Introduction


1 Classical International Law and Development 8
   I The Development Paradigm 8
      A The Development Era 9
      B Disagreements over Development. Theories of ‘Underdevelopment’ 14
   II The Emergence and Evolution of International Development Law – NIEO 17
      A Classical International Development Law 17
      B The Third World: A Reformist Project for the World 19
      C The New International Economic Order (NIEO) 23
   III Ultraliberal Reaction and the Impact of Economic Globalisation 28
      A The NIEO Abandoned and the Neoliberal Model Triumphant 29
      B Law Devalued and the Human Ends of Economics Overlooked 33

2 The New International Development Law 37
   I The Human Ends of Development 38
      A Human Development 38
      B Human Rights and Development: Two Converging Objectives 40
      C States’ Responsibility for Inadequate Development of their Populations 43
      D The Right to Development 45
      E Social Development 48
      F Good Governance: Democracy and Human Rights 49
      G The Contemporary Dominance of the Liberal Model 52
   II Sustainable Development 53

7 Recognition through Rights

In postcolonial and post-Cold War international society, the international law of recognition is not limited to the legal enshrinement of the objective principle of cultural diversity. It also takes the form of individual or collective subjective rights that must be guaranteed within states themselves and which protect and promote the identities of individuals and groups and put an end to stigmatisation and marginalisation. These rights are the essential complement to the right of cultural diversity, just as cultural diversity is essential to any effective exercise of them. The legal guarantee of cultural diversity is in itself not enough to recognise what constitutes the dignity of each individual, nor their specificity, if this is to be more specifically protected. That guarantee must be accompanied by the granting of subjective rights that endow each individual with specific
rights that are binding on their states but that also confer on the most vulnerable groups – minorities, indigenous peoples – the legal means to preserve their identity against the majority groups within states.3

The whole dynamic of subjective rights is therefore at work here and opens up both new perspectives and new difficulties. These are to be examined by distinguishing several categories of rights and I shall try to show how these may be situated within the issue of recognition which casts light on certain less familiar essential questions. First, we can group together the rights bestowed on specific groups or individuals because of their membership of those groups: these are the rights of minorities and of native peoples. We can

1 The recognition of rights has been examined by Honneth and Ricoeur, but they emphasised the rights common to all (eg civil, political, economic and social) and not specific rights. See Axel Honneth, *The Struggle for Recognition* (New York, Polity Press, 1996) 92 ff and Paul Ricoeur, *Parcours de la reconnaissance* (Paris, Gallimard, 2004) 311 ff.

2 Conditional upon the interpretation given above to the principle of cultural diversity, which cannot be invoked in violating fundamental human freedoms and rights, which would again entail the downward spiral of cultural entrapment. See Amartya Sen, *Identity and Violence. The Illusion of Destiny* (New York, Norton, 2006) 103 ff.

3 The underlying objective is also to confer more autonomy on them in the pursuit of their personal or group projects. See Axel Honneth, *La société du mépris. Vers une nouvelle théorie critique* (Paris, La découverte, 2006) 254 and Alain Caillé, *Théorie anti-utilitariste de l’action. Fragments d’une sociologie générale* (Paris, La découverte, 2009) 167–68. This shows that internationally, the issue of the right to be different does not necessarily run counter to human rights but may supplement their objective of autonomy of the individual and therefore of the ‘capabilities’ of human beings.
then identify the rights conferred on individuals regardless of their membership of a group but working on very
different assumptions, and we shall thus look at cultural rights, human rights and women’s rights. All these
categories of rights provide a striking picture of the diversity of practices of recognition and of the way in which
legal instruments respond to aspirations that are both similar and unlike by swinging constantly between the
concern to see the differences of individuals and groups respected and the concern for protecting their equal
dignity.

