School for Advanced Legal Studies – Faculty of Law

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Indigenous Peoples and the Right to Culture: An International Law Analysis

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PLAGIARISM DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Signed by candidate

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Ashimizo Afadameh-Adeyemi

DEDICATION

To Loveth – a mother, an aunt, a sister and a dear friend

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ABBREVIATIONS

CBD – Convention on Biodiversity

CERD – Committee on the Elimination of Racial Discrimination

CESCR – Committee on Economic, Social and Cultural Rights

CRC – Committee on the Rights of the Child

ECOSOC – Economic and Social Council

EEZ – Exclusive Economic Zone

EHRR – European Human Rights Reports

GA – General Assembly

HRC – Human Rights Committee

ICCPR – International Covenant on Civil and Political Rights

ICEARD – International Convention on the Elimination of All forms of Racial Discrimination

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ILC – International Law Commission

ILM – International Legal Materials

ILO – International Labour Organisation

PCIJ – Permanent Court of International Justice

REP – Report

RES - Resolution

UN – United Nations

UNESCO – United Nations Educational, Scientific and Cultural Organisation

UNCLOS – United Nations Convention on the Law of the Sea

UNTS – United Nations Treaty Service

WGIP – Working Group on Indigenous Peoples

WIPO – World Intellectual Property Organisation

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CHAPTER I

GENERAL INTRODUCTION AND OVERVIEW

1.1 Introduction

In the post or neo-colonial era, the question of fair and equitable treatment of indigenous peoples remains a subject of international political and legal discourse.[1] Efforts have been made to study ways of promoting and protecting indigenous rights and to develop international norms for the protection of these rights.[2] These efforts have sprung forth a plethora of questions; these questions include 'who qualifies as indigenous peoples?' and 'what rights do they enjoy under international law.'[3] This thesis takes a cursory look at the conceptual underpinnings of indigenous peoples and specifically evaluates their right to culture in the parlance of international law.

1.2 Objective of Thesis

Given the robust and volatile nature of the question of indigenous peoples, this thesis is streamlined to address the cultural rights of indigenous peoples. **The central focus of this thesis is to determine if the right to culture of indigenous peoples is a binding norm of customary international law.** While it is not disputed that highly ratified treaties like the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are applicable to the protection of indigenous culture, it is imperative to consider indigenous culture in terms of customary international law because treaties are only binding upon state parties. On the other hand, where an obligation arises under customary international law, it binds all states except those that can be classified as persistent objectors. It is

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[1] Siegfried Wiessner 'Rights and status of indigenous peoples: a global perspective and international legal analysis' (1999) 12 *Harvard Human Rights Journal* 57 at 58.
[2] Mpazi Sinjela and Robin Ramcharan 'Protecting traditional knowledge and traditional medicines of indigenous peoples through intellectual property rights: issues, challenges and strategies' (2005) 12 *International Journal on Minority and Group Rights* 1 at 2.
[3] These rights include the right to self-determination, indigenous cultural rights, indigenous intellectual property rights and indigenous land rights.

also important to mention that in this thesis, the cultural rights of indigenous peoples will include all aspects of culture that promotes their cultural identity.[4]

1.3 Foreseeable Challenges

An argument in the realm of international law is always marked with uncertainty. The argument gets more complicated if the issue in discussion pertains to whether a rule has become part of customary international law. The uncertainties involved in international law-making are usually associated with the formation of customary international law.[5]

This is because of all the sources of international law;[6] customary international law seems to be the most uncertain. Having stated this caveat, this thesis determines if there is sufficient state practice and *opinio juris* to support a claim of customary international law in terms of the protection of the culture of indigenous peoples. It is important to mention that although there is a vast literature on the definition, requirements and nature of customary international law, this thesis will take its cue from Article 38 (1) of the Statute of the International Court of Justice (ICJ). Various decisions of the ICJ are considered but emphasis is laid on the decision in the *North Sea Continental Shelf* case.[7]

1.4 Significance of Thesis

This thesis extrapolates the requisite state practice and *opinio juris* required for the formation of a rule of customary law by analysing treaties, declarations, resolutions and state legislation on the right to culture of indigenous peoples. If it is established that the right to culture of indigenous peoples is part of customary international law, then it could serve as a proper basis for legal actions, complaints, or other claims in any international or domestic proceedings.

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[4] This includes but is not limited to all forms of traditional knowledge of indigenous peoples.
[5] Jan Klabbers *The concept of treaty in international law* (1998) 1.
[6] Article 38(1) of the Statute of the International Court of Justice lists the sources of international law as: treaties, customary international law and general principles of law recognized by civilized nations.
[7] *North Sea Continental Shelf case* [1969] ICJ Rep 3. The ICJ stressed the need for widespread and representative state practice in support of the purported new rule, including the specially affected states, as well as a feeling of legal obligation.

It is important to make this determination because some states with indigenous peoples might avoid signing or ratifying treaties that address the cultural rights of indigenous peoples, with the sole aim of avoiding the international responsibility emanating from such treaties. If the cultural rights of indigenous peoples are part of the corpus of customary international law, international responsibility will accrue irrespective of the fact that a particular state has not signed or ratified a treaty which provides for the protection of indigenous culture. The only exception will be where the non-ratifying state can be categorised as a persistent objector.

1.5 Structure of Thesis

This thesis comprises of seven chapters. The chapter one gives a general introduction and overview of the entire thesis. This is done by setting out the objectives, significance, foreseeable challenges and structure of the thesis.

Chapter two makes an attempt at conceptualising the term 'indigenous peoples' by identifying the requisite characteristics which they must possess. It also discusses in brief the recognition of indigenous peoples in international law. The chapter is concluded by discussing the meaning and relevance of culture to indigenous peoples.

Chapter three examines the concept of customary international law and the required elements for its formation. The chapter also considers the role of treaties, declarations of international organisation and domestic state practice in the formation of customary international law. The essence of this chapter is to lay foundation for determining whether the right to culture of indigenous peoples is part of customary international law.

Chapter four examines the right to culture of indigenous peoples under various treaties. This is important because not only do treaties create binding obligations for state parties, they sometime help to develop or crystallize customary international law. Specific treaties considered include the International Labour Convention 169,[8] International Covenant on Civil and political rights,[9] the

[8] Article 5 (a) provides for the recognition and protection of the cultural values of indigenous peoples.

International Covenant on Economic, Social and Cultural Rights,[10] the Convention on Biological Diversity,[11] African Charter on Human and Peoples Rights.[12] Some other treaties not mentioned here are also examined. The chapter argues that these instruments protect indigenous culture and that they bind the signatories to these instruments. It also argues that ratification of these treaties is an indication by states parties to create a binding legal obligation as regards the principles enunciated in these instruments. The chapter lays foundation for the argument that if majority of states are under an obligation to protect the cultural rights of indigenous peoples; a leeway is created for the right to develop into a rule of customary international law.

Chapter five considers the protection of indigenous culture under declarations of international organisations. Of particular importance is the United Nations Declaration on the Rights of Indigenous Peoples. Special attention is given to this declaration because it is the most recent international instrument on the rights of indigenous peoples. The chapter argues among others that the declaratory tone of the Declaration signifies the intention of states to be bound by the provisions of the Declaration. It also considers other declarations and documents made by the United Nations Educational, Scientific and Cultural Organisation and the World Intellectual Property Organisation.

Chapter six briefly examines domestic state practice in relation to the protection of indigenous right to culture. In this regard, national legislation and decisions of national courts are considered.

Chapter seven concludes the thesis by arguing that in terms of the treaties, declarations and domestic state practice discussed in the preceding chapters, there is sufficient state practice and *opinio juris* to ascertain that the right to culture of indigenous peoples is a rule of customary international law.

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[9] Article 27 provides that '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.' This article does not specifically provide for the protection of indigenous peoples but the Human Rights Committee (the body responsible for the implementation of the Convention) have suggested that indigenous peoples are also protected under this article.

[10] Article 15 recognises the right of everyone to take part in the cultural life of the state.

[11] Article 8(j) provides for the respect, preservation and maintenance of indigenous traditional knowledge relevant for the sustenance and conservation of biological diversity.

[12] Article 17 provides for the protection and recognition of the cultural rights of individuals.

CHAPTER II

INDIGENOUS PEOPLES AND THE MEANING OF CULTURE

2.1 Introduction

The protection of the right to culture of indigenous peoples has become an issue of international concern. As such, it is pertinent to have an understanding of the meaning ascribed to the term 'indigenous peoples' and the relative importance of culture to the preservation of their existence.

This chapter gives a general overview of indigenous peoples. It is not the intention of this thesis to adopt a final definition for the term indigenous peoples (for the reasons explained below). Rather it will assess the recognition given to indigenous peoples in international law and characteristics manifested by indigenous peoples. It also examines the meaning and relevance of culture to indigenous peoples.

2.2 The Recognition of Indigenous Peoples under International Law

From 1945 till date, there has been a progressive acknowledgment of the concept of indigenous peoples in international law. This acknowledgement is largely attributable to the development of human rights during this era. The United Nations Charter 1945,[13] the Universal Declaration on Human rights 1948,[14] the International Covenant on Civil and Political Rights 1966[15] and the International Covenant on Economic, Social and Cultural Rights 1966[16] emerged within this era. These conventions enshrined the protection of human rights into the mainstream of

[13] Charter of the United Nations (1945) 1 UNTS XVI.
[14] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810.
[15] International Covenant on Civil and Political Rights 1966 (1967) 6 I.L.M 368.
[16] International Covenant on Economic, Social and Cultural Rights 1966 (1967) 61 ILM 360.

international law. In terms of the United Nations Charter, human rights precepts formed part of its foundational elements.[17]

The Charter also reinforced the need for the equal protection of the fundamental human rights of all persons.[18] The emergence of individual rights within the framework of the United Nations created a platform for the assertion of the individual rights of indigenous peoples because indigenous peoples have sought protection of their rights using these human rights instruments. As will be explained in chapter four, indigenous peoples in seeking recognition and protection of their rights, have relied on article 27 of the International Covenant on Civil and Political Rights and article 15 of the International Covenant on Economic, Social and Cultural Rights.

Within the framework of the United Nations, there have been attempts to recognise and protect indigenous peoples. Examples of such attempts led to the creation of the International Labour Organisation Convention 107 on Indigenous and Tribal Populations[19] and the International Labour Organisation Convention 169 on Indigenous and Tribal Peoples.[20] As will be discussed in chapter four, these Conventions specifically seek to protect various rights of indigenous peoples. In addition to these Conventions, the United Nations Economic and Social Council in 1982 established a 'Working Group' charged with the responsibility of drafting a Universal Declaration on the Rights of Indigenous 'populations.'[21] In 1990, the United Nations General Assembly designated the year 1993 as 'the International Year of the World's Indigenous Peoples.'[22]

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[17] James Anaya *Indigenous peoples in international law* 2ed (2004) 53.
[18] It is also important to mention that international organisations and individuals can now participate (although to a limited extent) in international law. *Reparation for Injuries Suffered in the Service of the United Nation* [1949] ICJ Rep 174 at 178-9. The court was of the opinion that there are now instances in which certain non-state actors now participate in international law.

[19] ILO Convention 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries June 26, 1957 U.N.T.S. 247.
[20] International Labour Organisation Convention 169 on Indigenous and Tribal Peoples (1989) 28 ILM 1382.
[21] United Nations Economic and Social Council Resolution 1982/34 of 7 May 1982. The Working Group recommended the renaming of the Working Group on Indigenous Populations as the 'Working Group of Indigenous Peoples.' Working Group on Indigenous Populations, Discrimination Against Indigenous peoples: Reports of the working Group on Indigenous Populations on its 14th session, U.N. Commission on Human Rights, Sub Commission on the prevention of Discrimination and Protection of Minorities, 48th session, U.N. Doc. E/CN.4/Sub.2/1996/21 (1996).
[22] International Year for the World's Indigenous Peoples, G.A Res. 45/164 (Dec. 18, 1990).

In 1993, the United Nations General Assembly further proclaimed an 'International Decade for the World's Indigenous Peoples.'[23] Furthermore, in 2000 the United Nations Economic and Social Council adopted a resolution creating a Permanent Forum on Indigenous Issues. In 2007, the United Nations General Assembly adopted the Universal Declaration on the Rights of Indigenous Peoples.[24] These conscious efforts made by the United Nations to directly address issues that border on indigenous peoples suggests that indigenous peoples have gained prominence within the international community.

2.3 Conceptualizing Indigenous Peoples

The term 'indigenous peoples' has become prevalent in contemporary international law although there has not been consensus on an acceptable universal definition.[25] The United Nations Declaration on the Rights of Indigenous Peoples which is the most current international instrument on indigenous peoples also does not define the term 'indigenous peoples.' Nonetheless, the lack of consensus on an exact definition is not sufficient reason to stop striving at a conceptual understanding of the legal meaning of the term 'indigenous peoples.'[26] In order to conceptualize the term 'indigenous peoples' it is important to ascertain the group of people entitled to exercise indigenous rights and to determine the minimum parameters for asserting indigenous status.

