THE PROTECTION OF INDIGENOUS PEOPLES
IN INTERNATIONAL LAW REVISITED–FROM
NON-DISCRIMINATION TO SELF-DETERMINATION

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A. Introduction

In an article for the Heidelberg Journal which was obviously intended as a survey of the state of discussion (and legal development), Rüdiger Wolfrum in 1999 analysed the growing set of rules protecting indigenous peoples in international law. He implicitly reminded the reader—like many other authors have done before and after him—that the issue constituted a left-over of the decolonization process. With decolonization and the granting of independence to former colonial territories, the power of the state was handed over to local colonial elites—elites mostly educated and formed in Europe—and these native elites now had to run a state modelled by Europeans according to the traditions of colonial statehood. The mere hand-over of power, which left unchanged the iron structures of colonial statehood, cemented an injustice of the past—the marginalization of indigenous peoples. These peoples had been robbed by the colonial state of their lands, had lost their self-rule which they had exercised according to local traditions and customs, and had become dependent upon (and subject to) the institutions of modern statehood. In the words of Rüdiger Wolfrum, “The reason why indigenous peoples are considered to need particular protection, that is to say a protection which exceeds the protection under international human rights regimes, is the fact that these peoples have been deprived by the immigration of other peoples of their rights. In particular, they have lost rights concerning the land they traditionally occupied, and

2 Id., at 369.
3 As to the resulting problems see the classical study by B. Davidson, The Black Man’s Burden: Africa and the Curse of the Nation State (1992).
the possibility to develop and sustain a community reflecting their particular values.\footnote{5}

These words already contain an insight gained only decades after the founding of the UN with its emphasis upon (individual) human rights—the insight that the injustices done in the past (and repeated in the present) to indigenous peoples are not automatically remedied with the enforcement of general catalogues of human rights. The tragic situation of indigenous peoples in many places around the world has a lot to do with discrimination; but mere non-discrimination does not really cure their sad fate, because much more is needed than a simple policy of anti-discrimination.\footnote{6} These peoples face—again in the words of Rüdiger Wolfrum—“the danger of losing their identity or, at least, they face difficulties adjusting their traditional values or customs to new conditions of life"\footnote{7}—specific difficulties that need specific (positive) measures helping them to lead a decent life in modern times. It took some time before the international community learned that lesson\footnote{8}—although indigenous peoples had come into the focus of international law as an object deserving specific protection as early as in the 1950s. The first international legal document specifically dedicated to indigenous peoples, however, the 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, was just the opposite of a genuine instrument of protection serving the specific needs of indigenous peoples. The Convention was an authentic expression of the spirit of the time, a spirit oriented towards ‘nation-building’ of the Newly Independent States.\footnote{9} The Convention’s thrust was not oriented towards reconstituting some kind of self-rule of indigenous peoples.