I Rights of Minorities and Indigenous Peoples

The domination and stigmatisation of certain minority groups is as old as the history of human societies. For
sure, not all minorities and peoples have been stigmatised but even so very many groups have been and still are
for multiple reasons, be it migration, conflict, colonisation for exploitation or settlement, domination, slavery or
forced movement of populations. It is obvious, too, that colonisation, where it occurred, made this phenomenon
worse. Settlement colonies led to a complete denial of the identity of native peoples, while exploitation colonies
often generated ambivalent attitudes, marked by a fascination for the Other and a rejection, but which ultimately
led, all the same, to the marginalisation of colonised peoples and, within those peoples, to discrimination among
ethnic groups (majority or minority groups) to the detriment of others. Precolonial, colonial and postcolonial sit-
uations are inseparable here, for the current claims are the outcome of all this history in which past and present
are inextricably interwoven. Moreover, the newly decolonised states themselves denied multiple identities and
discriminated against minority groups, tribes or ethnic groups within their territory and whom they usually
compelled to merge within the wholly artificial mould of the nation state.

But the phenomenon is a global one and involves all domestic societies, whichever they may be, the situations
being legion and each of them being narrowly dependent on context. And so to speak of ‘minorities’, ‘peoples’
or ‘ethnic groups’ as subjects of recognition is an extremely difficult exercise since each country has its own
minority groups or peoples and it attaches its own historical, legal and cultural references to these descriptions.
Inevitably, the problem has its repercussions on an international level and on the legal instruments that address
these questions when the concepts have to be defined. In truth, the purpose here is not to return to this point at
this stage of our reflection, but to indicate above all why and how there has progressively

2 See Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York, UN
emerged in the international arena a specific process of legal recognition of certain groups or peoples through the attribution of rights that are specific to their members or to themselves as subjects of rights.

A Rights of Minorities

Apart from a few very special cases like the regime of capitulations in Ottoman lands or certain clauses in European treaties designed to protect Christian minorities in Protestant or Catholic lands, it was only very late on, with the end of the First World War, that Euro-American international society recognised the rights of minority groups so as to find a solution to the aspirations of the many European minorities to identity. The famous principle of nationalities, that crystallised these expectations, had emerged in nineteenth-century Europe, especially in the Balkans, with the problem being unresolved. After the 1914–1918 War, several peoples found themselves in the position of national minorities split among several states and this deeply unsatisfactory situation was to accelerate the recognition of certain rights in their favour. In his historic 1918 speech enshrining the principle of nationalities, US President Woodrow Wilson announced a system of freedom and equality for all ‘nationalities’ and seemed to embark upon a true change in international relations in favour of minorities and dominated peoples. He stated that it was henceforth necessary to recognise ‘the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak’.

And yet Wilson’s address had already caused tremendous misunderstanding in that, contrary to what so generous a formula suggested, it was not universally applicable but addressed solely to the minorities of Central and Eastern Europe. Wilson was not speaking about colonised people at all. Accordingly, when, further to this address, the Egyptian nationalist leader Saad Zagloul wanted to voice the aspirations to autonomy of the colonised or semi-colonised peoples in the League of Nations, Great Britain not only scuppered the project but also exiled Saad Zagloul and part of the Egyptian delegation. This was the sorry paradox of an international society that was to begin to recognise the rights of some in Europe while continuing to violate the identity of others outside Europe.

Further to the US President’s address, the exercise of the right of peoples to self-determination and the protection and exercise of certain rights of European minorities began to be implemented with the five ‘Minority Treaties’ of 1919–1920 (Poland; Czechoslovakia; Kingdom of Serbs, Croats

