40; GAOR, 40th Sess., Supp. No. 40, at 35 (1985) (Canada); Rep. of the Human Rights Comm., U.N. Doc. A/46/40; GAOR, 46th Sess., Supp. No. 40, at 12 (1991) (Canada).

64. *See* Rep. of the Human Rights Comm., U.N. Doc. A/54/40; GAOR, 54th Sess., Supp. No. 40, at 49 (1999) (Canada); Rep. of the Human Rights Comm., U.N. Doc. A/55/40; GAOR, 55th Sess., Supp. No. 40, at 23, 72 (2000) (Norway, Australia); Rep. of the Human Rights Comm., U.N. Doc. A/57/40; GAOR, 57th Sess., Supp. No. 40, at 60 (2002) (Sweden); Rep. of the Human Rights Comm., 82d-84th Sess., Oct. 18, 2004-July 29, 2005, U.N. Doc. A/60/40; GAOR, 60th Sess., Supp. No. 40, at 25 (2005) (Finland); Rep. of the Human Rights Comm., 85th-87th Sess., Oct. 17, 2005-July 28, 2006, U.N. Doc. A/61/40; GAOR, 61st Sess., Supp. No. 40, at 21, 47, 67 (2006) (Canada, Norway, United States); Rep. of the Human Rights Comm., 88th-90th Sess., Oct. 16, 2006-July 27, 2007, U.N. Doc. A/62/40; GAOR, 62d Sess., Supp. No. 40, at 49 (2007) (Chile); Concluding observations of the Human Rights Comm., Brazil, 85th Sess., ¶ 6, U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005); Concluding observations of the Human Rights Comm., Panama, 92d Sess., U.N. Doc. CCPR/C/PAN/CO/3, at 5 (Apr. 17, 2008); Concluding observations of the Human Rights Comm., Mexico, 98th Sess., Mar. 8-26, 2010, ¶ 22, U.N. Doc. CCPR/C/MEX/CO/5 (May 17, 2010).

65. Issues concerning indigenous peoples were raised in connection with the reports submitted by 33 States either on the initiative of the State itself or by the Committee. *See, e.g.*, Concluding observations of the Human Rights Comm., Chile, 89th Sess., Mar. 12-30, 2007, U.N. Doc. CCPR/C/CHL/CO/5 (May 18, 2007); Concluding observations of the Human Rights Comm., United States of America, 87th Sess., July 10-28, 2006, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); Concluding observations of the Human Rights Comm., Norway, 86th Sess., Mar. 13-31, 2006, U.N. Doc. CCPR/C/NOR/CO/5 (Apr. 25, 2006); Concluding observations of the Human Rights Comm., Canada, 85th Sess., U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006); Concluding observations of the Human Rights Comm., Brazil, 85th Sess., U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005); Concluding observations of the Human Rights Comm., Finland, 82d Sess., U.N. Doc. CCPR/C/82/FIN (Dec. 2, 2004); Concluding observations of the Human Rights Comm., Russian Federation, U.N. Doc. CCPR/C/RUS/6 (Feb. 5, 2008); Concluding observations of the Human Rights Comm., Sweden, 95th Sess., Mar. 16-Apr. 3, 2009, U.N. Doc. CCPR/C/SWE/CO/6 (May 7, 2009); Consideration of reports submitted by states parties under article 40 of the covenant, Australia, U.N. Doc. CCPR/C/AUS/98/3 (July 22, 1999); Concluding observations of the Human Rights Comm., Panama, 92d Sess., Mar. 17-Apr. 4, 2008, U.N. Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008); Consideration of reports submitted by states parties under article 40 of the covenant, Argentina, U.N. Doc. CCPR/C/ARG/4 (Mar. 13, 2008); Consideration of reports submitted by states parties under article 40 of the covenant, U.N. Doc. CCPR/C/ECU/5 (May 26, 2008); Concluding observations of the Human Rights Comm., Mexico, 66th Sess., U.N. Doc. CCPR/C/79/Add.109 (July 27, 1999); Concluding observations of the Human Rights Comm., Rwanda, 95th Sess., Mar. 15-Apr. 3, 2009, U.N. Doc. CCPR/C/RWA/CO/3 (May 7, 2009); Consideration of reports submitted by states parties under article 40 of the covenant, Cameroon, U.N. Doc. CCPR/C/CMR/4 (May 11, 2009); Concluding observations of the Human Rights Comm., Japan, 94th Sess., Oct. 13-31, 2008, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008); Concluding observations of the Human Rights Comm., Philippines, 79th Sess., U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003); Concluding observations of the Human Rights Comm., New Zealand, 75th Sess., U.N. Doc. CCPR/CO/75/NZL (Aug. 7, 2002); Concluding observations of the Human Rights Comm., Nicaragua, 94th Sess., Oct. 13-31, 2008, U.N. Doc. CCPR/C/NIC/CO/3 (Dec. 12, 2008); Concluding observations of the Human Rights Comm., Costa Rica, 91st Sess., Oct. 15-Nov. 2, 2007, U.N. Doc. CCPR/C/CRI/CO/5 (Nov. 16, 2007); Concluding observations of the Human Rights Comm., Honduras, 88th Sess., U.N. Doc. CCPR/

As such, they represent an important development with potentially far-reaching implications.

The Committee's simultaneous references to Articles 1 and 27 raise questions about the content of these rights and the relationship between them. Unfortunately, the references tend to be quite terse and provide little in the way of explicit guidance on these issues. Fairly typical in this respect is the Committee's recommendation that the United States "should take further steps to secure the rights of all indigenous peoples under Articles 1 and 27 of the Covenant so as to give them greater influence in decision making affecting their natural environment and their means of subsistence as well as their own culture."<sup>66</sup> Implicit in this and similar observations is the idea that for indigenous peoples, self-determination and minority rights entail a more "significant"<sup>67</sup> or "stronger"<sup>68</sup> role in decision-making over their traditional lands and natural resources.<sup>69</sup> On other occasions, the Committee has invoked Articles 1 and 27 in expressing its concerns about the slow pace of demarcation of indigenous lands<sup>70</sup> and the impact of logging and large-scale oil and gas extraction on these lands.<sup>71</sup> No attempt is made, however, to distinguish between Articles 1 and 27 in terms of the content of these rights.

The situation is further complicated by the apparent inconsistencies in the Committee's approach to the rights of indigenous peoples. The survey reveals that in approximately two-thirds of States with indigenous peoples, the Committee made no reference to self-determination or Article 1 in its

C/HND/CO/1 (Dec. 13, 2006); Concluding observations of the Human Rights Comm., Paraguay, 85th Sess., U.N. Doc. CCPR/C/PRY/CO/2 (Apr. 24, 2006); Concluding observations of the Human Rights Comm., Suriname, 80th Sess., U.N. Doc. CCPR/CO/80/SUR (May 4, 2004); Concluding observations of the Human Rights Comm., Colombia, 80th Sess., U.N. Doc. CCPR/CO/80/COL (May 26, 2004); Concluding observations of the Human Rights Comm., Guyana, 68th Sess., U.N. Doc. CCPR/C/79/Add.121 (Apr. 25, 2000); Concluding observations of the Human Rights Comm., Cambodia, 66th Sess., U.N. Doc. CCPR/C/79/Add.108 (July 27, 1999); Consideration of reports submitted by states parties under article 40 of the covenant, El Salvador, U.N. Doc. CCPR/C/SLV/2002/3 (July 12, 2002); Concluding observations of the Human Rights Comm., Vietnam, 75th Sess., U.N. Doc. CCPR/CO/75/VNM (July 26, 2002); Concluding observations of the Human Rights Comm., Guatemala, 72d Sess., U.N. Doc. CCPR/CO/72/GTM (Aug. 27, 2001); Concluding observations of the Human Rights Comm., Venezuela, 71st Sess., U.N. Doc. CCPR/CO/71/VEN (Apr. 26, 2001); Concluding observations of the Human Rights Comm., Bolivia, U.N. Doc. CCPR/C/79/Add.74 (May 5, 1997); Concluding observations of the Human Rights Comm., Denmark, 94th Sess., Oct. 13-31, 2008, U.N. Doc. CCPR/C/DNK/CO/5 (Dec. 16, 2008).

66. Concluding observations of the Human Rights Comm., United States, 87th Sess., July 10-28, 2006, ¶ 37, U.N. Doc. CCPR/C/USA/CO3/Rev.1 (Dec. 18, 2006).

67. See Concluding observations of the Human Rights Comm., Sweden, 74th Sess., ¶ 15, U.N. Doc. CCPR/CO/74/SWE (Apr. 24, 2002).

68. Rep. of the Human Rights Comm., Vol. I, 55th Sess., ¶ 507, U.N. Doc. A/55/40; GAOR, 55th Sess., Supp. No. 40 (July 24, 2000).

