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Fulfillment of the LL.M Course for the Academic Year
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***“The Indivisibility Human Rights of Indigenous People’s
under International Human Rights Law”***

***Under The Guidance
Of Adjunct Professor
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DEDICATED TO MY PARENTS

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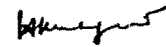
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CERTIFICATE

*This is to certify that this dissertation "**The Indivisibility of Human Rights of Indigenous People & International Human Rights Law**" submitted by Konark Sharma (ID. No. 370) for the degree of Master of Laws of National Law School of India University is a product of bona fide research carried out under my guidance and supervision. This dissertation of any part thereof has not been submitted elsewhere for any other degree.*

Date 31.05.2011 .

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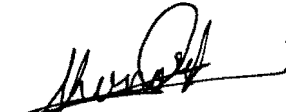
DECLARATION

*I do hereby declare that this dissertation on " **The Indivisibility of Human Rights of Indigenous People & International Human Rights Law**" is my original work. This project has been done by me in partial fulfillment of LL.M degree course at National Law school of India University, Bangalore, prescribed under final VIth Trimester during academic year 2009-2011.*

I further declare that this work is original except for such help as duly acknowledged and has not been submitted either in part or in whole for any other degree or diploma at any other university or like institution.

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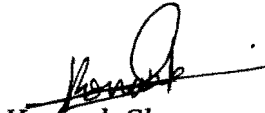
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Terms Commonly Used when Speaking about Indigenous Peoples'

Human Rights

Accede: "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.

Collective: Denoting a number of persons or things considered as one group or whole.

Colonization: An act of colonizing, meaning to establish a body of people living in a new territory but retaining ties with the parent state.

Covenant: A usually formal, solemn, and binding agreement. It is similar to a treaty.

Enter into force: When a treaty enters into force, it is legally binding on all parties that have ratified the treaty. A treaty usually goes into effect when a certain number of member states have ratified it.

General Assembly: The General Assembly is the main deliberative organ of the United Nations. It is composed of representatives of all Member States, each of which has one vote. The General Assembly passes resolutions on important issues concerning everything from outer space to disarmament.

Group: A number of individuals assembled together or having some unifying relationship.

International Decade: An International Decade is a ten-year period in which the UN focuses on a specific topic (for example: Indigenous Peoples) and tries to fulfill important goals regarding that topic.

Operational directive: World Bank Operational Directives contain a mixture of policies, procedures, and guidance on how the Bank deals with specific topics.

Rapporteur: An expert entrusted by the UN with a special human rights mandate, acting in his or her personal capacity.

Ratify: Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

Reservations: When a state makes a reservation to a treaty, it means that the state considers itself bound to the treaty, except for those provisions to which it makes the reservation. A reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply. Reservations must not be incompatible with the object and the purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.

Self-determination: The right of a cohesive national group (“peoples”) living in a territory to choose for themselves a form of political and legal organization for that territory.

Signed: To write one's [country's] name as a token of assent, responsibility or obligation.

Treaty: A contract in writing between two or more political authorities (as states or sovereigns) formally signed by representatives duly authorized and usually ratified by the lawmaking authority of the state.

World Bank: The World Bank is a development assistance bank. It provides strategies and loans to developing countries to help them "improve living standards and eliminate the worst forms of poverty."

Overview of main international responses

1957 - ILO Convention 107 on Indigenous and Tribal Populations is adopted

(<http://www.ilo.org/ilolex/english/convdisp1.htm>)

1972 - The Study of the Problem of Discrimination against Indigenous Populations (also known as the Martínez Cobo study) - is launched

1982 - The Working Group on Indigenous Populations is established by the UN

(<http://www.ohchr.org/english/issues/indigenous/groups/groups-01.htm>)

1984 - The Martínez Cobo Study is submitted to the UN 1985 - The Voluntary Fund for Indigenous Populations is created

1989 - ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent States

(<http://www.ilo.org/ilolex/english/convdisp1.htm>) is adopted

1992 - The Rio Earth Summit adopts the Convention on Biological Diversity

(<http://www.biodiv.org/convention/default.shtml>)

1993 - The World Conference on Human Rights recommends the establishment of a Permanent Forum on Indigenous Issues

1993 - International Year of the World's Indigenous People

1994 - The first International Decade for Indigenous People is launched (1994-2004)

1994 - The Voluntary Fund to support small-scale projects during the Decade is created

1998 - First Roundtable on Intellectual Property and Indigenous Peoples organized by the World Intellectual Property Organization - WIPO (<http://www.wipo.int>)

2000 - Establishment of the United Nations Permanent Forum on Indigenous Issues (UNPFII) (<http://www.un.org/esa/socdev/unpfii/index>)

2001 - The mechanism of a Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous

People is established by the Commission on Human Rights

(<http://www.ohchr.org/english/issues/indigenous/rapporteur/>)

2002 - A Voluntary Fund for Indigenous and Local Communities is established by the CBD (<http://www.cbd.int>)

2003 - A Voluntary Fund is established by the UN to support the Permanent Forum

2005 - The Second International Decade for Indigenous People is launched (2005-2015), including a fund to support small-scale projects

2005 - A Voluntary Fund for Indigenous and Local Communities is created by WIPO

2007 - The UN Declaration on the Rights of Indigenous Peoples is adopted by the UN General Assembly (<http://www.un.org/esa/socdev/unpfii/en/declaration.html>)

2007 - The new Expert Mechanism on the Rights of Indigenous Peoples is established by the Human Rights Council

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CHAPTER I

Chapter 1:

1.1 Introduction

The situation of indigenous peoples in many parts of the world continues to be critical: indigenous peoples face systemic discrimination and exclusion from political and economic power; they continue to be over-represented among the poorest, the illiterate, the destitute; they are displaced by wars and environmental disasters; the weapon of rape and sexual humiliation is also turned against indigenous women for the ethnic cleansing and demoralization of indigenous communities; indigenous peoples are dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural; they are even robbed of their very right to life. In more modern versions of market exploitation, indigenous peoples see their traditional knowledge and cultural expressions marketed and patented without their consent or participation. Of the some 7,000 languages today, it is estimated that more than 4,000 are spoken by indigenous peoples.¹ Language specialists predict that up to 90 per cent of the world's languages are likely to become extinct or threatened with extinction by the end of the century.² This statistic illustrates the grave danger faced by indigenous peoples.

¹ D Sanders, 1992. "Remembering Deskaheh: Indigenous Peoples and International Law" in *International Human Rights Law [:] Theory and Practice*, ed. I. Cotler & F.P. Eliadis. Montreal: Canadian Human Rights Foundation, 1992.

² *Language Vitality and Endangerment*. UNESCO

1.2 The concept of indigenous peoples

In the forty-year history of indigenous issues at the United Nations, and its even longer history at the ILO, considerable thinking and debate have been devoted to the question of the definition or understanding of "**indigenous peoples**". But no such definition has ever been adopted by any United Nations-system body.

One of the most cited descriptions of the concept of "indigenous" was outlined in the José R. Martínez Cobo's Study ³ on the Problem of Discrimination against Indigenous Populations. After long consideration of the issues involved, Martínez Cobo offered a working definition of "indigenous communities, peoples and nations". In doing so, he expressed a number of basic ideas forming the intellectual framework for this effort, including the right of indigenous peoples themselves to define what and who indigenous peoples are. The working definition reads as follows:

"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 on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."

³ D Shelton, 2001. "Environmental Rights," in Peoples' Rights, ed. P. Alston. New York: Oxford University Press.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

a. Occupation of ancestral lands, or at least of part of them

b. Common ancestry with the original occupants of these lands

c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)

d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)

e. Residence in certain parts of the country, or in certain regions of the world

f. Other relevant factors. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.⁴

During the many years of debate at the meetings of the Working Group on Indigenous Populations, observers from indigenous organizations developed a common position that

⁴ Martínez Cobo (1986/7), paras. 379-382.

rejected the idea of a formal definition of indigenous peoples at the international level to be adopted by states. Similarly, government delegations expressed the view that it was neither desirable nor necessary to elaborate a universal definition of indigenous peoples⁵. Finally, at its fifteenth session, in 1997, the Working Group concluded that a definition of indigenous peoples at the global level was not possible at that time, and this did not prove necessary for the adoption of the Declaration on the Rights of Indigenous Peoples.⁶ Instead of offering a definition, Article 33 of the United Nations Declaration on the Rights of Indigenous Peoples underlines the importance of self-identification, that indigenous peoples themselves define their own identity as indigenous.

Article 33

“1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.”

The concept of indigenous peoples emerged from the colonial experience, whereby the aboriginal peoples of a given land were marginalized after being invaded by colonial

⁵ H.J Steiner, and P. Alston. 1996. International Human Rights in Context: Law, Politics, Morals. New York: Oxford University Press.

⁶ Working Group on Indigenous Populations (2006a) and (2006b), paras. 153-154

powers, whose peoples are now dominant over the earlier occupants⁷. These earlier definitions of indigenesness make sense when looking at the Americas, Russia, the Arctic and many parts of the Pacific. However, this definition makes less sense in most parts of Asia and Africa, where the colonial powers did not displace whole populations of peoples and replace them with settlers of European descent. Domination and displacement of peoples have, of course, not been exclusively practised by white settlers and colonialists; in many parts of Africa and Asia, dominant groups have suppressed marginalized groups and it is in response to this experience that the indigenous movement in these regions has reacted.

It is sometimes argued that all Africans are indigenous to Africa and that by separating Africans into indigenous and non-indigenous groups, separate classes of citizens are being created with different rights⁸. The same argument is made in many parts of Asia or, alternatively, that there can be no indigenous peoples within a given country since there has been no large-scale Western settler colonialism and therefore there can be no distinction between the original inhabitants and newcomers. It is certainly true that Africans are indigenous to Africa and Asians are indigenous to Asia, in the context of European colonization. Nevertheless, indigenous identity is not exclusively determined by European colonization⁹.

⁷ H Steiner, 1999. "Do Human Rights Require a Particular Form of Democracy" in *Democracy, the Rule of Law and Islam*, ed. E. Cotran and A. O. Sherif. London: Kluwer Law International.

⁸ L. Henkin, 1999. "Rhetoric and Reality," in *Human Rights*, ed. L. Henkin, G. Neuman, D. Orentlicher, D. Leebron. New York: Foundation Press.

⁹ Amnesty International. 2007. *Maze of Injustice: The failure to protect indigenous women from*

The Report of the Working Group of Experts on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights therefore emphasizes that the concept of indigenous must be understood in a wider context than only the colonial experience.

The focus should be on more recent approaches focusing on self-definition as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.¹⁰

In conclusion, in the case of the concept of "indigenous peoples", the prevailing view today is that no formal universal definition of the term is necessary, given that a single definition will inevitably be either over or under inclusive, making sense in some societies but not in others. For practical purposes, the commonly accepted understanding of the term is that provided in the Martínez Cobo study mentioned above.

sexual violence in the USA. Amnesty International Publications

¹⁰ Report of the African Commission's Working Group of Experts on Indigenous Populations/communities.

