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# International Human Rights and Indigenous Peoples

■ S. JAMES ANAYA



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# ***INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES***

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**Wolters Kluwer**

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## PREFACE

This book is owed to remarkable developments in the international human rights system of over the last several years, and to the many individuals and groups of people who have driven these developments. When I first attended a session of the United Working Group on Indigenous Populations in Geneva in 1984, I had only a vague understanding of the significance of what I was witnessing. Groups identified as *indigenous* were increasingly making their presence known on the international stage, and the Working Group on Indigenous Populations was at that time their most significant foothold, providing them an important forum in which to voice their concerns. With little political power and no economic clout to speak of, they were gaining attention by the force of their stories of transgenerational suffering at the hands of dominant others and by their impassioned postulates of a better future grounded on the international system's expressed commitment to human rights.

In the years that followed, events would give way to a new body of international standard-setting instruments, decisions, and international institutions and programs focused on the concerns of indigenous peoples, concerns that are rooted in histories of invasion of their lands. This book includes a set of edited documents and commentary in an effort to provide a useful introductory synthesis of this still relatively new and developing regime that arises within the broader international human rights system. The book has grown out of a constantly evolving compilation of materials I have used for law school courses that I have developed on the subject since the early 1990s, and its conceptual framework draws substantially from my own engagement with the subject as both a scholar and practitioner.

The first chapter of the book provides background on the international indigenous rights movement that has given way to significant developments concerning indigenous peoples within the United Nations and regional human rights systems, and introduces a number of those developments against an historical backdrop. Subsequent chapters are closer looks into major developments and their normative significance, including the adoption of and mechanisms to implement the United Nations Declaration on the Rights of

Indigenous Peoples and International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples. Also surveyed in this book are reports and decisions of United Nations and Organization of American States institutions interpreting and applying other human rights treaties and normative instruments to issues concerning indigenous peoples.

Not included in this text is an in-depth examination of the African regional human rights instruments and institutions as they have begun in recent years to relate to the rubric of indigenous peoples, although some references are made and materials included in this regard. Also of note, focusing as it does on relevant aspects of the international human rights system, this book does not examine significant developments concerning indigenous peoples within the international intellectual property regime, international financial institutions such as the World Bank, or the international environmental regime associated with the Convention on Biological Diversity. It may be of interest to the reader to explore these subjects through other sources.

While not being exhaustive of all relevant developments, the aim of this book is to advance understanding about the way in which international human rights law and institutions have evolved to respond to the demands of indigenous peoples, both in connection with the advances and limitations in that evolution. The issues at stake stem from the determination of indigenous peoples' worldwide to overcome the legacies of their oppressive pasts and to flourish as culturally distinct communities under conditions of genuine equality. My hope is that the book will serve both as a practical tool to address these issues and as a stimulus for further thinking. It is my firm belief that examination of the human rights issues addressed in this book, being related—as will be seen—to fundamental principles of justice and the building of sound intercultural relations, are not only relevant to the concerns of indigenous peoples but are of concern to all.

*S. James Anaya*

*Tucson, Arizona  
September 2009*



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I cannot help but express my profound gratitude to my family—Jana, Andrea, and Emilio—for their constant patience and loving support for this and all my professional endeavors. Nor can I fail to acknowledge with thanks and respect the many indigenous peoples and individuals whose struggles and courage defined the subject matter of this book.

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# SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xix</i>
<b>1 INDIGENOUS PEOPLES AND THE INTERNATIONAL SYSTEM</b>	<b>1</b>
<b>2 THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ITS CONTENT, STATUS, AND PRACTICAL MEANING</b>	<b>55</b>
<b>3 INTERNATIONAL LABOUR ORGANIZATION CONVENTION NO. 169 ON INDIGENOUS AND TRIBAL PEOPLES</b>	<b>133</b>
<b>4 UNITED NATIONS TREATY REGIMES AND THEIR APPLICATION TO INDIGENOUS ISSUES</b>	<b>185</b>
<b>5 THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS AS APPLIED TO INDIGENOUS PEOPLES</b>	<b>251</b>
<i>Appendix</i>	<i>321</i>
<i>Index</i>	<i>359</i>

