



DATE DOWNLOADED: Fri May 16 12:08:28 2025

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Sylvanus Ghendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 INT'L HUM. RTS. L. REV. 242 (2017).

ALWD 7th ed.

Sylvanus Ghendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 Int'l Hum. Rts. L. Rev. 242 (2017).

APA 7th ed.

Barnabas, Sylvanus Ghendazhi. (2017). The legal status of the united nations declaration on the rights of indigenous peoples (2007) in contemporary international human rights law. *International Human Rights Law Review*, 6(2), 242-262.

Chicago 17th ed.

Sylvanus Ghendazhi Barnabas, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law," *International Human Rights Law Review* 6, no. 2 (2017): 242-262

McGill Guide 10th ed.

Sylvanus Ghendazhi Barnabas, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law" (2017) 6:2 Int'l Hum Rts L Rev 242.

AGLC 4th ed.

Sylvanus Ghendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6(2) *International Human Rights Law Review* 242

MLA 9th ed.

Barnabas, Sylvanus Ghendazhi. "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law." *International Human Rights Law Review*, vol. 6, no. 2, 2017, pp. 242-262. HeinOnline.

OSCOLA 4th ed.

Sylvanus Ghendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6 Int'l Hum Rts L Rev 242 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law

Sylvanus Gbendazhi Barnabas
Northumbria University, Newcastle, UK
mailsylvanus@gmail.com

Abstract

This article explores the legal status or effect of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in contemporary international human rights law. As a United Nations General Assembly (UNGA) resolution, the legal significance of UNDRIP may appear uncertain on the surface. However, several UNGA resolutions do carry some legal weight with far-reaching legal implications in international law. For example, the Universal Declaration of Human Rights 1948 (UDHR) has been widely accepted, at least in part, as forming part of customary international law. Through a critical examination of relevant literature and some decisions of international, regional and national courts, this article examines whether the UNDRIP, in whole or in part, reflects customary international law. It also considers the relationship of the UNDRIP with other international human rights instruments, and whether it should be applied as part of general principles of law on issues that are essential to indigenous peoples such as non-discrimination, self-identification, land rights and development.

Keywords

Declaration on the Rights of Indigenous Peoples (UNDRIP) – indigenous peoples – human rights – customary international law – international human rights instruments – general principles of law – international law – land rights

* The author thanks Professor Sue Farran, Dr David McGrogan, Emeritus Professor Gordon Woodman and anonymous reviewers for helpful comments on an earlier draft. The views expressed in this article are solely those of the author.

1 Introduction

It is now ten years since the United Nations General Assembly (UNGA) adopted the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) as an international human rights framework aimed at *recognising* 'the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States'.¹ The main purpose of this article is to explore the legal status or effect of the UNDRIP in contemporary international human rights law. As a UN General Assembly (UNGA) resolution, the legal significance of UNDRIP may appear uncertain on the surface. However, several UNGA resolutions do carry some legal weight with far-reaching legal implications in international law. One notable example is the Universal Declaration of Human Rights 1948 (UDHR),² which has been widely accepted as a universal standard in the context of articulating and providing for generally acceptable human rights norms globally. Indeed, arguably some writers have concluded that the UDHR, in whole or at least in part, has attained the status of customary international law.

However, while the UDHR was adopted without any votes against it,³ in the case of the UNDRIP four States with significant numbers of indigenous peoples (IPs) voted against it at the time of its adoption in 2007.⁴ How do those initial negative votes against UNDRIP by four States 'specially affected' by its provisions affect or nullify its legal status or effect in international law over ten years since it was adopted, if at all? As an international human rights instrument containing preambular and substantive provisions highlighting its relationship

1 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Resolution 61/295, UN Doc. A/RES/47/1 (2007), adopted on 13 September 2007, by a vote of 143 in favour to four against. (Australia, Canada, New Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). On UNDRIP, see SJ Anaya, *Indigenous Peoples in International Law* (Oxford UP, 2005); S Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' (2007) *Human Rights Law Review* 1; J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207; and S Allen and A Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Bloomsbury Publishing, 2011).

2 Adopted by the UNGA at its 3rd session on 10 December 1948, through Resolution 217 at the *Palais de Chaillot* in Paris, France.

3 Out of the fifty-eight Member States of the UN at the time of its adoption in 1948, forty-eight States voted for it, eight abstained and two refused to cast any votes.

4 See UNDRIP, *supra* n 1.

with both 'soft' and 'hard' international human rights instruments, what significance do this relationship have on its legal effect? This article attempts to examine these questions.

In exploring the above questions, this article critically examines some of the relevant literature and some selected decisions of international, regional and national courts and other human rights bodies. The article examines whether the UNDRIP has attained the status of customary international law (CIL), considers its relationship with other international human rights instruments, and examines whether it forms part of general principles of law. The article is structured into 5 thematic sections. Following this introduction, Section 2 considers the requirements for the emergence of CIL and applies these requirements to the UNDRIP to demonstrate whether or not it has attained the status of CIL. Section 3 discusses the relationship between UNDRIP and other international human rights instruments with a view to identifying the legal significance of UNDRIP. Section 4 examines whether the UNDRIP is part of general principles of law that must be respected by all UN Member States.