Over a short period, the term 'indigenous peoples' 'has been transformed from a prosaic depiction without much significance in international law and politics,

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[23] International Decade of the World's Indigenous People, G.A Res. 48/163 (Dec 21, 1993).
[24] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* 2007 A/RES/61/295.
[25] Indigenous representatives are of the opinion that there is no need for a definition for indigenous peoples because it might exclude some groups that ought to qualify as indigenous. *Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations System,* Commission on Human Rights, Fifty-fifth session 25 March 1999, E/CN.4/1999/83. Para 56. Available on http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1999.83.En?Opendocument [Accessed on 21 August 2009]. Wiessner posits that a formal definition might help to protect indigenous peoples against governments who deny their existence. On the contrary, the danger in arriving at a strict definition lies in the fact that governments may also use it as an excuse for not recognising Indigenous peoples within their territories. Wiessner (note 1) at 113. *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) 87.
[26] Martin Scheinin 'What are indigenous peoples?' in Nazila Ghanea and Alexandra Xanthaki (eds) *Minorities, Peoples and Self-Determination* (2005) 3.

into a concept with considerable power as a basis for group mobilization, international standard setting, trans-national networks and programmatic activity of intergovernmental and nongovernmental organisations.'[27] This paradigm shift reaffirms the need for a conceptual understanding of the term 'indigenous peoples.' Since no agreed definition is available, outlining the major characteristics of indigenous peoples will be of great importance.

Benedict Kingsbury is of the opinion that from the documents emanating from the United Nations, the International Labour Organisation (ILO) and the World Bank, three different approaches are instructive in understanding what is meant by the term 'indigenous peoples.'[28] While discussing the term 'indigenous peoples,' the United Nations makes use of the definition given by the UN Special Rapporteur Jose Martinez - Cobo. [29] He defined indigenous peoples in the following words:

> Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
> (a) Occupation of ancestral lands, or at least of part of them;
> (b) Common ancestry with the original occupants of these lands;
> (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
> (d) Language (whether used as the only language, as mother- tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
> (e) Residence in certain parts of the country, or in certain regions of the world;
> (f) Other relevant factors.[30]

From this definition, the core elements of indigenous peoples are; historical event of a community suffering from invasion or colonization; the group's self identification

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[27] Benedict Kingsbury 'Indigenous peoples in international law: a constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414.
[28] *Ibid* at 419.
[29] Study of the problem of discrimination against indigenous populations UN Doc. E/CN.4/Sub.2/1986/7 and Add 1-4; UN Sales No. E.86.XIV.3.
[30] *Ibid* at para 379-80.

as distinct from other parts of the national society; a present non-dominant status of the community; and the group's determination to preserve its ancestral lands.[31] Despite the fact that this definition is the standard reference within the United Nations framework for determining indigenous peoples, it is limited and controversial.[32]

This is because placing sole emphasis on the 'historic continuity with invasion and colonial societies,' creates a link with the phenomena of colonisation and invasion that might limit the concept of indigenous peoples to the Americas and Oceania.[33] This may exclude some indigenous peoples in Africa and Asia who are not necessarily oppressed because of colonial invasion but are oppressed by inhabitants who have become dominant groups in the society.[34] A typical example would be the Ogoni people of the Niger-Delta region in Nigeria. The contemporary marginalisation suffered by the Ogoni people is not solely attributable to European colonisation, rather it is been perpetrated by the Federal Government of Nigeria with regards to benefit sharing of natural resources.

Another criticism of Martinez - Cobo's definition is that the stipulation of the group's determination 'to preserve ancestral territories' might be a tool to exclude indigenous peoples who have maintained their indigenous identity, but now live in urban areas because they no longer have access to their ancestral lands.[35] An example of such a group would be the Wayuu people, who use to live in the border region between Colombia and Venezuela but now live in the outskirts of Maracaibo in Venezuela.[36] Another example would be the San people in Southern Africa who are nomadic in nature will be excluded.

[31] Wiessner (note 1) at 111.
[32] Kingsbury (note 27) at 420.
[33] Wiessner (note 1) at 111.
[34] *Ibid*.
[35] Wiessner (note 1) at 111.
[36] Rene Kuppe 'The indigenous people of Venezuela and the National Law' (1987) 2 *Law & Anthropology* 113.

In terms of the International Labour Organisation, ILO Convention 169[37] has a more diffuse historical requirement for indigenous peoples and includes in its legal definition an additional category of 'tribal peoples.'[38] The Convention's diffuse historical requirement, includes peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country or a geographical region at the time of the establishment of the present state boundaries.[39] This definition does not limit indigenous peoples only to those peoples who have suffered from invasion or colonisation. It also includes ancestors of indigenous peoples that may have existed in countries that did not experience conquest or colonisation.[40]

In contrast to the position of the ILO Convention 169 and that of the UN Special Rapporteur Martinez-Cobo, the World Bank[41] has dispensed with the criteria of historical continuity and colonialism. Rather, it has taken a functional approach in defining 'indigenous peoples' as a 'group with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged.'[42] This approach lays emphasis on cultural distinctiveness rather than historical continuity. The drawback with the definition provided by the World Bank is that it lumps together indigenous peoples, ethnic minorities and tribal groups. If this definition is universally accepted, it would pose a challenge in defining whether the rights accruable to indigenous peoples in international law should be extended generally to ethnic minorities and tribes.

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[37] ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries 169 (note 20). Article 1(1) stipulates that the convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

[38] Kingsbury (note 27) at 420.

[39] Article 1(1) (b), ILO Convention 169.

[40] Patrick Thornberry *Indigenous peoples and Human Rights* (2002) at 45.

[41] The World Bank Operational Directive 4.20 states: the terms 'indigenous people,' 'indigenous ethnic minorities,' 'tribal groups' and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, 'indigenous people' is the term that will be used to refer to these groups.

[42] Kingsbury (note 27) at 420.

The word 'indigenous' in English language is an adjective that connotes that a thing belongs to a particular place rather than coming from somewhere else.[43] Literally, indigenous peoples would mean people who belong to a particular place rather than those who emigrated. Simply put, indigenous peoples connote the original inhabitants of a particular place.

Professor Erica-Irene Daes offers a set of factors relevant to understanding the term 'indigenous'.[44] These factors are:

> (a) [p]riority in time, with respect to the occupation and use of a specific territory;
> (b) [t]he voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
> (c) [s]elf identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
> (d) [a]n experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these condition persist.[45]

Professor Daes's criteria of 'priority in time' as a factor for understanding indigenous peoples support the analysis of the term 'indigenous peoples.' However to use 'priority in time' as a sole determinant, is not without flaw. As Wiessner points out, 'the problem with this reference is the fact that this element is empirically framed, referring to facts of history that maybe false.'[46] Difficulties would arise where 'priority in time' in a particular territory is contested; for instance, where a group resettles into a new 'ancestral' territory that is claimed by other groups.[47] Wiessner suggests that one might rather adopt an approach that merely designates indigenous peoples as 'peoples that have been traditionally regarded as original inhabitants of a particular territory.'[48] This approach would not require a scientific hypothesis for discovering whether they were the first inhabitants of the particular territory.

Kingsbury has suggested that a flexible approach to understanding the term indigenous peoples, might involve a compilation of a combined list of essential

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[43] Oxford Advanced Learners Dictionary 7ed (1997) at 759.
[44] Wiessner (note 1) at 114.
[45] Erica-Irene A. Daes *Working paper on the concept of 'indigenous people'* U.N ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Session, at 5, U.N. Doc. E/CN.4/1996/2 (1996) 22.
[46] Wiessner (note 1) at 114.
[47] Kingsbury (note 27) at 454.
[48] Wiessner (note 1) at 115.

requirements and relevant indicia. He enumerates these essential requirements as follows:

(a) Self identification as a distinct ethnic group
(b) Historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation
(c) Long connection with the region
(d) The wish to retain a distinct identity.

He categorised the relevant indicia into strong indicia and other relevant indicia. The strong indicia include:

(a) Non dominance in the national (or regional) society
(b) Close cultural affinity with a particular area of land or territories
(c) Historical continuity with prior occupants of the land in the region.

The other relevant indicia include:

(a) Socioeconomic and socio-cultural differences from the ambient population
(b) Distinct objective characteristics such as language, race, and material or spiritual culture
(c) Regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.[49]

Kingsbury posits that strong doubts would be raised as to the indigenousness of a group that lacks all three categories and that the absence of either of the first two categories would raise doubts that might be rebutted in special circumstances.[50] The presence of the third categories may also be of assistance in understanding and applying the concept of 'indigenous peoples.'[51]

Wiessner drawing from Kingsbury's classification, has suggested that 'indigenous communities should be conceived as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in the past or present, a pervasive pattern of subjugation, marginalisation, dispossession, exclusion and discrimination.'[52]

Martin Scheinin has suggested that although the United Nations Declaration on the Rights of Indigenous Peoples does not define indigenous peoples, five

[49] Kingsbury (note 27) at 455.
[50] *Ibid*.
[51] *Ibid*.
[52] Wiessner (note 1) at 115.

characteristics of indigenous peoples can be inferred from both the preamble and the overall text. These characteristics are:

> (a) Distinctiveness, in the sense of wanting to be different
> (b) Dispossession of lands, territories through colonization or other comparable events in the past, causing today a denial of human rights or other forms of injustice
> (c) Land as a central element in the history, identity and culture of the group
> (d) Being first in the geographic area, at least in relation to the present dominant population
> (e) Lack of political control in respect of the state that today exercises sovereignty in the area where the lands are located.[53]

These characteristics which indigenous peoples are required to manifest are almost similar to the definition given by Jose Martinez- Cobo. The only difference lies in the fact that the element of historical continuity is not limited only to colonisation.

This thesis adopts the characteristics of indigenous peoples outlined by Martin Scheinin. This is because these characteristics emanate from the most recent international instrument on indigenous peoples and they complement the shortfall of the various definitions discussed above. In the context of this thesis, the term 'indigenous peoples' refers to any group of people who by virtue of their history are culturally distinct (and are willing to remain so) from the entire population of the nation and whose land on which they dwell plays a pivotal role in the propagation of their culture. The group must also be one that suffers from historical or political marginalisation and stands the chance of losing its cultural identity.

For the purpose of this thesis, a group will not be considered as indigenous peoples if they have attained prominent status and are now in control of the government. This is because there is a presumption that the level of vulnerability of the group reduces because they will have the resources to protect their identity within the nation-state. An example would be Fijians who now constitute 51.1% of the population of Fiji Island. Fijians also hold absolute majority seat in parliament and the President is appointed by the Bose Levu Vakaturaga, the Great Council of Indigenous Chiefs.[54]

Before proceeding to the next section, it is important to draw a distinction between minorities and indigenous peoples. Although it is widely accepted in legal

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[53] Scheinin (note 26) at 3.
[54] Nehla Basawaiya 'Status of indigenous rights in Fiji' (1997) 10 *St. Thomas Law Review* 197.

literature that indigenous peoples are not mere minorities,[55] the line of distinction is not clear-cut. However, one way that might be useful in ascertaining if a group are minorities or indigenous peoples is to determine if the group exhibits the characteristics of indigenous peoples discussed above. A common link between minorities and indigenous peoples is that they are classified as collective entities.[56]

In addition, the rights that accrue to minorities under international law are also applicable to indigenous peoples.[57] For example, the definition of minorities given by UN Special Rapporteur Capotorti can be applied to indigenous peoples.[58] He defined minorities as:

> A group numerically inferior to the rest of the population of a State, in a non – dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[59]

It is obvious from this definition that the characteristics for identifying minorities can also be found in among indigenous peoples. However, some characteristics (such as historic continuity) that indigenous peoples exhibit is not found within the definition of minorities. It therefore seems that there are stricter requirements to be complied with before for a group qualifies as indigenous peoples.

2.4 Culture in the Context of Indigenous Peoples

The importance of culture to indigenous peoples cannot be overstated. This is because culture plays an integral role in the preservation of the identity of indigenous peoples. Robert Murphy, a renowned social anthropologist defined culture to mean 'the total body of tradition borne by a society and transmitted from generation to generation. Thus, it refers to the norms, values, and standards by which people act, and it includes the ways distinctive in each society of ordering the world and

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[55] Alexandra Xanthaki *Indigenous rights and the United Nations standards: self-determination, culture and land* (2007) 133.
[56] Anne – Christine Bloch 'Minorities and indigenous peoples' in Asbjorn Eide *et al* (eds) *Economic, social and cultural rights: a textbook* (1995) 310.
[57] This point is discussed in chapter four.
[58] Thornberry (note 40) at 52.
[59] United Nations *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Sales No. E. 91. XIV. 2, para 568.

rendering it intelligible.'[60] Raymond Williams also suggests that the word 'culture' can be used to indicate a way of life of a people, period, group or humanity in general.'[61] Applying this definition to indigenous peoples will mean that indigenous culture gives effect to the total outlook and the continued existence of indigenous peoples. Invariably, indigenous culture influences the essence of indigenous peoples and plays a fundamental role in almost every aspect of their human existence.