1.3 A brief history of indigenous issues at the international level

For centuries, since the time of their colonization, conquest or occupation, indigenous peoples have documented histories of resistance, interface or cooperation with states, thus demonstrating their conviction and determination to survive with their distinct sovereign identities. Indeed, indigenous peoples were often recognized as sovereign peoples by states, as witnessed by the hundreds of treaties concluded between indigenous peoples and the governments of the United States, Canada, New Zealand and others. And yet as indigenous populations dwindled and the settler populations grew ever more dominant, states became less and less inclined to recognize the sovereignty of indigenous peoples. Indigenous peoples themselves, at the same time, continued to adapt to changing circumstances while maintaining their distinct identity as sovereign peoples¹¹.

In 1923, Cayuga Chief Deskaheh, the representative of the Six Nations of the Iroquois travelled to Geneva, to the League of Nations, to plead for the cause of his people. He waited a whole year to obtain recognition from the League but was not received and returned home to North America. Although he was not granted an audience by the League, he did sustain a remarkably successful PR campaign in Europe, where he found a much more receptive audience in the media and general public than he did amongst the delegations in the League.¹²

¹¹ J. S. James Anaya 1996. *Indigenous Peoples in International Law*. Oxford/New York: Oxford University Press.

¹² H. Hannum, 1990. *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press.

A similar journey was made the following year by Maori religious leader W.T. Ratana to protest at the breakdown of the Treaty of Waitangi, concluded in 1840 between representatives of the British Crown and Maori chiefs in New Zealand, a treaty that gave Maori ownership of their lands. Ratana first travelled to London with a large delegation to petition King George V, but he was denied access. He then sent part of his delegation to Geneva to the League of Nations and arrived there later himself, in 1925, but was also denied access.

Indigenous issues received scant attention from the international community until the last three decades of the twentieth century. One exception was in the 1950s, when concerns about situations of forced labour among "native populations" prompted the International Labour Organization to work on what became, in 1957, Convention No. 107, entitled "Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi- Tribal Populations in Independent Countries"¹³. This Treaty was later criticized as assimilationist by the indigenous movement, which had become more visible at the international level in the 1970s. This would eventually lead to the adoption of ILO Convention No. 169 in 1989¹⁴.

A great number of indigenous peoples' organizations, were established at national and international level in the 1960s and 1970s, spurred on by the decolonization era and a more

¹³ J. Donnelly, 1989. *Universal Human Rights in Theory and Practice*. Ithaca, N.Y.: Cornell University Press

¹⁴ S. Venne 1989. "The New Language of Assimilation: A Brief Analysis of ILO Convention 169". *Without Prejudice, The EAFORD International Review of Racial Discrimination*, Vol. II, No. 2 (1989)

general growth in non-governmental organizations. The issues that fuelled the movement ranged from broken treaties and loss of land to discrimination, marginalization, conflict and gross violations of human rights, including massacres. Although most of the activities of the nascent international indigenous movement took place outside the environs of the United Nations, indigenous peoples' voices were at last being heard, and the UN was finally willing to listen to these voices¹⁵.

In 1972, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities launched a Study on the problem of discrimination against indigenous populations, later known as "the Martínez Cobo study", the name of the Special Rapporteur appointed to prepare the report.¹⁶ The study began at a time when the international indigenous movement was growing rapidly throughout the Americas, the Caribbean, the Arctic, Australia, New Zealand, the Philippines, Bangladesh and elsewhere. This framed the nascent international indigenous movement in human rights terms—a landmark that has characterized the movement since¹⁷.

The Study created a momentum that, together with the advocacy work of the indigenous movement, led, in 1982, to the establishment of the first United Nations mechanism on indigenous peoples' issues, namely the Working Group on Indigenous Populations of the

¹⁵ , R Falk. 2000. *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*. New York/London: Routledge.

¹⁶ Martínez Cobo (1986/7).

¹⁷ Welsh, Andrew. 2008. "Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" *Canadian Journal of Criminology & Criminal Justice*. July 2008, Vol. 60 Issue 4. p. 492.

Sub-Commission. In 1983, in an unprecedented breakthrough, the Working Group decided to allow the participation of representatives of indigenous peoples and their organizations¹⁸.

The First Decade, launched in 1994 and completed in 2004, adopted the special theme of "partnership in action" and its programme of action was meant to raise awareness about, and integrate, indigenous issues into the intergovernmental and, by extension, the governmental agendas. The First Decade helped to promote awareness and solidified indigenous issues on the agenda of the United Nations and some of its agencies. Indigenous peoples themselves also took advantage of the Decade, documenting and providing information about human rights violations and carving themselves a niche within various international fora.

The other major goal of the first Decade was the establishment of the United Nations Permanent Forum on Indigenous Issues, by the Economic and Social Council in 2000. Despite these important steps forward, a number of challenges remained, most importantly the lack of implementation by states of programmes that promote the development and rights of indigenous peoples and the United Nations' role in assisting them. The other unfinished matter was the Draft Declaration on the Rights of Indigenous Peoples, which had not been adopted during the first Decade, despite great efforts by all sides¹⁹.

¹⁸ , L. Swepston 1978. "Latin American Approaches to the Indian Problem". International Labor Review, Vol. 117, No. 2, (March-April 1978).

¹⁹ , L. Swepston 1989. "A New Step in International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989". 15 Okla. City U.L.R. (1989)

In 1993, the Working Group completed a Draft Declaration on the Rights of Indigenous Peoples, a document held in high esteem by indigenous peoples, created with their participation and expressing indigenous peoples' aspirations. In 1994, the Draft Declaration was approved by the Sub-Commission and, in 1995, the Commission on Human Rights established a Working Group to examine and fine-tune the Draft Declaration. The negotiations were difficult and indigenous representatives again participated actively in the process, which eventually culminated, in June 2006, in the historic decision taken during its first session by the Human Rights Council—the body that succeeded the Commission on Human Rights—to adopt the Declaration. Just over a year later, on 13 September 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, which marked a major milestone in the work of the United Nations and indigenous peoples' struggle for the protection and promotion of their rights.²⁰

The Working Group on indigenous populations was abolished in 2007 and replaced with the Expert Mechanism on the Rights of Indigenous Peoples.²¹ The Expert Mechanism is a subsidiary body of the Human Rights Council, composed of five experts, which provides thematic expertise on the rights of indigenous peoples to the Council, focusing mainly on studies and research-based advice. The Mechanism may also suggest proposals to the Council for consideration and approval, although the mechanism does not adopt

²⁰ United Nations General Assembly Resolution(2007).

²¹ The Expert Mechanism on the rights of indigenous peoples.

resolutions or decision.

In 2001, the Commission on Human Rights decided to establish a Special Rapporteur on the human rights and fundamental freedoms of indigenous people to examine the situation of indigenous peoples worldwide on the basis of communications received and country-specific visits. The first Special Rapporteur, Rodolfo Stavenhagen, a well-known Mexican anthropologist, presented annual reports to the Commission on Human Rights—and, since 2006—to the Human Rights Council²² and the General Assembly. Mr. Stavenhagen was succeeded by the Native American law professor, Mr. S. James Anaya on 1 May 2008.

The establishment of the Permanent Forum on Indigenous Issues (UNPFII) in 2000 came after a ten-year process of international consultation following the Vienna Conference of 1993. The Forum has a broad mandate, namely to discuss economic and social development, culture, the environment, education, health and human rights and to advise the Economic and Social Council and the United Nations system on all matters pertaining to its mandate, promote the coordination and integration of indigenous issues in the United Nations system, raise awareness about indigenous issues and produce information materials on indigenous issues. This high-level body in the United Nations' hierarchy demonstrates the increasing political engagement of states in terms of cooperating with indigenous peoples to address a multiplicity of issues. More than 1,500 indigenous participants from all parts of the world attend the annual sessions of the UNPFII in New York, in addition to representatives from some 70 countries and around 35 UN agencies

²² The Special Rapporteur's reports may be accessed on the website of the Office of the High Commissioner for Human Rights, www.ohchr.org

and inter-governmental entities.

Research Methodology:

This Dissertation is submitted in partial fulfillment of the course Master of Laws.

Aims and Objectives:

This dissertation attempts to discuss human rights of Indigenous Peoples in the light of Declaration on the Rights of Indigenous Peoples ,2007. It is divided into five chapters that would discuss three broad areas of indigenous people human rights based on the six mandated areas of the Permanent Forum on Indigenous Issues, in addition to a chapter on emerging issues.

Scope and Limitation:

The scope of the dissertation is limited to lack systematized data on the social and economic indicators of indigenous people. The data are still extremely difficult to obtain because indigenous peoples are essentially invisible in the data collection of many international agencies and in most national censuses.

Approach:

The Researcher has adopted descriptive and analytical approach in the research of this dissertation.

Hypotheses:

The situation of indigenous peoples continues to be critical: indigenous peoples face systemic discrimination and exclusion from political and economic power leading to widespread human rights violation.

Research questions:

1. How to define Indigenous Peoples?
2. What are possible indicators of exercise and enjoyment of human rights?
3. How indigenous peoples' rights are interrelated with their human rights?
4. What are the major obstacles in implementing Indigenous human rights and in which areas?
5. What are the emerging issues relating to the displacement of indigenous peoples?

Source of data:

The research is non-doctrinal and based on secondary data from books and articles from the library and the internet.

Chapterisation:

The first chapter starts with the historical background and definitional debate around indigenous people. In the wake of serious abuses of human rights against them how international response has taken shape so far.

The second chapter discusses the indivisibility and interrelatedness of indigenous peoples' rights and how their human rights are intrinsically related to their rights. From the

Universal Declaration on Human Rights to the Declaration on the Rights of Indigenous Peoples, there are a significant number of international instruments that protect the human rights of indigenous peoples, and there have been marked improvements in recent years.

The third chapter emphasizes both self determination and the principle of free, prior and informed consent, which in practice, means that indigenous peoples themselves must be free to determine their own development.

In the fourth chapter, discusses various definitions of culture. Indigenous peoples continue to face racism and discrimination that sees them as inferior to non-indigenous communities and their culture as a hindrance to their development.

The chapter on environment begins by looking at the major environmental issues that indigenous peoples are facing today. The chapter emphasizes indigenous peoples' economic connection with their traditional lands and their tradition of collective rights to land in contrast with dominant models of individual land ownership which frequently lead to dispossession of indigenous peoples' land.

The last chapter will look at some of the emerging issues affecting indigenous peoples, including violence and militarism, effects of conservation, globalization, migration and urbanization, and indigenous peoples.

Citation:

The researcher has used a uniform mode of citation in the dissertation.

CHAPTER II

Chapter 2

2.1 Indigenous people: A human rights-based approach

Indigenous advocates believe the use of a human rights-based approach to advancing their rights, interests and concerns, and for resolving indigenous/ state conflicts, is critical to the future of indigenous peoples. As the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, has noted, a human rights-based approach

...should take into account basic principles such as the indivisibility and universality of human rights; non-discrimination, especially in the case of vulnerable or marginalized groups; participation and empowerment; and accountability. ²³

The inter-related, interdependent and indivisible nature of human rights

The authors of the Universal Declaration of Human Rights clearly recognized the interrelatedness of human rights in this hallowed text by including reference to civil, political, economic, social and cultural rights. In addition, those drafters of the International Covenants who argued for a single covenant understood the importance of the interrelationship of the basic human rights and freedoms that form the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

²³ Stavenhagen (2007), para. 14.