2 UNDRIP – Towards Customary International Law?

A declaration may codify or come to be accepted as CIL binding upon all states as custom. Is there evidence that the UNDRIP has attained the status of CIL? The answer to this question requires a careful and detailed examination of what it takes for CIL to emerge in international law. Anaya argues that UNGA resolutions could lead to the creation of CIL by evidencing consensus in the international community that imbue the contents of such resolutions with the expectation that they are obligatory when supplemented with additional activities by the international community.⁵ Indeed, in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Nicaragua case)*,⁶ the ICJ relied on UNGA resolutions to determine that the principle of non-use of force and non-intervention in the internal affairs of States were principles of CIL. However, the decision of the ICJ in the Nicaragua case has been criticised 'as a failure of legal scholarship ... It reveals the august judges

5 SJ Anaya, 'Contemporary Conception of Customary International Law' (1998) *Proceedings of the American Society of International Law* 41 at 43.

6 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, 1986 ICJ Reports 14, 27 June 1986.

of the International Court of Justice as collectively naive about the nature of custom as the primary source of international law.⁷

CIL, whether global or regional, is comprised of the two elements: an extensive and virtually uniform State practice and the belief that the practice is required by law (*opinio juris*).⁸ Article 38 (b) of the Statute of the International Court of Justice (ICJ Statute)⁹ provides that the Court shall apply among others 'international custom as evidence of a general practice accepted as law'. However, the ICJ Statute does not expressly state the elements that must exist to determine whether a rule of CIL has been established. This has led to several legal scholarly views on this issue. For example, Dennis Arrow proposes four elements that should exist before the creation of CIL which are: State practice; *opinio juris*; adherence to a norm by a majority of 'specially affected States'; and continuous practice over a period.¹⁰ In the *North Sea Continental Shelf* cases,¹¹ the ICJ maintained that belief in the existence of *opinio juris* by States was central to the formation of CIL.¹²

The idea of whether or not *opinio juris* is necessary to the formation of CIL remains largely contentious and unsettled.¹³ Gunning argues that the requirement of actual physical practice by States for the formation of CIL has

7 A D'Amato, 'Trashing Customary International Law' (1987) 81 *The American Journal of International Law* 101 at 105.

8 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark)*; (*Federal Republic of Germany v The Netherlands*) [1969] ICJ Reports 3, para. 77; *Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 29, para. 27; AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) *American Journal of International Law* 757; A D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101; and JL Kunz, 'The Nature of Customary International Law' (1953) 47 *American Journal of International Law* 662 at 665.

9 The *Statute of the International Court of Justice* is an integral part of the United Nations Charter, as specified by Chapter XIV of the United Nations Charter. All UN Member States are Parties to the Statute by their ratification of the UN Charter. See Charter of the United Nations, 26 June 1945, 24 October 1945, 1 UNTS XVI, Art. 93(2).

10 DW Arrow, 'The Proposed Regime for the Unilateral Exploitation of Deep Seabed Mineral Resources by the United States,' (1980) 21 *Harvard International Law Journal* 337 at 337-418 and JL Slama, 'Opinio Juris in Customary International Law' (1990) 15 *Oklahoma City University Law Review* 603 at 617-618.

11 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark)*; (*Federal Republic of Germany v Netherland*) [1969] ICJ Reports 3 at 4.

12 *Ibid*, at 44.

13 See G Norman and JP Trachtman, 'The Customary International Law Game' (2005) *American Journal of International Law* 541 at 542.

a tendency to result in an international society where only physical actions may be the means of resolving international disputes and not non-physical means.¹⁴ He maintains that uniformity of practice may come to be seen as evidence that such practice may be performed with the understanding that such arises out of legal obligations, thereby creating *opinio juris*.¹⁵ Kelly argues that acceptance by States give CIL legitimacy and that without this acceptance, practice is merely habitual and not CIL, but since there is no universally agreed mechanism for quantifying general practice of States as proof of *opinio juris*, this means it is a legal fiction.¹⁶ He maintains that even the ICJ has difficulty in investigating and proving State practice of a majority of States and 'when the I.C.J. has required direct proof of the *opinio juris* element, the Court has found the evidence inadequate.'¹⁷

Despite the above shortcoming, the main way of ascertaining *opinio juris* is through finding out the practice of States.¹⁸ The first case in which an international court determined the significance of *opinio juris* to the formation of CIL is the case of *ss Lotus (France v Turkey) (Lotus case)*.¹⁹ In that case the French claimed that a CIL rule had emerged which required acceptance that criminal trials arising from accidents on the high seas were within the exclusive jurisdiction of the flagship State.²⁰ They contended that as States had abstained from claiming jurisdiction in the matter, this was evidence of State practice which prevented other States other than France from asserting jurisdiction in the that case.²¹ The Permanent Court of International Justice (PCIJ) rejected this argument and held that *opinio juris* was necessary to demonstrate that such abstentions 'were based on states being conscious of having a duty to abstain ... to speak of an international custom.'²²

14 IR Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1990) 31 *Virginia Journal of International Law* 211 at 214–215.

15 *Ibid*, at 241.

16 JP Kelly, 'The Twilight of Customary International Law' (1999) 40 *Virginia Journal of International Law* 449.

17 See *North Sea Continental Shelf (France v Denmark, France v Netherland)* 1969 ICJ 344 (20 February 1969); *ss Lotus (France v Turkey)*, 1927 PCIJ (ser. A) No. 10, at 28 (7 September 1927); and *ss Wimbledon (United Kingdom v France)* [1923] PCIJ (ser. A) No. 1, at 25 (17 August 1923).

18 Kelly, *supra* n 16 at 470.

19 *Lotus case, supra* n 17.

20 *Ibid*, at 25–26.

21 *Ibid*, at 28.

22 *Ibid*.