Indigenous culture is the core body of beliefs, knowledge, traditions and way of life that is passed on from generations in indigenous communities.[62] Erica-Irene Daes notes that '…this body of beliefs, knowledge, traditions and way of life forms an integral part of indigenous peoples and is manifested in form of ancestor worship, religious or spiritual ceremonies, oral tradition and rituals which have been passed down from generation to generation.'[63]

For indigenous peoples, culture is the outcome of their relationship with other human beings, plants, animals and the land on which they dwell.[64] This relationship between the culture of indigenous peoples and their immediate environment distinguishes them from members of the general society.[65] These indigenous customs and traditions are central to the lives of indigenous peoples and constitute their existence as a separate entity.[66] Culture is therefore very necessary for the existence and survival of indigenous peoples. Indeed, Daes suggests that one of the factors to consider in understating the term 'indigenous' is the [t]he voluntary perpetuation of cultural distinctiveness.[67]

Without this cultural distinction, indigenous peoples stand the chance of been assimilated into the mainstream of the society thereby leading to their extinction. At present, this distinctiveness is under threat in many parts of the world. An example that buttresses the point is the policy of Arabisation which has been pursued by the Governments of Algeria and Morocco. This has had a negative impact on the distinct

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[60] Robert Murphy, *Cultural and social anthropology: an overture* 2ed (1986) 14.
[61] Raymond Williams, *Keywords: a vocabulary of culture and society* (1983) 90.
[62] Marina Hadjioannou 'The international human right to culture: reclamation of the cultural identities of indigenous peoples under international law' (2001) 8 *Chapman Law Review* 201 at 204.
[63] Erica-Irene Daes *United Nations Human Rights of Indigenous Peoples. Indigenous Peoples and their Relationship to Land* E/CN.4/Sub.2/1997/17., 3 - 6.
[64] Xanthaki (note 55) at 204.
[65] Daes (note 45) at 22.
[66] Daes (note 63) at 3. Anna Meijknecht, *Towards international personality: the position of minorities and indigenous peoples in international Law* (2001) 93.
[67] Daes (note 45) at 22.

cultural and linguistic identity of the Berber speaking population who reside in Algeria and Morocco.[68] Also in East Africa, the massive land dispossession has had negative consequences for the indigenous culture of the Maasai.[69]

It is therefore imperative to provide legal protection for the preservations of indigenous culture in order to forestall the extinction of indigenous peoples. The importance of culture for indigenous groups – and the legal implications to which this gives rise – are examined in more detail in Chapter 4.

[68] *Report of the African Commission Working Group of Experts on Indigenous Populations* (note 25) at 44.
[69] *Ibid*.

CHAPTER III

FORMATION OF CUSTOMARY INTERNATIONAL LAW

3.1 Introduction

This chapter discusses the elements required for the formation of customary international law (state practice and *opinio juris)* and argues that state practice and *opinio juris* are necessary for the creation of a rule/norm of customary international law. It is important to state at this point that an international norm is a pattern of authorised communications and acts on the part of international organisations and states. A norm includes, and is largely determined by, the enunciation and recognition of a given set of standards by authorised international bodies and agencies such as the United Nations.[70]

This chapter argues that for a binding international norm to be formed, the elements of state practice and *opinio juris* must be present and that these elements can be deduced from treaties, domestic legislation and resolutions of international organisations. It is important to mention that this chapter does not delve into the argument of the relative weight to be placed on either state practice or *opinio juris.* This is because despite the fact that there is a vast literature in this regard, no convergence has been reached on this point. This chapter is important because in determining whether the right to culture of indigenous peoples is a rule of customary international law, it is necessary to understand where this rule can be discerned.

3.2 Elements of Customary International Law

The formation of customary international law seems to be one of the most controversial aspects of international law given the vast and divergent literature on the subject. In addition, there is almost no agreement on the substantive principles of

[70] Raidza Torres 'The rights of indigenous populations: the emerging norm' (1991) 16 *Yale Journal of International Law* 127 at 145.

customary international law and the various ways in which customary international law is formed or should be identified. In this regard, the demise of custom as a source of international law has been widely forecasted because both the nature and the relative importance of custom's constituent elements are contentious.[71] However, this chapter relies on the provisions of the Statute of the International Court of Justice in determining the elements of customary international law.

The Statute of the International Court of Justice contains what most international lawyers consider the authoritative definition of customary international law.[72] Article 38 (1) (b) defines customary international law as 'international custom, as evidence of a general practice accepted by States as law.' This definition sets out two elements that must be complied with before customary international law is formed; they are: (1) evidence of state practice, and (2) an accompanying acceptance by states that the practice is obligatory in law.[73] The evidence of state practice is deemed the material element while the requirement that practice must be accepted by states as law is regarded as the psychological element (*opinio juris*).[74]

In determining whether there is a rule that prohibits the threat or use of nuclear weapons in international law, the International Court of Justice held that 'the substance of that law must be looked for primarily in the actual practice and *opinio juris* of States.'[75] In other words, a rule of customary international law is created when states generally recognise a certain uniform practice as obligatory.[76] Simply put, states must acknowledge that there is a legal obligation attached to the performance of a rule/norm. Anaya suggests that the norms of customary

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[71] Anthea Elizabeth Roberts 'Traditional and modern approaches to customary international law: A reconciliation' (2001) 95 *American Journal of International Law* 756.
[72] David Fidler 'Dinosaur, Dynamo or Dangerous? Customary international law in the contemporary international system' in Ellen Schaffer & Randall Snyder (eds.) *Contemporary practice of public international law* (1997) 62.
[73] John Dugard *International law: a South African perspective* 3ed *(*2005) 29.
[74] Martti Koskenniemi 'The normative force of habit: international custom and social theory' in Martti Koskenniemi (ed.) *international law* (1992) 225. State practice is regarded as the material element because it is mainly comprises of acts or manifestations by states, *opinio juris* on the other hand is regarded as the psychological element because it is the requirement of belief in the legality of the practice of states.
[75] *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 para 64.
[76] J.L Brierly *The Law of Nations* 6ed (1963) 61. In the *Lotus case*, the Permanent Court of Justice (the predecessor to the International Court of Justice) held that 'rules of law binding on States emanates from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law….' *The Case of the S.S. 'Lotus'* PCIJ, Ser. A., No. 10, 1927, 14.

international law crystallize when a preponderance of states and other authoritative actors converge on a common understanding of the norms.[77]

3.2.1 State Practice

Traditionally, customary international law is formed through the emergence of a general, uniform, consistent and settled practice, more or less gradually joined by a sense of legal obligation, the *opinio juris.*[78] This traditional view emphasizes consistent and settled state practice from which a sense of legal obligation is inferred.[79]For state practice to be indicative of a rule of customary international law there must be in existence generality and uniformity of such practice.[80]

According to Shaw, in examining state practice, it is important to take into consideration the consistency, duration and the generality of the practice of states with respect to the particular rule.[81] In opposing the idea that state practice should be of primary importance in the formation of customary international law, some scholars have argued that given the increasing number of states, it is almost impossible to obtain settled and consistent state practice from all states.[82] However the question of generality, consistency and uniformity of state practice is a matter of fact, assessed objectively by the court on a case-by-case basis. In the *Asylum case,* the ICJ held that:

> The party which relies on a custom…must prove that this custom is established in such a manner that it has become binding on the other party…that the rule invoked…is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State…. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction…that it is not possible to discern in all this any constant and uniform usage, accepted as law… '[83]

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[77] Anaya (note 17) at 61.
[78] Bruno Simma and Phillip Alston 'The sources of human rights law: custom, jus cogen, and general principles' (1988-1989) 12 *Australian Yearbook of International Law* 82 at 88. This is the position set out in article 38(1) (b) of the Statute of the ICJ.
[79] Some scholars argue that *opinio juris* is not required at all. To them, widespread and consistent practice is sufficient to infer a legal obligation if there is no evidence of any objection to the rule. Lauterpacht quoted in Andrew Guzman 'Saving customary international law' (2005) 27 *Michigan Journal of International Law* 115 at 149.
[80] Ian Brownlie *Principles of public international law* (2003) 7-8.
[81] Malcolm Shaw *International law* 5ed (2003) 72.
[82] Jonathan Charney 'Universal International law' (1993) 87 *American Journal of International Law* 529 at 543.
[83] *Asylum case* [1950] ICJ Rep 266 at 276-7.

Also, in determining state practice, it is not necessarily the case that all states must have acted in a particular way. It is important that the states most affected by the said rule have acted in a way which suggests that they believe to be so bound by it.

The ICJ in the *North Sea Continental case* reiterated this point when it stated that the generality of the practice is most relevant in terms of the states mostly affected by the rule.[84] In other words, it is the generality and consistency of practice by states affected by the rule that will be of utmost importance to the Court. For example, if the Court has to determine if the right to culture of indigenous peoples is a rule in customary international law, cognisance will be given to the practice of states with indigenous peoples. In terms of uniformity of state practice, the Court does not require states to act in identical ways, what is required is for them to act in such a way that is indicative of the fact that they are acting according to the generally accepted rule.[85] The Court explained this point in *Nicaragua v United States* when it held that:

> [t]the Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of the States should in general be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of a new rule.[86]

There are divergent views among international law scholars as to what constitutes state practice. Nevertheless, it appears that the practice requirement can be satisfied with reference to statements and claims made by states.[87] Wolfke has rejected this approach of deducing state practice from statements and claims made by states. Wolfke takes a divergent opinion and argues that statements made by states are not to be regarded as state practice. He argues that only physical deeds of states should be deemed as state practice.[88]

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[84] *North Sea Continental Shelf case* (note 7) at 43.
[85] Fidler (note 72) at 63.
[86] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 para 186.
[87] Guzman (note 79) at 152.
[88] Karol Wolfke *Custom in present international law* (1993) 41-42. Wolfke further argues that repeated verbal acts can give rise to international customs, but only to customs of making such declarations and not to customs of the conduct described in the content of the verbal acts.

However, the use of statements as 'state practice' has become the dominant approach. In the *Rights of Nationals of the United States of America in Morocco* case, the International Court of Justice used diplomatic correspondence to evaluate a claim to state practice.[89] Akehurst defines state practice as ' any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations in *abstracto* (such as General Assembly resolutions), national laws, national judgements and omissions….'[90] According to Brownlie, state practice can be inferred from diplomatic correspondence between states, policy statements, press releases, official opinions given by legal advisers on behalf of states, executive decisions and comments made by governments in response to draft laws produced by the International Law Commission.[91] In addition, legislation adopted by states, international and national judicial decisions, recitals in treaties and other international instruments, the practice of international organs and resolutions adopted by the United Nations General Assembly are good ways of determining state practice.[92] The International Law Commission has also recognised the above-mentioned sources as possible forms of state practice.[93]

If Akehurst, Brownlie, the International Court of Justice and the International Law Commission's articulation of what amounts to state practice is adopted, then statements made by states, treaties, UN General Assembly resolutions relating to legal questions, domestic legislation and national judicial decisions of states will be considered as state practice from which *opinio juris* is discerned.

3.2.2 Opinio Juris

While state practice refers to the general and consistent practice of states, the *opinio juris* requirement entails that the practice is followed out of a belief of legal obligation.[94] *Opinio juris* is the psychological element which is necessary to distinguish between actions undertaken by states which are motivated by moral or political reasons or mere courtesy and those undertaken by states with the belief that

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[89] *Rights of nationals of the United States of America in Morocco* case [1952] ICJ Rep 176 at 200.
[90] Michael Akehurst *'Custom* as a source of international law' (1974-1975) 47 *British Yearbook of International Law* 1 at 53.
[91] Brownlie (note 80) at 6.
[92] *Ibid*.
[93] International Law Commission 'Ways and means for making the evidence of customary international law more readily available' (1950) 2 *Yearbook of the International Law Commission* 367 at 368-372.
[94] Roberts (note 71) at 756.

such actions are legally binding in international law.[95] The acceptance of a practice as law creates the sense of legal obligation in terms of state practice. The psychological element distinguishes state practice motivated by mere courtesy or tradition from those motivated by a sense of legal obligation.[96]

In identifying *opinio juris*, the International Court of Justice has used two methods of approach.[97] Firstly, the Court assumed the existence of *opinio juris* based on evidence of a general practice or consensus among legal scholars or the previous decisions of the Court or other international tribunals.[98] David Fidler refers to this approach as the 'no scrutiny' approach.[99] Under this approach, the International Court of Justice assumes the existence of *opinio juris* because there is general and uniform practice.[100] The International Court of Justice adopted this approach in the *Gulf of Maine* case when it had to determine a single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America. In ascertaining the rule of customary international law that governs the subject of maritime delimitation of the continental shelf, the Court relied on its previous decisions in the *North Sea Continental Shelf case*[101] and the *Continental Shelf (Tunisia v Libya) case*[102] to establish the rule of customary law in that field. The Court held that 'delimitation must be an object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.'[103] The Court while referring to its judgment in the *North Sea Continental Shelf case* stated that:

> [t]hat judgment [North Sea continental Shelf], while well known to have attributed more marked importance to the link between the legal institution of the continental shelf and the physical fact of the natural prolongation than has subsequently been given to it, is *nonetheless the judicial decision which has made the greatest contribution to the formation of customary law in this field*.[104]

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[95] Shaw (note 81) at 80.
[96] Brownlie (note 80) at 8. *North Sea Continental Shelf case* (note 7) at 44.
[97] *Ibid*.
[98] *Ibid*.
[99] Fidler (note 72) at 65.
[100] *Ibid*.
[101] *North Sea Continental Shelf case* (note 7) at 3.
[102] *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Application to Intervene* [1981] ICJ Rep 3.
[103] *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine area (Canada v United States of America)* [1984] ICJ Rep 246 at 293-4.
[104] *Ibid* at 293 para 91. Emphasis added.