Similarly, indigenous peoples recognize the interrelatedness and interdependence of all human rights.²⁴ They do so in large part because of their worldview of the holistic nature of their relations and inter-relationships with all other beings and all living things. From their earliest interventions at the UN Working Group on Indigenous Populations (WGIP), indigenous peoples have seen the text of the UN Declaration on the Rights of Indigenous Peoples as a whole and have affirmed the view that human rights are interrelated, interdependent and indivisible.²⁵

The World Conference on Human Rights, through the Vienna Declaration and Programme of Action,²⁶ affirmed that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights

²⁴ There are a range of indigenous interventions, Joint Submissions, etc., on this point. Specifically, see Geneva Declaration on the Health and Survival of Indigenous Peoples, adopted at a 1999 World Health Organization health consultation; its preambular paragraph 11 states: "Reminding the international agencies and other bodies of the UN system of their responsibility, and the obligation of States, towards the promotion and protection of Indigenous Peoples' status and rights, and that a human rights approach to Indigenous health and survival is based on the said international responsibility and obligation to promote and protect the universality, indivisibility, interdependence and interrelation of the rights of all peoples". See WHO (1999).

²⁵ Numerous statements have been made by indigenous peoples about the provisions of the Declaration being dependent upon one another, and that the text must be read in context and as a whole. See, for example, the 1996 NGO Statement to the Commission on Human Rights Working Group on the Draft Declaration (WGDD) stating that, "the Preamble was fundamental to the overall draft because it lays the philosophical foundations and contextual clauses and it is responsive to the intent of the declaration". See WGDD (1997), para. 34. Also see the 1998 Statement of the Inuit Circumpolar Conference to WGDD stating that, "[the Declaration] was an integrated document to be read as a whole..." See WGDD (1998), 8. Finally, see the Joint Submission on the Urgent Need to Improve the UN Standard-Setting Process on Indigenous Peoples' Human Rights presented to the Permanent Forum on Indigenous Issues, Fourth Session, in New York UNPFII (2004), para. 10.

²⁶ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on June 25, 1993. UN Doc. A/CONF.157/23, Part I, para. 5.

globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

There are a growing number of international instruments that make specific reference to this important aspect of human rights.²⁷ In addition, this interpretation of human rights has been embraced by numerous scholars²⁸ and advocates.

The point of such an understanding and associated pronouncements is the need to recognize the dynamic inter- play between cultural diversity and universal norms, principles or ideals. Furthermore, such language helps to motivate respect for certain minimum standards and to promote the actual enjoyment of basic human rights, which may be taken for granted. There is no question that each state will (and must) take into consideration its "national and regional particularities and various historical, cultural and

²⁷ For example, the Inter-American Democratic Charter adopted by acclamation by the Hemisphere's Foreign Ministers and signed by the 34 countries of the Americas at the 28th special session of the OAS General Assembly, Lima, Peru, 11 September 2001. Its Article 7 states: "Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments." Also the United Nations Declaration on the Right to Development, Article 6.2 acknowledges that all human rights are indivisible and interdependent.

²⁸ Henkin (1999), 1214, where he discusses "cultural relativism" and "cultural imperialism" and states: "A holistic perspective on human rights is not merely faithful to the intellectual and political history of the human rights idea; it reflects the relationship in principle, in law and in fact, between national and international human rights in today's world." See Preamble to the Declaration on the Rights of Indigenous Peoples.

religious backgrounds."²⁹ However, they must do so in a fashion that is consistent with universally applicable minimum human rights standards.

These and other fundamental principles of the human rights framework cannot be overstated, especially from an indigenous perspective. It is quite elementary but important to reiterate that it is undesirable and inconsistent with the human rights framework to establish a "hierarchy" of rights³⁰ or to invite discussion over rights that may be derogable and those that may not. Consistent with the indivisibility of human rights and their interdependence, state governments have both specific and general duties to promote human rights and are not in a position to determine which rights they may or may not limit.³¹

2.2 Indigenous Peoples' human rights— on the ground

Despite all the positive international human rights standard-setting developments, indigenous peoples continue to face serious human rights abuses on a day- to-day basis. Issues of violence and brutality, continuing assimilation policies, marginalization, dispossession of land, forced removal or relocation, denial of land rights, impacts of large-scale development, abuses by military forces and armed conflict, and a host of other abuses, are a reality for indigenous communities around the world. Examples of violence and brutality have been heard from every corner of the indigenous world, most often perpetrated against indigenous persons who are defending their rights and their lands,

²⁹ Preamble to the Declaration on the Rights of Indigenous Peoples

³⁰ See Meron (1986), which addresses the notion of a hierarchy of norms in international law.

³¹ See Article 5 of the International Covenants, which addresses actions aimed at the destruction of any rights or freedoms recognized, and the purposes and principles of the United Nations.

territories and communities.

In 2005, Mapuche leaders in Chile were jailed, threatened and had their homes burned down solely because they were working in defence of their land rights.³² The Special Rapporteur, in his analysis of 15 different countries ranging from Myanmar to the Russian Federation to Australia, identified this unfortunate dynamic in the context of indigenous human rights violations:

“In many countries, indigenous people are persecuted because of their work in defence of their human rights and fundamental freedoms, and are the victims of extrajudicial executions, arbitrary detention, torture, forced evictions and many forms of discrimination.”³³

There are a myriad of examples and testimony at the international level of the There are a myriad of examples and testimony at the international level of the forced relocation of indigenous peoples and dispossession of their lands. For a number of years now, the San (formerly known as Bushmen) living in their traditional hunting grounds in the Central Kalahari of Botswana have been struggling with forced relocation from their homelands,

³² Stavenhagen (2006), para. 20. Stavenhagen, Rodolfo. 2003. Report on Large Scale development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the UN Economic and Social Council. UN Doc. E/CN.4/2003/90 21 January 2003.

³³ Stavenhagen (2006), para. 6. Stavenhagen, Rodolfo. 2004. Indigenous Peoples in Comparative Perspective - Problems and Policies. Background paper for the Human Development Report Office. UNDP.

without any substantive address of their fundamental human rights.³⁴ For over two decades, the conflicts between indigenous peoples and gold miners, cattle ranchers and other outsiders have been raging throughout Brazil with little international notice or attention. Though legislation to demarcate lands has been adopted, the reality on the ground is dramatically different from the laws of the nation-state. For example, the Special Rapporteur has received Urgent Appeals from the Guarani-Kaiowa in the State of Mato Grosso do Sul, Brazil concerning eviction notices received despite the fact that their lands were demarcated as indigenous lands in 2004.³⁵

In regard to large-scale or major development projects, the Special Rapporteur has summarized some of their effects on the human rights of indigenous peoples by stating that:

The principal human rights effects of these projects for indigenous peoples related to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and

³⁴ Stavenhagen (2006), para. 77. Stavenhagen, Rodolfo. 2007. "Mission to Kenya". Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the UN Economic and Social Council, Addendum 3. UN Doc. A/HRC/4/32/Add.3 26 February 2007.

³⁵ Stavenhagen (2006), 8. Stavenhagen, Rodolfo. 2003. Report on Large Scale development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the UN Economic and Social Council. UN Doc. E/CN.4/2003/90 21 January 2003.

*violence.*³⁶

In this particular discussion of large-scale development projects, there was also reference to the impact of large dam projects upon indigenous communities in Colombia. Unfortunately, in this case, the human rights violations became so grave as to include forcible removal from homes and lands, destruction of property as well as assassinations and disappearances carried out by paramilitary forces.

The Special Rapporteur has noted other similar dam projects and the resulting violations of indigenous peoples' human rights. Forced removal, clear-cutting of forests, military abuses, and deaths and disappearances are taking place in India, the Philippines, Panama, the United States, Canada, Malaysia, Costa Rica and Chile. This is not an exhaustive list—such cases are only the known violations based upon communications to the Special Rapporteur or the Office of the High Commissioner for Human Rights. It is highly likely that many other cases have not been reported or communicated to the UN or any other agencies.

Other development projects being imposed or forced upon indigenous communities include logging, mining, resort developments and highway construction, establishment of national parks and reserves as well as oil and gas exploration and exploitation. For example, in the Russian Far East, little or no consideration has been given to the indigenous peoples' demands to safeguard their hunting, fishing and gathering territories

³⁶ Stavenhagen (2003), 2. Stavenhagen, Rodolfo. 2004. Indigenous Peoples in Comparative Perspective - Problems and Policies. Background paper for the Human Development Report Office. UNDP.

in the face of oil and gas development.³⁷ These cases arise as urgent measures primarily due to the fact that state governments have not even established the ways and means for indigenous peoples to bring claims to gain any recognition or affirmation of their distinct rights to own and control their lands, territories and resources.

Testimony of abuses by State-controlled military or paramilitary forces has also been repeatedly given. In Myanmar, according to information received by the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, members of the village of Tagu Seik, near Einme, were tortured and their community ransacked on the basis of purported communications with another armed opposition group.³⁸ In the Philippines, a similar military attack upon indigenous peoples took place. This was again on the basis that the indigenous individuals were allegedly members of a "splinter group of communist terrorists".³⁹

Needless to say, these and numerous other gross human rights violations and abuses are perpetrated against indigenous peoples—as collectivities or as individual men and women—on the basis of their identity and marginalization, and, in the case of indigenous

³⁷ Stavenhagen (2003), para. 68. Stavenhagen, Rodolfo. 2007. "Mission to Kenya". Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the UN Economic and Social Council, Addendum 3. UN Doc. A/HRC/4/32/Add.3 26 February 2007.

³⁸ Stavenhagen (2003), para. 60. Stavenhagen, Rodolfo. 2003. Report on Large Scale development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the UN Economic and Social Council. UN Doc. E/CN.4/2003/90 21 January 2003.

³⁹ Stavenhagen (2003), para. 66. Stavenhagen, Rodolfo. 2004. Indigenous Peoples in Comparative Perspective - Problems and Policies. Background paper for the Human Development Report Office. UNDP.

women, on the basis of their sex. Unfortunately, such discriminatory actions have been constant, from the time of first contact with outsiders to the present. Little has changed, despite the groundswell of developments in the area of human rights standards specifically addressing indigenous peoples' human rights.

Concrete and urgent action must therefore be taken by the international community to curb such abuses and violations, and to actually move toward implementing the instruments discussed in this chapter. In so doing, indigenous peoples may then have some potential for genuinely exercising their human rights. In order to implement the UN Declaration on the Rights of Indigenous Peoples, for example, it may be useful for indigenous peoples to develop, either independently or in cooperation with states or others, benchmarks for the realization of human rights.

2.3 Possible indicators of exercise and enjoyment of human rights

A number of key questions about equality, racism, non-discrimination, access to justice systems, political representation, participation in the political life of the state, exercise and enjoyment of the right of self-determination and so forth may be useful starting points for an analysis of the exercise of human rights by indigenous peoples. Of course, any such indicators would have to be discussed and adapted on a case-by-case basis and dependent upon the issues facing particular indigenous communities.

