

Chapter 2

Overview of Narratives on Indigenouness

2.1 Introduction

The last two decades of the twentieth century have seen the expansion of indigenous claims worldwide. Numerous groups presented as being in the margins of societies in which they live, with political, social, economic or cultural ways of life differing from the ‘mainstream’ society, have come to identify with a movement that initiated in the Americas and Australasia and spread across all the corners of the globe. At a time when current globalizing trends are more than ever infiltrating and shaping almost every aspect of human life, it seemingly appears paradoxical that some groups are raising their voices high to claim and/or defend their right to be different. This paradox results into a rejection by these groups of dominant models of development and organization of society. Unlike the various fashionable and, at times, superfluous anti-globalization gatherings in the recent years, the aims of which are yet to be more or less elucidated,¹ indigenous peoples’ demands tend to have many ingredients in common, despite the inclusion under this label of a large number of groups from diverse social, political, economic, cultural and geographical environments. Over the years, they have succeeded in building a strong global network aimed at furthering their demands at the highest levels of national, and mostly international, legal and political structures. As rightly pictured by Niezen, the term ‘indigenous’ has been taken further to encompass ‘not only a legal category and an analytical concept but also an expression of identity, a badge worn with pride, revealing something significant and personal about its wear’s collective attachments’.² The global nature of the indigenous rights phenomenon is therefore an undeniable reality that can no longer be ignored.

Nonetheless, almost every concept of application to indigenous claims is subject to legal and definitional disagreements and uncertainties. Lengthy debates and academic literature abounds, questioning every aspect of their claims as

¹ See Scholte 2002, p. 7.

² Niezen 2003, p. 3.

‘indigenous’ or ‘people’s’ and the varied forms of protection sought under either notion. Furthermore, indigenous claims are part of a wider, evolving socio-political dynamic, challenging and shaking the prevailing paradigm of a mono-cultural state, shaped in post-Westphalian Europe and enhanced through Enlightenment ideals and international legal thinking.³ Their struggle intersects in different ways with minority rights, nationalist, regional, local, ethnic and tribal claims for varied forms of protection and/or autonomous rules. The various expressions of demands for protection of differential identities are rightly described as constitutive of *politics in the vernacular* by one of many Kymlicka’s books on the subject matter.⁴

An analysis of indigenous claims and rights both globally and in the African context imperatively requires an overview of the existing identification criteria of ‘indigenous peoples’. It would also be incomplete if it did not discuss the leading definitions of the concepts ‘indigenous’ and ‘peoples’ in academic (legal) literature and in case law. Accordingly, this chapter aims at: (1) analysing the various attempts to circumscribe the underlying concepts; (2) comparing and contrasting them with other related notions; and (3) examining the input of other most relevant disciplines than human rights law in capturing the position of indigenous peoples. These general considerations are very crucial in examining the relevance of indigenouness on the African scene, in subsequent chapters.

2.2 ‘Indigenous’ Claims and Labels Under Historical Perspective

2.2.1 *Notion*

The present paragraph argues that there appear to be three legal constructions of indigenouness, corresponding to more or less three historical usages of this conceptual category. First, from the advent of the colonial rule until decolonization, the concept was used to refer to all non-European natives on territories conquered and colonized by European powers. Second, under the early years of the post-colonial era, indigenouness was popularized as a concept referring to non-Europeans in countries where peoples mainly descending from European settlers remained dominant (focus on Americas and Australasia). Finally, the indigenous rights movement was internationalized to cover other (marginalized) groups, in Africa, Asia, Europe and the Pacific.⁵ The following and subsequent examinations of indigenouness in legal instruments, jurisprudence and doctrine try—as much as possible—to remain mindful of the corresponding experiences upon which the concept is constructed: colonization, post-colonial settlement and ‘globalization of

³ Anaya 2004, pp. 19 et seq.

⁴ Kymlicka 2001.

⁵ See, e.g. Niezen 2003, pp. 26 et seq.; Anaya 2004, pp. 15–94; Kingsbury 1998, pp. 414–457.

indigenoussness'.⁶ Proposed definitions or identification criteria are examined against the background of these historical realities. These realities inform any reflection on the ambiguities attached to the use of the 'indigenous' terminology and the feared implications of the 'politics of nativism'⁷ in many national contexts where indigenous claims are expressed. Before a substantive discussion thereon, an overview of figures said to reflect the current global indigenous population is essential.

2.2.2 Some Figures on the Global Indigenous Population

There are divergent figures on the overall world's indigenous population. In fact, the available figures are mere estimates by the United Nations, indigenous peoples' activists and advocates, as there are no reliable global data due to many factors. Such factors include a definitional deficit, the lack of updated population censuses in most countries where (claimant) indigenous peoples live, and the remoteness of their living environment whereby some indigenous peoples do not even hold any administrative certification of identity.⁸ Relying on these estimates to be taken cum grano salis, it is commonly believed that there are between 300 and 500 million indigenous peoples in more than 70 countries worldwide and represent about 5,000–7,000 indigenous societies or cultures.⁹ Indigenous peoples are, thus, said to represent 5% of the global population.¹⁰ The importance of these figures, even as disputed as they still are, justifies the relatively recent growing interest—mostly in United Nations and academic as well as NGO circles—in the plight and claims of the most vulnerable, marginal and dispossessed members of the human race. These figures legitimize the growing number of doors opened to indigenous peoples' claims, in both national constitutionalism and international fora, even where these demands sometimes translate into challenges to established premises and foundations of statehood. Notwithstanding interrogations as to the reliability of these figures,¹¹ they have the merit of adhering to certain pragmatism

⁶ For a relevant analysis, see Ngugi 2002, pp. 297–351.

⁷ As illustrated in the article by Kuper 2003, pp. 389–402, which, while acknowledging the marginal and dispossessed status of indigenous claimant groups, sceptically cautions against the adverse consequences of attribution of new rights to specific communities at the expense of others under the 'native' justification. The various ideas in the article were more elaborated in Kuper 2005. Kuper's criticisms attracted fierce responses from other anthropologists advocating for the rights of indigenous peoples, as illustrated in Kenrick and Lewis 2004, pp. 4–9.

⁸ Schmidt-Soltau 2003.

⁹ Details and contrasted figures can be found in Malezer 2005, p. 67; Daes 1996b, para 40; ECOSOC 2001, para 11; Burger 1987, p. 1; Maybury-Lewis 2002, pp. 8 et seq.; Thornberry 2002a, pp. 15–18.

¹⁰ Maybury-Lewis 2002, p. 9.

¹¹ See, e.g. Daes 1992, para 36; Daes 1996b, para 40.

in asserting indigenouness, rather than dwelling in complex and precision-oriented legalistic definitions of who qualifies as ‘indigenous’. The following sections are precisely aimed at reviewing the various leading efforts to define this complex concept and the continuing wrestling with calls for an elaboration of cognizable identification criteria for indigenouness.

2.2.3 Indigenouness as a Dynamic Concept

Numerous attempts to define indigenous peoples have met with insuperable hurdles as far as capturing the reality presented by current indigenous claims is concerned. In international fora, unsuccessful definitional attempts have given way to more pragmatic approaches in dealing with indigenous claims, as exemplified by the omission of a definition in the drafting process of the United Nations Declaration on the Rights of Indigenous Peoples.¹² In this respect, considerations over a definition of the ‘indigenous’ tend to be regarded as an old, and no longer relevant, debate. From the early years of the drafting process, the United Nations Working Group on the Draft Declaration (UNWGDD) on the rights of indigenous peoples excluded a definition in its proposed text so as not to be limitative.¹³ It somehow ignored the numerous calls from both governments and some indigenous representatives for a definition as a prerequisite for recognition of a particular group as ‘indigenous’.¹⁴ Consequently, there is a perceived erosion of indigenous claims as nothing prevents groups whose indigenouness is resisted—if not resented—by widely recognized groups to equally invoke this identity.¹⁵ Countries, mostly from Africa and Asia, continue to oppose domestic applicability of the concept. For these reasons, it is imperative for the present analysis to revisit the identification criteria for ‘indigenouness’.

2.2.3.1 The Importance of the Martinez Cobo Reports in Conceptualization of Indigenouness

Literature abounds as to the meaning attributable to the concepts of indigenous peoples, populations, communities or nations. These terms are often used interchangeably, either out of ignorance on their implications in national and international law, or in different contexts with different meanings. In either case, morphological, historical and legal considerations are at the heart of the

¹² Daes 1996a, para 2. For a text of the declaration, see Human Rights Council 2006, p. 25.

¹³ Daes 1996b, para 40; ECOSOC 1993, paras 43–66.

¹⁴ Daes 1995, paras 41–42.

¹⁵ Typical cases are Namibia’s Rehoboth Basters and South Africa’s Afrikaners, discussed subsequently. See also Alfonso Martinez 1995, para 121, note 47; Peeters 1993.

complexity of terminological discourses. Despite earlier efforts to further their rights in supranational fora, the first steps under the United Nations auspices to set internationally applicable identification criteria for indigenous peoples were initiated in the 1970s with the establishment of a UN Special Rapporteur on discrimination against indigenous populations.¹⁶ They took shape in the 1980s upon the submission of his reports.¹⁷ Consolidation of the nascent global indigenous movement came with the establishment of the UNWGIP.¹⁸ The ever-growing demands of groups identifying with the indigenous movement, coupled with international organizations' sympathy for their grievances, culminated in the establishment of the United Nations Permanent Forum for Indigenous Issues in 2000.¹⁹ From the outset, the internationalization of the indigenous movement has been accompanied by efforts to capture its conceptual framework. Most studies on contemporary legal conceptions of indigeness transit through the initial works by José Martínez Cobo, the United Nations' Special Rapporteur on Discrimination against Indigenous Populations. In his often quoted *Study of the Problem of Discrimination against Indigenous Populations*, considered as a landmark international attempt to circumscribe 'indigeneity', he described indigenous communities, peoples and nations as those which:

[H]aving 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.²⁰

Prior occupation of ancestral lands before colonization/settlement by newcomers, cultural distinctiveness and non-dominance are the most salient elements deriving from this attempt to frame a definition.²¹ Nevertheless, even at this very early stage in which indigenous global networking had not yet gained the strength it currently enjoys, the Special Rapporteur remained cautious by advocating a subjective element of self-identification as an important criterion in the definition.²² Among other objective elements for determination of indigeness, the author attached particular importance on historical continuity. He suggested, on an illustrative basis, some criteria to take into consideration in determining historical

¹⁶ Martínez Cobo 1987, Introduction.

