

# INDIGENOUS PEOPLES' RIGHTS IN INTERNATIONAL LAW



## EMERGENCE AND APPLICATION

A book in honor of Asbjørn Eide at eighty

Edited by  
Roxanne Dunbar-Ortiz, Dalee Sambo Dorough, Gudmundur Alfredsson,  
Lee Swepston and Petter Wille



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# INTRODUCTORY REMARKS

## Introduction

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Storytelling has always been of crucial importance to Indigenous Peoples. The intergenerational significance of oral history through origin legends, spirituality, life-sustaining lessons and much more is contained in the dynamic nature of the words and history being shared. This storytelling is no less important today. The life lessons of Indigenous Peoples involved at the international level is not only significant for future generations of Indigenous Peoples, nations and communities but for all of humankind. For this reason, many Indigenous Elders are telling their firsthand stories of international encounters in the 20th and 21st centuries, which still reflect only a nanosecond in the long history of Indigenous Peoples – this is only the tip of a fast-melting iceberg.

This volume emerges from a workshop held in Oslo in March 2012, hosted by the Norwegian Center for Human Rights and the University of Oslo. The workshop was timed to coincide with the 40 years that have passed since the initiation of the UN report by José Martínez Cobo on discrimination against Indigenous Peoples and the 30 since from the creation of the UN Working Group on Indigenous Populations (WGIP). The purpose of the workshop was to gather memories of how the international community decided to examine the situation of Indigenous Peoples, explore, explain and celebrate the pioneering work of Indigenous Peoples at the United Nations and the International Labor Organization, examine the present impact of that work, and identify desirable future developments. It gathered together a number of people who had been involved in these discussions over the years – some since the very beginning, others who had come in at different stages. Participants were drawn from Indigenous communities, from the United Nations and the ILO, from national governments and from NGOs. It was, *inter alia*, intended to assemble different historical and political perspectives on the same events, from different points of view.

Other international gatherings have recently enabled early Indigenous participants and other actors in the international processes to come together for

such storytelling. For example, a recent Symposium on Indigenous Peoples at the United Nations: "From the Experience of the First Delegates to the Empowerment of the Younger Generation" was convened in Geneva, Switzerland, in September 2013. It should be noted that this gathering coincided with the 24th session of the UN Human Rights Council, wherein the Council received reports from three of the four Indigenous-specific mandates within the UN: the Voluntary Fund for Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples, and the Special Rapporteur on the Rights of Indigenous Peoples.

The Geneva Symposium, organized by Carlos Mamani, an Aymara historian from Bolivia, was in response to a recommendation from the fourth Indigenous-specific mechanism at the United Nations, the Permanent Forum on Indigenous Issues. The collecting of individual memories of people involved in one of the most dynamic international processes of the last few decades, in order to pass them on to the younger generations, is a vital exercise in obtaining "desirable future developments". Such records are fundamental to the objective of ensuring that the world community, namely nation-states, has a comprehensive understanding of the context and content of Indigenous human rights in order to safeguard the ways of life of Indigenous Peoples and to ultimately welcome them into the "family of nations".

Constructive gatherings of this kind constitute important opportunities for Indigenous Peoples to express themselves, to tell their stories. Needless to say, the voices of Indigenous Peoples, through their storytelling, buttressed by many other allies such as academics, non-indigenous NGOs and others, center on the fundamental issues of the collective right to political self-determination and collective rights to lands, territories and resources – not easy discussion topics for representatives of nation-state governments, and particularly those who have not accurately charted the progressive course of development of international law and who hold fast to colonial mindsets. To be sure, these dialogues often result in heated, hand-wringing and painful experiences for Indigenous Peoples, especially in the light of rigid rules about their marginalized participation and treatment as mere objects rather than subjects of international law. Nevertheless, Indigenous Peoples have largely succeeded in effectively changing the rules of a rigid state-controlled system and have, indeed, become subjects of international law by redefining the relationships and by sharing, through storytelling, their world-views and their distinct cultural contexts.

The remarkable success of Indigenous Peoples' involvement in the United Nations is reflected in every preambular and operative paragraph of the UN Declaration on the Rights of Indigenous Peoples as adopted by the General Assembly in 2007. Many argue that the Declaration not only contains an Indigenous interpretation of individual and collective human rights related to the economic, social, cultural, political and spiritual lifeways of Indigenous Peoples but also principles of customary international law that must be recognized and respected within an Indigenous-specific context. Such customary international law principles include the right of self-determination; rights to land, territories and resources; the right to free, prior and informed consent as a dimension of the right of self-determination; the right to redress and reparations; and a right to culture. It is remarkable that the Indigenous participants were able to persuade the states, which still alone have voting rights, to adopt this view as well.

Nevertheless, despite these extraordinary and substantive developments, there remains an urgent need to change the dynamic of persistent human rights violations being perpetrated against Indigenous Peoples in every region of the world. The future course of action must be based upon these important international legal instruments as well as on concrete mechanisms that go well beyond what we now have in place. Although the ILO has a strong recourse mechanism, more must be done to increase the number of state accessions to Convention No. 169. And more must be done to increase the capacity of Indigenous Peoples to use the ILO supervisory bodies as well as access to financial resources to do so.

Regarding the UN Declaration, states must clearly take its status and import seriously by engaging in dialogue with Indigenous Peoples at the local, regional and national levels in order to identify the gaps, omissions or debilitating national policies that allow nation-state governments and third parties to breach their international legal obligations to protect and promote the human rights of all, including Indigenous Peoples. One potential tool that is being studied by members of the UN Permanent Forum on Indigenous Issues is the creation of a voluntary "optional protocol" associated specifically with the Declaration's provisions addressing Indigenous Peoples, especially those related to rights to lands, territories and resources. Given that land and resources have always been a source of conflict between Indigenous Peoples and others, such a mechanism may be one way forward.

Ultimately, the most important improvement on the ground would be for governments to read the text of the UN Declaration and initiate dialogue with the In-

digenous Peoples concerned with the aim of determining how best to collectively realize its overall objective: to end the systematic discrimination of Indigenous Peoples, which is manifested through national laws and policies, and to recognize that the realization of Indigenous-specific human rights standards “will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith”.

Prior to 1971, the United Nations had not discussed the subject of Indigenous Peoples' rights. The ILO had adopted a Convention – the Indigenous and Tribal Populations Convention (No. 107) in 1957, in cooperation with the rest of the UN system, but interest in it had receded and it was by then attracting very little attention. A multi-organization development effort known as the Andean Indian Programme had been in operation for 20 years but it was to close in 1972. The awareness that these two efforts were based on an assimilationist approach and a top-down development model was not yet being discussed although that debate was soon to open.

In 1971, a study of minority rights in the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities included a recommendation that a separate study on Indigenous Peoples should be undertaken by the United Nations and, in 1972, this study began – what was to become the massive and indispensable Martínez Cobo report. This was the beginning of a remarkable achievement in international understanding of long-lasting injustices, and in sparking awareness among the Indigenous Peoples themselves that help was to be found in the international system for the redress of their long-standing grievances.

The first international NGO of Indigenous Peoples was created in 1975, the World Council of Indigenous Peoples, and thus began the rapid march toward Indigenous Peoples speaking for themselves and not only through non-indigenous NGOs. A series of international gatherings on this subject began with the 1975 meeting on land rights, with those that followed, including the 1977 International NGO Conference on Discrimination against Indigenous Populations in the Americas, held in Geneva. This was, needless to say, the beginning of a sharp and often uncomfortable learning curve for Indigenous Peoples in international fora, for human rights advocates who had been presuming to speak on their behalf, and for governments, which were not prepared for or used to answering to the serious charges being put forward.

The UN Working Group on Slavery began discussing Indigenous populations in the 1970s. As a consequence of the Martínez Cobo study, the Working Group on Indigenous Populations (WGIP) was established in 1982, also as a subsidiary body of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Asbjorn Eide was its first Chair, and it took over the role of the Slavery Working Group in this area. Professor Eide laid the foundations for a new kind of dialogue, unheard of in the UN at that time, by allowing Indigenous representatives to attend and speak in WGIP meetings without the so-called consultative status granted to NGOs, thus bypassing government officials in order to hear directly from the peoples concerned. Erica Daes took on this fight when she inherited the Chair of the WGIP in 1984 and continued to move it forward. Other international organizations gradually joined the discussion, as the Working Group began the long process of drafting what was eventually, in 2007, to become the UN Declaration on the Rights of Indigenous Peoples.

While the UN system as a whole began grappling with the issue, pressure mounted on the ILO to revise or revoke Convention No. 107. The ILO became uncomfortable with having such an outdated instrument on its books and with the increasingly bitter criticism directed against it. The ILO Governing Body eventually agreed to call a meeting of experts in 1985 to advise on the revision of C107. Professor Rodolfo Stavenhagen of Mexico, later the first UN Special Rapporteur on the Rights of Indigenous Peoples, served as the Chair. This meeting concluded that C107 was out of date and, in 1989, the ILO adopted what remains the only international convention on the subject, the Indigenous and Tribal Peoples Convention (No. 169).

Events accelerated, with the establishment in 1990 of an inter-agency consultative group of international officials to attempt to coordinate the policies of the various international bodies involved. This eventually became the Inter-Agency Support Group, which today supports the Permanent Forum on Indigenous Issues. The World Conference on Human Rights, held in Vienna in 1993, recommended the establishment of a Permanent Forum on Indigenous Issues. This Forum began its work on 2001, with the innovative model of membership being drawn from both governments and the Indigenous Peoples themselves, and it has replaced the Working Group on Indigenous Populations as the largest annual gathering on the subject.

These and a number of other events at the international level have been taking place at an accelerated rate. They include:

- Adoption of the ILO Indigenous and Tribal Peoples Convention (No. 169) in 1989;
- Adoption of the UN Convention on the Rights of the Child in 1989, containing three provisions on the rights of Indigenous children;
- World Bank operational directives on Indigenous Peoples, adopted in 1991, revised in 2005 and 2013;
- First International Decade of the World's Indigenous People (1995-2004), and the Second Decade (2005 – 2014);
- Establishment of the UN Permanent Forum on Indigenous Issues (2001);
- Conversion of the inter-agency consultative group (1990) to the Inter-Agency Support Group on Indigenous Issues (2001);
- Adoption of Performance Standards on Indigenous Peoples adopted by the International Finance Corporation of the World Bank Group in 2006, revised in 2012;
- Appointment by the Commission on Human Rights of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples (2001), renewed by the Human Rights Council in 2007;
- Adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly (2007);
- Establishment of the Expert Mechanism on the Rights of Indigenous Peoples by the Human Rights Council (2007);
- Adoption of the UN Development Group Guidelines on Indigenous Issues (2008); and
- Convening of the World Conference on Indigenous Peoples (2014).

The essential point is that, in just over 40 years, the question of the promotion and protection of Indigenous Peoples and their rights has gone from a neglected and marginal issue to being central to development programs, to climate change and biodiversity, to human rights in general and human rights and business in particular, and to respect for human dignity in the international system. Another development that deserves highlighting is the increasing use of the International Covenant on Civil and Political Rights (ICCPR) and other human rights conventions to protect the rights of Indigenous Peoples, including cases decided by the Human Rights Committee under the ICCPR on protection of the material basis for exercising traditional ways of life. The international Indigenous movement has been born and come to maturity, and those who

presumed to speak for it have been tested and, sometimes, relegated to a back seat.