# CONTENTS

<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xix</i>
<b>1 INDIGENOUS PEOPLES AND THE INTERNATIONAL SYSTEM</b>	<b>1</b>
<b>I. INTRODUCTION</b>	<b>1</b>
<b>II. THE INTERNATIONAL MOVEMENT OF INDIGENOUS PEOPLES</b>	<b>3</b>
A. Background	3
• Ronald Niezen, The Origins of Indigenism: Human Rights and the Politics of Identity	3
Comments and Questions	16
B. Major International Platforms of Indigenous Rights Discourse	17
1. The U.N. Working Group on Indigenous Populations	17
• Robert A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World	18
2. The Permanent Forum on Indigenous Issues	20
• Permanent Forum on Indigenous Issues, Analysis and state of implementation of recommendations of the Permanent Forum on Indigenous Issues at its first to third sessions (Note by the Secretariat)	22
Comments and Questions	26

C. The Question of Which Groups Are Indigenous	27
• Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya — Addendum: the situation of indigenous peoples of Nepal	31
• Report of the African Commission's Working Group on Indigenous Populations/Communities	32
Comments and Questions	35
III. THE HISTORICAL AND JURISPRUDENTIAL CONTEXT: THE EVOLUTION OF DOCTRINE AND PRACTICE TO THE MODERN HUMAN RIGHTS FRAMEWORK	37
• S. James Anaya, Indigenous Peoples in International Law	37
Comments and Questions	53
 <b>2 THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ITS CONTENT, STATUS, AND PRACTICAL MEANING</b>	 55
I. INTRODUCTION	55
II. THE NORMATIVE SIGNIFICANCE AND CONTENT OF THE DECLARATION — A STANDARD OF SELF-DETERMINATION	58
• S. James Anaya, Why There Should Not Have to Be a Declaration on the Rights of Indigenous Peoples	58
• Stefania Errico, The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview	63
• Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples	70
Note on Self-Determination	73
• Committee on the Elimination of Racial Discrimination, Right to Self-determination, General Recommendation XXI	75
Comments and Questions	76
III. THE LEGAL STATUS OF THE DECLARATION	79
• Official Records, UN General Assembly, 61st Sess., 107th Plenary Mtg., Sept. 13, 2007	82
• Jenny Macklin, MP, Minister for Families, Housing, Community Services and Indigenous Affairs (Government of Australia) — Statement on the United Nations Declaration on the Rights of Indigenous Peoples	97

• S. James Anaya & Siegfried Wiessner, The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment	99
Comments and Questions	104
<b>IV. MECHANISMS TO IMPLEMENT THE DECLARATION AND PROVIDE IT PRACTICAL MEANING</b>	<b>105</b>
A. United Nations Mechanisms	105
• The Universal Periodic Review Procedure of the Human Rights Council	106
• The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people	107
• Statement by Professor James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people	108
• The Expert Mechanism on the Rights of Indigenous Peoples	112
Comments and Questions	113
B. Domestic Mechanisms	114
• Cal et al. v. Attorney General	116
Comments and Questions	131
<b>3 INTERNATIONAL LABOUR ORGANIZATION CONVENTION NO. 169 ON INDIGENOUS AND TRIBAL PEOPLES</b>	<b>133</b>
I. INTRODUCTION	133
II. THE CONVENTION'S BACKGROUND AND CONTENT	134
• Lee Swepston, The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption	134
Comments and Questions	142
III. THE ILO'S SUPERVISORY SYSTEM	145
A. Introduction	145
• Lee Swepston, The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption	145
B. The Reporting Procedure	147
• CEACR: Individual Observation Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 — Norway (Ratification: 1990)	147