¹⁷ Ibid. From an insider's standpoint, see Eide 2006, pp. 155–212.

¹⁸ Proposed in 1981 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, the UNWGIP was endorsed by the Commission on Human Rights (CHR) in Resolution 1982/19, and authorized by ECOSOC Res. 1982/34, 7 May 1982.

¹⁹ See UN Doc. E/RES/2000/22.

²⁰ Martínez Cobo 1987, para 379.

²¹ See Firestone et al. 2005, p. 225.

²² Martínez Cobo 1987, para 368.

continuity. They include: (1) occupation of ancestral lands, or at least of part of them; (2) common ancestry with the original occupants of these lands; (3) culture in general, or in specific manifestations; (4) language; and (5) residence in certain parts of the country, or in certain regions of the world.²³ Implied in this categorization was the prevailing conception of indigenous peoples as prior occupants of lands before European conquests and colonial campaigns.²⁴ Description of indigenous peoples presented indigenouness as a resultant of the latter campaigns. Under this perception, ‘indigenous’ rhymed with ‘colonized’ peoples.²⁵ Indigenouness entailed distinctiveness premised on non-adoption of, or assimilation into, dominant political, economic, social and cultural structures established, if not imposed, by the settlers. The prior occupant-indigenous and European-settler dichotomy further embodied, among other elements of differential identity, a racial component.²⁶ As well noted in a UN report submitted by Daes, despite subjection of Dutch settlers in South Africa to British rule following the Boer War, it was never conceived that Article VI of the Berlin Conference Final Act—whereby participating great powers endeavoured to protect ‘native tribes’ of Africa—was applicable to them.²⁷

Against this backdrop, the adoption by the International Labour Organization (ILO) of Convention 169 built on Martinez Cobo’s work on, and conceptualization of, indigenous peoples is likely. It is a fact that the ILO was the first international organization involved in the field.²⁸ It is also a fact that there are some differences between the ILO and other international bodies in their conceptualization of indigenouness.²⁹ The most noticeable difference is that the ILO maintained a distinction between ‘tribal’ and ‘indigenous’ peoples.³⁰ Convention 169’s scope of application covers:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community,

²³ Ibid., para 380.

²⁴ Kingsbury 1998, pp. 417–418; Martinez Cobo 1987, para 633.

²⁵ Waldron 2002.

²⁶ Daes 1996b, para 11.

²⁷ Ibid. See also the General Act of the Conference at Berlin, 26 February 1885, 10 Martens Nouveau Recueil (ser. 2), at 414, reprinted in (1909) 3 *Am. J. Int’l L.* 7 (hereafter, the General Act of the Berlin Conference).

²⁸ See Swebston and Torriente 2002, pp. 98–120.

²⁹ Swebston 1990, pp. 688 et seq.

³⁰ The distinction already existed albeit under a slightly different formulation in ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (International Labour Conference, 40th Sess., 1957). The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (International Labour conference, 76th Session, 27 June 1989) was a revision of the latter. The texts of both conventions are available at <http://www.ilo.org/ilolex/english/convdisp2.htm>, accessed 24 April 2006. Convention No. 169 dropped the ‘semi-tribal’ categorization in Convention No. 107 and replaced ‘populations’ in the latter with ‘peoples’.

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.³¹

This definition was, in fact, a slightly modified re-enactment of similar provisions in the 1957 ILO Convention 107. The distinction between 'indigenous' and 'tribal' peoples was intended to escape the constraining requirement to prove 'prior occupancy of ancestral land before extending protection to peoples seen as otherwise in similar conditions.'³² The retention of the 'tribal' categorization has been criticized for serving little practical significance. It is argued that section (b) of the definition in ILO Convention 169 covers, in the 'indigenous' category, not only descendents of the inhabitants of the territory 'at the time of conquest or colonization', but also descendents of people residing there at the time of 'establishment of present state boundaries'.³³ The differentiation has the merit of adhering to pragmatism in defining the convention's scope of application, thereby avoiding dwelling into the debate over determination of historical precedence dominating debates over indigenouness. Given the similarity in the differently worded Martinez Cobo and ILO Convention 169 definitions of indigenous peoples,³⁴ inferred is the assumption that peoples covered by litera (a) of ILO Convention 169 are not captured by Martinez Cobo definition. Persisting terminological confusions and historical uses of the indigenous label justified the ILO's pragmatic move to withhold the 'indigenous' versus 'tribal' dichotomy in Convention 169, which postdates the above-quoted Martinez Cobo criteria of identification.

³¹ Art. 1 ILO Convention No. 169.

³² Swebston 1990, pp. 695–696.

³³ Wiessner 1999, p. 112; Daes 1996b, para 28.

³⁴ The main definitional differences are that Martinez Cobo retains 'historical continuity' with pre-invasion and pre-colonial societies as a criteria for indigenouness, while ILO merely mentions 'descent', (see Donders 2002, p. 205); and the subjective element (consider themselves) in the former definition as opposed to the 'are regarded' formulation in the latter.

2.2.3.2 Insight into Historical Perception and Usage of the 'Indigenous' Attribute

The Genesis of International Indigenism

Repeated claims erecting 'colonization' of all indigenous peoples into a reality transcending history do not account for the recent, and at times artificial, historical construction of the phenomenon.³⁵ Despite some relativism inherent to the understanding of the relevant concepts, the colonization language is both misleading and dangerous to apply to all cases involving indigenous claims. The diverse identities subsumed in the indigenous peoples' category have so far annihilated endeavours aimed at conceptualizing an all-encompassing definition. They also complicate attempts to exhaustively analyse the historical roots of indigenoussness. At the heart of the difficulty lies a complex paradox. Not all peoples claiming prior occupancy of ancestral lands identify themselves as indigenous under the current meaning attached to the concept within the framework of the global movement. Conversely, not all peoples claiming indigenous status can undisputedly claim prior occupation of the lands on which they live.³⁶ Besides drawing a parallel between pre-invasion and settler societies' distinctive ways and customs, conceptualizations of indigenoussness invoked above retain non-dominance and attachment to ancestral lands as the most salient features common to groups claiming the status. Notwithstanding these suggested identification criteria, attempts to theoretically and exhaustively capture the global indigenous phenomenon are persistently confronted with challenges rooted in historical, political and socio-economical dynamics, which have affected, and continue to affect, communities currently demanding special protection as indigenous peoples.

The 'indigenous' attribute has been used with varying conceptual meanings throughout history. The current pride associated with 'originality' in indigenous identity claims contrasts with the previously implied inferior status attached to this categorization under the colonial legal and institutional arsenals. The contrast reflects an evolution, if not a fundamental change, in the meaning attached to the concept. Historical and etymological roots of the term suggest that it was initially used to establish a distinction between 'persons born in a particular place and those

³⁵ Barsh 1986, p. 373.

³⁶ In this respect, it has been rightly acknowledged that, unlike in the Americas and Australasia, historicity of aboriginality in Africa and Asia remains disputed in many regards and, as such, the concept needs to be taken with caution. On the application of aboriginality in the African context, see ACHPR and IWGIA 2005, pp. 91–95. Thornberry offers a similar proposition drawn from an interpretation of the ILO Convention No. 169 definition of indigenous peoples, which implies that 'ancestors of indigenous peoples may have existed in countries which did not experience conquest or colonization'. Thornberry 2002a, p. 45. The author puts forward four understandings of 'indigenous' namely: an association with a particular place; prior inhabitation; original or first inhabitants; and distinctive societies (pp. 37–40).

who arrived from elsewhere'.³⁷ It was further used in reference to groups perceived as having prior occupancy of a particular location. Thus, subsequent to the European encounter with inhabitants of conquered territories overseas, 'indigenous' primarily served as a label used by the former to refer to the latter.³⁸ Different terminologies such as 'aborigines', 'autochthones', 'natives', 'first nations', 'first peoples' or 'original peoples', with their variants in other languages, were—and to some extent still are—used to refer to peoples considered as indigenous.³⁹ Many, if not all, of these terms are still used interchangeably in scholarly literature.⁴⁰ Notwithstanding some dissenting voices,⁴¹ international institutions (mainly UN and specialized or affiliated institutions) have opted for the use of the term 'indigenous', even if some still refrain from referring to them as 'peoples'. Some use alternative formula such as 'populations', 'communities', 'tribes' or 'ethnicities', or a combination of these, as in 'indigenous ethnic minorities'.⁴² Regardless of the adopted terminology, the underlying concept has historically been associated with a 'primitive' status or with 'civilizations' considered to be 'backward'.⁴³

The relatively recent inscription of indigenous peoples' grievances on global agendas does not account for the fact that: 'From the very outset, international law encountered the *problématique* of indigenous peoples. And from the very beginning, the reaction of international law was to construct these peoples as "outside" its framework and thus not entitled to international protection'.⁴⁴ Constructions and deconstructions of the then existing international legal order were premised on the inherent inferior status of native populations in the colonies.⁴⁵ Nurtured by racial theories *en vogue* mostly in nineteenth century Europe, international law denied the natives the benefits of egalitarian norms attached to statehood. Drawing on the 'imperial division between the *barbari*, who are not sovereign or Christian or civilised, and the European nations, which are',⁴⁶ legal doctrine and institutional structures were designed to ensure the 'advancement' of the inferior,

³⁷ Daes 1996b, paras 10 et seq.

³⁸ Anaya 2004, pp. 16 et seq. In its application to Sub-Sahara Africa, 'indigenous' referred to pre-existing peoples, institutions and cultures before the encounter with Islamic culture from the North. On this, see Wani 1990–1991, p. 611.

³⁹ Burger 1987, pp. 5 et seq.; Niezen 2003, pp. 2 et seq.; Thornberry 2002a, pp. 37–40; ECOSOC 2002, para 92.