As a member of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Professor Asbjørn Eide of Norway was a pioneer of the early work at the United Nations, which drew attention to the continuing human rights problems facing Indigenous Peoples in a number of countries. Many of the peoples concerned were looking to the United Nations for acknowledgement of their grievances and to demand attention for their plight. As the first Chairman of the WGIP, he played a crucial role in drawing attention to the human rights challenges facing Indigenous Peoples. He played a crucial role in obtaining the Sub-Commission's endorsement of the draft Declaration on the Rights of Indigenous Peoples. In addition to playing a pivotal role in the initial work that led to the adoption of ILO Convention No. 169 and the UN Declaration, he also actively promoted the rights of Indigenous Peoples in his work as an outstanding human rights expert, scholar, teacher and activist. His contributions cover a wide range of areas, including UN reports and an impressive number of other publications. He is also a founder of the Norwegian Center for Human Rights. We pay tribute to him for his willingness to speak out courageously, in his multiple roles, for the advancement of human rights, not least Indigenous Peoples' rights. For these reasons, while at the same time honoring the many other Indigenous and non-indigenous representatives and experts that have helped to ensure that Indigenous Peoples' rights are now firmly established in international law, the editors have decided to dedicate this book to Asbjørn Eide.

In this volume we hear the voices of several participants in the Indigenous rights debates. These are clustered around the Indigenous movement, the UN Working Group and the drafting of a declaration, the drafting and adoption of the ILO Convention, monitoring of state compliance at the UN and the ILO, the situations in various countries and regions, and other intergovernmental activity. Looking back, however, is only of value if it leads us to look ahead. A number of the pieces in this volume thus project into the future to describe what will, or should, happen in the years to come. In some ways, there has been little national-level progress accompanying the international developments. Indigenous and Tribal Peoples are still subject to neglect, exploitation, discrimination and the loss of their habitats and ways of life in far too many countries. Some regions, notably parts of Africa and Asia, are lagging behind the growing awareness of Indigenous



rights in the Americas and in Europe and, even in these countries, there are countervailing forces.

Progress has been achieved, however, and the groundwork has been laid for more protection, more support and more self-determination of Indigenous Peoples in all regions. What is different now is that where the light of international attention can be brought to bear, the shadows in which these abuses take place are increasingly harder to hide. Coalitions of human rights and environmental organizations are fighting back against unsustainable “developmental” degradations. Discrimination against Indigenous Peoples is being challenged increasingly as both a violation of human rights and as unacceptable on any level. The rights of Indigenous Peoples have been recognized in law and in the constitutions of a growing number of states, while national and international courts are condemning abuses. As in all areas of human rights, implementation falls far behind consensus, but it is – we are confident – gathering speed. ○

The Editors  
10 April 2014

San Francisco  
Anchorage  
Ferney-Voltaire  
Strasbourg  
Oslo

## Comment on agenda items at the Oslo Conference on Indigenous Peoples' Rights<sup>1</sup>

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*Wilton Littlechild*

Looking back at the history of Indigenous Peoples' rights in the United Nations, I recall an Indigenous representative highlighting the progress we have made over the decades and stating that we had gone from having "No voice to many voices" between 1970's and the present time.

This is an important meeting to reflect back to see how far we have come and where we are today and where we need to go in ensuring implementation of the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration). For example, we now have three Indigenous specific mechanisms.

I also recall the Reunion of 1977 of the 150 delegates who returned 13 years ago for the 20th Anniversary of that first meeting in 1977. Then and today we can mark and celebrate your contributions. We have come a long way. Yes, we have a long way to go but it is important for me, as International Chief of Treaty 6, to thank all of you for the progress made to date.

I have seen the positive advancements in the development of ILO Convention No. 169, the UN Declaration, the UN Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples. A common link between the three mechanisms is the UN Declaration and the central importance of the right to self-determination.

A number of other important developments should be considered when evaluating Indigenous Peoples' rights. The work by the Expert Mechanism on the Rights of Indigenous Peoples, including the advice and studies on participation, education, languages and culture and extractive industries. There is the upcoming High-Level Panel and Interactive Dialogue of the Human Rights Council on Access to Justice and the upcoming World Conference on Indig-

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<sup>1</sup> Speaking notes for the Oslo Conference in 2012.

enous Peoples in 2014. These will all have important contributions to the implementation of the UN Declaration.

Some very brief highlights about the Maskwacis Cree Nation's participation at the ILO on ILO Convention 107 and at the UN on the UN Declaration include the following. My international participation began with the World Conference of Indigenous Peoples (WCIP) at Kiruna, Sweden in 1977. I had the honor of chairing the session on the analysis of then ILO Convention 107. After the conference, I was instructed to seek an amendment to Convention 107.

This led me to Geneva, with a delegation to the ILO, a delegation from the Four Nations Cree. For the first time, we met Mr. Lee Swepston. We established an Indigenous Working Group in Canada, with representatives of seven major organizations. One central issue was Article 1(3) regarding the term, "Indigenous Peoples". We participated in the two questionnaires leading up to ILO Convention 169. In 1989 I was seeking election as a Member of Parliament so Judy Sayers attended for our office.

I attended as an official delegate as part of the Canadian Labour Congress who offered us a seat at the ILO Assembly in Geneva. It was difficult to seek Indigenous Caucus input because, as I attended the sessions only open to official delegates, we had a representative who would convey the Indigenous Caucus positions to me to introduce on the floor. An important strategic move was to call on Canada to attach all our responses to the full questionnaires and proposals for wording, as an Annex to Canada's state submission. At the same time, we also had to attend the UN to begin work on the Declaration regarding the right to self-determination. On the issue of the right to self-determination, it was important to bring in the Treaty perspective.

During the Inter-sessional Working Group on the Draft Declaration, I proposed an Indigenous Co-Chair in order to seek more meaningful and direct participation. Our delegation also undertook the introduction of all articles – the official wording of the UN Declaration. Dalee Sambo Dorrough mentioned the walkout and its impact as a turning point. Others have also argued that the hunger strike that occurred later had the same effect.

I recall the humorous times we had – for example, when we attempted to bring a large drum into the conference room, security tried to fit it through the scanning machine which was, of course, impossible to do. They asked what was in the drum and just didn't know what to do. Julian Burger was called and had to explain that the drum could indeed be brought into the UN building!

Highlights at the UN Permanent Forum included the need for an urgent meeting with the President of the Security Council plus the UN Secretary General's

attendance at the first few annual sessions. This was significant because, at the first session of the UN Permanent Forum, we were given the message that "We were welcomed into the UN Family of Nations".

Getting back to my initial comment that we went from no voice to many – we now have three UN mechanisms: the Expert Mechanism on the Rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues and a Special Rapporteur on the Rights of Indigenous Peoples.

At the first session of the Indigenous Initiative for Peace (IIP), convened by Nobel Peace Prize Laureate Rigoberta Menchu, the IIP proposed an Independent Tribunal at the international level for Indigenous Peoples. This was advanced by the Maskwacis delegation at the UN Seminar in Nuuk, Greenland, and then at the World Conference on Human Rights in Vienna by Denmark in 1993. This was to later become the UN Permanent Forum on Indigenous Issues. So, as Chief, thank you all for your important contributions to the recognition of Indigenous Peoples and our rights at the international level.

It should also be recalled that one year there was no official Working Group on Indigenous Peoples. Instead, the Indigenous Peoples' delegations decided to go ahead with a meeting in Geneva, raising funds to pay for the session. The major outcome of this meeting, which I co-chaired, was the consolidation of the World Council of Indigenous Peoples and other texts of a proposed Indigenous draft of the UN Declaration. Ms Dalee Sambo later presented this on behalf of the Indigenous Caucus.

In response to Petter Wille's question about whether Indigenous Peoples had a long-term strategy; yes, we did, recalling the Indigenous Initiative for Peace Decade Plans. The Indigenous delegates present proposed that there be an International Decade and a Permanent Tribunal: the proclaimed Decade was indeed later adopted by the UN.

Indigenous Movement contributions were significant throughout the years of international advocacy. Spiritual, sacred ceremonies were held on a regular basis, in which we sought the Elders' guidance for the work we did at the UN.

Indigenous contributions included the recognition of environmental rights for everyone. An Indigenous elder challenged the UN delegations about who was going to represent and speak for our brothers: the fish, birds, water and air. The Indigenous Peoples' contributions included amendments to ILO Convention No 169 and then the right to self-determination, which was key to its inclusion in the UN Declaration.

The Maskwacis Cree and their direct participation was key in the Kiruna meeting in Sweden where one can begin to see change on the right to self-deter-

mination, its recognition and inclusion as a substitute for self-government becoming a paramount concern. We proposed wording on all articles through two questionnaires, then ensuring that Canada would annex our submissions, and securing a Canadian Labour Congress (CLC) seat as delegate status to represent ourselves. The ILO is a tripartite organization and Indigenous Peoples could only participate directly by being on an official delegation. This was made possible through the employees' organization, CLC, which had official delegation status.

One challenge for us in terms of the Inter-Agency Support Group is that the UN country offices and international agencies are not in all donor countries, so Indigenous Peoples from Canada are excluded, for example.

Another major forum for our participation was the first World Health Organization's World Conference on the Health of Indigenous Peoples where we presented the keynote address on the Indigenous Peoples' perspective of holistic health and the important element of spirituality.

As for the Expert Mechanism's Study on the Right to Participate, with a Focus on Extractive Industries and its examination of Free, Prior and Informed Consent, it was noted that there are, those who see consent as being a veto. Our view is that it is an opportunity and a call to work together. The World Bank Consultation Process substitutes consent with consultation in Free, Prior and Informed Consent, which is not the same interpretation.

The history of Indigenous Peoples and their treatment should be included in the educational systems through curricula (CRC Article 29.1), as addressed by the Truth and Reconciliation Commission of Canada in two recently released reports: History of the Residential School System and the Interim Report. Further, one of the central pillars of the work of the Canadian Museum on Human Rights. is to ensure the promotion of human rights education and to encourage a commitment to action by all involved in education.

It should also be noted that Article 30 of the UN Declaration was recently used to argue that lacrosse is a traditional game and to encourage a change in the United States' position on Indigenous Peoples' (Haudenosaunee) passports.

As for the relationship between minorities and Indigenous Peoples, our delegation participated in the Minority Rights Forum Study on the right to education in order to present (without prejudice) the Treaty Right to Education for our members. We informed the Forum that we were participating as Indigenous Peoples, a numerical minority only, but we were not agreeing to be categorized as minorities. This study was in addition to the EMRIP study on the Right to Education of Indigenous Peoples.

Looking to the future, the implementation and monitoring of Indigenous Peoples' rights, not least in domestic law, has been emphasized by the UN Permanent Forum on Indigenous Issues, in Article 42 of the UN Declaration and in ILO Convention 169. A unique body under the UN Declaration's cluster of articles on fair adjudication and redress (Articles 27, 28 and 42) should be developed to ensure implementation of the rights of Indigenous Peoples.

Has there been an impact? Yes, there has been a positive one. Allow me to present, briefly, some examples of what has been done in our territories in terms of using and implementing the UN Declaration.

The Ermineskin Cree Nation takes pride in having a written Constitution. It predates the patriation of Canada's Constitution in 1982. It incorporates by reference and endorses the UN Declaration, the UN Convention on the Rights of the Child and ILO Convention 169. The Ermineskin Cree Nation had constitutionally recognized the UN Declaration even before the Plurinational State of Bolivia.

The Chiefs of Treaty No. 6, No. 7 and No. 8 Nations have all, in Chiefs Assembly, adopted and supported the UN Declaration by resolution. At the recent Crown and First Nations Gathering (24 January 2012), the Assembly of First Nations used the relevant articles of the UN Declaration as the basis for an action plan. Also, at every AFN Chiefs Assembly, each resolution introduced is now linked to a relevant article of the UN Declaration.