69. See Concluding observations of the Human Rights Comm., Chile, 89th Sess., ¶ 19, March 12-30, 2007, U.N. Doc. CCPR/C/CHL/CO/5 (May 18, 2007).

70. Concluding observations of the Human Rights Comm., Brazil, 85th Sess., ¶ 6, U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005).

71. Concluding observations of the Human Rights Comm., Canada, 85th Sess., ¶ 9, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006).

Concluding Observations and Recommendations.<sup>72</sup> In some instances, it simply called on States to recognize the existence and rights of indigenous peoples or to report on how these rights were respected.<sup>73</sup> In others, no reference was made to indigenous peoples notwithstanding references to them in the State report under Article 27.<sup>74</sup> For the most part, the Committee called on States to adopt special measures to protect, preserve, and promote indigenous culture, for example, by recognizing indigenous land rights,<sup>75</sup> ensuring adequate protection for indigenous land and resource rights in relation to mining and other competing usage,<sup>76</sup> securing free and informed consent prior to the exploitation of natural resources on indigenous lands,<sup>77</sup> completing demarcation and granting title to indigenous lands,<sup>78</sup> and adopting mechanisms to enable indigenous peoples to be consulted and to participate in decisions affecting them.<sup>79</sup> The absence of any reference to self-determination in these Concluding Observations and Recommendations is intriguing given the similarity between the substance of

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72. See Concluding observations of the Human Rights Comm., New Zealand, 98th Sess., Mar. 8–26, 2010, U.N. Doc. CCPR/C/NZL/CO/5 (Apr. 7, 2010); Concluding observations of the Human Rights Comm., Argentina, 98th Sess., Mar. 8–26, 2010, U.N. Doc. CCPR/C/ARG/CO/4 (Mar. 31, 2010); Concluding observations of the Human Rights Comm., Ecuador, 97th Sess., Oct. 12–30, 2009, U.N. Doc. CCPR/C/ECU/CO/5 (Nov. 4, 2009); Concluding observations of the Human Rights Comm., Russian Federation, 97th Sess., Oct. 12–30, 2009, U.N. Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009); Human Rights Comm., Concluding observations, Rwanda, May 2009, *supra* note 65; Human Rights Comm., Concluding observations, Japan, Dec. 2008, *supra* note 65; Human Rights Comm., Concluding observations, Nicaragua, Dec. 2008, *supra* note 65; Human Rights Comm., Concluding observations, Costa Rica, Nov. 2007, *supra* note 65; Human Rights Comm., Concluding observations, Honduras, Dec. 2006, *supra* note 65; Human Rights Comm., Concluding observations, Paraguay, Apr. 2006, *supra* note 65; Concluding observations of the Human Rights Comm., Thailand, U.N. Doc. CCPR/CO/84/THA (July 8, 2005); Human Rights Comm., Concluding observations, Colombia, May 2004, *supra* note 65; Human Rights Comm., Concluding observations, Suriname, May 2004, *supra* note 65; Concluding observations of the Human Rights Comm., Philippines, 79th Sess., U.N. Doc. CCPR/CO/79/PHL (Dec. 1, 2003); Human Rights Comm., Concluding observations, Vietnam, July 2002, *supra* note 65; Human Rights Comm., Concluding observations, Guyana, Apr. 2000, *supra* note 65; Human Rights Comm., Concluding observations, Cambodia, July 1999, *supra* note 65; Human Rights Comm., Concluding observations, Bolivia, May 1997, *supra* note 65.

73. See Human Rights Comm., Concluding observations, Rwanda, May 2009, *supra* note 65; Human Rights Comm., Concluding observations, Vietnam, July 2002, *supra* note 65; Human Rights Comm., Concluding observations, Venezuela, Apr. 2001, *supra* note 65; Human Rights Comm., Concluding observations, Cambodia, July 1999, *supra* note 65.

74. See Human Rights Comm., Consideration of Reports, El Salvador, July 2002, *supra* note 65.

75. See Human Rights Comm., Concluding observations, Japan, Dec. 2008, *supra* note 65, ¶ 32; Human Rights Comm., Concluding observations, Honduras, Dec. 2006, *supra* note 65, ¶ 19; Human Rights Comm., Concluding observations, Paraguay, Apr. 2006, *supra* note 65, ¶ 23; Human Rights Comm., Concluding observations, Suriname, May 2004, *supra* note 65, ¶ 21; Human Rights Comm., Concluding observations, Guatemala, Aug. 2001, *supra* note 65, ¶ 29.

76. See Human Rights Comm., Concluding observations, Philippines, Dec. 2003, *supra* note 65, ¶ 16.

77. See Human Rights Comm., Concluding observations, Nicaragua, Dec. 2008, *supra* note 65, ¶ 21.

78. *Id.*

79. See, e.g., Human Rights Comm., Concluding observations, Mexico, May 2010, *supra* note 64, ¶ 22; Human Rights Comm., Concluding observations, Colombia, May 2004, *supra* note 65, ¶ 20; Human Rights Comm., Concluding observations, Suriname, May 2004, *supra* note 65, ¶ 21.



these comments and those where reference was made to Articles 1 and 27 concurrently. It demonstrates the erosion of the traditional boundaries between the content of these rights and the need to recognize this explicitly with a view to reconceptualizing the relationship between them.

C. *The catalyst for recent developments within the ICCPR*

It is clear from the foregoing analysis that the Committee's interpretation of Articles 1, 25, and 27 of the ICCPR has contributed to the emergence of a certain degree of interdependence and indivisibility in the content of these rights. To date, the Committee has not recognized this development explicitly nor explained the reasons for its occurrence. Thus, any discussion of its causes must be somewhat speculative. One can assume that the Committee interpreted these provisions in such a manner as to ensure respect for the rights of indigenous peoples. Concerns about the need to ensure the effective implementation of human rights have always underpinned the concept of the interdependence and indivisibility of human rights.<sup>80</sup> However, these concerns are not in themselves a complete explanation for recent developments under the ICCPR. The Committee must act in accordance with the terms of its mandate; its interpretation of the Covenant must always remain within acceptable boundaries. Consequently, the Committee cannot adopt *any* interpretation of these provisions simply on the basis that it would further the effective implementation of human rights.

The present Part analyzes the Committee's Concluding Observations and Recommendations with a view to identifying potential catalysts for recent developments concerning the rights of indigenous peoples. It will identify several trends that can help to explain why a modicum of interdependence and indivisibility in the content of these rights has emerged. The first relates to developments within other human rights regimes and their possible impact on the way in which the Committee has interpreted the relevant provisions in the Covenant. The second relates to developments at the national level and their potential impact on the interpretation of the provisions. Both go some way towards explaining the Committee's willingness to interpret the provisions in a more expansive manner to the point where it is now possible to identify some interdependence and indivisibility in the content of these rights.

One of the first trends to emerge from the survey of the Committee's Concluding Observations and Recommendations is that the references to Article 1, either alone or in conjunction with Article 27, tend to date from 1999 onwards.<sup>81</sup> Arguably, the timing of these references is significant as

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80. See *supra* notes 2–4.

81. See Concluding observations of the Human Rights Comm., Norway, 67th Sess., Oct. 26, 1999, U.N. Doc. CCPR/C/79/Add.112 (Nov. 1, 1999); Concluding observations of the Human Rights Comm., Canada, 65th Sess., Apr. 6, 1999, U.N. Doc. CCPR/C/79/Add.105 (Apr. 7, 1999); Human Rights Comm., Concluding observations, Australia, July 2000, *supra* note 65, ¶¶ 498–528; Human

they coincide with the emergence of a growing consensus within the U.N. Working Group on the Draft Declaration on the Rights of Indigenous Peoples that indigenous peoples should have a right to some form of self-determination.<sup>82</sup> Admittedly, the issue of self-determination for indigenous peoples continued to provoke controversy within the Working Group. However, the controversy centered on the scope and practical application of the right for indigenous peoples rather than on its recognition.<sup>83</sup> Viewed from this perspective, the Committee's increasing references to self-determination for indigenous peoples can be seen to mirror developments within the Working Group on the Draft Declaration on the Rights of Indigenous Peoples.

Of course, one has to be cautious about how one evaluates these developments. At most, one can say that there may be tentative evidence of what the present author would term "inter-regime dynamics" whereby developments within one human rights regime may impact on developments within another regime. In this context, developments relating to the U.N. Declaration on the Rights of Indigenous Peoples<sup>84</sup> may have had some indirect impact on the way in which the Committee is interpreting the Covenant<sup>85</sup> in relation to indigenous peoples' rights. If this proves to be correct, then inter-regime dynamics may help to expand the scope of the rights set out in the ICCPR. This would be significant not only in terms of increasing the rights of indigenous peoples but also in terms of understanding why the interdependence and indivisibility in the content of these rights has emerged as well as how it could develop in the future. At a more general level, it can contribute to our understanding of the diffuse processes at work in the evolution of international human rights law.

