# To Bind or Not to Bind: The United Nations *Declaration on the Rights of Indigenous Peoples* Five Years On

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## Abstract

In 2012, the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') celebrates its fifth birthday. Since its adoption by the UN General Assembly in 2007, the UNDRIP has inspired expansive academic commentary. This literature has scrutinised every aspect of the UNDRIP, from questioning the strategy and motives of its Indigenous co-drafters, to its ostensible delimiting of Indigenous peoples' right to self-determination in international law, as well as the controversial unilateral expansion by the UN Permanent Forum on Indigenous Issues of its mandate to be the supervisory mechanism of state's implementation of the UNDRIP. In particular, there is acute interest in the UNDRIP's status in customary international law, no doubt generated by the over-eager scholars who claimed at the outset that some of the rights contained within the Declaration already form part of customary international law. The anxiety over whether aspects of the UNDRIP are binding or not binding is palpable, yet less attention is paid by the purveyors of this interpretation to the limitations of customary international law and the unrealistic expectations such speculation creates in Indigenous communities. Given the scrutiny it has attracted, this article traces some of the key themes emerging from the somewhat discursive multi-disciplinary commentary of the past five years, in order to reflect on the significance of the UNDRIP's fifth anniversary.

## I Introduction

In 2012, the United Nations Permanent Forum on Indigenous Issues ('PFII') celebrated the fifth anniversary of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').[1] This was an emotional event for those who attended because the UNDRIP, as adopted by the UN General Assembly ('GA') in 2007, had taken almost two decades to progress through the UN system.[2] During this period the negotiations between Indigenous peoples and states were antagonistic and at times intractable.[3] Even the passage of the

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1 UN GAOR, 66th sess, 89th plen mtg, UN Doc A/RES/66/142 (30 March 2012); see also, *Backgrounder: High-level Event on the 5th Anniversary of the United Nations Declaration on the Rights of Indigenous Peoples*, UN Department of Public Information (May 2012).

2 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007) ('UNDRIP').

3 Sharon H Venne, 'The Road to the United Nations and the Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 557; Les Malezer, 'Dreamtime Discovery: New Reality and Hope' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Purich, 2010); Kenneth Deer, 'Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Purich, 2010); Luis Enrique Chavez, 'The Declaration on the

Declaration through the Third Committee of the GA was mired in suspense when the African Group voted to delay consideration of the text by the GA.[4] Its eventual adoption in 2007 with a recorded vote of 143 in favour, 4 against and 11 abstentions was met with the broad acclamation of Indigenous peoples and many states; although the negative votes cast by the USA, Canada, Australia and New Zealand ('CANZUS') certainly tempered the celebrations for many.

In its draft form, the UNDRIP attracted relatively uncritical scholarly attention except for the occasional prescient piece identifying future challenges, such as balancing the tension between individual and collective rights in the context of Indigenous women's rights.[5] It is unsurprising then that the UNDRIP — a new human rights instrument — has attracted so much comment and scrutiny — across disciplines — since its adoption. No doubt the UNDRIP has been of particular study because of the romantic political narrative — the Indigenous domain challenging the might of the Westphalian state — and calling into question the legitimacy of the territorial integrity of the state today.[6] The symbolism of 'Indigenous' peoples interposed in the UN system of state sovereignty has amplified the UNDRIP's attractiveness to legal and political scholars as fertile ground for critical analysis. In many ways, the UNDRIP is a rich and layered text that enables scholars and students to engage in many vertical, cross-cutting controversies in international law, such as UN reform, human rights enforcement and the role of non-state actors in the UN system.

Perhaps more surprising, though, is the discursive nature of the commentary; it is variable in nature and contains competing interpretations of its character (status in international law) and its content (the norms expressed therein) — even the motives of its non-state beneficiaries are scrutinised. It has been an exacting but illuminating challenge to monitor the competing legal interpretations of the text and competing interpretations of Indigenous peoples' political strategy. It is a necessary exercise to read, make sense of and engage with the divergent issues arising from this inquiry because it can be influential in fashioning a global understanding of both the character and content of the Declaration. The teachings of the most qualified publicists are a source of international law as a subsidiary means for the determination of rules of law; although this attracts competing

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Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples* (Transaction, 2009) 96; Andrea Carmen, 'International Indian Treaty Council Report from the Battle Field — The Struggle for the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples* (Transaction, 2009) 86; Megan Davis, 'United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439; Julian Burger, 'Standard-setting: Lessons Learned for the Future' (Paper presented at the International Council on Human Rights Policy and International Commission of Jurists Workshop, Geneva, 13–14 February 2005) 7; Megan Davis 'The United Nations Draft Declaration 2002' (2002) 5(16) *Indigenous Law Bulletin* 6.

4 Haider Rizvi, 'UN Delays Vote on Native Self-Determination', *Inter Press Service* (online), 28 November 2006 <http://www.ipsnews.net/news.asp?idnews=35638>.

5 David M Bigge and Amélie von Briesen, 'Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in *Magaya v Magaya*' (2000) 13 *Harvard Human Rights Journal* 299; Megan Davis, 'The Globalisation of International Human Rights Law, Aboriginal Women and the Practice of Aboriginal Customary Law' in Maureen Cain and Adrian Howe (eds), *Feminist Perspectives for the New Millennium* (2007) 137, 144–5; Catherine J Iorns, 'The Draft Declaration on the Rights of Indigenous Peoples' (1993) 1 *eLaw Journal: Murdoch University Electronic Journal of Law*.

6 Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, 2003) 129; Rhiannon Morgan, *Transforming Law and Institution* (Ashgate, 2011) 104–7.

interpretations as to its cogency.[7] The majority of the UNDRIP literature by no means constitutes that. Still, in the absence of a comprehensive and authoritative *travaux préparatoires*, it may be that some of these sources are used to reconstruct meaning or discern content. Indeed I have noticed law students' comprehension of the meaning of the text and their understanding of the usefulness of the UNDRIP to Indigenous peoples is being heavily influenced by this literature in the essays they produce.

The explicit reasoning for much of the discussion and debate in the literature turns on the question of its status in international law: to bind or not to bind? The anxiety that is present in the literature over the character of the UNDRIP is no doubt informed by the over-eager approach of some scholars prematurely to claim aspects of the UNDRIP as already constituting customary international law.[8] The eagerness to claim customary status has been met with caution by some, given the conservative nature of international law, especially the complexity surrounding the formation of custom.[9] Still, it would seem that the Declaration exists in an amorphous in-between state of constituting both a 'non-binding', influential and aspirational statement of soft law but equally an instrument that reflects already binding rules of customary international law. These claims of binding norms have animated the attention of Indigenous communities.[10] So, it is worthwhile to trace the literature the UNDRIP has generated since its adoption, as it provides us with a layered narrative of the contribution of the Declaration to Indigenous peoples rights in international law so far, and gives us some insight into the developing character of the UNDRIP. Indeed we must take this seriously because of the exigency of the Indigenous international project: to buttress the contemporary and ongoing Indigenous struggles around the world and to stem the tide of cultural destruction. For example, the rapid pace at which languages are disappearing has been central to the most recent constitutional recognition project in Australia. So too has been the destruction of sacred sites and cultural heritage. For this reason, it is important also to reflect on the dissonant tenor of some of this literature which is surprisingly negative and even, on occasions, mean spirited about the motives and capabilities of Indigenous peoples in this project.

Part of the aim of this article is to be descriptive and draw from the discursive body of UNDRIP literature to lay out the major issues that have emerged since its adoption. The article begins by providing a truncated version of the development of the UNDRIP from its early conception in the UN Working Group on Indigenous Peoples ('WGIP'), to its challenging passage through the Commission on Human Rights ('CHR') Working Group ('CHRWG') (the Human Rights Council replaced and assumed most of the mandates, functions and mechanisms of the Commission on Human Rights) to the Third Committee

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7 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 38(1)(d); See, Godefridus J H Hoof, *Rethinking the Sources of International Law* (Kluwer, 1983).

8 Siegfried Wiessner, 'United Nations Declaration on the Rights of Indigenous Peoples', *United Nations Audiovisual Library of International Law* (2009) <http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf>; Lorie M Graham and Siegfried Wiessner, 'Indigenous Sovereignty, Culture and International Human Rights Law' (2009) 110 *The South Atlantic Quarterly* 403; S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' (2007) *Jurist* <http://jurist.law.pitt.edu/ forumy/2007/10/un-declaration-on-rights-of-Indigenous.php>.

9 See, eg, Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27.

10 See, eg, Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (2011).

of the GA. Part III draws a picture of the competing interpretations and anxieties that have emerged since the UNDRIP's adoption by the GA in relation to content and character. Here, I will extract and examine in more detail the most important elements of the scholarly captivation with the UNDRIP. Regarding the content, I focus on three controversies: a) the question of whether the UNDRIP contains existing rights or *sui generis* rights; b) Article 3, the right to self-determination; and c) art 42 and the purported role of the PFII as an oversight mechanism for the implementation of the UNDRIP. Then, regarding character, I will turn to the discussion in the literature of the competing interpretations of: a) UNDRIP as 'soft' law; and b) the UNDRIP and customary international law. These elements of the scholarly discourse are the most useful in capturing the anxieties that have emerged since the UNDRIP's adoption. Part IV will examine the literature problematising the participation of Indigenous peoples in the drafting of the UNDRIP.

## II History of the UNDRIP

The genesis of the UNDRIP can be traced back to the work of the first specialised UN mechanism to examine Indigenous peoples' human rights issues, the Working Group on Indigenous Populations ('WGIP'). The WGIP was established in 1982 by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, as authorised by the Economic and Social Council ('ECOSOC').[11] The now-decommissioned WGIP was a body of five experts and its mandate was to review 'developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations' and 'to give special attention to the evolution of standards concerning the rights of such populations'.[12]

A unique feature of the WGIP was the frank and open environment of the meeting. Nurtured by the low-hanging status of the working group — as a subsidiary of the Sub-Commission on Prevention of Discrimination and Protection of Minorities — and the 'review of developments' mandate, this convergence enabled Indigenous peoples to air grievances about the state's violation of Indigenous peoples human rights.[13] This aided the WGIP's role in cultivating substantial evidence of the nature and extent of those violations in relative anonymity; very few states regularly attended the annual working group.[14] It was through this process that it became apparent to the experts and Indigenous participants that there was universality to the narrative of oppression and racial discrimination described by Indigenous peoples as consequence of colonisation. Also, there was a commonality to the ways colonisers had dispossessed Indigenous peoples of their lands: for example, imposing assimilation policies such as the prohibition on Indigenous languages and removal of Indigenous children from their families to boarding schools or non-Indigenous families.