On record, there is a Member of Parliament Motion calling on Canada to ratify ILO Convention 169 and there are three Private Member's Bills urging Canada to ensure that all federal legislation and policies comply with the UN Declaration.

An Inter-Parliamentary Union's Parliamentarians' Handbook on the UN Declaration is currently being finalized in order to provide a guide to enhance state understanding of implementation of the UN Declaration at the domestic level.

There is a Chiapas Declaration from an assembly of Members of Parliament, Senators and other elected officials from over 40 states and provinces calling for endorsement of the UN Declaration. Unfortunately, in Canada, however, this success is now used against Indigenous Peoples despite the Special Rapporteur's recommendations.

Notwithstanding the announced change in Canada's position from opposition to one of support and endorsement of the UN Declaration, Canada should be called on to ratify ILO Convention 169. During recent FAO, CERD and UPR submissions and meetings, Canada stated that it "will not ratify ILO Convention 169". So Canada "supports and endorses the UN Declaration" but resists it by

“deliberate avoidance”, And yet there was a House of Commons motion and Senate motion whereby both Chambers voted “yes” to adopting the UN Declaration.

When did the positions change? When was there a government change? It should be recalled that, during the Prime Minister’s apology on behalf of Canada for the Indian Residential Schools, each of the opposition leaders made reference to the UN Declaration.

At the TRC of Canada (noting Asbjørn Eide’s comment on Sami Boarding Schools), we are advocating and calling for the use of the UN Declaration as a framework for reconciliation. Indeed, recently the Aboriginal Affairs and Northern Development Minister’s speeches referred to both the TRC of Canada and to reconciliation.

Meetings on the Organization of American States’ Declaration on the Rights of Indigenous Peoples will be reconvening in order to hold negotiations with a view to reaching consensus. The basis being used for this work is that of the UN Declaration.

The UN will also be holding a 3rd UN Expert Seminar on Treaties this July. It will be important to address Article 37 – What does it mean? How can states implement it? What are some good practices, for example, of Treaty Commemorations and Treaty Commissioners?

Our delegation has proposed focusing, now positively, on implementation; for example, perhaps there should be a Third Decade on Indigenous Peoples, focused on implementation.

The discourse around rights that the UN Declaration is a “non-legally binding instrument” and “is only an aspirational document” is a limiting and inaccurate understanding of the nature of Indigenous Peoples’ rights. This is repeating what states that do not want to implement the ILO Convention 169, and the UN Declaration, are saying. We need to reframe the debate, for example, focusing instead on the unique strengths of the UN Declaration and the substantial agreement of states.

Remember also that there is a 1962 UN Office of Legal Affairs opinion that defines a Declaration as being very serious and with legal effect and, therefore, much more than aspirational. Finally, Indigenous Peoples’ Tribes and Nations must continue to proactively assert their rights by first ensuring a better understanding of the UN Declaration and other international norms, standards and laws by their members and, acting as Indigenous governments, implementing Indigenous Peoples’ rights for the betterment, survival and dignity of their members.

Hai Hai. (Thank you.)

## A Few Introductory Words

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*Erica-Irene Daes*

**A**t the 37th session of the UN General Assembly, a proposal was made by me, as Greek Representative to the Third Committee, to consider authorizing the Sub-Commission on Prevention of Discrimination and Protection of Minorities - through the Economic and Social Council - to create a Working Group on Indigenous Populations (WGIP) with the main purpose of guaranteeing the survival and protection of millions of the world's Indigenous Peoples.

In 1993, the distinguished Norwegian expert, Asbjørn Eide, made a concrete proposal to the aforesaid Sub-Commission with regard to creating the WGIP. This was supported by me, as the Greek expert on the Sub-Commission and, consequently, the Sub-Commission decided to establish the WGIP.

Among the main achievements of the WGIP was the proclamation of 1993 as the International Year of the World's Indigenous Peoples. At the opening ceremony of the International Year, which was attended by thousands of Indigenous persons from every corner of the world, I (as the Chairperson of the WGIP) emphasized that the International Year was an opportunity for Indigenous Peoples to take their rightful place as a voice of the conscience of the world and as the true voices of the earth. By means of a decision of the UNGA, the WGIP was later asked to organize the Decade of the World's Indigenous Peoples.

At the opening ceremony of the International Year, I pointed out that the WGIP had provided a discussion forum that offered a flexibility, openness and humanity which, over the years, had grown to be a very special quality. The WGIP had created a forum for constructive dialogue between governments and Indigenous Peoples and for reconciliation between them. It was a dynamic and essential meeting place for concerned governments and Indigenous Peoples. In this modest way, the WGIP came to constitute one of the most open fora for governments and Indigenous Peoples. Indigenous Peoples aired their grievances and govern-



ments provided information about their efforts at, and experiences of, bringing about peaceful and constructive change.

It might be useful to recall, as an example, that the 16<sup>th</sup> session of the WGIP in 1998 was attended by nearly 1,000 people. Among them were representatives from 42 States, 10 NGOs and 840 Indigenous groups, as well as representatives of international organizations.

Over its lifetime, the WGIP considered a number of reports from other UN bodies and committees. Thus, for example, the WGIP was called on to consider the 4th report of the Centre on Transnational Corporations on "Transnational Investments and Operations on the Lands of Indigenous People". One of the most important conclusions of this discussion was that Indigenous Peoples should have the right to give or withhold their consent with regard to any use of their resources. ○



# THE INDIGENOUS MOVEMENT

## CHAPTER 1

# Old Woman Bear sitting next to the Creator (Notokwew Muskwa Manitokan) A Short Story of Decolonization Efforts

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*Sharon Venne*

In our tradition, we pass information on to the listener through an oral tradition that comes out in our stories. In this regard, I am going to write a story about our path to the United Nations and the subsequent moves by colonial state governments to try to maintain their grip on our lands and territories. This short essay tells a little about our work at the United Nations (UN) and our attempts to place ourselves among the family of nations. Indigenous Peoples of the Great Turtle Island are being given a choice – accept assimilation into the state or face extinction as an Indigenous Nation. For us, Cree Peoples, we have no choice. We have to continue. Our children not yet born are depending on us to make a path for them to the future. We cannot give up our original instructions and responsibilities to the Creation.

One of the most prominent Cree Okimaw Pitikwahanapiwiyyin (Chief Pound-maker), had much wisdom. One statement is pertinent to this essay: “It would be so much easier just to fold our hands and not make this fight– to say I, one man can do nothing. I grow afraid only when I see people thinking and acting like this.”

Our trail today is towards decolonization. This is our path at the domestic and international level. In our short journey, we have made strides and have been pushed back by the colonial states. These states have to protect themselves against our Nations.

Today, the story is not much different since the colonizers first arrived on our shores. The picture is a bit obscure now. The colonial state governments are working hard to give the illusion that Indigenous Peoples are giving our “consent” to our destruction. In the last year and a half since Prime Minister Harper was elected with a majority government, conditions have worsened for our Nations.

The government of Canada has introduced a number of bills designed to undermine our relations with our territories and to undermine our Peoples in Canadian public opinion. Our Peoples have been targeted for racial attacks in the media and through social media. There have been no attempts by the state of Canada to diminish or correct these attacks. In fact, various members of the Canadian government have led several of these attacks. Further, the government amended legislation to remove causes of action that would have enabled Indigenous Peoples to lodge complaints against the attackers.

On a number of occasions over the months, Indigenous Nations have introduced substantive amendments to legislation that directly affects our territories and Peoples. Our proposed amendments or any substantive discussion of the underlying issues have been repeatedly rejected by the government in Ottawa. We wanted not only to make a submission to the various Standing Committees of the Canadian Parliament on these draft laws, which are going to directly impact our lands and resources. Our Chiefs wanted to engage in a substantive discussion on the contents and make amendments to the legislation. This is our right as Treaty Peoples. However, the government of Canada does not want us to be seen or heard. Canada has denied effective participation by Indigenous Peoples on legislation that directly affects the citizens of our Nations.

The colonizers are manufacturing consent. The government of Canada engages in the deception that its proposed legislative changes have been requested by Indigenous Peoples. Canada is ignoring the fact that our traditional governments made Treaties. These organizations created under the laws of Canada do not have inherent authority but rather authority as vested by the state. Canada says that Indigenous Peoples can have our governments recognized if the structure of our governments is a mirror image of the Canadian system. Our traditional governments, based on our relationship with our territories and the laws of the land, are not recognized. The education system is based on the colonial system. Our true histories are not taught. A similar process is happening at the international level, at the United Nations and other international bodies. The international work of Indigenous Nations, who have spent years and thousands of hours asserting our rights as Peoples entitled to be free from colonial domination through the exercise of our right of self-determination, has now been frustrated by governments such as Canada and the United States. Specifically, Article 46 of the UN Declaration on the Rights of Indigenous Peoples seems to subordinate the rights of Indigenous

Peoples to the self-interest of the countries that have invaded and that continue to occupy our territories.

## **The start of the trail began**

When we come from the Creation, we arrive in this world with our original instructions on how to live while on Great Turtle Island. These instructions relate to our responsibilities to the earth and all the beings of the Creation. We are raised to know these instructions. As parents, we teach our children, in order for them to teach their children. Why did we leave our Great Turtle Island to go across the big waters to the United Nations in Geneva, Switzerland?

Canada is a colonial, settler state. Our ancestors made Treaties with the British Crown to allow for the settlement of our territories by the Crown's subjects. Our Treaties made with the British Crown are peace and friendship treaties. These were not land surrender treaties. Canada does not own our resources or our territories. Canada advances an unproven assertion of underlying title for the territory now called "Canada", vested in the Crown. Within our Indigenous legal systems, Commonwealth and international law, there are no concepts of discovery, conquest or terra nullius. Consequently, the treaty relationship between Indigenous Nations and the Crown is the sole foundation for any assertion for a legitimate state of Canada.

In 1969, the government of Canada presented a "White Paper". This policy document outlined the plans of the federal government to "deal with the Indian" problem. The paper outlined, in detail, the plans to assimilate the Indigenous Nations into the colonial state of Canada. The Elders and Chiefs fought against the policy and Canada said that they were going to put the policy on hold. However, the Elders were suspicious of Canada's sincerity, and instructed the young people to look beyond Canada for support. There was an exploration at the international level – the United Nations, the Commonwealth and among other Indigenous Nations. Was it possible to form alliances with other Indigenous Peoples going through the same process? What did our Nations take on the start of our journey? We took our inherent rights, including our right of self-determination, to the international community to make alliances and build our future destiny based on our original instruction.

As Indigenous Peoples, we always start at the beginning of the story. We could go back to our beginning but that is not the purpose here. Our story here

is about the colonization process and its continued impact on our lives on a daily and hourly basis. We are constantly reminded of the occupation of our territories by invaders and colonizers. Our Great Turtle Island was renamed when the colonizers arrived. An Italian map maker, Amerigo Vespucci, put his name "America" on our territories. This is the same story that I heard among the Indigenous Peoples living in other parts of the earth.

One time, while travelling among the Indigenous Nations, I listened to an Indigenous woman as she told us: "When the colonizers came into our territories, the colonizers want to change all the names of our lands and territories". These colonizers are very insecure people travelling in our territory. If they change the names to suit themselves, they feel more at home. But the land does not take kindly to the change in name. As Indigenous Peoples, we are constantly reminding our children about the names of the rivers, the mountains, the plants, the animals, the birds and all the responsibility to care for the Creation. It is in the renaming that colonizers try to claim those territories and resources for themselves. While I was in Geneva last summer, I met students who told me that they were coming to America to study. I said to them - where is that "America?" They laughed and said, "You know". I said, "No - I know Great Turtle Island". The colonizer's lie is so prevalent that people forget that our Nations pre-existed colonization. It is as if we are erased from the land. This is the goal of colonization. It is still happening today.