However, in the *Trail Smelter Arbitration (United States v Canada)*,²³ the tribunal did not rely on State practice to establish *opinio juris* as it found none, choosing rather to apply US Supreme Court judgments, this has led to the argument that the decision here was not based upon 'any grounding in state practice, its conclusions about CIL are neither persuasive, nor evidence of anything.'²⁴ Likewise, in *Libya v Malta*,²⁵ the ICJ did not rely on *opinio juris* or State practice in the determination of the principle of 200 nautical miles of Exclusive Economic Zone (EEZ) on the continental shelf, it chose rather to rely on the provisions of the UN Law of the Sea Convention 1982²⁶ to rule that the principle of EEZ was CIL.²⁷ The above decisions demonstrates the uncertainty about whether *opinio juris* is really necessary to establish a rule of CIL.²⁸

In the *Asylum case (Colombia v Peru)*,²⁹ Colombia asserted a right based upon a principle of CIL applicable in the Latin American region,³⁰ to prosecute an offense committed by a political refugee against the government of Peru.³¹ Colombia demanded that the alleged refugee be free to leave Peru since he had been granted asylum by Colombia.³² In finding if such a rule existed as CIL, the Court expressed the need to establish *opinio juris* through State practice.³³ This decision regarding the requirement of State practice to prove *opinio juris* was affirmed in the *Case Concerning Right of Passage Over Indian Territory (Portugal v India)*.³⁴ In this case, the ICJ was presented with the issue of whether there was a regional CIL between India and Portugal in which Portugal had the right of passage through Indian territory. It was held that based on State practice on the right of passage in the region, a CIL had emerged in

23 *Trail Smelter Arbitration (United States v Canada)* [1941] UN Reports of International Arbitral Awards (RIAA) 1905 at 1949.

24 Kelly, *supra* n 16 at 471–472.

25 *Libya v Malta* [1985] ICJ Reports 13.

26 *UN Law of the Sea Convention* 1982, adopted 10 December 1982 in Montego Bay, Jamaica, came into force 16 November 1994.

27 *Ibid.*

28 RM Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 *Israel Law Review* 344 at 459.

29 *Asylum case (Colombia v Peru)* [1950] ICJ Reports 266.

30 *Ibid.*, at 276.

31 *Ibid.*, at 274.

32 *Ibid.*, at 273.

33 *Ibid.*, at 276.

34 *Case Concerning Right of Passage Over Indian Territory (Portugal v India)*, [1960] ICJ Reports 266 at 277.

favour of Portugal.³⁵ In *North Sea Continental Shelf Cases (Germany v Denmark) (Western Germany v Netherland)*,³⁶ the ICJ confirmed that *opinio juris* was necessary to the formation of CIL and that in looking for evidence of such, the Court could rely on treaties.³⁷

In terms of time and its relevance to the formation of CIL, it seems the length of time in which a norm has been practiced by States is not of the essence. Thus, in the *Continental Shelf* cases the ICJ stated that:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are especially affected, it should have been both extensive and virtually uniform in the sense of the provision invoked³⁸

However, it has been argued that consistent State practice of a norm over a long period of time may outweigh one that has been practiced over a shorter period in determining whether such norms have metamorphosed into CIL.³⁹ Karol Wolfke argues that continuous practice by States without interruption is not a *sine qua non* for the emergence of CIL.⁴⁰ Cheng appears to agree with Wolfke on the issue of length of time not being of the essence in State practice.⁴¹ Therefore, the issue of length of time in State practice for the purpose of the emergence of a norm as CIL is not essential.⁴² Kuntz maintains that State practice by a majority of States is not sufficient, rather such practice must be in existence and applied 'by the overwhelming majority of states which hitherto

35 Ibid, at 40.

36 *North Sea Continental Shelf Cases (Germany v Denmark) (Western Germany v Netherland)*, [1969] ICJ Reports 3.

37 Ibid, at 42–44. See generally, JL Slama, 'Opinio Juris in Customary International Law' (1990) 15 *Oklahoma City University Law Review* 603 at 641–645.

38 *North Sea Continental Shelf* case, *supra* n 36 at para. 74.

39 J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 15 *European Journal of International Law* 523 at 530.

40 K Wolfke, *Custom in Present International Law* (Tow Nauk, 1964) at 60.

41 B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law' (1965) 23 *Indian Journal of International Law* 23 at 45.

42 Kammerhofer, *supra* n 39 at 530.

had an opportunity of applying it.⁴³ Therefore, it would appear that irrespective of the length of time in which a norm has been practiced by States, once such norm has been practiced by a substantial number of States specially affected by such rule a CIL would be deemed to have emerged.

However, the role of State practice in providing evidence of *opinio juris* in the formation of CIL is largely unclear.⁴⁴ It is not certain whether State practice is needed as evidence of *opinio juris* or if it is an independent ingredient to the formation of CIL.⁴⁵ In the determination of whether there is sufficient State practice and whether there is evidence of the existence of *opinio juris* to establish CIL, Kuntz recommends that courts could rely on diplomatic correspondence, the decisions of domestic courts and provisions of international treaties.⁴⁶ However, Anaya and Williams have argued that there should not be an over reliance and emphasis on actual State practice and that mere express communications amongst States, irrespective of whether this is done in association with real events or not should be counted as 'a form of practice that builds customary rules.'⁴⁷

Academic debates about the legal status of some of the rights of indigenous peoples (IPs) which are now declared under UNDRIP, have led some scholars into arguing that some IPs' rights are already CIL. For example, Anaya and Wiessner contend that several categories of IPs' rights have developed into CIL, such as the rights to 'demarcation, ownership, development, control and the use of lands that [indigenous peoples] have traditionally owned or otherwise occupied and used'.⁴⁸ In line with the above claim, a 1999 comparative

43 Kunz, *supra* n 8 at 666.

44 *Ibid*, at 532.