At the behest of Indigenous participants, the experts turned their attention to responding to the comprehensive body of information assembled annually by the WGIP,

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11 ESC Res 1982/34, UN ESCOR, Supp (No 1) at 26, UN Doc E/1982/82 (1982).

12 Ibid.

13 Ibid.

14 *Report of the United Nations Working Group on Indigenous Populations on its Fourth Session*, UN Doc E/CN.4/Sub.2/1985/2, Ann. II (1985). See generally Julian Burger, 'The United Nations Draft Declaration on the Rights of Indigenous Peoples' (1996–97) 9 St *Thomas Law Review* 209.

enacting its standard-setting mandate to commence drafting an international legal instrument on the rights of Indigenous peoples to address the protection gap.[15] During the fourth session of the WGIP in 1985 the experts resolved to elaborate a draft declaration on Indigenous peoples' rights ('Draft Declaration'). According to Mathew Coone Come, Grand Chief of the Grand Council of the Crees at the time, each and every article of the Draft Declaration was said to be a reflection on the contemporary and historical experiences of Indigenous peoples globally:

> Every paragraph of the Draft Declaration is based upon known instances of the violations of the human rights of Indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the Draft Declaration. … The Draft Declaration ... began from a cry from the Indigenous peoples for justice, and it is drafted to confirm that the international standards which apply to all peoples of the world apply to Indigenous peoples. It is an inclusive instrument, meant to bring Indigenous peoples into the purview of international law as subjects of international law.[16]

This commonly cited passage reflects the extent to which Indigenous participants at the WGIP viewed the Draft Declaration as responding substantively to the often harrowing stories shared openly — and often at great personal risk — with the WGIP. In addition, the passage illustrates how Indigenous peoples who participated in the drafting of the text viewed it as extending already existing international human rights standards pertaining to the individual to the collective; extending existing human rights, rather than creating new ones.

The final text of the Draft Declaration was concluded by the WGIP in 1993 and was followed by a technical review by the Secretariat.[17] And in 1994, it was transmitted to the Sub-Commission at its 45th session, where it decided to submit the Draft Declaration to the CHR. In 1995 the CHR established an open-ended inter-sessional working group CHRWG to consider the UNDRIP.[18]

The CHRWG had a difficult history, which has been extensively canvassed in the literature. The seemingly insuperable challenges included: Indigenous participants' 'no change' approach to drafting,[19] collective rights,[20] disputation over application of the right

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15 See generally Sarah Pritchard, 'Declaration on Rights of Indigenous Peoples — Drafting Nears Completion in UN Working Group' (1993) 2 *Aboriginal Law Bulletin* 9.

16 Mathew Coone Come, Grand Chief of the Grand Council of the Crees at a seminar organised by the Aboriginal and Torres Strait Islander Commission, Sydney, 1995, cited in Sarah Pritchard and Charlotte Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Reporter* 473, 477.

17 See *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add.1 (1994) ('Draft Declaration'); *Technical Review of the Draft United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994).

18 *Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution* 49/214 of 23 December 1994, Commission on Human Rights Res 1995/32, UN Doc E/CN.4/1995/32 (1995). See also *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32* of 3 March 1995, UN Doc E/CN.4/1996/84 (1996) ('*Working Group Report* 1996'.

19 *Working Group Report* 1996, above n 18. See also Sarah Pritchard, 'The United Nations and the Making of a Declaration on Indigenous Rights' (1997) 3 *Aboriginal Law Bulletin* 4; Statement of Indigenous Peoples Caucus to the Chairman of the Intersessional Open-Ended Working Group Established to Elaborate a Draft Declaration on the Rights of Indigenous Peoples (21 October 1996); *Indigenous Issues: Written Statement Submitted by the Asian Indigenous and Tribal Peoples Network (AITPN), a Non-governmental Organization in Special Consultative Status*, UN Doc E/CN.4/2004/NGO/138 (2004).

to self-determination of Indigenous peoples,[21] implications of self-determination for state sovereignty and territorial integrity,[22] and the extent of the scope of rights pertaining to lands, territories and resources.[23]

In the end, following significant progress in drafting after a breakthrough on Indigenous peoples' 'no change' policy in 2004, the chairperson, Luis Enrique Chavez from Peru, developed a Chair's text, which was transmitted to the newly established Human Rights Council ('HRC'). In its first session in June 2006, the HRC adopted the chairperson's text with a recorded vote of 30 votes in favour, to 2 against, and 12 abstentions.[24] The text then moved to the GA where it was sent to the Social, Humanitarian and Cultural Committee (commonly known as the 'Third Committee') to be considered.

Although Indigenous peoples expected the UNDRIP to be passed by the GA in 2006, there was a lack of consensus on the draft text in the Third Committee. In particular, African states needed more time to consider the implications of the right to self-determination for their legal systems, and sought deferral of the Draft Declaration. To many, this was understandable, given that few, if any, African states regularly attended the CHRWGs. Unlike the sizeable foreign policy budgets of states like CANZUS, most African states have smaller budgets that prevent them from attending all Geneva-based sessions of meetings such as the CHRWG, and focus on priorities such as activity in World Trade Organization, for example. This is why the African concerns mirrored the exact sticking points of the CHRWG: the right to self-determination, collective rights, the definition of Indigenous peoples and state sovereignty.

The African Group questioned whether the right to self-determination 'may be wrongly interpreted and understood as the granting of a unilateral right to self-determination and a possible cessation [sic] to a specific section of the national population, thus threatening the political unity and territorial integrity of any country'.[25] Rwanda submitted to the Third

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20 See, eg, *Working Group Report* 1996, above n 18; *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/1998/106 (1997) ('*Working Group* 1997'); *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/2000/84 (1999) ('*Working Group Report* 1999'); Douglas Sanders, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368.

21 Sarah Pritchard, 'Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives' in Sarah Pritchard (ed), *Indigenous Peoples, United Nations and Human Rights* (Federation Press, 1998) 42, 46; Richard Falk, 'Groups Claims within the United Nations System' in *Human Rights Horizons* (Routledge, 2000) 128; Alexandra Xanthaki, *Indigenous Rights and the United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) 110.

22 See generally *Working Group Report* 1996, above n 18; *Working Group* 1997, above n 20; *Working Group Report* 1999, above n 20; *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, Commission on Human Rights Res 2001/58, UN Doc E/CN.4/RES/2001/58 (2001); see also Catherine J Iorns, 'Indigenous Peoples and Self Determination: Challenging State Sovereignty' (1996) 24 *Case Western Reserve Journal of International Law* 199; Statement of Indigenous Peoples Caucus to the Chairman of the Intersessional Open-Ended Working Group Established to Elaborate a Draft Declaration on the Rights of Indigenous Peoples (21 October 1996). See also Pritchard, above n 19; Gerry Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 32.

23 Iorns, above n 22.

24 *Working Group of the Commission on Human Rights to Eaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994*, UN Doc A/HRC/I/L.3 (23 June 2006).

25 African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (adopted by the 41st ord sess, 16–30 May 2007) [16] ('*Advisory Opinion*').

Committee that the Draft Declaration 'established divisive policies and set a bad precedent. It isolated groups and incited them to establish their own institutions alongside central existing ones. That would weaken [African] States as a whole and hinder their recovery processes'.[26] Namibia then proposed an amendment: that the Third Committee defer consideration of the Draft Declaration for a year.[27] The Committee decided to defer to allow time for further consultations.[28]

In the following year, the African Commission on Human and Peoples' Rights requested the Working Group of Experts on Indigenous Populations to respond to the African Group's concerns about the Draft Declaration.[29] The Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples concluded that self-determination had evolved since decolonisation:

> [t]he notion of self-determination has evolved with the development of the international visibility of the claims made by Indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.[30]

The *Advisory Opinion* reiterated the consensus that had been achieved in the CHRWG — that self-determination can only be exercised in the context of art 46, which reaffirms the safeguard on territorial integrity in the Friendly Relations Declaration. In response to the concern of some African states that recognising 'Indigenous peoples' as a group may equate to special treatment of Indigenous peoples over other citizens, the *Advisory Opinion* invoked the international law of substantive equality, stating that the recognition or identification of 'Indigenous peoples' is not about 'protecting the rights of a certain category of citizens over and above others', nor does it 'create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized'.[31] To address African concerns about the definition of Indigenous peoples, the following words were inserted in the preamble: 'Recognizing that the situation of Indigenous peoples varies from region to region and from country to country'. With the African concerns allayed, on 13 September 2007, the GA adopted the UNDRIP, with a recorded vote of 143 in favour, 4 against and 11 abstentions.

## III UNDRIP: Understanding the Content and the Character

Indigenous peoples' advocacy in the UN system and the development of a normative framework of Indigenous peoples' rights in international law has always attracted extensive

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26 *Third Committee Approves Draft Resolution on Right to Development: Votes to Defer Action Concerning Declaration on Indigenous Peoples*, 61st sess, 3rd Comm, 53rd mtg, UN Doc GA/SHC/3878 (2006).

27 The UN Third Committee adopted the Namibian amendment by a recorded vote of 82 in favour, 67 against and 25 abstentions.

28 *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*: Namibia: Amendments to Draft Resolution A/C.3/61/L.18 /Rev.1, UN Doc A/C.3/61/L.57/Rev.1 (2006).

29 African Commission on Human and Peoples' Rights, above n 25.

30 Ibid [22].

31 Ibid [19].

scholarly commentary.[32] Certainly, in its draft form, the UNDRIP was the subject of extensive scholarly analysis ranging from: its history and origins,[33] its slow progress through the CHRWG,[34] the status of its content,[35] and its contribution to standard-setting.[36]

Generally, the UNDRIP has animated rich and diverse literature including concern for its status in customary international law,[37] admonishment for the 'creative interpretations' of the UNDRIP,[38] fixation on the actions of the original CANZUS dissenters and/or their 'pattern of endorsement',[39] anxiety over the Indigenous/minority dichotomy or 'firewall'[40] and questioning the political and legal strategy of Indigenous peoples in international law.[41]

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32 The Rights of Indigenous Peoples: Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; Raidza Torres, 'The Rights of Indigenous Populations: The Emerging International Norm' (1991) 1 *Yale Journal of International Law* 127; Russel L Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1996) 80 *American Journal Internationl Law* 369; Mary Ellen Turpel, 'Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25 *Cornell International Law Journal* 579; Maivân Clech Lam, 'Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination' (1992) 25 *Cornell International Law Journal* 603; Jeff J Corntassel and Tomas Hopkins Primeau, 'Indigenous "Sovereignty" and International Law" Revised Strategies for Pursuing "Self-Determination", (1995) 17 *Human Rights Quarterly* 343; see generally, Keal, above n 6; Maivân Clech Lam, *At the Edge of the State: Indigenous Peoples and Self-Determination* (2000); S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004); Mauro Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32 *Human Rights Quarterly* 951.