In other words, the Court relied on its previous decisions to assume the required *opinio juris* needed to affirm the formation of a rule of customary international law.

The second approach is a more rigorous approach that calls for positive evidence of recognition of the validity of the rules in question in the practice of states.[105] David Fidler refers to this approach as the 'strict scrutiny' approach. In this approach, the Court demands positive evidence that *opinio juris* exists in state practice.[106] The Court in the *North Sea Continental Shelf case* also adopted this approach. In this case, the Court had to decide whether the 'equidistance-special circumstances principle' by virtue of article 6(2) of the 1958 Geneva Convention on the Continental Shelf had become binding customary international law for determining the delimitation of the continental shelf or adjacent or opposite countries.

In determining this point, the Court acknowledged that non- parties to the 1958 Geneva Convention on the Continental Shelf had in fact delimited their continental shelf by using the equidistance principle. However, the Court was of the opinion that these countries were not applying the Convention and no inference could be justifiably drawn to show that they believed themselves to be applying a mandatory rule of customary international law.[107] The Court went further to state that in order for the acts of non-parties to the Convention to suffice as *opinio juris*:

> [n]ot only must the acts concerned 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 requiring it.[108]

Although the 1958 Geneva Convention provided for the equidistance principle, there was no evidence to show that states that were not parties to the Convention applied the principle based on their belief that they were under a legal obligation to comply with the rule. In this case, the Court declined to assume the existence of *opinio juris* based on the 1958 Geneva Convention because there was no positive evidence to show that non-state parties to the Convention believed that they were under an obligation. Brownlie suggests that it would be incorrect to interpret the judgement to

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[105] Brownlie (note 80) at 8.
[106] Fidler (note 72) 65.
[107] *North Sea Continental Shelf case* (note 7) at 44 para 76.
[108] *Ibid* at para 77.

mean that the existence of general practice does not raise a presumption of *opinio juris.*[109] This is because with regards to the equidistance principle, there was little practice before the Convention.[110]

In *Nicaragua v United States*, the Court in determining whether the Charter obligation to refrain from the threat or use of force was also a principle of customary international law, assumed the existence of *opinio juris* from the attitude of the parties and the attitude of states towards certain General Assembly resolutions particularly resolution 2625. [111] The Court was of the opinion that consenting to the text of such General Assembly resolutions may signify the acceptance of the validity of the rule or set of rules declared by the resolution.[112]

From the decisions of the International Court of Justice in the above cases, *opinio juris* can be assumed from state practice. Examples of such practice will include judicial decisions of the International Court of Justice or that of other international tribunals and the attitude of states towards United Nations General Assembly.

3.3 The Role of Treaties, Resolutions of International Organisations, Multilateral Declarations by States and Domestic State Practice in the Formation of Customary International Law

Having stated above that state practice and *opinio juris* must be present for the formation of customary international law, it is important to discuss how treaties and UN resolutions help to create or develop customary international law.

3.3.1 Treaties and Customary International Law

Treaties do not make customary international law but they may codify existing law and contribute to the process by which new customary law is created.[113] They are one of the most important evidence of rules of international law because they are easily accessible to ascertain the views and manifestations of conduct of contracting

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[109] Brownlie (note 80) at 9.
[110] *Ibid*.
[111] Military and paramilitary activities in and against Nicaragua (note 86) at para 188.
[112] *Ibid*.
[113] Alan Boyle and Christine Chinkin *The making of international law* (2007) 234.

parties.[114] A treaty may provide evidence of customary international law in several ways. It may codify pre-existing rules of customary international law.

A treaty may also recognise the existence of a rule in which case it will serve as evidence of the view of states on the particular rule.[115] In the *North Sea Continental Shelf* case the ICJ was of the opinion that one of the recognised methods through which new rules of customary international law are formed is where a conventional rule passes into the general corpus of international law and is supported by *opinio juris* to make it binding on even on countries which are not parties to the convention.[116]

Also in *Libya/Malta Continental Shelf case*[117] the International Court of Justice considered the effect of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on the evolution of the customary international law relating to seabed boundaries. At the time of the litigation, UNCLOS was not yet in force but parties were of the opinion that some of the provisions of the Convention had become customary international law but they failed to identify these provisions.[118] The Court therefore had to ascertain the provisions of the Convention that had become part of customary international law.

Articles 76 and 83 of UNCLOS reflected the development of customary international law of the continental shelf and the Convention as a whole portrayed how the Exclusive Economic Zone (EEZ) and the continental shelf are inter – related in international law.[119] In evaluating the evidence before it, the Court was of the opinion that UNCLOS was of major importance in determining the applicable customary international law rule because it had been adopted by an overwhelming majority of states.[120]

From the above case law, it is evident that the treaties play a great role in the development of customary international law. Boyle and Chinkin suggests that the law-making intention behind the negotiation certain multilateral treaties can

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[114] Wolfke (note 88) at 141.
[115] Ralph Gaebler 'Conducting research in customary international law' in Ellen Schaffer & Randall Snyder (eds) *Contemporary practice of public international law* (1997) 83.
[116] *North Sea Continental Shelf* case (note 7) para 71.
[117] Case Concerning the Continental Shelf (Libya Arab Jamahiriya /Malta) [1985] ICJ Rep 13.
[118] *Ibid* at para 26.
[119] *Ibid* at para 33, 34 and 77.
[120] *Ibid* at para 27.

constitute evidence of *opinio juris* in favour of new rules of international law particularly if the treaty is negotiated by consensus or by a majority of states.[121] In other words, both the subjective and objective elements required for the formation of customary international law can be deduced from treaties. In this regard, chapter four will examine various treaties that protect the culture of indigenous peoples in order to determine if these treaties have either codified or developed the rule that indigenous peoples have a right to culture under customary international law.

3.3.2 Resolutions of International Organisations, Declarations and Customary International Law

Resolutions or declarations of international organisations like the United Nations play a role in the development of customary international law.[122] The role that these resolutions or declarations play in the development of customary international law will depend on the factors or circumstances of each case. For example, a resolution might be used to determine the *opinio juris* or state practice for the formation a new rule; a resolution may also be declaratory of existing rules of customary international law.[123]

Scholars like Akehurst and Brownlie are of the opinion that resolutions or declarations of the Untied Nations General Assembly pass for state practice.[124] Sloan on the other hand argues that these resolutions can pass as evidence of both state practice and *opinio juris*.[125] However, in line with the decision of the International Court of Justice in the *Nicaragua case*, General Assembly resolutions should be regarded as evidence of *opinio juris.*[126] In the light foregoing, chapter five examines the various declarations by international organisations to determine if they provide for the protection of indigenous culture.

3.3.3 Domestic state practice and Customary International Law

As mentioned earlier, domestic legislation and decisions of national courts can be classified as state practice.[127] The International Law Commission regards domestic

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[121] Boyle and Chinkin (note 113) at 236.
[122] *Ibid* at 225.
[123] *Ibid*.
[124] See section 3.1.1 on state practice.
[125] Blaine Sloan *United Nations General Assembly resolutions in our changing world* (1991) 71-75.
[126] *Nicaragua v United States of America* (note 86) at para 188.
[127] See section 3.1.1 on state practice.

legislation as evidence of customary international law.[128] Also decisions of national courts reflect a state's view of international law and as such it serves as valuable evidence of national practice.[129] In the light of the foregoing, both domestic legislation and decisions of national courts reflect the position of states as regards a rule of customary international law.

3.4 CONCLUSION

It is important to mention at this point that although the Statute of the International Court of Justice requires 'practice generally accepted as law' (state practice and *opinio juris)* for the formation of customary international law, scholars have divergent opinion as to which of these elements takes precedence over the other. This divergence in opinion has not been alleviated by the fact that the International Court of Justice in the *Nicaragua case* stressed *opinio juris* over state practice.

In this regard, some scholars have argued that the importance of state practice has been reduced and that '… practice no longer has any constitutive role to play in the establishment of customary law; rather it serves a purely evidentiary function.'[130] Also Cheng as far back as 1965 had argued that *opinio juris* alone is sufficient for the formation of customary international law.[131] In line with this view, Guzman argues that one way of identifying the beliefs and expectations of states is through practice and as such, practice should best be viewed as evidence of *opinio juris.*[132] He considers state practice as an 'evidentiary touchstone' which reveals *opinio juris* by shedding light on whether a particular norm is regarded as obligatory.[133] He asserts that there is no practice requirement for the establishment of a customary international law rule and that practice may be relevant inasmuch as it affects the perceptions of states regarding the existence of a legal rule.[134]

Without undermining the arguments canvassed by these scholars, it is important to note that the element of state practice still manifests in their approach – albeit in an evidentiary role. Frederic Kirgis suggests that the position of the

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[128] International Law Commission (note 93) at 370.
[129] Gaebler (note 115) at 92.
[130] Simma and Alston (note 78) at 89.
[131] Bin Cheng 'United Nations resolutions on outer space: "instant" international customary law' (1965) 5 *Indian Journal of International Law* 23 at 36.
[132] Guzman (note 79) at149.
[133] *Ibid*.
[134] *Ibid*.

International Court of Justice in the *Nicaragua case* can be reconciled with the traditional approach that requires state practice if one considers the elements of custom (state practice and *opinio juris)* not as fixed or mutually exclusive, but as interchangeable along a sliding scale.[135] He posits that very frequent and consistent practice will establish a customary rule without much evidence of *opinio juris* so long as the rule is not negated by evidence of a non- normative intent.[136] In other words, state practice will create a rule of customary international law once there is no positive evidence to show that states did not regard the rule as non - binding. In addition, where practice is not frequent and consistent then positive evidence of *opinio juris* will be required.

It is important to suggest that enormous difficulty will arise if either element is completely jettisoned. If one decides to abandon *opinio juris* and sticks only to state practice for the formation of customary international law, then acts done by states out of courtesy will inevitably be regarded as part of customary international law. An approach of this nature will defeat the purpose of article 38 (1) (b) of the Statute of the International Court of Justice. The Statute expressly requires practice that states accept to be law. By entailment, it is understood that there are in existence certain practices which states do not accept as law. On the other hand, if we accept that *opinio juris* alone is sufficient to form a rule of customary international law and that state practice at best serve as evidence of *opinio juris*, it invariably means that *opinio juris* will be without substance in the absence of state practice. The question to be asked then is if the rule is without content, to what do states have a sense of legal obligation to?

The essentiality of both requirements is expressed in terms of the following analogy. Assuming that there are no treaties, national legislation, judicial decisions or international declarations protecting the cultural rights of indigenous peoples but states in furtherance of protecting the traditional ecological knowledge of indigenous peoples have often given them exclusive access to the biological resources within the reservations they live in. This may amount to evidence of state practice. However, it might be very wrong to conclude that because states have often given

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[135] Frederic Kirgis 'Custom on a sliding scale' (1987) 81(1) *American Journal of International Law* 146 at 149.
[136] *Ibid*.

indigenous peoples this privilege, there is in existence a customary rule of international law which mandates states to act in this regard. This is because the mere fact that states have not prohibited indigenous peoples from having exclusive access to their biological resources does not as a matter of law imply the existence of a legal obligation. States might argue that they have acted in this way to preserve the cultural diversity within their states and not based on a rule of customary international law that mandates them to do so. In other words, an inference of *opinio juris* might not necessarily be drawn from the overt act of states in protecting indigenous traditional ecological knowledge.

Accordingly, for indigenous peoples to establish that within the corpus of customary international law there is in existence a rule that protects indigenous traditional ecological knowledge: they must show that states have always protected indigenous ecological knowledge and that this protection has been based on a sense of legal obligation. The existence of the rule will be more easily ascertained if for example there are multilateral treaties, General Assembly resolutions, state legislation and other international instruments that mandate states to protect indigenous traditional ecological knowledge.

It is not in dispute that arguments canvassed by scholars who either give preference to state practice or *opinio juris* are substantive and meritorious. However, taking into consideration the fact that customary international law remains one of the sources of international law, it is important to maintain the integrity of the discipline by examining each emerging rule to determine state practice in terms of the rule and *opinio juris* that make such a rule binding on states. It may be that in some instances, depending on the nature of the rule in question, that either state practice or *opinio juris* may take prominence over the other. This however does not negate the fact that these elements of customary international law do not trump each other. In other words, state practice and *opinio juris* must act as complimentary elements for the formation of customary international law.