45 See generally, CA Bradley and JL Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) *Harvard Law Review* 815 and PR Trimble, 'A Revisionist View of Customary International Law' (1985) 33 *University of California Law Review* 665.

46 Kunz, *supra* n 8 at 667–668. See also, RR Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 *British Year Book of International Law* 275 at 277–278.

47 SJ Anaya and RA Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System,' (2001) 14 *Harvard Human Rights Journal* 33 at 54–55.

48 SJ Anaya and S Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' (2007) 206 *Third World Resurgence* 15; SJ Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 *Colorado Journal of International Environmental Law & Policy* 237; and SJ Anaya, 'International Human Rights and Indigenous Peoples: The Move Towards the Multicultural State' (2004) 21 *Arizona Journal of International and Comparative Law* 13 at 44. See also, RT Ako and O Oluduro,

research conducted by Wiessner into State practice on IPs' rights demonstrates that there are many positive developments in States' legislation, policies and practices,⁴⁹ which provide evidence that land rights and rights to natural resources by IPs have crystallised into CIL.⁵⁰ As Weisner puts it:

Today, many of these proposed or actual prescriptions, coinciding, as they do, with domestic state practice as documented above, have created a new set of shared expectations about the legal status and rights of indigenous people that has matured and crystallized into customary international law.⁵¹

The above claim appears to be supported by the Inter-American Commission on Human Rights (IACHR). In the *Mayagna (Sumo) Awas Tigni Community v Nicaragua (Awasi Tigni)* case,⁵² the IACHR asserted that 'there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands'.⁵³ Also in *Maya v Belize*,⁵⁴ the Belize Supreme Court supported this opinion as the senior judge in that case argued that 'both customary international law and general principles of international law would require that Belize respect the rights of its indigenous peoples to their lands and resources'.⁵⁵ One possible authority that could support the claim that the provision of UNDRIP may contain or provide evidence of norms of CIL is the decision of the ICJ which has stated that UNGA resolutions could provide

'Identifying Beneficiaries of the UN-Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region' (2014) 22 *African Journal of International & Comparative Law* 369 at 385.

49 S Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57 at 109.

50 S Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141 at 1152.

51 Wiessner, *supra* n 49 at 109. See also, S Wiessner, 'The United Nations Declaration on the Rights of Indigenous Peoples' in A Constantines and N Zaikos (eds.), *The Diversity of International Law* (Brill, Leiden, 2009) at 343–362.

52 *Mayagna (Sumo) Awasi Tigni Community v Nicaragua* [2001] Inter-Am Court of Human Rights (IACHR) (ser. C) No. 79. See also, JM 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' (2009) 27 *Wisconsin International Law Journal* 51.

53 *Awasi Tigni* case, *supra* n 52 at 71.

54 *Aurelio Cal v Attorney-General of Belize*, Claim 121/2007 (Supreme Court, Belize, 18 October 2007) 127.

55 *Ibid.*

evidence for the purpose of establishing a rule of CIL,⁵⁶ if there is 'overwhelming evidence of a long-established rule, or some very authoritative evidence of a recently established rule (such as a decision of the ICJ or a sufficiently widely accepted treaty provision)'.⁵⁷

However, it has also been argued that CIL in relation to land rights of IPs 'does not yet exist' but 'there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands'.⁵⁸ Xanthaki maintains that 'the suggestion that indigenous rights already constitute uniform state practice seems over-ambitious. Such a suggestion actually undermines the importance of the *Declaration*: its adoption was such a success exactly because it *anticipated changes to indigenous rights in national systems*'.⁵⁹

Although IPs have benefited from increasing better protection in several States and regions and UNDRIP seems to have been a catalyst for more positive outcomes in relation to IPs' rights at the national, regional and international levels,⁶⁰ the view by some scholars that some categories of IPs' rights, including land rights, already have developed into CIL appear to be too hasty. Indeed, the text of UNDRIP anticipates that the circumstances of IPs and their rights in various States vary around the world.⁶¹ The varying circumstances of IPs around the world make it very difficult for State practice to be uniform. Therefore, to argue that IPs' rights to land as provided under UNDRIP have crystallised into CIL appears erroneous as this overlooks the differing practices regarding IPs' rights to land by various States in the Americas, Europe, Australia and Africa.

56 See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226.

57 RK Gardiner, *International Law* (Pearson Education Limited, 2003) at 104–105.

58 T Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law,' (2011) 10 *New York University Journal of International Human Rights* 54 at 54–55.

59 A Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27 at 35–36. The emphasis is added. See also, K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141 at 163.

60 Xanthaki, *supra* n 59 at 35–36.

61 Para. 23 preamble to UNDRIP states that: 'Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularise and various historical and cultural backgrounds should be taken into consideration.'