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Rights Comm., Concluding observations, Sweden, Apr. 2002, *supra* note 67; Human Rights Comm., Concluding observations, Finland, Dec. 2004, *supra* note 65; Human Rights Comm., Concluding observations, Brazil, Dec. 2005, *supra* note 70; Human Rights Comm., Concluding observations, Canada, Apr. 2006, *supra* note 71; Human Rights Comm., Concluding observations, Norway, Apr. 2006, *supra* note 65; Human Rights Comm., Concluding observations, U.S.A., Dec. 2006, *supra* note 66; Human Rights Comm., Concluding observation, Chile, May 2007, *supra* note 69; Concluding observations of the Human Rights Comm., Panama, 92nd Sess., Mar. 17–Apr. 4, 2008, U.N. Doc CCPR/C/PAN/CO/3 (April 17, 2008); Human Rights Comm., Concluding observations, Sweden, May 2009, *supra* note 65; and Human Rights Comm., Concluding observations, Mexico, May 2010, *supra* note 64 (showing evolution of Article I references from 1999 onward).

82. By 1999, the Chairperson-Rapporteur of the Working Group on the Draft Declaration on the Rights of Indigenous Peoples noted that "participants in general agreed that the right to self-determination was the cornerstone of the draft declaration." U.N. Comm. on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶ 82 U.N. Doc. E/CN.4/2000/84 (Dec. 6, 1999).

83. *See, e.g.*, U.N. GAOR, 61st Sess., 107th plen. mtg., at 12, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) (Canada's explanation of its vote against text presented by the Human Rights Council).

84. The Declaration is located within the UN Charter-Based Human Rights regime. *See infra* notes 106–130 and accompanying discussion.

85. The covenant is enforced through the UN Human Rights Treaty Monitoring System. *See supra* notes 24–29 and accompanying discussion.

A second trend that emerges from the survey is that there seems to be some correlation between the Committee's approach to the rights of indigenous peoples and the approach adopted by the States concerned. Where the Committee omitted any reference to self-determination, the States concerned had tended to discuss indigenous peoples solely within the framework of Article 27 in their reports.<sup>86</sup> In contrast, where the Committee referred to self-determination, the States concerned had either discussed indigenous peoples in the section of their reports dealing with self-determination,<sup>87</sup> expressed a willingness to recognize a limited right to self-determination for indigenous peoples,<sup>88</sup> and/or had some domestic concept

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86. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, Nicaragua, ¶¶ 749–86, U.N. Doc. CCPR/C/NIC/3 (Oct. 19, 2007); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Japan, ¶¶ 378–83, U.N. Doc. CCPR/C/JPN/5 (Apr. 25, 2007); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Costa Rica, ¶¶ 427–37, U.N. Doc. CCPR/C/PRY/2004/2 (Aug. 3, 2004); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Paraguay, ¶¶ 591–602, U.N. Doc. CCPR/C/PRY/2004/2 (Aug. 3, 2004); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Suriname, U.N. Doc. CCPR/C/SUR/2003/2 (July 4, 2003); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Colombia, ¶¶ 959–82, U.N. Doc. CCPR/C/COL/2002/5 (Sept. 18, 2002); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Vietnam, ¶¶ 122–30, U.N. Doc. CCPR/C/VNM/2001/2 (July 26, 2002); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, Venezuela, ¶¶ 405–14, U.N. Doc. CCPR/C/VEN/98/3 (Mar. 30, 1999); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Guyana, ¶ 94, U.N. Doc. CCPR/C/GUY/99/2 (May 18, 1999). There was some reference to indigenous peoples in the sections of the State Reports on Article 1 submitted by the Philippines, Nicaragua and Honduras but the references were very brief and/or ambiguous in terms of accepting the relevance of this provision to indigenous peoples as a specific group. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Philippines, ¶ 455, U.N. Doc. CCPR/C/PHL/2002/2 (Dec. 18, 2002); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, Nicaragua, ¶ 9, U.N. Doc. CCPR/C/NIC/3 (Oct. 19, 2007); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Initial Report, Honduras, ¶ 15, U.N. Doc. CCPR/C/HND/2005/1 (Apr. 26, 2005).

87. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Canada, ¶ 8, U.N. Doc. CCPR/C/CAN/2004/5 (Nov. 18, 2004); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Brazil, ¶ 14, U.N. Doc. CCPR/C/BRA/2004/2 (Apr. 11, 2005); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Finland, ¶ 93, U.N. Doc. CCPR/C/FIN/2003/5 (July 24, 2003) (also referencing a discussion under Article 27); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, Australia, ¶ 30–33, U.N. Doc. CCPR/C/AUS/98/3 (July 22, 1999) (also discussing issues concerning indigenous people under Article 27).

88. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Sixth Periodic Report, Norway, ¶¶ 4–5, U.N. Doc. CCPR/C/NOR/6 (Nov. 11, 2010); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Mexico, ¶ 36, U.N. Doc. CCPR/C/MEX/5 (Sept. 24, 2008); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Sixth Periodic Report, Sweden, ¶¶ 5–11, U.N. Doc. CCPR/C/SWE/6 (Dec. 5, 2007);

of indigenous self-determination<sup>89</sup> even if the term “self-determination” was not explicitly used.<sup>90</sup> Indeed, in one instance the Committee expressly stated that since the government and parliament of a particular State had addressed the situation of indigenous peoples within the framework of the right to self-determination, it expected that State to report on the indigenous peoples’ right to self-determination under Article 1 of the Covenant in subsequent reports.<sup>91</sup>

This trend demonstrates one way in which developments at the domestic level can impact the interpretation of rights at the international level. Arguably, this goes beyond the generally accepted principle that where a State exceeds the minimum required under a human rights treaty, it will be considered bound by its additional undertakings.<sup>92</sup> In the present context, it is interesting to observe how developments at the domestic level can have a more diffuse impact on the expansion of rights at the international level, particularly when one factors in the potential for inter-regime dynamics referred to previously. Arguably, at least some of the references to self-determination in the Committee’s Concluding Observations and Recommendations reflected developments at the domestic level in particular States.<sup>93</sup> These Concluding Observations and Recommendations were then invoked during the drafting of the U.N. Declaration on the Rights of Indigenous Peoples, particularly in the context of discussions concerning the *scope* of the right to self-determination to be included in the Declaration.<sup>94</sup> At the same time, the emergence of a consensus on the *recognition* of a right to self-determination during the drafting of the U.N. Declaration may, in turn, help to explain the increasing references to self-determination in some of the State reports<sup>95</sup> and the Committee’s Concluding Observations and Rec-

Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report, Chile, ¶ 51, U.N. Doc. CCPR/C/CHL/5 (July 5, 2006); Human Rights Comm., Canada’s Response to the List of Issues, ¶¶ 25–39, U.N. Doc. CCPR/C/SR.2312 (Oct. 17, 2005).

89. See Rep. of the Human Rights Comm., 54th Sess., Sep. 14, 1999–Sep. 5, 2000, U.N. Doc. 54 GAOR Supp. No. 40; Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, United States of America, ¶¶ 18–25, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

90. However, Panama was the exception as none of these considerations applied to it. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report, Panama, ¶¶ 734–41, U.N. Doc. CCPR/C/PAN/3 (Aug. 29, 2007).

91. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations, Norway, ¶ 17, U.N. Doc. CCPR/C/79/Add.112 (Nov. 1, 1999).

92. See, e.g., Belgian Linguistic Case (No. 2), 1 Eur. Ct. H.R. 252, 283 (1968).

93. See, e.g., *supra* note 91 and accompanying text.

94. See *infra* note 128 and accompanying text.

95. Some of the State reports explicitly refer to the U.N. Declaration in their State Reports when discussing their compliance with Article 1 of the Covenant in relation to indigenous peoples. See Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Sixth Periodic Report, Norway, ¶ 5, U.N. Doc. CCPR/C/NOR/6 (Nov. 25, 2009); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report, Argentina, ¶ 144, U.N. Doc. CCPR/C/ARG/4 (Mar. 13, 2008).

ommendations in recent years. Although it is still quite tentative and somewhat speculative, this theory points to possible complex patterns of interaction between the domestic and the global that can contribute to an expansion of human rights, including those of indigenous peoples, and the emergence of interdependence and indivisibility in the content of these rights.

*D. The extent to which recent developments within the ICCPR are replicated elsewhere in the U.N. Human Rights Treaty Monitoring System*

Clearly, the ICCPR is not the only core human rights treaty relevant to indigenous peoples and their rights. This raises the question whether developments concerning the interdependence and indivisibility in the content of their rights under the ICCPR are occurring elsewhere in the U.N. Human Rights Treaty Monitoring System. A brief review of other core human rights treaties such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Racial Discrimination suggests that they are. This is evident from a brief overview of the recent practice of the relevant Treaty Monitoring Bodies (“TMBs”), notably, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination.