Finally, having stated that state practice and *opinio juris* can be deduced from treaties and declarations and that treaties and declarations help in the formation of customary international law, chapters four and five discuss treaties and declarations in terms of the right to culture of indigenous peoples.

CHAPTER IV

TREATIES AND THE RIGHT TO CULTURE: THE PERSPECTIVE OF INDIGENOUS PEOPLES

4.1 Introduction

The right to culture in human rights law is primarily about the recognition and protection of humankind's creativity and traditions. The right to culture is enshrined as an individual human right in various human rights instruments. Treaties are binding only on states that have consented to them.[137] Once a state ratifies or accedes to a treaty, it is bound to respect the provisions of the treaty. Non-compliance with the treaty provisions gives rise to a breach of an international obligation.[138] Accordingly, the right to culture of indigenous peoples is discussed in terms of treaty law in order to determine if treaty law has either codified or developed the right to culture of indigenous peoples into the corpus of customary international law.[139]

This chapter examines the protection of indigenous culture under the International Labour Organisation Convention 107 on Indigenous and Tribal Populations and International Labour Organisation Convention 169 on Indigenous and Tribal Peoples. It also examines how the right to culture under various international human rights conventions has been made applicable to indigenous peoples. Particular reference is made to the International Convention on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the European Convention on Human Rights and Fundamental Freedoms, the European Framework Convention on the Protection of National Minorities, the American Convention on Human Rights, the African Charter on Human and Peoples Rights and the Convention on Biological Diversity.

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[137] Martin Dixon *International Law* 4ed (2000) 25.
[138] Article 16 International Law Commission Draft Articles on State Responsibility (1998) 37 I.L.M. 440.
[139] Dixon (note 137) at 25.

4.2 International Labour Conventions 107 and 169

Presently, two International Labour Organisation Conventions in force are specifically devoted to the protection of group rights of indigenous peoples.[140] These conventions are the International Labour Organisation Convention 107 on Indigenous and Tribal Populations[141] and the International Labour Organisation Convention 169 on Indigenous and Tribal Peoples.[142]

Convention 107 acknowledges the need for governments to adopt appropriate measures to the social and cultural characteristics of the populations, in order to make them aware of their rights and duties, especially in regard to labour and social welfare.[143] However, the convention does not specifically mention that there are rights that accrue to indigenous peoples because of their distinct social and cultural composition. Furthermore, the general tone of Convention 107 was that of assimilation of indigenous peoples into the national society. The concept of assimilation negates the need for the protection of indigenous culture. This assimilation approach led to a condemnation and eventual revision of the Convention.[144] This is because an indigenous community might stand the chance of loosing its distinct cultural identity once it is assimilated into the national society.

Convention 169 on the other hand, recognised the distinct nature of indigenous peoples and sought to protect them from been assimilated into the national society. Hence, by the provisions of the Convention, indigenous peoples are to live as a distinct group within the structure of the national society. The provisions of Convention 169 therefore protect all forms of culture and identity and place a duty on state parties to recognise and protect indigenous cultures, customs and customary law.[145] Article 2 (2) (b) of the Convention mandates governments to take measures for promoting the full realisation of the social, economic and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs

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[140] Paul Magnarella, 'Protecting indigenous peoples' (2005) 5 *Human Rights and Human Welfare* 126 at 128.
[141] ILO convention 107 (note 19).
[142] ILO convention 169 (note 20).
[143] Article 26 ILO Convention 107.
[144] Luis Rodriguez –Pinero *Indigenous peoples, post colonialism, and international law: the ILO regime 1919-1989* (2005)186.
[145] Thornberry (note 40) at 358.

and traditions and their institutions. Article 4(1) also provides for the adoption of special measures for safeguarding the persons, institutions, property, labour, cultures and environment. In addition, Article 5 (a) places a duty on governments to recognise and protect the social, cultural, religious and spiritual values and practices of indigenous peoples.

The above-mentioned articles recognise the cultural rights of indigenous peoples and commit governments to pursue policies that will protect these rights. Accordingly, Convention 169 remains one of the most important, of the authoritative and legally binding sources on indigenous peoples in terms of states that have ratified it.[146]

4.3 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[147] (ICCPR) came into force in 1976 when the United Nations General Assembly adopted it. 164 state parties, including countries with indigenous populations, have ratified the Covenant. The ICCPR also has an Optional Protocol.[148] The purpose of the Optional Protocol as set out in the preamble of the protocol is to enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

The Human Rights Committee is an eighteen-member body of independent experts charged with the responsibility of assisting states in the implementation the Covenant.[149] The Human Rights Committee does the implementation by considering and studying mandatory reports from states.[150] It also receives inter-state complaints from states.[151] Finally, the Optional Protocol empowers it to receive individual complaints of human rights violation under the ICCPR. Taking into account that the Human Rights Committee is the special body charged with the implementation of

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[146] Chidi Oguamanam *International law and indigenous knowledge* (2006) 78.
[147] International Covenant on Civil and Political Rights (note 15). The convention was concluded on the 16th of December 1966 and entered into force on the 23rd of March 1976.
[148] Optional Protocol to the International Covenant on Civil and Political Rights (1967) 6 ILM 368.
[149] The Human Rights Committee is established by article 28 of ICCPR.
[150] Article 40 ICCPR.
[151] Article 41 ICCPR.

the ICCPR, its interpretation of the Covenant serve as an authoritative source for determining the applicability of the Covenant. [152]

Article 27 of the ICCPR protects the rights of minorities. It provides that, '[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' Although article 27 is expressed in the negative, it certainly recognises the rights of minorities to their culture. In General Comment 23, the Human Rights Committee stated that '…a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are required against acts of State party, through legislative, judicial or administrative authorities and also against the acts of other persons within the State party.'[153]

In this way, the Human Rights Committee has made article 27 applicable to the protection the cultural rights of indigenous peoples.[154] In General Comment 23, the Human Rights Committee also notes the complexity of the term culture and gives an insight into the substance of the right to culture. The Committee observed that:

> [w]ith regard to the exercise of the cultural rights protected under article 27, culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[155]

In *Sandra Lovelace v Canada*, the issue for determination was whether the Indian Act that prevented the Applicant from residing in the Tobique reservation was in breach of article 27.[156] The Human Rights Committee found that the Indian Act

[152] On the role of the Human Rights Committee, see Dominic McGoldrick, *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (1991).
[153] General Comment No. 23: The Rights of Minorities (Art. 27): CCPR/C/21/Rev.1/Add.5, para 6.1.
[154] *Ibid* at para 3.2 and 7.
[155] *Ibid* at para. 7.
[156] *Sandra Lovelace v Canada* (1977) Application No. 24/77, UN Doc. CCPR/C/OP/1 para 1.

unjustifiably restricted Lovelace's access to her indigenous culture and language, so a breach of article 27 was successfully made out.[157]

The right to culture under the ICCPR encompasses the totality of the way of life of indigenous peoples that sets them apart from other members of the national society. Benedict Kingsbury notes that 'the right of members of a group to enjoy their culture may be violated where they are not allocated the land and control of resource development necessary to pursue economic activities of central importance to their culture, such as hunting or trapping. The right to enjoyment of culture also seems to extend to maintenance of the group's cohesiveness through, for instance, possession of land base and pursuit of important cultural activities of an economic nature.'[158]

In applying article 27, the Human Rights Committee in *Kitok v Sweden,*[159] established the link between culture and traditional or otherwise typical means of livelihood of indigenous peoples.[160] In *Kitok's case,* the question for determination before the Human Rights Committee was whether the author of the communication was a victim of a violation of article 27 of the Covenant because he was denied his right to carry out reindeer husbandry by Swedish legislation.[161] Ivan Kitok was a Swedish citizen of Sami ethnic origin[162] who claimed to belong to a Sami family that had been active in reindeer breeding for over 100 years. Kitok claimed that he had inherited the 'civil right' to reindeer breeding from his ancestors as well as the rights to land and water in Sorkaitum Sami Village but he had been denied the exercise of these rights because he was said to have lost his membership in the Sami village under a 1971 Swedish statute.

The Swedish Government argued that the legislation was necessary to sustain the economic viability of reindeer husbandry among the Sami people and as

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[157] Sarah Joseph *et al* The *International Covenant on Civil and Political Rights: cases, materials, and commentary (*2000) 578.
[158] Benedict Kingsbury 'Claims by non-state groups in international law' (1992) 25 *Cornell International Law Journal* 481 at 490.
[159] *Kitok v Sweden Official records of the Human Rights Committee,* Communication no. 197/1985, 1987/88.
[160] Martin Scheinin 'The right to enjoy a distinct culture: indigenous and competing uses of land' in Theodore S. Orlin *et al* (eds.) *The jurisprudence of human rights law: a comparative interpretative approach* (2000) 165.
[161] *Kitok v Sweden* (note 159) at para. 9.1.
[162] The Sami's are indigenous peoples who spread across the nordic countries in Europe. They are traditionally known for breeding reindeer.

such did not violate the right to culture of the either the author or the Sami people.[163] The Committee noted that though the regulation of an economic activity is a matter for the state, where such activity is an essential element in the culture of an ethnic community, its application to an individual might fall within the ambits of article 27.[164] The reasonable conclusion that can be drawn from this decision of the Committee is that article 27 covers the right to culture even when expressed in terms of cultural economic activities.

In *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*[165], the Human Rights Committee also found violation of article 27 in relation to the subjection of traditional indigenous lands to 'modern' usage.[166] In reaching its decision, the Human Rights Committee held that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. It held that a continued threat to the way of life and culture of the Lubicon Lake Band constitutes a violation of article 27.[167]

A careful examination of the cases discussed above suggests that article 27 protects the traditional lifestyle of indigenous peoples both as an individual right and a collective right. While in *Sandra lovelace,* it was the individual right of the Applicant to have access to her reservation that was violated, in the *Lubicon lake Band* it was the threat to the entire band that constituted a violation of article 27. It is important to mention that although the Human Rights Committee has held that under the Optional Protocol, only individuals can bring complaintsl,[168] the Committee's application of article 27 certainly protects the collective right of indigenous peoples.

One might question the rationale or importance of recognising the individual and collective rights of indigenous peoples on the ground that if the individuals are protected then the rights of the group are automatically safeguarded. This analogy

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[163] *Kitok v Sweden* (note 159) at para 4.3.
[164] *Ibid* at para 9.2.
[165] *Lubicon Lake Band v. Canada,* Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990). The author of the communication (Bernard Ominayak) was the leader and representative of an indigenous community in Canada.
[166] Scheinin (note 160) at 164.
[167] *Lubicon Lake Band* case (note 165) at para 32.2 and 33.
[168] A. D v Canada Communication No. 78/1980, *Selected Decisions of the Human Rights Committee under the Optional Protocol,* CCPR/C/OP/2, 23-25.

might not be valid in all instances. This is because there are some indigenous rights that have both individual and collective value. Xanthaki explains this point by citing land rights as an example. She argued that the United States General Allotment Act 1887 allowed land in Indian reservations to be divided into parcels owned by individual tribal members (guaranteeing individual rights) but by the time the Act was repealed in 1934 by the Indian Reorganisation Act; the tribal members had sold two-third of the reservation.[169] This example illustrates that protection of the individual right of indigenous peoples does not necessarily protect the collective right of the people.

From the foregoing examination of decisions and general comments of the Human Rights Committee, it is not in dispute that article 27 can be used and has been used for the protection of indigenous culture. Within the ambits of the ICCPR the right to culture of indigenous peoples also extends to the protection of land belonging to indigenous peoples and which has been used for the maintenance and preservation of the traditional lifestyle of indigenous peoples. This interpretation invariably brings indigenous peoples within the purview of article 27 to the extent that the 164 state parties to the Covenant are bound to respect, promote and protect the culture of indigenous peoples.

Furthermore, the Human Rights Committee's interpretation of article 27 in terms of its General Comments and case law has effectively created a robust jurisprudence for the protection of indigenous rights. In this regard, other international bodies have applied the interpretations given by the Human Rights Committee for the protection of indigenous peoples. For example, as will be discussed in section 4.8, the Inter-American Commission while assessing the situation of indigenous peoples in Ecuador[170] relied on the provisions of article 27 in reaching its decision. In other words, the General Comments and case law on article 27 have greatly influenced the development of the right to culture of indigenous peoples.

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[169] Xanthaki (note 55) at 31.
[170] Organisation of American States, Inter-American Commission on Human Rights, *Report on the situation of human rights in Ecuador* (1997) OEA/Ser.L/V/II 96 at 103.