## **United Nations**

While we were looking around, we noted that one of the central tenets of the United Nations Charter is: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." This made sense to the old People. We made Peace and Friendship Treaties. Our Peoples have a right of self-determination. We are Nations. We made treaties among ourselves and with the Crown to allow for settlement in our Territories. These were international criteria. We wanted to maintain the peace. In addition, the story about Deskaheh of the Haudenosaunee going to the League of Nations was known by our Peoples. Across the northern part of our own Island, there was a system of communication among our Peoples based on the old trade routes. The old ones

knew what happened. They said – We should try to see what can be done – so we went.

The UN was a foreign system to us. We did not know how it worked. At the beginning, we did not know how to write an intervention or to get on a speakers' list. It was going into a completely different way of thinking. When we reported to the old People and the Chiefs on the obstacles ahead of us, they encouraged us to try. We had been living with these colonizers for a long time and it would take time to decolonize ourselves. I remember one meeting with the old People as I explained the many problems that I saw at the UN in pushing our case and an older woman said to me: "It is a good thing that you are a young woman." I laughed because I did not know at that time that a lifetime of work would not get us very far. Five hundred years of colonization may take 500 years to decolonize. That is the sad reality.

## **What is the problem?**

Columbus came across the great pond known as the Atlantic Ocean and fell onto the shores of Indigenous Peoples. In this process of arrival on our shores, our world and the view of our world was dramatically altered by the colonizers. The invaders changed the name of our lands to their names, calling our lands "America". The name should go back to our Indigenous names. These are our lands and territories. We are still alive to talk and write about our own history and our own view of the world. We have worked to have our rights recognized as a collective. Indigenous Peoples have our right to self-determination. We recognize and act on it. This is our responsibility to the ancestors and to the future generations. These are our original instructions. We cannot move away from those instructions. Our rights are not limited to human rights. We have rights that include human rights. Our Indigenous Nations recognize each other. We follow the protocols of diplomacy. The non-Indigenous world does not recognize Indigenous Nations within the family of nations. Our territories and lands are seen to be exploited and used. If the Indigenous Peoples are in the way, then they need to be removed. This is no different from the time of first contact in 1492.



## The Groundwork for today laid in 1492

On contact with the Europeans, each of the hundreds of Indigenous Nations possessed all the elements of nationhood that were well-established by European settlers: territory, governing structures, legal systems and a historical continuity in our territories. All Indigenous Nations were and remain free and independent in our own rights. Nothing since the arrival of Columbus has occurred to merit any reduction in the international legal status of Indigenous Peoples. The recognition of Indigenous Nations and our rights poses no threat to non-Indigenous Peoples.

According to the documents of the time, Europeans were generally unsure about the status of the peoples they encountered, who fell outside of the Christian family of nations. In the 14th and 15th centuries, the Catholic Church issued numerous Papal Bulls relating to the rights of Europeans in Indigenous territories. Romanus Pontifex (1455), for example, denied people living outside of Europe any rights to lands and possessions, thereby allowing Christian monarchs to claim our lands and territories. With the legal support of the Pope, the “new world” was thus divided between the Portuguese and the Spanish.

Atrocities committed by explorers against inhabitants of lands sought as colonies became known in Portugal and Spain. This knowledge resulted in a public debate led by scholars, which had a profound effect on contemporary legal thinking about the rights of Indigenous Peoples. One side of this debate was a departure from accepted contemporary international law norms. This view held that peoples indigenous to these newly discovered lands were not human, owing to their lack of Christian knowledge and, therefore, did not possess the same rights as Europeans. Scholars, such as Bartolomé de Las Casas, urged the conversion of the Indigenous inhabitants rather than the slaughter and enslavement that was occurring. Las Casas was able to persuade the Spanish king to suspend the licensing of permits in Indigenous Peoples' lands while the debates persisted; however, when they continued for many months without a clear conclusion, expeditions were resumed. The opposing side held that the Indigenous inhabitants were human and had rights that needed to be respected; this view was based on the international legal norms of the time.

In an essay of 1532, *De India et De Jure Belli* Reflections, Francisco de Victoria reviewed the rights of Indigenous Peoples. He argued that Indigenous Nations were the true owners of our lands and territories and, as such, could not be

dispossessed through the doctrine of discovery or terra nullius. Vitoria argued that title to the lands of Indigenous Peoples could not be conveyed to a European power -- title could not be derived by either the Spanish monarchy or the Pope, whose authority did not extend to secular matters. Thus, by Vitoria's reasoning, the Spanish could not acquire title to Indigenous lands through discovery. With recognition that title to our lands was vested in Indigenous Peoples, Vitoria also held that our lands could be surrendered as a result of a "just war" waged to Christianize us. For the Christian nations, then, the mission to convert Indigenous inhabitants could justify continued atrocities and the claiming of our lands and territories by the colonizers. This "just war" continues to this day.

## **What is the continued struggle?**

Part of the strategy of Indigenous Peoples to gain recognition for our lands and territories involved lobbying at the international level through the UN system. The UN is a complex and multi-layered body that is slow and cumbersome in its internal procedures. The one place we should have been able to immediately access was the "Decolonization Committee". However, through self-serving resolutions – including the infamous Blue Water - passed by the General Assembly, we were denied access. The Blue Water Thesis – or the Belgian Thesis – stated that there needed to be blue water between the colonizer and the colonized. Who does this benefit: the colonizers of Great Turtle Island?

We were forced to look at other options within the system. There appeared to be an opening within the human rights system. To this day, it is not clear if the states created this opening to turn us away from our efforts to appear before the Decolonization Committee. Looking back – it appears to have been a path of diversion. We have spent so much time trying to create inroads into the human rights sector only to be told by the states to implement the Declaration on the Rights of Indigenous Peoples through existing state mechanisms of human rights commissions or human rights tribunals. This would make it a domestic state standard rather than an international one. What happened to the Charter of the United Nations? When it came to the rights of Indigenous Peoples, the General Assembly voted against including us in the family of Nations.

Our efforts to bring the recent developments in our territories have been thwarted by the establishment of an Expert Mechanism and the Permanent Fo-

rum on Indigenous Issues. These two bodies do not have a mandate to hear recent developments. There is no place within the present system to develop international standards. The Declaration is a dead end. Where can a binding instrument be drafted? Who would move it? It is a state-centric document designed to be implemented by the state. The UN system is working with state governments to implement that document. This is the purpose of the so-called High-Level Plenary scheduled for 2014 in the General Assembly Hall in New York.

In 1988, Indigenous Peoples from the "Americas" came together in Geneva prior to the start of the Working Group on Indigenous Peoples. During the course of the discussion, the issue of the Papal Bulls from the time of Columbus arose. Why were these Papal Bulls still in place? It was nearly 500 years since Columbus. There was a decision taken to push for a UN declaration of an international year on Indigenous Peoples in 1992 to celebrate our survival as Peoples. In addition, there was a decision to write a letter to Pope John Paul II asking him to rescind the Papal Bulls related to our lands and territories. In addition, we wanted to be recognized as owners without being Christians. Indigenous Peoples lost both attempts.

The UN was pushed by countries who wanted to celebrate the whole process of 500 years in the "Americas". There was the hosting of the Olympic Games in Barcelona, Spain, the World Fair in Seville, Spain with the Expo theme of "The Age of Discovery" at which over 100 countries were represented. The City of Chicago in the United States was supposed to be a joint sponsor of the world fair but, due to funding problems, their participation did not materialize. Then, there was Italy, which wanted to celebrate their "son" Columbus. The Roman Catholic Church declined to revoke the Papal Bulls, informing Indigenous Peoples that the Church was going to celebrate "500 years of evangelism in the Americas". In the face of these self-serving proclamations, the UN voted to make 1993 the international year of Indigenous People – without the "s" on Peoples. We were insulted. The UN did nothing but make a poster. There was nothing. No special stamps issued by the UN postal system – a common practice of for an international year. No special projects. In the international year of the potato there was a cook book of potato recipes published by the UN. There was a stamp for the potato. There were conferences on the potato. For Indigenous Peoples: a poster with the "s" left off of Peoples. We were forced to carry a black permanent marker around with us to put the "s" on the posters. Indigenous Peoples made our points heard at each and every meeting.

So, the Working Group members, led by Madam Daes, suggested the declaration of a Decade on the Rights of Indigenous Peoples. The decade was to run from 1994 until 2004. The decade was a snooze fest. Nothing was done. The UN came under criticism once again. In an attempt to maintain some kind of relationship with Indigenous Peoples, the UN suggested that there be a second decade from 2004 to 2014. But Indigenous Peoples were not going to be involved in another state self-serving pat on the back. There was nothing being done to promote the rights of Indigenous Peoples.

As a matter of fact, things seemed to be going backwards. In the Working Group meeting held in the summer of 2002, Indigenous Peoples were told that our support for a second decade would finish with a World Conference with all the "bells and whistles". The UN has held many world conferences on many issues, from Women in China, Environment in Rio, Racism in South Africa to Human Rights in Vienna and many other topics. It has a lot of experience of putting together World Conferences. The preparation takes place over a number of years with preparatory meetings held at the regional level. There is work on a program of action to be approved at the World Conference as an outcome document. It was proposed that a World Conference on Indigenous Peoples would be held over a number of days with all the UN agencies involved in promoting the rights of Indigenous Peoples. Reluctantly Indigenous Peoples agreed to a second decade, with the commitment of a World Conference.

Fast forward to 2014 and the process was ground down to 1.5 days in the General Assembly Hall in New York. The resolution called for a "High-Level Plenary" to be called a "World Conference". This will not be a real world conference. Once again, Indigenous Peoples have been kicked to the back of the line and out of the room. Indigenous participation has been orchestrated from afar through certain NGOs with funding from "friendly governments". Its aim is to focus on the implementation of the State-centric Declaration on the Rights of Indigenous Peoples. There will be no discussion on discovery, the continued loss of our territories and resources and 522 years of colonization. General Assembly rules for a high-level plenary applied. Over the 1.5 days, there were to be three sessions each lasting three hours. But, there was only one session – three hours – in the general assembly. The next part was interactive dialogues. That was three hours in the General Assembly Hall bringing the time to 180 minutes. If each state took ten minutes, they would run out of time after 18 states – less than a tenth of the members.

It started on Monday morning and goes on into Monday afternoon, with completion on Tuesday afternoon. However on Tuesday, the General Assembly looked at Climate Change. Indigenous Peoples were pushed off the agenda. Security was at a high level as President Obama of the United States addressed the General Assembly on Wednesday. If an Indigenous person is able to get into the room, their speaking time will be tightly controlled. This is a very long way from a World Conference. It is a very long way from focusing the UN and the world's attention on the plight of Indigenous Peoples as would have been the case with a World Conference. The colonizer states have a lot of gain. There was no one questioning the colonization of the "Americas". This was a very carefully orchestrated to give the appearance of something, when really it is nothing.

There are so many actors that need to be consulted on any issue. Indigenous Peoples have learnt the system and some have been corrupted by it. Many have been collaborators with their state governments in promoting the rights of the state over Indigenous Peoples. It is a sad state of affairs. It is colonization. It remains part of the complex process of settler state colonization. The push for recognition might have to go elsewhere. In real terms, Indigenous Peoples have achieved a number of remarkable goals within the system: a study on treaties, a study on land rights, inclusion in the 1992 Rio Declaration and many other points of entry into the system. But not into the Decolonization Committee room to gain assistance to decolonize.