The increasing tendency of the Human Rights Committee to refer to self-determination for indigenous peoples, for example, is echoed in the practice of the Committee on Economic, Social and Cultural Rights, usually in relation to concerns about ancestral lands and natural resources.<sup>96</sup> Like the Human Rights Committee, it does not formulate these concerns solely in terms of the right to self-determination but also, concurrently, in terms of the right to participate in cultural life<sup>97</sup> and/or the right to non-discrimi-

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96. A survey of the State reports submitted under the ICESCR shows that from 2003 onwards the Committee on Economic, Social, and Cultural Rights (“CESCR”) referred to self-determination for indigenous peoples in its consideration of over half the reports submitted by States with indigenous peoples. The survey undertaken by the present author is based on the documentation available on the CESCR’s website (<http://www2.ohchr.org/English/bodies/cescr/sessions.htm>) and covers the period 1997–2010. Prior to 2003, there was a tendency to formulate concerns about indigenous peoples in general terms without referring to specific articles in the Covenant. From 2003, self-determination was referred to explicitly in the CESCR’s List of Issues and/or Concluding Observations and Recommendations concerning the State Reports submitted by Brazil, Australia, Philippines, Sweden, Bolivia, Paraguay, Finland, Canada, Denmark, the Russian Federation, and Colombia. See U.N. Docs. E/C.12/BRA/CO/2 (June 12, 2009) (Brazil); E/C.12/AUS/CO/4 (July 28, 2009) (Australia); E/C.12/PHL/Q/4 (Sept. 17, 2008) (Philippines); E/C.12/PHL/CO/4 (Dec. 2, 2008) (Philippines); E/C.12/SWE/CO/5 (Dec. 1, 2008) (Sweden); E/C.12/BOL/Q/2 (Jan. 16, 2008) (Bolivia); E/C.12/PRY/Q/3 (Sept. 14, 2007) (Paraguay); E/C.12/FIN/Q/5 (Aug. 25, 2006) (Finland); E/C.12/Q/CAN/2 (June 30, 2005) (Canada); E/C.12/Q/DEN/1 (June 19, 1998) (Denmark); E/C.12/1/Add.94 (Dec. 12, 2003) (Russian Federation); E/C.12/COL/CO/5 (June 7, 2010) (Colombia). No reference was made to self-determination in the CESCR’s consideration of the State Reports submitted by Nicaragua, Costa Rica, El Salvador, Mexico, Norway, Chile, Ecuador, Guatemala and New Zealand during the same period.

97. See Concluding observations of the Comm. on Economic, Social and Cultural Rights, Australia, 42d Sess., May 4–22, 2009, U.N. Doc. E/C.12/AUS/CO/4 (June 12, 2009); Concluding Observations of

natory enjoyment of Covenant rights.<sup>98</sup> Again, this form of cross-referencing demonstrates a certain blurring of the boundaries between the content of the specified rights. This approach is also evident in the practice of the Committee on the Elimination of Racial Discrimination.<sup>99</sup> In the absence of any explicit provision on self-determination or indeed minority rights, this Committee has interpreted the rights “to own property alone as well as in association with others,” and “to participate in cultural activities” without racial discrimination<sup>100</sup> as protecting or embodying a more general right of indigenous peoples to own, develop, control and use their communal lands, territories and resources and to participate in decisions affecting them.<sup>101</sup> In effect, it seems that indigenous peoples can now claim broadly similar participatory rights and rights over their ancestral lands by virtue of a range of separate and distinct human rights within different core rights treaties. It demonstrates that recent developments concerning the interdependence and indivisibility of indigenous peoples’ rights are not confined to the ICCPR but are representative of a more general trend within the U.N. Human Rights Treaty Monitoring System.

The practice of these Treaty Monitoring Bodies also provides further insights as to why this trend may have developed. Once again, there is some evidence of inter-regime dynamics.<sup>102</sup> There is also some suggestion that

the Comm. on Economic, Social and Cultural Rights, Philippines, 41st Sess., Nov. 3–21, 2008, U.N. Doc. E/C.12/PHL/CO/4 (Dec. 1, 2008).

98. See Concluding observations of the Comm. on Economic, Social and Cultural Rights, Sweden, 41st Sess., Nov. 3–21, 2008, U.N. Doc. E/C.12/SWE/CO/5 (Dec. 1, 2008).

99. See Concluding observations of the Comm. on the Elimination of Racial Discrimination, Finland, 44th Sess., Feb. 16–Mar. 6, 2009, U.N. Doc. CERD/C/FIN/CO/19 (Mar. 13, 2009); Rep. of the Comm. on the Elimination of Racial Discrimination, 72d–73d Sess., Feb. 18–Aug. 15, 2008, U.N. Doc. A/63/18; GAOR, 63d Sess., Supp. No. 18 (2008) at 30, 31, 58, 64–65, 72, 78, 97; Rep. of the Committee on the Elimination of Racial Discrimination, 70th–71st Sess., Feb. 19–Aug. 17, 2007, U.N. Doc. A/62/18; GAOR, 62d Sess., Supp. No. 18 (2007) at 19, 38, 61, 67; Rep. of the Comm. on the Elimination of Racial Discrimination, 68th–69th Sess., Feb. 20–Aug. 8, 2006, U.N. Doc. A/61/18; GAOR, 61st Sess., Supp. No. 18 (2006), at 35, 45.

100. See CERD, *supra* note 24, arts. 5(d)(v), 5(e)(vi).

101. See, e.g., Comm. on the Elimination of Racial Discrimination, Concluding observations, Finland, Mar. 2009, *supra* note 99; Rep. of the Comm. on the Elimination of Racial Discrimination, GAOR, 63d Sess., Supp. No. 18, *supra* note 99, at 30–31, 58, 64–65, 72, 78, 97; Report of the Comm. on the Elimination of Racial Discrimination, GAOR, 62d Sess., Supp. No. 18, *supra* note 99, at 18, 19, 38, 61, 67; Report of the Comm. on the Elimination of Racial Discrimination, GAOR, 61st Sess., Supp. No. 18, *supra* note 99, at 35, 45.

102. In the case of the Committee on the Elimination of Racial Discrimination, these dynamics are evident in its recommendations to several States to take the necessary action required under the U.N. Declaration on the Rights of Indigenous Peoples or to accede to or comply with ILO Convention 169. See, e.g., Comm. on the Elimination of Racial Discrimination, Concluding Observations, Finland, Mar. 2009, *supra* note 99; Concluding observations of the Comm. on the Elimination of Racial Discrimination, Pakistan, 74th Sess., Feb. 16–Mar. 6, 2009, U.N. Doc. CERD/C/PAK/CO (Mar. 16, 2009); Concluding observations of the Comm. on the Elimination of Racial Discrimination, Chile, 75th Sess., Aug. 3–28, 2009, U.N. Doc. CERD/C/CHL/CO/15-18 (Sep. 7, 2009); Concluding observations of the Comm. on the Elimination of Racial Discrimination, Japan, 76th Sess., Feb. 15–Mar. 12, 2010, U.N. Doc. CERD/C/JPN/CO/3-6 (Apr. 6, 2010); Rep. of the Comm. on the Elimination of Racial Discrimination, GAOR, 62d Sess., *supra* note 99, at 21, 70, 89. The Committee has also called on States to take action with respect to the U.N. Declaration. See, e.g., Concluding observations of the Comm. on the

developments at the national level have contributed to the expansion of the rights of indigenous peoples at the international level to the point where one can identify some interdependence and indivisibility in the content of these rights.<sup>103</sup> There is, however, an additional reason for this development, which becomes apparent when one reviews the practice of the various Treaty Monitoring Bodies. It is that these bodies have interpreted the rights in their respective treaties in such a way as to enable them to respond to the legitimate claims of indigenous peoples within the terms of their mandate. It means that while the Human Rights Committee will deal with issues concerning the use of ancestral lands under the right to self-determination and the right to respect for identity, the Committee on the Elimination of Racial Discrimination will deal with the same issues under the right to own property alone and in association with others as well as the right to partici-

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Elimination of Racial Discrimination, Suriname, 74th Sess., Feb. 26–Mar. 6, 2009, U.N. Doc. CERD/C/SUR/CO/12 (Mar. 13, 2009); Rep. of the Comm. on the Elimination of Racial Discrimination, GAOR, 63d Sess., *supra* note 99, at 97; Rep. of the Comm. on the Elimination of Racial Discrimination, GAOR, 62d Sess., *supra* note 99, at 21. The CESCR has also called on States to ratify ILO Convention 169 either in the Committee's List of Issues or the Concluding Observations and Recommendations on the State Reports submitted by Australia, the Philippines, Nicaragua, Sweden, Finland, Chile, Panama, and Argentina. *See, e.g.*, Concluding observations of the Comm. on the Elimination of Racial Discrimination, Australia, 42nd Sess., May 4–22, 2009, U.N. Doc. E/C.12/AUS/CO/4 (June 12, 2009); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Philippines, 41st Sess., Nov. 3–21, U.N. Doc. E/C.12/PHL/CO/4 (Dec. 1, 2008); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Nicaragua, 41st Sess., Nov. 3–21, 2008, U.N. Doc. E/C.12/NIC/CO/4 (Nov. 28, 2008); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Sweden, 41st Sess., Nov. 3–21, 2008, U.N. Doc. E/C.12/SWE/CO/5 (Dec. 1, 2008); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Finland, 38th Sess., Apr. 30–May 18, 2007, U.N. Doc. E/C.12/FIN/CO5 (Jan. 16, 2008); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Chile, 33d Sess., Nov. 8–Nov. 26, 2004, U.N. Doc. E/C.12/1/Add/105 (Nov. 26, 2004); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Panama, 26th Sess., Aug. 13–31, 2001, U.N. Doc. E/C.12/1/Add.64 (Sep. 24, 2001); Concluding observations of the Comm. on Economic, Social, and Cultural Rights, Argentina, 33d–36th and 52d Sess., Nov. 17–19 and Dec. 1, 1999, U.N. Doc. E/C.12/1/Add.38 (Dec. 8, 1999).