33 For a concise history, see Joshua Cooper, 'Persistent Resistance: UN and the Non-violent Campaign for the Human Rights of Indigenous Peoples' (2003) 22 *Social Alternatives* 17; see generally Anaya, above n 32; Ravi de Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (UNSW Press, 2006); Xanthaki, above n 21; Rhiannon Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and its impact on the Normative Development of International Law' (2004) 13 *Social & Legal Studies* 481; Elsa Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' (1994) 16 *Human Rights Quarterly* 58.

34 Burger, above n 14; Pritchard, above n 19; Sarah Pritchard, 'Declaration on Rights of Indigenous Peoples — Drafting Nears Completion in UN Working Group' (1993) *Aboriginal Law Bulletin* 4; Pritchard, above n 21; Davis, 'The United Nations Draft Declaration 2002', above n 3.

35 Caroline Foster, 'Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 *European Journal of International Law* 145; Stefania Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' (2007) *Human Rights Law Review* 741.

36 Burger, above n 3, 7.

37 Clive Baldwin and Cynthia Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 122; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International & Comparative Law Quarterly* 957, 968; Emmanuel Voyiakis, 'Voting in the General Assembly as Evidence of Customary International Law?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 207; Anaya and Wiessner, above n 8.

38 Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project in the Indigenous Context' in Allen and Xanthaki, above n 37, 229.

39 Sheryl R Lightfoot, 'Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere' (2012) 16 *International Journal of Human Rights* 100.

40 Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy' in Allen and Xanthaki, above n 37, 183; Allen, above n 38, 225.

41 Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141; Ward Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as "Self-Determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 526; Kathy Bowrey, 'Law and Its Confinement: Reflections on Trevor Nickolls Brush with the Lore' (2011) 20 *Griffith Law Review* 729; Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture and Strategy* (Duke University Press, 2010); M J Peterson, 'How the Indigenous got Seats at the UN Table' (2010) 5 *The Review of International Organisations* 197; Malreddy Pavan Kumar, '(An)other Way of Being Human: "Indigenous" Alternative(s) to Postcolonial Humanism' (2011) 32 *Third World Quarterly* 1557.

In terms of the normative content, there is literature that expounds on lands territories and resources,[42] sovereignty,[43] collective rights versus individual rights,[44] cultural heritage,[45] free, prior and informed consent,[46] and the right to self-determination and democracy and participation.[47] Another distinguishing feature of this literature is a curious over-emphasis or authority afforded to the four original dissenters — Canada,[48] Australia,[49] New Zealand[50] and the United States[51] — which have each since endorsed the UNDRIP.[52]

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42 Mattias Ahrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in Charters and Stavenhagen, above n 3, 200; Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *European Journal of International Law* 165; Enzamaria Tramontana, 'The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources' (2010) *International Journal on Minority and Group Rights* 241, 246; Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Allen and Xanthaki, above n 37; Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009–10) 27 *Wisconsin International Law Journal* 51, 90; Michael Mansell, 'Will the Declaration Make any Difference to Australia's Treatment of Aborigines?' (2011) 20 *Griffith Law Review* 659.

43 Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transitional Law* 1141.

44 Rauna Kuokkanen, 'Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights' (2012) 34 *Human Rights Quarterly* 225; Austin Badger, 'Collective v Individual Human Rights in Membership Governance for Indigenous Peoples' (2010–11) 26 *American University International Law Review* 485.

45 Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) *European Journal of International Law* 121; Jessica Christine Lau, 'The Protection of Maori Cultural Heritage: Post-Endorsement of the UN Declaration on the Rights of Indigenous Peoples' (Working Paper No 2011/02, International Communications and Art Law Lucerne working paper June 2011) <http://www.unilu.ch/files/i-call_Working_Paper_2011_02_Lai_Maori_Cultural_Heritage__UNDRIP.pdf>.

46 Jérémie Gilbert and Cathal Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Allen and Xanthaki, above n 37, 289; Brant McGee, 'The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development' (2009) 27 *Berkeley Journal of International Law* 570; Andrea Carmen, 'The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress' in Hartley, Joffe and Preston, above n 3, 120, 120; Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 *International Journal of Human Rights* 1.

47 Russell A Miller, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination' (2006–07) 31 *American Indian Law Review* 341, 370; Claire Charters, 'A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making' (2010) 17 *International Journal on Minority and Group Rights* 215; Catherine J Iorns Magallanes, 'Indigenous Rights and Democratic Rights in International Law: An "Uncomfortable Fit"?' (2010) 15 *UCLA Journal of International Law and Foreign Affairs* 111; Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' in Allen and Xanthaki, above n 37, 259; Enzamaria Tramontana, 'Civil Society Participation in International Decision Making: Recent Developments and Future Perspectives in the Indigenous Rights Arena' (2012) 16 *International Human Rights Journal* 173; Irene Bellier and Martin Preaud, 'Emerging Issues in Indigenous Rights: Transformative Effects of Recognition of Indigenous Peoples' (2012) 16 *International Journal of Human Rights* 474; Mauro Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' (2011) 13 *International Community Law Review* 413.

48 Aboriginal Affairs and Northern Development Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (12 November 2010).

49 Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Statement delivered at Parliament House, Canberra, 3 April 2009).

50 Hon Dr Pita Sharples, Minister of Maori Affairs, 'Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples' (Statement delivered at the 9th Session of the United Nations Permanent Forum on Indigenous Issues, Opening Ceremony, New York, 19 April 2010).

51 Barack Obama, President of the United States of America, 'Remarks by the President at the White House Tribal Nations Conference' (Speech delivered to the White House Tribal Nations Conference, Washington DC,

The literature has oscillated between declaring the UNDRIP in part or wholly binding customary international law to being 'vulnerable' or 'fragile architecture',[53] constituting mere 'political bargains' with only 'in principal' consensus; to claims that the text 'facilitates the ongoing domestication of [state] violence'.[54]

This next section is divided into two parts. Part A will consider the content of the UNDRIP and, in particular, focus on two articles that have attracted significant comment: a) whether the rights contained within the UNDRIP are *sui generis* or existing rights; b) art 3; and c) art 42. Part B will examine the literature dealing with the *character* of the UNDRIP and here I will focus on: a) soft law; and b) customary international law.

## A *Content*

Essentially the rights contained in the UNDRIP are grouped into themes: (1) the right to self-determination; (2) life, integrity and security; (3) cultural, religious, spiritual and linguistic identity; (4) education and public information; (5) participatory rights; (6) lands and resources; and (7) the exercise of self-determination. Articles 1–6 recognise general principles pertaining to nationality, self-determination, equality and freedom from adverse discrimination. This cluster of rights includes art 3, affirming the right to self-determination, and art 4, which qualifies this as a right to self-government and autonomy in relation to internal and local affairs. Articles 7–10 contain rights to life, integrity and security. Articles 11–13 express rights to culture, spirituality and linguistic identity. Articles 14–17 pertain to education, information and labour rights. Articles 18–23 deal with participatory rights including special measures for addressing economic and social disadvantage. Articles 24–31 contain the rights to lands, territories and resources. The rights set out in arts 32–6 explain how self-determination can be implemented, including matters relating to internal local affairs such as culture, education, information, media, housing, employment, social welfare, economic activities, land and resources, and the environment. And finally, the remaining articles give guidance to states on how these substantive rights can be implemented within domestic legal and political systems. For example, art 37 recognises the right of Indigenous peoples to conclude treaties, agreements or other constructive arrangements with states. Article 38 is concerned with domestic implementation of the rights contained within the UNDRIP including legislative measures to achieve the ends of the UNDRIP, and art 39 lays out the right to access financial and technical assistance from states for the enjoyment of the rights recognised in the UNDRIP. Articles 40–46 are implementation provisions expounding the role of the state and international organisations in recognising the rights provided in the UNDRIP. Finally, art 46 renders all the articles subject to existing international and domestic law. This means that the rights are relative and must be balanced with the rights of others.

### 1 Sui generis *or existing rights?*

Part of the broader discussion and debate on the content of the UNDRIP has been the question of whether the norms contained therein are existing norms or whether they are

16 December 2010) <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

52 See also, for discussion of dissenters, Lightfoot, above n 39.

53 Engle, above n 41, 147.

54 Bowrey, above n 41, 743.

indeed new and distinct rights. The orthodox view seems to be that they are not new or special rights but an extension of what already exists in the human rights universe. According to the Special Rapporteur on the rights of Indigenous peoples, S James Anaya:

> [t]he Declaration does not attempt to bestow Indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.[55]

These rights are considered to be the extension of the existing corpus of individual human rights to a collective. As Erica-Irene Daes recalls of the early debates in the UNWGIP:

> Many other governmental observers stressed that the approach to the question of 'collective rights' in the revised draft Declaration was 'fundamentally inconsistent with existing international human rights instruments…'. This interpretation was opposed by virtually all of the Indigenous representatives, who supported an extension of the traditional Western understanding of human rights, ie rights of individuals to be free from oppression by the state, to a broader recognition of the rights of peoples to exist as collectives and to be secure in their collective integrity from intrusions by the state or other threatening forces.[56]

There is an abundance of literature that repeats this view.[57]

Still, there is some contention on the point that the UNDRIP rights reflect existing rights. From Kirsty Gover's perspective:

> 'Indigenous rights', so understood are especially vulnerable, because they appear to derive from a particular set of historic circumstances or experiences, or else from political bargains, and so fall outside of the corpus of universal human rights that vest in all human beings by virtue of their humanity. Thus while the adoption of the UNDRIP suggests that there is at least an 'in principle' consensus amongst states that Indigenous rights are morally justified, there is nothing like a consensus on why they are needed. Because they are often understood to be 'political rights', rather than inherent human rights, questions arise as to their political purpose and function, requiring justifications of the kind that are seldom sought of individual civil and political rights.[58]

Mauro Barelli argues they are *sui generis* rights, noting that 'it took more than two decades for the claims of Indigenous peoples to be addressed seriously within the UN framework, the UN human rights machinery has increasingly and intensively focused on the issue, ultimately creating a sui generis regime of Indigenous rights'.[59] Stephen Allen emphasises the sensitivity of 'prominent Indigenous representatives' to the '*sui generis*

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55 S James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) 24 [86].