In regard to assessing the exercise or manifestation of the right of self-determination by indigenous peoples, communities and nations, some basic indicators might include

analysis of state government positions and policies in relation to indigenous peoples' self-determination. For instance, to what extent have various states been requested to take action on the implementation of the right of self-determination of indigenous peoples as understood in international law? What state policies impede or help to accelerate the exercise of self-determination by indigenous peoples

The inter-related, inter-dependent and universal aspects of human rights are crucial indicators of the exercise of the right of self-determination. The right of self-determination is recognized as a pre-requisite to the exercise and enjoyment of all human rights. Hence the language of Article 3 of the UN Declaration on the Rights of Indigenous Peoples:

Indigenous 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.

In this regard, do indigenous peoples exercise their human right to development, including social development, economic development, cultural development and spiritual development? Do indigenous peoples control all forms of development in their communities? In terms of universality, do some indigenous peoples' communities enjoy greater exercise of self-determination than others?

There is also an inter-relationship (meaning you cannot attain one without the other) between development, security and human rights. And, in this context, "security" is not

confined solely to military security. Rather, in an indigenous context; do indigenous peoples enjoy environmental security? Do indigenous peoples enjoy security in relation to their hunting, fishing and other gathering rights? If self-determination had been effectively attained, it would embrace such indigenous priorities and such questions would not have to be asked.

The right to free, prior and informed consent is another crucial element of self-determination. Is it recognized and respected in relations, agreements, etc., with states? Or is it diminished through mere "consultations" or denied and violated through unilateral state actions?

There is a strong correlation between the health of individuals and communities and the exercise or denial of the right of self-determination, with a growing body of evidence to support this thesis. Self-determination is intended to strengthen communities, not weaken or devastate them. What are the health conditions of indigenous communities, psychological, physical, etc.? Are the members of indigenous communities healthy?

Similar to health, is there equity of options and opportunity for indigenous peoples and indigenous peoples' communities? Poverty or the overall health and viability of a community are other relevant indicators of the exercise or denial of self-determination.

Democracy, the rule of law and human rights are inter-related and important dimensions of self-determination. Democracy in this context does not mean majority rule. Rather, it

suggests a review of democratic principles and whether they are in operation within indigenous communities and in their relations with others.

These are only preliminary suggestions for possible indicators with which to analyse the extent to which indigenous human rights are respected, recognized exercised and enjoyed. Most indigenous communities already have a clear sense of the impact of human rights abuses. Yet such indicators may be useful in specifying and linking human rights violations to specific existing and emerging standards in international human rights law.⁴⁰

2.4. Relevant human rights instruments specifically concerning indigenous peoples

Though indigenous peoples are the beneficiaries or subjects of all existing international human rights instruments, it is important to focus upon those instruments that specifically address their distinct context.

The United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly's adoption on September 13, 2007 of the United Nations Declaration on the Rights of Indigenous Peoples demonstrates the Organization capacity to accommodate the distinct status of indigenous peoples. The instrument now provides an important framework for the realization of indigenous peoples' human rights as well as

⁴⁰ The United Nations Permanent Forum on Indigenous Issues has been promoting the development of indicators with the direct involvement of indigenous peoples themselves. After an intense period of regional and global meetings on the subject, a synthesis paper was presented at the Forum's Seventh Session. See UNPFII (2008).

a benchmark for state accountability in relation to their specific obligations.

In regard to its actual content, the United Nations Declaration is an extraordinary document, reflecting the important balance between individual and collective indigenous human rights as well as the legitimate interests and concerns of state governments. Though the entire Declaration is significant for indigenous peoples, there are a number of notable articles that deserve specific mention. Article 3 embraces the right to self-determination and, when read in context with all other relevant preambular and operative paragraphs, it strikes the necessary balance between the exercise of this right by indigenous peoples and the international obligations of state governments. The matter of free, prior and informed consent, contained most specifically in Article 19, is an important dimension of the right to self-determination and further ensures the "participatory" role of indigenous peoples in matters that affect them.

The articles addressing lands, territories and resources reinforce the distinct rights of indigenous peoples to their surrounding environment. These provisions have been consistently expressed in the context of the profound relationship that indigenous peoples have to their lands, territories and resources. Furthermore, the articles elaborate upon State obligations to recognize indigenous land rights and to take action to affirm and safeguard them. The linkage between lands, territories and resources and the ability to exercise human rights, including the human right to development, are embodied in Article 23, which addresses indigenous peoples' right to determine their own priorities for development.

Overall, the fact that the text is consistent with international law and its progressive development, and more importantly the purposes and principles of the UN Charter, ensures that it will play a dynamic and lasting role in the future of specific indigenous/state relations and international law generally.

OAS Proposed American Declaration on the Rights of Indigenous Peoples

On a regional basis, the Organization of American States (OAS) has a history of dealing with indigenous peoples' issues dating back to the first Inter-American Indian Congress, held in Patzcuaro (Mexico) in 1940.⁴¹ Since that time, the Inter-American Indian Institute has become one of the specialized agencies of the OAS and has played a primarily advisory role to the OAS on matters concerning indigenous peoples, including the work of the Inter- American Commission on Human Rights.⁴² The OAS is currently considering a proposed American Declaration on the Rights of Indigenous Peoples.⁴³ This development emerged in early 1989 and was almost certainly prompted by both the revision of ILO

⁴¹ Created under the 1940 Patzcuaro International Convention, the basic objectives of the Inter-American Indian Institute are to assist in coordinating the Indian affairs policies of the member States and to promote research and training of individuals engaged in the development of indigenous communities. The Institute has its headquarters in Mexico City.

⁴² The Inter-American Commission on Human Rights has a long history of dealing with indigenous matters under the American Declaration of the Rights and Duties of Man, adopted by the Ninth Conference of American States (Res. XXX, 1948). See OAS(1948). For a brief discussion of the work of the Commission in regard to the Yanomami and other indigenous peoples of the Oriente, see Shelton (2001), 240-242.

⁴³ See the Inter-American Commission on Human Rights Annual Report (1988-9), 245-52. As an ICC representative, the author of this chapter participated in a number of consultations leading up to the OAS decision to prepare this "juridical instrument." See also Hannum (1990) for a discussion on the overall Inter-American system and the "protection of Indigenous human rights" through the Inter-American Court of Human Rights, country reporting procedures and the proposed Declaration.

Convention No. 107 and the elaboration of the Declaration by the United Nations.⁴⁴

Since 1989, procedural issues and inadequate measures for indigenous peoples' participation have triggered the development of a wider discussion within the OAS around the use of a "civil society" accreditation system modelled on the UN's non-governmental organization procedures. As with the changes in indigenous participation within the United Nations, this has been a significant turning point in the history of the OAS.

Unfortunately, at this stage, the fundamental matters of self-determination, lands, territories and resource rights, plus a host of other articles, remain unresolved and contentious. Like the UN, the OAS does have the competence to deal with political rights. One of the most troubling issues to emerge is therefore the potential for language that attempts to "qualify" the term "peoples", similar to the misinterpreted debate within the context of ILO Convention 169 .

Re-drafting of the text continues in earnest. With work ongoing, it is difficult to speculate upon the final outcome. Nonetheless, this is another strand that can be woven into the overall trend of the international community's willingness to visit, or re-visit, the human rights of indigenous people

The ILO Conventions

Dating back to 1921, the International Labour Organization (ILO) is one of the few

⁴⁴ Anaya (1996), 54. See also Suagee (1997), 365.

intergovernmental organizations to have concerned itself with indigenous and tribal peoples and the issues facing them. In June 1957, the ILO adopted Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. This Convention ⁴⁵has been ratified by only 27 States and came into force in June 1959 (and remains in force for some). The 1957 instrument encourages the gradual assimilation of indigenous individuals into national societies and economies, thus legitimising the gradual extinction of indigenous peoples as such. Moreover, the Convention presupposes complete state control over the affairs of indigenous peoples. As one might guess, many indigenous peoples have strongly criticized the ILO and its early interest in the area of indigenous conditions for being "paternalistic" in its approach to "protecting these groups". The ILO itself has acknowledged this criticism. ⁴⁶

The Convention does not deal with political matters such as self-government or other political dimensions of self-determination. The ILO has made it clear that these matters fall outside the "competence of the ILO" and that, as an international organization, they cannot deal with political rights, in the context of the Convention or otherwise.

However, the revised ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989,⁴⁷ substantiates and reinforces indigenous rights. This

⁴⁵ 328 UNTS 247.

⁴⁶ Swepston (1978), 450, explained this as follows: "The problem with the Convention stems from the ethos of the period in which it was adopted, i.e., at the height of the paternalistic era of the United Nations system, the heyday of the "top down" development approach...the ILO did something perfectly acceptable at the time...but they omitted to ask the underprivileged themselves what they thought of the idea."

⁴⁷ ILO Convention No. 169 was adopted in Geneva on 26 June 1989 and came into force on 5 September 1991. Reprinted in 28 ILM 1382 (1989). See Barsh (1990), 209; Swepston (1990), 677 and (1998), 17.

updated instrument, which remains open for state ratification, provides standards and protections relating to the environment, development and direct participation of indigenous peoples in matters affecting their rights, lives and territories.

Conventions Nos. 107 and 169 are the only legally binding international treaties that deal specifically with indigenous rights and, furthermore, include a recourse mechanism: the Committee of Experts on the Application of Conventions and Review of Recommendations. If the Committee is actively used, it is an effective method for overseeing government behaviour and actions toward indigenous peoples in those countries where the Convention has been ratified.⁴⁸ This aspect of ILO Convention No. 169 cannot be underestimated. Because of the efforts of trade unions and support groups such as Survival International and Amnesty International, even application of the outdated Convention No. 107 has saved lives

When read in context, there are many possibilities for interpreting the language in a positive fashion. Setting aside the criticisms about Convention No. 169,⁴⁹ it has proved useful to indigenous peoples in domestic policy development⁵⁰ and litigation,⁵¹ as well as

⁴⁸ ILO Convention No. 169 has been ratified by 20 countries (source: ILOLEX 30.11.08) □ E

⁴⁹ See S. Venne (1989).

⁵⁰ The following information was downloaded from the ILO website at <http://www.ilo.org>: "Prior to its submission to the Committee of Experts of the ILO, the Government of Norway sent its latest report on the implementation of Convention No. 169 to the Sami Parliament for its comments. These comments form an integral part of the report, under the terms of an agreement entered into between the Norwegian Government and the Sami Parliament. This co-operation is established as a permanent procedure to ensure the inclusion of the opinion of the Sami Parliament in the formal reporting procedure on Convention No. 169. The Sami Parliament has indicated its willingness to enter into an informal dialogue with the Committee of Experts, together with the Norwegian Government, to facilitate the implementation of the Convention. The

in formal human rights complaints to the Inter-American Commission on Human Rights.

International Covenants

The Universal Declaration of Human Rights was utilized as a starting point for the codification of first and second generation rights, namely civil and political rights as contained in the International Covenant on Civil and Political Rights (ICCPR)⁵² and economic, social and cultural rights as contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵³ It is interesting to note that some of those engaged in the process grappled with the fact that civil and political rights and economic, social and cultural rights were interdependent.⁵⁴

Government has stated that it shares the wish to facilitate the implementation of the Convention in this way, believing that open co-operation between governments and representative indigenous bodies may contribute effectively to the international promotion of indigenous rights and cultures, and the Government therefore fully supports the suggestion of a supplementary dialogue.”