103. This is evident, for example, in the practice of the CESCR where at least some of its references to self-determination for indigenous peoples can be explained by developments at the national level for the State concerned. In the majority of cases, where references were made to self-determination, the State in question had accepted some form of self-determination for indigenous peoples either explicitly or by discussing indigenous peoples' rights in the section of its report on Art. 1 of the ICESCR. *See* Implementation of the ICESCR, 2d Periodic Rep., Brazil, Subst. Sess. 2008, Aug. 6, 2007, U.N. Doc. E/C.12/BRA/2 (Jan. 28, 2008); Implementation of the ICESCR, 5th Periodic Rep., Sweden, Subst. Sess. 2006, June 30, 2006, U.N. Doc. E/C.12/SWE/5 (Sept. 6, 2006); Implementation of the ICESCR, 5th Periodic Rep., Finland, Subst. Sess. 2006, Oct. 10, 2005, U.N. Doc. E/C.12/FIN/5 (Feb. 8, 2006); Implementation of the ICESCR, 2d and 3d Periodic Rep., Paraguay, Subst. Sess. 2007, 1994–2006, U.N. Doc. E/C.12/PRY/3 (Feb. 26, 2007); Implementation of the ICESCR, 4th Periodic Rep., Denmark, Subst. Sess. 2003, Mar. 2, 2003, U.N. Doc. E/C.12/4/Add.12 (Apr. 28, 2003); Implementation of the ICESCR, 4th Periodic Rep., Russian Fed., Subst. Sess. 2002, Nov. 15, 2001, U.N. Doc. E/C.12/4/Add.10 (Nov. 27, 2007). There was no discussion of self-determination for indigenous peoples in the State reports of some of the States concerned. *See* Implementation of the ICESCR, 4th Periodic Rep., Australia, Subst. Sess. 2008, June 27, 2007, U.N. Doc. E/C.12/AUS/4 (Jan. 7, 2008); Implementation of the ICESCR, 2d, 3d and 4th Periodic Rep., Philippines, Subst. Sess. 2007, Dec. 14, 2006, U.N. Doc. E/C.12/PHL/4 (Sept. 7, 2007); Implementation of the ICESCR, 2d Periodic Rep., Bolivia, Subst. Sess. 2007, Jan. 30, 2007, U.N. Doc. E/C.12/BOL/2 (Aug. 20, 2007); Implementation of the ICESCR, 5th Periodic Rep., Canada, Subst. Sess. 2006, Aug. 1, 2005, U.N. Doc. E/C.12/CAN/5 (Aug. 30, 2005).

pate in cultural activities without racial discrimination. Viewed in this light, the interdependence and indivisibility that is emerging in the content of indigenous peoples' rights may, at least in part, be an inevitable consequence of the multiplicity of treaties that exist in relation to the rights of indigenous peoples as well as the range of rights that they currently recognize.

## II. THE U.N. CHARTER-BASED SYSTEM

The following Part explores recent developments within the U.N. Charter-Based System with a specific focus on the U.N. Declaration on the Rights of Indigenous Peoples. The General Assembly's adoption of this Declaration in 2007<sup>104</sup> is arguably the most significant development concerning indigenous peoples' rights within this human rights system.<sup>105</sup> As the first global instrument to recognize a right to self-determination for indigenous peoples,<sup>106</sup> the Declaration is a groundbreaking document. However, what is of particular interest for the purposes of this Article is the relationship between the right to self-determination and the extensive array of provisions on participation set out in the Declaration. Analyzing the drafting of the Declaration, it is far from clear where the right to self-determination ends and where other rights, such as the right to participate in public life or the right to enjoy one's culture, begin. In particular, it is not evident where the extensive provisions on participation and consultation<sup>107</sup> should be located in terms of the traditional classification of these human rights. As such, the Declaration provides substantial evidence of a growing interdependence and indivisibility in the content of a wide range of indigenous peoples' rights. It demonstrates that the recent developments noted in relation to the core human rights treaties are part of an even broader trend within the international system for protecting human rights.

Reviewing the text of the Declaration, it seems that the provisions on participation can be organized into four broad categories. The first category comprises those provisions<sup>108</sup> that reaffirm the right to participate in political, economic, social, and cultural life, a right that is already recognized in many international human rights treaties,<sup>109</sup> such as Article 25 of the ICCPR. The remaining categories go beyond the existing parameters of this

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104. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 23.

105. Other components include the Human Rights Council's system of Universal Periodic Review ("UPR") and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. In relation to UPR, a survey of the reviews undertaken of States with indigenous peoples reveals that the emphasis is on the implementation of rights rather than any real discussion of the content of these rights.

106. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 23, arts. 3–4.

107. See *id.* arts. 5, 18, 19, 23, 27, 30(2), 36(2), 38, 41.

108. See *id.* arts. 5, 41.

109. See, e.g., American Convention on Human Rights art. 23, Nov. 22, 1969, 1144 U.N.T.S. 17955; African Charter on Human and Peoples' Rights, *supra* note 3, art. 13; European Convention for



right, raising questions as to whether they represent a practical elaboration of a right to self-determination for indigenous peoples or an expansion of their existing rights to participate in public life, to enjoy their own culture, or to non-discriminatory enjoyment of their property.

The second category of provisions on participation recognizes the right of indigenous peoples to maintain and develop their distinct political, legal, economic, social, and cultural systems and institutions.<sup>110</sup> As a form of autonomy, it may be regarded as one example of how the right to self-determination may be exercised. However, it may also be seen as a way of increasing effective participation in public life in much the same way as devolution or other autonomy arrangements have tried to do so in non-indigenous contexts.<sup>111</sup> Equally, it may be regarded as a way of preserving and promoting the traditional way of life of indigenous peoples that is an integral part of their right to enjoy their own culture.

The provisions in category three also seem to cut across traditional boundaries between human rights. These provisions include the right of indigenous peoples to participate in decision-making concerning matters implicating their rights<sup>112</sup> and require States to consult with the affected indigenous peoples in order to obtain their free, prior, and informed consent prior to approving any project involving their lands and natural resources<sup>113</sup> or adopting legislative or administrative measures that may come to bear on them.<sup>114</sup> In this respect, they echo and build on developments within the U.N. Human Rights Treaty Monitoring System concerning the interpretation of a range of human rights, particularly the right to self-determination, the right to enjoy one's own culture, and the right to non-discriminatory enjoyment of traditional lands and resources.<sup>115</sup>

The fourth category of provision provides that States shall establish "in conjunction with indigenous peoples concerned" a "fair, independent, impartial, open and transparent process to give due recognition to indigenous peoples' laws, customs and land tenure systems and to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources."<sup>116</sup> Again, this provision goes beyond the traditional boundaries of the existing rights. It does not readily mesh with the right to self-determination, as traditionally understood, because indigenous peoples cannot determine these modalities of participation *unilaterally* but must do so

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the Protection of Fundamental Freedoms art. 3, Nov. 4, 1950, E.T.S. No. 5 and Protocol 1, Mar. 2, 1952, E.T.S. No. 9.

110. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 23, arts. 5, 18, 20.

111. See, e.g., the United Kingdom Government's White Paper, *A Voice for Wales* (1997) CM 3718, explaining the reasons for proposing devolution for Wales.

112. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 23, art. 18.

113. See *id.* art. 32(2).

114. See *id.* art. 19; see also *id.* arts. 23, 29(2), 30.

115. See *supra* notes 15–21 and accompanying text.

116. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 23, art. 27.

in conjunction with the State.<sup>117</sup> Similarly, it is not easily accommodated within the existing parameters of the right to participate in public life since it envisages the *creation* of new modalities of participation and not simply *participation in existing modalities* without discrimination.<sup>118</sup> While one can identify a clear link between the provision and the rights to enjoy one's culture and to enjoy one's property without discrimination, it also goes beyond the existing scope of these rights by stipulating the involvement of indigenous peoples in the actual *development* of mechanisms that can contribute to a more effective enjoyment of these rights.