Woodrow Wilson, Address to Congress of 8 January 1918; wwi.lib.byu.edu/index.php/President_Wilson’s_Fourteen_Points.
and Slovenes; Romania and Greece) and the peace treaties of Saint-Germain-en-Laye (1919, Austria), Neuilly (1919, Bulgaria) and Trianon (1919, Hungary). All these treaties were imposed by the victor states on the vanquished states and on the newly formed states of Eastern Europe after the collapse of the great pre-war empires. They were supplemented by several bilateral undertakings, a number of unilateral declarations made by certain states to the League of Nations (Finland, Albania and the three Baltic states) and by the creation in 1919 of a Commission within the League of Nations for the new states and for the protection of minorities. Any member could then bring before the League of Nations or the Permanent Court of International Justice a case of conflict between a minority and a state. The system was even extended to individuals in 1926. In terms of recognition, the system enabled not just the recognition of the identity of the minority as such – since its existence was accepted de facto (but not de jure as a subject of law) – and its right to national and international protection, but also the application of the principle of non-discrimination and the more specific recognition of certain rights granted to its members. These rights usually included the right to use their own language freely (considered as the priority), the free exercise of their religion and the right to specific teaching, especially the right to set up schools and to teach in their mother tongue. All these were part of their culture and to be duly ensured and supervised as part of belonging to a protected minority. Even so, innovative as it was, this set of principles merely instituted an exceptional regime as it was only valid for the minorities situated in the territory of the vanquished or newly formed states. It did not apply to the minorities of the victorious states and to the vanquished minorities, nor, a fortiori, to the other minorities or peoples of the rest of the world. Although the system worked well initially, the 1930s marked its decline with the resurgence of nationalism, the advent of fascism and the instrumentalisation of the question of minorities for imperialist purposes. The League of Nations system no longer imposed or controlled anything. A number of minorities were systematically oppressed or assimilated and Hitler’s policy, consisting in annexing Germany’s neighbours on the pretext of reuniting or liberating oppressed German-speaking minorities, led to the Second World War. This regression explains that while the
From the outset, the recognition of equal dignity (non-discrimination) was associated with the recognition of specific rights. This was very clearly stated by the Permanent Court of International Justice (PCIJ) in its Advisory Opinion of 6 April 1935 in *Minority Schools in Albania* PCIJ Collection, 1936, Series A/B64, 17.
Nor did it apply to all categories of minority. The Treaty of Lausanne of 24 July 1923 required Turkey to observe the rights of non-Muslim minorities in its territory and Turkey therefore concluded that this did not concern the Kurds. Turkey still denies the minority status to the Kurdish population today. Similarly, Greece relied on the Treaty of Lausanne to recognise a Muslim but not Turkish minority. This was contested recently in the European Court of Human Rights. See ECHR, *Tourkiki Enosi Xanthis v Greece*, 27 March 2008, Req No 26698/05.
League of Nations had wagered on a first form of recognition of minority rights, things were different after the Second World War.

For European minority rights only, the massive transfer of minorities was contemplated at the end of the war as a radical and terribly brutal solution flouting the most elementary individual rights. In 1946, Winston Churchill declared 'Expulsion is the method which [. . .] will be the most satisfactory and lasting. There will be no mixture of populations to cause endless trouble. . . A clean sweep will be made.'

Indeed many transfers were made, notably of German minorities under the terms of the 1945 Potsdam Conference in the worst of conditions and in the post-war atmosphere of settling old scores. The outcome was a significant reduction in the numbers of certain minorities in Europe but the underlying problem was still not settled. It was the UN Charter that was to put an end worldwide to the system of protection of minorities established by the League of Nations. It does not even contain the word minority, an omission which was obviously not an oversight since the appearance of human rights internationally coincided with the provisional disappearance of the special rights of minorities. Human rights, which were integrated for the first time into an international text with the UN Charter, were to transcend any reference to minority rights. They were considered a far more satisfactory alternative for international society because they are not based on the idea of membership of any particular minority but on the idea of human nature that is common to all. They therefore reflect a model of protection that does away with all the cultural, religious or linguistic differences that characterised minorities and that were perceived, in 1945, as engendering violent and nationalistic claims that were deeply destabilising for the integrity of European states and for the world. So human rights alone are included as an objective of the UN Charter and they alone were the subject of the Universal Declaration of Paris in 1948, while no mention was given to the rights of minorities. From 1945 to 1948, from Dumbarton Oaks to Paris by way of San Francisco, came a string of votes that set aside the question of minorities each time: The debates preceding the adoption of the 1948 Universal Declaration are illuminating testimony to this sidelining. They reveal that an article on the rights of national, linguistic and religious minorities was proposed by the USSR but ultimately rejected with near general consent. There were two reasons for the rejection: the delegates feared that any specific provision in favour of minorities might


revive nationalist passions and see the whole of the new international order implode; and more incidentally that a discriminatory category might be set up for minorities differentiating the case of their members from any other individual. The fact is that while members of minorities were denied any specific rights, the principle of non-discrimination was, by contrast, contained in Article 2 of the Declaration, expressly prohibiting any discrimination on the basis of language, religion, sex, race or ‘other status’, which implicitly and specifically meant the status of members belonging to minorities.