4.4 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights[171] (ICESCR) contains a specific article neither on indigenous peoples nor on minorities. However, the Committee on Economic, Social and Cultural Rights (CESCR) has applied the Covenant to Indigenous peoples.[172] The CESCR is not a creation of the ICESCR; rather the United Nations Economic and Social Council (ECOSOC) set it up.[173] It is a body of human rights experts who assist the ECOSOC in administering the ICESCR. In other words, the CESCR helps with the implementation of the ICESCR. The implementation of the Covenant is based on a state reporting system. The CESCR also issues General Comments as to the provisions of the ICESCR. These General Comments are considered an authoritative interpretation of the ICESCR.[174]

By virtue of article 15 (1), state parties recognise the right of everyone 'to take part in cultural life; to enjoy the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The CESCR while giving reporting guidelines for article 15, requires states to report on the availability of funds for the promotion of cultural development and the participation in popular cultural life, promotion of cultural identity and promotion of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous peoples.[175]

In General Comments 17,[176] the CESCR considered that 'any scientific, literary or artistic production,' within the meaning of article 15, paragraph 1 (c), refers to creations of the human mind, that is to 'scientific productions,' such as scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities, and 'literary and artistic

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[171] International Covenant on Economic, Social and Cultural Rights (note 16). The convention was concluded on the 16th of December 1966 and came into force on the 3rd of January 1976. It has been ratified by 160 states.
[172] Thornberry (note 40) at 182.
[173] United Nations Economic and Social Council resolution 1985/17, 28 May 1985.
[174] Committee on Economic, Social and Cultural Rights *Report on the twentieth and twenty – first sessions* E/2000/22, E/C.12/1999/11 para 53.
[175] *Manual on Human Rights Reporting* 153 para. 1 (a) (c) (d) respectively. Available on http://www.ohchr.org/Documents/Publications/manualhrren.pdf [Accessed on 23 August 2009].
[176] General Comment 17 (2005) E/C.12/GC/17. Committee on Economic, Social and Cultural Rights, Thirty fifth Session Geneva, 7-25 November 2005.

productions,' such as, inter alia, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions.[177]

In paragraph 32 of General Comments 17, the CESCR requires states parties to adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. The CESCR states further that the measures adopted should recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes. Judging from the practice of the CESCR in its implementation of the ICESCR, it is obvious that the CESCR recognises the right to culture of indigenous peoples in terms of article 15. It also takes a step further to ensure that indigenous peoples benefit both collectively and individually from any economic gains that may arise from the utilisation of their culture.

4.5 International Convention on the Elimination of All Forms of Racial Discrimination

Irrespective of the fact that the International Convention on the Elimination of All Forms of Racial Discrimination[178] (ICEARD) does not expressly protect indigenous peoples, the Committee on the Elimination of all forms of Racial Discrimination[179] (CERD) has made the Convention applicable to indigenous peoples.[180] Judging from the recommendations of the CERD, the CERD acknowledges that the culture of indigenous peoples is fundamental to their existence.

In terms of protection of the culture of indigenous peoples, the CERD calls upon state parties to 'recognise and respect indigenous distinct culture, history,

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[177] General Comments 17 (note 176) para 9.
[178] International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195. The Convention was adopted on the 7th of March 1966 and came into force on the 4th of January 1969. It has been ratified by173 states.
[179] The Committee on the Elimination of Racial Discrimination (CERD) is created pursuant to article 8; it is a body of independent experts that monitors implementation of the Convention by State parties. Article 9 obliges States parties to submit regular reports to the Committee on how the rights provided for in the Convention are being implemented.
[180] CERD General Recommendation XXIII: Indigenous Peoples, Fifty –first session 1997 U.N. Doc. A/52/18, annex V at 122, para 1.

language and way of life as an enrichment of the State's cultural identity and to promote its preservation.'[181] State parties are also expected to 'ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.'[182]

4.6 Convention on the Rights of the Child

Article 30 of the Convention on the Rights of the Child[183] is almost *in pari materia* with article 27 of the ICCPR. The only exception is that the word 'indigenous' is expressly mentioned in article 30. Its states that '[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.'

Article 30 is designed to ensure the protection of children belonging to a group and sharing the same culture, religion or language.[184] In complying with this article, states are obliged to submit reports to the Committee on the Rights of the Child[185] showing measures taken to recognize and give effect to the realization of the provisions of this article.[186] The recognition of the right of children who belong to a minority or indigenous group further reflects the right to be different from the majority prevailing in a country. It also buttresses the need to respect and preserve their cultural identity.[187]

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[181] *Ibid* at para 4 (a).
[182] *Ibid* at para 4(e).
[183] Convention on the Rights of the Child 1989 (1989) 28 ILM 1456. The Convention was adopted on 20 November 1989 and came into force on 2 September 1990. It has been ratified by 193 states.
[184] Marta Santos Pais, 'The Convention on the Rights of the Child' in *Manual on Human Rights Reporting* (1997) 393 at 491.
[185] The Committee on the Rights of the Child (CRC) is created pursuant to article 43. It is a body of independent experts who monitor implementation of the Convention by its State parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography.
[186] General guidelines for periodic reports: CRC/C/58, 20/11/96, para. 166.
[187] Marta Santos Pais (note 184) at 491.

4.7 European Convention on Human Rights

The European Convention for the protection of Human Rights and Fundamental Freedoms[188] does not contain a clause relating to the protection of indigenous culture. However, some cases decided in terms of article 8 of the Convention have dealt with the characteristic way of life of indigenous peoples in Europe.[189] Article 8 of the Convention provides as follows: (1) 'Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

In *G and E v Norway,*[190] the complaint related to the Norwegian Government's decision to construct a water dam and hydroelectric power station in the Alta Valley. The applicants who were members of a Sami community had traditionally used the Alta valley for reindeer herding, hunting and fishing. They claimed that the dam would affect their way of life. Martin Scheinin notes that although the case was never decided by the European Court of Human Rights (because the European Commission declared it inadmissible based on it being manifestly ill-founded), certain parts of the reasoning of the Commission demonstrates the applicability of article 8 to indigenous peoples.[191]

The Commission considered that the applicants' complaints must partly be examined under article 8 of the Convention, which guarantees the right to private life, family life and home. The Commission was of the opinion that under article 8, a minority group is in entitled to claim the right to respect for the particular life-style it may lead as being within the definition of 'private life,' 'family life' or 'home.'[192]

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[188] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998.
[189] Thornberry (note 40) at 297.
[190] *G and E v Norway* 6 European Human Rights Report 357.
[191] Scheinin (note 26) at 174.
[192] *G. and E v Norway* (note 190) at para 2.

Although it is true that under the Convention, there are no direct provisions for the recognition and protection of indigenous culture, the general attitude of the Commission to protect the traditional lifestyle of indigenous peoples supports the fact that the right is recognised within the framework of the European Convention on Human Rights.

4.8 The European Framework Convention for the Protection of National Minorities

The European Convention for the Protection of National Minorities[193] does not make specific reference to indigenous peoples; it specifically protects the rights of national minorities. However, it is not in dispute that indigenous peoples though distinct from minorities, can also assert minority rights.[194] As stated earlier while discussing the provisions of the ICCPR, the Human Rights Committee has made it clear in General Comment 23 that indigenous peoples can exercise minority rights.

The sixth preamble of the Convention recognizes the need to respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, and to create appropriate conditions enabling them to express, preserve and develop their identity. In terms of article 5(1) of the Convention, state parties undertake to promote the necessary conditions for persons belonging to minorities 'to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.'

The European Court of Human Rights, while assessing the complaint of the Applicant in *Chapman v United Kingdom,*[195] applied the principle set out in article 5 of the Convention when it observed that there is an emerging international consensus among states in Europe to recognize the special needs of minorities. The Court further held that there is an obligation to protect their security, identity and lifestyle

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[193] Framework Convention for the Protection of National Minorities (1995) 34 ILM 351. The Convention was adopted on the 10th of November 1994 and entered into force on the 1st of February 1998.
[194] *Sandra Lovelace v Canada,* (note 156) at para. 83.
[195] *Chapman v United Kingdom* (1995) Application No. 27238/95 European Court of Human Rights.

for the purpose of safeguarding the interest of the minorities themselves and to preserve a cultural diversity of value to the whole community.'[196]

4.9 The American Convention on Human Rights

The American Convention on Human Rights[197] like most human rights conventions does not include provisions for the protection of indigenous rights. However the Inter-American Commission in its *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, stated that 'for an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the rights set forth by the American Convention on Human Rights, since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity.' [198]

In addition, the Commission in its *Report on the situation of Human rights in Ecuador*[199] based its argument for the protection of indigenous culture on the right to freedom of expression. The Commission noted that '[t]he right to freedom of expression, for example, cannot be fully realized by an individual in isolation; rather, he or she must be able to share ideas with others to fully enjoy this right… For indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture.'[200] In this report, the Commission made reference to article 27 of the ICCPR and its interpretation by the Human Right Committee in General Comment 23. The Commission reaffirmed the fact that states have an obligation to protect the culture of indigenous peoples. From these reports, it is evident that the Inter-American Commission based on the jurisprudence of the Human Rights Committee has used the instrumentality of the American Convention on Human Rights to protect the right to culture of indigenous peoples.

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[196] *Ibid* at para 93.
[197] American Convention on Human Rights, (1970) 9 ILM 99.The Convention was concluded on the 22 November 1969 and entered into on the 18th of July 1978.
[198] *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* OEA/Ser.L/V/II.62.
[199] *Report on the Situation of Human Rights in Ecuador* (note170).
[200] *Ibid* at chapter IX.

4.10 The African Charter on Human and Peoples Rights

Within the framework of the African Charter on Human and Peoples Rights,[201] there is no express provision for the recognition and protection of the right to culture of indigenous peoples. However, the African Charter recognises both individual rights and people's right. The rights mentioned in articles 19-24 specifically refer to the rights of 'all peoples.' This clearly indicates that the African Charter recognises the distinction between traditional individual rights and those that can be enjoyed in a collective manner.[202]

The question that arises is whether the collective rights in the African Charter are applicable to indigenous peoples. This question is relevant because most African governments have argued that there are no indigenous peoples in Africa.[203] In terms of the applicability of 'peoples rights' to indigenous populations, the African Commission on Human and Peoples Rights[204] is of the opinion that collective rights (peoples rights) within the context of the African Charter are applicable to indigenous populations.[205] Bojosi and Wachira[206] note that one communication that manifests the African Commission's willingness to consider cases of violations of peoples' right is the case of the *Katangese Peoples' Congress v Zaire.*[207] Although the communication was dismissed for want of evidence to show that the Katangese people were oppressed and therefore entitled to the right to self-determination under article 20(1), the African Commission held that the Katangese people were entitled to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

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[201] African (Banjul) Charter on Human and Peoples Rights 1981, (1982) 21 I.L.M 58.The African Charter was adopted in Kenya in 1981 and came into force in 1986. It has been ratified by 53 African States.

[202] *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (note 25) at 73.

[203] *Indigenous world* (2000-2001) 453.

[204] The African Commission on Human and Peoples Rights was established in terms of article 30 of the African Charter. In terms of article 45(3), the African Commission has the mandate to interpret all provisions of the African Charter.

[205] Advisory Opinion of the African Commission on Human and Peoples Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 7, para 24. The opinion was adopted by the African Commission on Human and Peoples Rights at its 41st Ordinary session in 2007.

[206] Kealeboga Bojosi and George Wachira 'Protecting indigenous peoples in Africa: an analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382 at 401.

[207] *Katangese Peoples' Congress v Zaire* (2000) African Human Rights Law Report 72.

Although the Katangese peoples might not necessarily qualify as indigenous peoples, the decision of the African Commission in terms of the collective rights of peoples is instructive for indigenous peoples. The African Commission's Working Group of Experts on Indigenous Populations notes that 'by recognising the right of a section of a population to claim protection when their rights are being violated, either by the state or by others, the African Commission has paved the way for indigenous peoples to claim similar protection.'[208]

Accordingly since the African Charter gives all peoples the right to social and cultural development in the equal enjoyment of the common heritage of mankind,[209] it may be argued that from the interpretation given to 'peoples' by the African Commission that the Charter protects the right to cultural development of indigenous peoples. This is because indigenous peoples will fall into the category of persons protected under 'people's rights.' It is pertinent to mention that although there are examples of gross violation of cultural rights of indigenous populations across the African continent,[210] no communication has been brought before the African Commission for the interpretation on a collective right to culture.

4.11 The Convention on Biological Diversity

The Convention on Biological Diversity[211] provides for the protection of indigenous traditional knowledge, which is a form of culture of indigenous peoples. Article 8 (j) of the Convention provides that:

> [e]ach Contracting Party shall…subject to its national legislation…respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote wider application with the approval and involvement of holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

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[208] *Report of the African Commission Working Group of Experts on Indigenous Populations* (note 25) at 79.
[209] Article 22(1) African Charter.
[210] In East Africa, the massive land dispossession has had negative consequences for the culture of many pastoralists, such as the Maasai. In Southern Africa, the San, have been chased out of the Central Kalahari Game Reserves in Botswana thereby depriving them of the use of their indigenous knowledge systems concerning wildlife. In North Africa, the policy of Arabisation which has been vigorously pursued by the Governments of Algeria and Morocco has had a negative impact on the cultural and linguistic Imazighen identity of the Berber speaking population. *Report of the African Commission Working Group of Experts on Indigenous Populations* (note 25) at 40-44.
[211] Convention on Biological Diversity (1992) 31 ILM 818. The Convention has 191 state parties.