The position of the International Law Association (ILA) on the formation of CIL is that UNGA resolutions may constitute or create CIL,⁶² subject to the *proviso* that such resolutions 'have been accepted unanimously or almost unanimously and that there is a clear intention by the States that support it to lay down a rule of international law.'⁶³ However, in the case of UNDRIP initially States such as the US, Canada, Australia and New Zealand that have some IPS communities voted against its adoption. In addition, statements and comments by some of the States who voted in favour of it made it expressly clear that they had no intention to lay down any rule of CIL.⁶⁴ Even the preamble to UNDRIP states that it: '*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples *as a standard of achievement to be pursued* in a spirit of partnership and respect.'⁶⁵ Since UNDRIP was not adopted by a unanimous vote at the UNGA, there is strength in the argument that it may be erroneous to view UNDRIP or substantial portions of its provision as CIL.⁶⁶

In a futuristic sense however, there is the possibility that UNDRIP and its provisions may contribute to the formation of CIL on IPS' rights at regional levels as it can be used as evidence to establish the existence of rules or the development of *opinio juris*.⁶⁷ Although a few States voted against it, thereby limiting its contribution in this respect, the ICJ has held that the limited legal weight of UNGA resolutions would normally be a result of opposition from a substantial number of States whose interests are affected specially.⁶⁸ While considering the issue of whether a rule contained in a Convention can be considered to have become a CIL, the ICJ ruled that representative and widespread participation in a Convention would be sufficient provided such participation 'includes that of States whose interests are specially affected.'⁶⁹

Although UNDRIP is not a treaty, its provision can be used as evidence of *opinio juris* at a regional level. As noted above, while during the adoption of

62 See International Law Association (ILA), (2000) *Statement of Principles Applicable to the Formation of Customary International Law*, <<http://legal.un.org/ilc/reports/2011/english/annex.pdf>>.

63 Ibid.

64 Xanthaki, *supra* n 59 at 28.

65 See the last paragraph to UNDRIP (emphasis added).

66 Xanthaki, *supra* n 59 at 10.

67 See MJ Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2008) *University of South Wales Australia (UNSW) Law Research Paper*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392569>. See *Legality of the Threat or Use of Nuclear Weapons*, *supra* n 56.

68 *North Sea Continental Shelf*, Judgment, ICJ Reports [1969] at 3.

69 Ibid, at para. 73.

UNDRIP, four States only casted contrary votes,⁷⁰ they do not constitute most of States specially affected by UNDRIP most of whom voted in favour of it.⁷¹ The contrary votes do not represent the views of a substantial portion of the international community and those votes may not of themselves prevent the emergence of such *opinio juris* on the rights of IPs at a regional level. Moreover, the effect of the votes by those States that initially voted against it, has now been whittled down because of developments from the USA, Canada and Australia that suggest their current acceptance of the rights contained in the UNDRIP.⁷²

Compared with the International Labour Organisation (ILO) Indigenous and Tribal Populations Convention 1957 (ILO 107)⁷³ and ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (ILO 169)⁷⁴ (hard-laws), UNDRIP appears to be able to make a much broader impact among States as an UNGA resolution. It is not legally binding and falls within the category of soft-law.⁷⁵ However, as demonstrated in sections 2–4 below the legal significance of UNDRIP cannot be dismissed on the basis that it is soft-law *simpliciter*. Indeed, it has been vehemently argued that ‘a soft law document is to be preferred to no document at all, and, similarly, a soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions.’⁷⁶ Instead, its legal weight must be ascertained by taking into account of the fact that contemporary international law-making and standards

70 USA, Canada, New Zealand and Australia.

71 UNDRIP was adopted by a vote of 143 in favour.

72 On recent development in Canada, Australia and the USA see further analyses below.

73 ILO *Indigenous and Tribal Populations Convention 1957* (C107), adopted in Geneva, at the 40th ILC session on 26 June 1957, entered into force on 2 June 1959, it is currently an outdated instrument and it may be denounced between 2 June 2019 and 2 June 2020.

74 ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989* (C169), adopted in Geneva, at the 76th International Labour Congress session on 27 June 1989.

75 On the nature of ‘soft-law’ in international law, see A Di Robilant, ‘Genealogies of Soft Law’ (2006) *The American Journal of Comparative Law* 499; and CM Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *International & Comparative Law Quarterly* 850 at 850–866. For a critique of ‘soft-law’ in international, see J Klabbers, ‘The Undesirability of Soft Law’ (1998) 67 *Nordic Journal of International Law* 381.

76 M Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 957 at 964. See also, Chinkin, *supra* n 75 at 861.

emerges as a result of interactions between different forms of law, irrespective of their legal nature.⁷⁷

3 UNDRIP and International Human Rights Law

Another way to understand the legal significance of UNDRIP is to consider the nature of its relationship with other 'hard' international human rights instruments. Although, the nature of the rights of IPs under UNDRIP are commonly referred to as *sui generis* (special rights), these rights are not distinct rights in the sense of being compartmentally different 'from the fundamental human rights that are deemed to be of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.'⁷⁸ It follows logically, that the rights of IPs including land rights under UNDRIP certainly sets standards that must be respected by States within their national legal systems.⁷⁹

Alan Boyle argues that UNGA declarations represent 'at least an element of good faith commitment, evidencing in some cases a desire to influence state practice or expressing some measure of law-making intention and progressive development'.⁸⁰ This is an argument that is particularly relevant in the area of international human rights law, where declarations of the UNGA have proved to be more effective instruments than hard law.⁸¹ In this respect, Xanthaki argues that the UNDRIP 'is substantially informed by international law [and can be] perceived as agreed interpretation of the UN human rights treaties concerning indigenous rights.'⁸² To buttress Xanthaki's view, Boyle argues

77 Barelli, *supra* n 76 at 959. See also, A Boyle and CM Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007); A Hurrell, 'International Law and the Changing Constitution of International Society', *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000) at 327–347; and CM Chinkin, 'Normative Development in the International Legal System' in D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) at 21–42.

78 SJ Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc. A/HRC/9/9. 11 August 2008, at para. 40.

79 *Ibid.*, at 960.