When Indigenous Peoples came to the UN in 1977 as "outsiders" looking for our rightful place, we were met by state governments and inherent prejudices against Indigenous Peoples. To overcome these prejudices, Indigenous Peoples have had to find our way among the different procedures and forums in order to create a space for ourselves. The struggle has been to break down the barriers that state governments have raised against Indigenous Peoples inside and outside the state system. Going to the UN was not intended as a promotion of the system but rather to concentrate efforts on breaking down the barriers of racism and colonization. Our struggle at the UN is a history of continued efforts to decolonize. Our focus has been our collective rights to our lands and territories, and this has been crystallized around the concept of self-determination. "We continue to challenge the idea that somewhere we have 'lost' our international juridical status as nations/peoples".

As I wrote at the beginning – it is a short story in our long history of colonization. It is not at an end. ○

## CHAPTER 2

## 1977 and the Participation of Indigenous peoples in the United Nations and the International Arena

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*Nilo Cayuqueo*

**T**his is a statement made in Geneva on 10 September 2013 at a DOCIP Conference remembering the First Conference on Indigenous Peoples at the UN held in 1977:

Dear friends of the international community, and indigenous brothers and sisters. First, I'd like to thank DOCIP for their tremendous effort in organizing this historic symposium.

The First Conference on Indigenous Peoples of the United Nations, which took place in 1977, was organized by non-governmental organizations with the support of the International Committee for the Indigenous Peoples of the Americas (INCOMINDIOS), the International Work Group for Indigenous Affairs of Denmark (IWGIA), and individuals who would later go on to organize DOCIP. This conference took place during a tumultuous political context in so-called Latin America. It was a time when many Central and South American countries had military dictatorships, and there was much repression, killings, arrests and dispossession of our territories.

At the same time, this moment marked a milestone in the Indigenous Peoples' relationship with the UN, international organizations and Europeans who, for centuries, had ignored us. Some indigenous delegates at the conference said, ironically, that they had come to discover Europe. It would be fair to say that 1977 marked the beginning of the Indigenous Peoples' more active political representation at the UN and in the international arena in general. It also launched more active organizing work among native peoples, including peoples from the United States, Canada, the Saami, and so-called Latin America, where around 50 million Indigenous Peoples live in over 800 distinct peoples.

It should be noted that the first contact between Indigenous Peoples of the north and south began in 1974 when Shushuap Chief and president of the National Indian Brotherhood of Canada, George Manuel (from so-called British Columbia), was invited to participate in the First Conference of Indigenous Peoples of the Southern Cone in Paraguay,

along with other leaders from Alberta, Canada. The conference was organized by the Catholic University of Asunción and the Paraguay Association of Indigenous Parties.

The National Indian Brotherhood and the Union of British Columbia Indian Chiefs had made contact with the Saami Council, in particular with one of its founders, Nils Sara. They had also made contact with Kuna representatives from Panama, such as Julio Dixon, and with brothers from Mexico. Together, they all decided to convene an international conference of Indigenous Peoples in Canada in 1975. They invited indigenous leaders who had participated in the First Conference on Indigenous Peoples in Paraguay to their conference, which was held in Port Alberni, British Columbia, in 1975. Delegates from indigenous organizations across the continent attended this conference, at which they formed the World Council on Indigenous Peoples (WCIP).

The Second WCIP Conference, organized by the Saami Council, took place in August 1977 in Kiruna, Sweden. This took place two weeks before the First Conference on Indigenous Peoples at the UN, which we are remembering here today. It is noteworthy that the WCIP was not invited to participate because the organizing committee at the time, the Indian Treaty Council (ITC), was in conflict with George Manuel. In fact, George Manuel attended the conference in Geneva, but he was not allowed to speak at the opening ceremony.

This conference was a very enriching personal experience for me. Getting to see and know the United Nations alone was very impressive, and the march at the entrance of the UN was exciting. The ability to meet and connect with leaders from many countries, and with representatives from governments and international organizations, marked an important step for the world's Indigenous Peoples.

After I had spoken at the opening ceremony on the first day of the conference, the Argentine ambassador to the UN - a representative of the military junta that had staged the coup d'état of 1976 - said he wanted to speak with me and a fellow representative from Argentina, Juan Navarro of the Kolla People. He said there was a communist campaign threatening the country, and he asked me if I was part of that political movement. Obviously I said I was not, but when I returned to Argentina, a colleague at my organization said that a very negative report about me had arrived from Geneva. Because of my participation in the UN and in other political activities, I began to be threatened, and the military came looking for me one day. Luckily, they did not find me. If they had, I would not be here talking to you today.

I fondly recall a friend, Helge Kleivan, who attended the conference in 1977 as the IWGIA representative from Denmark. We became friends and, later, when I was in trouble with the military in Argentina, he convinced me to leave the country. With his

support and that of the Danish consulate in Buenos Aires, I was able to leave Argentina in 1979 and settle in Peru.

The delegates present at the UN conference in 1977 decided to organize an indigenous coordination in South America. Because I was living in Peru at the time, we organized the First Meeting of South American Indigenous Movements in Cuzco in 1980, with the support of IWGIA.

In 1981, while I was still living in Peru, I participated in the Second Conference on Indigenous Peoples and the Earth, here in Geneva. This conference was decisive in launching the Working Group on Indigenous Peoples. We also made contact with representatives from the ILO in order to change Convention 107 which, in 1989, led to the adoption of Convention 169. Many of us use this historic agreement as it enshrines important rights of Indigenous Peoples. Although many governments have ratified this agreement, very few apply it in practice, and it is constantly violated.

After living in several countries, I settled in the United States where, with other indigenous brothers and sisters of the United States and some anthropologists, we established the South and Meso-American Indian Rights Center (SAIIC) to defend human rights in Latin America and to establish links with Indigenous Peoples in North America. Finally, nine years ago, I was able to return to Argentina to live in my community, Los Toldos.

We continue fighting for our ancestral rights. The situation in Argentina is not good: our current government calls itself populist and nationalist but actually follows an extractive political model and is deeply wedded to multinational corporations such as Monsanto, Chevron, mining companies, etc. And, since many so-called natural resources are on indigenous lands, the government invests heavily in welfare programs and regularly buys people out in order to pursue its extractive policy. Meanwhile, it refuses to acknowledge rights that already exist by law.

In spite of these challenges, we have formed an alliance of communities and organizations across the country. Two months ago, we organized an Indigenous Summit in Formosa, near the border with Paraguay, and we continue in the fight. We also have alliances with grassroots and progressive sectors, and our proposal is to rebuild the country as a plurinational state. This October 12th marks 521 years of European invasion, and we are planning demonstrations in the historic Plaza de Mayo and in all provinces.

Returning to the 1977 Geneva commemoration, I believe we have come a long way in terms of indigenous rights. To have created the Working Group on Indigenous Peoples, to have changed Convention 169, to have created the Permanent Forum on Indigenous Issues and, finally, to have the UN Declaration on the Rights of Indigenous Peoples approved is something I never would have imagined when we began our participation at the UN.



However, despite these achievements, our rights continue to be violated in most countries. With economic globalization, corporations rule the world. Powerful countries such as the United States continue to impose their policies, which defend the interests of transnational companies while further impoverishing Indigenous Peoples.

Indigenous territories are constantly invaded, even in countries that consider themselves to be popular and claim to defend majority interests. Today, 40 years after we first came to this building at the UN, Mother Earth is threatened by multinational corporate greed and the drive for profit. All of this is made possible through the complicity of governments and the elites who run the global economy.

The power and influence of multinational corporations is also present in the UN, of course, since it is composed of the same colonialist states from which we all come, and in some cases our brothers and sisters are pressured into accepting policies that go against their own interests, such as REDD at the World Bank, and other multilateral agency programs. I think we are not doing enough to defend Mother Earth and our territories from the invasion of multinational corporations.

My message for young people who are taking up the fight for our ancient rights is that they should act on the premise that we are children of colonized peoples. And, as such, we must honor all that our ancestors did for us, and honor the fact that they died defending our rights. Our youth should not fall into the temptation of individualism, or allow themselves to become instruments of corporations or of any other entity of the colonizer. It is sad to see sister organizations who have a long history of struggle today negotiating with multilateral agencies over so-called natural resources in our territories.

Speaking of youth, I believe that we elders must pass information down to them, since they are the future of our people. With this in mind, I am writing a book about my experience of the struggle of our peoples on the continent of *Abya Yala* (America), starting in the late 1960s.

I want to thank all of the non-governmental organizations that enabled us to be present and continue the fight over the years. We are fighting so that, in the not-so-distant future, we can all form part of an international community that respects cultural diversity. And we are fighting for our own representation in this important body, the UN.

Finally, I pay humble tribute to those who were with us in 1977 and who have gone to the spirit world, and with whom we shared the dream of fighting for our people to one day be free again.

Chaltumai. Thank you very much.



## CHAPTER 3

## The First Ten Years From Study to Working Group, 1972-1982

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*Roxanne Dunbar Ortiz*

**T**he historic decade, 1972-1982, marked a life-changing involvement for me in the initiation of Indigenous representatives' presence at the United Nations and the emergence of norms of international human rights law. I tell this story as both a trained historian and an active participant.

### **Beginning on the Trail of Broken Treaties in the United States**

In 1972-74, during a period of writing my doctoral dissertation in history while at the same time attending law school, as well as being active in the local San Francisco Bay Area American Indian Movement (AIM) chapter, the Indigenous movement in North America galvanized global attention and support, culminating in a nearly two-month occupation of the hamlet of Wounded Knee, located in the Pine Ridge Sioux reservation in South Dakota, the site of the 1890 U.S. army massacre of hundreds of unarmed Sioux refugees. The chief demand of the hundreds of occupiers, who were surrounded by armed federal and state troops with their tanks and aircraft, concerned the Sioux-United States Treaty of 1868, which guaranteed Sioux sovereignty over a large contiguous land base that had since been reduced to small, separate reservations by illegal federal annexations, along with an erosion of Sioux government sovereignty.

The leadership that was formed there, along with a number of international law specialists guided by Sioux attorney and best-selling author, Vine Deloria,

Jr.,<sup>1</sup> formulated a set of demands that called on the international community to intervene and international law to be applied. The following year, 1974, 5,000 Indigenous representatives from many parts of the world and representing more than 90 Indigenous communities met and founded the International Indian Treaty Council (IITC). This was the context that brought me to the United Nations, initially working with the legal team and serving as an expert witness in U.S. federal court challenges.

## Two International Indigenous Organizations and Cold War Politics

Jimmie Durham,<sup>2</sup> a Cherokee, initiated the IITC's UN project and became the first director of the organization. A successful sculptor and artist then and now, Durham lived in Geneva during the late 1960s and early 1970s when his wife was a staff member of the Geneva-based World Council of Churches. Indigenous movements in North and South America were stirring at a time of national liberation movements, particularly in Africa, inspired and emboldened by Vietnamese resistance to United States' invasion. In Geneva, Durham befriended a number of the African liberation leaders who had travelled there to present their cases at the UN, including Amílcar Cabral of PAIGG, the liberation front in Guinea Bissau, the African National Congress (ANC) and Southwest Peoples Liberation Organisation (SWAPO) of southern Africa, along with those of Angola, Mozambique and Zimbabwe. From afar, Durham followed the birth of the American Indian Movement (AIM) in the United States, from the 1969 occupation of Alcatraz to the 1972 seizure of the Bureau of Indian Affairs building in Washington D.C. and, most importantly, the over two-month siege at Wounded Knee on the Pine Ridge Sioux reservation. Durham returned to the United States in 1973, met with AIM leaders and proposed an international project. During the following years, he gained UN non-governmental organization (NGO) status for the IITC in 1977, and convinced

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1 At the time, Deloria had published two best sellers during the Indigenous occupation of Alcatraz Island, 1969-1971: *Custer Died for Your Sins: An Indian Manifesto* and *We Talk, You Listen; New Tribes, New Turf*; he would go on to author or co-author 30 books on Indian sovereignty and cultures and U.S. colonial law.

