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The American University in Cairo
School of Global Affairs and Public Policy

**THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES
UNDER INTERNATIONAL CUSTOMARY LAW**

A Thesis submitted to the
Department of Law
in partial fulfillment of the requirements for
the degree of Master of Arts in International Human Rights Law

By

Rosa M. Navarro

June 2012

The American University in Cairo
School of Global Affairs and Public Policy

THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS
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Rosa M. Navarro

Supervised by Professor Thomas Skouteris

ABSTRACT

The Right to self-determination is a notion that grew out of the human rights regime post World War II. It was one of the core ideas that drove the decolonization of most of the world then colonized by European and Western imperialism. This very idea helped liberate millions of people around the globe; however, it failed to liberate indigenous peoples and communities who are still under foreign domination and who are still marginally oppressed and heavily discriminated against. Indigenous peoples are unique peoples with unique rights, and my paper will argue that the notion of self-determination does apply to them as peoples under international law. In mounting this argument I will assess various perspectives on the legitimacy of this application. I will explain why it is indeed legitimacy. In doing so I will discuss its recognition by the United Nations Human Rights Council, the ECOSOC council, the Inter-American Court and Commission on Human Rights, and the Nordic Countries of Europe. By tracing the these peoples' achievement of recognition under international law, I will illustrate how what was once seen as a wholly domestic issue became an international human rights law issue deeply rooted in the human rights regime that was built to protect all peoples from abuses. This paper will argue that it is under the Modern Custom Theory of International Customary Law (ICL) that UN Declarations can be 'crystallized' into ICL, requiring they espouse a strong *opinio juris* and have a strong moral content. I will argue that the UN Declaration on the Rights of Indigenous Peoples, in particular Article 3, of Self-Determination has been crystallized into international customary law.

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Introduction

Indigenous peoples' legal fight for self-determination is their last struggle for survival. For the past five hundred years, indigenous peoples have been "forcefully removed from their lands, disposed of their natural resources, and discriminated against or simply decimated."¹ There is an estimated 370 million indigenous peoples all over the world. They are on all continents and many are amongst the world's poorest people.² According to the latest United Nations report, issued in 2010, "While indigenous peoples make up around 370 million of the world's population, some 5 per cent, they constitute around one-third of the world's 900 million extremely rural poor people."³ Their situation according to the United Nations is critical. Indigenous peoples face systemic discrimination and exclusion from political and economic power, often dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural, even robbed of their very right to life.⁴ In Latin America for example, the statistic of child mortality rates are 70% higher than a non-indigenous child.⁵

Indigenous peoples have characteristics that separate them from the rest of the population,⁶ including "ethnic, religious, and linguistic"⁷ characteristics.⁸ Their survival as a unique group of peoples is critical to our world's diversity and a true test of humanity, of the human rights legal regime and of nation states' obligation to protect them and grant them their human rights. Indigenous peoples' rights fall deep within the human rights regime that has grown since World War II. Since its inception indigenous peoples were overlooked by this regime, designed as it was to protect human rights

¹ Paul J. Magnarella, *The Evolving Right of Self-Determination of Indigenous Peoples*, 14, St. Thomas L.Rev. 425, (2001-2002) at 425.

² *Id.* at 425-426.

³ UN Report *State of the Worlds Indigenous Peoples* Published in 2010, available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf.

⁴ *Id.*

⁵ *Supra* note 1 at 4.

⁶ *Id.* at 4-5.

⁷ *Id.*

⁸ Magnarella *supra* note 1, Magnarella argues that "in many cases of repressive majority-indigenous relations, the classic unitary nation-states has proved to be a dangerous fiction. Attempts by states governments to force diverse cultural populations into the majority ethnic mold have frequently led to human rights abuses. Historically, diverse ethnic populations with a traditional of mutual animosity have not found common citizenship in a single state to be sufficient basis for social harmony." at 9.

generally; they were seen as being under the rubric of domestic affairs, not the international community's. Thankfully, this has changed, and globalization has made us more interconnected – one of the changes that has put indigenous rights at the forefront of international human rights affairs.

The right to self-determination has been legally codified in two Covenants: the International Covenant on Civil and Political Rights (ICCPR)⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESR).¹⁰ Both stipulate, under Article 1(1), that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This right has been granted to peoples: to freely participate in the civil and political life of whichever nation they reside within. This right was most recently enshrined in the controversial United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹¹ where it further validated indigenous peoples' legal right to seek self-determination under international law. This was the first time in indigenous peoples' legal history that their right to self-determination had been enshrined in a document that recognizes their legal rights under international law.

While some scholars have contested the legal validity of such declarations and resolutions, and others question the validity of international law generally, these remain the legal instruments best suited to progress indigenous peoples' right to self-determination. As I will argue, the law is a work in progress, and the crystallization of international customary law is complex, I will do my best to explain how international customary law is the best-equipped system of law to address and codify indigenous rights law. I believe that as states and peoples become more interconnected the human rights system, built over half a century ago, will finally begin to redress the social inequalities and atrocities that have been committed and continue to occur to indigenous peoples communities all around the world.

The right to self-determination itself remains a contentious legal debate in

⁹ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A(XXI), 16 December 1966 *available at* <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁰ International Covenant on Economic, Social and Cultural Rights (ICESR), G.A. Res. 2200A (XXI), 16 December 1966, *available at* <http://www2.ohchr.org/english/law/cescr.htm>.

¹¹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295 13 September 2007, *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf .

international and domestic law. It has often been received with hostility by nation states, and with good reason. The traditional view on self-determination, and much of the hostility towards it, is rooted in the Westphalia notion of absolute sovereignty. I believe that this is, however, an incorrect notion. Most indigenous peoples and communities around the world are not calling for the right to external self-determination or secession, but rather for internal self-determination or autonomy within the nation-states they reside within. What they are seeking is to finally be accepted as part of the state. I will further analyze this in chapter two.

The discussion of indigenous rights takes place with the wider one of human rights, and we must look at both within the framework of international law. International law has progressed since World War II in line with the social needs of the international community. We now live in a world that has 194 countries, and international law must develop to meet the needs of all these countries collectively and individually. Existing within the international law's framework, international customary law was codified as a law source by the International Court of Justice Statute, Article 38. As it is now written, customary international law no longer applies to modern world affairs, for reasons I will detail in this thesis. Some legal scholars argue that a new, progressive view of customary international law, often referred to as "Modern Custom", is more viable for meeting the needs of the international community, and that the old "Traditional Custom" no longer applies to human rights in the fast-paced world we live in.

This paper argues that the right to self-determination of indigenous peoples has been codified into customary international law as a legal right. I base my view on the new progressive theory often referred to as the "Modern Custom theory" of international law, which deviates from the "traditional approach" to customary international law. Although this modern theory is still not universally accepted, the International Court of Justice (ICJ) has ruled in important cases, citing only *Opinio juris* in the matter and thus further validating this theory.

Chapter one will focus on defining customary international law (CIL). This chapter is designed to look at the various theories and ways that (CIL) is codified; it analyses various competing theories from legal scholars. The intention is to assess the extent to which the right to self-determination of indigenous people has been codified

under international law. In defining CIL I will describe the three main theories of this law: Classical, Traditional, and Modern. Clarifying this background is crucial, as some legal scholars now contest the application of customary law to international law, while others argue that customary law is necessary to meet the needs of the nations and peoples operating in the evolving global sphere. I will argue that under these competing theories, “modern custom” is the most relevant to human rights because it specifically codifies indigenous rights law. More importantly I will focus on the argument of modern custom and its ability to legally codify United Nations Declarations as International Customary Law that espouses strong *Opinio juris* and strong moral content. Therefore, this paper will focus on the modern theory of international law to argue that the right to self-determination has indeed been codified.

Chapter two of this paper will argue that the right to self-determination of indigenous peoples under international law has been codified as customary international law under the Modern Custom theory. Under the modern custom theory, I will argue that human rights principles enshrined into UN Declarations or Resolutions can be crystallized into ICL. This is based on the strong *opinio juris* and the strong moral content (*Lex ferenda*) of the document being passed through the General Assembly. To support this belief this chapter will provide four case studies that show a strong *opinio juris* of state compliance with the right to self-determination of indigenous peoples from both regional human right bodies and national state legislation to the Human Rights Council.

For this paper, I will use the most widely used definition of ‘indigenous peoples’, as adopted by the United Nations Working Group on Indigenous Issues. This defines Indigenous peoples in the following way:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of the 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.¹²

¹²ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND THE UNITED NATIONS STANDARDS, Cambridge (2007)

This definition of what constitutes an indigenous person or community is still contentious. There is no universally agreed upon definition of who or what constitutes an indigenous person. However, this definition has been favored by most indigenous communities worldwide because there is no one definition, it seems, that can include all the indigenous populations of the world today. However, self-identification has been the primary tool of representation for those identifying as an indigenous person or community.

at 9. See also the study by Jose Martinez-Cobo titled, *Study of the Problem of Discrimination Against Indigenous Populations* (1981), UN Doc. E/CN.4/Sub.2/1983/21, available at <http://social.un.org/index/IndigenousPeoples/Library/Mart%C3%ADnezCoboStudy.aspx>.

I. International Customary Law

A. Introduction

This chapter describes and critically evaluates the different theories of what constitutes the way to declare International Customary Law (ICL). ICL is one of three main sources of law that the International Court of Justice (ICJ) derives its laws and verdicts from. The other two are the international conventions accepted by states as law and the general principles accepted by states as law. The ICJ's Statute Article 38 classifies all three sources of law, so ICL is one of its main sources of law.¹³ By discussing what ICL is, and by briefly describing the two key theories of applying it, Traditional, and Modern, I am able to confront those legal scholars who argue that customary law does not suit international law. I can then show the essential role it plays in regulating nation states and their responses to the ongoing efforts of indigenous peoples to establish their right to self-determination.

I will argue that although ICL theories can all *technically* codify the right to self-determination, the modern theory is more applicable to indigenous rights and the human rights regime as it exists under international law. I base this on the fact that the new modern theory of ICL focuses more on *opinio juris* and *lex ferenda* than on *lex lata*¹⁴ and state practice. Put very simply, this means that modern theory accepts the notion that law is made to guide practice, not merely to codify actions that already exist. *Opinio juris* is the second element required in the formation of ICL; known as the 'psychological element', it connects a state's behavior with the custom they have *chosen* to follow. In other words, it requires that the state acted out of a sense of legal obligation with the custom and not out of habit, not for political reasons, and not because of the belief that the custom was already guiding and regulating the state's behavior. In addition, the state acted as it did because there were legal consequences to not acting this way.

I will discuss in depth important ICJ cases in which the court has further validated this notion of *opinio juris* as weighing heavily against the traditional view of state

¹⁴ *Lex ferenda* and *lex lata* are Latin legal terms. *Lex ferenda* literally means what the law ought to be or future law where as *lex lata* means what the law currently is or as it is. One is a prescriptive term and one is a descriptive term. I use these terms to articulate the need for improvement of indigenous rights, in particular their right to self-determination.

practice.

While it can be argued that all theories are valid, it can be equally argued that all theories are equally wrong and invalid. But at this point they are the only significant theories at our disposal for resolving the issues addressed in this thesis. While I argue for the use of Modern custom over the Traditional approach of custom, both have fundamental theoretical problems that cannot be fully addressed within the sphere of this paper. Nevertheless, I will attempt to explain why I view modern custom as providing the best legal approach for establishing indigenous rights to self-determination in international law. This view favors modern custom's heavy reliance on *opinio juris* and *lex ferenda* at least partly because it guides the law to what it should be over approaches favoring states' interests and the way they want the law to be applied.

1. International customary law, the International Court of Justice, and its Statute Article 38

The statute of the International Court of Justice (ICJ) describes custom as “evidence of a general practice accepted as law.”¹⁵ Custom is generally described as having two essential elements, “state practice and *Opinio juris*.”¹⁶¹⁷ This is the mostly widely accepted definition and the traditional definition as well. These two elements are what distinguish customary international law from other types of international law. The main problem, however, and the source of controversy over this source of international law, is how to measure and determine what has actually “crystallized” into ICL.¹⁸ This difficulty is mostly due to the fact that different legal scholars approach ICL differently. While some are more apprehensive and conservative with applying it, others argue, for instance,

¹⁵Anthea Elizabeth Roberts. *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, Amer. J. of Law; Vol. 95. (2001) at 1.

¹⁶*Id.* at 1.

¹⁷ HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION, (1972) Thirlway in his book also contends that “ the generally held view of customary international law, which has been endorsed by the International Court of Justice, is that the creation of a rule of customary international law postulates: (1) a general practice of states and (2) the acceptance by states of the general practice as law.”

¹⁸ MARK E. VILLIGER. CUSTOMARY INTERNATIONAL LAW AND TREATIES : A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS, WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (1985) at 3.

for a more modern approach to it.

2. State Practice and *Opinio juris*: The two elements of International Customary Law

State practice is often referred to as the “raw” element in the formation of ICL. State practice, for the ICJ, can be any act or expression of, or on behalf of, a state that occurs in relation to a custom or norm in international law.¹⁹ According to the International Law Commission (ILC), the following can be used to prove state practice: “treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and practice of international organizations.”²⁰

In ICL, state practice is the practice of nation-states who follow a norm, one that could be written or not, out of a sense of obligation to that custom.²¹ How state practice is actually measured is a much-debated issue in international law. Legal scholars will often agree that there is very little international consensus on what actually counts as state practice.²² This ambiguity remains a renowned weakness (some would say a flaw) in ICL. Some legal scholars argue that only the “physical acts of a state”²³ can constitute the state practice of a state. Because it is nearly impossible to measure how many states participate in a custom at any given point in time, it is almost impossible to measure the exact role played by state practice in the formation of ICL.

Opinio juris is the second required element of ICL. A Latin term, *Opinio juris* is seen as the “psychological element” in ICL.²⁴ *Opinio juris* literally means an “opinion of law or necessity.”²⁵ It is the belief that an act by the state was carried out because of that state’s sense of legal obligation.²⁶ It helps distinguish acts by states done out of personal interest from those they feel obliged to follow because of the law.²⁷ The distinction is

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ Jack L. Goldsmith, Eric A. Posner, *The Limits of International Law* (2005) at 4.

²² *Id.* at 23.