The drafting history provides further insights into the relationship between the various rights. Indigenous people strongly advocated for a right to self-determination<sup>119</sup> and thought that this particular right was essential for the enjoyment of all other rights of indigenous peoples.<sup>120</sup> These advocacy efforts suggest that there was some recognition of the interdependence and indivisibility of human rights at least in the traditional sense of rights being mutually reinforcing. Beyond this, the relationship between the various rights becomes more complex and indeterminate. This is due in part to the heterogeneous nature of the provisions on participation: whereby some fit more neatly within the framework of the right to self-determination or the right to participate in public life, others more closely align with evolving interpretations of land and cultural rights.

The complex relation between the rights contained within the Declaration is also due to the shifting positions of the States and indigenous peoples that participated in the drafting of the Declaration. For example, at one point, some of the provisions on participation were organized thematically as relating explicitly to the right to self-determination but were subsequently decoupled from this right.<sup>121</sup> Clearly, there was some difficulty in

117. It has been a cardinal principle of self-determination, especially during the decolonization period, that it is left to the people concerned to choose how to exercise their right to self-determination. See, e.g., Quane, *The U.N. and the Evolving Right to Self-Determination*, *supra* note 15, at 537, 547–58.

118. See *supra* notes 46–50 and accompanying text.

119. See, e.g., U.N. Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶ 19, 70, 82, U.N. Doc. E/CN.4/1999/82 (Jan. 20, 1999).

120. See, e.g., U.N. Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶ 56, U.N. Doc. E/CN.4/2001/85 (Feb. 6, 2001); U.N. Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution of 3 March 1995, ¶ 25, U.N. Doc. E/CN.4/1998/106 (Dec. 15, 1997).

121. A Norwegian proposal to re-cluster “Articles 3, 31, 19, 20, 21, 30 and 36 of the draft declaration dealing with self-determination and autonomy” was “welcomed” by government delegations and several Indigenous Peoples Representatives and discussions of the right to self-determination proceeded on the basis of this re-clustering at least for a time. See U.N. Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶¶ 19–20, U.N. Doc. E/CN.4/2003/92 (Jan. 6, 2003); see also U.N. Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶ 67, U.N. Doc. E/CN.4/2004/81 (Jan. 7, 2004). This re-clustering was subsequently changed and the provisions on participatory rights dropped from the organization of work concerning self-determination. See U.N. Comm'n on Human Rights, Draft Report of

pinning down these provisions in terms of traditional classifications of rights. While several participants noted a close relationship between some of the provisions on participation and the right to self-determination,<sup>122</sup> others went further and regarded these provisions as a form of realization of the right to self-determination for indigenous peoples.<sup>123</sup> Other provisions on participation were associated more with land and cultural rights<sup>124</sup> or the right to participate in public life as set out in existing international instruments.<sup>125</sup>

On balance, the drafting history suggests a variety of perspectives not only on the part of States but also on the part of indigenous peoples with disparate views being taken on the participatory rights, notably, that they were a form of indigenous self-determination, a means of attaining it, had some indeterminate “close” relationship to it, a permutation of all three, and/or were rights building on or flowing from land and cultural rights. At the very least, the multiple understandings demonstrate the cross-cutting nature of these provisions, rendering it difficult to categorize them neatly within traditional boundaries of human rights. This difficulty in categorization illustrates the increasing indivisibility of human rights with respect to their content.

What also emerges from the Declaration and its drafting history is further evidence of inter-regime dynamics.<sup>126</sup> For example, ILO Convention

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the Working Group Established in Accordance with Commission on Human Rights Resolution 1995 of 3 March 1995, ¶ 12, U.N. Doc. E/CN.4/2005/WG.15/CRP.6 (Nov. 29, 2005).

122. See, e.g., U.N. Comm’n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶¶ 217, 231, U.N. Doc. E/CN.4/1997/102 (Dec. 10, 1996); U.N. Comm’n on Human Rights, Report on the International workshop on the draft United Nations Declaration on the Rights of Indigenous Peoples, Patzcuaro, Michoacan, Mexico, September 26–30, 2005, ¶ 6, U.N. Doc. E/CN.4/2005/WG.15/CRP.1 (Nov. 29, 2005); U.N. Comm’n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, ¶ 10, U.N. Doc. E/CN.4/2006/79 (Mar. 22, 2006).

123. See, e.g., U.N. GAOR, 61st Sess., 107th plen. mtg., *supra* note 83 at 22, 24, 25 (respectively Norway, Sweden and Thailand’s explanation of their votes); see also Comm’n on Human Rights, Working Group Report, Mar. 2006, *supra* note 122, ¶ 22 (proposal submitted by Australia, New Zealand and the United States defining the right to self-determination as the right to “freely participate in determining their political status” and the “right to autonomy and self-management in matters relating directly to their internal and local affairs”).

124. See, e.g., Comm’n on Human Rights, Working Group Report, Mar. 2006, *supra* note 122, ¶ 24; U.N. Comm’n on Human Rights, Report of the Working Group Established in Accordance with Comm’n on Human Rights Resolution 1995/32 of 3 March 1995, 19, U.N. Doc. E/CN.4/2005/89/Add.1 (Feb. 24, 2005); U.N. Comm’n on Human Rights, Report of the Working Group on Indigenous Populations on its eighteenth session, ¶ 59, U.N. Doc. E/CN.4/Sub.2/2000/24 (Aug. 17, 2000). Some indigenous peoples also regarded these land and natural resource rights as “an integral part of the right to self-determination.” Comm’n on Human Rights, Working Group Report, Feb. 2001, *supra* note 120, ¶ 104.

125. See, e.g., Comm’n on Human Rights, Working Group Report, Dec. 1996, *supra* note 122, ¶ 199.

126. See, e.g., Comm’n on Human Rights, Working Group Report, Jan. 1999, *supra* note 119, ¶ 85(c). Evidence of inter-regime dynamics is also evident in other components of the U.N. Charter-Based System such as the Human Rights Council’s system of Universal Periodic Review, where States were called upon to consider ratification of ILO Convention 169 or to comply with the recommenda-

169 was invoked on numerous occasions to assist in the formulation of several of the rights set out in the Declaration.<sup>127</sup> As previously noted, extensive references were also made to the Concluding Observations and Recommendations of the Human Rights Committee and other Treaty Monitoring Bodies during the drafting of the Declaration.<sup>128</sup> The final draft of the Declaration appears to give some explicit support to inter-regime dynamics by calling on U.N. bodies and specialized agencies to “promote respect for and full application of the provisions” of the Declaration.<sup>129</sup> As such, the Declaration confers some legitimacy on the actions of the Treaty Monitoring Bodies and the ILO when they draw on the provisions of the Declaration in the interpretation and application of their respective man-

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tions of the Treaty Monitoring Bodies. *See, e.g.*, the recommendations made by Bolivia to Finland, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Finland, U.N. Doc. A/HRC/8/24 (May 23, 2008), ¶ 22; by Mexico to Botswana, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Botswana, U.N. Doc. A/HRC/10/69 (Jan. 13, 2009), ¶ 39; by Mexico to the Russian Federation, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Russian Federation, U.N. Doc. A/HRC/11/19 (Oct. 5, 2009), ¶ 81; by Mexico to Bangladesh, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Bangladesh, U.N. Doc. A/HRC/11/18 (Oct. 5, 2009), ¶ 68; by Mexico to Cameroon, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Cameroon, U.N. Doc. A/HRC/11/21 (Oct. 12, 2009), ¶ 46; by Mexico to Malaysia, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Malaysia, U.N. Doc. A/HRC/11/30 (Oct. 5, 2009), ¶ 89; by Mexico to the Congo, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Congo, U.N. Doc. A/HRC/WG.6/5/L.5 (May 15, 2009), ¶ 35; by Mexico to Vietnam, U.N. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, Vietnam, A/HRC/WG.6/5/L.10 (May 12, 2009), ¶ 55; by Norway, Argentina, and Iran to New Zealand, U.N. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, New Zealand, U.N. Doc. A/HRC/WG.6/5/L.7 (May 15, 2009), ¶¶ 28, 30, 33; by Peru and Bolivia to Uruguay, U.N. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, Uruguay, A/HRC/WG.6/5/L.11 (May 25, 2009), ¶¶ 59, 69; by Slovenia to Guatemala, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Guatemala, U.N. Doc. A/HRC/8/38 (May 29, 2008), ¶ 28; by Jordan to Canada, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Canada, U.N. Doc. A/HRC/11/17 (Oct. 5, 2009), ¶ 53; and by South Africa and Jordan to New Zealand, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, New Zealand, A/HRC/WG.6/5/L.7 (May 11, 2009) ¶¶ 40, 67.