From 1945 onwards, minority rights were therefore protected primarily in the name of two fundamental human rights which are closely correlated: in the name of the principle of non-discrimination and in the name of the principle of equal rights of members of minorities and the others members of the state. International law at the time did not grant special rights to minorities, but it did ensure the members of minority groups equal treatment with the members of majority or dominant groups and equal entitlement to the same rights. In point of fact, the principle of non-discrimination was already applied to minorities in the inter-war years and so did not come as a surprise, but while it had been a principle of the pre-war international law of minorities, it became a principle of the post-war international law of human rights. It was set out in Articles 1 and 55 of the UN Charter, Article 2 of the 1948 Declaration and the 1966 Covenants and again in Article 14 of the 1950 European Convention on Human Rights and Fundamental Freedoms, which had similarly excluded any direct consideration of the rights of minorities. However, recognising equal treatment of members of minorities and majorities was not enough to ensure the cultural identities of the minority groups, nor was it the stated aim. It might even be thought that most states hoped, on the contrary, to be done with minorities and their identity claims which were viewed as a threat. They hoped that, through human rights alone, it might be possible at last to resolve the problem of minorities by no longer aiming to maintain minorities as such, but by aiming rather at their successful assimilation into society as a whole. From this point of view, the post-1945 international law of human rights was a resounding failure, for not only did human rights and notably the principle of non-discrimination prove wholly inadequate in combatting discrimination and the de facto sidelining of many minorities, but the attempts to assimilate minorities merely intensified their self-segregation by way of reaction. Drawing on the lessons from this failure, states, on two occasions, re-orientated international law in favour of renewed recognition of special rights for members of minorities, thereby renewing with the foundational intuitions and the highly specific legal experience of the inter-war years.

13 International law scholarship of the time confirms this very widely held post-war view. See for example Pablo de Azcarate, ‘Protection of Minorities and Human Rights’ (1946) 246 Annals of the American Academy of Political and Social Science, 127 ff.
The first re-orientation came with Article 27 of the 1966 UN Covenant on Civil and Political Rights. It was essential at the time since, for the first time since 1945, international law broke with the generalised distrust shown towards minorities and explicitly recognised specific rights for persons belonging to minorities and in particular the right for members of ‘ethnic, religious or linguistic minorities’ to be able ‘in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’. In fact, this provision is limited as it imposes a negative obligation on states not to deprive cultural minorities of their own cultural life without imposing any positive duty. But at least the provision was a sign that attitudes were gradually changing and it was to allow these issues to be brought before the Human Rights Committee, allowing the Committee to clarify the provision itself by prohibiting forcible assimilation policies and to see it was applied by the states parties to the Covenant. A new approach had been opened up, but it was only from the 1990s onwards that the existence of specific rights for minorities was fully reaffirmed in international law, by means of a particularly insightful interpretation of their aspirations.

The end of the Cold War saw a second and far more decisive re-orientation of international law in this direction, wherein the fundamental idea was to connect the recognition of specific rights for members of minorities to the preservation of their identity and their cultural difference. It was time to take stock and experience since 1945 showed that despite the principle of non-discrimination and Article 27 of the 1966 Covenant, the same types of difficulties arose and it had not always been possible to successfully preserve minorities, which remained particularly vulnerable and stigmatised groups. Each time, the majority of the state imposed its cultural model by marginalising minorities and exacerbating their identity claims by way of reaction.

It is not surprising, therefore, that, in compliance with the new values granted to recognition, a reaction took shape after 1989, notably in Europe, but also worldwide. Several international legal instruments were adopted which, this time, enshrined specific and distinctive rights for members of minorities, rights which were therefore based on the explicit recognition of cultural identity. They vary in the degree to which they are binding and for the time being are mostly European texts. They include the 1990 Organisation for Security and Co-operation in Europe (OSCE) Copenhagen Document; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UN General Assembly in 1992; the Copenhagen Criteria set by the EU in 1993 as conditions for the Eastern European countries to join the EU, which imposed the protection of minorities; and the Framework Convention for the Protection of National Minorities of 2 February 1995.