²³ Anthony D’Amato, *Trashing Customary International Law*, *AMER.J. OF INTL. LAW* (1987) at 2.

²⁴ Goldsmith and Posner, *supra* note 21, at 4.

²⁵ Francesco Parisi, *The Formation of Customary Law* (2000) at 6.

²⁶ Goldsmith and Posner *supra* note 21 at 23.

²⁷ *Id.* at 23.

difficult to draw precisely though, because it can convincingly be argued that the state sees its self-interest as increased by acceding to laws that, while perhaps curtailing their short-term interests, will benefit that state over the longer term. Here is the ambiguous core of the issue of what exactly constitutes ICL. However, *opinio juris* has helped to define what customary international law really is by ²⁸ drawing so much attention to the different motivations for following law – self-interest versus obligation.

ICL does not “arise and exist” immediately, or instantaneously,²⁹ or organically. Once created, often through treaties or declarations, it must be confirmed by repeated state practice and *opinio juris*; at some point, this combination of state practice and *opinio juris* is recognized as having proven that the custom or norm has ‘crystallized’ into ICL.³⁰ Exactly how much state practice, over precisely how long a period, is still up for debate and no real consensus exists exactly, nor does anyone know exactly how many states must participate in the practice.³¹ The generally accepted requirement is that state practice must be ‘consistent and widespread’. Monitoring and measuring the behavior of the world’s 194 states accurately³² remains a daunting challenge.

Another problem with measuring state practice is the question of which nation-states’ practice should we follow or observe to establish proof of ICL? Technically, and according to the United Nations Charter, all states are equal and thus all states should have the same weight politically. However, we know this to be untrue. Scholar Anthea Roberts reflects on this issue by stating, “newly developing, and social states have objected to customs as having been created by wealthy European and imperialistic powers.” She continues, saying, “the legal fiction of free and equal states also masks the reality of extreme variations of defacto power.”³³

In another critique of this pattern of only counting western states as counting

²⁸Thirlway, *supra* note 17, at 47.

²⁹Jeremy Pearce, *Customary International Law not Merely Fiction or Myth*, Australian Intl. L.J. (2004) at 7

³⁰ Roberts, *supra* note 15, According to Roberts, “*Opinio Juris* concerns statements of belief rather than actual beliefs” at 1.

³¹ Thirlway, *supra* note 17, at 47.

³²Villiger, *supra* note 18, at 22; Villiger contends that: “In respect of the contribution of active state practice for the formation or existence of a customary rule, the court has stipulated as an additional requirement, the uniformity and consistency of the practice in question. In the *North Sea cases*, the ICJ demanded that: ‘Within the period (of time) in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.’”

³³ Roberts, *supra* note 15, at 12.

towards the establishment of state practice, Roberts cites the *Lotus Case*, where “the Permanent Court cited decisive precedents based on actions by only six western states.”³⁴ This noted unfairness makes a myth of the ‘equalness’ of states on the international plane.³⁵ This is not merely to point out a flaw of the Westphalia-influenced traditional view on ICL, but a pronouncement on the inequality in the system of creating law. This disproportionate weighting of western states when recognizing state practice means, of course, that less powerful states with little or no power in ‘crystallizing’ ICL are forced to comply with norms they are powerless to influence. This is a huge problem that needs to be addressed and, as I soon argue, one best addressed with modern custom theory’s notion of how customary law should ‘crystallize’ into ICL.

B. The Modern Approach: Custom Theory Based on the Doctrine of *Opinio Juris*

The endless debates about what international customary law is and how it is formed will not end anytime soon, if ever. The precise status of ICL in international law seems to be unknown, and while some scholars argue for the necessity of it, others call for its “demise.”³⁶ Whether or not it survives the scholarly debates, only time will tell. Legal scholar Anthea Roberts starts her article, *Traditional and Modern Approaches to Customary Law: a Reconciliation*, by saying that “the demise of custom as a source of international law has been widely forecasted.”³⁷³⁸ Roberts contends, however, that the rise of the human rights regime in the international sphere has helped in resurrecting ICL.

³⁴ *Id.*

³⁵ Pearce, *supra* note 29, Pearce in his article *Customary International Law: Not Merely Fiction or Myth (2003)* he states that “Judge Hudson attempted to articulate his formula to clarify international customary law, he provided it with five elements:

1. The Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
2. The continuation or repetition of the practice over a considerable period of time;
3. The conception that the practice is required by, or consistent with, prevailing international law;
4. The general acquiescence in the practice of other states; and
5. The establishment of each element by a competent international authority” at 6.

³⁶ Roberts, *supra* note 15, at 1.

³⁷ *Id.*

³⁸ *Id.* Roberts also goes on to say that “at the same time custom has become an increasingly significant source of law in important areas such as human rights obligations” at 1.

Roberts says that the “codification conventions, academic commentary, and the case law of the international Court of Justice have also contributed to a contemporary resurrection of custom.”³⁹ Each of these represents an aspirational outcome that seeks to progress the law into areas not yet codified under current state practice. All exist within a framework primarily contested via the two main opposing theories of ICL: the Traditional Custom theory and the Modern Custom theory.

Roberts emphasizes the differences in the manner in which each mode “crystallizes” into law: “traditional custom and modern custom are generally assumed to be alternatives because the former emphasizes state practice, whereas the latter emphasizes *Opinio juris*.”⁴⁰ Goldsmith and Posner argue that “treaties, especially multilateral treaties, but also bilateral ones, are more often used as evidence of customary international law.” They add, “even more controversially, United Nations General Assembly Resolutions and other non-binding statements and resolutions by multi-lateral bodies are often viewed as evidence of customary international law.”⁴¹ James Anaya supports this view: “United Nations declarations are not legally binding, but they nonetheless have some measure of authority and impact when they are invoked.”⁴²

Roberts further elaborates on what she has coined ‘traditional custom’ and ‘modern custom’:

What I have termed traditional custom results from a general and consistent practice followed by states from a sense of legal obligation. It focuses primarily on state practice in the form of interstate interaction and acquiescence. *Opinio juris* is a secondary consideration invoked to distinguish between legal and non-legal obligations. Traditional custom is evolutionary and is identified through an inductive process in which a general custom is derived from specific instances of state practice. This approach is evident in *S.S Lotus*, where The Permanent Court of International Justice inferred a general custom about objective territorial jurisdiction over ships on the high seas from previous instances of state action and acquiescence.⁴³

This is important because this is exactly how I will be using the two terms and theories. I also believe that ICL evolves, just like any other form of international law. Law

³⁹ *Id.*

⁴⁰ Roberts, *supra* note 15, at 2.

⁴¹ Goldsmith and Posner, *supra* note 21, at 23.

⁴² JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES, (2009) at 79.

⁴³ Roberts, *supra* note 15, at 2.

progresses to meet the needs of the now 194 nation-states acting in the international arena.

1. Traditional Custom V. Modern Custom

Traditional custom is “closely associated with descriptive accuracy because norms are constructed primarily from state practice – working from practice to theory.”⁴⁴ But state practice, I believe, is no longer the major trend for states to follow. In regard to the law, “as the frequency and consistency of state practice declines, a stronger showing of *Opinio juris*... will depend on the importance of this activity in question and the reasonableness of the rule involved.”⁴⁵ This applies more to the modern theory of custom that, I will argue, is the most applicable for helping to codify not only human rights law but also indigenous rights law. This is because Modern custom theory is more reliant on *opinio juris* than on ‘hard’ state practice, which in any case is almost impossible to prove. Although both theories have major flaws and setbacks, I believe that as the law evolves ICL will be formed more through international consensus, partly through major UN General Assembly Resolutions and Declarations.

Francesco Parisi argues that the traditional theory of customary law “emphasizes the awkward notion that individuals must believe that a practice is already law before it can become law.”⁴⁶ In other words, law only becomes law after lawmakers recognize that people already believe what the law then states. Legal scholars have increasingly argued that courts have started to ignore state practice altogether. As an example, Parisi states the reference by courts and scholars to ICL’s “prohibition on torture”, which exists alongside the simple fact that “many states of the world torture their citizens.”⁴⁷

The prohibition of torture is a clear example of how state practice has actually become irrelevant to the international custom that you should not torture your citizens. The prohibition of torture is an *Erga Omnes* obligation that no state is allowed to deviate from, according to ICL. And yet, if we were to survey how many states actually refrain

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 4.

⁴⁶ Parisi, *supra* note 25, at 18.

⁴⁷ Goldsmith and Posner, *supra* note 21, at 24.

from torture and how many engage in it, we would find that torture is widespread. This does not mean, however, that torture is not an *Erga Omnes* obligation, nor that it has not been codified as ICL. It just means that here the *opinio juris* outweighs actual state practice in the sense that the obligation to not torture stands firm in the face of states' ongoing breach of the prohibition of torture. Thus, I argue that state practice, as understood from the traditional view on custom, no longer reflects the way states actually engage with ICL.

Another critique of the traditional view of custom comes from Goldsmith and Posner:

the traditional paradigm does not explain how customary international law emerges from disorder, or how it changes over time... The traditional account also cannot explain the fact that states frequently change their views on the content of customary international law, often during very short periods of time... In addition, it does not explain why states sometimes say that they will abide by particular customary international laws and then violate their promises... finally; the traditional account does not explain why states comply with customary international law.⁴⁸

2. Modern Custom

The term that has been coined as modern custom is neither a 'modern' nor a contemporary or even a new theory. The notion of putting more emphasis and reliance on *opinio juris* as an element of ICL can be traced back to the German Historical School of Thought.⁴⁹ The German Historical School was the first "to introduce the subjective element in the definition of 'custom,'⁵⁰ thus, it was not a 'creation of international law', but of this school of thought within the private law sphere.⁵¹ According to Jun-Shik Hwang, the French Jurist and scholar François Gény built on the concept from the German Historical school and coined the term *Opinio juris* "for the first time to explain the psychological element of customary law in 1899."⁵² Under the German Historical theory on *opinio juris* they saw law as the will of man; they called this "volksgeist", or

⁴⁸ *Id.* at 24-25.

⁴⁹ Jun- Shik Hwang. *A sense and Sensibility of Legal Obligation: Customary International Law and Game Theory*, TEMP. INT'L & COMP. L.J. 111 (2006) at 9.

⁵⁰ *Id.*

⁵¹ *Id.* at 9.

⁵² *Id.* at 9-10.

the will of the people, or nation, and “not something willed or arbitrary.”⁵³ This school of thought rejected the Traditional theory on custom, declaring the *opinio juris*, or will of the people primary. And so traditional custom could not become “legislation as the protagonists of the Historical School saw that it was something intentionally imposed on the people, not spontaneously created by them.”⁵⁴

According to Hwang, these scholarly works on the creation and necessity of *opinio juris* were forgotten in the scholarly literature of their time.⁵⁵ It was not until the twentieth century that the notion of *opinio juris* was used as part of ICL.⁵⁶ This is historically seen as the beginning of the school of thought some have called the ‘subjective element’ in ICL. It is based on the ideology that customs should be based upon the will of the people, not forced upon them. However, even this very ideology has shifted. While, the modern custom theory that I am using in my paper argues for the usage of *opinio juris* over state practice, it is not invoking the ‘volksgeist’ notion that the German Historical school of thought introduced. Modern custom, although invoking *opinio juris* usage over state practice, is not declaring that ICL is ‘spontaneous’ in nature, nor that it is framed within a ‘declaratory’ frame, but rather is a ‘constitutive’ view. By this, I am saying that in the declarative view, “the *opinio juris* is an opinion, or a conviction, of states that something already is law, not a will that something became law.”⁵⁷ Under the ‘constitutive’ view, “the *opinio juris* is the direct reason for the custom’s binding character.”⁵⁸ The modern custom embodies the core belief of both, that the state acted in conformity with the belief that something has become ‘law’, and there was a legal obligation to follow the custom, but also that there is proof of states’ compliance with the *opinio juris* of the principle being followed.⁵⁹

⁵³ Raphael M. Walden. *The Subjective Element in International Customary Law*, 12 ISR. L. REV. 344 (1977) at 15.

⁵⁴ *Id.*

⁵⁵ Hwang, *supra* note 49, at 9.

⁵⁶ *Id.* at 10.

⁵⁷ MARTTI KOSKENMIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL Argument (2005) at 418.

⁵⁸ *Id.*

⁵⁹ For alternative views and theories on the history of *Opinio Juris*, see the following articles: Olufemi Elias *The Nature of the Subjective Element in Customary International Law* (1995); HCM Charlesworth *Customary International Law* (1997); Brigitte Stern *Custom at the Heart of International Law* (2001, translated by Michael Byers and Anne Denise); Martti Koskenniemi *The Normative Force of Habit: International Custom and Social Theory* (1990)

The contemporary view and theory of Modern custom supports the view that custom has progressed and is more in tune with the world's needs and the evolution of international law. Roberts says Modern custom is created through a “deductive process that begins with general statements of rules rather than particular instances of practice.”⁶⁰ The modern custom ‘approach’ focuses on the concept of *opinio juris* instead of the traditional approach to custom that emphasizes state practice.⁶¹ Modern custom theory “relies primarily on statements rather than actions.”^{62,63} It is important to emphasize, “modern custom is not a new system of law, rather an evolvement from the traditional view on customary international law.”⁶⁴ The theory of emphasizing the importance of *opinio juris* over state practice in the creation of human rights customs is also not new, but rather an evolution from the German Historical school of thought.

However, the modern theory that Roberts is introducing is an evolution from the “volksgeist’ in the sense that claiming that declarations have or have not become custom depends on whether or not the declaration was “phrased in declaratory terms, supported by a widespread and representative body of states, and confirmed by state practice.” Therefore, modern custom includes both a declaratory and constitutive view of *opinio juris* on the formation of ICL.⁶⁵ In this sense, modern custom is seen as guiding action, or state practice, rather than waiting for actions by states to reach that point when they are recognized as having crystallized sufficient to be considered worthy of becoming law. In this vein, “treaties and declarations represent *Opinio juris* because they are statements about the legality of action, rather than examples of that action.”⁶⁶ Modern custom is more appealing for codifying human rights norms due to its capacity to “develop quickly because it is deduced from multilateral treaties and obligations.” A good example of this is the merits decision in the case of the *Military and Paramilitary Activities against Nicaragua* (1986). The judgment of the ICJ, Roberts argues, acknowledged this by stating that:

⁶⁰ Roberts, *supra* note 15, at 3.