⁵¹ The following information was downloaded from the ILO website at <http://www.ilo.org>: “With regard to the environment, the Norwegian Ministry of Culture has instructed the regional board responsible for managing crown land in Finnmark to ask the opinion of the Sami Assembly before taking any decision concerning land-use projects. The reindeer herding districts are legally entitled to be consulted, have the right to be compensated, in the event of economic damage, and may bring lawsuits before the courts if they consider a project inadmissible.” In this case, the provisions of ILO Convention No. 169 were invoked and utilised by the Sami peoples. Such use of the language of the Convention is only available to those whose respective state members have ratified the treaty.

⁵² International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976. General Assembly Resolution. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS. 171.

⁵³ International Covenant on Economic, Social and Cultural Rights (1966), adopted by the United Nations General Assembly on 16 December 1966 and entered into force 3 January 1976. General Assembly Resolution 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3,

⁵⁴ Steiner and Alston (1996), 17. The authors re-print the “Annotations on the Text of the Draft International Covenants on Human Rights,” UN Doc. A/2929 (1955), which include: “[Between 1949 and 1951 the Commission on Human Rights worked on a single draft covenant dealing with both of the categories of

Common to both the ICCPR and the ICESCR is the fact that they are binding upon State parties to the Covenants— creating international legal obligations that relate to the very principles and purposes of the United Nations Charter. It is important to underscore also the common Article 1, which recognizes the right of peoples to self-determination. Article 1 is clearly a collective right of "peoples" to self-determination that contrasts with the overall individual rights orientation of the two Covenants. Both the ICCPR and the ICESCR also outline State party obligations for the fulfilment of these basic human rights. Finally, in regard to implementation and monitoring, the treaty-based bodies established by the Covenants are significant not only to the realization of such human rights by individuals and the monitoring of violations of human rights by state governments but also to an understanding of the content of such rights to both individuals and groups.

The rights enshrined in the Universal Declaration and the Covenants do attach to indigenous individuals and collectivities, who also strive for human dignity and enjoyment of their natural rights as human beings. Hence, the use by indigenous peoples of the treaty bodies responsible for overseeing state implementation of the rights embraced by the Covenants. Such actions have dramatically increased due to the efforts of

rights. But in 1951 the General Assembly, under pressure from the Western-dominated Commission, agreed to draft two separate covenants]...to contain 'as many similar provisions as possible' and to be approved and opened for signature simultaneously, in order to emphasise the unity of purpose.... Those who were in favor of drafting a single covenant maintained that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured...."

indigenous peoples, the elaboration of an indigenous cultural context and reliance upon such expressions by treaty body members. Though indigenous peoples, nations and communities have remained distinct from existing state governments, such actions are even more critical because the creation of states is a historical, legal and political reality that indigenous peoples must deal with.

CHAPTER III

Chapter 3

3.1 Cultures & Indigenous People

Culture has been defined as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capacities and habits acquired by man as a member of society".⁵⁵ In other words, culture is a patterned way of life shared by a group of people. Culture encompasses all that human beings have and do to produce, relate to each other and adapt to the physical environment. It includes agreed-upon principles of human existence (values, norms and sanctions) as well as techniques of survival (technology).⁵⁶ Culture is also that aspect of our existence which makes us similar to some people, yet different from the majority of the people in the world... it is the way of life common to a group of people, a collection of beliefs and attitudes, shared understandings and patterns of behaviour that allow those people to live together in relative harmony, but set them apart from other peoples.⁵⁷³

Indigenous communities have kept their cultures alive by passing on their worldview, their knowledge and know-how, their arts, rituals and performances from one generation to the next. Preserving their cultural heritage has also included speaking and teaching their own languages, protecting their sacred and significant sites and objects. It has also

⁵⁵ Suagee, D. 1997. "Human Rights of Indigenous People: Will the United States Rise to the Occasion?" 21 Am. Indian L. Rev. (1997).

⁵⁶ Donnelly, J. 1989. *Universal Human Rights in Theory and Practice*. Ithaca, N.Y.: Cornell University Press

⁵⁷ Anaya, S. James. 1998. "Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize," 1 Yale Hum. Rts. Dev. L.J. (1998)

included defending and holding onto their lands and territories, since these are fundamental for sustaining them as peoples and cultures.

It is this all-encompassing nature of indigenous cultures that makes them unique and so different from the cultures of those groups that hold the political, economic and social power in the nation-states in which they live. But because indigenous peoples have been excluded from the decision-making and policy frameworks of the nation-states in which they live, and because they have been subjected to processes of domination and discrimination, their cultures have been viewed as being inferior, primitive, irrelevant, something to be eradicated or transformed. In addition, they have continued to experience the loss of access to lands, territories and natural resources. The result has been that indigenous cultures today are threatened with extinction in many parts of the world.

In order to assess the current situation of indigenous cultures, this chapter presents a brief overview of some of the fundamental elements of indigenous cultures—such as lands and languages, spirituality, social institutions and traditional knowledge. However, it is important to bear in mind that indigenous cultures can be understood only in a holistic and comprehensive way, and that their various "elements" should be seen as essentially interconnected with and dependent on each other.

3.2 Land, language and identity

Among the many markers of indigenous cultural identity, the attachment to land and the use of an indigenous language are two of the most significant.

Land

The importance of land and territories to indigenous cultural identity cannot be stressed enough. The survival and development of indigenous peoples' particular ways of life, their traditional knowledge, their handicrafts and other cultural expressions have, since time immemorial, depended on their access and rights to their traditional lands, territories and natural resources. But land is not only the basis of the indigenous economy. Indigenous peoples also have a deep spiritual relationship with the land; they feel at one with their ancestral territory and feel responsible for the healthy maintenance of the land—its waters and soils, its plants and animals—for both themselves and future generations.⁵⁸ Land is where their ancestors are buried and where sacred places are visited and revered.

Very often, people identify themselves by taking the name of the place to which they belong. In Maasailand, for example, sub-groups are named after their particular area of origin. Thus the IIKaputiei are from Kaputiei, IIPurko are from Purko, IIMatapato are from Matapato, etc. Hence, the place is also the people. In this way, the notion of "pertaining to the land" is embedded in indigenous peoples' cultural identities. This is also reflected in the common understanding of indigeneity as expressed in various international documents, including ILO Convention No. 169, which all reflect the special and intimate attachment of indigenous peoples to their lands and territories and its fundamental importance for their collective physical and cultural survival as peoples.⁵⁹

⁵⁸ Young (2000), 57.

⁵⁹ These international documents include—besides ILO Convention No. 169 (1989)—the Study on the Discrimination against Indigenous Peoples (Martínez Cobo Study) from 1986/7 and the Working Group on Indigenous Populations' Working Paper on the concept of "indigenous peoples" from 1996.

The centrality of land in the lives of indigenous peoples has been recognized by the Permanent Forum in the following words:

“Land is the foundation of the lives and cultures of indigenous peoples all over the world. This is why the protection of their right to lands, territories and natural resources is a key demand of the international indigenous peoples' movement and of indigenous peoples and organizations everywhere. It is also clear that most local and national indigenous peoples' movements have emerged from struggles against policies and actions that have undermined and discriminated against their customary land tenure and resource management systems, expropriated their lands, extracted their resources without their consent and led to their displacement and dispossession from their territories. Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct cultures is threatened.

Land rights, access to land and control over it and its resources are central to indigenous peoples throughout the world, and they depend on such rights and access for their material and cultural survival. In order to survive as distinct peoples, indigenous peoples and their communities need to be able to own, conserve and manage their territories, lands and resources.⁶⁰

The United Nations Declaration on the Rights of Indigenous Peoples addresses lands, territories and natural resources thoroughly, including the right to maintain spiritual relationships with the land, the right not to be forcibly removed or dispossessed, the right for indigenous peoples to have their own land tenure systems, the right to redress for land that has been taken or damaged and the right to conservation and protection of the environment. Article 26 contains some of the most important language on land:

⁶⁰ UNPFII (2007c), paras 5-6.

Article 26

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

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.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

In addition to the Declaration, some significant progress has been made at the national level. This holds particularly true regarding legislative reforms, respecting indigenous peoples' collective rights to land. In Northern Canada, for example the Nunavut land claim agreement grants approximately 25,000 Inuit title to around 350,000 square kilometres of lands and resources. In South America, some of the most advanced legal frameworks for indigenous land tenure are in Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Nicaragua, Panama, Paraguay and Peru, enshrined in legislation and often in constitutions as well. Indigenous peoples' collective rights to land are also recognized in Australia, New Zealand, Northern Europe and the Russian Federation. The situation in Asia varies greatly. Cambodia and the Philippines have enacted legislation that recognizes communal land rights, while in India, there is constitutional protection of indigenous lands in areas of Northeast India. In Africa, very few countries recognize indigenous

peoples' rights to land, although in South Africa and Botswana, some peoples have had success in having their land claims recognized.⁶¹

In many cases, these legislative reforms are a direct consequence of court decisions in favour of indigenous peoples and their demand for the recognition of their ancestral lands, while in other cases, these reforms correspond with changing international standards. In all cases, these reforms are a direct consequence of indigenous peoples' resistance and demands that their rights be respected, protected and fulfilled.

Indigenous languages

Maintaining distinct languages, at least in part, has also been seen as an essential part of being indigenous.⁶² Language is a system of symbols, or words arranged to convey meaning, and enables people to communicate either verbally or in writing. Language is an important component of one's identity. It is fundamental to understanding values, beliefs, ideology and other intangible aspects of culture. It enables people to communicate as specific peoples and determines participation, access to knowledge, leadership and depth of understanding.⁶³

It is usually estimated that there are between 6,000 and 7,000 oral languages in the world today. Most of these languages are spoken by very few people, while a handful of them are

⁶¹ IWGIA (2004), 4-7.

⁶² See, among other documents, ILO Convention No.169 and WGIP (1996).

⁶³ See UNESCO (2008), 2. UNESCO also underlines the key role languages play in the various pillars of sustainable development and in achieving the Millennium Goals. 16

spoken by an overwhelming majority of the world. About 97 per cent of the world's population speaks 4 per cent of its languages, while only 3 per cent speaks 96 per cent of them.⁶⁴ A great majority of these languages are spoken by indigenous peoples, and many (if not most) of them are in danger of becoming extinct. These are languages that are spoken by only a handful of elders and are not being acquired by children and, as the remaining native.

The extinction of a language is a great loss for humanity; it constitutes the invaluable loss of traditional knowledge and cultural diversity. But for the indigenous peoples themselves, the loss is even greater, especially since many of the indigenous languages exist only orally and cannot, therefore, be retrieved once they are no longer spoken. The loss of a language is thus "a cause of intense grief and disorientation to hundreds of thousands of indigenous men and women who struggle to be themselves without the words to say what that means."⁶⁵

Language, furthermore, is not only a communication tool, it is often linked to the land or region traditionally occupied by indigenous peoples; it is an essential component of one's collective and individual identity and therefore provides a sense of belonging and community. When the language dies, that sense of community is damaged.