⁴⁰ As reflected in the title of the following publication, Houtart 2000, p. 2.

⁴¹ To be invoked in subsequent sections.

⁴² World Bank, *OD 4.20: Indigenous Peoples* (September 1991), para 3, as replaced by *OP 4.10: Indigenous Peoples* (January 2005).

⁴³ Marks 2003, p. 13.

⁴⁴ Wallace-Bruce 1985, pp. 575–602.

⁴⁵ Williams 2003, pp. 177 et seq. In Daes 1996b, para 13, Daes offers a good example whereby despite being part of the British Empire, 'advanced' South Africa was entrusted with a mandate under Art. 22 of the Covenant of the League of Nations over 'indigenous' Namibia.

⁴⁶ Fitzpatrick 2001, p. 12.

primitive indigenous populations by enlightening their lives with the ‘blessings of civilization’.⁴⁷

Challenges of Conceptualizing indigenouness Beyond the Americas and Australasia

The persisting reluctance, if not opposition, by some African and Asian states to acknowledge the existence of distinct categories of indigenous peoples within national boundaries can partially be explained by the historically chauvinistic connotations attached to that status as a result of their colonial legacy.⁴⁸ For many states, the concept of indigenous populations is associated with colonialism and aggression by foreign nations. Early European encounter with inhabitants of Africa, Asia and America ‘did not begin with conquest and subordination, but with international relations either on the basis of equality or even of European subordination’.⁴⁹ Subsequent conquest and control over natives’ lands culminated into the establishment of clear legal, institutional and social differentiations between original inhabitants of conquered territories on the one hand and the colonizers on the other hand. Within the colonies, differing laws and institutions, of either European or ‘indigenous’ origin, were established to regulate socio-political and economic interactions.⁵⁰ A product of the ‘divide and rule’ political strategy, the institutionalization of differences—not only between the colonizers and the colonized but also between diverse local groups—was also a tool used by colonial administrations in their efforts to assert effective control over the colonies.⁵¹ The colonial ‘modernization project’,⁵² was motivated by the idea that it was necessary to emancipate native peoples from their indigenouness. This goal is clearly stated in Article 22 of the Covenant of the League of Nations which uses ‘peoples not yet able to stand for themselves’ and ‘indigenous population’ interchangeably.

The historical particularities of the colonization and decolonization processes in Americas and Australasia, on the one hand, and Africa, Asia and the Pacific, on the other hand, account for the differing conceptualizations of indigenouness. European effective control over many Africa and Asian territories took place at the time when Latin American former Spanish and Portuguese colonies had gained or were in the process of gaining their independence.⁵³ In the same vein Canada, Australia and New Zealand, following the United States example, were progressively

⁴⁷ The terminology is borrowed from Art. VI of the General Act of the Berlin Conference, para 1. For further details, see Fisch 1992, pp. 33 et seq.

⁴⁸ ACHPR and IWGIA 2005, pp. 45–50 and 86.

⁴⁹ Fisch 1992, p. 20.

⁵⁰ Ibid. See also Kouevi 2000, p. 178; Anghie 1999, pp. 1–80.

⁵¹ Ngugi 2002, pp. 321–322.

⁵² Phrase borrowed from Ngugi 2002, p. 321.

⁵³ On this, see Burger 1987, pp. 34–43.

emancipating themselves from direct British rule.⁵⁴ The achievement of independence in these cases resulted into a transfer of political control to European settlers and/or some 'modernized', or 'Europeanized' local elites. Colonial and successor state policies to assimilate all prior occupants of the lands into the newly crafted national identities were unsuccessful. Excluded politically and socio-economically, native populations suffered many losses but remained strongly determined to preserve their own identity. Regarded as 'outcasts of civilization', they initiated their struggle for recognition of their differential identity at a time when native populations of Asia, Africa and the Pacific—together labelled 'indigenous' by their colonizing powers—were still struggling to break the chains of their subjugation.⁵⁵

Contrary to the situation described above, the decolonization movements in Asia, Africa and the Pacific throughout the twentieth century resulted in the transfer of power to elites from 'indigenous' peoples within the meaning attributable to the concept in the pre-global indigenous movement era.⁵⁶ As most states reverted to sovereignty under reconfigured territorial structures resulting from the arbitrary drawing of colonial boundaries, many postcolonial African and Asian states tried to maintain a difficult equilibrium between the colonially inherited modernization-development paths and respect for pre-colonial institutional and legal structures.⁵⁷ The relative success or failure can be attributed to postcolonial policies and leadership, but also to the level of suppression of pre-existing social structures by the colonial rule. Thus, in many countries in Africa, 'modern' state structures functioned alongside traditional or customary institutions also referred to as 'indigenous'.⁵⁸

The revival of 'indigenous political structures' during and after the colonial era adds to the conceptual difficulty to differentiate them with indigenous claims under the contemporary indigenous movement.⁵⁹ The rise of the global indigenous movement since the 1970s and 1980s, on relatively different philosophical grounds than the concepts of traditional chiefdoms, enlisted participation from all over the world, including Asia, Africa, the Americas, the Pacific and some European countries.⁶⁰ Thus, it has been suggested that in the African and Asian contexts, 'indigenous' should be understood relationally.⁶¹ In these regions, most groups view themselves as indigenous *vis-à-vis* European settlers. There is also a popularized belief that hunter-gatherers and former

⁵⁴ Sanders 2003, pp. 56–68.

⁵⁵ Ibid. See also Wiessner 1999, pp. 57–128; Wallace-Bruce 1985, pp. 575–602.

⁵⁶ Even as late as in 1992, this point was made by Alfonso Martinez 1992, para 208.

⁵⁷ Wallace-Bruce 1985, pp. 587–588.

⁵⁸ Hence, writings such as in Vaughan 2005.

⁵⁹ See Englebert 2005, pp. 33 et seq.

⁶⁰ On general works on participant groups in the global indigenous movement, see, e.g. Burger 1987; Thornberry 2002a; Niezen 2003; Anaya 2004.

⁶¹ Kenrick and Lewis 2004, p. 6.

hunter-gatherers were the first occupants of the land.⁶² Similarly, contextual and differing uses of ‘indigenous’—or other related concepts such as ‘scheduled tribes’—during and after colonization of some Asian countries testify to the ‘relational’ conceptualization attached thereto.⁶³ In the end, the proposed identification criteria for indigenouness are ill-suited in some African and Asian contexts. The generalized discourses on the sources of indigeneity are far from convincing. Analyses of the indigenous rights phenomenon need to keep in mind the various historical evolutions of the concept and the pragmatic considerations that dictated the fluctuating meanings attached thereto over the time. Crystallization of new meanings attached to indigenouness is always confronted with the reality of an ‘indigenous’ concept which, etymologically, specifically refers to primary occupation of a given territory.

2.2.3.3 Post-Martinez Cobo Reconceptualization of Indigenouness

Some literature finds inclusiveness in the Martinez Cobo definition of the ‘indigenous’ through reference to ‘pre-invasion’—in addition to ‘pre-colonial’—societies, thereby extending the coverage of his proposed definition beyond the so-called ‘blue water’ or ‘salt water’ theory.⁶⁴ The later theory was developed to counter suggestions, made by some colonial powers faced with pressure from the decolonization movement, to extend the applicability of Chapter XI of the UN Charter on non-self-governing territories to indigenous populations within independent states.⁶⁵ It restricted the applicability of the relevant procedures to ‘non-self-governing territories separated by “blue water” from the metropolitan territory of the administering power’.⁶⁶ It has rightly been argued that ‘because of the ambiguity caused by the salt water theory, most African and Asian countries deny the existence of indigenous peoples within their territories or have, at best, remained ambivalent about it’.⁶⁷ Nonetheless, without dwelling into the contradictory critics over the ‘underinclusive’ or ‘overinclusive’ characters of the Martinez Cobo’s definition,⁶⁸ one should keep in sight the acknowledgment by the Special Rapporteur that Africa and most of Asia were not covered by his ‘working definition’, which he presented as being of a purely provisional nature.⁶⁹ He even

⁶² Ibid.

⁶³ Kingsbury 1998, pp. 426–428.

⁶⁴ Lehmann 2004, pp. 94–98.

⁶⁵ Anaya et al. 2006, p. 2 note 3.

⁶⁶ Quentin-Baxter 1999, p. 89; Kingsbury 1998, p. 434.

⁶⁷ Oguamanam 2004, pp. 370–387.

⁶⁸ Lehmann 2004, p. 97 note 46.

⁶⁹ Martinez Cobo 1987, paras 19–20 and 366. Para 19 makes it clear that without having global coverage, the study was merely limited to 37 countries.

suggested that a corresponding study be 'undertaken to cover African countries, perhaps with a slightly modified working definition'.⁷⁰

Furthermore, the *problématique* of applicability of the 'indigenous peoples' category to Africa and Asia within the UN circles reveals personal imprints of Special Rapporteurs. Taking up on Martinez Cobo's work in the area, the Special Rapporteur Alfonso Martinez put forward what he considered as reasons pleading against recognition of exclusive indigenous claims in African and Asian countries. In his 1999 *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations*, he espoused the position commonly held by a number of states from both continents. He concurred that indigenous claims by some groups living within their artificially drawn boundaries provide an additional ground for 'balkanization' of those states for which they have 'not only the right but also the duty to preserve their fragile territorial integrity'.⁷¹ Accordingly, he sceptically concluded that relevant claims put forward in African or Asian states 'should be analysed in other forums of the United Nations than those that are currently concerned with the problems of indigenous peoples; in particular in the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities'.⁷²

Partly, due to practical considerations imposing indigenouness as a living reality, this proposition has often been so easily sidelined without substantive discussions on its merits. Alfonso Martinez remarks raise two major concerns on the applicability of indigenouness beyond the Americas and Australasia: the suitability of claims for special legal protection on the ground of aboriginality and the relevant forum for such or related claims. This cautious approach to indigenouness has been espoused by a number of anthropological studies which, while acknowledging the need for protection of marginalized and dispossessed groups, underscored states' 'legitimate grounds for emphasizing the characteristics, interests and rights shared by *all* citizens, rather than dividing them into indigenous and non-indigenous peoples'.⁷³

Numerous demands by groups claiming to be indigenous, including in Africa and Asia, are still formulated using the radical autochthonous-settler or colonizers-colonized dichotomizations borrowed from the American and Australasian contexts.⁷⁴ Despite constantly shifting emphasis thereon, indigenous rights advocates still use first occupancy of ancestral lands as a ground for special protection. Unless one adheres to the post-modern line of thinking whereby the existence of current Westphalian states is a passing reality, advocacy for an absolute right to recognition of all forms of identity claims seems to be a wishful, at times utopian,

⁷⁰ Ibid., para 20.