⁶¹ *Id.* at 3.

⁶² *Id.*

⁶³ Roberts, *supra* note 15, Roberts fully elaborates on this subject by stating that “modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, and generate new customs.” *Id.*

⁶⁴ *Id.*

⁶⁵ Roberts, *supra* note 15, at 3.

⁶⁶ *Id.* at 2.

The court did not make a serious inquiry into state practice, holding that it was sufficient for conduct to be generally consistent with statements of rules, provided that instances of inconsistent practice had been treated as breaches of the rule concerned rather than as generating a new rule.⁶⁷

This shows that when a state's practice does not accord with its own rules it can claim the inconsistent behavior as a breach. By the logic of traditional custom, this new behavior should force a change in the law because it supposes that practice generates law. This exposes a fundamental loophole in the application of traditional custom; it pretends to follow state practice but when state practice contravenes law, it relies on a record of conduct that is "generally consistent"⁶⁸ thus exonerating their own 'anomalous' breach.

Modern custom is not just more feasible when trying to codify human rights obligations; it is more democratic and fair. When attempting to codify human rights norms into ICL, they will in my opinion be more successful in being codified and being respected if they are formed in a democratic way, where most states will have their say and vote. This is because of the strong "moral content" of modern custom, as expressed by Roberts when she writes, "*Jus Cogens* norms prohibit fundamentally immoral conduct and cannot be undermined by treaty arrangement or inconsistent state practice."⁶⁹ Goldsmith and Posner add to this argument by saying that "increasingly, courts and scholars ignore the state practice altogether."⁷⁰ Put simply, this means that courts recognize that the practice of states is not always the most useful guide to the formation or interpretation of law.

Modern theory of ICL accepts the idea that state practice can constitute more than just the 'physical acts' of states. Some legal scholars are warming to the idea that the UN General Assembly's resolutions and declarations can serve as evidence of ICL, especially if the norms the documents espouse can be shown to be regulating states' behaviors, or that the norms being expressed by these instruments are of vital importance to the human rights regime.⁷¹

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.* at 9.

⁷⁰ Goldsmith and Posner, *supra* note 21, at 24.

⁷¹ Villiger, *supra* note 18, Villiger also argues this point: "the fact that practice is 'against interest' gives it more weight than the mere acceptance of a theoretical rule in the course of the discussion by state representatives at the conference, and considerably more weight than the assertion of such a rule...claims

It can be argued that “state practice is less important than custom in forming modern law because these customs prescribe ideal standards of conduct rather than describing existing practice. For example, the customary prohibition on torture expresses a moral abhorrence of torture rather than an accurate description of state practice.”⁷² Although most if not all states adhere to the prohibition on torture as an ‘inhumane practice’, few states actually refrain from this practice. For instance, the United Nations General Assembly Resolution on “torture was adopted unanimously, but a much smaller number of states ratified the Convention Against Torture and others entered significant reservations to it.”⁷³⁷⁴ The point is that custom, understood through the Modern approach, and when applied in the formation of law, guides lawmakers in ways that the simple fact of state practice cannot. We can best grasp why this is so by clarifying the distinction between the modern and traditional approaches to custom.

I turn now to some of the critiques of modern custom that reveal its weakest elements. Roberts accepts that its “reliance on statement... to regulate global, as opposed to regional or national” issues means it can struggle to respond to such “issues in a timely manner.”⁷⁵ However, I feel it is right to subordinate short-term responsiveness to fairness: “Deriving customs primarily from treaties and declarations, rather than state practice, is potentially more democratic because it involves practically all states. Most states can participate in the negotiation and ratification of treaties and declarations of international law and within the UN, such as the United Nations General Assembly.”⁷⁶⁷⁷ However, “votes in the General Assembly usually receive little media scrutiny and are generally not

may be made in the widest of general terms; but the occasion of an act of state practice contributing to the formation of custom must always be some specific dispute or potential dispute.”

⁷² Roberts, *supra* note 15, at 8.

⁷³ *Id.* at 13.

⁷⁴ *Id.* Roberts also argues that “the court must attempt to formulate eligible interpretations that can explain the raw data of state practice and *Opinio Juris*. If there is little or no state practice or *Opinio Juris*, there will be no eligible interpretations. In easy cases, there will be strong state practice and *Opinio Juris*, which will produce only one eligible interpretation. In hard cases, there will be inconsistent levels of state practice and *Opinio Juris*, thus giving rise to multiple interpretations. ...For example: high state practice and low *Opinio Juris*, may indicate that torture is permitted, and low state practice and high *Opinio Juris* may indicate that torture is prohibited.” at 16.

⁷⁵ *Id.* at 12.

⁷⁶ Roberts, *supra* note 15, at 12.

⁷⁷ *Id.* Roberts claims this “...notion of sovereignty equality (one state, one vote) helps to level the playing field between developed and developing countries.” She sees this as providing less powerful states with a “...cost-effective means of expressing their views” at 12.

intended to make laws.”⁷⁸ While these critiques of Modern Custom highlight an important flaw, Modern Custom does not claim that all UN General Assembly resolutions or declarations will become ICL instantly. The norms that it does codify need to have been regulating state behavior prior to the passing of the resolution or declaration. It would also be important for it to pass through the UN General Assembly with few or no votes against it, making it a ‘universal’ declaration of States’ attitudes towards the principles and norms it is trying to declare. One of the strengths I perceive in modern custom is its more democratic way of understanding custom. It is also a more progressive way of codifying norms than, for example, the way that powerful and wealthy (and mostly western) states have so often been able to “wield disproportionate and often decisive influence in determining the content and application of custom.” While the actual usage of *opinio juris* has been criticized widely, I would like to say that it is the element that guides states behaviors towards compliance with the rules and norms – it is what binds the custom to law. It is what gives moral authority to states to declare why it is following a rule. The ICJ in the *South West Africa Case (1966)* made a “subjective/objective distinction” by stating, “law exists, it is said, to serve a social need.”⁷⁹

Another weakness in modern custom is its reliance on ideas and ideals, rather than on actual state behavior.⁸⁰ This reliance, according to its critics, opens too large a gap between modern custom and actual state practice.⁸¹ Another important criticism is that modern custom lacks a *jus cogens* norm, which develops with state practice. However, modern custom often has a strong moral content compared to the laws enacted on the basis of traditional custom, making it more applicable to modern human rights law.^{82,83} Despite well-noted weakness in its theory, modern custom’s strong moral content of *lex*

⁷⁸ *Id.* at 14.

⁷⁹ MARTTI KOSKENMENNI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL Argument (2005) at 31.

⁸⁰ Roberts, *supra* note 15, at 13.

⁸¹ *Id.* at 13.

⁸² Roberts, *supra* note 15, at 18.

⁸³ *Id.* Roberts also claims that “modern custom is more likely to yield eligible interpretations if we broaden our understanding of the state practice beyond the traditional forms...the atrocities of World War II, the globalization of trade, and improvements in communications have all diminished the importance of state boundaries. International law now covers many intrastate issues such as the human rights obligations, which largely protect citizens from their own governments” at 21.

ferenda makes it more appealing for codifying human rights norms into ICL because it helps codify customs that are relevant to the human rights regime. In addition, it more democratically crystallizes customs into law, allowing all states to partake in the process and not just elitist western states who tend to make customs based on their own interests and not what is best for all, or what is best for the advancement of human rights. The weaknesses attributed to modern custom are also general weaknesses attributed to custom formation in general. It has been well noted that ICL has several weaknesses as well as avid critics of this source of law.⁸⁴

As states evolve with the systems through which they interact, the law too evolves. It is through this evolution, I believe, that modern custom theory will become more accepted by legal scholars within the human rights regime. ICL in general will always have flaws because of the very nature of its ambiguous philosophical underpinnings. It will remain a contentious debate. However, for this paper, the question is which theory best expedites human rights law in the arena where international law and custom intersect. I believe modern custom is the theoretical approach that best achieves this development.

Roberts introduces an intriguing concept in regards to custom making, which she refers to as “Descriptive Accuracy and Normative Appeal.”⁸⁵ For Roberts, “descriptive laws” can be discovered from observation and “reasoning” because they reflect statements about a State’s actual behavior and what its practice has been (*Lex lata*).⁸⁶ However, dissimilarity prescriptive law, a term that basically refers to what the law should aspire to be, is hard to find by observation because it reflects states’ “demands” about what the law “should or ought to be” (*Lex ferenda*).⁸⁷ Modern custom is always “prescriptive” because it makes claims about how individuals and states should regulate their behavior. This is justified whenever we recognize that “what the practice has been and/or what the practice” ought to be are not the same, revealing that we recognize the need to change a behavior. A law is descriptive if it conforms to what the law has been or

⁸⁴ See generally: W. Michael Riesman, *The Cult of Custom in the Late 20th Century* (1987). *Faculty Scholarship Series*. Paper 732, http://digitalcommons.law.yale.edu/fss_papers/732.

⁸⁵ Roberts, *supra* note 15, at 5.

⁸⁶ *Id.*

⁸⁷ *Id.*

what the state practice has been.⁸⁸⁸⁹

According to Roberts, “determining what the law is from what the practice ‘has been’ relies heavily on the choice of characteristics under which precedents are classified and the degree of abstraction employed.”⁹⁰ This level of subjectivity leads to ambiguity, and exposes the determination of law to disproportionate levels of influence from those states with the most power. This theory clarifies this by declaring, “Description and prescription are not coextensive because one reflects practice (description) and the other directs practices (prescription).”⁹¹

Modern custom argues that the “justifications” for both the modern and the traditional custom approach “align with “descriptive and normativity” where each keeps true to its own theory and to the characteristics of each of the two theoretical “approaches.”⁹² However, modern custom “derives norms primarily from abstract statements of *opinio juris*.”⁹³ Modern custom is based upon statements of “*Lex ferenda* cloaked as *Lex lata*.”^{94 95}

⁸⁸ Roberts, *supra* note 15, at 5.

⁸⁹ *Id.* Roberts elaborates further and says that “a law is primarily normative if it is formulated on the assumption that the law is what the practice ought to be. What the law should be (prescriptive) can be justified by what the practice has been (description) or what the practice ought to be (normativity). Thus, we should distinguish between what the practice has been, what the law is, and what the practice ought to be: ‘has/is/ought (description/prescription/normativity). These notions, Roberts claims are “often confused”:

“some theorists mistakenly amalgamate descriptive and prescriptive considerations by aligning the distinction between description and normality with the Positivist ‘is/ought dichotomy’. This is misguided because it merges descriptive and prescriptive elements by fusing considerations of what the level of law creation because it requires the formulation of an abstract rule from actual practice, despite the existence of silences, ambiguities, and contradictions in that practice.” at 5.

⁹⁰ *Id.*

⁹¹ *Id.* She further explains this:

First procedural normativity requires that the process for forming laws be transparent, so that states are aware of the real basis for forming customs and can regulate their actions accordingly...Second, substantive normativity requires that laws be coherent and that their content be morally good or at least neutral, depending on their subject matter. Claims about ‘morality’ are contentious because it remains unclear whether morality is objective or culturally relative.

⁹² *Id.* at 6.

⁹³ *Id.* at 7.

⁹⁴ *Id.*

⁹⁵ *Id.* Roberts’s claims there are three reasons for this. “First, attempts to distinguish *Lex Lata* often rely on differentiating between codification and progressive development of the law...even though codification is meant to be scientific, not political, formulating a general rule from actual practice...codification involves legal judgments because it seeks to form a coherent rule in the face of inconsistent practice, which requires some crystallization...Second, it is difficult to distinguish between codification and progressive development by examining the languages of treaties and declarations...[they] might form customs when expressed in obligatory language, such as ‘must’...rather than ‘should’. However the court has relied on resolutions couched in both mandatory and non-mandatory language...finally, treaties and resolutions often

I agree with Robert's analysis of prescriptive laws because they reflect what the law should actually be based on human rights and human dignity, versus descriptive law that tends to be focused on state-centric rules and laws that only benefit those states. Modern custom often represents progressive developments of the law masked by phrasing *lex ferenda* terms as *lex lata*. Importantly, modern custom, as Roberts theory describes it, has the ability to form a custom, even in light of inconsistent practice. This is because even though states 'infringe' on the custom, the custom is still crystallized as ICL. State practice is unreliable; therefore, relying on *prescriptive* laws and statements from states and resolutions which espouse strong moral content represents the progression of the law that is often *lex ferenda* imposed as *lex lata*. This is where ICL needs to progress if it is to compliment and grow with international human rights law. As the traditional theory stands, it is more in tune with state interests than *actual* human rights.

C. Opposing views

1. *Declarative Law: An Alternative to Modern Custom Theory?*

Hiram Chodosh sees the definition and declaration of modern customary law as an incorrect classification.⁹⁶ Because it is so inconsistently applied, there is now a "modern" understanding of ICL as the "international law not embodied in treaties"⁹⁷ He argues, "by continuing to categorize all international law as either treaty or custom, many contemporary scholars have failed to recognize the emergence of a new body of

use mandatory language to prescribe a model of conduct and provide a catalyst for the development of modern custom. Treaties and declarations do not merely photograph or declare the current state of practice on moral issues...For example, some rights are set out in the universal declaration of Human Rights of 1948 are expressed in mandatory terms and have achieved customary status even though infringements are 'widespread', often gross and generally tolerated by the international communities. As a result, modern custom often represents progressive developments of the law masked as codification by phrasing *Lex ferenda* as *Lex Lata*." at 7-8.

⁹⁶ Hiram Chodosh, *Neither Treaty or Custom: The Emergence of Declarative International Law*, TEX.INT'L L.J. 87 (1991) at 2.