2 See J. Durham, *Certain Lack of Coherence: Writings on Art and Cultural Politics*. Kala Press, 1993.

the international NGO community at the UN in Geneva to sponsor a conference on the Indigenous peoples of the Americas.

The IITC was not the only Indigenous federation seeking international involvement.<sup>3</sup> In 1975, one year after the founding of the IITC, the World Council of Indigenous Peoples (WCIP) was established. Its origins date back to August 1972 when the General Assembly of the National Indian Brotherhood (NIB) of Canada, under the leadership of George Manuel, endorsed the idea of an international conference on Indigenous peoples. In discussions with international experts familiar with the UN system, they had been encouraged to participate in international human rights activities and were assured that some governments were prepared to take initiatives on the Indigenous question. Manuel's initiative coincided with the beginning of the Sub-Commission Study on Indigenous Peoples. The NIB applied for NGO consultative status at the UN, which was granted in 1975. In 1977, the WCIP took over the NIB's status. Indigenous groups from developed countries were involved in the creation of the WCIP, with significant financial support from the governments of Canada, Denmark and Norway.

Initially, the WCIP was a fusion of the National Indian Brotherhood of Canada, the National Congress of American Indians (NCAI) in the United States, led by Joe de la Cruz and Phillip (Sam) Deloria, and the Nordic Saami Council. Jimmie Durham mistrusted the WCIP due to its financial support from the governments of Canada and the Nordic countries, as well as the NCAI's involvement, given that that organization's funding source was the United States government. The suspicions were mutual and reflected the geopolitics of the Cold War. The IITC eschewed all government support and sought to affiliate with national liberation movements and the Non-Aligned Movement, which had the favour of the "Eastern" bloc, that is, the Soviet Union and other socialist states. The WCIP, on the other hand was at the time firmly based in the North Atlantic region and avoided relationships with leftist organizations and governments. The election of Jimmy Carter as president of the United States also signaled to the world that human rights would be used as a propaganda weapon against the Soviet Union as the policy of détente began to cool the rattling of nuclear weapons. The year before,

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3 North American Indigenous peoples had long regarded themselves as nations among nations and, after the founding of the United Nations, began to seek strategies for participation, long before the appearance of the IITC and the NIB. See D. M. Cobb, *Native Activism in Cold War America: The Struggle for Sovereignty*. Lawrence: University of Kansas Press, 2008.

in August 1975, the Helsinki Declaration had come out of the "The Final Act of the Conference on Security and Cooperation in Europe" that was signed by 35 European states along with Canada and the United States, proclaiming the right of all peoples to determine their internal and external political status. Principle VII required respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief; and Principle X required fulfilment in good faith of obligations under international law. Highly publicized by Jimmy Carter in his campaign for president, IITC members took notice and pointed to a century of suppression of Native American political, economic, social and cultural freedoms, and religions, as well as violations of treaty agreements with Indigenous nations.

### Local to Global

Between its establishment in 1974 and gaining NGO status in the UN in 1977, the IITC secured an office across from the UN headquarters in New York, and another in San Francisco. IITC staff organized numerous activities in preparation for its international role by educating Indians all over the country, particularly the traditional elders, holding seminars on international law, assisted by well-known international lawyers such as Richard Falk. IITC began participating in UN organized meetings - the 1975 International Women's Year Conference in Mexico, the 1976 UN Habitat Conference in Vancouver and the 1977 UN Conference on Desertification in Buenos Aires, as well as a conference of non-aligned countries in Peru in 1976. Through these interactions, the IITC made Indigenous peoples' situations and movements visible, and became acquainted with other NGOs, government representatives and UN procedures and culture.

In late 1976, Jimmie Durham's assistant, a young Comanche, Paul Chaat Smith,<sup>4</sup> moved to San Francisco to open an IITC office. I had agreed with Durham to work on the project and to write for and help with the publication and distribution of the monthly newsletter we initiated, *Treaty Council News*. We rented a

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4 Paul Chaat Smith went on to author prize-winning books and is a curator at the Smithsonian Institute's Museum of the American Indian in Washington DC. See P.C. Smith and R.A. Warrior, *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee*. New York: The New Press, 1997; and P. Smith, *Everything You Know About Indians is Wrong*. Minneapolis: University of Minnesota Press, 2009.

small office in the historic Flood Building in downtown San Francisco, where many diplomatic counsels had offices. Our principle tasks involved publicizing and organizing for the conference that the IITC and the Geneva-based NGO Human Rights Committee's Sub-Committee on Racism planned for September 1977. We organized a large and successful benefit, spoke in schools and to community groups, and worked with the Native American Solidarity Committee (NASC) and the Wounded Knee Legal Defence/Offence Committee, both of which formed in the wake of the Wounded Knee siege. The San Francisco Bay Area was a rich environment for gaining solidarity and support during that period, following nearly two decades of radical oppositional organizing. There was a lively Free University, where Paul and I taught Native American history and issues to activists from many social justice organizations. By that time, there were burgeoning Women's Liberation and Gay and Lesbian movements. When I searched for a publisher for my book on the Wounded Knee trials, which we called the "Sioux Treaty Hearing", in the midst of negative responses came a welcome offer from a new, small feminist press, Moon Books. Our IITC office collaborated particularly closely with the Union of Democratic Filipinos (KDP), which was formed in the U.S. in 1973. The KDP promoted socialism in the U.S., as well as supporting the National Democratic Movement in the Philippines (CPP). We met elderly Indigenous Igorot individuals, as well as Bukidnon representatives from Mindanao who informed us about the oppressed conditions of their communities and their desire for self-determination. There were also sizable American Samoan and Hawaiian communities in the Bay Area.

The two decades of intensive organizing in Indian Country that had preceded the founding of the international project brought energy and hope to reservation communities; it also brought young Indigenous people flocking back to their reservations to build movements and implement self-determination. It was thus an exciting moment in June 1977 when the IITC met for five days at Wakpala village in the Standing Rock Sioux reservation to choose official delegates to the conference. We drove from San Francisco to South Dakota, hauling bundles of the newsletter and copies of documents for the work. As was usual for American Indian Movement gatherings, everyone camped out, and we met inside a large marquee. By then I had participated in dozens of camp meetings on Indian land but none as consequential and exciting as this one, selecting delegates and planning for the first international conference on Native Americans. It was a dream come true, making the previous months of non-stop work all worthwhile.

## Indians at the UN, 1977

The more than 100 Indigenous representatives from all over the western hemisphere who gathered from 21-23 September 1977 for the officially titled "International NGO Conference on Discrimination Against Indigenous Populations in the Americas -1977" reflected organized forces of inestimable dimensions and dazzled the international community and press (without a line or mention in the U.S. media). We were even welcomed and embraced by the Swiss citizens of Geneva who normally ignored, and even resented, UN doings. Jimmie Durham had made many friends in Geneva during his time living there, and he had organized a Swiss support group, INCOMINDIOS, established by Swiss lawyer Alexander Weber, and which still exists to this day. Two well-known Swiss anthropologists, Louis Necker and Rene Fuerst, were part of the support network Durham had built in Geneva, and which included Pearl Grobet, Jacqueline De Puy, Isabelle Schulte-Tenckhoff, Sidney Lamb, Lee Weingarten and others who they recruited to do everything - drive us around, make copies of documents, translate and interpret, find housing, as well as continue the work afterwards. Following the conference, a documentation centre was established by the Swiss supporters to house all the documents submitted during the conference and to remain a resource centre. The Geneva government provided funds for the Documentation Centre for Indigenous Peoples (DOCIP), which also continues to have a vital and enlarged existence and role.

However, it was a local Geneva angle that made the event riveting to the citizens of Geneva: in the early 1920s, the Iroquois diplomat, Deskeheh, had been sent by the Six Nations of the Iroquois in North America to approach the newly-established League of Nations for recognition and membership. Although Deskeheh never achieved that goal, his presence for several years in Geneva became the stuff of legend and the city's history, known to every school child for generations. Conference delegates included Deskeheh's descendants. Geneva officials rolled out the red carpet with a formal reception and museum exhibit.

The chair of the conference was Edith Ballantyne, the General Secretary of the Women's International League for Peace and Freedom and president of the Conference of NGOs in Consultative Status with ECOSOC (CONGO). The other officers, all officers of the Geneva Special NGO Committee on Human Rights and its Sub-Committee on Racism, Racial Discrimination, Apartheid and Decoloniza-

tion, were Niall MacDermot, Secretary-General of the International Commission of Jurists; Romesh Chandra, Secretary-General of the World Peace Council; Rolande Gaillard, the International Council of Women; Lars-Gunnar Eriksson, International University Exchange Fund; I. Matéla, World Federation of Democratic Youth; and Abderrahmen Youssoufi, Arab Lawyers Union. The United Nations was represented by the Director of the Human Rights Division, Theo C. van Boven, who had that year assumed the post, along with Augusto Willemsen-Díaz, the Human Rights Division specialist on Indigenous issues, and Lee Swepston, from the International Labour Office (ILO) Department of International Labour Standards. Three other UN bodies sent representatives: the United Nations High Commissioner for Refugees (UNHCR); the United Nations Institute for Training and Research (UNITAR); and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

Forty non-governmental organizations with UN status attended the conference, thanks to Jimmie Durham's close collaboration with the Conference of NGOs for several years. Twenty-seven governments sent representatives to the conference; the Carter administration even sent two prestigious Indigenous individuals, attorney Kirk Kickingbird and Shirley Hill Witt, which did not sit well with IITC organizers, particularly attorney Tim Coulter who was on the staff of the Institute for the Development of Indian Law with Kickingbird and had not been informed that he would be representing the U.S. government at the conference. Despite its involvement in the founding and support of the WCIP, the Government of Norway provided funding to the NGO Sub-Committee for the conference. Although a few individuals associated with WCIP were present as observers, including George Manual representing the National Indian Brotherhood of Canada, the WCIP did not send a formal delegation; José Carlos Morales from Costa Rica, who would later become WCIP president, was a delegate representing a national organization. There were Indigenous delegates from 15 countries of the western hemisphere, some in exile from military dictatorships, such as Antonio Milape of the Mapuche Confederation in exile, and Nilo Cayuqueo and Juan Jacinto Navarro from Argentina.

Mario Ibarra, a young Chilean militant who had been detained, tortured and imprisoned after the 1973 military coup had been allowed to leave Chilean prison for what turned out to be permanent exile in Geneva, arriving just before the 1977 conference. At the end of the conference, he volunteered to be the Geneva representative for the IITC while he pursued his studies at the Geneva Institute. In



the early years following the conference, Mario was the only person representing Indigenous issues on a day-to-day basis during the periods between the two annual human rights meetings in which only a few of us were present at first.

### **Five-Year Programme of Action**

The conference formulated a programme of action for NGOs with recommendations to submit all documents to divisions of the United Nations. The conference documentation was formally submitted to the UN Secretary-General and to the President of the UN General Assembly in November 1977. The 12th October (Columbus Day) was declared "International Day of Solidarity and Mourning with Indigenous Peoples of the Americas", with a view to establishing a day of solidarity by the UN. The recommendations included a call for respect for traditional law and customs, and for unrestricted rights of land ownership, as well as Indigenous control over natural resources in their territories. The conference found that Indigenous peoples in the Americas have the right to own land communally and manage it according to their traditions, and that such ownership must be recognized and protected in international as well as national laws. The governments of all the American states were called upon to ratify the UN conventions on Genocide, Anti-Slavery, Elimination of all Forms of Racial Discrimination, the twin Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as the American Convention on Human Rights; and calls were made for ILO Convention 107 on Tribal and Indigenous Populations to be revised in order to remove the emphasis on integration as the main approach to Indigenous problems and to reinforce the provisions in the Convention for special measures in favour of Indigenous peoples. A recommendation was made to establish a Working Group on Indigenous Peoples in the Sub-Commission of the UN Commission on Human Rights.<sup>5</sup>

In all-night sessions, the Indigenous participants hammered out a document that they submitted collectively. This document, entitled "Draft Declarations of

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<sup>5</sup> This recommendation was taken up in the 1981 session of the Sub-Commission and was approved by the Commission and ECOSOC in their 1982 sessions. The newly established Working Group on Indigenous Populations met for the first time in August 1982. ILO Convention 107 was rewritten as Convention 169 and approved in 1988.