127. *See, e.g.*, U.N. Comm’n on Human Rights, Note by the Secretariat on the Technical Review of the United Nations draft declaration on the rights of indigenous peoples, U.N. Doc. E/CN.4/Sub.2/1994/2 (Apr. 5, 1994); Comm’n on Human Rights, Working Group Report, ¶¶ 44, 119, 181, 203, 227, 237, 285, 320, Dec. 1996, *supra* note 122.

128. Usually these references were made by indigenous peoples as a way of establishing that they had collective human rights including an unrestricted right to self-determination in the face of attempts by some States to impose limitations on their right to self-determination. *See, e.g.*, Comm’n on Human Rights, Report of the Working Group Established in Accordance with Comm’n on Human Rights Resolution 1995/32 of 3 March 1995, ¶ 40, Annex II, U.N. Doc. E/CN.4/2002/98 (Mar. 6, 2002); Comm’n on Human Rights, Working Group Report, Jan. 2003, *supra* note 121, ¶ 36; Comm’n on Human Rights, Working Group Report, Feb. 2001, *supra* note 120, ¶¶ 23, 79, 105.

129. *See* U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 23, art. 42. Arguably, this departs from the provisions in many of the existing instruments, which allows for some cooperation between various bodies and specialised agencies, for example, to be present when a particular TMB is considering issues relevant to its mandate. *See, e.g.*, CEDAW, *supra* note 24, art. 22.

dates,<sup>130</sup> although it is questionable whether the drafters fully appreciated the provision's potential significance in this regard. This dynamic may help to sustain, if not accelerate, the interdependence and indivisibility that has emerged in the content of indigenous peoples' rights by reinforcing one of the potential catalysts for its existence. The mounting evidence of inter-regime dynamics in both the U.N. human rights treaty monitoring system as well as the U.N. Charter-Based System suggests that, for the foreseeable future, this trend may show little sign of abating. The need for a detailed analysis of the principal implications of the increasing interdependence and indivisibility of the content of human rights is clear. Part III undertakes such an analysis drawing on developments within both U.N. human rights regimes in order to assess the significance of this trend not only for indigenous peoples' rights but also for international human rights law more generally.

### III. CONCLUSION

Originally, the concept of the interdependence and indivisibility of rights referred to the mutually reinforcing nature and equal importance of all human rights.<sup>131</sup> The preceding Parts of this Article suggest an additional dimension to the concept of interdependence and indivisibility, one that relates to the actual content of human rights. The expansion of participatory rights is a good illustration given that indigenous peoples can now invoke these rights by virtue of a range of separate and distinct human rights norms. Such newfound flexibility for articulating rights-based claims demonstrates how rights that were conceived originally within specific and clearly defined boundaries are no longer contained exclusively within those limitations, leading to the current interdependence and indivisibility in the content of these rights.

This additional dimension to the concept of the interdependence and indivisibility of human rights is the product of several factors. The need to address the legitimate claims of indigenous peoples is clearly among these factors. Others relate to the fragmentation of international law as reflected in the multiplicity of international bodies entrusted with the task of monitoring and encouraging State compliance with international human rights

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130. This will undoubtedly assist these bodies when faced with objections by States about their use of documents originating outside their particular human rights regime. One such complaint was made within the ILO system. On that occasion, the ILO Committee rejected the State's objection on the ground that it may refer to documentation from U.N. bodies as "indicative of the general framework" and to "explain the context in which the application of the Convention or some of its provisions takes place." See Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Academics of the National Institute of Anthropology and History (Mar. 19, 2004), ILO Doc. 162004MEX169B, ¶ 130.

131. See *supra* notes 2–9 and accompanying text.

obligations. The existence of the various Treaty Monitoring Bodies, for example, means that they will try to address legitimate indigenous concerns with the means at their disposal and within the terms of their mandate. Therefore, while the Human Rights Committee may address concerns about ancestral land use within the framework of the right to self-determination and the right to enjoy one's culture, the Committee on the Elimination of Racial Discrimination will have to address similar concerns within the framework of the general non-discrimination principle or the principle of non-discrimination in the right to own property alone or in association with others. While the question of overlap within the U.N. Human Rights Treaty Monitoring System has long been recognized,<sup>132</sup> the impact of this overlap in terms of expanding the scope of human rights and giving new meaning to the interdependence and indivisibility of these rights does not seem to have received similar attention.<sup>133</sup> It follows that proposals for streamlining the Treaty Monitoring System<sup>134</sup> could have implications not simply for the implementation of human rights but also for the content of these rights and the nature of the relationship between them.<sup>135</sup>

Another factor relates to the evolution of the normative human rights framework. In the specific context of indigenous peoples, this is particularly striking. Originally formulated within the individual rights framework, over time these rights came to comprise the additional rights of persons belonging to minorities and, more recently, collective rights. At present, there is a complex array of international instruments of varying legal status and significance dealing with indigenous peoples' rights. One consequence is that currently there is a dual classification of indigenous peoples as a "minority" and as a "people" under international law. So long as this dual classification persists, it is perhaps inevitable that there will be some overlap in terms of the content of their rights, with references being made concurrently to self-determination and minority rights.

It may be that this interdependence and indivisibility is simply a temporary phenomenon, at least until the status of indigenous peoples is finally clarified in international law. Current trends suggest that there is gathering momentum towards recognizing indigenous peoples as a people under in-

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132. See, e.g., Eric Tistounet, *The Problem of Overlapping Among Different Treaty Bodies*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 383 (Philip Alston & James Crawford eds., 2000); Michael O'Flaherty, *Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement*, 10 *HUM. RTS. L. REV.* 319, 321 (2010).

133. See, e.g., Tistounet, *supra* note 132, at 383.

134. See Report by the Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006); see also Senate Chamber, University of Nottingham, *Report on Expert Workshop on Reform of United Nations Human Rights Treaty Monitoring Bodies*, February 11–12, 2006, available at [http://www.nottingham.ac.uk/shared/shared\\_hrlcprojects/Projects\\_Current\\_Projects\\_Nottingham\\_TB\\_Workshop\\_Report.pdf](http://www.nottingham.ac.uk/shared/shared_hrlcprojects/Projects_Current_Projects_Nottingham_TB_Workshop_Report.pdf).

135. Notably, these proposals may implicate whether rights are interdependent and indivisible in the traditional sense of being mutually reinforcing and of equal importance or whether they are also interdependent and indivisible in terms of their content.

ternational law, with all the implications for their human rights that would entail. The very adoption of the U.N. Declaration on the Rights of Indigenous Peoples seems to signal an international consensus that individual and minority rights had fallen short of fully protecting the legitimate interests of indigenous peoples. The adoption of the Declaration implies an understanding that a new rights framework was necessary, one that would recognize indigenous peoples as possessing collective human rights, most notably, the collective right to self-determination. Some key States with significant numbers of indigenous peoples voted against the Declaration, but developments since then suggest some may be moving towards its acceptance.<sup>136</sup> Consequently, it is not inconceivable that the status of indigenous peoples as such will become more firmly embedded in international law, raising interesting possibilities in terms of the nature, scope, and interdependence of their human rights.

It is possible that developments in this area may proceed in different directions. If indigenous peoples are recognized as a people under international law, the most important implication is that they will have a clear and unequivocal legal right to self-determination. This may result in the subsumption of issues concerning land, resources, and participation under this right. If this is done to the exclusion of other rights, then there will be a substantial reduction in the overlap of content of their rights. This would mean that the interdependence and indivisibility of rights that have grown up in this sphere would have been simply a transitional phenomenon. However, such a conclusion is questionable for several reasons. Self-determination for indigenous peoples is a much more complex concept<sup>137</sup> than that which existed during the decolonization process.<sup>138</sup> Unpacking the meaning of self-determination in an indigenous context tends to reinforce rather than lessen the interdependence and indivisibility of human rights. This much is evident from the U.N. Declaration on the Rights of Indigenous Peoples, in which it is difficult to pinpoint where the right to self-determination ends and others such as the right to participate in public life begin. Further, one can anticipate that minority rights will continue to be relevant not least for those persons belonging to indigenous groups residing away from ancestral

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136. Australia, Canada, New Zealand, and the United States voted against the Declaration. Since then, the Canadian House of Representatives has adopted a motion calling on Parliament and Government to “fully implement the standards” in the Declaration while the Australian government has formally endorsed the Declaration. See *UN Experts Welcome Canadian House of Commons’ Endorsement of the Declaration on the Rights of Indigenous Peoples*, UN NEWS SERVICE (Apr. 18, 2008), <http://www.un.org/apps/news/story.asp?NewsID=26376&Cr1=rights>; and Government of Australia, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Apr. 3, 2009, available at [http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un\\_declaration\\_03apr09.aspx](http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx).

137. Self-determination for indigenous people inevitably requires that it be exercised in conjunction with the right to self-determination of the entire population of the State within which the indigenous people are located.