⁹⁷ *Id.*, Chodosh also mentions that "the traditional international court of justice definition of customary international law ('generally practice accepted as law') is now so loosely applied that a new, modern definition has emerged in the literature. Under this modern definition, implicitly accepted by most contemporary scholars, customary international law is that international law not embodied in treaties." at 2.

international law, ‘declarative international law’.”⁹⁸ Chodosh claims, “like customary law, declarative international law is not based exclusively on treaties and may evolve.”⁹⁹ He also acknowledges that “declarative law” has not been accepted as law by a majority of states.¹⁰⁰ The traditional approach, according to Chodosh, does not apply to ‘declarative law’ because, like the definition of Modern custom, it only requires one of the elements of ICL.¹⁰¹ Chodosh sees ‘declarative law’ as *Lex ferenda*, as rules “that are declared by law by a majority of states but not actually enforced by them, or rules that are both practical and accepted as law, but only by a minority of states.”¹⁰²

Chodosh argues that creating this new “third category” of international law, (declarative law) would help “restore legitimacy” to ICL.¹⁰³ He claims that extending the traditional definition of custom to embrace modern understandings of custom only “undermines much of the authoritative force” of ICL.¹⁰⁴ I do not think that the modern custom approach to ICL undermines its force; on the contrary, I think it helps create a fairer system of international law that gives it more authority. It does so by reinforcing the importance of human rights obligations and enforcing these norms in international law as binding legal customs on all states, which in return reinforces the significance of human right obligations in international law. It does this by codifying norms with a strong moral content. However, it is important to note that there is no legal enforcement in international law, no mechanism that really regulates law, just the ICJ, and this has no enforcement mechanism either. In addition, Chodosh claims that because “they do not fully satisfy the criteria of either treaty or custom, declarative rules could be excluded from any realm of law altogether.”¹⁰⁵

The pros and cons of the traditional approach to custom or the modern approach, or of declaring a new source of law, “appear to differ because the traditional develops slowly through state practice, while the modern can arise rapidly based on *Opinio*

⁹⁸ *Id.* at 3.

⁹⁹ Chodosh, *supra* note 96, at 3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

juris.”¹⁰⁶¹⁰⁷ Scholar Jeremy Pearce seems to agree with the notion of a progression of customary law. He writes that “the environment in which ICL operates changes constantly; this law needs to be flexible to be of use. Secondly, it has to be closely aligned with the internal workings of sovereign states’ relations for it to endure in this environment.”¹⁰⁸ Pearce is saying that custom needs to “sit comfortably with state consent.”¹⁰⁹ He argues that it must also “regulate” nation states’ behavior for it to avoid the illogical claim of being able to move “from fact into fiction or myth.”¹¹⁰

However, introducing a new body of law altogether, instead of utilizing what we already have and expanding on it so the law evolves in step with the world it regulates, is not only naïve but dangerous because it risks inventing laws too far removed from the practices it seeks to regulate. This can result in creating more problems than it actually helps to solve. How does creating an entirely new body of law help international law? If states and legal scholars are hostile to the idea of expanding ICL beyond the traditional custom approach and into the modern custom approaches, how would they react to an entirely new system of law that extends from the same ideas as modern custom? While I can see and understand the potential efficacy of establishing something new, something that helps the law evolve, something that would help instantly codify and “crystallize” an already existing custom or norm, inventing such a new body of law as Chodosh suggests would, I believe, only create further and more complicated problems for international law. States are hesitant about change within international law, and developing a completely new mode of international law would be a lengthy process with no guarantee that states would even accept it. I think that for the time being, modern custom theory remains the best approach. We can not foresee the future, but we can take lessons from the past, and the human rights regime was built to protect people from abuses in the past that continue until this day, so perhaps the whole system will have to be re-worked one

¹⁰⁶ Roberts, *supra* note 15, at 3.

¹⁰⁷ *Id.* Roberts make the statement that “The legitimacy of traditional and modern custom has been debated at length.” at 3; And, for the sake of this thesis, I will not focus on the entirety of the debate, but rather explain both approaches and apply them to the right to self-determination of indigenous peoples under international law. It is not in my interest to get into this scholarly debate, but rather to briefly explain both and explain why I see the modern approach as more fitting for the ever changing and progression of human rights law in the international fora.

¹⁰⁸ Pearce, *supra* note 29, at 3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

day. But for the sake of this paper this cannot be fully debated here. Chodos's acknowledgement that few states recognize this body of law indicates that still fewer states will be inclined to jump on board.

Unlike declaratory law theory, modern custom theory recognizes that not all UN resolutions or declarations have the potential to become actual ICL. The law that is derived from these international documents needs to have been guiding states' behaviors already and, more importantly, must be written in authoritative form and passed unanimously by the General Assembly.

As it has been pointed out above, the ICJ has been inconsistent in its application of customary law. Jeremy Pearce is not alone when he argues that "the International Court of Justice in some decisions manifests a type of 'reverse engineering' in order to facilitate a decision so that the law fits the facts."¹¹¹ Pearce also argues, "Charlesworth supports this position stating that the court in the case concerning *Military and Paramilitary Activities in and against Nicaragua* may be criticized for the obscurity in its judgment, which is at odds with the *North Sea Continental Shelf Case*."¹¹²¹¹³

Pearce believes that at the heart of this 'declarative' "school of thinking" is "Cheng's idea of 'instant' customary law. He espouses the notion that customary law is created by states through the medium of General Assembly resolutions that articulates each state's sense of agreed obligations."¹¹⁴ He also emphasizes Cheng's view that "practice is not required, and that a 'single element' custom is possible in cases when such unanimous support exists. This 'single element' custom also demonstrates the robust nature of ICL, and it matters little whether custom is defined objectively from a single element. The argument that it is possible gives ICL greater scope to be applied in varied situations."¹¹⁵¹¹⁶ Cheng's idea of 'instant' customary law espouses much of what Roberts

¹¹¹ Pearce, *supra* note 29, at 7.

¹¹² *Id.* at 7.

¹¹³ *Id.* However, Pearce also notes that "Wolfke states that: 'in its sixty years of activity the court has only four times explicitly quoted or at least referred to sub paragraph 1(b) of Article 38 of its statute...one even gains the impression that the court purposely avoided the terms 'custom' and 'customary law' in its decisions and opinions. The reasons for this may be *inter alia*, the notoriously controversial character of international customary law in general..." However, Pearce argues that the above declarations by Wolfke "hardly reflect a situation where the entire nature of customary international law is deemed to be fiction or myth." at 9.

¹¹⁴ Pearce, *supra* note 29, at 11.

¹¹⁵ *Id.*

¹¹⁶ Roberts, *supra* note 15, Roberts argues to this point that "likewise, Charney, Daniel Bodansky, and

declares as modern custom. However, instant customary law differs from modern custom in that Cheng's notion would mean that any UN General Assembly Resolution or Declaration would instantly become ICL binding upon all states. Whereas modern custom theory would codify only those Declarations or Resolutions with strong moral content and that can prove both *opinio juris* and that the principle was already guiding states behavior. Therefore, only one element from the traditional custom theory is needed, and that one element is *opinio juris*.

All these legal scholars are advocating for exactly what modern custom is attempting to do – integrate custom into ICL. This is exactly what I am arguing for. There needs to be a more cohesive voice that can integrate all these theories into one cohesive version of modern custom. Modern custom is not only a more viable option than introducing another new concept or an altogether new body of law, it is the one that has already been accepted in cases by the ICJ, the one legal body that regulates international law. We should focus on what has already been established and what the ICJ has already accepted to be part of international law. This way we can better utilize this body of law, making it more applicable to human rights and, more specifically, to indigenous rights law.

2. Anthony D'Amato's Critique

Roberts accepts that “the divergence between traditional and modern custom has been criticized as undermining the integrity of custom as a source of law.”¹¹⁷ Critics such as Patrick Kelly argue that “custom is indeterminate and a malleable source of law, simply a ‘matter of taste’.”¹¹⁸ Anthony D'Amato is another harsh critic of modern customary law. He says, “resolutions of the United Nations are not a source of law at all; if they were, the United Nations would be a world legislature.”¹¹⁹ D'Amato also argues, “Conventions simply create law directly for their signatories. Other misnamed ‘sources’ such as the decisions of international and national courts and the writings of publicists, at the best are

Hiram Chodosh conclude that modern custom is really a new species of universal declaratory law because it is based on authoritative statements about practice rather than observable regularities of behavior.” at 4.

¹¹⁷ Roberts, *supra* note 15, at 3.

¹¹⁸ *Id.* at 3.

¹¹⁹ Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, GA. J. INT'L & COMP. L. 47(1995-1996) at 6.

interpretative; they do not directly create law.”¹²⁰

In D’Amato’s article, *Trashing International Customary Law*, he argues that, “central to the world court’s mission is the determination of international custom “as evidence of a general practice accepted as law.”¹²¹ He also claims that the International Court of Justice “has been better at applying customary law than defining it.”¹²² He makes the argument that the famous case at the ICJ, *Nicaragua V. United States (1986)*, “was not forged out of the heart of adversarial confrontation. Instead, it reveals the judges of the world court deciding the content of customary international law on a *tabula rasa*. Sadly it reveals that the judges have little idea about what they are doing.”¹²³ He goes on, “the court thus completely misunderstands customary law.”¹²⁴¹²⁵ He also argues that custom can only “arise out of state practice”¹²⁶ and is not found in any declaration or resolution passed by the UN General Assembly,¹²⁷ and that *opinio juris* “has nothing to do with the ‘acceptance’ of rules in such documents.”¹²⁸

At the center of D’Amato’s critique of ICL is what he presents as illogical connections between custom and international law. The problem, as he sees it, is that custom cannot both create law and then require the law based on that custom, or an element of it, to follow a pre-existing “obligation’ of international law. In D’Amato’s own words, “If a custom creates law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law? If the law prior exists, would not custom be...superfluous as a creative element?”¹²⁹ But there is no reason why a law that has emerged from one custom shouldn’t then become the basis for the interpretation of another custom, and for that interpretation to lead to the

¹²⁰ *Id.* at 5.

¹²¹ D’Amato, *supra* note 23, at 1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 2.

¹²⁵ *Id.* According to D’Amato, “what makes international custom authoritative is that it consists of the resultants of divergent state vectors...thus brings out what the legal system considers a resolution of the underlying state interests. Although the acts of states on the real world stage often clash, the resultant accommodations have an enduring and authoritative quality because they manifest the latent stability of the system. The role of *Opinio Juris* in this process is simply to identify which acts out of many have legal consequences.” at 1.

¹²⁶ *Id.* at 2.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Pearce, *supra* note 29, at 6.

establishment of another law. Custom, as he says, creates law, but this occurs as a process of one case after another. In other words, each formation of each law based on custom is time-and-place specific. In an international framework it seems to me logical that a custom that has become law in one time and place could then be used as a source to establish a connection between a custom and a law in another. D'Amato's approach strikes me as a product of the traditional Westphalian notions of law; it is limited to the functioning of individual states. As the international interactions between 194 states increase almost exponentially, such notions appear outdated at best. I would further argue that deriving custom from UN General Assembly resolutions and declarations is a more democratic way of formulating a legal international custom than deriving it from state practice and *opinio juris*. The UN is the one place where all nations of the world meet to discuss critical matters of international security and human rights obligations. So when a resolution is passed through its General Assembly in relation to this international security and, more pertinently, in regards to human rights, it should be accepted as ICL.

If not, then why do states pass resolutions and declarations if they have no intention of following or accepting them as one day regulating their behavior? If states do not believe in human rights, then why do they sign and ratify important international human rights treaties? They do so, in my opinion, because they believe them to be the norm that will one day 'crystallize' into ICL and regulate their state behavior. Otherwise why pass important human rights resolutions or declarations? Are they just empty documents making empty promises? I do not think so. I think they represent the world consensus at the time they are unanimously passed. Therefore, they guide states' behaviors and customs towards these norms.

Hugh Thirlway comments on D'Amato's approach by saying:

professor D'Amato... dismissed the terms 'sources' and 'evidences' of international law as 'best regulated to the domain of counter-productive terminology'; and in effect [he] rejects the concept of sources as evidences also inasmuch as they 'create more problems and ambiguities than they can possibly solve'. With regard to the division of rules into primary and secondary, unfortunately Professor D'Amato permits himself a slight looseness of terminology which makes it difficult to summarize his arguments. In effect, he distinguishes three classes of rules: (a) rules which are the direct product of international consensus, and which indicate to states what they must or must not

do; (b) rules which are similarly the product of international consensus, and which the ways in which rules indicating to states what they must or must not do may be created, ascertained, or changed; and (c) rules which ascertainment of rules laid down in class (d), and must indicate to states what they must or must not do.¹³⁰

This simply supports the criticism I have made of D'Amato. As Thirlway makes clear, D'Amato's attempts to refute ICL become confused in interpretations that are, at best, unclear. ICL and the role of modern custom theory in ICL may involve complicated legal concepts, and these complications may be easily attacked, but that does not mean such complication cannot be ordered and established as sound law. Indeed, the increasingly complex relationships of states – and between states and their peoples – in the post-Westphalian world require us to grapple with laws that can manage these relationships, however much D'Amato would like the relative simplicity of the traditional legal models. ICL is a complicated source of law, but this does not mean it is not relevant or that, as time progresses and international law with it, it will not find its footing within the international arena. The rebirth of ICL, has been very recent and it's been resurrected by the ICJ and human rights advocates because it is the best source of law to manage the demands and needs of the human rights regime. It is the only way to regulate it and hold states accountable for the human rights resolutions and declarations they pass within the UN General Assembly,

Pearce presents other theorists opposed to ICL: Schacher, who “states that ‘customary law’, new and old, are products of political ‘aims and conditions’”; Visscher, who “states that ‘every international custom is the work of power’”¹³¹; and Byers, saying, “‘although states are generally entitled to participate in the customary process it may be easier for more ‘powerful’ states to behave in ways which will significantly influence the development and maintenance or change of customary rules’”.¹³² All these criticisms appear to me to share the presumption that supporters of ICL seek its success outside the power relationships and political agendas that already exist between states. None of the scholars I have presented argue that ICL should develop or be applied outside the power relationships and the politics of present day international relations between states.

Meanwhile, Pearce offers his own view, which is that “Codifying customary

¹³⁰ Thirlway, *supra* note 17, at 41.

¹³¹ Pearce, *supra* note 29, at 4.

¹³² *Id.*

international law into treaty form disallows the law to change and evolve, as is usually the case with the creation of customary international law.”¹³³ But, as I have pointed out, the creation of ICL need not be any more rigid or fixed than other international law or law more generally. Actually, I am not alone in believing that modern custom theory brings flexibility and responsiveness to the codification of ICL.