56 Erica-Irene A Daes, 'The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples' in Charters and Stavenhagen, above n 3, 48, 67.

57 See, eg, Indigenous Bar Association, above n 10, 7; Malezer, aboven 3, 30; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011) 7.

58 Kirsty Gover, 'Book Review: The Elusive Promise of Indigenous Development: Rights, Culture, Strategy' (2011) 12 *Melbourne Journal of International Law* 419.

59 Barelli, above n 32.

quality of Indigenous rights claims'. Allen suggests this is because of a 'theoretical weakness' in the cultural difference argument.[60] Thus he regards the Indigenous 'strategy' of claiming the UNDRIP as creating no new or special rights for Indigenous peoples as an 'unusual tactic'. For Allen, this strategy is aimed at 'hiding their particular, temporal and political characteristics' by stressing the 'universal, unhistorical and un-political nature of the rights contained in the DRIP' and seeks to 'avoid stirring up identity politics'.[61] Of course, the same could be said of the entire body of human rights norms. The universal nature of human rights typifies the 'unpolitical' nature of human rights and the corpus of international human rights law is often criticised as being ahistorical and apolitical. The system seeks to avoid as far as possible 'identity politics' by being reductionist and universal. The 'invention' of human rights and, for example, the drafting of the *Universal Declaration on Human Rights*, has been extensively critiqued.[62] Allen's assertion of 'prominent Indigenous representatives" — whomever they may be — sensitivity to claims of *sui generis* rights is unexceptional because as Gover rightly suggests the strategy is clearly a 'realist Indigenous strategy'.[63]

Allen mistakenly conflates substantive equality with concrete rights, however, when he argues: 'if past injustices are resolved (as far as possible) and current discriminatory practices are corrected, the case for permanent rights rooted in cultural affiliation collapses and any such entitlements must cease'.[64] For those of us who live in states with Indigenous peoples, we know that such a generalised statement is negated by the variation in the way national legal systems have recognised Indigenous rights, and the very clear distinction between special measures that are temporary and concrete rights that are permanent. In Australia, for example, this distinction is clear in the vast difference between native title rights and Indigenous-based welfare entitlements. In any event, in the cut and thrust of the struggle, it is likely that neither 'prominent Indigenous representatives' nor their communities are overly concerned with the theoretical weakness of claiming that these *sui generis* rights are existing rights — even if that is what they are. As states gradually implement the UNDRIP and this state practice has an impact upon the daily lives of Indigenous peoples, speculation such as Allen's becomes the exclusive domain of academics. As Willem van Genugten argues, the fact is that: 'regardless of the fears about its legal strength, national courts have begun to make use of the Declaration as adopted'.[65]

Similarly, Gover suggests one of the challenges of the UNDRIP is that, 'there is no consensus amongst states on how to identify and balance Indigenous and other human rights in the public interest, there is no consensus amongst Indigenous groups themselves on how this is to be done'.[66] On the contrary, it is clear that each and every day, courts and governments with Indigenous populations in their jurisdiction grapple with the identification and contest of Indigenous rights. Indeed, frequently during the drafting of

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60 Allen, above n 38, 236.

61 Ibid.

62 See, eg, Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010); Makau Mutua, *Human Rights A Political and Cultural Critique* (University of Pennsylvania Press, 2008); Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, 2001).

63 Gover, above n 58.

64 Allen, above n 38, 238.

65 Willem van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *American Journal of International Law* 29.

66 Gover, above n 58.

the text, states would invoke examples in their own domestic jurisdiction to illustrate where their law and policy was located in relation to the threshold of minimum standards (although this was much to the frustration of Indigenous peoples because states are not permitted to use domestic law to prevent the development of international legal standards). Even so, in addition to this, the UN human rights treaty system has often dealt with the issue of how to identify and balance Indigenous and other human rights and over the years has provided us with a rich and textured body of jurisprudence on how states can balance rights, the most commonly cited example being the United Nations Human Rights Committee and decisions such as *Lovelace v Canada*[67] and *Kitok v Sweden*.[68] If anything, there is less consensus on what is fair and just in that balancing act. Take the Australian example of the High Court decision in *Wik*.[69] Here is an example of the balancing of such rights — Indigenous and other rights in the public interest — widely lamented today as a discriminatory and unfair outcome. It could be argued that consensus on balancing rights dies exist — at the oint that any conflict is usually resolved in favour of the non-Indigenous public interest. Certainly this is why Indigenous peoples turned to international law to seek an alternative approach.

It is worthwhile to consider, however, Gover's critical point about the lack of consensus among Indigenous groups themselves on how to balance Indigenous rights with other human rights. In particular, there is no consensus on how Indigenous groups balance their collective rights with the individual rights of the group internally. It is difficult to draw broad generalisations on this point because it depends on the jurisdiction, the specific Indigenous group and the pattern of colonisation. For example, the *Lovelace v Canada* decision is an example that is very unique to the Canadian experience of colonisation: the *Indian Act*.[70] However, even in the case of Canada, Aboriginal women had to challenge the Act constitutionally and then seek redress at the HRC under the *International Covenant on Civil and Political Rights*[71] to bring about a change in domestic law.

Another example that illustrates the challenge of the Indigenous normative framework is balancing the rights of the most vulnerable within any collective, such as women and children. In regard to the case of Australia and the federal government's emergency response ('NTER') to the findings of the 2007 Ampe Akelyernemane Meke Mekarle — 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse,[72] there were competing views. One view was that property rights — convincingly a part of the Indigenous human rights framework — were disproportionately attenuated in favour of the rights of Aboriginal women and children. On the other hand, there was a view that the seriousness of sexual

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67 *Lovelace v Canada*, Communication No R.6/24, Report of the Human Rights Committee, UN GOAR, 36th Session, Supp No 40 at 166 UN Doc A/36/40, Annex 18 (1977) (views adopted 29 December 1977).

68 United Nations Human Rights Committee, Communication No 197/1985: Sweden (Kitok), UN Doc CCPR/C/33/D/197/1985, 10 August 1988.

69 *The Wik Peoples v The State of Queensland*; *The Thayorre People v The State of Queensland* (1996) 187 CLR 1.

70 *Indian Act*, RSC 1985, c I-5 ('*Indian Act*').

71 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

72 See generally Mal Brough, Minister for Families, Community Services and Indigenous Affairs, 'National Emergency Response to Protect Children in the NT' (Press Release, 21 June 2007) <http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm>.

abuse and violence in those communities warranted an 'intervention'.[73] Even so, the NTER represents a critical juncture in the history of Aboriginal rights in Australia because it highlighted the inherent tension between collective rights/land rights/racial equality rights and individual rights/Aboriginal women's rights/gender equality rights.

What we do know is that, until the UNDRIP, Indigenous women were not recognised in the Indigenous-specific international instruments because of the presumption that Indigenous women fall under the category of 'Indigenous peoples'. Yet the challenge remains that the UNDRIP augments Indigenous women's position as one of vulnerability within Indigenous communities and arguably entrenches in international law the structural inequalities that exist within states and communities that marginalise and neglect Indigenous women by emphasising their 'special needs', as opposed to their unique status as Indigenous women and as rights-bearers. For example, art 22(2) provides that the state has an obligation to protect Aboriginal women and children from violence. Aside from the women-specific provisions in the UNDRIP, international law provides little guidance as to how Aboriginal women are situated within the normative framework of the right to self-determination: in particular, whether true self-determination can ever be achieved if Aboriginal women and children do not live in safety and are unable to maintain bodily integrity. As Rauna Kuokkanen lays bare, the question must be asked whether violence against women is related to self-determination and autonomy.[74] After all, international law sets minimum standards for states and it is left to the state to determine, in consultation and co-operation with Indigenous peoples, how the right to self-determination is to be achieved internally.[75] Thus, much depends on how Aboriginal women's rights are recognised and implemented by domestic legal systems.

## 2 *Article 3*

Naturally, the Indigenous right to self-determination has attracted extensive analysis and comment since the adoption of the UNDRIP. There are competing interpretations of the negotiated outcome of the text, which range from 'groundbreaking' to expressions of disappointment at the capitulation of Indigenous drafters to the state.

By way of historical background, the major obstacle to Indigenous peoples' advocacy on the right to self-determination was the history of self-determination as decolonisation or the 'saltwater' or 'bluewater' thesis — that self-determination was limited to non-self-governing colonies separated by the sea from their administering territory, and internal groups were excluded from the right.[76] Therefore the internal/external bifurcation of the

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73 See, eg, Bess Price, "'I Have Seen Violence Towards Women Every Day of My Life": Australia, 2009' (2009) 30 *Australian Feminist Law Journal* 149; see generally Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena, 2007); Larissa Behrendt, 'Finding the Promise of Mabo: Law and Social Justice for the First Australians' (Speech delivered at the Mabo Oration, Anti-Discrimination Commission Queensland, 2007). See also Pat Turner and Nicole Watson, 'The Trojan Horse' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena, 2007) 205.

74 Kuokkanen, above n 44, 226.

75 See UNDRIP art 38.

76 Benyamin Neuberger, 'National Self-Determination: A Theoretical Discussion' (2001) 29 *Nationalities Papers* 391; Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177; Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 *International and Comparative Law Quarterly* 537.

right to self-determination became synonymous, in the minds of states, with threats to state sovereignty and questions about territorial integrity and secession.

Nevertheless, self-determination — the right to determines one's economic, social and cultural identity — appealed to Indigenous peoples as anchoring their internal struggles within the state. And as Inuit lawyer Dalee Sambo Dorough argued, the state's dichotomy of 'internal' and 'external' self-determination was a false dichotomy and 'the expressions of Indigenous peoples ... at the UN, the Arctic Council and other international fora are examples of the external exercise of the right to self-determination'.[77] Hence, as S James Anaya points out in his study of Indigenous Peoples in International Law, it was the 1970s when Indigenous peoples, having had access to education, began to turn to international law as a consequence of the protection gap in human rights in domestic jurisdictions and the lack of recognition for Indigenous peoples rights. The right to self-determination, expressed as the right to determine their own economic, social, cultural and political destinies, came to represent the fundamental principle underpinning Indigenous peoples' advocacy. Almost universally, Indigenous peoples had been institutionalised to the extent that every aspect of their lives was controlled by the state. As each trend in Indigenous policy emerges and subsides, the idea that Indigenous peoples should have some control over the decisions that are made about their lives took hold in Indigenous political advocacy.