⁷¹ Alfonso Martinez 1999, para 89.

⁷² Ibid., para 90.

⁷³ Bowen 2000, p. 14.

⁷⁴ The different formulations of general demands by indigenous groups, including in Africa and Asia, are elaborated in, among others, Niezen 2003, pp. 145 et seq.; Anaya 2004, pp. 97 et seq.

thinking since the realities in some corners of the globe require numerous compromises. In fact, the challenges to official recognition of a multiplicity of identities are not only faced by Africa and parts of Asia where state formation and bridging national identities are still far from accomplished processes, but also by countries from other continents. Even in the most liberal, stable and democratic polities, legal and institutional recognition of national diverse identities remains subjected to several limitations.⁷⁵ Hence, the arguments in favour of recognition of diversity within national realms find their limits in the fact that some forms of affirmation of identities might translate into threats to the very existence of states or harmonious co-existence of various ethno-cultural groups.

Furthermore, claims for special protection on grounds of aboriginality/ autochthony in the Asian and African contexts remain in many respects irrelevant if one considers the diverse ethnic or tribal identities engulfed in most, if not all, states on both continents and the artificial nature of their formation.⁷⁶ Conceptualization of indigenouness beyond its traditional linkage to European expansion remains a dubious exercise, as historical and anthropological data are not yet settled on who were the first inhabitants of particular African or Asian territories.⁷⁷ Adherence to Darwinist evolution theories in social sciences coupled with constant historical migrations in all directions for aeons annihilates any claims instituting some groups as autochthonous and others as settlers, since in the majority of cases settlement of all groups predates the formation of the current political entities.⁷⁸ Moreover, there is no objective historical period likely to constitute a starting point from which 'aboriginal' and 'settler' statuses might be determined. This being the case, autochthony, strictly construed, appears ill suited as a ground for claiming special protection in these particular contexts.

Given the controversies attached to claims of first occupancy of territories beyond the context of European expansion and colonization, the legitimate grievances of marginalized, dispossessed and victimized groups would, ideally, fit into other broader categorization or fora than indigenouness. Despite differences in terms of substantive rights, UN Special Rapporteur Alfonso Martinez suggested that the minority rights framework—to be examined subsequently—might have been less contested than the indigenous.⁷⁹ However, in more than one African country, the minority rights framework encounters similar problems as indigenouness, since the multiplicity of ethnicities in many countries does not fit into the dichotomous imagery of 'mainstream dominant majority' versus 'marginalized

⁷⁵ See Kingsbury 1998, pp. 424–426. Tully 1995, offers an interesting treatise on the *problématique* of constitutional recognition of diverse identity.

⁷⁶ Ngugi 2002, pp. 321–326; Anghie 1999, pp. 1–80. For a related reasoning, see Perrin 1995.

⁷⁷ In this respect, the work of C.A. Diop is important in illustrating the complexity of claiming aboriginality on a continent believed to be the cradle of civilization and humanity, Diop 1974, and Diop 1987.

⁷⁸ Ibid.

⁷⁹ Alfonso Martínez 1999, paras 90–91.

minority groups'.⁸⁰ Thus, despite the existence of some cases of political and, in some instances, constitutional special protection of some groups, crystallization of the minority language is still widely avoided in Africa.

Academic debates have put forward alternative avenues or called for a suitable redefinition of the international 'indigenous' movement in order to accommodate the diverse groups and claims subsumed in this identity. Alternative terminological uses such as tribes, ethnicities or 'local communities' have been explored, but they have proved so far unconvincingly able to capture the reality contemporary indigenouness represents. They also fall short of entirely capturing the diverse reality of the current global indigenous movement.⁸¹ Overall, any of these proposed alternative terminologies is somehow used in different parts of the world to conceptualize or institutionalize other realities than what is subsumed in the current global indigenous movement. Regardless of this complexity, Alfonso Martinez' proposition for exclusion of the applicability of indigenouness to Africa and Asia sounds rather as a dissenting voice in supranational spheres where pragmatic considerations prime over purely semantic and definitional imperatives.

Arguments in favour of inclusion of Africa and Asia into the global indigenous movement build on pragmatic considerations. Numerous groups from Africa and Asia have, *de facto*, been internationally recognized as indigenous peoples, notwithstanding the hurdles faced by a search for common denominators. Within UN circles, one of the most vocal advocates for inclusion was former UN Special Rapporteur and Chairperson of the WGIP Erica-Irene Daes. While acknowledging the difficulty involved in finding a comprehensive definition of indigenous peoples, the Special Rapporteur proceeded with an analysis of the evolutionary construction of 'indigenous' and 'tribal' in international law. She built on existing theory and practice, namely ILO Conventions 107 and 169, the work of various intergovernmental institutions as well as the conclusions of her predecessor's (Martinez Cobo) report, with a view of formulating generally applicable identification criteria. The Special Rapporteur singled out distinctiveness and self-identification as two widely accepted criteria in international law and relevant scholarship in the assessment of indigenouness.⁸² Out of these rather general criteria less likely to allow for a differentiation between 'indigenous' and other related concepts such as minorities, the Special Rapporteur drew four sets of factors considered as relevant in understanding the former concept:

- (a) priority in time, with respect to the occupation and use of a specific territory;
- (b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and

⁸⁰ Slimane 2003; Blanton et al. 2001; ECOSOC 2003.

⁸¹ For a related discussion, see Kingsbury 1998, pp. 450–453.

⁸² Daes 1996b, para 30.

- (d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.⁸³

Paragraph 70 of the report clearly shows that the Special Rapporteur remained prudent by specifying that these factors cannot be considered as constituting ‘an inclusive or comprehensive definition’. The usefulness of these factors was to provide general guidance to ‘reasonable decision-making in practice’. For that purpose, it is suggested that these factors ‘may be present, to a greater or lesser degree, in different regions and in different national and local contexts’.⁸⁴ In a later contribution enriched by her personal international experience in the field—jointly authored with Eide, another prominent figure in framing the current minority and indigenous rights architecture—she clearly acknowledges the existence of instances where groups from Africa and Asia resort to indigenous protection in contexts where the above criteria are not fully met.⁸⁵ In addition to being influenced by ILO flexible and inclusive approaches to its ‘indigenous and tribal peoples’ categories, Daes’ generous attitude towards recognition of indigenous claims was also motivated by the growing indigenous claims beyond the Americas and Australasia and relevant practice of international institutions.

From the end of the 1980s onwards, international bodies such as the UNW-GIP,⁸⁶ the World Bank,⁸⁷ UNESCO,⁸⁸ UNDP,⁸⁹ UNICEF,⁹⁰ UNEP,⁹¹ and so forth, became active in matters relating to indigenous peoples. The increasing flexibility of the framework led to a progressive disconnection of ‘indigeness’ from a context of ‘conquest or colonization’, or ‘the establishment of present states borders’. Shared experiences of ‘subjugation, marginalization, dispossession, exclusion or discrimination’,⁹² came to, more or less, replace the invocation of these contexts, even if they remained an integral part of indigenous rights discourses.

In dynamic discourses on indigenous rights, priority in time is still an important ingredient. Yet, the radical language of aboriginality on ‘ancestral territories’ since

⁸³ Ibid., para 69.

⁸⁴ Ibid.

⁸⁵ Eide and Daes 2000, para 37.

⁸⁶ Dunbar-Ortiz 2006, p. 70; Kingsbury 1998, p. 433 note 73.

⁸⁷ See Thornberry 2002a, pp. 28–29. OD 4.20 described indigenous peoples as ‘social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process’. Due to subsequent definitional developments highlighted above, the World Bank followed the trend by modifying its directives on indigenous populations. OP 4.10 used a more flexible language to describe indigenous peoples.

⁸⁸ United Nations Educational, Cultural and Scientific Organization. See (UN)GA 1996, paras 28, 52, 79, 100–101.

⁸⁹ Ibid., paras 56, 84–85, 103. UNDP is the United Nations Development Programme.

⁹⁰ United Nations Children’s Fund (UNICEF) 2003.

⁹¹ UN Doc. A/51/493, paras 44, 74, 112–113. UNEP stands for the United Nations Environment Programme.

⁹² Daes 1996b, para 70(d).

'time immemorial' is progressively giving way to softened formula such as 'occupation and use of a specific territory'. The flexibility underpinning the quest for common denominators is reflected by the merely illustrative enumeration of possible elements of distinctiveness, which include 'aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions'.⁹³ The avoidance of exhaustiveness and precision in formulating these criteria reflects an adherence to what has been dubbed a 'constructivist', 'structural' or 'relational' approach to indigeness in opposition to the strict tendencies of positivistic considerations.⁹⁴

The pragmatism of constructivist approaches to indigeness—resulting into a disconnection of the term from its semantic roots and initial meaning—appears to be the foundational premise upon which 'self-identified' indigenous peoples from Africa, Asia and some areas of the Pacific are included into the global indigenous agendas. International institutions, organizations and the global 'civil society' are instrumental in 'mainstreaming' this reconfigured conception of the indigenous. These various actors have coalesced in promoting recognition and protection of groups claiming indigeness beyond the traditional homelands of the movement. Such promotion is mainly channelled through assistance to claimant groups, their (purported) representatives or through cooperation and development programs. Constructivist re-conceptualization of indigeness has led Wiessner—grounding mainly on the work by Daes and Kingsbury's propositions—to propose a tentative and revisited definition of indigenous peoples as:

[P]eoples 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 hand of which they have suffered, in the past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.⁹⁵

Somehow, the generality and flexibility of this proposed definition capture most of the reality subsumed in the current indigenous claims and attributes. Yet, subsequent analyses will show that they still fail to single out distinctive features of indigeness, mostly in those inherently multicultural societies where several, if not all, national communities can rightly claim to meet most, if not all, (objective) requirements in the definition.