The 1992 UN Declaration, which was adopted thanks to the accession of the new Eastern European states to the UN, which were particularly concerned
about managing this problem after the Cold War, remains the only text of general scope dealing exclusively with this issue. As part of the post-Cold War recognition paradigm, the Resolution sets out the question of minorities immediately on the terrain of respect for their identity (Article 1), with states being compelled to protect and promote it. It sets out the specific rights to be granted to members of minorities in order to preserve their identity, including, exhumed from the inter-war years, the rights to use their language, to practise their religion and to enjoy their own culture (Article 2). In the wake of the Declaration, the General Assembly also conferred in 1993 on the Office of the High Commissioner for Human Rights the task of promoting and protecting the rights of minorities enshrined in the Declaration and to begin dialogue with states on this subject, while the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities created a working group that has become a particularly active forum for dialogue and reflection on the issue. To this is added the action of the Human Rights Committee which developed an interpretation of Article 27 of the 1966 Covenant that has also evolved in this direction and supports the general movement that is thus being deployed worldwide.

Even so, most of the essential legal instruments were adopted at a European level. The end of the Cold War recreated a situation in Europe reminiscent of the inter-war years. The break-up of the major Communist states, the USSR, Yugoslavia and Czechoslovakia, reshaped Central and Eastern Europe into 28 states, most of which have national minorities representing more than 10 per cent of their population, while new minorities have emerged like the Russian minorities outside Russia or Serb minorities outside Serbia. Now, the post-Communist transition stirred up nationalist feeling among most majority peoples and secessionist temptations among certain minorities, with the result that it once again became urgent for Europe to re-think the question of minorities and to find an appropriate response to their desire for recognition and to the need for stability. Tying back in with the novel experiences of the inter-war years, the European states developed a whole battery of legal instruments in a decade by which they define specific rights for people belonging to their minorities. Summarising the essential points of the new paradigm centred on the recognition of identities, the 1995

14 It was drafted in two weeks thanks to the new Eastern European states, while the UN had failed to come up with a common text for more than 14 years. It is very general, however, and the frequent use of conditional forms heightens its non-mandatory character. Resolution AG/47/135 (18 December 1992), Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; www2.ohchr.org/english/law/minorities.htm.
15 This does not mean that other states around the world do not try to protect their minorities or attribute specific rights to them. See, for example, Rita Manchanda, The No Nonsense Guide to Minority Rights in South Asia (New Delhi, Sage Publications, 2009) and Alan Axelrod, Minority Rights in America (Washington DC, CQ Press, 2002).
Framework Convention for the Protection of National Minorities considers in its Preamble that:

[A] pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.17

As for the content of special rights of members of minorities, the Copenhagen Document, for example, was one of the first post-Cold War texts adopted in this domain and it indicated the main rights, which were often taken from binding texts.18 In its Part IV, it recalls first of all the principle of non-discrimination as a human right to be applied to all people belonging to minorities. But it supplements the statement of this right by a whole series of specific rights that members of minorities were recognised as having and that states must observe. These rights included the right ‘to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects’ (Article 32), the right to use their mother tongue (Articles 32.1 and 32.3), the right ‘to establish and maintain their own educational, cultural and religious institutions’ (Article 32.3) and to seek public assistance to this end (Article 32.2) and the right ‘to profess and practice their religion’ (Article 32.3). To all these rights there corresponds a positive duty of the state to implement them and ensure them, which entails taking account of their economic and social aspects.

One should not underestimate the scope of such rights and the magnitude of the shifts they reflect in legal terms. First of all, the new international law of minorities ties in, as said, with the law of the inter-war years on minorities, but integrating it decisively in the new paradigm of recognition, for while the rights of minorities had been conceded after 1918, it was primarily because of the new distribution of territory which had been made at the time and not directly to protect any right to be different. This was a complete turnaround compared with 1945 and 1948. Contrary to what had been attempted after 1945 and was often prompted by an implicit will to assimilate minorities, the question is no longer one of preserving minorities through the same rights granted to all, without discrimination, but of protecting them, too, through specific rights conferred on persons belonging to minorities, and therefore precisely because they do belong to minorities. In response to the minorities’ need for recognition, these rights ensure a minority’s particular characteristics and therefore, more fundamentally still, the right for their members to be different and to live differently in accordance with their own culture. In other