80 A Boyle, 'Soft Law in International Law-Making' in M Evans (ed.), *International Law* (Oxford University Press, 2nd edn, 2006) at 141 and 143.

81 For example, the UDHR 1948 is now incorporated into the constitutions of many States in the world as hard law including regional human rights instruments.

82 Xanthaki, *supra* n 59 at 36–37.

that the 'interaction with related treaties may transform [a non-legally binding declaration's] legal status into something more'.⁸³ However, others argue that UNGA resolutions have no legal effects.⁸⁴

UNDRIP's effect and contribution to the development of the international law on IPS' rights is demonstrated by its usage by international, regional and national bodies as a legal source and authority on the rights of IPS, as since its adoption, many bodies have established that UNDRIP is an authority of legal standards on IPS' rights.⁸⁵ In addition to the national and international case law referred to above, the United Nations Permanent Forum on Indigenous Issues (UNPFII) uses UNDRIP as a guide to its work on IPS.⁸⁶ Likewise, the UN Development Group, which is composed of various UN programs, bodies and agencies working on development, has accepted the UNDRIP as its main framework for the implementation of its *Guidelines on Indigenous Peoples' Issues*.⁸⁷

The legal weight attached to the rights of IPS under UNDRIP therefore lies in the fact that it takes into account previous and recent normative developments in the general body of international human rights law with particular applications to IPS, which have occurred at international, regional and national levels.⁸⁸ It is important to note that UNDRIP recognises and affirms that IPS as a collective or as individuals, are entitled to 'all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal

83 Boyle, *supra* n 80 at 148. For more analyses on the interaction between soft-law and hard-law in international law see, A Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' in V Gowlland-Debbas (ed.), *Multilateral Treaty-Making* (Springer, 2000) at 25–40; G Shaffer and MA Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706; and KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

84 See J Castaneda, *Legal Effects of United Nations Resolutions* (Columbia University Press, 1969) and D Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955) 32 *British Year Book of International Law* 97.

85 See Section 4 below.

86 See United Nations Permanent Forum on Indigenous Issues (UNPFII), *Indigenous Peoples: Development with Culture and Identity: Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples – Report of the International Expert Groups Meeting*, adopted at the UNPFII Ninth session in New York on 19–30 April 2010. E/C.19/2010/14. 5 February 2010.

87 UN Development Group, *Guidelines on Indigenous Peoples' Issues* (1 February 2008), <<http://www.ohchr.org/Documents/Issues/IPeoples/UNDGGuidelines.pdf>>.

88 Barelli, *supra* n 76 at 962. See also, W van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *American Journal of International Law* 29.

Declaration of Human Rights and international human rights law'.⁸⁹ It then merges and crystallises such normative developments and concepts with long established principles and norms of general international human rights law to create elaborate international legal standards on the rights of IPs.⁹⁰ For example, IPs in the exercise of their rights, are entitled to the right to be free from 'any kind of discrimination', in particular that based on their indigenous origin or identity.⁹¹

The land rights of IPs provided under Articles 25 and 26 of UNDRIP already exist under similar categories of norms articulated under ILO 169.⁹² Due to such effective synthesis and synchronisation of international, regional and national human rights law, UNDRIP establishes 'far-reaching, comprehensive and innovative categories of human rights principles which are heavily grounded on established international human rights laws.'⁹³

The rights of IPs under UNDRIP ought to be interpreted and understood in accordance with the broader body of international human rights law as required by various preambular paragraphs and substantive provisions of UNDRIP which make references to the UN Charter, International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), the Vienna Declaration and Programme of Action and the Universal Declaration of Human Rights 1948 (UDHR).⁹⁴ Therefore, since the UNDRIP restates rights and principles already existing and emerging in the general body of international human rights law such as freedom from discrimination, cultural rights, and land rights, its provisions must be respected by the UN Member States to the extent they are consistent with States human rights obligations under legally binding human rights instruments.

89 UNDRIP, *supra* n 1, Art. 1 (emphasis is added).

90 Barelli, *supra* n 76 at 962. See also, W Van Genugten and C Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional and National Dimensions' (2004) 11 *International Journal on Minority and Group Rights* 379.

91 UNDRIP, *supra* n 1, Art. 2.

92 For example, Arts. 14 and 15 of ILO 169 makes provisions for land rights of IPs which are similar to those provided under Arts. 24 and 25 of UNDRIP. See below for similar provisions under the African Charter.

93 EIA Daes, 'Dilemmas posed by the UN Draft Declaration on the Rights of Indigenous Peoples' (1994) 63 *Nordic Journal of International Law* 205 at 211.

94 See e.g. UNDRIP, *supra* n 1, paras. 1 and 16 of the preamble, and Arts. 1 and 46.

4 UNDRIP as Reflecting General Principles of Law

Perhaps, a less contentious but more defensible approach in relation to the legal status of UNDRIP is that its provisions can be applied as 'general principles of law' (GPL) which can influence the decisions of courts. GPL (found in most national legal systems) are recognised as sources of law at national and international levels.⁹⁵ They have been used in the resolution of disputes between various States by international courts and tribunals.⁹⁶ GPL encompasses two main components: 'general principles' and recognition by 'civilized nations'. In terms of the latter, it appears that in the era of the UN all Member States are 'civilized' in the context of the UN Charter. However, there is more uncertainty regarding 'general principles'. Some have contended that GPL are both 'expressions of national legal systems'⁹⁷ and 'expressions of other unperfected sources of international law in the statutes of the ICJ'.⁹⁸

Boyle and Chinkin have rightly argued that GPL do not need to emanate exclusively from treaties, binding instruments or from national law.⁹⁹ Rather, it is the recognition of such general principles by States that confer them legitimacy. For example, domestic courts in many African States – Botswana, South Africa and Uganda – increasingly recognise the rights of IPs in their domestic legal systems.¹⁰⁰ When principles such as non-discrimination, self-identification and land rights are applied to IPs by judicial bodies, they create binding legal obligations upon States. In addition, UNGA and UN Security Council (UNSC) resolutions may contain or express such principles.¹⁰¹ GPL may be used as

95 L Oppenheim, *International Law: A Treatise*, vol. 1 (Lauterpacht, 1955) at 29–30.

96 Ibid.

97 MC Bassiouni, 'A Functional Approach to General Principles of International Law' (1989) 11 *Michigan Journal of International Law* 768 at 768.