Jurist and current Special Rapporteur, S James Anaya, elucidated the meaning of self-determination for Indigenous peoples and his exposition of self-determination is frequently cited by scholars. Anaya distinguishes between substantive and remedial self-determination.[78] He effectively divides substantive self-determination in two: constitutive and ongoing self-determination.[79] Constitutive self-determination concerns the establishment of governing institutional arrangements, and requires that such arrangements reflect the collective will of the people or peoples governed. The ongoing aspect of self-determination means that those arrangements, independently of the processes that created them, must establish a system of governance that enables individuals and groups to make meaningful choices about their lives.[80] Remedial self-determination refers to the actions or measures that must be taken where the substantive elements of self-determination have been violated (the most obvious example being decolonisation).[81]

At the outset of the CHRWG, most states did accept Indigenous peoples' right to self-determination, while some states maintained concerns regarding destabilisation of territorial integrity through the vehicle of collective rights and self-determination. As Chairperson Chavez of the CHRWG summed up during the eighth session in 2002:

> Some States can accept the use of the term 'Indigenous peoples' pending consideration of the issue in the context of discussions on the right to self-determination. Other States cannot accept the use of the term 'Indigenous peoples', in part because of the implications this term may have in international law, including

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77 Dalee Sambo Dorough, 'Indigenous Peoples and the Right to Self-Determination: The Need for Equality: An Indigenous Perspective' in International Centre for Human Rights and Democratic Development, Seminar: *Right to Self-Determination of Indigenous Peoples* (ICHRDD, 2002) 44.

78 Anaya, above n 32, 104.

79 Ibid.

80 Ibid 105.

81 Anaya, above n 32, 107.

> with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the declaration, such as 'Indigenous individuals', 'persons belonging to an Indigenous group', 'Indigenous populations', 'individuals in community with others', or 'persons belonging to Indigenous peoples'.[82]

At multilateral standard-setting conferences, it is important to manufacture consensus.[83] Without raking over the history of the self-determination debates, as that has been addressed in substantial pre- and post-adoption scholarly literature,[84] it was at the 10th CHRWG session that specific reference was made to the Friendly Relations Declaration in the text to guarantee state sovereignty. Of course, this was controversial among Indigenous peoples because, consistent with the *Vienna Convention on the Law of Treaties*,[85] the Draft Declaration would be already subject to existing international law. At this time, the chairperson also attempted to moderate the position of the CANZUS states primarily concerned about self-determination by creating an additional paragraph to art 3 which was referred to in the working group sessions as 'Article 3 bis'. This involved inserting in a modified form the language of art 31 from the Draft Declaration to accompany the self-determination provision.[86] Article 3 bis read: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.[87] It was the combination of art 3 and art 3 bis that was accepted by CANZUS as a compromise. Article 3 bis became art 4 in the final text.

In addition, to counter state fears about secession, Indigenous peoples supported another qualification to art 3: the insertion of a new article, art 46, containing the safeguard clause from the *Friendly Relations Declaration* to guarantee the territorial integrity of states. In the end, art 46 became the catch-all provision to arrest state fears about the implications of the recognition of cultural rights for municipal legal systems and concerns about the impact of such a declaration upon the rule of law. Once this breakthrough was reached, the re-drafting and compromise on all the other relevant articles was relatively swift. Article 46 reads:

> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any

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82 *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, Annex I, UN Doc E/CN.4/2002/98 (2002).

83 See, Ronald A Walker, *Multilateral Conferences: Purposeful International Negotiation* (Palgrave Macmillan, 2004); Megan Davis, '"A Home at the United Nations": Indigenous Peoples and International Advocacy' in William Maley and Andrew Cooper (eds), *Global Governance and Diplomacy Worlds Apart?* (Palgrave Macmillan, 2008) 211.

84 Sarah Pritchard (ed), *Indigenous Peoples, United Nations and Human Rights* (Federation Press, 1998); Sarah Pritchard, *Setting International Standards: An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (2nd ed, 1998) 39; Xanthaki, above n 21, 110; Allen and Xanthaki, above n 37.

85 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

86 Article 31 of the Draft Declaration reads: 'Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.'

87 *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32* of 3 March 1995 on its 11th Session, 23, UN Doc E/CN.4/2006/79 (2006).

> action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
>
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Discussion in the literature has focused on whether or not the right to self-determination as recognised in the UNDRIP delimits the right. Once this breakthrough was reached, the re-drafting and compromise on all the other relevant articles was relatively swift.

Much has been written and said about this 'compromise', 'capitulation', 'subjugation'. According to Karen Engle, the 'declaration seals the deal: external forms of self-determination are off the table for Indigenous peoples'.[88] Mauro Barelli, on the other hand, reads it as simply a reflection of existing international law: 'despite the uncertainties surrounding the scope of this right, one thing has always been fairly clear, namely that sub-national groups do not have a right to independence. Indigenous peoples never seriously entertained secession'.[89] Indeed it is important to keep in mind that many of the participants were lawyers, either practising or academic, and had undergraduate and in many cases postgraduate law degrees and they were well aware of the law pertaining to secession. As David Keane points out, 'The Declaration does not however differ from other international legal instruments in that the right to self-determination is limited to remedies short of secession'.[90] The UNDRIP has simply reaffirmed this principle in international law. Barelli goes so far as to argue that, 'it should be stressed that Article 46(1) does not explicitly exclude remedial secession' because in the end secession, like most significant changes in domestic law, came about as a consequence of real politik.[91]

## 3 *Article 42*

On 28 July 2000, the ECOSOC approved the establishment of the Permanent Forum on Indigenous Issues to be constituted by both Indigenous experts and representatives of states.[92] The forum was called the Permanent Forum on Indigenous 'Issues' instead of the Permanent Forum on Indigenous 'Peoples' to avoid any legal implications stemming from the use of Indigenous 'peoples'. The resolution established the PFII as an advisory body to ECOSOC with a mandate to discuss Indigenous issues relating to economic and social

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88 Engle, above n 41, 147.
89 Barelli, above n 47, 422.
90 David Keane, *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar, 2012) 299.
91 Barelli, above n 47, 426.
92 *Establishment of a Permanent Forum on Indigenous Issues*, ESC Res 2000/22, UN Doc E/RES/2000/22 (2000).

development, culture, the environment, education, health and human rights. According to the UN mandate, the Permanent Forum is specifically expected to: (a) provide advice and recommendations on Indigenous issues to the Council, as well as to programs, funds and agencies of the UN through the Council; (b) raise awareness and promote the integration and co-ordination of activities relating to the Indigenous issues within the UN system; and (c) to prepare and disseminate information on Indigenous issues.[93]

Article 42 of the UNDRIP is part of the implementation cluster and reads:

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

The controversy that emerged out of art 42 was the attempt by the PFII to set itself up as a type of quasi-supervisory body for the implementation of the UNDRIP. It was suggested by the PFII that art 42 adds to the mandate of the PFII. This thesis was the subject of a PFII Expert Group Meeting ('EGM') — which is an inter-sessional meeting of the PFII on specific technical issues of international law pertaining to Indigenous peoples. Central to the discussion was the proposition that: 'Article 42 of the Declaration signals a new mandate for the Permanent Forum'.[94]

Essentially, the argument is that the presence of art 42 in the UNDRIP modifies the mandate of the PFII without requiring it formally to alter its mandate via its parent body the ECOSOC. To some extent, the PFII's eagerness to constitute the supervisory mechanism for the state's implementation of the UNDRIP is informed by the eternal 'to bind or not to bind question' as revealed by the EGM report:

> The experts noted that some United Nations agencies and the Inter-Agency Support Group had referred to the Declaration as a non-binding instrument, which they considered to be misleading. While it was not binding in the nature of, or to the degree of, a treaty, it was binding in character and States could become bound under international law in other ways besides treaty ratification. The Declaration was a human rights standard that did not create new or special rights but elaborated upon fundamental human rights of universal application and set those rights in the cultural, political and social context of Indigenous peoples.[95]

It would seem the competing (or 'misleading') interpretations of the UNDRIP as 'non-binding', 'soft', and 'aspirational' required the establishment of an authoritative body to counter such misinterpretations by collating the evidence of how states actually practised in the field of Indigenous rights law. As a consequence of this, the PFII maintained that 'a priority task should be for the Permanent Forum to elaborate and adopt interpretive statements or general comments on the most important provisions of the Declaration'.[96] Doing this would require the PFII to:

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93 Ibid.

94 UNPFII E/C.19/2009/2, 4.

95 *Report of the International Expert Group Meeting on the role of the Permanent Forum on Indigenous Issues in the implementation of article 42 of the United Nations Declaration on the Rights of Indigenous Peoples* E/C.19/2009/2, 11, 5 [17].

96 Ibid 6 [23].

> maintain ongoing communication with the human rights treaty bodies on the application of the Declaration, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child. Recommendations must focus on the obligation of States to comply with the provisions of the Declaration whenever Indigenous rights are involved. It is important for the Declaration to be utilized by the Human Rights Council, including during its Universal Periodic Review.[97]

A recommendation of the EGM was:

> to encourage States in particular to support this procedure and to use it as an opportunity to provide the Permanent Forum with substantive information on the implementation of the Declaration and a reliable assessment of the effectiveness of the Declaration at the national and the local levels.[98]

And finally, it was agreed by the EGM that the PFII should:

> Elaborate and adopt interpretive statements or general comments on the most important provisions of the Declaration. That task could be conducted on the basis of studies and papers that would be prepared by members of the Permanent Forum with the assistance of relevant experts. … It was proposed that the Permanent Forum make it a goal to adopt a general comment on article 42 at the 2009 session. The Permanent Forum might also give attention to article 3, which would be of use to other forums, such as courts that were adjudicating the rights of Indigenous peoples.[99]

Isabelle Schulte-Tenckhoff and Adil Hasan Khan take exception to this expansion of the mandate and in particular the PFII's assumed role in generating General Comments on articles of the UNDRIP despite that not being in their mandate. While Schulte-Tenckhoff and Khan are overstating the PFII's 'permanent quest to expand its mandate', there is merit in their concern that the issuing of General Comments can create confusion not to mention the resource implications for the PFII as well as its ability to carry out the mandate it already has. They argue that the PFII's 'attempt to expand its own mandate (and legitimacy) might have had a negative impact upon the legal status of a document that Indigenous delegates had battled to generate at the level of the WGIP'.[100] This is because as the PFII attempts to push at the boundaries of its mandate, there is automatic pushback coming from states who reiterate in the PFII that the UNDRIP was not meant to be binding. Of course that is to be expected from states but Schulte-Tenckhoff and Khan query what negative effect such statements can have on the legal status of the UNDRIP:

> What comes across in our analysis of the Permanent Forum is the mostly unintended negative impact the Forum's permanent quest for a mandate has generated for the

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97 Ibid 11.