17 conventions.coe.int/Treaty/en/Treaties/Html/157.htm. However, the Framework Convention reduces the field of protection to national minorities whereas the 1992 Declaration covers ethnic, religious and linguistic minorities.
words, it really is a question of officially bestowing a right to be different while being equal. While it was thought in 1945 and 1948 that the indiscriminate exercise of the individual rights of freedom of speech, thought, religion or assembly, which were also recognised as being enjoyed by all, would suffice for minorities to live as they saw fit, after 1989, there was a change in legal strategy and rights were adopted which, in addition to the formal freedoms recognised as being enjoyed by all, directly ensured the exercise of their cultural difference and therefore their identity. For example, although the same right to free speech may be applied without discrimination, experience shows that it does not answer the concern of linguistic minorities for the protection of their languages. By contrast, the existence of a special right to teach and speak one’s language will preserve it sustainably as it creates the condition for its effective use over time. In this respect, the 1992 European Charter for Regional or Minority Languages even affirms that the use of a regional or minority tongue in public and private life is an ‘inalienable right’ (Preamble). It should be emphasised that these changes mean that the principle of non-discrimination has itself been the subject of new interpretations converging in this direction as these interpretations take far more account of the diversity of concrete cultural situations of individuals than was the case before, with the result that the aim is no longer to treat different people equally but to treat different people differently because they belong to a minority. There probably remains the tricky question of how to find a satisfactory articulation between this principle of non-discrimination (always affirmed by way of priority) and the specific rights of minorities, because the question is never clearly defined and may raise particularly delicate problems of interpretation and application. But what makes the act of recognition both difficult and subtle is its capacity to express itself in this articulation, on a case-by-case basis, when it is no longer a matter of enclosing minorities within their cultural difference but of recognising them as being both ‘equal and different’; and so ultimately strengthening their equal standing with ‘majorities’ by combatting the formalism of earlier law, which far from being neutral and non-discriminatory, invariably favoured majority groups.

And so it can be seen how, despite a path strewn with many obstacles, the rights of minorities have finally been duly recognised in international law, paving the way towards a new legal arrangement based on difference and which it is hard to imagine being ignored nowadays as it corresponds to such a deeply

19 This is what the PCIJ had already concluded in the inter-war period, when specific rights of people belonging to minorities were at last recognised. See PCIJ, Advisory Opinion of 6 April 1935, Case of Minority Schools in Albania PCIJ Series A/B 17 ff.
21 See Human Rights Committee, General Comment 23 (1994) on Article 27 (Rights of minorities) §6.2: ‘positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group’; www.unhchr.ch/hbs/doc.nsf/(Symbol)/fbf1b12c2f88bb21c12563ed004df111?OpenDocument.

Rights of Minorities and Indigenous Peoples 149150 Recognition through Rights
rooted requirement of minorities but also of the times we live in. The scope of the changes that have come about since 1945 in this area should not hide a restriction of a general order that still prompts much discussion: the fact that the rights recognised are individual and not collective rights, that is, they are enjoyed by individuals insofar as they belong to a minority and not to the minority itself as a subject of law in its own right. The non-recognition of a collective right should not come as a surprise since it is in accordance with the very old and not groundless fear that such collective rights would open the floodgates to a desire for secession of the new subject of law formed by the minority. That is also why, a fortiori, the right to self-determination of minorities is never recognised nor the right to internal self-determination, except for very ancient national minorities. The international law of minorities has been constructed historically on the basis of a difficult balancing act between the observance of the sovereignty of states and the necessity to grant certain rights to the minorities in their territory, and this double foundation explains why the individuals alone are recognised as having rights. But some observers fear that this time the minority as a group might vanish in the end. While the problem remains a real one, especially for small minorities, individual rights may work in favour of maintaining the group: although the minority itself is not recognised as a subject of law, it is clear that the rights of members of minorities are no less dependent on the capacity of the minority to be able to protect its group identity and culture in the interest of all its members, with the result that the recognition of individual rights for the members of minorities entails the protection of the group as such and strengthens its status as a minority.22

B Rights of Indigenous Peoples

Testifying in turn to this new favour currently enjoyed by recognition, the actions undertaken for the rights of native peoples, perhaps more than the actions for minorities, enhanced awareness that some groups had been particularly stigmatised for hundreds of years and still were, and that such a situation was not only troubling but simply unacceptable in respect of the new contemporary values and the post-Cold War requirements of international social justice. Native peoples, who were weaker and more vulnerable than the subjected populations in exploitation colonies, were particularly hard hit with, in the space of four centuries, the almost complete despoliation of their lands and the disappearance of 85–90 per cent of their numbers.23 As a result,