The Convention not only enjoins states to respect and protect the indigenous traditional knowledge of indigenous peoples, it goes a step further by encouraging the equitable sharing of benefits derived from such knowledge. Although the Convention makes the provision of article 8 (j) subject to national legislation, its inclusion in the Convention shows the importance ascribed to the protection of indigenous culture in the areas of traditional knowledge.

4.12 Conclusion

The pertinent question to be asked is whether the above treaties have either codified or developed the right to culture of indigenous peoples into the corpus of customary international law. A treaty does not create customary international law, but it may codify existing law and contribute to the process by which new customary law is created and developed.[212]

In determining if the above treaties codified the right to culture as a rule of customary international law, it may be over ambitious to answer in the affirmative for the following reason. The ICCPR which has been widely ratified and applied to indigenous peoples does not expressly provide for indigenous culture. It is important to bear in mind that article 27 was intended to be applied for the protection of minority groups as a whole. Its application to the protection of indigenous peoples has been made applicable by the Human Rights Committee's interpretation of article 27.

It may not be correct to say that a treaty has codified a rule not expressly provided for. Drawing from a passage in the *Nicaragua (merits) case*, the ICJ stated that '... [w]here two States *agree to incorporate a particular rule in a treaty*, their agreement suffices to make that rule a legal one, binding upon them….' [213] A literal reading of this passage shows that states must agree to incorporate the particular rule in question. In terms of article 27, although states have subsequently accepted its application to indigenous culture, there is no positive evidence to show that they intended article 27 specifically apply to the culture of indigenous peoples. In light of

[212] Boyle and Chinkin (note 113) at 234.
[213] *Nicaragua v United States* (note 86) at para 184. Emphasis added.

the foregoing, it may be more convincing to argue that the subsequent application of article 27 to the protection of indigenous culture has helped to develop the rule.

Since the question on the codification of the right to culture of indigenous peoples is answered in the negative, the next issue to address is, if the above treaties have helped to develop the right to culture of indigenous peoples. Within the framework of the International Covenant on Civil and Political Rights, the right to culture of indigenous peoples has been established within the gamut of article 27. The Human Rights Committee has in several instances applied article 27 to the protection of indigenous culture either in matters that pertain to the violation of land use[214] or loss of cultural benefits and identity.[215] As noted earlier on in section 4.2, the General Comments and case law of the Human Rights Committee in terms of article 27 has effectively created a robust jurisprudence for the protection of indigenous rights which other international bodies have drawn from. The fact that the ICCPR also enjoys enormous ratification indicates that a majority of states are bound to protect and preserve the right to culture of indigenous peoples.

It is important to mention that the jurisprudence created by the Human Rights Committee in terms of article 27 is not whittled down by the fact that not all State parties to the ICCPR are signatory to the first Optional Protocol. This is because the International Covenant on Civil and Political Rights creates the Human Rights Committee, and the first Optional Protocol only gives individuals the right to bring complaints before the Human Rights Committee. The fact that indigenous peoples may not be able to bring a claim under article 27 because their countries are not parties to the first Optional Protocol does not necessarily absolve those countries if they breach their article 27 obligation.

Various provisions of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of all forms of Racial Discrimination, the ILO Convention 169, European Convention on Human Rights, the Framework Convention for the Protection of National Minorities, the American Convention on Human Rights, the African Charter on Human Rights and the Convention on Biological Diversity, have been used to protect the right to culture of indigenous

[214] *Lubicon Lake Band v. Canada* (note 165).
[215] *Sandra Lovelace v Canada* (note 156).

peoples. This lays down a foundation for an argument that irrespective of the fact that the right to culture of indigenous peoples is not expressly provided for within these Conventions,[216] states are willing to recognise and protect the right of indigenous peoples to culture. Since states are obliged to adhere to the decisions and recommendations of the implementation committees of these conventions, an inference can be drawn that states acknowledge that they are under a legal obligation to protect the cultural rights of indigenous peoples.[217]

Furthermore, if state practice continues to develop in line with the general notion created by these treaties in terms of indigenous culture; impetus may be added to the formation of customary law in this regard.[218] Having said this, it may not amount to over-ambition if one concludes that these treaties have greatly contributed to the development of the right to culture of indigenous peoples in customary international law. Nevertheless, states that have ratified or acceded to the above conventions are under an obligation to protect the right to culture of indigenous peoples within the ambits of these conventions.

However, to determine if the right to culture of indigenous peoples has sufficiently developed to become a binding norm in international law, the general attitude of states should be taken into consideration in terms of treaties, declarations and national legislation. In light of the foregoing, the next chapter discusses the right to culture of indigenous peoples under some declarations of international organisations.

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[216] One may suggest that the reason why these conventions do not have express provisions for the protection of indigenous peoples lies in the fact that the concept of indigenous peoples had not achieved significant prominence in the international plane when these conventions were concluded.
[217] These Committees are organs created by the various treaties which are mandated to give effect to, and implement the provisions of the treaties.
[218] Dixon (note 137) at 26.

CHAPTER V

DECLARATIONS BY INTERNATIONAL ORGANISATIONS AND THE RIGHT TO CULTURE OF INDIGENOUS PEOPLES

5.1 Introduction

Soft law is a convenient description for various non-legally binding instruments used in contemporary international law.[219] These include United Nations General Assembly resolutions, declarations of international organisations or non-treaty agreements between states and other entities that lack the capacity to conclude treaties.[220] As explained in chapter three, these resolutions and declarations may serve as evidence of existing customary international law, or *opinio juris* required to create new rules of customary international law.[221]

In light of the foregoing, this chapter examines the right to culture of indigenous peoples under some declarations such as: the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, the Declaration of the Principles of International Cultural Co-operation and the Universal Declaration on Cultural Diversity.

[219] Boyle and Chinkin (note 113) at 212.
[220] *Ibid*. As a rule, General Assembly resolutions are recommendatory in nature. *Reparation for injuries suffered in the service of the United Nations* [1949] ICJ Rep 174, at 178. The International Court of Justice has however has recognized the binding legal effect of General Assembly resolutions pertaining to the admission of new Member States and apportionment of the United Nations budget. *Competence of the General Assembly for the admission of a state to the United Nations* [1950] ICJ Rep 4, at 8 and *Certain expenses of the United Nations* [1962] ICJ Rep 151 at 163 respectively. Megan Davis 'The significance of the UN Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439 at 465.
[221] Boyle and Chinkin (note 113) at 212.

5.2 The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Economic and Social Council mandated the Working Group on Indigenous Populations (WGIP) to review developments concerning the human rights of indigenous populations, giving special attention to the evolution of standards concerning the rights of such populations.[222] In carrying out this task, the WGIP at its 4th session in 1985 decided to produce a declaration on indigenous rights which was to be adopted by the United Nations General Assembly. In its proposed declaration, the WGIP set out seven principles that serve as the core foundation for the development and preservation of the cultural identity and traditions of indigenous peoples.[223] These seven principles are at the core of articles 8, 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples that will be discussed subsequently.

The WGIP agreed on a final draft Declaration of Rights of Indigenous Peoples in 1993. The United Nations General Assembly adopted the Declaration via a resolution on the 13th of September 2007. At the General Assembly, 143 states voted for the adoption of the Declaration, 4 voted against it (United States, Canada, Australia and New Zealand) and 11 abstained from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine).

The states that voted against the adoption of the Declaration were of the opinion that they could not support it because of their concerns over the provisions on self-determination, land rights and the language giving indigenous peoples a right of veto over national legislation.[224] Among the states that abstained from voting, only four gave reasons for their abstention. Russia stated that it abstained from voting because it did not agree with the Declaration on the issues of control of

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[222] Thornberry (note 40) at 371.
[223] Other principles include the right to full and effective enjoyment of universally recognised human rights, the right to equality and freedom from discrimination, the collective right to exist and to be protected against genocide as well as the individual right to life, the right to access sacred sites, the right to all forms of education and the right to promote intercultural information and education, recognising the dignity and diversity of their cultures. It is important to note that at subsequent sessions, other principles were added to these seven principles. I will not delve into the other principles because they are not of primary concern to this thesis.
[224] http://www.un.org/News/Press/docs/2007/ga10612.doc.htm [Accessed on 20 September 2009].

natural resources and compensation for indigenous peoples. Bangladesh explained that it abstained because the Declaration did not define indigenous peoples.

On the part of Nigeria, it abstained from voting because it did not agree with the provisions of the Declaration on self-determination and control of land and natural resources. Finally, Colombia stated that it could not vote in favour of the Declaration because it did not agree with the provisions of article 19, 30 and 32.[225] Article 19 requires the government to obtain the consent of indigenous peoples before enacting legislation that affect them. Article 30 prevents the government from carrying out military activities on the land of indigenous peoples without their consent while article 32 gives indigenous peoples the right to determine their priorities for the development of their land and other resources. It is important to point out that no state objected against the adoption of the Declaration because it did not agree with any of the provisions relating to the protection of indigenous culture.

Articles 8, 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples are central to the protection of indigenous culture. Article 8 provides that:

> (1). Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
> (2). States shall provide effective mechanisms for prevention of, and redress for:
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
> (d) Any form of forced assimilation or integration;
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination.

This article gives indigenous peoples the right of non-assimilation and destruction of their culture. It also places a corresponding duty on states to prevent and provide redress for any action that is geared towards assimilating or destroying the culture of indigenous peoples.

Article 11 provides that:

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[225] *Ibid*.

> (1). Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
> (2). States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

In terms of article 11, a positive right to practise indigenous cultural traditions and customs is also created. It goes further to mention the elements or contents of such right. A duty is placed on states to give effect to redress mechanisms when these rights are violated. Article 11 (2) is of particular interest because it also protects the intellectual, religious and spiritual aspects of indigenous traditions and customs. Finally, article 12 provides that:

> (1) Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
> (2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

From the wordings of article 12 (1), it is obvious that indigenous culture is not a stagnant concept, the rights created here include the right to develop and teach indigenous traditions and customs.

Without undermining the other articles that refer to indigenous culture,[226] these three articles are central to the protection of indigenous culture because they encapsulate almost every aspect of culture. They create a robust framework for the propagation of indigenous cultural rights. A careful look at these provisions reveal that not only does the Declaration cover almost every aspect of indigenous culture provided in the treaties discussed in chapter four, it also expresses the rights in a positive tone. An example is article 27 of the ICCPR. While article 27 is expressed in the negative ('…minorities shall not be denied their right…to enjoy their culture…') article 11 of the Declaration is couched in the positive ('Indigenous peoples have the right to practise and revitalize their cultural traditions and

[226] Article 15, for example, recognizes the dignity and diversity of indigenous culture.

customs'). In addition, the Declaration couches the obligation of states in a mandatory tone. The word 'shall' is used in articles 8 (2), 11(2) and 12 (2) creates a mandatory obligation on the part of states to give effect to the rights mentioned in sub-articles 1.

In determining the legal effect of the Declaration on the right to culture of indigenous peoples, one may argue that the Declaration fulfils the *opinio juris* element required for the formation of customary international law rule on the right to culture of indigenous peoples. This position is in line with the decision of the International Court of Justice in the *Nicaragua case* where it determined *opinio juris* from a General Assembly resolution.

Critics might argue that the Declaration does not amount *opinio juris* or reflective of the position of customary international law on the rights of indigenous peoples because it was not unanimously voted for at the United Nations General Assembly. It is important to again mention that the four countries that voted against the Declaration did so on the ground that they did not agree with the provisions self-determination, land rights and the right of indigenous peoples to veto national legislation. No objection was made by any of the countries as to the substantive cultural rights enunciated in the Declaration.

Anaya and Wiessner, suggest that while the entire Declaration is not binding, individual component prescriptions of the Declaration might have becoming binding if they are independently assessed and categorised as reflective or generative of customary international law.[227] To this extent non-unanimity in the voting at the General Assembly may not be sufficient to dismiss an assertion that the Declaration might have helped indigenous culture secure a place in customary international law.

5.3 United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities

The United Nations General Assembly in 1992 adopted the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic

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[227] James Anaya & Siegfried Wiessner '*The UN Declaration on the Rights of Indigenous Peoples: Towards re-empowerment*.' Available on www.twnside.org.sg/title2/resurgence/206/cover3.doc [Accessed on 30 June 2009].

Minorities.[228] In adopting the declaration, the United Nations General Assembly declares that the Declaration is inspired by the provisions of article 27 of the ICCPR.[229] Article 1(1) of the Declaration requires states to protect the existence of cultural, religious and linguistic identity of minorities within their respective territories.

Article 2 also gives minorities the right to enjoy their own culture and language without interference or discrimination from the public. The text of this Declaration reaffirms the general international law position on the protection of culture of minorities as enshrined in article 27 of the ICCPR. As mentioned in the previous chapter, the cultural rights of minorities under article 27 of the ICCPR are applicable to indigenous peoples.