• CEACR: Individual Observation Concerning Convention No. 107, Indigenous and Tribal Populations, 1957 — Bangladesh (Ratification: 1972) Comments and Questions	149 151
C. Complaints Under Article 24 of the ILO Constitution	151
• Luis Rodriguez-Piñero, Historical Anomalies, Contemporary Consequences: The ILO Convention of Indigenous and Tribal Peoples (No. 169)	152
• The Case of the Federation of Shuar People of Ecuador (FIPSE)	156
• ILO Supervision of Ecuador in the Aftermath of the FIPSE Decision	164
• The Case of the Thule Inuit People of Greenland	166
• Case concerning Constitutional Reforms Affecting Indigenous Peoples in Mexico — Background	173
• Case Concerning Constitutional Reforms Affecting Indigenous Peoples in Mexico	174
• ILO Supervisory Activity Related to the Situation of Indigenous Peoples in Mexico, in Addition to the Article 24 Adjudication Comments and Questions	181 182

## **4 UNITED NATIONS TREATY REGIMES AND THEIR APPLICATION TO INDIGENOUS ISSUES**

I. INTRODUCTION	185
II. THE APPLICATION AND DEVELOPMENT OF TREATY-BASED NORMS THROUGH THE REPORTING AND RELATED PROCEDURES	186
A. The Human Rights Committee's Evaluation of Reports and Its Interpretation of Articles 1 and 27 of the ICCPR	187
• U.N. Human Rights Committee, General Comment 23: The Rights of Minorities (Art. 27)	187
• Concluding Observations of the Human Rights Committee: Canada	190
• Concluding Observations of the Human Rights Committee: Canada	191
• Concluding Observations of the Human Rights Committee: Guatemala	192
• Concluding Observations of the Human Rights Committee: Finland	192

• Concluding Observations of the Human Rights Committee: Chile	193
Comments and Questions	193
<b>B. Monitoring by CERD on the Basis of the Principle of Non-Discrimination</b>	194
• U.N. Committee on the Elimination of Racial Discrimination, General Recommendation 23: Indigenous Peoples	194
• Committee on the Elimination of Racial Discrimination, Summary record of the 1475th Meeting: United States of America	196
• Committee on the Elimination of Racial Discrimination, Concluding Observations: United States of America	197
• The Early Warning and Urgent Action Procedure of CERD: The Western Shoshone Case	199
• Yomba Shoshone Tribe and Ely Shoshone Tribe of the Western Shoshone People, Amended Request for Urgent Action Under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations	200
• Committee on the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure: Decision 1(68) — United States of America	204
• Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination	207
• Indigenous Issues in the United States 2007 Periodic Report to CERD	212
Comments and Questions	214
<b>III. THE HUMAN RIGHTS COMMITTEE AND ITS ADJUDICATION OF COMPLAINTS UNDER THE OPTIONAL PROTOCOL TO THE ICCPR</b>	215
• Sandra Lovelace v. Canada	216
Comments and Questions	224
• Chief Bernard Ominayak and the Lubicon Lake Band v. Canada	225
• Apirana Mahauika et al. v. New Zealand	234
• Francis Hopu and Tepoaitu Bessert v. France	242
Comments and Questions	247

<b>5</b>	<b>THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS AS APPLIED TO INDIGENOUS PEOPLES</b>	<b>251</b>
I.	INTRODUCTION	251
II.	THE EXAMINATION OF INDIGENOUS ISSUES BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN ITS COUNTRY REPORTS	253
	• Inter-Am. Comm. H.R., Report on the Human Rights Situation in Ecuador	253
	Comments and Questions	261
III.	THE COMPLAINT PROCEDURE AND THE DEVELOPING INDIGENOUS RIGHTS JURISPRUDENCE OF THE INTER-AMERICAN COMMISSION AND COURT	264
A.	The Awas Tingni Case	265
	• S. James Anaya & Maia S. Campbell, Gaining Legal Recognition of Indigenous Land Rights—The Story of the Awas Tingni Case in Nicaragua	266
	Comments and Questions	280
B.	Developments in the Jurisprudence of the Inter- American System in the Aftermath of the Awas Tingni Case	284
	Comments and Questions	289
	• Saramaka People v. Suriname	290
	Comments and Questions	315
	<i>Appendix</i>	321
	• United Nations Declaration on the Rights of Indigenous Peoples	321
	• International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (1989)	333
	• Proposed American Declaration on the Rights of Indigenous Peoples	347
	<i>Index</i>	359