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22 The international law of minorities does, however, have its dark side. See Patrick Macklem, ‘Les droits des minorités en droit international’ in Hélène Ruiz-Fabri and Michel Rosenfeld (ed), Repenser le constitutionnalisme à l’âge de la mondialisation et de la privatisation (Paris, Société de législation comparée, 2001) 233–59.

they now present themselves to the international community as ‘survivors of history’, as per the rallying cry of the Australian Aborigines at the time of the celebration of the bicentenary of British colonisation in 1988: ‘We have survived!’ Even so, one must again measure the substantial changes that have come about in this respect which pertain to the same profound change in attitudes and behaviours in this area, but also to a particularly shocking situation of historical injustice.

Indigenous peoples have been defined as the descendants of those who inhabited a territory before the advent of settlement colonies, which then completely subjected them. They are numerous throughout the regions of the world, including in Africa where some particularly vulnerable groups like the pastoral and hunter-gatherer communities aspire to be recognised as indigenous peoples. The communities with the highest media profiles, however, are the indigenous peoples of South America and those colonised by English-speaking populations. For a long time, however, international law debated only the fate and standing of colonised peoples outside the mother country and ignored indigenous peoples, who were considered to come within the strictly internal jurisdiction of states. While the former finally achieved their independence at the time of decolonisation in the 1950s and 1960s, the latter continued to directly suffer the discrimination and disregard of the majority group, and were very brutally subjected to cultural, political and economic domination. However, as early as 1947, Belgium had excoriated the different legal and political treatment of non-self-governing peoples depending on whether or not they were characterised as colonies. Only territories that were separate from the mother country and inhabited by peoples with specific cultural and ethnic features were considered to be colonies and as such were entitled to the protection of the Charter. Conversely, other non-self-governing peoples, dwelling within sovereign states, enjoyed no internationally defined protection. But why, Belgium asked, was no obligation imposed on the former settlement colonies? Why did the UN not control the way in which India treated the Nagas, the United States the native North Americans, Canada the Eskimos or New Zealand the Maoris, when it supervised the way states acted with respect to the colonies and territories covered by Chapters XI and XII of the Charter? As a colonising country itself, Belgium was not acting without self-interest but its proposal did at least expose the cynicism of some states that took an anticolonial moral stance while continuing unabashed to completely dominate the native peoples whose land they

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Rights of Minorities and Indigenous Peoples 151152 Recognition through Rights
had colonised old. This attempt to impose the same protective regime on indigenous peoples proved to be in vain and it was only much later that things began to change.

Progressively from the 1980s onwards, awareness of the need for a special regime for indigenous peoples spread to the entire international community. The indigenous populations concerned were behind a whole series of actions and initiatives that have been termed the ‘indigenous peoples’ movement’, which successfully drew media attention to their cause and promoted it within their respective states and then internationally. In 1982, Ecosoc set up a UN Working Group on Indigenous Populations which was to be the keystone to the promotion of the rights of indigenous peoples internationally. True, a Convention 107 had been adopted by the International Labour Organisation (ILO) in 1957 on indigenous peoples, but it provided for their straightforward political assimilation, which was broadly denounced. It was superseded by a new Convention 169 adopted by the ILO in June 1989 on tribal and indigenous peoples which, in keeping with the undercurrent that swept the post-Cold War world, sought to replace the integrating and paternalistic perspective of Convention 107 by a policy that respected the customs of native peoples and their cultural identities. The change in outlook between the 1957 and the 1989 Conventions in itself summarises the shift in attitudes towards groups and cultural identities and attests again to the advent of the recognition paradigm into the contemporary world from 1989. In the wake of Convention 169, under the decisive impetus of the Vienna World Conference, 1993 was declared International Year of the World’s Indigenous People and a first International Decade of the World’s Indigenous People was declared by the UN in 1995.