Nicole Roughan, in her article, *Democratic Custom V. International Customary Law*, maintains that “custom appears to be an undemocratic mode of order because it lacks the very formalism and rational approach to decision-making which most democracies consider vital for solving problems of disagreement.”¹³⁴ She sees that at the “international level these problems – the race of power, the dominance – are amplified both between and within states, rendering custom a seemingly unhelpful and unattractive basis for a legal system.”¹³⁵ But I suggest that in seeking to avoid this ‘amplification’ Roughan shies away from precisely the complexities that face the world’s states as they grapple with how to interact not just with each other, but also with the various peoples residing within them. The “formalism and rational approach to decision-making” she speaks of has been the very strategy used by some powerful states (not all of them “democracies”) for “solving problems of disagreement.” Too often the ‘solution’ for one state has been the problem – sometimes the catastrophe – for another state or people. Also, her implicit accusation that those using custom as a source of international law are irrational, seems to betray a desire for the apparent simplicity of Westphalian-style relationships between states; a relationship, I have argued, that suits some states more than others.

That such fierce debate rages between scholars of law over the pros and cons of ICL seems to me not only healthy, but also essential for such law to development. Nobody would argue that law has not evolved, and few would present this history as without disagreement and occasional hostility. I believe that through these debates, and through the increasing acceptance and application of modern custom theory, the 194 states and the peoples within them will progress towards the most democratic methods of

¹³³ *Id.* at 14.

¹³⁴ Nicole Roughan, *Democratic Custom V. International Customary law*, VICTORIA U. WELLINGTON L. REV. 403 (2007) at 1.

¹³⁵ *Id.*

codifying international law. More specifically, it is through the application of ICL, based on modern custom theory, that indigenous peoples are most likely to achieve their rights to self-determination.

D. Conclusion

I have critically analyzed and debated the two main theories of how to codify international customary law: the traditional and modern theories. I have attempted to explain why under the two main theories of ICL I support Roberts' accretion of modern custom and all it has been able to encompass. In light of today's globalized world, and at a crucial point in our history, especially in reference to human rights laws and customs, it has become important to find the best possible method to codify these norms into ICL. This is crucial because we need to evolve international law to match the fast-paced system of human rights. In this way it can help codify these norms and help regulate states' behavior and compliance with human rights norms and obligations under ICL.

This is why I believe that traditional custom should no longer be used to codify international custom. Due to ambiguities inherent in its establishment, state practice alone is not effective for deciding if a custom has reached an international legal status, or if it has 'crystallized' into ICL. Nor can we access state practice democratically under this model because of the likelihood of more powerful states dominating this process. The United Nations Charter clearly states that all states are created equal and are equal before international law. This may be true in theory, but in practice, it is not. When the Permanent Court of Justice, in its infamous *SS. Lotus Case*, relied on just six western states as evidence of state practice, the system of law was revealed as not only undemocratic, but unfair. We cannot just look at western states for proof of state practice; we must look at *all* states to determine whether or not the vast majority of states are participating in a norm or not. This is why modern custom is the best system to democratically form a custom into ICL. In line with the modern custom theory, UN General Assembly resolutions are considered to be part of this ICL regime, and can embody general norms and customs already regulating states behavior. More importantly, it leads to a more fair and democratic process of declaring ICL – one country, one vote, and one voice. In UN General Assembly resolutions of declaration voting sessions, no state's vote weighs more than another's; they are all equal, as it should be.

II Self-Determination: The Right of Indigenous Peoples under Customary International Law

The Cree's have no Interest in secession from Canada. We want self-determination to be recognized so that we can finally become part of Canada ~ Cree Leader Ted Moses¹³⁶

A. Introduction

In chapter one, I established that indigenous peoples' right to self-determination is best advanced through a modern custom approach to ICL. This involved establishing the logic of the legal interpretive framework. In this second chapter, I will explore the ways this framework is applied and the specific declarations that allow this application to advance not only individual rights to self-determination, as recognized with traditional approaches to ICL, but also that these rights extend to indigenous peoples. Essentially, the modern custom theory recognizes that the traditional approach does not, by protecting individual rights, protect the rights of indigenous peoples within nation-states; in response, the modern approach formulates a legal framework to grant such rights to these peoples' *within* nation states.

Once I have discussed exactly *how* the various UN declarations advance indigenous peoples' rights to self-determination, I will present and analyze case studies to prove the argument of chapter one: the right to self-determination of indigenous peoples under international law has been codified as customary international law (CIL) under the modern custom theory.

The right to self-determination is a people's right to manifest and govern their own lives within their communities. It is the ability to control their own civil and cultural affairs without the interference of state governments and institutions, the ability to control their own lives to ensure their survival. Under current international law, the right to self-determination has been codified into the two international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), often referred to as Common Article 1

¹³⁶ Roderic Pitty and Shannara Smith, *The Indigenous Challenge to Westphalian Sovereignty*, AUSTRALIAN JOURNAL OF POLITICAL SCIENCE, 46:1, 121-139 (2011) at 7.

for the commonality of Article 1 in both covenants. Common Article 1 states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence¹³⁷

Those supporting traditional custom theory would agree that these two articles define the right to self-determination. However, they would say that these articles do not apply to indigenous peoples because, as they were conceived and established, these articles were written in response to the needs of a post-colonial scenario in which indigenous peoples were considered to be under the jurisdiction of states and not the international community. Proponents of modern custom theory, however, point out that the international law has evolved in line with the international community, which has long since ceased to function as it did before the establishment of the human rights regime we live with today.

The ICCPR and ICESCR “lay down the foundation of what has subsequently developed as International Law of Human Rights.”¹³⁸ Common Article 1 is essential for indigenous rights since it “reveals the reasoning that before any rights are enjoyed it is vital for the people to become masters of their own political destiny.”¹³⁹ Therefore the right to self-determination is not limited nor “restricted” to a political or even civil right but is the “gateway to economic, social and cultural rights.”¹⁴⁰ The core idea of self-determination is that peoples and individuals as human beings have the right to manifest and control their own destiny and be “free of alien masters and not be handled about from

¹³⁷ UN International Covenant on Civil and Political Rights, General Assembly Resolution 2200A, 16 December 1966. Available at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹³⁸ Joshua Castello and Jeremie Gilbert, *Self-Determination, Indigenous Peoples and Minorities*, 3 MACQUARIE L.J. 155 (2003) at 31.

¹³⁹ *Id.*

¹⁴⁰ *Id.*; Please also see Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993); and Abdullah Al Faruque and Najnin Begum, *Conceptualizing Indigenous Peoples' Rights: An Emerging New Category of Third-Generation Rights*, 5 ASIA-PAC. J. ON HUM. RTS. & L. 1 (2004).

sovereign to sovereign as if they were property.”¹⁴¹ They and only they have the right to choose the government structure that will dictate their rules and norms.¹⁴²

In line with the modern custom theory, human right principles enshrined in UN Declarations or Resolutions can be crystallized into ICL. This is based on the strong *opinio juris* and the strong moral content of the document being passed through the General Assembly, as detailed in chapter one. The right to self-determination as granted under Common Article 1 of the international covenant stipulates that peoples have the right to seek self-determination but at the same time respect the territorial integrity of the state, except in extreme cases where secession is the only possible solution left for survival. This notion has also been upheld by the ICJ, as in the cases of Namibia and Western Sahara, and with the “Legality of the Separation Barrier in the Occupied Palestinian Territories.

As discussed in chapter one, the ICJ held that the right to self-determination is an *erga omnes* obligation under international law that no state is allowed to derogate from. Indigenous peoples have the fundamental right to manifest their own destiny and with their own political systems manage and express their culture, resist assimilation policies, keep their language of origin and create an educational system that meets their needs. In other words, they have the right to internal self-determination.

Under modern custom theory, United Nations General Assembly Declarations can be sought to embody norms of customary international law if the norms are articulated into forceful terms and the *opinio juris* of the Declaration is already guiding states behaviors. The United Nations Human Rights Council (HRC) and the UN General Assembly (UNGA) Declaration on the rights of Indigenous Peoples (UNDRIP) has granted and declared that indigenous peoples are beneficiaries of this legal principle. This ICL codification of their right to self-determination occurred under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as internal self-determination or autonomy. Article 3 of the UNDRIP reads exactly as Common Article 1, except it replaces ‘peoples’ with ‘indigenous peoples’.

¹⁴¹ Deborah Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992) at 3.

¹⁴² S. James Anaya, *Indigenous peoples in International law*, 8 ARIZ. J. INT'L & COMP. L. 1 (1991) at 31.

I will argue that the concept of self-determination has evolved in international law to include both the notion of internal and external self-determination aspects. This development of the concept has been addressed by multiple international actors and instruments to include indigenous peoples. Most importantly, Common Article 1 of the International Covenants has codified self-determination as a legal principle that has liberated colonized peoples and States. I will start by distinguishing between the classical model's 'external' application of self-determination and the modern 'internal' approach.

B. The Classical Model (External) V. The Modern theory (Internal)

This section is divided into two parts: external self-determination, which I will refer to as the Classical Model of Self-determination, and internal self-determination, referring to the Modern theory of self-determination, or autonomy.¹⁴³

The right to external self-determination is the "right of the people to be independent and free from outside interference."¹⁴⁴ This Classical Model has been primarily entailed the notion of the decolonization process in the 1960s.¹⁴⁵ It was further legalized by the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples that stated "the subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights; it is contrary to the UN Charter, and is an impediment to the promotion of world peace and cooperation."¹⁴⁶ This very movement allowed Africa and Asia to seek independence from its European colonizers in the 1960s.¹⁴⁷ However, this 'Salt-Water' approach is a limited view of self-

¹⁴³ In my advocacy for the right to self-determination of indigenous peoples, I am arguing for the internal right of self-determination. I do, however, believe in leaving the door open for external self-determination for extreme cases in which indigenous peoples are denied the right to internal self-determination and where they face high levels of discrimination from the nation state they reside within. But for the sake of this thesis, I am arguing for the internal right of self-determination of indigenous peoples to live peacefully among others and within the nation-states they now find themselves within. I am not arguing for the right to secede or become an independent state, unless it is their only option for survival.

¹⁴⁴ Halim Morris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (1997) at 2.

¹⁴⁵ *Id.* at 2-3.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 3; See also, for opposing views on Indigenous right to self-determination based on the classical view of self-determination theories, Mark Bennett, "Indigeneity" as *Self-Determination*, 4 INDIGENOUS L.J. 71 (2005); and Allen E. Buckman, *The Right to Self-Determination: Analytical and Moral Foundations*. 8 ARIZ. J. INT'L & COMP. L. 41 (1991) Buckman argues that self-determination would create chaos and violence, but what indigenous peoples need is 'political autonomy'. He fails to understand that self-

determination if it ossifies into a rigid norm that prohibits the evolution of international law. Unfortunately, despite the increasingly globalized world and progression in human and indigenous rights, this is still the main theory of international law for nation-states continue to keep indigenous peoples outside the benefits of self-determination. The salt-water theory clearly distinguished between the ‘over sea’ colonies of European and Western nations and that of the indigenous populations that were integrated with “immigrant populations.”¹⁴⁸

The salt-water theory has “challenged the resolve of indigenous peoples of the enclave territories”¹⁴⁹ because it reinforces the notion of “sanctity of borders,”¹⁵⁰ and by drawing so heavily upon the 1970 Declaration on Principles of International Law Concerning Friendly Relation and Cooperation Among States.¹⁵¹ “This declaration served to preserve the former boundaries and underpin the claims of states that internal conflicts are exclusively an issue of domestic jurisdiction and not subject to international scrutiny.”¹⁵² But developments in indigenous and human rights and in ICL have, in my opinion, made this theory outdated.

1. Internal Self-determination: The Modern Theory (Autonomy)

Although the *principle* of internal self-determination has created fierce debate “among nation states and scholars”,¹⁵³ one thing is clear; the vast majority of claims for self-determination are based on cases of internal self-determination.”¹⁵⁴ This paper argues that indigenous peoples’ right to internal self-determination is intrinsically connected to their right to control their ancestral lands and the resources on them. This view is supported by the United Nations Human Rights Council and the Inter-American System

determination is political, social, and cultural autonomy, that in order for indigenous peoples to enjoy their basic human rights, they must be granted the right to self-determination. I will clarify this later in my argument.

¹⁴⁸ *Id.* at 24.

¹⁴⁹ *Id.* at 25.

¹⁵⁰ Morris, *supra* note 144, at 6.

¹⁵¹ *Id.* at 6.

¹⁵² *Id.*

¹⁵³ Halim, *supra* note 144, at 4.

¹⁵⁴ *Id.* at 4.

of Human Rights. (I will shortly present cases as evidence of this connection.)

Legal scholar Deborah Cass writes that, “the definition [of the modern approach to self-determination] was further elaborated regarding the manner in which the right could be implemented. The right to self-determination can be exercised in one of three ways – integration, free association, or independence.”¹⁵⁵ This means indigenous peoples can decide how to position themselves relative to the nation states within which they find themselves.

Judge Dillard wrote in his Opinion on the Western Sahara Case, “it is for the people to determine the destiny of the territory and not the territory the destiny of the people.”¹⁵⁶

Kingsbury notes that the “distinction”¹⁵⁷ between external self-determination in the classical sense and internal self-determination in the modern sense is extremely important “because, as regards indigenous peoples in both Canada and the United States, politicians tend to ignore it and simply lump any claim to sovereignty or self-determination in one big package.”¹⁵⁸ Kingsbury also argues that:

external self-determination arises when a people finds that this internal concept of self-determination is not being respected – that fundamental human rights are not available to them. They cannot participate in the system and the wealth of the nation is inaccessible to them; they cannot exercise the right to take advantage of the land and resources around them.¹⁵⁹

In this way we see, along with Kingsbury, how the traditional approach to indigenous claims to self-determination fails. Because it sees all such internal claims as a movement towards secession, it refuses to address them. It thus determines the creation of scenarios where the only way for such peoples to claim their rights is through secession. It is by such circular reasoning that the traditional approach maintains its logic. The modern approach, as elucidated by Kingsbury, not only exposes the traditional approach as the self-fulfilling prophecy it is, but opens the door to managing claims to self-determination in ways that can satisfy the indigenous peoples making them and the states they live within.

¹⁵⁵ Cass, *supra* note 141, at 3.

¹⁵⁶ *Id.*

¹⁵⁷ Benedict Kingsbury and William S. Grodinsky, *Self-Determination and "Indigenous Peoples"*, Proceedings of the Annual Meeting, AMER. SOC. OF INT'L L., Vol. 86(APRIL 1-4, 1992) at 3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 14.