Principles for the Defence of the Indigenous nations and Peoples of the Western Hemisphere”,<sup>6</sup> represented the dominant theme of the conference and set the basis for subsequent UN negotiations regarding the question of Indigenous peoples. The declaration contains 13 brief and unequivocal statements of Indigenous rights:

1. **Recognition of Indigenous nations:** Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental requirement of nationhood, namely: (a) having a permanent population; (b) having a defined territory; (c) having a government; (d) having the ability to enter into relations with other states.
2. **Subjects of International Law:** Indigenous groups not meeting the requirements of nationhood are hereby declared to be subjects of international law and are entitled to the protection of this Declaration, provided they are identifiable groups having bonds of language, heritage, tradition, or other common identity.
3. **Guarantee of Rights:** No Indigenous nation or group shall be deemed to have fewer rights or lesser status for the sole reason that the nation or group has not entered into recorded treaties or agreements with any state.
4. **Accordance of Independence:** Indigenous nations or groups shall be accorded such degree of independence as they may desire in accordance with international law.
5. **Treaties and Agreements:** Treaties and other agreements entered into by Indigenous nations or groups with other states, whether denominated as treaties or otherwise, shall be recognized and applied in the same manner and according to the same international laws and principles as the treaties and agreements entered into by their states.
6. **Abrogation of Treaties and other Rights:** Treaties and agreements made with Indigenous nations or groups shall not be subject to unilateral abrogation. In no event may the municipal laws of any state serve as a defence to the failure to adhere to and perform the terms of treaties and

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6 *United Nations Document No. E/CN.4/Sub.2/L.684 Annex IV, pp. 3. 21 July 1978.*

agreements made with Indigenous nations or groups. Nor shall any state refuse to recognize and adhere to treaties or other agreements due to changed circumstances where the change in circumstances has been substantially caused by the state asserting that such change has occurred.

7. **Jurisdiction:** No state shall assert or claim to exercise any right of jurisdiction over any Indigenous nation or group unless pursuant to a valid treaty or other agreement freely made with the lawful representatives of the Indigenous nation or group concerned. All actions on the part of any state which derogate from the Indigenous nations' or groups' right to exercise self-determination shall be the proper concern of existing international bodies.

8. **Claims to Territory:** No state shall claim or retain, by right of discovery or otherwise, the territories of an Indigenous nation or group, except such lands as may have been lawfully acquired by valid treaty or other cessation freely made.

9. **Settlement of Disputes:** All states in the Western hemisphere shall establish through negotiations or other appropriate means a procedure for the binding settlement of disputes, claims, or other matters relating to Indigenous nations or groups. Such procedures shall be mutually acceptable to the parties, fundamentally fair, and consistent with international law. All procedures presently in existence that do not have the endorsement of the Indigenous nations or groups concerned, shall be ended, and new procedures shall be instituted consistent with this Declaration.

10. **National and Cultural Integrity:** It shall be unlawful for any state to take or permit any action or course of conduct with respect to an Indigenous nation or group which will directly or indirectly result in the destruction or disintegration of such Indigenous nation or group or otherwise threaten the national or cultural integrity of such nation or group, including, but not limited to, the imposition and support of illegitimate governments and the introduction of non-Indigenous religions to Indigenous peoples by non-Indigenous missionaries.

11. **Environmental Protection:** It shall be unlawful for any state to make or permit any action or course of conduct with respect to the territories of an Indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an Indigenous nation or group through the

effects of pollution of earth, air, water, or which in any way depletes, displaces or destroys any natural resources or other resources under the dominion of, or vital livelihood of an Indigenous nation or group.

12. **Indigenous Membership:** No state, through legislation, regulation, or other means, shall take actions that interfere with the sovereign power of an Indigenous nation or group to determine its own membership.

13. **Conclusion:** All of the rights and obligations declared herein shall be in addition to all rights and obligations existing under international law.

This declaration could be characterized as the fundamental political document of the international Indigenous movement, and would provide the basis for the elaboration of the Draft Declaration of Principles for the Rights of Indigenous Peoples in the Working Group on Indigenous Populations that became the subject of more than a decade of negotiations in the Commission on Human Rights, finally approved by the UN General Assembly in 2007.

## Learning How to Navigate the UN System

The 1977 Geneva conference appeared as a great triumph for the International Indian Treaty Council (IITC) and the American Indian Movement. Behind the scenes, however, it was crisis-ridden. Jimmie Durham, the brilliant magician who had made it all happen, chose the occasion of the Geneva conference as his moment to exit the international stage. Having arrived a week early, he returned to New York the day before the conference was to begin, leaving a letter asking me to assume the duties he would not be around to attend to. Being one of a quickly assembled group of volunteers, I knew no more than the others, which was nothing and no one. Only Jimmie held the metaphorical keys to the secrets of the United Nations. The notes I had taken when he briefed us were hopelessly confused. I did not speak French, the language of Geneva and the UN staff and diplomats, and in which Jimmie was fluent. Together, however, our 19-member IITC staff, including Paul Smith, Winona LaDuke, Fern Eastman, Chockie Cottier, Bill Means, as well as many of the delegates and the conference officers, along with local supporters, carried off the feat, a spectacular event.

One of the key organizers of the conference, Indigenous attorney Robert T. (Tim) Coulter, director of the Institute for the Development of Indian Law in Wash-

ington D.C., was not pleased with the IITC's domination of the conference. He formed his own international NGO, the Indian Law Resource Centre (ILRC), which gained NGO status in the UN in 1981 and became antagonistic to the politics and strategy of the IITC. Jimmie Durham returned for a while to the IITC office in New York, during which time he ousted me. He soon left for good but I did not return to representing the IITC. The chaos for several years in the New York office ended in its closure, and that of the San Francisco office, and the feuding between the IITC and the ILRC played out at the UN Commission on Human Rights meetings in Geneva made consistent UN work difficult. Together with my colleague in the IITC, Aileen "Chockie" Cottier, a Lakota from an American Indian Movement family in Pine Ridge, we used the NGO credentials of the Afro-Asian Peoples' Solidarity Organisation to learn the UN work while we developed the Indigenous World Association, which received UN status in 1985, and is still active in UN work.

At the 1977 conference, I first met Augusto Willemsen-Díaz, a Guatemalan international law specialist and long-time staff member of the UN Human Rights Secretariat, who had a mission. Although not Mayan himself, Willemsen-Díaz was preoccupied with and knowledgeable of the situation of the Mayan people, who comprised the majority of the Guatemalan population, a situation that would soon turn into state genocide against them. He befriended and convinced Martínez Cobo to propose the Sub-Commission study of Indigenous peoples in 1972. Willemsen-Díaz also made certain that Indigenous peoples would be a category in the UN Decade to Combat Racism, Racial Discrimination and Apartheid, which began in 1974.<sup>7</sup> The Decade focused on apartheid in South Africa but also dealt with peoples living under military occupation, migrant workers and Indigenous peoples. His goal was to build a base of documentation upon which Indigenous peoples could construct infrastructure within the UN system. Willemsen-Díaz was the actual architect of the Sub-Commission study and of the definition of Indige-

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7 U.S. administrations from Jimmy Carter to George W. Bush have boycotted the UN initiatives on racism, including the activities of the two Decades --1974-1983, 1984-1993-- ostensibly because of the inclusion of the Palestinian question on the agenda. However, although Zionism as Racism was removed from that agenda after the 1993 Oslo accords, the United States continued to be unsupportive of anti-racist initiatives. The George W. Bush administration registered for, and then walked out of, the 2001 World Conference on Racism in Durban, South Africa. Many U.S. NGO representatives of colour, including Native Americans, believe that the U.S. rebuff of the issue of racism internationally is due to the institutionalized racism inherent in the U.S. government itself.

nous peoples used in the study. Until his retirement, and even afterwards while he remained in Geneva during the 1980s, Willemsen-Díaz served as an unpaid consultant to Indigenous peoples at the United Nations, mentoring the initial activists, including myself, and many more who arrived later. Mario Ibarra worked closely with Willemsen-Díaz, learning every aspect of UN procedures, passing his knowledge on to other Indigenous representatives.

### **Foundational Sub-Commission Study on Indigenous Populations**

In hindsight, the UN study appears more significant than it did at the time. In 1972, the former United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>8</sup> commissioned the “Study of the Problem of Discrimination against Indigenous Populations”. A member of the Sub-Commission, Ambassador José R. Martínez Cobo of Ecuador, was selected to carry out the study. Completed a decade later, in 1982, it took longer than any other study in the history of the United Nations (UN).<sup>9</sup> During that decade, Indigenous peoples’ representatives began to participate in the process and contributed to placing a new item, Indigenous Peoples, on the UN human rights agenda.

The venue for the study was not an auspicious beginning for Indigenous issues in the UN hierarchy. The former Sub-Commission was composed of 26 “independent experts” who technically served in their own capacity but were elected by the former UN Commission on Human Rights from nominations made by UN member states.<sup>10</sup> The Commission on Human Rights, the parent body of the Sub-Commission, was composed of UN member states, as was the Commission’s parent body, the Economic and Social Council of the United Nations (ECOSOC), an institution that focuses on human rights and social issues. Although the Sub-Commission’s original mandate was to prepare comprehensive reports in the ar-

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8 Later called the Sub-Commission on the Protection of Human Rights, it ceased to exist when the UN Commission on Human Rights was replaced by the UN Human Rights Council in 2007.

9 *United Nations Document* No. E/CN.4/Sub.2/1982/33. 25 August 1982.

10 For the history and functions of the Sub-Commission, see: Tom Gardeniens, Hurst Hannum, and Janice Kruger. “The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Recent Developments”. *Human Rights Quarterly* 4 (3) 1982: pp. 353-370; and Peter Haver, “The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities”. *Columbia Journal of Transnational Law* 21: pp. 103-134, 1982.

cases of discrimination and minorities, it actually did much more, making dozens of resolutions to the Commission regarding all aspects of human rights. All the Sub-Commission members were close to --or even worked within-- the foreign ministries of their respective governments. Several members also served as their nations' representatives to the UN Commission on Human Rights. Despite these government links, the Sub-Commission was the only official body of the UN in which non-governmental organizations (NGOs) were able to enjoy full access and participation. NGOs were compelled to have official recognition and consultative status under ECOSOC, which required an arduous process of application and consensus approval by a UN committee; in other words, any member state sitting on the committee could deny an NGO's application.<sup>11</sup>

In the first stages of the Study on Indigenous Peoples, governments were sent lengthy questionnaires which formed the basis of monographs on state practices. The Rapporteur also had the authority to solicit and receive information from experts and ECOSOC-recognized NGOs. During each annual session of the Sub-Commission, which convened each year in Geneva for the month of August, interim reports on the study were submitted in the form of chapters. Between the 1975 and 1978 sessions, no reports were submitted, and it seemed that the study, whose reports had not been met with any great enthusiasm on the part of the Sub-Commission members, would simply be discontinued. Martínez Cobo, the author of the study, was no longer a member of the Sub-Commission, and no other member appeared interested in reviving the study. The situation changed following the 1977 International Conference on Indigenous Peoples of the Americas, which demanded, among other things, that the Sub-Commission establish a Working Group on Indigenous Peoples. The conference and direct participation of Indigenous representatives thus revived the study and stimulated new interest in the question. Martínez Cobo, as an outside expert, was appointed to complete the study.