Indigenous languages have been dying, not only as a result of unintended consequences of colonization and globalization, but also because of deliberate assimilation policies that sought to deny indigenous peoples their own identities and cultures. Indigenous languages were dismissed as the "gibbering of monkeys" or "barbaric tongues" that were to be eradicated to make way for an English (or French or Spanish, etc.) that "all who are

⁶⁴ See, for example, Skutnabb Kangas (2000) and UNESCO (2003).

⁶⁵ Brody (2000), 5.

civilized can understand".⁶⁶ These assimilation policies lead to the destruction of languages and can thus be considered a form of ethnocide or linguistic genocide.⁶⁷²⁰

While some indigenous peoples are successfully revitalising languages, many others are fighting a losing battle, where languages are simply no longer passed from one generation to the next. Most governments are aware of this language crisis but funding is often provided only for the recording of languages, while limited funds are diverted to language revitalization programmes.

Although the recording of a language is a valuable effort, it is no substitute for revitalization programmes that produce new speakers and keep a language alive. This is an important distinction to make, given that funds are often diverted from indigenous peoples' efforts at revitalization to academic recording projects. While there are hundreds of languages that face impending extinction, there are thousands of other languages that are not in immediate danger of being lost but may well be in danger of extinction within a generation or two if policies and actions that facilitate the use of minority languages within states are not put into place.⁶⁸

⁶⁶ Brody (2000), 5

⁶⁷ Barsh, R.L. 1990. "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples." 15 Oklahoma City University L. Rev (1990).

⁶⁸ For further information, see for example the Report of the International Expert Group Meeting on Indigenous Languages organized by UNPFII (2008).

3.3 Threats and challenges

While this increased recognition of the importance of indigenous cultures and indigenous traditional knowledge is a positive development, at the same time, indigenous peoples realize that they have to struggle ever more in order to protect their cultures and traditional knowledge from a number of threats and challenges.

Misappropriation of indigenous knowledge

There is an increasing appreciation amongst academics and scientists, as well as industrial and agricultural corporations, of the value of traditional knowledge. Entrepreneurs, too, have been quick to see the market potential, and many Western companies are patenting traditional medicines without granting due recognition to the indigenous communities whose knowledge systems went into identifying the active ingredients as useful for particular ailments.⁶⁹

A growing number of widely used consumer products, pharmaceutical drugs, cosmetics and handicrafts are derived from traditional knowledge and indigenous cultural expressions. There are also high hopes for further advances based on traditional knowledge in the fields of biotechnology, medicine and agriculture.

For centuries, indigenous peoples have readily shared their knowledge with non-indigenous people, seeing their knowledge not as private property to be protected, but as collective goods to be shared for the benefit of all. However, in more recent times, as they have seen how their traditional knowledge is being ever more used for profit, indigenous peoples

⁶⁹ See supra note 2, 4.

increasingly demand that their traditional knowledge be protected and recognized.

The respect—or rather, the lack of respect—accorded to indigenous peoples in terms of their identity and cultural expressions is an ongoing issue. The idea that indigenous peoples "own" their own cultures as well as the spiritual and cultural meanings of their lives and surroundings is an issue that many institutions are reluctant to concede. Previously, indigenous peoples' knowledge systems and cultural expressions were seen as the property of academics, governments, scientists, museums and art galleries. For example, many indigenous sites are today considered to have cultural and scientific as well as aesthetic and public value and therefore the potential of becoming World Heritage sites that "belong to all the peoples of the world, irrespective of the territory on which they are located".⁷⁰ The connection and relationships between these sites and living indigenous communities who want to protect their cultural heritage and assert their custodianship is still an issue that the wider society finds difficult to understand and accept.

Tourism

As indigenous peoples and their cultures and territories are increasingly seen as desirable tourist attractions, tourism has opened the further commodification of indigenous cultures—something that affects many indigenous communities.

Tourism is undeniably an immensely important industry, with almost 900 million visitors generating US\$856 billion in 2007. Understandably, governments have recognized tourism

⁷⁰ See World Heritage site at <http://whc.unesco.org/en/about>. See also Chapter I "Indigenous Peoples: Poverty and Well-being" in this publication.

as an important opportunity for income generation.⁷¹ But as a profit-driven industry, tourism tends to view landscapes and people as consumer products to be bought and sold. Particularly when imposed from outside the community, the negative impacts of tourism may include disrupted lifestyles and ecosystems, poorly distributed or inconsistent profits, the pressure to turn cultural traditions into products, greenwashing,⁷² and unequal participation in the planning of projects dominated by foreign or government interests. Many critics have pointed out that the tourist industry is dominated by outsider interests, which retain most of the benefits and leave the host destinations to suffer the costs.⁷³

The rise of ecotourism has particularly been promoted as a viable development model for indigenous peoples. Tourism, including ecotourism, is frequently not environmentally friendly. It takes vast amounts of fossil fuel to transport 900 million individuals to their destinations, and the expansion of tourism in the relatively pristine areas where indigenous peoples live brings a great deal of waste and disruption to local environments, economies and cultures. With ecotourism, indigenous peoples have experienced eviction from traditional lands, overuse of habitat related to increased tourist demand and the destruction of habitat to create tourism infrastructure.⁷⁴

Indigenous peoples involved in the tourist industry and who incorporate cultural elements in their tourist products are constantly faced with the challenge of sharing their culture without

⁷¹ Hinch and Butler (1996), 4.

⁷² Greenwashing is the unjustified appropriation of environmental virtue by a company, an industry, a government, a politician or even a non-governmental organization.—Ed. Hinch and Butler (1996), 4. Tourism Concern (2002).

⁷³ Hinch and Butler (1996), 4.

⁷⁴ Tourism Concern (2002).

compromising its integrity. This situation often results in indigenous peoples and their communities having to face difficult decisions and potential dissent. The issue of whether outsiders can participate in ceremonies and other spiritual activities, for example, varies from place to place. However, in most instances, indigenous elders are unequivocal in their belief that indigenous peoples' spirituality is not for sale, and that there is no place for spiritual ceremonies in tourism products.⁷⁵

At the same time, tourism is not inherently negative for indigenous peoples and can certainly be an important source of revenue and job creation, provided that indigenous peoples themselves are directly involved in all decision-making processes regarding tourism on their lands. Over the past two decades, community-based approaches to tourism have gained popularity. This form of ecotourism is often presented as an important contribution to sustainable development that generates employment and revenues, improves local infrastructure and generally contributes to a positive interaction between visitor and local communities, thereby promoting increased cultural awareness and respect. In this context, it is crucial to adhere to the principle of free, prior and informed consent, ensuring that indigenous peoples are fully aware of planned tourism activities on their lands, that they themselves authorize and approve these activities and benefit from them

Intellectual property rights and indigenous peoples

Many indigenous peoples feel they should be able to stop the commodification of some

⁷⁵ Notzke (2004).

aspects of their culture, especially of objects that are sacred to their communities. The dominant model for recognising and protecting knowledge and cultural expressions is the intellectual property rights regime. This regime, which is based on Western legal and economic parameters as well as on Western property law, emphasizes exclusivity and private ownership, reducing knowledge and cultural expressions to commodities that can be privately owned by an individual or a corporation. The intellectual property rights regime is widely recognized as the primary mechanism for determining ownership and property rights over knowledge, processes, innovations, inventions, and even naturally occurring phenomena such as plants, animals and genetic material. This form of ownership is protected by states and promoted by the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO).

The intellectual property rights (IPRs) regime and the worldview it is based on stand in stark contrast to indigenous worldviews, whereby knowledge is created and owned collectively, and the responsibility for the use and transfer of the knowledge is guided by traditional laws and customs.⁷⁶ What is often overlooked by the wider society is the fact that, within indigenous societies, there are already laws governing the use and transmission of their knowledge systems that often do not have any formal recognition in the wider legal system. These internal regimes have operated within indigenous communities since time immemorial and have been developed from repeated practices, which are monitored and enforced by the elders, spiritual and community leaders. The

⁷⁶ The United Nations Permanent Forum on Indigenous Issues, at its Fifth Session, appointed Mick Dodson, Member of the Forum, to prepare a study on customary laws pertaining to indigenous traditional knowledge. This study was presented to the Permanent Forum at its Sixth Session. See UNPFII (2007b).

international property rights regime, however, often fails to recognize indigenous customary law.

The Hoodia case

A celebrated case regarding the appropriation of indigenous traditional knowledge involves the San of southern Africa. In 1937, an anthropologist noticed that the San ate the Hoodia cactus to stave off hunger and thirst. Based on this knowledge, in 1995, the South African Council for Scientific and Industrial Research (CSIR) patented the Hoodia cactus's appetite-suppressing element (P57). By 1998, revenues from the licensing fee for developing and marketing P57 as a slimming drug had risen to US\$32 million. When the San alleged biopiracy and threatened legal action in 2002, the CSIR agreed to share future royalties with the San.

Source: Human Rights Report 2004

3.4 Recent Trends

All over the world, there are clashes between state and indigenous peoples' cultures and systems of livelihood (pastoralism, hunting and gathering, and shifting cultivation). It is a clash between the desire of many indigenous peoples to live on traditional lands, and the general thrust of government policies aimed at using indigenous peoples' lands for other purposes. Whether this is the establishment of natural reserves or mega-projects such as hydro-electric dams or infrastructure development, indigenous peoples are frequently portrayed as an obstacle to national development plans.

Governments and developers have employed the dominant development paradigms to

manufacture stereotypes that are negative and that depict indigenous peoples as "backward", "uncivilized" and "uncultured". While the Western culture and way of life is presented as modern and "civilized", that of the indigenous peoples is depicted as an embarrassment to modern states. As a result, indigenous peoples have been discriminated against and marginalized by the processes of economic modernization and development.

Although indigenous peoples are often portrayed as a hindrance to development, their cultures and traditional knowledge are also increasingly seen as assets. It is argued that it is important for the human species as a whole to preserve as wide a range of cultural diversity as possible, and that the protection of indigenous cultures is vital to this enterprise. The twenty-first century is already witnessing growing recognition of the right of indigenous peoples to decide for themselves what should happen to their ancient cultures and their ancestral lands.

In recent years, the world has become more aware of the role of indigenous cultures in development processes. Many United Nations agencies and countless civil society organizations continue to make the case for the central role that indigenous peoples play in the preservation of cultural diversity. For development to be socially and economically sustainable, it must take into account and draw upon the values, traditions and cultures of the people in the countries and societies it serves. Indigenous peoples, perhaps more than any others, are aware of these relationships between culture and development.⁷⁷

Such campaigns are bringing influence to bear on policy makers, development

⁷⁷ Tauli Corpuz (2005). Janke

practitioners and the public, who have become increasingly aware of the important role that indigenous peoples' traditional knowledge systems (TKS) can play in promoting sustainable development in the economic and spatial spheres they occupy.⁷⁸ However, much remains to be seen in the practical world of development because indigenous peoples' cultures have not yet had the desired influence on development institutions, which are located far from the often remote areas in which indigenous people live.⁷⁹

In the face of increasing losses through globalization, discrimination or pressures to assimilate, there is also evidence indicating the resurgence of indigenous cultures, knowledge and languages. The increasing number of people acknowledging their indigenous status is contributing to the increased numbers and expansion of indigenous peoples and to the recovery of languages and indigenous knowledge systems. Efforts are being made toward recovering some of the endangered languages and cultures. This change is largely attributed to an increased knowledge of indigenous cultures and their potential. It is now an established fact that indigenous peoples' cultures are self-sustaining and can guarantee indigenous peoples a sense of well-being.⁸⁰

This resurgence is particularly evident at the international level, where the global indigenous movement grows ever stronger while indigenous peoples' organizations keep growing in size and sophistication. The indigenous peoples' movement has made

⁷⁸ Åhrén (2002); Traditional Knowledge Bulletin (2008).