One of the international documents that has addressed the aspect of ‘internal’ or ‘autonomy’ in international law is the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States. It clearly stipulates that, “implementation of the right to self-determination need not conflict with territorial sovereignty or the political entity of a state.”¹⁶⁰ This has, however, been criticized as limiting the force of self-determination for state-centric purposes.¹⁶¹ Therefore, there is tension here between advancing the rights to self-determination of peoples within a state and the rights to claim nation-state status.

I am arguing that the right to self-determination includes both internal and external aspects.¹⁶² It includes “interrelated political, economic, social and cultural aspects.”¹⁶³ Gros Espiell, Special-Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities,¹⁶⁴ has reaffirmed that, “among other things, the right of self-determination of peoples means that peoples have the right to enjoy their cultural heritage and ‘to determine, in freedom and sovereignty, the economic system or regime under which they are to live.’”¹⁶⁵

Self-determination in its modern interpretation has both an internal ‘autonomy’

¹⁶⁰ *Id.* at 7; For a more in-depth read on what ‘autonomy’ means and different types of autonomy please see generally, Donna Lee Van Cott, *Prospects for Self-Determination of Indigenous Peoples in Latin America: Questions of Law and Practice*, 2, GLOB. GOVERN, 43, (1996). In her article she advocates for greater autonomy of indigenous communities and the importance of land rights, and the connection of indigenous rights to their lands and the necessity of self-determination to seek this right. She argues that what indigenous peoples seek is greater autonomy and not secession or independence from states.

¹⁶¹ *Id.*

¹⁶² Magnarella, *supra* note 1, Magnarella also argues that “the current debate of self-determination of indigenous peoples rests on several historical legacies: the Westphalian idea that the territorial integrity of existing ‘nation-states’ is sacrosanct; the League of Nations practice of treating peoples organized into states as wards of existing states; the UN tendency to treat human rights violations of peoples as remediable individual grievances, international scholars generally that international law presently neither validates nor prohibits secession from an independent state.” at 9; However, Anaya “proposes that the substance of the norm of self-determination be analytically distinguished from what he calls its remedial prescriptions...the substance continues a universe of human rights that attaches to all the peoples and empowers them to control their destinies. When governments deviate from their human rights obligations, remedies are triggered. But the type of remedy is to be determined by the nature of the government’s deviation; it is not the free choice of the injured people. The right of secession and independence would be justified only in the most extreme cases. For example, the appropriate remedy for colonialism is independence of the subjected people, lesser deviations or human rights violations could trigger lesser remedies, such as autonomy [internal self-determination]. Representatives of nation-states, being concerned with territorial integrity, oppose secession under any condition.” at 9.

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

aspect and, in extreme cases, an external ‘secession’ aspect.¹⁶⁶ Internal self-determination does not threaten a state’s “territorial integrity.”¹⁶⁷ On the contrary, it can be developed and implemented

within the constitutional framework of the state...autonomy can involve local control over...education, religion, land use, taxation, family law, cultural institutions, and municipal government. It does not involve control over foreign policy, national defense¹⁶⁸

The modern custom theory, by maintaining claims to both internal and external self-determination, is positive for the state in which indigenous communities live because it offers a way to deal with an indigenous community’s rights claim without risking sovereignty. Ideally – for both a state and the indigenous community within it – internal avenues suffice for the gaining of rights to self-determination for indigenous peoples. Nevertheless, the right to seek self-determination external, typically through a claim to independence, should remain only for last-resort situations where doing so internally has become impossible. This is complicated, however, by the fact that not all indigenous communities constitute a geographical minority within the state. In some countries such as Guatemala, Bolivia, and Greenland, indigenous peoples constitute a majority, and often comprise diverse communities. I realize the potential problems this could have on host states; if they have twenty different indigenous communities, should all twenty be autonomous? This is complex. Theoretically, under my argument, yes; however, this is something that both the communities and the government must decide without infringing on indigenous peoples’ right to choose freely. Some communities may want more autonomy than others. The extent to which each community needs self-determination will depend on the current situation of that community.

The situation of indigenous peoples varies from region to region, and from community to community, so all these factors need to be considered, case by case. Such discussion, however, is beyond the scope of this paper. I am not the spokesperson for indigenous rights or communities, but I strongly believe in indigenous rights and social justice. I consider the commitment to managing such considerations a small step forward in repairing the damage and, in more than a few cases, the horrors that indigenous

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Id.* at 10.

¹⁶⁸ *Id.*

peoples have faced and continue to face. I see this as a small step in the long battle against states for the full recognition of indigenous legal rights and communities.¹⁶⁹

Although nation-states defiantly oppose the principle of self-determination for indigenous peoples on an international level, most western states do practice various norms of internal self-determination for their own indigenous peoples within their territorial sovereignty.¹⁷⁰ This varies from state to state and is influenced by the “local circumstances” and historical narratives of indigenous peoples.¹⁷¹ The several different forms of autonomy currently granted to indigenous peoples are: “(1) autonomy based on contemporary indigenous political instructions, such as the Saami parliaments in the Nordic Countries; (2) autonomy based on the concept of an indigenous ancestral territory, such as the arrangement for the Comaraca, Kuna Yala in Panama; and (3) regional autonomy within the state, such as the Nunavut Territory in Canada and the indigenous autonomous regions in the Philippines”¹⁷²

C. Indigenous peoples’ right to self-determination under the Modern Theory of International Customary Law

International law has evolved and progressed from merely being concerned with the rights of states to being concerned with the rights of “individuals and collectives rights as human beings.”¹⁷³ The concept of self-determination has also evolved into “a legal

¹⁶⁹ For a critique and alternate view on indigenous peoples struggle for the right to self-determination please see; Jeff J. Corntassel and Thomas Hopkins Primeau, *Indigenous Sovereignty and International Law: Revised Strategies for Pursuing “Self-determination”*, 17 HUM. RTS. Q. 343 (1995) the authors seem to agree that the right to self-determination is only a secession mechanism from the state. They view self-determination as the classical theory, and claim that since what indigenous people are really seeking is autonomy, that they are pursuing it the wrong way. They contend that the classical view of self-determination is “not a prerequisite for cultural preservation” and that the human rights regime already has all the mechanisms needed to help preserve their rights. They also argue against the usage of the term ‘indigenous’ because it is used to describe ‘5,000’ groups of people. The Authors contend that the right to self-determination is not an ‘inalienable right’ but rather a right within the classical view of decolonization. The authors, however, fail to understand, in my view, that indigenous peoples are victims of colonization and more importantly that the definition for self-determination has evolved to include an internal aspect, something the UN Human Rights Council has concurred upon. This has been discussed in this paper, and will be further debated in the last section of this chapter.

¹⁷⁰ Magnarella, *supra* note 1, at 11.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Lori M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J INT’L & COMP L 385 (2004) at 3.

precept benefiting human beings as human beings and not as sovereign entities as such.”¹⁷⁴ Although the right to self-determination embodied in Article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is a non-binding legal document, it carries political weight and “legal significance for the development of customary international law.”¹⁷⁵ According to Koivurova even with these differences, “these processes have much in common in that the main legal source they rely on is Article 1 common in the two Covenants.”¹⁷⁶ As I have asserted, modern custom theory of international law allows United Nations Declarations to become ICL, as long as legal principles are espoused that are already guiding states behaviors with strong *opinio juris*.

Article 3 of the UNDRIP has been codified as ICL. It reads exactly as Common Article 1 of the International Covenants, stipulating that, “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁷⁷ This is then defined as internal self-determination by Article 4: “Indigenous peoples... have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”¹⁷⁸ In the preamble of UNDRIP, the Declaration states in authoritative terms that this right has been granted by various international instruments under international law.¹⁷⁹

Article 46 also makes this point very clear, where it states that nothing in the Declaration should be construed as granting indigenous peoples the right to independence or secession from the state. It states, while exercising their right to self-determination, it may not “dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”¹⁸⁰ However, the preamble of UNDRIP contains the caveat that this is true “Bearing in mind that nothing in this Declaration may be used to deny any person their right to self-determination, exercised in conformity with

¹⁷⁴ *Id.*

¹⁷⁵ Timo Koivurova, *From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-determination*, INT'L J. MINORITY & GR. RIGHTS, 15 (2008) a 4.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ United Nations Declaration on the Rights of Indigenous Peoples, *available at* <http://www.un.org/esa/socdev/unpfii/en/drip.html>. Adopted by General Assembly Resolution 61/295 on 13 September 2007.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

international law.”¹⁸¹

The Declaration passed through the UN General Assembly with only four countries voting against. However, two of those four countries – Australia and New Zealand – have reversed their vote and endorsed the Declaration while the remaining two, the U.S. and Canada, have declared they are revising their position on the Declaration. Both Australia and New Zealand emphasized the importance of the Declaration for indigenous rights. Australia’s MP Jenny Macklin stated the following in Parliament on April 3, 2009:

Today, Australia takes another important step in re-setting the relationship between indigenous and non-indigenous... Today Australia gives its support to the Declaration... [which] needs to be considered in its totality – each provision as part of the whole. Through the article on self-determination, the declaration recognizes the entitlement of indigenous peoples to have control over their destiny¹⁸²

This is important because, although technically UN Declarations are non-binding, states are taking them seriously enough for them to guide state behavior; states like Australia and New Zealand are espousing *opinio juris* in their reversal statements. This further validates the belief that the UNDRIP can espouse ICL and that the right to internal self-determination has been crystallized into ICL.

James Anaya contends that the UNDRIP “has a formal status like that of the Universal Declaration of Human Rights.”¹⁸³ He also argues that the Declaration should be understood to “reflect, to some extent, a norm of customary international law.”¹⁸⁴ Anaya contends that ICL “crystallizes” when a vast majority of states “converge on a common understanding of the norms content and expect future behavior to confirm to the norm.”¹⁸⁵ Here Anaya is in line with my argument in chapter one. Although the Declaration is non-binding, “the standards they set were already guiding states behavior.”¹⁸⁶

¹⁸¹ *Id.*

¹⁸² Anaya, *supra* note 42, at 97.

¹⁸³ *Id.* at 79.

¹⁸⁴ *Id.* at 80.

¹⁸⁵ *Id.*; Anaya also contends that “Professor Brownlie for example, includes among the ‘very numerous’ sources of custom the following: “Diplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, e.g. manuals of military law, executive decisions,...and resolutions relating to legal questions in the United Nations General Assembly.” at 80.

¹⁸⁶ Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN’S

Scholars such as Richard Falk have questioned whether it “is now widely enough endorsed by states to qualify as a norm of customary international law?”¹⁸⁷ This reserve seems to reflect a widespread fear of the UN Declaration becoming ICL because “articles 4 and 26 imply that the Declaration buttresses notions of greater autonomy and self-determination for indigenous groups.” But comments by Anaya, one of the foremost writers on indigenous rights, support the notion that “self-determination is widely acknowledged to be a principle of customary international law and even *Jus cogens*, a peremptory norm.” Article 46 of the Declaration, on the other hand, does limit the right to self-determination,¹⁸⁸ granting only the right to internal self-determination, and certainly not secession from the state.¹⁸⁹ An important point to state here is that:

at particular points, customary international law likewise created obligations that ran in favor of individuals and against states...the fundamental goal of the ‘Universal Declaration’ was to expand these examples to the broad field of international rights, both by inspiring express adoption in future formal treaties and by initiating the dialogue and actions necessary for the recognition of international customary law¹⁹⁰

The Universal Declaration of Human Rights (UDHR), declared by the UN General Assembly in 1948, can be interpreted as espousing the same idea. As human rights have become increasingly important in international law, the UDHR has become binding on states and is the foundation upon which human rights law has developed.¹⁹¹ The UDHR “has become customary international law or been translated into treaty form.”¹⁹²

We should try to understand the role of the UDHR in ICL outside its broader legal context. John Dugard, author of *The influence of the Universal Declaration in Law*, states, “today it is pointless to examine the UDHR as ‘law’ without an examination of its

L.J. 348 2004-2005 30 QUEEN'S L.J. 348 (2004-2005) at 47.

¹⁸⁷ Anaya, *supra* note 42, at 100.

¹⁸⁸ *Id.* at 100.

¹⁸⁹ *Id.*; For a general overview of the historical and legal significance of the UNDRIP, please see. Megan Davis, *Indigenous Struggles in Standard Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. INT'L L. 483 (2008); ¹⁸⁹ Alexandra Xanthaki, *Indigenous Rights and the United Nations Standards*, Cambridge (2007); Aliza Gail Oragaick, *Listening to Indigenous Voices: What the United Nations Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. INT'L L. & POL'Y 171 (2009); Jon Beidelschies, *The Impact of the United Nations Declaration on Wisconsin Tribes*, 26 WIS. INT'L L.J. 479 (2008) .

¹⁹⁰ Michael Van Alstine, *The Universal Declaration and the Developments in the Enforcement of International Human Rights in Domestic Law*, MARYLAND J. OF INT'L L. Vol.24:63 (2009) at 65-66.

¹⁹¹ John Dugard, *The Influence of the Universal Declaration as Law*, 24 Md. J. Int'l L. 85 (2009) at 2.

¹⁹² *Id.* at 2-3.

legally binding offspring, the Covenants. They, together with the UDHR and the Optional Protocol to the Covenant on Civil and Political Rights,' constitute the International Bill of Rights.”¹⁹³ He also acknowledges:

Today there is no doubt that the human rights provisions of the Charter are legally binding. The International Court of Justice confirmed this in the Namibia Opinion of 1971.¹⁹⁴

The *Nicaragua case* from the ICJ confirmed this belief¹⁹⁵ that a United Nations Declaration can have legally binding principles upon all states when it ruled that “evidence of *opinio juris*, may be deduced from United Nations General Assembly Resolutions.”¹⁹⁶ Cass argues, “Resolutions 1514, 1541, and 2625 indicate a belief within the international community that self-determination is part of customary international law.”¹⁹⁷

While I am arguing that the UNDRIP has espoused an *opinio juris* consensus from states and thus can embody principles of ICL, scholars and states still debate the capacity of indigenous claims to achieve the status of *opinio juris*.¹⁹⁸ I acknowledge that this is harder to prove as a factual, evidence-based practice than at the theoretical level. I have no doubt though that the endeavor to translate the core ideas in this theory into law will continue to move towards more regular legal practice; the case studies I will shortly present encourage this belief.