98 Ibid.

99 Boyle and Chinkin, *supra* n 77 at 223.

100 See e.g. *Roy Sesana (First Applicant), Keiwa Setlhobogwa and 241 others, (Second and Further Applicants) v the Attorney General of the Republic of Botswana*, High Court of Botswana, (2006); and *Matsipane Mosetharyene (First Appellant) and Gakenyatsiwe Matsipane (Second Appellant) v the Attorney General (Respondent)*, High Court of Botswana, (27 January 2011); *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460, Constitutional Court of South Africa; *Uganda Land Alliance, Ltd v Uganda Wildlife Authority*, Miscellaneous Cause No. 0001 of 2004, High Court of Uganda at Mbale.

101 See LB Sohn, 'Generally Accepted International Rules' (1986) 61 *Washington Law Review* 1073.

sources of legal rules, being guidelines for judiciaries in the interpretation of law and by making up for *lacunae* in the law.¹⁰²

The Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ) have provided guidance as to how to identify whether GPL have emerged. For GPL to emerge under Article 38 (1) (3) and (c) of the Statute of the ICJ they must exist as principles of law in many States but do not have to be of universal acceptance by all States and it appears no numerical criteria has been established. In *ss Lotus (France v Turkey)* (*Lotus case*),¹⁰³ the PCIJ held that Article 38 (1)(3) demands that such principles should be of universal acceptance by States by stating that GPL 'is applied between all nations belonging to the community of states.'¹⁰⁴ However, the facts of the case suggest that the principle at issue was known to be of universal application by all States. The principle in question was the territorial jurisdiction of States in criminal matters. It has been argued that based on the facts, the Court did not intend to establish a principle of universality in relation to GPL.¹⁰⁵

Indeed, the ICJ jettisoned the requirement of universality in relation to the emergence of GPL in the *South West Sahara Cases* (*sw Sahara cases*), where it noted that: 'The recognition of a principle by civilized nations ... does not mean recognition by all civilized nations ...'.¹⁰⁶ Similarly, the universality test was rejected by the same Court in the *North Sea Continental Shelf Case* where it was stated that 'the evidence should be sought in the behavior of a great number of states, possibly the majority of States, in any case the great majority of the interested States.'¹⁰⁷

The various rights of IPS as declared under the UNDRIP illustrates the creation and elaboration of GPL with a synthesis of hard and soft international

102 B Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, vol. 2 (Cambridge University Press, 1994); W Friedman, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 *American Journal of International Law* 279 at 287; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1950) 27 *British Year Book of International Law* 1; HG Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2011) 44 *New York University Journal of International Law & Policy* 1049; and AL Paulus, 'The International Legal System as a Constitution' (2009) *Ruling the World* 69.

103 *ss Lotus (France v Turkey)* [1927] PCIJ (ser. A) No. 10, 16 September 1927.

104 *Ibid.*

105 Bassiouni, *supra* n 97 at 788.

106 *South West Sahara Cases (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ 4 at 299 18 July 1966 (Judge Tanaka's dissenting opinion).

107 *North Sea Continental Shelf Case (Western Germany v Denmark, Western Germany v Netherlands)* [1969] ICJ 101 at 229, 20 February 1969 (dissenting opinion of Judge Lachs).

law. When the provisions of UNDRIP and the general body of international human rights law are taken together with regional human rights instruments, the conclusion suggests that there is now a GPL in which the rights of IPs (e.g. to non-discrimination) must be respected.¹⁰⁸ At the international level, evidence that UNDRIP's provisions in relation to IPs' rights are GPL is supported by the works of the United Nations Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR) and Committee on the Elimination of All Forms of Racial Discrimination (CERD). For example, in its Concluding Observations on the fourth, fifth and sixth periodic reports on the USA whilst acknowledging that the USA voted against the adoption of the UNDRIP, the CERD still recommended that it must '... be nevertheless used as a guide to interpret the State Party's obligations under ICERD relating to indigenous peoples.'¹⁰⁹ A similar approach has been adopted by CERD in relation to the following IPs' rights: self-identification and recognition in Denmark¹¹⁰ and France¹¹¹; land rights in Costa-Rica¹¹² and Guatemala¹¹³; and free, prior and informed consent in Norway.¹¹⁴

The argument that rights of IPs are GPL has been supported by developments at some national levels. For example, the Supreme Court of Belize has held that the protection of land rights of IPs is now a GPL.¹¹⁵ Indeed, the Bolivian State has adopted UNDRIP *verbatim* as part of its State legislation,¹¹⁶

108 Barelli, *supra* n 76 at 977.

109 Committed on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination United States of America*, UN Doc. CERD/C/USA/CO/6 at 29, (8 May 2008).

110 CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination Denmark*, UN Doc. CERD /C/DNK/CO/20–21, (20 September 2010).