138. During this process, self-determination was generally understood as a right to independence for colonial peoples. See Quane, *The U.N. and the Evolving Right to Self-Determination*, *supra* note 15, at 547–58.

lands and wanting, for example, to have their children educated in their mother tongue. Recognition of the continuing relevance of individual and minority rights can also mitigate the potential risks associated with the recognition of collective human rights.<sup>139</sup> Ultimately, therefore, one can expect that individual, minority, and collective rights will continue to apply concurrently to indigenous peoples and that the interdependence and indivisibility between the content of these rights will continue to exist. This raises the question of the trend's implications for international human rights law.

Doctrinally, the developments in indigenous rights law highlight the need to rethink the traditional distinction between a "people" and a "minority" and to recognize that a group can be classified concurrently as a "people" and a "minority" with all the rights that attach to such classifications. It also emphasizes the need to recognize that it may not always be possible to pinpoint precisely where a particular right is located within the traditional classifications of human rights. In addition, the evolving corpus of indigenous rights raises questions as to whether these rights should be classified as individual or collective rights and how one should respond to State restrictions on them. All these issues can have practical implications, but the very recognition of the interdependence and indivisibility of these rights can provide some guidance on how to address them.

The implementation of a right to self-determination for indigenous peoples provides a telling illustration. Current State practice suggests that, at most, indigenous peoples have a limited right to self-determination. This opens up the prospect of numerous implementation difficulties not least because of the absence of any guidance on how to regulate restrictions on this right as well as the disparate negotiating powers of States and indigenous peoples in the implementation process. By recognizing the interdependence and indivisibility of rights, however, it becomes apparent that one has to adopt a consistent approach to any restriction on indigenous peoples' rights, not least because of the overlap, in certain respects, of their right to self-determination and their other rights. Conditions that currently apply to any interference with the individual and minority rights of indigenous peoples should therefore apply by extension to their collective right to self-determination. In practical terms, this suggests that interferences with the right to self-determination should be clearly prescribed by law, pursue a legitimate aim, be proportionate to achieving that aim, must not erode the essential substance of the right, and should not be discriminatory. This would go some way towards introducing greater transparency and accountability whenever a State interferes with the right to self-determination of indigenous peoples. It would also allow indigenous peoples to challenge

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139. For example, the interests of the collective or group would take priority over the rights of individuals. *See* Rep. of the Human Rights Comm., U.N. Doc. A/36/40; GAOR, 36th Sess., Supp. No. 40 (Jul. 30, 1981).



such State actions in domestic courts by reference to a clear set of guidelines. One has to concede that problems will still arise, not least because of the difficulties often encountered by indigenous peoples in accessing justice.<sup>140</sup> Nevertheless, depending on the circumstances, indigenous peoples may be able to file a complaint with an international human rights body. Given that these bodies currently receive applications only in respect to individual rights,<sup>141</sup> the interdependence and indivisibility of indigenous peoples' rights may perform a useful function in allowing the complaint to be formulated in terms of an individual right rather than as a collective right that would otherwise fall outside the jurisdiction of these bodies.<sup>142</sup> Such tactical maneuvering illustrates one of the practical implications of the increasing interdependence and indivisibility of human rights. More fundamentally perhaps, this trend towards substantive interdependence of human rights requires States and indigenous peoples to avoid overly rigid perceptions of rights and entrenched positions that can inhibit constructive negotiations that would secure a more effective implementation of these guarantees.

At the same time, one has to acknowledge that departing from the relative certainties of past rights classifications can bring with it its own particular risks, not least its potential to generate uncertainty about these rights and to open up the possibility of variations between the approaches adopted at the international and domestic levels. Arguably, the explicit recognition of the interdependence and indivisibility of certain aspects of human rights can be a first step in addressing these risks. At the very least, recognizing the interrelationship of various human rights suggests that it is not appropriate to view the position of indigenous peoples from the perspective of a particular right or category of rights. For States, this means factoring in the full range of individual and collective rights in their relations with indigenous peoples. For indigenous peoples, it suggests that while collective rights such as the right to self-determination remain of seminal importance to them, they cannot overlook the rights of their members both as individuals and as citizens of the State. For international human rights bodies, it provides a certain coherence and legitimacy to their treatment of issues concerning indigenous peoples under a range of individual and collective human rights. It means that even if a right to self-determination for indigenous peoples becomes firmly embedded in international law, the different

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140. See U.N. Comm. on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Provisional Agenda, U.N. Doc. E/CN.4/2002/WG.15/2 (Sept. 10, 2002).

141. See First Optional Protocol to the ICCPR art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.

142. A good illustration of this is the *Lubican Lake Band* case where, due to the limitations of the Optional Protocol, the Human Rights Committee dealt with the complaint under Article 27. However, the Committee subsequently followed up on Canada's response to this case using the framework of Articles 1 and 27. Compare U.N. Rep. of the Human Rights Comm., U.N. Doc. A/45/40; GAOR, 45th Sess., Supp. No. 40 (Vol. II), Annex IX (1990) with Concluding Observations of the Human Rights Committee, 85th Sess., Oct 27–28, 2005, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006).

bodies will not be precluded from dealing with the legitimate claims of indigenous peoples with the means at their disposal and within the scope of their various mandates. In this respect, the multiplicity of bodies and their ability to act across a range of mandates can ensure that pressure is maintained on States to comply with their international obligations towards indigenous peoples.

Beyond this, there is a need for an overarching principle that can provide coherence and direction for these recent developments. Arguably, the principle of non-discrimination is the most appropriate. The need to address discrimination experienced by indigenous peoples, which is reflected in their economic and political marginalization, led to the expansion of their rights resulting in the current observable overlap.<sup>143</sup> Further, as the equality of all human beings is at the heart of the human rights project, the principle of non-discrimination as an overarching principle firmly roots recent developments within the wider international human rights framework and helps to counter perceptions that the indigenous rights regime constitutes special or preferential treatment for indigenous peoples. On a practical level, the non-discrimination principle can provide direction for the application of indigenous peoples' rights by legitimizing their expansive interpretation with an eye to achieving substantive equality, but only to the extent required to achieve such equality and only as long as inequality persists.

At the same time, it must be recognized that drawing on the principle of non-discrimination may be seen by some as problematic. Questions may arise as to whether the principle can fully accommodate the recognition of a limited right to self-determination for indigenous peoples. Indigenous peoples have consistently rejected any limitations on this right, arguing that since no restrictions were imposed in the past to do so now would constitute discrimination.<sup>144</sup> However, one has to recognize that the right to self-determination continues to evolve in international law. It follows that the right to self-determination as it is presently understood is not necessarily the same as the right that developed in the past.<sup>145</sup> Indeed, the very recognition that indigenous peoples have a right to self-determination in itself imposes restrictions on the right to self-determination of the entire population or people of the State in which they reside. Consequently, rather than seeing limitations on the right as inherently discriminatory against indigenous peoples, one should recognize that current formulations of the right are far more complex than in the past, imposing limits not only on recent beneficiaries of the right but also on its traditional holders. Viewed from

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143. See generally Comm'n on Human Rights, Report on the International Workshop, Sept. 2005, *supra* note 122, ¶ 4.

144. See *id.*, ¶¶ 71, 74.

145. That is, the right to self-determination is not understood in the same manner as it was during the decolonization process. See Quane, *The U.N. and the Evolving Right to Self-Determination*, *supra* note 15, at 547–58.

this perspective, the non-discrimination principle retains its salience in providing coherence and direction to recent developments concerning the interdependence and indivisibility of indigenous peoples' rights.

One final observation on recent developments in indigenous rights law relates to the insights they provide into the formation and implementation of international human rights. While many international human rights instruments refer to the need for increased coordination between various U.N. bodies and specialized agencies,<sup>146</sup> one has to acknowledge that this coordination can take different forms for different ends. In these instruments, the need for increased coordination refers primarily to the need to streamline the activities of these bodies and agencies to avoid unnecessary duplication, especially in terms of State reporting burdens.<sup>147</sup> As such, coordination is directed primarily to the effective implementation of human rights. There is an additional type of coordination whereby developments within one human rights regime can impact the acceptance, interpretation, and application of human rights within others. This goes beyond the well-established practice of one human rights body citing the jurisprudence of another in its decisions. Instead, it constitutes a particular form of inter-regime dynamics, which includes human rights bodies within one regime calling on States to accede to human rights treaties located in others, drawing on State practice as well as jurisprudence within other regimes as they interpret and apply specific human rights obligations. Arguably, this has contributed to a more expansive interpretation and acceptance of rights in addition to the substantive overlap now emerging between some. The complex patterns of interaction between national and international developments, viewed against the backdrop of these inter-regime dynamics, illustrate the very diffuse processes at work in the formation and implementation of international human rights norms.

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146. See, e.g., *Vienna Declaration and Programme of Action*, *supra* note 8, at Part II.

147. See *id.* at Part II, ¶ 1.