This debate is also on “whether there is a consensus among states that they are under obligation to recognize certain indigenous claims as binding customary international law.”¹⁹⁹ Ougamanom argues that:

Raidza Torres argued that international legal developments on indigenous peoples have emerged as a normative regime. According to her, there is a non-binding moral obligation among states to respect the norms that have emerged concerning

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 3.

¹⁹⁵ *Id.*

¹⁹⁶ Cass, *supra* note 141, at 4.

¹⁹⁷ *Id.* at 4.

¹⁹⁸ Ougamanom, *supra* note 186, at 42.

¹⁹⁹ *Id.* at 42; Ougamanom however argues that “a review of scholarly literature from the 1980’s to the present time indicates that there is greater support of the existence of *Opinio Juris* with respect to indigenous issues. However, a subtly different position taken by some scholars with regard to developments concerning indigenous issues is that states are inclined to comply with indigenous norms on the basis of moral, as opposed to legal, obligation” at 42.

dealings with the indigenous populations. Torres argued that the effects of the proliferation of domestic and international declarations, studies, working groups and state practices dealing with indigenous concerns is to ‘demonstrate an emerging norm in the protection of cultural, land, welfare, and self-determination rights within a particular context of each aboriginal group.’²⁰⁰

Again we find evidence for a progression, an evolution in the interpretation of ICL via a range of declarations. Each of these emerged from evidence-based theoretical responses to the plight of various peoples. Ougamanom also supports this notion of a transition from theory to law when he states, “contemporary international law has embraced broad moral precepts among its constitutional elements, particularly with in the rubric of human rights.”²⁰¹ He also argues that under the United Nations charter and international documents of international law, “the obligation to uphold human rights has crystallized as general international law.”²⁰² He agrees with other legal scholars who have, in my view rightly, “Linked the notion of *Opinio juris* to the subjective principles of humanity, morality, religion, reason and natural law.”²⁰³

Self-determination of indigenous peoples is a unique case that does not apply in the same manner to other individuals or peoples. This is because of their unique history and how they were colonized long before the international law of the 1960s forced the most recent decolonization period. For indigenous peoples there never was a decolonization period; they never saw their territories rightfully returned to them – these rights were always denied.

D. Evidence of *Opinio Juris* on the Right to Self-determination of Indigenous Peoples

While I recognize there are weaknesses in the examples I am about to present, they have emerged from prominent, and important human rights bodies. They are the United Nations Human Rights Council (HRC), the United Nations Economic, Social and Cultural Council (ECOSOC), the Inter-American Court of Human Rights, the Inter-

²⁰⁰ *Id.* at 44.

²⁰¹ Ougamanom, *supra* note 186, at 49.

²⁰² *Id.* at 49.

²⁰³ *Id.*

American Commission on Human Rights and a National Case by the supreme court of the country of Belize. I believe that as ICL advances these scenarios grow more persuasive as evidence because they come to support each other as precedents. In short, they become the new norm.

Perhaps the most significant flaw at present lies in the fact that none of these human rights bodies has a definitive enforcement mechanism, except for the Optional Protocol for the ICCPR. The only legally binding enforcement mechanism within the United Nations is the Security Council, and unfortunately I do not foresee indigenous peoples' rights becoming a concern, much less a priority. (I am certain the US would veto anything in regards to indigenous peoples' right to self-determination before it even hit the floor for a crucial debate. And it would not be alone.)

However, this argument could be said of human rights in general – there is no legal international mechanism with the capacity to enforce human rights law. Although the ICJ has ruled on important cases in the past, indigenous rights, including that to self-determination, might take a while longer before it becomes enforceable. The extent to which these human right bodies affect world practice with their rulings towards indigenous rights remains highly contentious and hotly debated. It has only been six years since the adaption of the UNDRIP, but from observing how far it has reached and the amount of attention it has received I feel confident stating it is on its way. I do want to acknowledge and clarify, that there is no accurate way of claiming whether or not the right to self-determination of indigenous peoples has been codified as ICL under the modern custom. Theoretically, it has, but practically I argue that it is still on its way to being crystallized as such.

1. *The Human Rights Council (HRC) on Indigenous Rights and Self-determination*

The United Nations Human Rights Council (HRC) has been the most “active” United Nations body to help address the self-determination of indigenous peoples.²⁰⁴ The UN HRC has a “reporting procedure of the ICCPR and its optional protocol.”²⁰⁵ Through the

²⁰⁴ Graham, *supra* note 173, at 21.

²⁰⁵ *Id.* at 21.

reporting procedure, the HRC has been able to advocate and promote Common Article 1 to indigenous peoples, being the first UN body to acknowledge and accept that self-determination is a right of indigenous peoples.²⁰⁶ Although, like all human rights law, the ICCPR has no enforcement mechanism, its Optional Protocol does. The HRC addresses the issue of self-determination of indigenous peoples and submits reports on its findings.²⁰⁷

The most important fact to note about the HRC and its advocacy for indigenous self-determination is that, prior to 1999, it protected indigenous rights under the ICCPR Article 27 under the guise of the protection of minorities' rights.²⁰⁸ The HRC strategy change in 1999 was significant – it went from utilizing Article 27 to protect indigenous rights as a minority to utilizing Article 1 to protect them as 'peoples' under international law.²⁰⁹

The progression of the HRC in adapting Article 1 to address indigenous peoples' right to self-determination under this article, "departing from its earliest" focus under Article 27 is extremely significant and of utmost importance.²¹⁰ It signified that the HRC was now dealing with indigenous rights as 'peoples' under international law. In addition, in 1999, the HRC "urged Canada to report on the situation of its Aboriginal Peoples in its next periodic report under Article 1."²¹¹ The HRC manifested this approach again in 2000 when it addressed a similar case involving New Zealand and *Apirana Mahuika* Case.²¹²

In this case the HRC stated:

The committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the covenant, Article 6 to 27, inclusive. As shown by the committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of Article 1 may be relevant in the interpretation of other rights protected by the covenants, in particular Article 27.²¹³

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 22.

²⁰⁸ Koivurova, *supra* note, 175 at 5.

²⁰⁹ *Id.* at 6.

²¹⁰ *Id.* at 7.

²¹¹ *Id.*

²¹² *Apirana Mahuika et al. v. New Zealand*, Communication no. 547/1993.

²¹³ Koivurova, *supra* note 175, at 7.

The HRC committee also has requested that states who under their own domestic law recognize their indigenous population's right to self-determination report to the committee on their status.²¹⁴ The HRC did exactly this in 1999 with Norway when it stated:

As the government and parliament of Norway have addressed the situation of the Sami in the framework of the right to self-determination, the committee expects Norway to report on the Sami People's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that Article²¹⁵

The HRC's "concluding observations no longer hinge on the state itself treating indigenous peoples as a self-determining entity; rather, the Committee has considered all well-established indigenous peoples as being covered by Article 1."²¹⁶ The HRC has been tremendously effective in safeguarding indigenous peoples' right to self-determination; it has been the major United Nations body that recognizes indigenous peoples as "peoples" for the purpose of self-determination under international law and, most importantly for this paper, under international customary law. The HRC has also "stressed that the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Article 25, 26, and 27."²¹⁷ Therefore, for peoples to enjoy their fundamental human rights to liberty and their full cultural rights, their right to self-determination must be upheld.

The HRC is a fundamentally important human rights body within the United Nations; it is the body that overlooks the human rights conventions and treaties and asks countries to report on the human rights situation on the ground. It has been cast as the human rights watch agency within the United Nations. It was restructured in 2006, which strengthened its mandate. According to its main website:

²¹⁴ *Id.*, The HRC committee and now Council, after it was reformed in 2006 by the UNGA, appears, according to Koivurova, "to have taken a stronger stance on indigenous peoples right to self-determination. Its concluding observations no longer hinge on the state itself treating indigenous peoples as a self-determining entity; rather, the committee has considered all well-established indigenous peoples as being covered by Article 1. A good example is the committees concluding observation to Finland: in its 2003 Periodic report, Finland discussed the situation of its Saami Indigenous peoples under Article 27, to which the committee responded that, to its regret, 'it had not received a clear answer concerning the rights of the Saami as an indigenous people, in the light of Article 1 of the Covenant.'" at 8.

²¹⁵ *Id.* at 8, The Human Rights Committee has also referred in the same manor towards in its "observations towards Mexico."

²¹⁶ *Id.* at 8.

²¹⁷ Castello and Gilbert, *supra* note 138, at 19.

The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and making recommendations on them, . . . The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly.²¹⁸

It is fundamental to the indigenous rights claim of self-determination that the ruling body of human rights within the United Nations actually recognizes it as a legitimate legal right of all indigenous peoples. It helps strengthen the claim that the UNDRIP Article 3, that self-determination can in fact embody ICL.

2. *The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights*

The Inter-American Court of Human Rights (henceforth referred to as ‘the court’) and the Inter-American Commission on Human Rights (henceforth ‘the commission’) have both adapted the text of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In its special report issued on *Indigenous and Tribal Peoples’ Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System (2010)*,²¹⁹ the Commission and the Court stated that they:

have also had recourse to the interpretations of United Nations human rights organs and mechanisms in respect to the rights enshrined in the international treaties monitored by these organs and mechanisms of particular relevance has been the jurisprudence crafted by the Human Rights Council (HRC) in relation to Article 1 (self-determination) of the International Covenant on Civil and Political Rights (ICCPR)²²⁰

The Commission and the Court also state that they view the “right to indigenous property” as having the relative importance that UNDRIP rights gives indigenous peoples.²²¹ Since the adaption of UNDRIP by the General Assembly in 2007, according to the Commission and the Court it has played a major part as a “guide for the adoption

²¹⁸ The United Nations Human Rights Council website *available at*: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

²¹⁹ Inter-American Commission on Human Rights (Inter-Am. C.H.R.) Special Feature, 35 AM. INDIAN L. REV. 263 (2010-2011) This report is available at: <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> .

²²⁰ Inter-Am. C.H.R., *supra* note 221, at 13.

²²¹ *Id.* at 15.

and implantation of norms and public policies in the countries of the Inter-American System.”²²² The Court and the Commission both claim that the UNDRIP, along with the systems of jurisprudence that constitute *Corpus Iuris*, or body of civil law, “is applicable in relation to indigenous peoples rights.”²²³ The inter-American System of human rights has more importantly called upon all states with mandate to provide information on its implementation of UNDRIP on its indigenous peoples within their boundaries. Thus, we see the reinforcing of the norm that, although originally a non-binding instrument, has enshrined by UNDRIP as a legally binding norm on all states within the Organization of the Americas System. While not clearly declaring that UNDRIP has embodied ICL principles, it is clearly saying that they are legally binding, and thus, I would argue, be declared ICL under the modern custom theory. The Inter-American System of human rights has clearly demonstrated *opinio juris* towards UNDRIP and indigenous peoples right to self-determination.

Both the Court and the Commission of the Inter-American System of human rights view the right to self-determination as a mandatory precursor to all other indigenous rights, most notably land and resource rights. The Commission and the Court have found, that a “lack of access to ancestral territory prevents the exercise of indigenous and tribal peoples’ right to self-determination.”²²⁴ They emphasize in their report that UNDRIP explicitly recognizes the right to self-determination of indigenous peoples as a fundamental right. The right to self-determination has been found instrumental in all other rights as mentioned before, including land and resource rights.²²⁵

This finding was best illustrated in the merits and judgment of the *Saramaka Peoples V. Suriname* case (2007); the judgment was handed down only a few months after the passage of UNDRIP. In the *Saramaka Peoples* case, “the court referred to the right to self-determination in its interpretation of indigenous land and resource rights under the American Convention Article 21. It noted that the committee on Economic, Social, and Cultural rights interpreted Common Article 1 of the Covenants as being

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 118.

²²⁵ *Id.*

applicable to indigenous peoples.”²²⁶ This also supports the belief that indigenous peoples have the right to enjoy their own “social, cultural, and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied.”²²⁷

This case was further unique in the sense that the Saramaka peoples were not necessarily indigenous to the area per say. They were ancestors of the slaves who had run away and had established their community in Suriname. The Saramaka People are “one of six tribes of Maroons who have inhabited the in land of Suriname since the early 1700’s.”²²⁸ They are a unique community who follow their own “customs and laws.”²²⁹ The Court here applied the “same community property rights and principles to tribal peoples who held the land collectively” and who had an “Omni-comprehensive relationship” with their lands. The court stated that although the communities were not indigenous to the area, they shared “similar” characteristics with indigenous peoples, such as having social, cultural, and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regarding themselves, at least partially, by their own norms, customs, and traditions.”²³⁰ The ruling was based on the UN Declaration of the Rights of Indigenous Peoples and the notion of self- identification. Even more importantly, it relies on the UNDRIP Article 26, stipulating:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.²³¹

While it only exemplifies one important case,²³² I argue it establishes an important

²²⁶ Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 6 HUM. RTS. L. REV. 281 (2006) at 8.

²²⁷ *Id.*

²²⁸ Lisl Brunner, *The Rise of the Peoples Rights in the Americas: The Saramaka People decision of the Inter-American Court of Human Rights*, CHINESE J. OF INT’L L, 7 (2008) At Pg. 2.

²²⁹ *Id.*

²³⁰ *Id.* at 62.

²³¹ *Supra* note 11 Article 26 found at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf .

foundation upon which the Inter-American human rights system will operate in future. The fact that this regional human rights body has formally endorsed the UNDRIP and made rulings based on it, and only a few months after its adoption by the UNGA, has a huge significance for its future legal status. The Inter-American system for human rights is the Americas' regional human rights body, the part of the world that is home to the majority of indigenous populations, and where most indigenous communities are struggling for state recognition of their rights as indigenous peoples. Therefore, this has become ICL in the Western hemisphere, which is important in establishing indigenous rights laws in the Americas. The Inter-American Court of Human Rights is a regional human rights body which, like its counterparts the European Court of Human Rights and the African court on Human and people's Rights, helps establish important case law in regards to indigenous peoples.