⁹³ Ibid., para 70(b).

⁹⁴ Kingsbury 1998, pp. 414–415; see also Hodgson 2002, p. 1042; Saugestad 2001, pp. 52–54.

⁹⁵ Wiessner 1999, p. 115.

2.3 Indigenousness and Related Concepts

2.3.1 *Revisiting the Differentiation between Indigenousness and Minority Status*

The formulation and development of legal norms protecting minorities and indigenous peoples can hardly be rightly captured without taking into consideration their background and respective contexts of their formulation. While the need for protection of minorities was initially felt in the context of state formation in Europe, indigenous peoples rights were formulated in the Americas and Australasia out of the struggle for preservation of distinctive cultural features of populations subjugated by European settlement on these continents.⁹⁶ While, from a social science perspective, the development of indigenous peoples' rights is regarded as one among many other manifestations of distinctive ethno-cultural identities,⁹⁷ international (human rights) law currently insists on the differences in legal protection sought under either concept, in spite of possible overlaps.⁹⁸ Legal theory and practice establishes a strict contrast between indigenous peoples' protection and minority rights, the most salient aspect being the rights sought under either category. Some analyses tend to consider indigenous peoples' rights as a form of specific protection under minority rights, and successful claims from groups engaged in the global indigenous movement have been adjudicated under Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR) protecting minorities.⁹⁹ Other analysts and actors, including some indigenous representatives and advocates, insist on the specificity of the indigenous legal protection.¹⁰⁰ Using minority rights provisions, the jurisprudence of the Human Rights Committee contains cases of accommodation of claims for special protection of distinctive identities of groups considered as indigenous.¹⁰¹ In justifying

⁹⁶ For this reason, it has been argued that minority rights protection is Eurocentric, while indigenous rights have an America-centric character. See Eide and Daes 2000, para 25.

⁹⁷ Ibid. See also Verdery 1994, pp. 33–58.

⁹⁸ Eide 1993, para 40; see also Meijknecht 2001, pp. 65 et seq.; Donders 2002, pp. 163–225.

⁹⁹ They include *Lovelace v. Canada*, Communication No. 24/1977, UN GOAR, 36th Sess., Supp. No. 40, at 166, UN Doc. A/36/40, Annex 18 (1977), 30 July 1981; *Kitok v. Sweden*, Communication No. 197/1985, UN GOAR, 43rd Sess., Supp. No. 40, at 207, UN Doc. A/43/40, Annex 7 (G) (1988), 27 July 1988; *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992, 26 October 1994; *Chief Bernard Ominayak of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN GOAR, 45th Sess., Supp. No. 40, Vol. 2, at 1, UN Doc. A/45/40, Annex 9 (A) (1990), 26 March 1990; *Sara et al. v. Finland*, Communication No. 431/1990, UN Doc. CCPR/C/50/D/431/1990 (1994); *R. L. et al. [names deleted] v. Canada*, Communication No. 358/1989, UN Doc. CCPR/C/43/D/358/1989 (1990); *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000); *X. v. Australia*, Communication No. 557/1993, UN Doc. CCPR/C/57/D/557/1993 (1996).

¹⁰⁰ See generally Thornberry 1993.

¹⁰¹ Besides the cases referred to above, see also HRC 1994.

the use of minority rights by (claimant) indigenous groups, Rehman suggests that '[i]ndigenous peoples, in general parlance and in most ways epitomize characteristically the minority syndrome'.¹⁰² However, indigenous representatives insist on being considered as 'more than minorities'.¹⁰³

The development of different, even though overlapping, legal frameworks protecting minorities and indigenous peoples rights—with the former type of protection providing for essentially individual rights, while the latter is centred on group rights—does not solve the challenges attached to protecting specific groups living in inherently multiethnic societies. Attempts to establishing clear distinction between indigenous peoples and minorities under international law have resulted into ambiguous discourses. In the end, the differentiation remains reliant on the more subjective self-identification criteria than any other objective factor.¹⁰⁴

The evolution of parallel and crosscutting normative, jurisprudential and theoretical framework leaves intact the core question of setting up criteria that might lay the ground for objective determination of the form of protection needed by any group, beyond self-identification. Hence, references to: (1) numerical inferiority; (2) social isolation, exclusion or persistent discrimination; (3) cultural, linguistic or religious distinctiveness; (4) territoriality; and (5) aboriginality, as the characteristic features of minorities and/or indigenous peoples are still subject to multiple qualifications and relativization.¹⁰⁵

The difficulty in singling out distinctive features of indigenousness beyond their minority status remains unsolved in legal scholarship and lays the ground for questioning the relevance of indigenous identification in some countries. It also reinforces the discretionary power of national authorities in determining whether to recognize or not recognize domestic indigenous claims.¹⁰⁶ In the African, Asian and Pacific contexts, the various proposed definitions or identification criteria for indigenousness and minorities fall short of clarity in setting differentiation criteria between these legal categories.¹⁰⁷

First, indigenous claimants' priority in time on ancestral territories is not an established and undisputed historical fact. While it is generally believed that most hunter-gatherers groups, many of which currently claim indigenousness, are the first inhabitants of the territories on which they live,¹⁰⁸ the same cannot be asserted by the numerous pastoralists that are increasingly enlisting in the global

¹⁰² Rehman 1998, p. 230.

¹⁰³ Thornberry 2002b, p. 517.

¹⁰⁴ ILO Convention No. 169 specifically provides in Art. 1(2) that '[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

¹⁰⁵ See Eide and Daes 2000, paras 28–50.

¹⁰⁶ As reflected by Alfonso Martinez doubts on applicability of indigenousness in Africa and Asia. See also Thornberry 2002a, pp. 37–40.

¹⁰⁷ On the said criteria, see Eide and Daes 2000, paras 33–50.

¹⁰⁸ For more, see Panter-Brick et al. 2001.

indigenous movement.¹⁰⁹ In either case, historical, sociological and anthropological studies have described complex migratory waves and mingling between different groups throughout centuries—or millennia—whereby asserting priority in time and continuous occupation of specific territories by specific groups is a difficult, at times hazardous, task.¹¹⁰

Second, in many parts of Africa (and arguably in parts of Asia) reliance on, and attachment to, ancestral lands for survival is not a distinctive feature of the sole claimant indigenous peoples. It is rather an attribute of other impoverished, rural societal groupings not necessarily identifying with the emerging global indigenous movement. In such contexts where the salient attributes of indigenouness are not exclusive features of a limited number of groups, the differentiation between minorities and indigenous peoples remains reliant on subjective rather than any cognizable objective criteria.¹¹¹ Several communities in African countries, mainly in rural areas, are still organized under such institutions as clans, tribes/ethnicities or chiefdoms. They are also characterized by an attachment to traditionally inherited and communally owned lands.¹¹²

Finally, the remaining criteria, namely subordination and cultural distinctiveness are even less decisive in establishing a distinction between indigenous peoples and minorities in these intrinsically heterogeneous settings, whereby struggles for power or political participation translate into marginalization of numerous groups.¹¹³

It is also relevant to wonder whether—grounding on the often-mentioned situational characteristics of either group—the status as ‘minorities’ or ‘indigenous peoples’ disappears once the claimed rights are realized. By crossing the boundaries delineated by the ‘salt water theory’, indigenouness has posed new challenges. Without any objective and generally applicable determination factors except situational characteristics of claimant indigenous groups, self-definition remains the sole source of indigeneity.¹¹⁴ As they get increasingly aware of the comparative advantages of invoking indigenous protection, ‘some minority groups prefer to seek redress as indigenous peoples in order to attract global attention, especially in the battle for resource control, environmental accountability and political advantage’.¹¹⁵ It would not be an overstatement to conclude that, while providing for some general indications as to who qualifies for minority and/or indigenous rights protection, the existing definitions or identification criteria are becoming less suitable in establishing a differentiation between both concepts under the current landscape of multiplicity of claims, beyond the initial landscapes

¹⁰⁹ Igoe 2006.

¹¹⁰ Bowen 2000, pp. 13 et seq.

¹¹¹ Meijknecht 2001, pp. 77 et seq.; Kingsbury 1998, pp. 453–455.

¹¹² Coldham 1985.

¹¹³ See Oguamanam 2004, p. 385.

¹¹⁴ Ibid., pp. 369–372.

¹¹⁵ Ibid., p. 386.

of their formulations.¹¹⁶ In the light of the increasing irrelevance of objective criteria in differentiating minorities and indigenous peoples and given the fact that international legal practice allows for indigenous peoples to invoke minority rights provisions in international instruments, it remains attractive for any group to invoke the far-reaching indigenous rights protection. As argued in sections below, indigenusness appears to be a complex concept not easy to dissociate from the minority status under international law, but also from other related forms of affirmation of distinctive identities.

2.3.2 Indigenusness, Multiculturalism and Other Forms of Cultural Relativism

The rise and consolidation of the global indigenous movement are contemporaneous to other varied forms of affirmation of differential identities. The post Cold War era has witnessed an overemphasis on ‘multiculturalism’, ‘pluralism’, ‘peoples/group rights’ and calls for ‘intercultural dialogues’ and ‘tolerance’.¹¹⁷ Whether there is substance to them or they are mere slogans, these concepts are part of the neo-liberal political thought and are championed by the ever-growing global ‘civil society’ advocating a respect for different identities and their participation in matters affecting their lives.¹¹⁸ The meaning and nuances carried by each of these and related concepts, as well as their inherent practical limitations beyond rhetorical proclamations, are subject to rich and fashionable post-Cold War literary debates.¹¹⁹ In their most radical forms, these debates culminate into a questioning of the very essence of the Westphalian state by postmodernist scholarship.¹²⁰

Terminological variations in referring to these differential identities vary depending on disciplinary perspectives. Indigenous claims are thus one among other expressions of differential identities by ‘ethno-cultural’ and other minorities.¹²¹ Most identity-based grievances are formulated against the state due to a perceived lack of political and socio-economic participation by marginalized ethno-cultural and other identities and due to the assimilative trends in some processes of nation building. Use of ‘ethno-cultural and other minorities/identities’ here refers to a wide range of groups—including national, ethnic, religious,

¹¹⁶ Compare and contrast leading definitions on minority (Capotorti, Eide, and Deschênes) and indigenous (Martinez Cobo and Daes) statuses in Capotorti 1979, para 568; Deschênes 1985, para 181; Eide 1993, para 29; Martinez Cobo 1987, para 379; Daes 1996b, para 69.