98 Ibid 12 [64].

99 *Indigenous Issues in the Implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples* E/C.19/2009/2, 6 [23].

100 Isabelle Schulte-Tenckhoff and Adil Hasan Khan, 'Permanent Quest for a Mandate Assessing the UN Permanent Forum on Indigenous Issues' (2011) 20 *Griffith Law Review* 673, 697.

> normative content of the Declaration on the Rights of Indigenous Peoples as a whole, as well as its chances of acquiring a binding force.[101]

In essence, Schulte-Tenckhoff and Khan are arguing that the PFII is an institutional device that promotes mainstreaming of Indigenous issues throughout the UN while simultaneously contributing to the erosion of the rights of Indigenous peoples, especially their group rights. While I would argue this is an exaggerated claim, it is true to say that the PFII's past attempts to broaden the mandate have raised a number of red flags, not just within the UN or among states, but also among Indigenous groups themselves. In particular, the PFII has to be cautious not to duplicate the work of the Special Rapporteur on the Rights of Indigenous Peoples or the Expert Mechanism on the Rights of Indigenous Peoples. Each of the three mechanisms are working to elaborate further on the meaning of individual rights within the UNDRIP: for example, in January 2012, the PFII held an EGM to elaborate on art 22(2) of the UNDRIP, which obliges states to take measures to protect Indigenous women and children from violence. It is true that what needs to be avoided is a constant stream of state interventions issuing clarifications of the character and content of the UNDRIP because this may have, as Schulte-Tenckhoff and Khan assert, unintended consequences for the impact of the Declaration. Still, as the Special Rapporteur on the rights of Indigenous Peoples asserts, what really matters in terms of impact at the end of the day is state practice: when and where states are implementing the UNDRIP and the UN mechanisms monitoring that implementation.

## B *The UNDRIP Character*

The preceding discussion of the content of the UNDRIP highlighted the discursive nature of the literature on the UNDRIP. This is understandable because of the competing ideas of what a 'declaration' constitutes in international law. The next section considers the question of soft law versus hard law and then customary international law.

### 1 *Soft law*

The orthodox position is that the UNDRIP is a non-binding declaration of the General Assembly or 'soft' international law, thus it does not create any binding legal obligations in domestic legal systems. Language often attributed to the UNDRIP is that it is 'aspirational' or 'persuasive'; it provides a framework to guide states in their relationship with Indigenous peoples. For young Indigenous international lawyers it can be confusing to be confronted then with the position that it is neither 'soft' nor 'non-binding'. The Special Rapporteur has identified this as a problem because the soft/hard law dichotomy is not a true representation of how international law actually works:

> On too many occasions State and other actors attempt to diminish the normative weight of the Declaration by describing it as an instrument that is not 'legally binding'. As a resolution of the General Assembly, the Declaration by its nature is not, in and of itself, a legally binding instrument, given the authority of the General Assembly under the Charter of the United Nations only to make 'recommendations', except in regard to membership, budgetary and administrative matters. But

[101] Ibid 694.

> understanding the normative significance and legal obligations related to the Declaration does not end there.
>
> First, whatever its legal significance, the Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function not only of the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by Indigenous peoples themselves. The Declaration is the result of a cross-cultural dialogue that took place over decades, in which Indigenous peoples took a leading role. The norms of the Declaration substantially reflect Indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community.[102]

Similarly, Mauro Barelli takes up the same thread as Anaya when he argues that context and history also matter to any understanding of soft law instruments:

> It follows that special attention should be paid to the relationship between soft law and existing hard law. Secondly, the category of soft law includes, among others, inter-State conference declarations, UN General Assembly resolutions, codes of conduct, guidelines and the recommendations of international organisations. It is therefore clear that various soft law instruments will have different legal significance, as well as different degrees of effectiveness. This assertion goes far beyond the limited formal aspect of the instrument concerned. More importantly, it refers to, inter alia, the different contexts within which an instrument is adopted, the circumstances which have led to its establishment, its very normative content and the institutional setting within which it exists.[103]

On the other hand, Kathy Bowrey sees the Declaration's soft international status as maintaining 'the state monopoly on violence by confining the interpretation of the UNDRIP within the bars of the state. Its productive value is constrained by the interpretative context that privileges the state'.[104] Bowrey may be correct, however it cannot be argued that Indigenous peoples were not aware of this fact of existing power imbalances, particularly when one thinks of early drafters such as S James Anaya, Rob Williams, Dalee Sambo Dorough or Mick Dodson; all of whom have critically engaged with international law and its limitations. Allen opens his essay on the limitations of the international legal project for Indigenous peoples by stating that: prominent Indigenous representatives and sympathetic international lawyers/scholars have embraced the UNDRIP despite it being a non-binding international instrument.[105]

One concern I have with this literature is that it denies 'agency' to the Indigenous participants. There was, among at least some of these participants, a preference for the Declaration to remain as a Declaration when adopted by the GA to avoid the problems of treaties or conventions and in particular the problems ILO 169 had faced in ratification. It may be that the anxiety stems from the preference of Indigenous peoples for the UNDRIP to remain a non-binding declaration in international law. The consensus is that any move

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102 S James Anaya, *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/65/264 (9 August 2010) 17 [59]–[61].

103 Barelli, above n 37, 968.

104 Bowrey, above n 41, 744.

105 Allen, above n 38, 225.

toward the development of a treaty on the rights of Indigenous peoples would be deleterious to Indigenous rights because the ratification and effect of any treaty would depend on attracting enough signatures to become an international instrument and then, even if it did, would require implementing legislation in dualist systems.

The focus on the UNDRIP being 'soft' law does seem to overlook the impact it can have in domestic legal systems.[106] Certainly since the adoption of the UNDRIP the immediate response from practitioners and undergraduates is that it is only soft law and automatically non-binding. This dismissive tendency dominates the post-adoption literature. Partly, it is no doubt due to the minimal level of public international law in undergraduate degrees in common law jurisdictions like Australia, New Zealand and Canada. It would seem that in recitations of 'sources of public international law' soft law does not have the gravity of sound of 'hard' law.

It may also be connected to a paucity of knowledge about how international law has influenced so much Indigenous law in various jurisdictions. In Australia, the decisions in *Koowarta* and in *Mabo*[107] are illustrative of this point. In *Police v Abdulla*, Perry J referred to the *Convention Concerning Indigenous and Tribal Persons in Independent Countries* (ILO Convention 169), which has not been ratified by Australia:

> Section 11 of the *Criminal Law (Sentencing) Act* makes it plain that a sentence of imprisonment must be regarded as a sentence of last resort. In the case of Aborigines this is reinforced by provisions to be found in [ILO Convention 169]. Australia is not a party to the Convention. But it is an indication of the direction in which international law is proceeding. In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of universal application, at least where they are not in conflict with the domestic laws of this country.[108]

And the UNDRIP has also been referred to in litigation in the 2012 High Court proceedings in *Maloney v The Queen*,[109] the 2010 High Court of Australia decision in *Wuridjal v Commonwealth*[110] and in a Supreme Court of Queensland decision in 2010, *Aurukun Shire Council*.[111] The PFII has highlighted the potential for the UNDRIP in domestic jurisdictions moving forward:

> In cases where negotiations with the State did not succeed, the Declaration could be a major factor in litigation for rights or in complaints brought before the human rights treaty bodies. The Declaration could also help to shift the dynamics of disputes so that the burden of proof was not always placed on Indigenous peoples, but rather

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106 Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851; Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167; Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381.

107 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

108 *Police v Abdulla* (1999) 106 A Crim R 466, 472.

109 Transcript of Proceedings, *Maloney v The Queen* [2012] HCATrans 342 (11 December 2012)

110 (2009) 237 CLR 309.

111 *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 037.

> on States. Participants referred to examples where the Declaration had already been effectively used in dialogue between Indigenous peoples and the State.[112]

In Australia, by way of example, international law may be used by courts when attempting to construe the meaning of a statute or in cases of statutory ambiguity. In circumstances of statutory ambiguity, legislation may also be interpreted in accordance with customary international law.[113] It is a general rule of statutory construction that, in the event of statutory ambiguity, interpretation should be consistent with international law. On this point, Gleeson CJ has opined that:

> [W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.[114]

And in decisions like *Polites* and *Teoh* it was apparent that, when interpreting statutory ambiguity consistent with international law, it does not principally require incorporating legislation to give effect to the principle of statutory interpretation.[115]

Internationally, we know that the Draft Declaration had a significant influence on decisions such as the Inter-American Court on Human Rights *Awas Tingni*[116] case and similarly, in 2007, we have the UNDRIP influencing the decision in *Case of the Saramaka People v Suriname*,[117] this case setting down some principles around free, prior and informed consent. In addition one month after the adoption of the UNDRIP, the Supreme Court of Belize handed down a decision relating to Mayan rights to lands and resources applying the Declaration. Chief Justice Conteh found that Belize was obligated by the Constitution and also international law to recognise, respect and protect Maya customary land rights.[118]

David Keane rightly ascribes agency to the strategic work of Indigenous peoples at the UN, 'the choice of a soft law instrument for Indigenous peoples rights is one of many examples where advocates of human rights and states negotiate the risks of non-ratification of hard law instruments with non-compliance with soft law'.[119] The dismissal of the UNDRIP as mere soft law denies the way in which the Declaration is already having an impact throughout the world. As Barelli notes, the non-binding nature of the UNDRIP is a virtue:

> In sum, the non-binding nature of the Declaration does not negatively affect the value of the document. Rather than limiting its potential universality, it actually enhanced it. In addition, it allowed Indigenous peoples' representatives to negotiate directly with States' delegates, and created favourable conditions for international

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112 *Report of the International Expert Group Meeting on the role of the Permanent Forum on Indigenous Issues in the implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples* E/C.19/2009/2.