Like minorities, most indigenous peoples do not seek to escape completely from state tutelage but to secure recognition of their existence and of their trampled historical rights, to recover control over their natural resources and to put an end to the stigma and social disregard to which they are subject. They call for equal rights but also for the recognition of their collective identity and their cultural difference based on their social organisation, their relationship to the land, their ancestral customs and their traditional arts. Some of them, however, would also like to benefit from the right to self-determination and a lively debate has arisen over the legal characterisation of these groups either as ‘peoples’, and therefore as being capable of exercising the right of peoples’ to self-determination, or as simple ‘populations’ with no such right. In truth, they may be characterised as a people without that

27 On the violence of this domination in North America on which the international community has been silent, see Ward Churchill, Struggle for the Land. Indigenous Resistance to Genocide, Ecocide, and Expropriation in Contemporary North America (Monroe, Common Courage Press, 1993).

necessarily leading them to the status of independent state, but to a very broad degree of internal autonomy as was done for the Inuit peoples of northern Canada in 1999. Finally, a Declaration on the Rights of Indigenous Peoples was adopted in September 2007 by the UN General Assembly reflecting this development. It was largely approved, as 143 states voted for it. It recognises indigenous peoples’ right to self-determination in relation to internal affairs and to freely determine their economic, social and cultural development (Articles 3 and 4), but no mention is made of self-determination in respect of external affairs. However, it solemnly states that the rights recognised ‘constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’ (Article 43) and although it has no directly binding value, it is very specific as to the content of the obligations it sets out, offering a sound legal basis for UN and state action in this domain. As the point of arrival of a long journey towards recognition for peoples who until then had been invisible internationally, the Resolution finally attests to the general legal movement towards the recognition of cultural identities and differences and sets itself explicitly on the ground of the right to difference. The Preamble to the Declaration affirms that ‘indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, And to be respected as such’.

Those lines capture the spirit of the contemporary process of recognition and of what is particularly fertile in it. The terms are emblematic of what might be the new formula for living together within international society, which has already been evoked for minorities, and that best expresses the quintessence of current aspirations: to live ‘equal but different’. This concern for equality, while remaining different, is the mark of soft or hard international law that is concerned for recognition and from it flows, in the same way as for minorities, the adoption of specific rights for the members of indigenous peoples, on the basis of their belonging to an indigenous group, that does not concern the other members of the society. Again, we find the now familiar provisions about the right to protection and use of their language, their religion, their customs, their traditional arts, their knowledge, but also the exercise of their rights to maintain and strengthen their political and economic institutions (Article 5), ‘the collective right to live in freedom, peace and security as distinct peoples’ (Article 7.2) and very detailed rights about their ancestral land and the resources it contains (Articles 26–30), for it is known to what extent these resources and lands have been and still are

30 It can even be considered it is prohibited by Article 46 recalling the necessary respect for the state’s territorial integrity.

Rights of Minorities and Indigenous Peoples 153154 Recognition through Rights
plundered and their rights flouted by oil, mining and logging companies. In this respect, international and domestic texts tend to more readily recognise certain collective rights for indigenous peoples – rights that are conferred on the group as a whole as a subject of law. This point is emphasised in the Declaration. Despite the fear of thereby prompting growing autonomy of the group that might lead to secession, recognising this type of collective rights is here a necessity if there is to be any true recognition of their identity and culture. An example is their relationship to land. Most indigenous peoples have a fundamental tie to the land as it defines much of their identity. This relation to the land is both material and spiritual since, they claim, the land belongs to the group and the group belongs to the land. Being compelled to adopt the legal discourse on rights to defend their land, they have finally claimed a right of collective and not individual ownership. They wish to secure full ownership of their ancestral land to ensure its protection but they do not wish any individual to enjoy that right. And so it is by taking account of this very strong cultural background which is so intrinsically related to their identity and to their very being that existing international texts recognise their collective territorial and internal administrative rights.

That being so, the practical implementation of such rights is particularly limited and runs up against the ordinary provisions of the municipal law of the states concerned. This is illustrated by the celebrated Mabo decision by the High Court of Australia in 1992. Through this case, which was a landmark decision for the future development of international law, the Court, in a revolutionary move, recognised the Aborigines’ natural right over their ancestral land, but, at the same time, ruled out any form of retroactive compensation for spoliation before 1975 and required the Aborigines to prove uninterrupted ancestral occupation of the lands claimed in order for a tribal land title to be granted. That, of course, excluded the majority of existing Aborigines from the outset, who had been duly ‘de-tribalised’ and removed from their territories during previous centuries.