¹¹⁷ For relevant references, see Tully 1995, pp. 1 et seq.; Kingsbury 2001, pp. 98–100; Eide 2002, pp. 47–71; Brinkel 2006, pp. 73–88.

¹¹⁸ Ibid.

¹¹⁹ See Dore and Carper 2002; Soutphommasane 2005.

¹²⁰ For a discussion thereon and relevant sources, see Tully 1995, pp. 8–9, 44–47.

¹²¹ Terminology borrowed from Kymlicka 2001, p. 1.

linguistic or sexual minorities, racial or immigrant groups—currently claiming special protection (as individuals and/or collectives). The enumeration goes beyond the narrowness of the listing in relevant international or regional minority rights instruments.¹²² Due to spatial and temporal factors at the source of contemporary international minority rights standards, the primary focus of the protection was on members of ‘national or ethnic, religious and linguistic’ groups. There is a relatively rich scholarship theorizing over international legal protection of the so-called ‘historic minorities’ and the correlated exclusion of ‘new minorities’.¹²³ As a result, minority rights framework does not extend legal protection to some groups claiming minority status and, by providing for essentially individual rights, it only offers a protection *par ricochet* to the group as such under the ‘in community with other members’ formula.

The ‘multiculturalism–pluralism’ discourse somehow represents a shift from previously prevailing integrationist, assimilationist, separatist or paternalist approaches and responses to identity challenges in many countries prior to the development of the relevant normative and theoretical framework.¹²⁴ Despite being challenged for its linkage to the ‘narrowness, individualism and atomistic nature of liberalism’, the discourse optimistically and ambitiously advocates national recognition of various cognizable identities beyond existing minority and indigenous peoples’ rights legal confines.¹²⁵ The current international legal framework on minority and indigenous peoples’ rights is far from reflecting the entire complexity of the struggle for multicultural/pluralist societies. It fails to capture all identity-based grievances expressed by various ethno-cultural minorities. While some national constitutional orders or legal systems have been praised for their achievements in trying to accommodate the diverse national identities including indigenous peoples,¹²⁶ domestication of multiculturalism remains in many places

¹²² Besides Art. 27 ICCPR, Art 30 CRC, and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minority Rights Declaration), adopted by GA Res. 47/135 of 18 December 1992, minority rights are specifically protected under the European Regional mechanism, among others: Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (future organization on Security and Cooperation in Europe -OSCE), 29 June 1990; Council of Europe Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995, CETS No. 157; and European Charter on Regional and Minority Languages, Strasbourg, 5 November 1992, CETS No. 148. On groups claiming protection, see also Kymlicka and Norman 2000, p. 2; Letschert 2005, pp. 27 et seq.

¹²³ In this respect, see Leuprecht 2001, pp. 120–126.

¹²⁴ McGoldrick 2005, p. 31.

¹²⁵ Ibid., p. 37; UNDP 2004, pp. 1–12.

¹²⁶ Often mentioned are Australia, New Zealand, Canada, Scandinavian countries and—to some extent—the USA. See Hocking and Hocking 1999. For South Africa, see Lehmann 2004, pp. 86–118. Other examples include the untested provisions of the far-reaching Art. 39(5) of the 1994 Ethiopian Constitution whereby ‘Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession’. See Weller 2005, p. 16 and more extensively Selassie 2003, pp. 61–68.

not more than an aspiration since formal adherence to noble ideals is not generally followed by concrete action. Celebration of national or societal pluralism is increasingly fashionable among some anthropologists, sociologists and mostly political philosophers.¹²⁷ Yet, translation of their positive prescriptions into reality is still confronted by insuperable challenges. Whether expressed under radical ethno-nationalist—at times secessionist—armed movements or through other conciliatory, legal means, demands for recognition of distinctive identities abound. Many groups throughout the various corners of the globe are increasingly raising their voices to demand protection of their cultural—but also civil, political, economic and social—rights to be enjoyed individually or collectively.¹²⁸

The inherently heterogeneous African and Asian (mostly southeastern Asian) countries are not unique in facing the challenges involved in efforts to bridge identities. Complex constitutional arrangements have been or are being shaped to accommodate identity-based claims for protection of Catalans, Basques, Bretons, Kurds, Quebecois, Roma, Sámi, Scots, Welsh and numerous other groups in western, central and eastern Europe to name but a few examples.¹²⁹ Constitutional and legislative protection can only be successful if they are accompanied by genuine political will. Their success also requires popular endorsement of the importance of protecting the needs and aspirations of differential identities.¹³⁰ In capturing the complex reality of marginality of many ethno-cultural identities within several nation states, some scholarship prefers to use ‘non-dominant’ groups or ‘nationalities’ instead of ‘minorities’.¹³¹ The ‘minority’ concept is perceived as hardly applicable to groups of ‘Indian’ descent in Bolivia and Guatemala or to the status of black populations in apartheid South Africa, which, in reality, constitute(d) the majority.¹³²

Contextual realities explain the multifaceted nature of civil, political, social, economic and cultural demands by the different claimant groups and shape the paths to solutions. Many of these demands are often summed up into the contentious, and somehow still ambiguous, right to self-determination or a perceived emerging ‘right to cultural identity’.¹³³ It is widely suggested that of these other forms of identification, only indigenous peoples enjoy a ‘peoplehood’ status with an unequivocal right to (internal) self-determination under international law in the post-colonial era.¹³⁴ However, some national constitutional arrangements—or mere practice—provide for varied forms of autonomous rule, or other far-reaching

¹²⁷ Besides Kymlicka, see also Taylor et al. 1994; Rajchman 1995; Poole 1999, *Nation and Identity* (Routledge); and Tully 1995.

¹²⁸ See Franck 1993, pp. 3 et seq.

¹²⁹ Skurbaty 2000, pp. 73 et seq.

¹³⁰ UNDP 2004, p.v.

¹³¹ See Burger 1987, p. 11; Thornberry 2002a, pp. 52–55.

¹³² Thornberry 2002a, pp. 52–55.

¹³³ As illustrated by the title of the previously referred to book by Donders, *Towards a Right*.

¹³⁴ See an extensive discussion therein in Kingsbury 2001, pp. 87–100.

identity-based rights, to ethno-cultural identities not necessarily identifying with indigenouness.¹³⁵ As rightly pointed out, '[s]ince the end of the era of Cold War and decolonization, the meaning of self-determination entitlement and its "territorial integrity" counterpart has had to be considered in the context of burgeoning postmodern tribalist secessionism'¹³⁶ The present analysis does not intend to provide an in-depth analysis and categorization of the adopted constitutional or practical arrangements in response to expressions of distinctive identities. It is worth mentioning that a number of the said arrangements consist in awarding claimant groups varied forms of autonomous rule, ranging from (re)institution of traditional chiefdoms on tribal or ethnic lines (as institutionalized, even though apprehensively, in many African countries),¹³⁷ to some forms of constitutional federalism as illustrated by the Canadian, Spanish, UK or South African systems.¹³⁸

The limited scope of the present analysis does not allow for an extensive examination of the entire *problématique* of multiculturalism versus nation building and territorial integrity of states. The question is examined later in the particular context of conceptualization of indigenouness in Africa. For the sake of the present analysis, it is worth noting that the indigenous peoples' movement is an integral part of the emerging movement celebrating multiculturalism. The movement strives for effective legal protection of collective identities and of the rights of increasingly assertive communities. In indigenous rights theory, full realization of participation rights, which are central to claims expressed by other ethno-cultural minorities, are said to be rather a secondary than the main goal. Overall, any comprehensive analysis of indigenouness can hardly ignore the wider context of identity politics. The indigenous rights movement needs to be analysed in the context of other claims for constitutional recognition and accommodation within post-colonial states in which the claimed rights are formulated. The relatively recent internationalization of discourses celebrating multiculturalism still needs further elaboration to be able to answer questions over the nature of distinctive identities and the appropriate forms of protection of these identities.

2.4 Disciplinary and Ideological Perspective on Indigenous Peoples' Rights

2.4.1 Re-thinking Differences Under Various Disciplines

The preceding section described indigenouness as forming part of a wider phenomenon of revival of differential identity claims by ethno-cultural groups.

¹³⁵ Ibid., pp. 78–87; see also Crawford 2001, pp. 7–67; and Alston 2001, pp. 259–293.

¹³⁶ Franck 1993, p. 15.

¹³⁷ Selassie (1992–1993), mostly pp. 12–18; Okafor 2000; Wani 1990–1991, pp. 611–643.

¹³⁸ Tully 1995, pp. 7 et seq.

It posited that these claims were part of a neo-liberal advocacy for multicultural societies. The paradigm shift from early depictions of indigenous peoples as 'passing historic relic'¹³⁹ to be developed and civilized¹⁴⁰ to their characterization as non-dominant identities in need for protection is noticeable in more than one academic discipline.¹⁴¹ Formerly depicted as obstacles in the enterprise of bridging national identities,¹⁴² indigenous peoples are more and more presented—in democratic, multicultural, liberal ideals—as part of the diverse, enriching heritage of humankind to be safeguarded and protected against extinction.¹⁴³ This conceptual shift has been accompanied by flexible approaches to 'peoplehood' under international law. Prior applications of the concept 'peoples' to all inhabitants of specific states as opposed to particular groups within those states are increasingly under review.¹⁴⁴ Henceforth, a complete understanding of the indigenous movement needs to take into consideration the various historical, political, socio-economical and ideological factors.