111 CERD, *Concluding Observations on the Combined Twentieth and Twenty-First Periodic Reports of France*, UN Doc. CERD /C/FRA/CO/20–21, (10 June 2015).

112 CERD, *Concluding Observations on the Combined Nineteenth to Twenty-Second Periodic Reports of Costa Rica*, UN Doc. CERD /C/CRI/CO/19–22, (25 September 2015).

113 CERD, *Concluding Observations on the Combined Fourteenth and Fifteenth Periodic Reports of Guatemala*, UN Doc. CERD /C/GTM/CO/14–15, (12 June 2015).

114 CERD, *Concluding Observations on the Combined Twenty-First and Twenty-Second Reports of Norway*, UN Doc. CERD /C/NOR/CO/21–22, (17 October 2016).

115 In *Manuel Coy et al v The Attorney General of Belize et al*, Supreme Court of Belize, Claims No. 171 and 172 (10 October 2007), para. 132 the Belize Supreme Court held with regards to land rights of some Mayan peoples, that once a UNGA resolution incorporates principles of general international law, States cannot disregard them. It also found that UNDRIP incorporates general principles in relation to the land rights of IPs that must to be taken into account.

116 See *Bolivian Rights of Indigenous Peoples Law* No. 3760, 2007.

while Ecuador and Nepal have used it as a reference point in the process of revising their constitutions.¹¹⁷ Even those States that voted against UNDRIP now appear to have reversed their decision on it. For example, Australia has now formally endorsed and supports UNDRIP,¹¹⁸ and in an earlier case a Court in Australia affirmed the native title of IPs.¹¹⁹ In 2008 Canada's Parliament passed a motion demanding that the Government should implement the standards set out under UNDRIP.¹²⁰ Later, Canada's Indigenous Affairs Minister Carolyn Bennett announced that Canada is 'now a full supporter of the declaration, without qualification' and that Canada intends 'nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution'.¹²¹

In Africa, there have been some important jurisprudential developments on the protection of IPs rights. There is an increased use of litigation before domestic courts to seek recognition and judicial protection of IPs rights by challenging discrimination faced by IPs.¹²² For example in 2014 a land court in Kenya relied on the provisions of UNDRIP to recognise and uphold the land rights of IPs.¹²³ At a regional level, both the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have examined important cases concerning IPs rights.¹²⁴ In May 2017 in the *Ogiek* case, the African Court on Human and Peoples' Rights (African Court) affirmed that land rights of IPs are protected under the African Charter on

117 SJ Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc. A/HRC/9/9 11 August 2008 at para. 54.

118 See a 2009 Media Release entitled 'United We Stand – Support for United Nations Indigenous Rights Declaration: A Watershed Moment for Australia', 3 April 2009, <www.humanrights.gov.au/news/media-releases/2009-media-release-united-we-stand-support-united-nations-indigenous-rights>.

119 In *Mabo v Queensland (No. 2)* [1992] 175 CLR 1. See also *The Wik's Peoples v The State of Queensland* [1996] 134 ALR 637, where it was held that pastoral leases cannot extinguish native title.

120 See 'UN Experts Welcome Canada's Backing for Indigenous Rights Declaration', 18 April 2008, <www.un.org/apps/news/story.asp?NewsID=26376#.V_FORfWcGM8>.

121 See T Fontaine, Canada officially adopts UN declaration on rights of Indigenous Peoples, CBC News, 10 May 2016, <<http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>>.

122 See cases cited above in n 100.

123 *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, ELC Civil Suit No. 821 of 2012, [2014] eKLR 1, (The Environmental and Land Court at Nairobi, 17 March 2014), <<http://kenyalaw.org/caselaw/cases/view/95729/>>.

124 See e.g. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, (2010).

Human and Peoples' Rights.¹²⁵ The logical conclusion from the above survey is that increased litigation on IPs' rights to land and natural resources supports the application of IPs rights, as recognised in the UNDRIP, as GPL. Such emergence does not require the acceptance of every State in the world to be legally binding.¹²⁶ This includes the increased reference to 'indigenous peoples' to recognise the discrimination faced by them.

5 Conclusion

This article has explored the legal status or effect of the UNDRIP in contemporary international human rights law by considering whether it constitutes CIL and whether it should be applied as GPL. Given the continuous references to UNDRIP by national and international courts in the determination of cases concerning the rights of IPs including its adoption by several States as well as its subsequent acceptance by those States that voted against it during its adoption, there is room for optimism that in a futuristic sense, UNDRIP may contribute to the further development on the rights of IPs at regional and national levels.

As a UNGA resolution, the legal significance of UNDRIP may not be as clear-cut as an international human rights treaty. However, it carries significant legal weight and far-reaching legal implications in international human rights law in relation to IPs and their rights. Like the UDHR which has been widely accepted as a universal standard in the context of articulating and providing for generally acceptable human rights norms globally, the initial negative votes against UNDRIP by four States 'specially affected' by its provisions do not appear to have affected its legal status or effect in international law over ten years since it was adopted. Although such negative votes may hamper its emergence as CIL at a global level, it has been argued that as an international human rights instrument containing preambular and substantive provisions highlighting its relationship with both 'soft' and 'hard' international human rights instruments, UNDRIP carries significant legal weight. It has been argued the rights recognised by the UNDRIP such as non-discrimination should be applied as part of general principles and should be respected by UN Member States.

125 *African Commission on Human and Peoples' Rights v The Republic of Kenya*, Application No. 006/2012, Judgment of 26 May 2017.

126 P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 2002) 45.