3. *Belize case*

While this case was not part of the Inter-American System of human rights, it transpired in one of its member states. I include it in this section for its relevance to the main argument in this thesis. Belize may not be an influential country politically, but I am addressing it from the theoretical notion that under the UN Charter all states are created equal, even if in practicality this is not the case. The ruling of Belize's Supreme Court reflects ICL in the Americas; therefore, I believe it is directly linked to this argument.

The Supreme Court of Belize's ruling in the case of *Aurelio Cal, et al. V. Attorney General of Belize* (2007), in supporting the "collective and individual land rights to the traditionally owned land and resources of Mayan communities in Southern Belize," cited the UN Declaration on the Rights of Indigenous Peoples, which had been adapted by the United Nations General Assembly just a month earlier. In the case, the "Supreme Court found it to be of importance that Belize had voted for the UNDRIP, which embodies "general principles of international law relating to indigenous peoples and their lands and resources."²³³

²³² For the full merits of the case available at:
http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf .

²³³ Anaya, *supra* note 42, at 116.

The Chief Justice presiding over this case in his decision declared:

This Declaration was adopted by an overwhelming number of 143 states in favor with only four States against with eleven abstentions. It is of some signal importance, in my view, that Belize voted in favor of this Declaration. And I find it's Article 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does the growing consensus and the general principles of international law on indigenous peoples and their lands and resources.²³⁴

The chief Justice presiding over the case went further in his judgment remarks to state, saying that the Declaration embodied “general principles of international law relating to indigenous peoples and their lands and resources.” He thought it:

of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration's provision and to follow up its effectiveness.”²³⁵

He goes on to state the nation of Belize is obliged under international law to uphold this Declaration in “good faith”, or by notion of *Pacta Sunt Servada*, something that is usually only applicable to actual, legally binding treaties; this collapses a particular distinction between the declaration and the nation state's binding treaty, as well as challenging²³⁶ that distinction generally.

This case is extremely important in the sense that it is the first time a supreme court of any nation directly refers to the UNDRIP and bases part of its ruling on it. It held the state of Belize responsible for ensuring the implementation and upholding of the Declarations principles and rights towards indigenous peoples. It held Belize accountable for voting in favor of it, thus declaring that since Belize voted in favor of the Declaration

²³⁴ *Aurelio Cal, et al. v. Attorney General of Belize, Supreme Court of Belize* (Claim 121/2007) (18 Oct 2007) (Mayan land rights) the Honorable Abdulai Conteh, Chief Justice, Judgment remarks *available at* <http://www.elaw.org/node/1620>; *See also* Anaya, *supra* note 42, at 129-130.

²³⁵ Anaya, *supra* note 42, at 130.

²³⁶ *Id.* In his actual remarks the Chief Justice presiding over the case stated, “I therefore venture to think that the defendants would be unwilling, or even loath to take any action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned. Finally, Article 46 of the Declaration requires that its provisions shall be interpreted in accordance with the principles of justice, democracy, and respect for human rights, equality, non-discrimination, good governance and good faith.”

that Belize demonstrated *Opinio juris* towards it and the rights enshrined in it.²³⁷

4. *The Saami Peoples Convention of the Nordic Countries*

The final case I present is that of the Saami peoples of Scandinavia. The Saami are an indigenous group of peoples who reside in mostly the Nordic countries of Europe. They live mostly in Norway, Sweden, Finland and Russia.²³⁸ The Saami Peoples have been granted greater autonomy by the Nordic countries compared to indigenous peoples in other parts of the world. The Saami's traditional homeland "stretches from a great arc in Soviet Kola peninsula, across the northern third of Finland, and along both sides of the mountains range which separates Norway and Sweden."²³⁹ The Saami have suffered a similar fate to most indigenous communities around the world: "subjected to assimilationist practices, a development that was reversed in some parts of the Nordic states only as recently as the 1970s."²⁴⁰

The Saami have been unique in that they have successfully fought for recognition of their rights in their Nordic countries of residence.²⁴¹ For example, they managed to establish the "Nordic Saami Council (now the Saami Council) in 1956."²⁴² The Saami have their own parliaments in each of these Nordic countries and to a certain degree enjoy autonomy.²⁴³ However, only Finland and Norway actually acknowledge the Saami as an indigenous and unique group of peoples.²⁴⁴ This is crucial for their 'quest' for self-determination.²⁴⁵

²³⁷ For a general review of the case please see: Maia S. Campbell and S. James Anaya *The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights* (2008) HUM. R. L. REV. 8:2.

²³⁸ HURST HANNUN, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS*, University of Pennsylvania Press (1990) at 125.

²³⁹ *Id.* at 247.

²⁴⁰ Timo Koivurova, *The Draft for a Nordic Saami Convention*, 6 EUR. Y.B. MINORITY Issues 103 (2007) at 2.

²⁴¹ For a more general historical and legal background of the Saami people, Please see generally: Tom G. Svensson *Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Saami in Norway* (2005); Mattias Ahren *Indigenous Peoples' Culture, Customs, and Traditions and Customary Law-The Saami Peoples Perspective* (2004).

²⁴² Koivurova, *supra* note 240, at 3.

²⁴³ Else Grete Broderstad, *Political Autonomy and Integration of Authority: The Understanding of Saami Self-determination*, INT'L J. MIN'TY & GR. RIGHTS (2001) at 2.

²⁴⁴ *Id.* at 6.

²⁴⁵ *Id.*

In 1996, the council appointed a committee to draft the Nordic Saami Convention, which “was equally represented by three representatives from the three Nordic Countries and three representatives from the Saami Parliaments.”²⁴⁶ The committee completed its work in 2005, and submitted the report to the Nordic countries.²⁴⁷ The most important Article of this regional convention was that it emphasized the right to self-determination of the Saami Peoples. It stipulated in Article 3 of the draft:

As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources²⁴⁸

It was written to reflect Common Article 1 of the International Covenants.²⁴⁹ More importantly, the committee drafting the convention remarked on the fact that the UN HRC has since 1999 approached the question of indigenous self-determination as pertaining to indigenous peoples under Common Article 1. This appeared in its reports to the Nordic countries in reference to the Saami populations within these countries.²⁵⁰ They also referred to the fact that all three Nordic countries have signed and ratified both Covenants, and that all Nordic countries voted in favor of the UNDRIP (except Russia, who abstained).²⁵¹ Critically, the committee noted that other “human rights monitoring bodies have also pronounced Article 1 as applying to indigenous peoples; it also cites the EU’s Northern Dimension program, which has articulated the Saami’s inherent right to self-determination.”²⁵²

An important aspect of the commentary from the draft committee was that it did not limit the Saami’s self-determination, as did the UNDRIP. It referred to the fact that the HRC looked at the right to self-determination as it is written in Common Article 1. Therefore, it should be understood as stating that in an extreme case the Saami would have the right to secede from the state, if there right to internal self-determination was

²⁴⁶ Koivurova, *supra* note 175, at 13.

²⁴⁷ *Id.* at 14.

²⁴⁸ *Id.* at 15.

²⁴⁹ *Id.*

²⁵⁰ Koivurova, *supra* note 175, at 16.

²⁵¹ *Id.*

²⁵² *Id.*

denied.²⁵³ In other words, where ‘internal’ legal frameworks have failed to deliver rights to self-determination for this indigenous people, the commentary accepts that Common Article 1 should be interpreted as legalizing that people’s right to achieve their right to self-determination ‘externally’. As I have argued earlier, rather than leading to secession, this encourages states and indigenous peoples to work constructively within the internal framework. The best way to achieve this is through the application of modern custom theory.

What the Saami convention helps prove, is that there is a consensus at regional and state levels over the following: a) the right to self-determination does apply to indigenous peoples, as written in Common Article 1; b) there is broad consensus on the acceptance of the UNDRIP as encompassing legally binding principles that could embody ICL; and c) more and more states are willing to apply these principles to their indigenous communities to comply with indigenous rights law indicative of a strong *opinio juris* regarding indigenous peoples’ right to self-determination.

The Saami Nordic Convention, though yet to be ratified by these three Nordic countries, would powerfully advance the political and legal discussion on the right to self-determination of indigenous peoples. This is crucial for the Saami Peoples who, although they have some autonomy in Finland and Norway, do not have full ownership of their lands.²⁵⁴ These lands are of vital importance to their survival, depending as it does on hunting, and fishing.²⁵⁵ As we have seen, the HRC and the Inter-American Court and Commission on Human Rights have confirmed that in order for any indigenous group to enjoy their right to self-determination, they must have full access to their lands and natural resources.

The cases that I have presented are evidence of *opinio juris* regarding the consensus over the right to self-determination of indigenous peoples, enshrined in Common Article 1 and UNDRIP Article 3 as a fundamental and legal right of indigenous peoples. The major body tasked by the General Assembly with monitoring the status of human rights in the world, United Nations Human Rights bodies of the Human Rights Council, has

²⁵³ *Id.* The full draft text of the Saami Nordic Convention is available here: <http://www.regjeringen.no/upload/BLD/Nordic%20Sami%20Convention.pdf> .

²⁵⁴ Lauri Hannikainen. *Autonomy in Finland: The Territorial Autonomy of the Aland Islands and the Cultural Autonomy of the Indigenous Saami People*, 2 BALTIC Y.B. INT’L L. 175 (2002) at16.

²⁵⁵ *Id.*

recognized self-determination of indigenous peoples as a key tool for their survival. The HRC has the mandate to oversee and give feedback to states in regards their performance in relation to human rights, and especially with regard to violations of human rights.

The Inter-American System of Human Rights is the regional human rights body of the Western Hemisphere that has recognized the right to self-determination of indigenous peoples within the Americas based upon the HRC ruling of indigenous peoples being covered under Common Article 1. It has adapted the text of the UNDRIP to further empower indigenous communities throughout the Americas. The Supreme Court of Belize has also upheld UNDRIP Article 3 in its ruling against the State in favor of the Southern Mayan indigenous communities, which actually forced Belize to follow its commitment to voting in favor of the UNDRIP. Consequently, they have declared that the UNDRIP embodies principles of ICL that binds the nation-state of Belize.

Lastly, the Saami Nordic Convention sought its mandate from the rulings of the HRC council on Common Article 1, and on UNDRIP on the Saami peoples' right to self-determination. Most importantly, all the human rights mechanisms I have presented as legal frameworks for establishing rights to self-determination recognize the *collective* rights of indigenous peoples, such as land, culture, language, and resource rights. The right to self-determination that all these mechanisms recognize is not just civil and political, but cultural. They recognize that the right to self-determination is more than just self-government; it's about their survival as peoples.

Conclusion

The right to self-determination is of vital importance for the survival and full recognition of indigenous rights. Their survival as a unique group of peoples is critical to our world's diversity. To me they represent a test of humanity's commitment to the very principles we claim so often to live by, and to the human rights legal regime built in the wake of WWII to establish those same principles. It is undeniable that the right to self-determination has become a *Jus Cogen* norm, which has been legally recognized as a

right of all peoples; it would also be “inadmissible and discriminatory to argue that these people lack the right to self-determination merely because of their indigenoussness.”²⁵⁶

The outdated notion of self-determination maintained in and by the classical theory underpinning the salt-water theory no longer applies to contemporary international realities of states’ inter-dependence. Invoking the modern custom theory to crystallize this legal norm is necessary in light of the current conditions of indigenous peoples around the world. As the United Nations report of 2010 points out, they are in a very critical position within the nations they reside within. Their full legal recognition of their right to self-determination is their only hope left for survival as unique peoples.

The traditional system of customary law can no longer be applied. It is no longer applicable to the human rights regime because this body of law is so deeply rooted in the colonial and imperial mentalities of Westphalian sovereignty. It can no longer represent what the human rights regime was built to create. In order for humanity to face up to its own oft-stated commitments via the rights system it has created, we must recognize that international law, and states’ place within it, has evolved in line with our understanding of human rights

Indigenous peoples are not under the rubric of domestic affairs; it is the international community’s job to ensure their rights are protected and safeguarded, that they are granted their right to self-determination as they see fit for the survival of their community. The system of human rights has affirmed and granted indigenous peoples this fundamental right. We must hold law-makers and states accountable for the human rights they pledge to uphold if human rights are not to become empty promises. UN Declarations are not simply aspirations – they are a confirmation of the global world consensus and *opinio juris* of the obligation to uphold human right obligations. These legal norms are developed to protect peoples and individuals from abuses and tyranny, and we must fulfill these obligations.

We have failed these peoples in the past, and we must not fail them again, and this means having legal frameworks in place that accept that their survival is contingent on their right to self-determination; it has been proven that without this legal right they

²⁵⁶ Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 *TRANSNAT’L L. & CONTEMP. PROBS.* 1 (1993) at 9-10.

cannot enjoy their basic human rights, such as right to their ancestral lands and resources for their livelihoods.

I acknowledge that the modern custom approach to codifying human rights and the right to self-determination does not answer all the questions, and might possibly raise questions and difficulties it cannot yet fully resolve. Nevertheless, in the current state of international relations, along with the systems that regulate these, it is the most democratic method for progressing international human rights law and the best method to crystallize important human rights norms and obligations into ICL. Law is created in response to the social needs of a given population; it therefore needs to be flexible enough to meet those needs and to evolve with it. Traditional custom theory does not have this flexibility built into it; it was built to serve the needs of state-centric interests and not the needs of the peoples or human rights. It proceeds as if the peoples of the world were neatly contained by geographical borders with singular, homogenous groups residing within them. It no longer accurately reflects contemporary world affairs and so cannot properly regulate them. We must look forward so our systems of law can reflect the global world consensus. Human rights were created to protect peoples from the very atrocities committed against them by states, not to protect states who deny their peoples their basic human rights.

I believe all the peoples of the world will be better served into the future if the modern custom theory is increasingly invoked, not only by the ICJ, but also by all other regional human rights bodies. I am hopeful that the effect will trickle down to nation-states themselves and help improve not only the status of indigenous peoples worldwide but also the human rights regime itself. The *Lex ferenda* that modern custom emphasizes is important to human rights, and indigenous rights fall squarely within the human rights system that has grown and developed for the last half century; the very regime of human rights is at stake here. We must use the development of this law to stand up and finally hold *all* states accountable for their human rights violations, not just the weaker or less politically significant states. We must take this stand against the tyrannical systems that have been created to oppress indigenous peoples and their rights; we must work to reconcile past injustices and move forward with indigenous peoples seeking justice and

the full legal recognition of their right to self-determination as peoples under international law.