It should be noted that the plight of indigenous peoples and the global indigenous movement have been subject to a wide range of conceptual and analytical perspectives beyond the sole realm of law. They are also a subject matter of developmental agendas of national and international bodies. They are deeply debated in political philosophy and socio-anthropological studies.¹⁴⁵ Inherently premised on relativistic approaches to social realities, socio-anthropological and philosophical theories have played a tremendous role in furthering protection and recognition of indigenous peoples and their distinctive identities. As rightly noted, 'indigenous rights have been the special legacy of anthropology and cultural relativism, as well as a target of anthropological concern in criticizing modernization trends and development practices'.¹⁴⁶ Despite the inescapable ethnocentric reflections of the 'self' in most analyses of the 'other', these disciplines attempt to relate to individuals and groups, not necessarily as beneficiaries of rights or duties under national or international realms, but by focusing on their socio-cultural patterns.¹⁴⁷ They provide the substance upon which legal considerations over subjects of a specific form of protection—in this case who qualifies as indigenous?—are drawn. Since indigenouness appears for the moment to be the sole international legal regime comprehensively accommodating group rights, many

¹³⁹ Sentence borrowed from a statement by the South African delegation at the UNWGIP in Geneva on 27 July 1999, quoted in ACHPR and IWGIA 2005, p. 45.

¹⁴⁰ Ngugi 2002, pp. 298 et seq.

¹⁴¹ For an overview on this change in perception, see Anaya 2004, pp. 15–34.

¹⁴² As exemplified by the 'assimilationist' ILO Convention No. 107.

¹⁴³ Niezen 2003, pp. 16 et seq.

¹⁴⁴ See, e.g. Klabbers and Lefeber 1993, pp. 39 et seq. See also Alston 2001, pp. 259–293.

¹⁴⁵ See Eversole et al. 2005; Blaser et al. 2004; Thornberry 2002a; and Kuper 2003, pp. 389–402.

¹⁴⁶ Messer 1993, p. 236.

¹⁴⁷ Just 1992.

marginal groups, including from the African continent, have little choice than to endorse the indigenous flag in seeking national and international protection of their collective identity. The limited scope of this inquiry does not allow for an extensive assessment of the relevance of both sociology and anthropology in shaping and legitimizing indigenous claims. While this role remains crucial and even embedded in legal analyses, the following section will examine the relevance of the emerging conceptualizations over ‘victimology’ and ‘human security’ in discourses over indigenous rights protection.

2.4.2 Human Security and Victimological Insights in Discourses on Indigenous Rights

The very focus of this book does not allow for an in-depth examination of the increasingly popular disciplines of victimology or human security, given the multiple dimensions they encompass. The case about indigenous peoples as victims is increasingly made, even if the present analysis will not dig deep into its substance.¹⁴⁸ The final part of the book examines the input of the current human security thinking into the debate over indigenouness in Africa. The present section intends to, summarily, underscore the resonance of both notions on indigenouness. Academic scholarship abounds on the historical roots of the current international legal protection of human beings, mainly after the Second World War and the ensuing East–West and North–South ideological blocs. There is extensive literature on the impact that ideological divisions played in shaping the existing configuration and codification of rights into civil and political versus economic, social, cultural and, to some extent, group rights.¹⁴⁹ While this trilogy in the rights language held much currency for some time in the past, the importance currently attached thereto is much more formal than substantial in the light of the growing affirmation of indivisibility, interconnectedness and interdependence of all human rights.¹⁵⁰ This being the case, ‘victimology’ and ‘human security’, in their most general conceptualization, represent, undoubtedly and retrospectively, additional and complementary analytical perspectives. They somehow break away—mostly

¹⁴⁸ For some relevant reference, see Gilbert 2006. For the specific case of Africa, see Ndahinda 2007.

¹⁴⁹ For a critical appraisal of the roots of the ideological divisions, see Alfredson and Eide 1999; Alston and Steiner 2001; Mutua 1995–1996.

¹⁵⁰ See Proclamation of Teheran, Final Act of the International Conference on Human Rights, 22 April–13 May 1968, UN Doc. A/CONF. 32/41 (1968), p. 3, para 13; Committee on Economic, Social and Cultural Rights 1990, para 8; Vienna Declaration, World Conference on Human Rights (Vienna Declaration), 14–25 June 1993, UN Doc. A/CONF.157/24 (Part I) (1993), p. 20, para 5; *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August–8 September 2001, UN Doc. A/CONF.189/12, 25 January 2002, para 25 of the preamble.

human security—from the traditional dichotomy in mainstream human rights language opposing individuals to states, thereby sidelining other societal groupings and actors. Under its broadest understanding, ‘human security’, as the very words suggest, implies an ambitious and holistic approach to security of human beings. As rightly noted:

The notion of human security is based on the premise that the individual human being is the only irreducible focus for discourse on security. The claims of all other referents (the group, the community, the state, the region, and the globe) derive from the sovereignty of the human individual and the individual's right to dignity in his or her life.¹⁵¹

The notion of security here is disconnected with the narrowest construction of the concept under which external threats to sovereign states constitute the essence of the discourse.¹⁵² Some studies on human security still focus on violent threats to individuals and communities.¹⁵³ However, they acknowledge that this is rather an incomplete dimension of security. The report of the Independent Commission on Human Security has captured the multiple dimensions and objectives sought under a concept, the main concern of which is ‘to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment’.¹⁵⁴ The report goes on stating that:

Human security means protecting fundamental freedoms - freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.¹⁵⁵

Under this conceptualization, the legitimacy of the centrality of states as codified in traditional human rights instruments and channelled under liberal and neoliberal ideals is questioned and challenged. The nature of threats to human security is further expanded beyond the traditional imagery of physical violence and other violations of the so-called ‘fundamental’ human rights, to include hunger, disease and natural disasters.¹⁵⁶ The very nature of this human-centric—by opposition to state-centric—construction of human security necessarily carries a less realistic, but rather overoptimistic longing for a differently structured system revolving around the imperatives of protecting not only physical, but also other

¹⁵¹ MacFarlane and Khong 2006, p. 2.

¹⁵² The criticism of such perception is voiced in UNDP 1994, pp. 22 et seq.

¹⁵³ The 2005 Human Security Report, while adopting a narrow construction of ‘human security’ in its analytical framework, adhered to the ‘broad’ understanding of the concept for ‘pragmatic and methodological reasons’. See Human Security Centre (HSC) 2005, p. viii.

¹⁵⁴ Commission on Human Security (CHS) 2003, p. 4.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid. Some of these might have been part of the human rights architecture for a while, but they have not received the same kind of attention as what is considered as ‘fundamental human rights’.

security dimensions for all mankind.¹⁵⁷ Depending on the schools of thoughts, ‘human security’ is either criticized for being an additional façade conceptual invention devoid of any substantial meaning and practicability, or seen as part of an evolving, genuine paradigm shift, offering an alternative and attractive language in rethinking and furthering protection of human beings beyond currently dominant dogmatic paradigms and constitutional technicalities.¹⁵⁸ Thus, theorizations over human security intersect and, to some extent, incubate the rising voices questioning the current international legal order and the existing hierarchies in the human rights corpus, the universal claims of which—beyond formalism—is contested on the ground of its dominant Western imprint and lack of cultural legitimacy in (some) non-Western societies.¹⁵⁹

This conception of human security goes far beyond the prevailing practice in victimology, which, while filling the gaps in early human rights instruments by providing for victims’ rights, only focuses on certain categories of victims.¹⁶⁰ Early structured conceptualizations in victimology are contemporaneous to the post Second World War development of human rights corpus.¹⁶¹ However, while victims’ rights form an integral part of the normative framework of some domestic legal systems and frequent empirical studies on victimization are conducted mainly in developed countries, the international movement for enactment and legal enforcement of these rights is still very much struggling to assert its authority and gain general acceptance.¹⁶² As rightly noted, victim legislations and assistance programs developed in some countries remain unheard of in many others.

The predominant practice in the field focuses on victims of crimes, the criminal nature of acts or omissions leading to victimization being primarily determined in accordance with national criminal legislations.¹⁶³ While the 1985 UN victims’ rights declaration laconically included abuse of power—to be determined under ‘internationally recognized norms relating to human rights’—among the forms of victimization,¹⁶⁴ this aspect has virtually been ignored in practice and remains to be elaborated.¹⁶⁵ While reaffirming the principles enunciated in the UN victims’ rights declaration, subsequent standards narrowly focused on the sole victims of

¹⁵⁷ See Bruderlein 2001.

¹⁵⁸ Upadhyaya 2005. In trying to contrast ‘human security’ with related notions, the author opens with the following quotation: ‘Concepts come and go, they do not stay around forever. “Human Security” is in; “Humanitarian intervention” is out’.

¹⁵⁹ See, e.g. Mutua 1995–1996; Mutua 2001; Okafor 2005; Gathii 1998.

¹⁶⁰ See generally Lamborn 1987–1988; Von Hentig 1948; Mendelsohn 1963; Mendelsohn 1956; Fattah 2000.

¹⁶¹ On the development of victimology and victims’ rights, see Fattah 2000, pp. 17–46; Meier and Miethe 1993; Bassiouni 2006.

¹⁶² See Van Wilsem et al. 2003; Van Wilsem 2004.

¹⁶³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985, para 1 (hereafter, UN Victims’ Rights Declaration).

¹⁶⁴ See *ibid.*, para 18.

¹⁶⁵ See Lamborn 1987–1988, pp. 59–95.