113 *Polites v Commonwealth* (1945) 70 CLR 60.

114 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492.

115 *Polites v Commonwealth* (1945) 70 CLR 60; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

116 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-American Court of Human Rights (ser C) No 79.

117 *Case of the Saramaka People v Suriname* (Inter-American Court of Human Rights, Ser C, No 172, 28 November 2007).

118 Belize — *Aurelio Cal et al v Attorney General of Belize*, Supreme Court of Belize (Claim 121/2007) (18 Oct 2007) (Mayan land rights).

119 Keane, above n 90, 299.

> support to develop. Lastly, it did not prevent the instrument from having significant legal effects.[120]

As Barelli notes, 'a soft law document is to be preferred to no document at all and, similarly, a soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions'.[121] Indigenous peoples have repeatedly and consistently stated that they do not want a convention because moving to a treaty would require a number of initial signatories as well as, ultimately, state ratification, in order to have effect; in addition there may be reservations that weaken the declaration. Barelli argues that, 'For Indigenous peoples, instead, it was crucial that, after more than twenty years of negotiations, the final instrument could be instantly effective. This is so because urgent action is key to the protection of their rights'.[122] This is an important point and one I have already emphasised: that holding out for some kind of Indigenous utopia in contemporary society was unrealistic. It was far better to have the UNDRIP adopted. The criticism of Indigenous drafters for this is irredentist.

## 2 *Customary international law*

The focus of this article is on the common threads emerging from critical analysis of the UNDRIP. It is not meant to be an exposition on customary international law. It is also important to caution that there is ongoing debate about the legitimacy of customary international law. However, in order to survey the literature on customary international law it is useful to lay out the parameters of customary international law as a source of law.[123]

To meet the requirements of customary international law as set down by the International Court of Justice in the *North Sea Continental Shelf Case*, evidence is required of widespread state practice in addition to *opinio juris* which translates as the belief by states that such practice is required by law.[124] Without going into too much detail on establishing the test, it is notoriously difficult to achieve. Having said that, once the state practice and belief is established, the custom can crystallise into binding international law if such acts amount to settled practice:

> But they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[125]

In any event, as stated at the outset, the commentary by Siegfried Wiessner and others that parts of the UNDRIP are already customary international law sparked a response in the literature about the premature nature of such comments. Wiessner writes:

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120 Barelli, above n 37, 968.
121 Ibid 965.
122 Ibid 968.
123 *Statute of the International Court of Justice*, art 38(1).
124 *North Sea Continental Shelf* (*Federal Republic of Germany v Denmark*, *Federal Republic of Germany v Netherlands*) [1969] 169 ICJ Rep 3.
125 Ibid 44.

> UNDRIP is a solemn, comprehensive and authoritative response of the international community of States to the claims of Indigenous peoples, with which maximum compliance is expected. Some of the rights stated therein may already form part of customary international law, others may become *fons et origo* of later-emerging customary international law. Scholarly analyses of State practice and *opinion juris* have concluded that Indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life; that they hold the right to political, economic and social self-determination, including a wide range of autonomy and that they have a right to the lands they have traditionally owned or otherwise occupied and used.[126]

Similarly, the United Nations Special Rapporteur on the rights of Indigenous peoples argues:

> UNDRIP can be seen as embodying to some extent the general principles of international law. In addition, insofar as they connect with a pattern of consistent international and state practice, some aspects of the Declaration can also be considered as a reflection of norms of customary international law.[127]

From the adoption of the UNDRIP, Anaya and Wiessner argued there is already a distinct body of customary law that accords with the Indigenous right to 'demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used'.[128] They conducted a study involving a global survey of state practice relating to Indigenous land. Regardless of CANZUS objections to the UNDRIP, this does not diminish the contribution those states have already made to state practice when it comes to recognition of Indigenous land. This customary norm was referred to by the Inter-American Court of Human Rights in the *Awas Tingni* decision.[129] Thus, while it is true the Declaration is non-binding in and of itself, to Anaya and Weissner, state practice clearly demonstrates that aspects of its operative provisions relating to land are already recognised by states, including the objectors to the UNDRIP.[130]

In his book *Indigenous Peoples in International Law*, Anaya provides a more considered and convincing argument as to why this may be so. Anaya is more optimistic about the way in which an emerging rule can crystallise into a binding norm of customary law in contemporary society. He argues that 'interactive patterns around concrete events are not the only — or necessarily required — material elements constitutive of customary norms'.[131] Anaya argues that:

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126 Graham and Wiessner, above n 8, 405; Wiessner, above n 8.

127 United Nations Special Rapporteur on the rights of Indigenous peoples, *Annual Report* A/HRC/9/9.

128 Anaya and Wiessner, above n 8; see also S James Anaya and Robert A Williams, 'The Protection of Indigenous Peoples Rights over Lands and Natural Resources under the Inter-American Human Rights System' (1999) 12 *Harvard Human Rights Journal* 57.

129 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Inter American Court of Human Rights; a copy of the judgment is available at 'The Case of the *Mayagna (Sumo) Awas Tingni Community v Nicaragua*' (2002) 19 *Arizona Journal of International and Comparative Law* 415.

130 S James Anaya and Claudio Grossman, 'The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19 *Arizona Journal of International and Comparative Law* 8; S James Anaya, 'The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers and Government Neglect in Nicaragua' (1996) 9 *St Thomas Law Review* 157.

131 Anaya, above n 32, 62.

> With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and expectation about rules ... It is thus increasingly understood that explicit communication among authoritative actors, whether or not in association with concrete events, is a form of practice that builds customary rules.[132]

In support of Anaya's position, many Indigenous and non-Indigenous commentators refer to the fact that the Declaration, when in draft form, was used extensively by Indigenous advocates and by international bodies and organisations, as well as by governments in municipal contexts. In relation to the UNDRIP, Anaya's analogy coalesces with the Belize decision which was transmitted throughout Indigenous networks globally via email communication, and arguably gives weight to Anaya's version of Thomas Franck's pull toward compliance: the idea that explicit communication among authoritative actors is a form of practice that may bring about a convergence of understanding and expectation that builds customary rules.[133]

Thus, even in its draft form it was suggested that the normative statement of Indigenous rights had developed, in part, sufficient 'belief' and practice apropos customary international law.[134] So it is that the anxiety present in the literature arises out of the murky waters of customary international law. Barelli argues that:

> although 'viewing the Declaration or substantial parts of it as customary international law may be rather premature', the document may have significant effects on the formation of customary international law. In particular, as stated by the International Court of Justice (ICJ) in the Legality of Nuclear Weapons Opinion, 'General Assembly resolutions, even if they are not binding, may ... provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*.[135]

Regarding General Assembly declarations, Emmanuel Voyiakis states the law as, 'GA Resolutions can provide inspiration for the development of new customary international practices. Second, such Resolutions may often help to sharpen existing customary practices'.[136] Again, the Special Rapporteur on the Rights of Indigenous Peoples, S James Anaya, states that:

> even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to be generally accepted within international and State

132 Ibid.
133 Anaya, above n 32, 62.
134 Ibid 61–71.
135 Barelli, above n 37, 967.
136 Voyiakis, above n 37.

> practice, and hence to that extent the Declaration reflects customary international law.
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> In sum, the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.

This is supported by the Law Council of Australia, which states that:

> the UNDRIP, whilst lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's Indigenous peoples.[137]

Similarly, the International Law Association's Indigenous Rights Committee has concluded that:

> The 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. It however, includes key provisions which correspond to existing State obligations under customary international law.[138]

This brings me to a corollary concern in the literature: the study of the endorsement statements by the CANZUS states who originally voted against the Declaration. As I previously mentioned, there is a concern in the context of customary international law regarding the role of the persistent objector. This is still relevant despite the fact that CANZUS states have comparatively stronger land and territories recognition in their jurisdictions than the minimum standard required by the UNDRIP. Sheryl Lightfoot argues that:

> [t]heir commitments, qualifications and exclusions related to Indigenous rights remained remarkably consistent whether they were opposing or supporting the declaration. With their qualifications and exclusions, all four states strategically, collectively and unilaterally wrote down the content of international Indigenous rights norms so that they were already in alignment with the legal and institutional status quo in the Anglosphere, making further implementation efforts unnecessary.[139]

In writing on the endorsement pattern of CANZUS, Australian Aboriginal scholar Aileen Moreton-Robinson takes the approach that 'patriarchal white sovereignty's possessive logic determines what constitutes Indigenous peoples' rights, and what they will be subjected to in accordance with its authority and law'.[140] According to Moreton-Robinson, 'the possessive logic of patriarchal white sovereignty operates discursively, deploying virtue as a strategic device to oppose and subsequently endorse the Declaration.

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137 Law Council of Australia, 'Policy Statement on Indigenous Australians and the Legal Profession' (Background Paper, February 2010) 6.

138 International Law Association, *Rights of Indigenous Peoples* (2012).

139 Lightfoot, above n 39, 116.

140 Aileen Moreton-Robinson, 'Virtuous Racial States: The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 641, 656.

As an attribute of patriarchal white sovereignty, virtue functions as a useable property to dispossess Indigenous peoples from the ground of moral value'.[141]

While Moreton-Robinson, like other writers, elevates the original dissenting states to a place of higher authority — despite their subsequent endorsement — Barelli suggests that the anxiety over the original dissenters may be overstated:

> Generally, the fact that the Declaration was not adopted by unanimous vote might weaken its contribution in this respect. However, a more attentive analysis of the recorded vote suggests that this is not necessarily the case. The limited weight of a resolution would normally result from the opposition of a considerable number of States or even a small number of States provided that these are the States whose interests are specially affected. Certainly a more focused discussion would be required in order fully to assess the implications of the Declaration for customary international law. With regard to the issue of opinio iuris, however, it would seem that these contrary votes fail to represent the view of a significant segment of the international community, and therefore cannot per se prevent its emergence.[142]

Emanuel Voyiakis has written specifically and extensively on the declaration as a GA resolution and how that can impact upon the development of customary international law. He argues that the idea that GA resolutions tell us things about states' intentions with regard to international custom needs careful defence:

> just as participation in a treaty does not necessarily allow inferences about the views of States parties regarding customary international law, we have some reason to doubt whether GA votes can tell us that much about the views of voting States on international custom.[143]

In surveying the legal framework on this question, he suggests that the adoption of resolutions such as the UNDRIP 'should not be taken to have an intrinsic impact on customary international law, but rather to function as an inspiration for future practice'.[144] While Voyiakis admits his approach is probably more conservative than what the broader international law literature assumes, this approach serves a strategic purpose because:

> a more modest conception of the impact of its Resolutions on international custom has the potential to defuse bitter disagreements of the sort that delayed the adoption of the Declaration by nearly a decade and to create conditions for the development of better substantive law.[145]

## IV Observations on the Indigenous Participants in the Drafting of the UNDRIP

Finally, in terms of the literature that has emerged in the five years since the UNDRIP's adoption, I want to record some observations. One notable feature is the absence of Indigenous perspectives. In the beginning, there were Indigenous voices present in the

141 Ibid 644.
142 Barelli, above n 37, 967.
143 Voyiakis, above n 37, 210.
144 Ibid 222.
145 Ibid.

discussion of the UNDRIP regarding early recollections of the difficulty of the drafting process and triumphal descriptions of the Declaration's passage.[146] And certainly, since then, there is an emerging body of critical Indigenous commentary.[147]

Nevertheless, most of the literature is dominated by, although not limited to, non-Indigenous academics; no doubt due to a lack of critical mass of Indigenous scholars or lawyers. I raise this as an observation because much of the analysis lacks an Indigenous voice and often Indigenous participants in this space are reduced to lax and vague descriptors as 'Indigenous peoples', 'Indigenous advocates' or 'Indigenous representatives', almost universally without reference to primary or secondary sources. Indeed, often non-Indigenous and Indigenous drafters and/or advocates are conflated. Why is this important? In part, because it is the first text drafted by states and rights-holders/bearers and, given its history manifest in the WGIP and indeed the history of Indigenous peoples and colonisation, it is pertinent that its interpretation may be skewed through a lens that is not Indigenous. As Anaya attests, the UNDRIP is a result of decades of cross-cultural dialogue and 'the product of years of advocacy and struggle by Indigenous peoples themselves'.[148] Anaya argues that, 'the norms of the Declaration substantially reflect Indigenous peoples own aspirations, which after years of deliberation have come to be accepted by the international community'.[149] Similarly, as Makau Matua insists, 'the Draft Declaration would not have been possible but for the tireless efforts of Indigenous peoples' NGOs. This is one case where the victims developed the standards by which they want to be governed'.[150] In part, this observation raises questions about who interprets international law — after the three-decade struggle of standard setting is over. This is germane because many of the authors of this literature did not participate in the drafting of the UNDRIP and, in the absence of a comprehensive *travaux préparatoires*, there is overreliance on the thin official CHRWG records or, in some cases, records of DOCIP to elicit an understanding of what went on and the motivations and thoughts of Indigenous participants. This explains why the literature reveals competing interpretations and understandings of the UNDRIP and the articles therein; whether this will have any implications for its interpretation by states or in courts is a valid question.

A second observation is the political and cultural analysis of the UNDRIP; the problematising of Indigenous legal and political strategy in participating in the drafting of the UNDRIP. The language of 'capitulation' or 'compromise' abounds, especially in regard to the right to self-determination and in consolidating state sovereignty and territorial integrity; we are asked, is it an 'imperialist instrument'?[151] For example, Ward Churchill in his analysis of the UNDRIP describes the instrument as a 'travesty of a mockery of a sham' and argues that the Declaration 'fails to fulfil the aspirations of those who pursued such an articulation during the last quarter'.[152] Churchill also argues that, 'the only substantive result ensuing is that the very structure of relations Indigenous peoples sought to challenge

146 See Charters and Stavenhagen, above n 3.
147 Moreton-Robinson, above n 140; Mansell, above n 42, 659.
148 Anaya, above n 102, 17 [59]–[61].
149 Ibid.
150 Makau Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 587.
151 H Patrick Glenn, 'The Three Ironies of the UN Declaration' in Allen and Xanthaki, above n 37, 172.
152 Ward Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as "Self-Determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20 *Griffith Law Review* 526.

through the processes of the United Nations has been legitimated in law, the terms of the law itself having been subverted to accommodate the legitimation'.[153] In a similar vein, in analysing the 'crucial implications' of the UNDRIP in terms of depriving Indigenous peoples of any possibility to claim any form of legal standing as peoples, Schulte-Tenckhoff and Khan assert that, 'tragically, some Indigenous representatives seem to have allowed themselves to be accomplices in this process' and 'contribute to a misinterpretation of the *UN Declaration on the Rights of Indigenous Peoples*'.[154] Kathy Bowrey describes Indigenous participation in this dialogue as giving 'assistance' to the state in legitimating and fine-tuning its governance of the 'other'. Bowrey views international law as the embodiment of the Westphalian/post-Westphalian system that configures Australian Indigenous peoples as existing within the bars of the nation-state while 'potentially transcending those confines'. Bowrey expresses unease with the 'continuing faith in utopian readings of international law and processes for inclusion within settler states without a much clearer articulation of the confines of that "inclusion"'.[155] Bowrey pleads: Why do we think this ghostly transition is a possibility?[156] Here, Bowrey questions the UNDRIP's capacity to do 'work' for Indigenous peoples rights and suggests that a part of the power imbalance is a knowledge and expertise imbalance and so we must be cautious of what the UNDRIP can actually deliver because:

> the skills and legal education of Indigenous lawyers are often fine honed toward identifying existing 'lacks' they can then articulate in international fora. With a historical focus on speaking to what the law lacks, there has been precious little development of creative thinking about strategic approaches to the legal categories that continue to rule Indigenous lives.[157]

Bowrey also raises an important point about the need for a clearer articulation of the confines of international law's 'inclusion' of Indigenous peoples and invites us to consider the indigenous international framework in the broader critique of 'the emancipatory capacity of human rights jurisprudence'.[158] Some of the literature reveals disappointment about the compromises in negotiations with states on the draft text. Yet the 'no change' strategy, for example, clearly illustrates the resolve Indigenous peoples had in resisting the states' attempts to alter the text. Ultimately, the decision to negotiate on the text was a strategic one because states had commenced redrafting the text without the input of Indigenous peoples. For example, absent from much of the literature (no doubt due to the generality of the so-called *travaux*) was the development of the principles during the CHRWG in 1998 by which negotiation on the draft text could proceed. These drafting principles were designed to provide a principled, human rights framework to any suggestion for alteration of the Draft Declaration text and to respond to the redrafting exercise being undertaken by some states. The principles set out criteria to be addressed by proponents of change to the existing text:

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153 Ibid 549.
154 Schulte-Tenckhoff and Khan, above n 100, 697.
155 Bowrey, above n 41, 739.
156 Ibid 735.
157 Ibid 740.
158 Ibid 730.

> The Draft Declaration must be approached on the basis of a very high presumption of the integrity of the existing text. In order to rebut this presumption, any proposal must satisfy the following criteria:
>
> It must be reasonable.
>
> It must be necessary.
>
> It must improve and strengthen the existing text.
>
> In addition, any proposal must be consistent with the fundamental principles of:
>
> Equality.
>
> Non-discrimination.
>
> The prohibition of racial discrimination.[159]

The development of these principles was critical to moving toward abandoning the 'no change' strategy. It was a significant development in the drafting of the text, yet absent from the literature appraising the indigenous UNDRIP strategy, and illustrates the need for greater nuance or texture when judging the motives of Indigenous drafters. It is important that Indigenous peoples are not deprived of agency. The notion that Indigenous peoples could have held out on issues such as the right to self-determination is unrealistic. It overlooks the urgency many Indigenous groups felt in terms of developing an international instrument to utilise domestically. Kirsty Gover comes close to capturing this when she notes that the UNDRIP 'was the result of a realist Indigenous strategy, intended to secure the best possible outcome in the face of state opposition, and to make the most of any momentum and goodwill remaining after 22 years'.[160]

## V Conclusion

Since the adoption of the UNDRIP in 2007, there has been an enormous body of literature that has emerged describing, analysing and critiquing every aspect of the process, the legal character and its content. This article has sought to draw together some of the key elements of this literature to shed some light on the layered and textured narratives of the UNDRIP coming from many different scholarly disciplines. I hope I have been provocative.

While it is true that self-determination as elaborated in the UNDRIP is 'internal', I suspect this is simply a reality; an inherently pragmatic decision. Indigenous peoples understand the world that they live in: mostly democratic, utilitarian societies. Indigenous peoples are acutely aware that to deliver benefits to children here and now requires us to engage with this system here and now. This does not mean that Indigenous peoples are aware of the 'game' that is played on the international level manifested in geo-politics and in diplomacy. Indigenous peoples are skilfully using the tools that are available to them and it denies Indigenous peoples agency to imply that they have somehow contributed to the

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159 Sarah Pritchard, 'Setting International Standards', above n 84, 39.

160 Gover, above n 58.

limiting of self-determination and of sovereignty. By whose standards of self-determination and sovereignty is that judged? This reveals the irredentist tone to the literature that hones in on the motives of the Indigenous people who participated in the project; it is not Indigenous peoples who are unrealistic about the world they live in — it is those who study us and write about us who project their own beliefs and values onto us. Of course this is the nature of academic inquiry; the diverse and competing intellectual trends through which the UNDRIP is filtered.

In all of the rich and varied literature I have surveyed over the course of the past five years, there is very little doubt that international law has been transformative for Indigenous peoples. Whether we have reached the limit of that potential, as some of the literature suggests, whether we have wall-papered over the inherently political characteristics of our rights or equally ignored the tensions with liberalism or conveniently turned a blind eye to the power dynamics embedded in the international and domestic system or hampered the progress of minority rights — these important questions are ones for the academic domain.

Indigenous peoples are in the international sphere, not just as a manifestation of our external self-determination, but because international law has mattered. International law has made substantive and concrete changes in the lives of Indigenous peoples. In Australia in the 1970s it led to the abolition of the protection legislation and permit system so my grandfather and his brother had freedom of movement and freedom of speech. It has led to substantial gains in rights — especially land rights — for Indigenous peoples in Australia: in particular, the *Racial Discrimination Act 1975* (Cth) and the *Aboriginal Land Rights Act (Northern Territory) 1975* (Cth). In the absence of entrenched rights and protections in Australia, international standards, whether binding or non-binding, have had persuasive authority in the Australian legal and political system. It is true that there have been many losses, but the UNDRIP has played and will continue to play an authoritative role in the lives of Indigenous peoples globally, whether binding or not, and that is a suitable place in which to end a reflection on the fifth anniversary of the GA's adoption: a birthday we were never certain we would be celebrating.