# INDIGENOUS PEOPLES AND THE INTERNATIONAL SYSTEM

## I. INTRODUCTION

Groups identified as “indigenous peoples” are now important subjects of concern within the international program to advance human rights. The rubric of indigenous peoples includes the diverse Indian and aboriginal societies of the Western Hemisphere, the Inuit and Aleut of the Arctic, the aboriginal peoples of Australia, the Maori of Aotearoa (New Zealand), Native Hawaiians and other Pacific Islanders, the Sami of the European far North, and at least many of the tribal or culturally distinctive non-dominant peoples of Asia and Africa. They are *indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.

The most prominent manifestation of the international concern for this segment of humanity is the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the U.N. General Assembly on September 13, 2007. The Declaration, which is discussed in detail in the next chapter, represents widespread recognition of the ongoing effects on indigenous peoples of historical forces of oppression linked to colonialism or other, similar invasive settlement. Historical patterns of colonialism and empire have actively suppressed indigenous peoples’ own political institutions and cultural patterns, and deprived them of vast landholdings and access to life-sustaining resources. As a result, indigenous peoples of today characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them.

Historical phenomena grounded in racially discriminatory attitudes are not just blemishes of the past but rather translate into current inequities. Indigenous peoples have been crippled economically and socially, their

cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. In both industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are on the lowest rung of the socioeconomic ladder. See Gillette Hall & Harry Anthony Patrinos, *Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004: Executive Summary* 1, 4-6, 8 (2005); United Nations Economic Commission for Latin America and the Caribbean, *The Millennium Development Goals: A Latin American and Caribbean Perspective* 48-49, 72-73, 91-92, 141 (2005); Carolyn Stephens, et al., *Indigenous peoples' health—why are they behind everyone, everywhere?*, 366 *The Lancet* 10, 10-11 (2005). Some indigenous groups were not severely affected, if at all, by colonization or its legacies until well into the twentieth century. But even the most isolated indigenous groups are now threatened by encroaching commercial, government, or other interests motivated by prospects of accumulating wealth from the natural resources on indigenous lands or by strategic military concerns. In many places, history is repeating or threatening to repeat itself in the name of modernization, development, and security. Today indigenous peoples seek to roll back the inequities lingering from historical patterns and defeat the contemporary barriers to the ability to flourish as distinct communities on lands to which their cultures remain attached.

As global processes of decision evolve with shifts in the ordering of power and in prevailing normative considerations, so too does the system of laws, policies, institutions, and procedures that function internationally. Since the middle part of the twentieth century and the creation of the United Nations, the structure and normative parameters of international law and relations have advanced significantly to include moral precepts that are increasingly informed by diverse cultural perspectives. Under the banner of human rights, transnational processes have worked to extend the competency of the international system into matters once deemed to be exclusively within the sovereign prerogatives of states. These processes promote an ever more influential discourse that engages the language of morality to challenge existing conditions of oppression. This evolution in international law and policy has provided fertile ground for a new and still developing regime of international standards and institutional activities specifically concerning the rights of indigenous peoples.

The U.N. Declaration on the Rights of Indigenous Peoples embodies contemporary normative trends on the subject, substantially in line with indigenous peoples' own articulated aspirations. With its affirmation that "Indigenous peoples have the right to self-determination" (art. 3), and of an array of individual and collective rights deemed essential to or derivative of self-determination, including rights to lands and resources, the Declaration embodies the demands asserted by representatives of indigenous peoples and their advocates for decades at the international level. See Chapter 2, pages 55-79.

Increased sensitivity to the oppression of indigenous peoples and the resulting international response have been brought about by a burgeoning worldwide social movement in which indigenous peoples themselves are the principal protagonists. Over the last few decades, indigenous peoples have ceased to be mere objects of the discussion of their rights—or lack of