'gross' violations of international human rights law and 'serious' violations of international humanitarian law, without bridging a link between this new formulation and the concept of 'abuse of power' in the said declaration.¹⁶⁶ In either case, victims of natural disasters and mass victimization have traditionally not been the focus of the dominant, crime-oriented victimological assessment of victimhood as they were left within the realm of humanitarianism.¹⁶⁷ Using social sciences' empirical quantification methods, victimology ambitiously aims at scientifically analysing victimization, in order to formulate varied forms of redress and assistance mechanisms meant to empower victims in coping with their misfortune. Despite the prevailing ambiguities and shortcomings therein, the recent development of binding and non-binding international instruments providing recognizing rights of victims of particular crimes or human rights violations testifies to the rising interest over the place of victims in society. Challenges attached to working out a generally agreed upon definition of 'victims' are relatively trivial, compared to the importance of developing a framework dedicated thereto.¹⁶⁸ In spite of the aforementioned apparent backtracking from the broad formulation over victimization through 'abuse of power' in subsequent instruments, the fact remains that there are instruments, supported by theory that still cover individual and collective forms of victimization through criminal acts and/or abuse of power.¹⁶⁹ This being the case, one may argue that (claimant) indigenous people(s) have been, and in many places still are, subject to individual and collective victimization.¹⁷⁰ Nevertheless, in the light of the central focus of the present analysis on the contested nature of indigeneness in Africa, it will not elaborate on victimization of (claimant) indigenous peoples in Africa.¹⁷¹ Instead, subsequent analyses focus on human security, arguing that the idea might play a role in consolidating legal protection of vulnerable groups that include, but are not limited to, (claimant) indigenous peoples in Africa.

Overall, victimology and human security constitute additional theoretical frameworks in furthering indigenous peoples' individual, and mostly, collective or

¹⁶⁶ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006 (hereafter, Basic Principles and Guidelines).

¹⁶⁷ United Nations Office for Drug Control and Crime Prevention (UNODCCP) 1999, pp. 3 and 99; Lamborn 1987–1988, pp. 17 et seq. For efforts and steps to include these victims, see Statute of the International Criminal Court (adopted in Rome on 17 July 1998, PCNICC/1999/INF/3), mainly Art. 68; De Feyter et al. 2005; Ferstman et al. 2009; Boyle 2006.

¹⁶⁸ The major international instruments and standards on victims' rights include: UN Victims' Rights Declaration; Basic Principles and Guidelines; International Criminal Court Rules of Procedure and Evidence, Rule 85 (elaborating on Art. 68 of the Statute of the International Criminal Court) (hereafter, ICC-RPE-PCNICC/2000/1/Add.1).

¹⁶⁹ See the definition of a victim in the UN Victims' Rights Declaration, paras 1 and 18. Similarly, see Rule 85 of ICC-RPE.

¹⁷⁰ See generally Gilbert 2006.

¹⁷¹ This was examined in a separate publication. Ndahinda 2007, pp. 1–23.

group rights, since any comprehensive protection needs to take into consideration special attributes of the beneficiaries. Both frameworks embody the potential of accommodating the collective dimension of indigenous peoples' claims, despite the subsisting practical operationalization challenges requiring a departure from established individual-centric legal and empirical techniques. For purposes of the present section, it is important to postulate that both victimology and human security and their relative accommodation of collectives are far from guaranteed in a context dominated by liberal individual-centric precepts.

2.4.3 Indigenouness and the 'Individual Versus Group Rights' Debate

The development of international human rights law under the aegis of the United Nations has been hailed as constituting one of the most significant revolutions of the twentieth century.¹⁷² From its post-Second World War inception and development, the human rights movement has been characterized by its universal aspirations. The universality of human rights was formally endorsed with the adoption of the 1948 Universal Declaration of Human Rights. It was affirmed, in an era in which more than half of the countries constituting the current world community of states could not participate in deliberations as they were still under colonial domination.¹⁷³ In the post-colonial world order, positivistic arguments and techniques underlying current international legal theory and practice interpret the formal adherence by the overwhelming majority of states to the major human rights instruments as a manifestation of their universality.¹⁷⁴ As highlighted above, the adopted rights were predominantly individualistic in nature. Enforceability of civil and political rights took precedence over economic, social and cultural rights. Rights listed in the former category were ascribed the 'fundamental' or 'non-derogable' attributes.¹⁷⁵ The more elaborate development of 'group', 'community' or 'collective' rights—depending on positivistic meanings attached to the differentiation—is presented as having emerged in a third phase, after the latter two categories.¹⁷⁶ This justifies the now traditional, but still questioned and ambiguous, division of human rights into three generations.¹⁷⁷ Legalistic and

¹⁷² As famously put by Henkin 1990, p. ix, cited in Mutua 1995–1996, pp. 627–628.

¹⁷³ See Mutua 2001, pp. 201–245; Mutua 1995–1996, pp. 589–657; Meyer 1995–1996; Van der Wal 1990, pp. 83–98.

¹⁷⁴ For relevant analyses, see Anghie 1999, pp. 1–80, and Mutua 1995–1996, pp. 607 et seq.

¹⁷⁵ On universality and relativism in human rights, see Donnelly 1984; Meron 1986; Franck 2001.

¹⁷⁶ See Alston 2001, pp. 259–293. The right to self-determination—a group right—was already codified in the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR).

¹⁷⁷ The conceptualization of generations of rights is often attributed to Vasak 1984.

philosophical debates over the emergence, formulation, content and implementation of group rights and their linkage to relativistic considerations have dominated human rights discourses since the early 1970s.¹⁷⁸ While currently losing momentum in an increasingly globalizing world—which, at least formally, adheres to multiculturalism—these debates are far from settled. From the outset, the importance of the perceived relativist/communitarian school in human rights has been sidelined by the prevailing conception of human rights as ‘rights of individuals held principally against society and the state ... even in most contemporary group oriented societies’.¹⁷⁹ Much discussions focus on the determination of the beneficiaries of collective/group rights and the bearers of obligations (state parties or international solidarity as an obligation rather than a moral commitment).¹⁸⁰ They also insist on judicial challenges including *locus standi* before adjudicatory bodies and ‘justiciability’ of collective/group rights not only nationally, but also before international bodies, even where substantive norms exist.¹⁸¹ Hence, despite some apparent normative advances in the formulation of collective and group rights (mostly through so-called soft law instruments), the long road towards their generalized endorsement and implementation is far from being fully paved. This suggestion derives from an observation of the contemporary context whereby claims for protection of culturally and institutionally different societies struggling for recognition of their collective and/or group rights are contemporaneous to a dynamic of globalization that insists on the ‘sameness’.¹⁸²

Against this backdrop of unremitting normative ambiguities and disputed nature of certain rights—mostly collective/group rights, some of which are formally endorsed in legal instruments—the affirmation of the indivisibility, interconnectedness and interdependence of universal human rights appears to be an ideal yet to be realized and whose contours need to be further elaborated. Subsequent analyses try to examine in substance the nature of claimed collective rights and how far they are likely to be implemented in the African context, taking into consideration the unsettled nature of these debates in international legal theory and practice.

¹⁷⁸ See Vasak and Alston 1982; Kymlicka 1989.

¹⁷⁹ Donnelly 1993, pp. 119–150.

¹⁸⁰ Donnelly 1993, pp. 123 et seq.

¹⁸¹ On the problematic of *locus standi* and ‘justiciability’ of some collective rights, see Donders 2002, pp. 65–105. For some cases before the HRC thereon, see *Chief Bernard Ominayak of the Lubicon Lake Band v. Canada*, para 32.1, whereby the HRC held that the right to self-determination under Art. 1 of the ICC cannot be claimed by groups through the individual complaint procedure instituted in additional protocol 1 to the ICCPR. See also HRC 1994, para 3.1, whereby the court held that: ‘Self-determination is not a right cognizable under the Optional Protocol’.

¹⁸² Howard 1997–1998.

2.5 Concluding Remarks

The present chapter ambitiously attempted, even though succinctly, to place the emergence of global indigenous claims in the wide context of their historical and conceptual formulation. Premised on the idea that the historical contexts under which the indigenous attribute was used is material in examining contemporary indigenous claims and the attitudes of the various actors involved, the present chapter tried to identify three somehow different, even though closely linked, historical constructions of indigenouness. It was argued that the relatively recent extension of the global indigenous movement beyond the boundaries of its birth was not accompanied by clear conceptualization of the applicability of the concept in different landscapes. Existing terminological ambiguities and confusions over indigenouness are grounded on the differing semantic and contextual uses of the 'indigenous' or 'native' attributes. The Berlin Act on the partition of Africa, the ILO Conventions 107 and 169, the Martinez Cobo reports, UN bodies and Special Rapporteurs since Erica-Irene Daes are some of the illustrations of the contextually differing constructions of indigenouness. It results from these instruments that from the time of Berlin Conference throughout the colonial era, all Africans were referred to as indigenous in opposition to European settlers. The Martinez Cobo studies and formulations of definitions within the first three decades following the decolonization of most of Africa did not cover a continent that, according to early conceptions, had passed under 'indigenous' rule. Subsequent conceptions of indigenous peoples coinciding with the internationalization of the indigenous movement through involvement of many international bodies including the UN 'relativized' the linkage of indigenouness to colonization. The linkage to colonization was progressively abandoned as one of the most determinant yardsticks of indigenouness in favour of situational characteristics of marginalized and dispossessed groups.

The chapter further underscored the environment in which indigenous claims are expressed. They have correlations with other developments challenging the previously prevailing perception of nation states as homogeneous and mono-cultural entities. While most of these concepts remain underdeveloped (at least in their application to Africa) and do not necessarily translate into legal protection, multiculturalism/pluralism, minority rights, human security and victims' rights are all concepts or frameworks somehow challenging the prominence of states as the central referents in determining the rights of individuals and other non-state collectivities. In the international legal framework, minority rights protection differs from indigenous peoples' rights. Nonetheless, the chapter discussed the complex and crosscutting nature of both concepts and legal protections. The resonance of this complexity in the African context is further explored in subsequent developments. Part of the jargons of political scientists or philosophers than legal concepts, multiculturalism and pluralism ideals are nonetheless linked to the multifaceted aspirations of ethno-cultural communities, some of which embrace a quest for minority or indigenous legal protections. Similarly, 'victims' rights' and

'human security' are emerging concepts equally focused on providing security and redress to individuals and groups beyond the existing state-centric paradigms. While the scope of this book does not allow for extensive and in-depth analysis of the correlation between each of these concepts and indigenouness in Africa, some of them such as minority rights protection and human security are developed in the following chapters.

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Ndahinda, F.M.

2011, XXII, 393 p., Hardcover

ISBN: 978-90-6704-333-5

A product of T.M.C. Asser Press