5.4 Declaration of the Principles of International Cultural Co-operation

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 1966 adopted the Declaration of the Principles of International Cultural Cooperation.[230] Article 1 of the Declaration provides that people have a right and duty to develop their culture. In addition, the value and dignity of each culture is to be respected.

This Declaration recognises the value of each culture and the need to respect and preserve the diverse culture of individuals. It also establishes the right and duty of individuals to preserve their culture. This Declaration is applicable to indigenous peoples because the right and duty to develop and preserve culture is placed on every individual.

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[228] UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities 1992, (1993) 32 I.L.M. 911.
[229] 4th preamble of the Declaration.
[230] Declaration of the Principles of International Cultural Co-operation, Nov. 4 1966, UNESCO Doc.14C/Resolutions.

5.5 Universal Declaration on Cultural Diversity

The General Conference of UNESCO adopted the Universal Declaration on Cultural Diversity[231] in 2001. The preamble affirms the General Conference's commitment to the implementation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Article 1 of the Declaration provides that culture takes diverse forms and this diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. In view of this fact, article 1 stresses the need to recognise the common heritage of humanity. Article 4 provides for the defence of cultural diversity as an ethical imperative that is inseparable from the respect for human dignity. Furthermore, the article provides that the defence of cultural diversity implies a commitment to human rights and fundamental freedoms, particularly in terms of the rights of persons belonging to minorities and those of indigenous peoples. Article 4 draws a link between the protection of cultural diversity and human dignity of indigenous peoples.

5.6 World Intellectual Property Organisation

The World Intellectual Property Organisation (WIPO) is a specialized agency of the United Nations that is responsible for developing a balanced and accessible international intellectual property system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding public interest. In line with these functions, WIPO has initiated programmes aimed at promoting indigenous traditional knowledge that forms part of the culture of indigenous peoples. In this regard, WIPO in 1998 commenced a fact-finding mission on intellectual property and traditional knowledge.

[231] Universal Declaration on Cultural Diversity 2001, (2002) 41 ILM 57.

5.7 CONCLUSION

From the various declarations discussed above, it is not in dispute that the right to culture of indigenous peoples is recognised and protected in terms the United Nations Declaration on the Rights of Indigenous Peoples and other declarations by UNESCO. Discussing specifically in terms of the United Nations Declaration of the Rights of Indigenous Peoples,[232] some scholars are of the opinion that even though it is not a binding instrument in international law, its preamble and the operative text engage the language of rights and iconic documents of international law.[233] Also given the highly participatory level of states both in its adoption by the United Nations General Assembly and its drafting process, its legitimacy is unimpeachable.[234] The Declaration is generally perceived to reflect to a large extent a codification of extant customary international law on indigenous peoples.[235] In the light of the foregoing, the right to culture of indigenous peoples as provided for in the Declaration expresses the position of states on the cultural rights of indigenous peoples.

[232] I lay special emphasis on the United Nations Declaration on the Rights of Indigenous Peoples because it is the most recent document that provides for the protection of the cultural rights of indigenous peoples.
[233] Thornberry (note 40) at 374.
[234] Oguamanam (note 146) at 82.
[235] *Ibid* at 81. Anaya & Wiessner 'The UN Declaration on the Rights of Indigenous Peoples: towards re-empowerment' (note 227) at 2.

CHAPTER VI

DOMESTIC PRACTICE OF STATES AND THE RIGHT TO CULTURE OF INDIGENOUS PEOPLES

6.1 Introduction

Domestic practice of states includes both legislation and decisions of national courts. In chapter three, it was stated that national legislation and judicial decisions of national court could serve as evidence of a state's view of customary international law. In other words, the state practice element required for the formation of customary international may be inferred from national legislation and judicial decisions of national courts. In this regard, this chapter examines the right to culture of indigenous peoples in terms of domestic practice of states.

6.2 National Legislation and Decisions of National Courts

Quite a relatively large number of states have incorporated into their national legislation provisions that protect indigenous peoples and their culture. This has taken the form of either direct protection through the constitution or by enacting specific legislation or through judicial decisions. For example in Canada, indigenous peoples are recognised and protected under the Constitution Act, 1982 and the indigenous cultural rights of native Indians are protected under Canada's Indian Act.[236]

Countries like Norway, Sweden, Russia, Mexico, Guatemala, Nicaragua, Panama, Trinidad and Tobago, Suriname, Colombia, Venezuela, Ecuador, Peru, Bolivia, Brazil, Argentina, New Zealand, Japan, Philippines, Indonesia, Cambodia, Morocco, Algeria, Niger, Mali, Ethiopia, Uganda, Burundi, Republic of Congo, Cameroon, Central African Republic, Angola, Botswana and South Africa have all

[236] *The indigenous world 2007* (2007) 34-546.

made efforts to protect the culture of indigenous peoples either through national legislation or judicial decision.[237]

In the United States of America, the cultural rights of indigenous peoples have also been recognised through legislation and judicial decisions. An example of a federal legislation that protects the cultural rights of indigenous peoples is the Native American Graves Protection and Repatriation Act.[238] The Act protects Indian graves on federal and tribal lands, and its implementation necessitates consultation with Native American groups claiming cultural affinity to the individuals buried in those graves. The Act also requires the repatriation of human remains and associated grave goods found on federal lands when requested by tribes claiming cultural affinity.[239]

In terms of judicial decisions, the courts in the case of the *United States v Washington*[240] acknowledged the cultural import of traditional fishing among the Salish peoples.[241] The Plaintiffs who were part of the Salish peoples sought a declarative and injunctive relief concerning off-reservation treaty right fishing. The Court in granting the relief sought, observed that '[i]n pre-treaty times Indian settlements were widely dispersed throughout Western Washington… but one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish, to sustain the Indian way of life.'[242]

Furthermore the Court held that 'the taking of anadromous fish from usual and accustomed places, the right to which was secured to the Treaty Tribes in the Stevens' treaties, constituted both the means of economic livelihood and the foundation of native culture. Reservation of the right to gather food in this fashion

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[237] *Ibid* at 34-546.
[238] Native American Graves Protection and Repatriation Act, 1990, 104 STAT. 3048 PUBLIC LAW 101-601.
[239] Kurt E. Dongoske 'The Native American Graves Protection and Repatriation Act: a new beginning, not the end for osteological analysis--a Hopi perspective' (1996) 20(2) *American Indian Quarterly* 287 at 288. Jack F. Trope and Walter R. Echo-Hawk 'The Native American Grave Protection and Repatriation Act: background and legislative history' (1992) 24 *Arizona State Law Journal* 35-78. This legislation gives credence to article 12 of the United Nations Declaration on the Rights of Indigenous Peoples which provides *inter alia* for the right to repatriation of human remains.
[240] *United States of America, Quinault Tribe of Indians on its own behalf and on behalf of the Queets Band of Indians, et al v State of Washington, Thor C. Tollefson, Director, Washington State Department of Fisheries* (1974) 384 F.Supp. 312.
[241] The Salish is an indigenous Indian tribe found throughout Western Washington.
[242] *United States v Washington* (note 240) at 350.

protected the Indians' right to maintain essential elements of their way of life.[243] In granting the relief sought by the plaintiffs, the judge based his decision on cultural considerations in view of the fact that traditional fishing was part of the culture of the Salish peoples.[244] From the above legislation and judicial decision, it is obvious that various forms of culture of indigenous peoples are recognised and protected in the United States.[245]

6.2 Conclusion

The relevant conclusion that may be drawn from the fact that some states through national legislation and judicial decisions recognise indigenous culture is that those states are willing to respect and protect the right to culture of indigenous peoples. Furthermore, this fact helps to strengthen an argument with regards to generality of practice among states.

[243] *Ibid* at 407.
[244] Michael Anderson 'Law and the protection of cultural communities: the case of Native American fishing rights' (1987) 9 *Law and Policy* 125 at 133.
[245] Although the jurisprudence for the protection of these cultural rights might not necessarily be based on only human rights law, the fact that these rights are protected is of significant importance to their incorporation into the rubric of the laws on indigenous peoples.

CHAPTER VII

ASCERTAINING THE RIGHT TO CULTURE OF INDIGENOUS PEOPLES UNDER CUSTOMARY INTERNATIONAL LAW

7.1 Introduction

The benefits of ascertaining if the right to culture of indigenous peoples is a rule under customary international law cannot be overstated. As international law becomes codified, the primary significance of a norm's customary character is that the norm binds states that are not parties to the instrument in which that norm is restated. It is not the treaty norm, but the customary norm with identical content that binds such states.[246] States are under an obligation to give effect to their human rights obligation by enacting domestic legislation that restates their international obligation.[247]

In determining if the right to culture of indigenous peoples is a norm of customary international law, one must establish sufficient state practice and *opinio juris* which support the notion on the basis of an acknowledged legal obligation. Taking into consideration the fact that the elements of state practice and *opinio juris* must be present before a rule becomes part of customary international law, this chapter in determining state practice and *opinio juris* takes a cursory look at the treaties and declarations discussed in chapters four and five.

[246] Theodor Meron *The humanization of international law* (2006) 357. *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)*, [1984] ICJ Rep 392 at para 73.

[247] A state's failure to enact legislation that gives effect to an international obligation places the state in breach of its international obligation

7.2 Discerning state practice for the right to culture of indigenous peoples

As mentioned earlier in chapter three, the main point of focus when discussing state practice is consistency and generality of the practice. In this regard, state practice could take the form of treaties, national legislation and judicial decisions of national courts. In terms of the right to culture of indigenous peoples, practice can be inferred from the application of various treaties that protect the culture of indigenous peoples. The ICCPR that provides for the protection of indigenous culture under article 27 has been ratified by 164 states, the ICESCR that makes article 15 (1) applicable to the cultural rights of indigenous peoples has also been ratified by 160 states. In addition to these conventions, the ICEARD has been ratified by 173 states, the CRC has been ratified by 193 states and the CBD has been ratified by 191 states. These conventions all provide for the protection of the culture of indigenous peoples.

In terms of generality and consistency of the practice, the high number of states that have ratified these conventions strengthens the generality of the practice. Also the practice can be deemed consistent given the constant reoccurrence of the right to culture of indigenous peoples in all these treaties. It is also important to mention that having stated in chapter three that practice can be inferred from decisions of international tribunals, the Human Rights Committee's General Comments on articles 27 of the ICCPR and its body of case law on indigenous peoples goes a long way in strengthening the right to culture of indigenous peoples.

Another point to note is that these conventions are domesticated by a vast majority of countries thereby making them part of the national legislation. Also as discussed in chapter six various states protect indigenous culture within their national legislation through either their constitution or other enactments. This invariably means that these states are bound to give effect to the provisions of these conventions.

In the light of the foregoing, there is sufficient state practice in terms of the right to culture of indigenous peoples. Evidence of contrary practice on the part of states should therefore be regarded as a breach.

7.3 Discerning the *opinio juris* for the right to culture of indigenous peoples

Opinio juris may be inferred from the consistency and generality of state practice.[248] As mentioned earlier it can also be inferred from resolutions of the United Nations General Assembly when they are expressed in declaratory terms. For states that have ratified the various conventions that provide for the protection of the culture of indigenous peoples, such acts of ratification signify their intention to be legally bound by the conventions.

A sense of legal obligation can be discerned from the United Nations Declaration on the Rights of Indigenous Peoples. Anaya and Wiessner suggest that the language of 'rights' and 'status' used in the Declaration is the language of the law.[249] The participation of states and the concern shown over the years for special rights and status of indigenous peoples on the international plane, demonstrates an *opinio juris*.[250] In other words, the active participation of states in the formation of the Declaration and the non-objection to the provisions concerning the protection of indigenous culture gives credence to the fact that states consider themselves to have a legal obligation to protect the culture of indigenous peoples. It is also pertinent to mention that apart from Bhutan, all other states that either voted against the Declaration or abstained from voting in favour of the Declaration have ratified the ICCPR that protects the culture of indigenous peoples. This may imply that in one way or the other, these states satisfy the *opinio juris* requirement necessary for the formation of customary international law concerning the right to culture of indigenous peoples.

7.4 Conclusion

In conclusion, taking into consideration that in the *North Sea Continental Shelf case* the International Court of Justice stressed the need for widespread and representative state practice in support of a purported new rule, including the specially affected

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[248] Meron (note 246) at 366.
[249] Anaya & Wiessner '*The UN Declaration on the Rights of Indigenous Peoples: towards re-empowerment'* (note 227) at 3.
[250] *Ibid*.

states, as well as a feeling of legal obligation, it may be safe to conclude that the right to culture of indigenous peoples has crystallized into a binding norm of customary international law. This is because the right to culture of indigenous peoples is protected under various treaties, domestic legislation of states, national judicial decision and declarations of other international organisations. Therefore, instances of non-compliance with the rule that states have a customary international law obligation to respect and protect the right to culture of indigenous peoples should be regarded as a breach of the rule.

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