⁷⁹ Champagne, Duane. 2007. *Social Change and Cultural Continuity among Native Nations*. Lanham, New York; Toronto; Plymouth, UK: Altamira Press.

⁸⁰ Friedl, J. and Pfeiffer, J.E.. 1977. *Anthropology*, New York: Harper's College Press.

significant strides in fighting for the recognition and protection of the collective rights of indigenous peoples, as highlighted by the adoption of the United Nations Declaration on the Rights of Indigenous Peoples on the part of the United Nations General Assembly in 2007, and indigenous peoples are increasingly present and visible at various international fora. These new achievements are heralding a new era in promoting the protection and development of indigenous cultures around the world.

CHAPTER IV

Chapter 4

4.1 Introduction

Throughout the world, there are approximately 370 million indigenous peoples occupying 20 per cent of the earth's territory. It is also estimated that they represent as many as 5,000 different indigenous cultures, and the indigenous peoples of the world therefore account for most of the world's cultural diversity, even though they constitute a numerical minority.⁸¹ The areas they inhabit often coincide with areas of high biological diversity, and a strong correlation between areas of high biological diversity and areas of high cultural diversity has been established.⁸²

Indigenous peoples have always identified themselves by the importance of the bond with their lands and their distinct cultures.⁸³ Indigenous peoples share a spiritual, cultural, social and economic relationship with their traditional lands, and their customary laws, customs and practices reflect both an attachment to land and a responsibility for preserving traditional lands for use by future generations.⁸⁴ A critical issue for indigenous peoples around the world is therefore access to, as well as the protection and preservation of, their lands and territories and the natural resources pertaining to these lands.

Although indigenous peoples have demonstrated that their close relationship with the

⁸¹ Gray (1991), 8.

⁸² See, e.g., WWF-International and Terralingua (2000).

⁸³ Gray (1991), 8.4

⁸⁴ OHCHR (2008).

environment also makes them its best guardians, the strong environmental movement that emerged after World War II made no reference to indigenous peoples, and for a long time, efforts focused more on how nature could be protected from damaging interventions by human activities⁸⁵ than on what impact environmental degradation had on human beings.

Thus, it was first in 1972, with the UN Conference on the Human Environment,⁸⁶ that "the protection and improvement of the human environment" was seen as a major issue "which affects the well-being of peoples...."⁸⁷ Conference documents, however, made no mention of indigenous peoples and their critical situation, and it was to take 15 years and the Brundtland report on sustainable development (1987)⁸⁸ before indigenous peoples were mentioned in an environmental document.

The real breakthrough occurred during the 1992 United Nations Conference on Environment and Development (UNCED, often called the Earth Summit), when indigenous peoples were included as a "major group" that their specific relationship with the environment was recognized and some of their concerns taken into consideration. This was, among other things, the result of efforts made by the international indigenous movement prior to the Earth Summit. The indigenous movement had by then gained strength and recognition within the UN system, notably with the creation of the Working

⁸⁵ IUCN (International Union for Conservation of Nature and Natural Resources) was founded in 1948 as an organization dedicated to natural resource conservation; WWF (standing, at that time, for World Wildlife Fund), was established in 1961 for the conservation, research and restoration of the natural environment.

⁸⁶ Also known as the Stockholm Conference. One of the outcomes of this conference was the decision to create an environmental agency - the United Nations Environment Programme (UNEP).

⁸⁷ See Declaration of the Conference on the Human Environment at <http://www.unep>.

⁸⁸ See Our Common Future (also known as the Brundtland Report), Report of the World Commission on Environment and Development (1987).

Group on Indigenous Populations (1982) and the adoption of ILO Convention No. 169 .

UNCED was therefore seen as an opportunity to inform the international community about the environmental issues indigenous peoples were facing and how their traditional ecological knowledge and practices could contribute to resolving the global environmental problems.

Indigenous peoples prepared for UNCED as thoroughly and extensively as any state. Prior to the Earth Summit, indigenous peoples held their own summit at Kari Oca, near Rio de Janeiro, to develop their own Declaration and Charter on sustainable development. The Kari Oca Summit was instrumental in formulating the basic documents for indigenous peoples on issues related to sustainable development at a global level and for influencing the official and civil society summits.

All these efforts were reflected in some of the documents that came out of the Summit, including the Convention on Biological Diversity. Since then, indigenous concerns, knowledge and expertise have been taken increasingly into account by the numerous international initiatives related to the environment and by the ensuing documents and policies. Indigenous peoples have also gained some recognition from a number of large environmental organizations such as WWF and IUCN,⁸⁹ which have taken this step to work with indigenous peoples in their conservation activities.

⁸⁹ In 1996, WWF (now standing for World Wide Fund for Nature) issued a Statement of Principles on Indigenous Peoples and Conservation, intended to guide partnerships between WWF and indigenous peoples' organizations in conserving biodiversity within indigenous peoples' lands and territories and in promoting sustainable use of natural resources.

At the same time, the inherent rights of indigenous peoples to their lands and resources and to their full and effective participation in decisions relating to their lands, resources and livelihoods have been reflected in a number of international documents and mechanisms, most recently in the UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007. This Declaration recognizes in its preamble that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment", and although it does not create any new rights, it responds to the urgent need to respect and promote indigenous peoples' right to self-determination and thereby, among other things, their inherent rights in relation to political, economic, social, cultural, spiritual as well as environmental and natural resource management⁹⁰.

These remarkable advances do not mean, however, that the struggle of indigenous peoples for their rights and concerns when it comes to lands and natural resources is over. At the international level, indigenous peoples' voices are still often marginalized, and vital indigenous interests not taken into consideration at the moment of formulating policies. But it is at the national and local levels that indigenous peoples face the most overwhelming challenges in protecting their environmental rights from structural discrimination, corporate interests, globalization, etc., and in adapting their livelihoods to climate changes.

⁹⁰ Joffe (2008), 2.2.

This chapter examines a number of issues on the topic of indigenous peoples and the environment. After identifying some of the environmental problems confronting indigenous peoples, the chapter looks at the existing international law and mechanisms for environmental protection and how indigenous peoples make use of these instruments. It finally identifies some of the implementation gaps and challenges indigenous peoples still face in the struggle for their environmental right.

4.2 International treaties, laws and declarations related to environmental protection

Over the past decades, a growing international awareness of the degradation and destruction of the global environment, the loss of biodiversity and the foreseen impact of climate change has generated a plethora of international laws and mechanisms addressing environmental protection and related issues.⁹¹

At the same time, however, the current treaty-based framework of international environmental law is seen to be poorly equipped to accommodate indigenous peoples as non-state players with rights equivalent to states within the area of international environmental law.⁹² International law is built on the Westphalian premise of state sovereignty. This is reiterated throughout international treaties, such as the Convention on Biological Diversity, which reaffirms that "states have sovereign rights over their own

⁹¹ Regarding environmental protection, there exist almost 60 legally binding agreements encompassing a wide variety of issue-areas, from nature conservation and terrestrial living resources to atmospheric pollution, hazardous substances and nuclear safety.

⁹² L. Westra *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (2008) EarthscanPress, UK at p. 9 citing Metcalf (2004)

biological resources". On the international and domestic stages, the challenge for indigenous peoples is to assert their sovereign rights as peoples to natural resources, decisions concerning resources, and the way in which states engage with them.

Indigenous peoples are not only affected by these instruments, they have also been able to play an important part both in the processes that have led up to the formulation of conference declarations and documents and to the establishment of related mechanisms, as well as in the follow-up processes

4.3 International law and indigenous land rights

Environmental protection cannot be discussed from an indigenous perspective without first looking at indigenous peoples' rights to lands and territories and the natural resources pertaining to these lands, and the international treaties dealing with these rights.

- **ILO Convention Nos. 107 and No. 169**

The first international treaty to specifically deal with indigenous rights was ILO (International Labour Organization) Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, adopted in 1959. This Convention recognized the indigenous peoples' right, among other things, of ownership, collective or individual, of the lands they traditionally occupy (Article 11).

Criticized for its assimilationist approach, Convention No. 107 was replaced in 1989 by Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries. This Convention also recognizes indigenous peoples' land rights, defining territory as including "the total environment of the areas which the peoples concerned occupy or otherwise use".⁹³ It establishes their right to "the natural resources pertaining to their lands, including the right to participate in the use, management and conservation of these resources".⁹⁴ Article 15.2 specifically provides rights to fair consultation, participation in the benefits, and compensation for any damages sustained as a result of exploration and exploitation of sub-surface resources. It also establishes their right to be consulted and to freely participate at all levels of decision-making "in bodies responsible for policies and programmes which concern them",⁹⁵ and to control their own institutions, ways of life and economic development.

The United Nations Declaration on the Rights of Indigenous Peoples also provides new international guidelines, such as the right to develop strategies for the development or use of indigenous peoples' lands and resources. Going beyond ILO 169 on this matter, the Declaration affirms that states not only have to consult indigenous peoples about projects that affect them, but have "to obtain their free and informed consent" prior to the projects' approval, particularly in connection with the development, use or exploitation of mineral, water or other resources.

⁹³ ILO Convention No. 169, Article 13.2

⁹⁴ ILO Convention No. 169, Articles 14.1 and 15.1. ILO

⁹⁵ Convention No. 169, Article 6.1

The Earth Summit (1992)

As already mentioned, the 1992 Rio Conference on Environment and Development (UNCED), commonly referred to as the Earth Summit, was a turning point for indigenous peoples. Not only were they recognized as a "major group" of civil society but, for the first time, they were able to participate in and influence processes relating to the environment.

UNCED led to the adoption of some of the most important treaties on the environment, namely, the 1992 Convention on Biological Diversity and the 1992 United Nations Framework Convention on Climate Change. In addition, several non-binding documents were adopted: the Declaration on Environment and Development—known as the Rio Declaration; Agenda 21; and the non-legal, non-binding Forest Principles. Most of these documents contain provisions on indigenous concerns

The Convention on Biological Diversity

The objectives of the UN Convention on Biological Diversity (CBD) "are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources...."⁹⁶In its preamble, the Convention recognizes "the close and traditional dependence of indigenous and local communities" on biological diversity, and, in Article 8 on In-situ Conservation, which mainly deals with the establishment of protected areas,⁹⁷ paragraph (j) recommends that a Party shall, subject to its national legislation, respect, preserve and

⁹⁶ Convention on Biological Diversity (1992), Article 1.

⁹⁷ CBD, Article 8 reads: "Each contracting party shall... (a) establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity".

maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.⁹⁸ Other relevant articles are Article 10(c) on customary sustainable use and Article 15 on access and sharing of the benefits arising out of the utilization of genetic resources.

UN Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) adopted in 1992 is aimed at stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The text of the Convention does not explicitly discuss indigenous peoples in relation to climate change, although Article 4 is interpreted as describing the urgency that various social groups are facing in relation to climate change. Further, developed countries are urged to support social groups living in developing countries through the transfer of knowledge and technology in order to strengthen their resilience to the adverse effects of climate change on their livelihoods.⁹⁹

Since 1988, indigenous peoples have been participating at UNFCCC Conferences of the Parties (COP) and have released a number of statements and declarations expressing

⁹⁸ CBD, Article 8(j).

⁹⁹ Macchi (2008), 11.

concerns on the implications of climate change policies on their livelihoods and cultures. Since 2001, indigenous peoples' organizations have been acknowledged as a constituency in climate change negotiations within the UNFCCC. At the same time, however, indigenous peoples are still waiting for the approval of an ad hoc Working Group on Indigenous Peoples and Climate Change by the UNFCCC, allowing them to actively participate in the meetings of the Conference of Parties.¹⁰⁰ With no mandatory limits on GHG for individual nations and no enforcement provisions, the Convention is considered legally non-binding.

The Forest Principles

The Statement of Principles for the sustainable management of forests is also non-legally binding. However, it has paved the way for a number of mechanisms, and Principle 12(d) recommends recognising, respecting, recording, developing and, as appropriate, introducing in the implementation of programmes "indigenous capacity and local knowledge regarding the conservation and sustainable development of forests". It further states that "benefits arising from the utilization of indigenous knowledge should therefore be equitably shared with such people".

The United Nations World Summit on Sustainable Development (WSSD)

As stipulated in the Rio Declaration, a first assessment of Agenda 21 was made in 1997. This assessment concluded that, despite some positive developments, many of the trends

¹⁰⁰ Ibid, p. 12

and problems that faced leaders in Rio remained unabated or had worsened. In 2002, a second summit was convened in Johannesburg, South Africa, where the international indigenous movement participated actively.

Assembled in Kimberley (South Africa), 20-24 August 2002, more than 300 indigenous peoples' leaders and organizations from all over the world attended the Indigenous Peoples' International Summit on Sustainable Development. Two documents were adopted at the Summit: the "Kimberley Political Declaration", which highlighted, among other things, the fact that the commitments made to indigenous peoples in Agenda 21, including their full and effective participation, had not been implemented because of a lack of political will, and the Plan of Implementation on Sustainable Development. This Plan sets forth commitments and visions addressing the future role of indigenous peoples in working toward a sustainable future and insists that sustainability on a global scale cannot be achieved if governments and corporations continue to ignore the rights and unique capabilities of indigenous communities.

United Nations Forum on Forests (UNFF)

As one of the Major Groups, indigenous peoples also participate in the work of the United Nations Forum on Forests (UNFF). The UNFF is a subsidiary body of ECOSOC and was established in 2000, together with the Collaborative Partnership on Forests (CPF), comprising forest-related UN agencies and international and regional organizations, institutions and instruments

The mandate of the UNFF has been to facilitate and promote the implementation of the Proposals for Action set up by the UN Intergovernmental Panel on Forests (IPF) and the Intergovernmental Forum on Forests (IFF).¹⁰¹ In 2007, the Forum adopted the Non-Legally Binding Instrument on All Types of Forests (NLBI), and a Multi-Year Programme (2007-2015) with four measurable and time-bound global objectives to achieve sustainable forest management.¹⁰²

NLBI is the first ever inter-governmental instrument on sustainable forest management. It covers issues ranging from protection and use of traditional forest-related knowledge and practices in sustainable forest management to the need for enhanced access to forest resources and relevant markets to support the livelihoods of forest-dependent indigenous communities living inside and outside forest areas.¹⁰³

Although UNFF recognizes the role of indigenous peoples in achieving sustainable forest management, indigenous peoples' organizations and civil society have generally been disappointed by the UNFF, which does not build on the open and progressive practices of the IPF/IFF and CSD.¹⁰⁴ They have also widely criticized NLBI for failing to recognize, respect and support the implementation of customary rights of indigenous peoples who live in and depend on forests and for failing to comply with best practices in environment management.¹⁰⁵

¹⁰¹ IPF was set up by the CSD in 1995. It was succeeded by the IFF in 1997, which, in turn, gave way to the UNFF in 2000.

¹⁰² For full text of NLBI, see UN Doc. A/C.2/62/L.5 (2007). NLBI

¹⁰³ Article 6 (f) and (y).

¹⁰⁴ See, e.g., Forest Peoples Programme (2004a). See, e.g.,

¹⁰⁵ Forest Peoples Programme (2007a).

4.4 Implementation gaps and challenges

Indigenous peoples today are increasingly attempting to exert greater control over their natural resources as well as over their economic and political life. They are acutely aware of the environmental damage that accompanies most development programmes and the toll that these efforts impose on peoples and their ecosystems.¹⁰⁶ They also realize that the rapid pace of human-induced environmental change calls for decisive action not only at the international level but also at the national and local levels in order to fill the implementation gap and fully respect indigenous peoples' environmental rights. However, while indigenous peoples have, since 2002, experienced increased recognition of their environmental rights at the international level, translating this political recognition into concrete advances at the national and local levels remains a major challenge. Many decisions made at the international level are not always respected or implemented at the national level, and indigenous peoples' voices are all too often marginalized, if heard at all.

Several factors contribute to this situation: structural discrimination of indigenous peoples at all levels in many countries, a lack of political will to prioritize indigenous issues and provide funds to address them, the low level and efficacy of indigenous participation in national policy formulation and implementation, and a lack of awareness of international commitments amongst government officials as well as among indigenous peoples themselves (except for a minority who work in leading indigenous organizations)

¹⁰⁶ Barkin (2006).

At the local and national level, however, indigenous land rights, land use and resource management remain critical issues. The environmental damage to indigenous lands and territories has been substantial: flora and fauna species have become extinct or endangered, unique ecosystems have been destroyed, and rivers and other water catchments have been heavily polluted. Commercial plant varieties have replaced the many locally adapted varieties used in traditional farming systems, leading to an increase in industrialized farming methods. In many countries, development projects, mining and forestry activities, and agricultural and conservation programmes continue to displace indigenous peoples. In addition, indigenous peoples are now also facing new challenges, such as biotechnology, intellectual property rights and, not least, the impacts of climate change. For many indigenous peoples, climate change is a potential threat to their very existence and a major issue of human rights and equity.

It has been argued that this situation is the result of the current treaty-based framework of international law, including the Convention on Biological Diversity, which is poorly equipped to accommodate non-state players such as indigenous peoples with rights equivalent to those of states.¹⁰⁷ International law is built on the principle of state sovereignty and Article 3 of the CBD therefore affirms that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies...." But good international policies do not necessarily result in good implementation, and one of the greatest challenges lies at the national level. Many

¹⁰⁷ Carino (2001), 4.

indigenous peoples have a distinct legal status within their countries, are barely recognized as equal citizens, and face multiple constraints when trying to claim the rights that international law grants them. This does not mean that efforts at the international level should not be sustained. On the contrary, because it is here that indigenous peoples, aside from their political aims, can develop a multiplicity of additional relationships, that are critically important for self-realization and the exercise of self-determination¹⁰⁸ and can have the opportunity for face-to-face interactions and dialogues with decision-makers at the national level and thereby the possibility to impact domestic policies.

At both levels, the Declaration can be a useful tool. Indigenous participants in recent CBD meetings on the International Regime on Access to Genetic Resources and Benefit-Sharing pointed out that the Declaration contained articles of direct relevance to the issues under discussion and that any component or provision of the International Regime had to be consistent with the Declaration. At the same time, they also noted among the Parties a widespread recognition of the Declaration as a new framework to be taken into account.¹⁰⁹

On the international and domestic stages, the challenge for indigenous peoples is therefore to continue to assert their sovereign rights as peoples to access their lands and natural resources, to participate in decisions concerning these resources, and to use their right of free, prior and informed consent.

¹⁰⁸ IWGIA (2008), 564.

¹⁰⁹ Forest Peoples Programme (2004b), 2. Carino (2001), 5.

CHAPTER V

Chapter 5

5.1 Emerging issues relating to the displacement of indigenous peoples

In the years that have elapsed since the Permanent Forum's creation¹¹⁰, the significant participation of indigenous representatives in the Forum's work has greatly enhanced the United Nations system's understanding of the pressing issues faced by indigenous communities. This has allowed the Forum experts to clarify and further assess the nature of the problems facing indigenous peoples globally.

While there is a great diversity of problems confronting indigenous peoples today, it is clear that one of the most significant threats faced by indigenous peoples arises from their displacement, eviction and separation from their lands, territories and resources. These issues are expanding and represent significant challenges to the security, health and survival of indigenous peoples and their cultures. The issues that the Forum will monitor and further assess in future years as it addresses the specific themes identified on its mandate include violence and militarism, conservation refugees and globalization¹¹¹.

5.2 Issues relating to the peaceful resolution of conflicts

Indigenous peoples often find themselves involved in conflict with the dominant society, mostly relating to the loss of their lands, territories and resources or to the deprivation of

¹¹⁰ Secretariat of the United Nations Permanent Forum on Indigenous Issues (SPFII). Annual MDG Desk Reviews, available online at: <http://www.un.org/esa/socdev/unpfii/en/mdgs.html>.

¹¹¹ *ibid*

their civil, political, cultural, social and economic rights. The rapid pace of globalization has accelerated such conflicts and indigenous peoples, like all other peoples, need access to mechanisms for peaceful conflict resolution.¹¹²

The United Nations system does not provide specific juridical mechanisms for the resolution of conflicts to which indigenous peoples are a party or which result in the victimization of indigenous peoples.

The International Court of Justice (ICJ) does not provide legal standing to indigenous individuals or collectives to pursue litigation against States and others. The human rights treaty bodies and the regional international courts, such as the Inter-American Court, have been accessed by indigenous peoples to a limited extent, i.e., in cases where a State party has agreed to optional protocols, or where a State party has reporting obligations under a treaty. It should be noted, however, that the decisions of these human rights treaty bodies are not binding or enforceable and are often ignored by offending States. Thus, indigenous efforts in these fora have not had significant results in the resolution of conflicts¹¹³.

5.3 The Manila Declaration

In December 2000, the Tebtebba Foundation, an indigenous organization based in the Philippines, convened an International Conference on Conflict Resolution, Peace building, Sustainable Development and Indigenous Peoples. The outcome document,

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¹¹³

referred to as the Manila Declaration, affirmed the right of indigenous peoples:

*"...to create new systems and institutions of peace-making that are sourced in indigenous values and that co-exist with existing bodies such as the International Court of Justice and similar regional bodies. Such institutions could include independent indigenous peoples' tribunals; commissions of inquiry that are recognized as legitimate organs in any process of conflict resolution."*¹¹⁴

The Conference agreed that an "independent International Commission of Indigenous Peoples for Mediation and Conflict Resolution be organized not later than the year 2002. The mission of this body will be to promote and defend the rights of indigenous peoples, and to expose and denounce aggression and abuses of the rights of indigenous peoples in different parts of the world."¹¹⁵ The Manila Declaration contains detailed recommendations for peace building, technical assistance, training in mediation and other approaches to conflict

¹¹⁴ Manila Declaration (2000), Preamble.

¹¹⁵ Willemssen Diaz (2004), 547-552.

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