Due to its long and unusual history, the study is more like two separate studies. The first part of the Sub-Commission study, 1973-1975, based on government responses to questionnaires, is dry and legalistic, as well as being paternalistic in that Indigenous peoples were not involved. It nevertheless contains important material and constitutes an archive on state policies and claims. The second

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11 *United Nations Document No. E/CN.4/Sub.2/L.84. 25 June 1973.*

part of the study, 1978-1982, is more dynamic and balanced, with the inclusion of material from Indigenous organizations and experts and other non-governmental sources.

Yet the initial period of the Study also formed a useful basis for the work that came later. The first interim report submitted to the Sub-Commission's 1973 session contained an analysis of all measures adopted by the UN that were applicable to Indigenous peoples, including the UN Charter, as well as three international treaties: the 1948 Convention on the Prevention and Punishment for Genocide; the Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and the International Convention on the Elimination of All Forms of Racial Discrimination. Only one international law instrument, however, dealt specifically with Indigenous peoples, the International Labour Organization's (ILO) 1953 Convention on Tribal and Indigenous Populations and, thanks to the ILO official responsible for the ILO's work on Indigenous and Tribal Peoples, Lee Swepston, it was analyzed in detail. At the 1977 Indigenous NGO conference, Swepston introduced and explained the Convention, to which Indigenous representatives reacted negatively given its paternalistic and integrationist framework. They called for its revision, which, following a decade of negotiations, became a reality with the adoption of ILO Convention 169.

The 1974 report<sup>12</sup> outlined actions taken by the Organization of American States (OAS), the Inter-American Commission on Human Rights and the Inter-American Indian Institute. It began preliminary consideration of certain substantive aspects of the problem of discrimination against Indigenous peoples in the areas of housing, political rights, religious rights and practices, protection of sacred places and objects, and protection of places and objects of archaeological interest.

The 1975 report<sup>13</sup> was structured around the governments' questionnaire responses as well as information from experts. The first issue dealt with was definition. The definition of Indigenous populations was analyzed in terms of ancestry, culture, religion, the fact of living under a tribal system, membership of an Indigenous community, dress, livelihood, language, group consciousness, acceptance by the Indigenous community, residence in certain parts of the country, legal definitions, change in status from Indigenous to non-Indigenous and vice versa,

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12 *United Nations Document No. E/CN.4/Sub.2/L596*. 19 June 1974.

13 *United Nations Document No. E/CN.4/Sub.2/L707*. 17 July 1975.



registration and certification, and the decision-making authority to decide who is and who is not Indigenous. The report also dealt with population, both composition and statistical trends, although the analysis was superficial and incomplete. After two years of no reports, the study resumed in 1978, and the reports from the following years, up to the final report in 1982, reflect the participation of Indigenous representatives.

### **Context of the First UN Decade to Combat Racism**

Following the 1977 conference, Indigenous delegations were invited to make presentations all over Western and Eastern Europe to report on the human rights violations of Indigenous peoples and aspirations for self-determination. Representatives returned to their home territories to share information about the conference. Paul Smith and I immediately began work in San Francisco compiling and publishing the conference report, a special issue of the *Treaty Council News*. We distributed the reports and also made local presentations, as well as attending a national American Indian Movement meeting in Minneapolis. Aileen "Chockie" Cottier, who was a member of the IITC staff at the conference, and I spent a week at the UN General Assembly, along with other representatives who had come to present the final conference documents and the report to the President of the General Assembly and to the Secretary-General. We sat in on sessions of the Third Committee, which deals with economic and social issues and deals with much the same matters and issues as the UN Commission on Human Rights. The Third Committee is the sieve through which resolutions must be proposed and forwarded to the General Assembly for approval.

The World Peace Council asked me to be the U.S. coordinator with Jack O'Dell, an African American civil rights organizer and writer, for their upcoming NGO conference on racism in May 1978 in Basle, Switzerland. The purpose of the conference was to prepare documentation and a report on racism around the world to present at the UN World Conference to Combat Racism and Racial Discrimination, to take place in Geneva, 14-25 August 1978. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) had been adopted in 1965, and came into force in 1969. In 1973, the UN had declared the Decade for Action to Combat Racism and Racial Discrimination, so the 1978 conference was to be a mid-term review of progress. Since Indigenous peoples

were a part of the agenda of the Decade and the conference, it seemed important to prepare and to participate, although the Indigenous lobby was small and new to UN work. In February, I attended the planning meeting of all the coordinators from around the world in Basle, during which we planned the plenary, panels and workshops. In addition to the attendance of old friend Sid Welch, a Mojave representing the American Indian Movement, I persuaded the late Wendell Chino, popular president of the Mescalero Apache tribe of New Mexico and national Indigenous leader, to head the delegation. The final report stated:

The Special Hearing on Racism in the United States was a momentous occasion, both for the United States delegation and for the conference participants. President Wendell Chino, Mescalero Apache Nation, opened the hearing with an eloquent appraisal of the historical context, and situation of American Indian peoples in the U.S.A. President Chino noted the hypocrisy of Carter's 'human rights' statements, and fully informed the conference on the pending racist anti-Indian legislation and its potential effects in annihilating the remaining two million American Indians of the United States. President Chino is a descendant of the great resistance leader, Geronimo, and is an esteemed leader of American Indian tribes.<sup>14</sup>

I had introduced President Chino, and when I said that he was a direct descendant of Geronimo, the thousand or so conference delegates, the majority from Africa, rose for a long, standing ovation, which brought tears to his eyes as he took the microphone and expressed his happy surprise that African freedom fighters knew about and revered his beloved ancestor whose small guerrilla army had resisted three of the five regiments of the U.S. military as well as the Mexican army for three decades, never being captured.

Soon after the Basle conference in preparation for the UN Conference on Racism, I was invited to attend a meeting in Colombo, Sri Lanka, of the Afro-Asian Peoples' Solidarity Organisation -- a non-governmental organization with ECOSOC consultative status based in Cairo -- for their preparatory meeting. While in Basle, the AAPSO Secretary-General had invited me to use the organization's credentials to access UN meetings, and especially to have access to

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14 *World Conference for the eradication of Racism and Racial Discrimination, Basle, 1-21 May 1978*. Helsinki, Finland: World Peace Council, 1978. pp. 52.

representatives of African and Asian diplomats and national liberation movements' representatives for lobbying on Indigenous issues. He wanted me to be at their meeting in order to introduce the Indigenous issue and thus develop stronger links with the Non-Aligned Movement. Their journal, *Development and Socio-Economic Progress*, also took up the issue. While in Colombo, I witnessed the roots of what would become a savage war of ethnic cleansing by the dominant Sinhalese, who are mostly Buddhist, against the Tamil communities, who are a mixture of Hindu, Christian and Muslim. Those roots could be seen in the popular uprisings of the poor and working people, both Sinhalese and Tamil, against International Monetary Fund guidelines for "structural adjustment", a class war that the ruling elite had turned into ethnic conflict.

Jimmy Durham had set the stage for the Indigenous international work to be linked with the Non-aligned Movement (NAM), the organization of African, Asian and Latin American/Caribbean states as well as national liberation movements. NAM was founded by Nehru of India, Nasser of Egypt and Tito of Yugoslavia in the 1950s, in order to avoid the Cold War binary and stake out an autonomous path for decolonization, nation-building and economic development. United States' administrations consistently charged that the NAM was a tool of the Soviet Union. In fact, it was the Soviet Union and the Socialist bloc that always voted on the side of the NAM in the UN, not the reverse. The NAM states were a varied bunch, with many different systems of governance, with only a few outside Eastern Europe, such as Cuba and Vietnam, being actual Soviet allies. Most of the Indigenous and other international human rights NGOs eschewed the NAM linkage and rather sought allies with the North Atlantic states. This political reality exhibited the typical Cold War divide, but it was difficult to discern where "red scare" left off and North Atlantic white supremacy began.

The August 1978 conference on racism in Geneva overlapped with the annual meeting of the Sub-Commission, which I sat in on as well. I could stay only one week, which limited how much I could accomplish, but I also knew very little about the functioning of an official UN meeting rather than the NGO one we organized, which was much less formal. I was with a large AAPSO delegation and learned a great deal in a brief time. I was amazed and heartened by the presence of ordinary people from around the world who were there to participate through the non-governmental organizations' sponsorship. For Indigenous peoples, only Nilo Cayuqueo, a Mapuche from Argentina who had attended the 1977 NGO conference, and myself were present. I did not expect the Indigenous issue to be

prominent, as the central purpose of the UN Decade and the Conference was to stimulate action to end apartheid in South Africa. The United States and Britain supported the regime, which made it difficult to mount international sanctions. I had become involved with the African National Congress as a graduate student in the mid-1960s, so I was happy to lobby on behalf of AAPSO for strong resolutions.

One evening, I was attending a committee meeting, chaired by a Nigerian ambassador. I had volunteered to stay and take notes while the other AAPSO delegates went to dinner. Suddenly, I heard the representative of Norway propose a resolution that the World Council of Indigenous Peoples be designated as the sole representative of Indigenous peoples at the United Nations. This was Asbjørn Eide, representing Norway, but I did not know him or even know of him at the time, not until he was elected to the Sub-Commission in 1981. Had I known him, I would have spoken to him and disagreed with his idea for a single organization to represent Indigenous peoples at the UN but, in the situation, I quickly wrote a note to the Nigerian chairman to the effect that AAPSO would appreciate nullification of the proposal, which he did. All of the suspicions that Jimmy had expressed about the WCIP rushed to my head, and I did not know what to make of it. I have often wondered what would have happened had the resolution been passed and approved by the conference in its final report. I did learn that it was necessary to follow closely what transpires in UN meetings, because there are many agendas at work. At any rate, Indigenous peoples were a part of a major UN conference, another step in the long struggle to build international law pertinent to their lands and self-determination.

## **Researching the Avenues of Possibilities**

In the fall of 1978, I became a full-time faculty member and administrator of Native American Studies at the University of New Mexico, a two-year commitment, and could make only brief visits to UN meetings during that time, several for the General Assembly Third Committee meetings, and a week at the 1979 meeting of the Sub-Commission in Geneva. Each occasion was a learning experience. I began to research and write a book on the prospects for the UN work, but needed much more knowledge and experience than I had, so I applied for a research grant, which allowed me to spend a full year participating in UN meetings. I lived in New

York from June 1980 to February 1981, and moved on to Geneva for the Commission on Human Rights, then the Sub-Commission. It was a year of learning a wide spectrum of UN work. I felt it was important to explore all the possibilities that might be available to Native American peoples' intervention. Based on that year of research and NGO participation, I finished my book,<sup>15</sup> the first to deal with the UN's Indigenous work, *Indians of the Americas: Human Rights and Self-Determination*, published in 1984.

I had been involved for a year, representing AAPSO, in preparatory meetings organizing the programme for the NGO Forum, a parallel conference at the World Conference of the United Nations Decade for Women: Equality, Development and Peace in Copenhagen (14-30 July 1980).<sup>16</sup> Not only were we functioning within the UN Decade to Combat Racism but also the UN Decade for Women, which began in 1975. It was my first opportunity to attend a large NGO parallel conference, which was common practice for NGOs with UN status. Six thousand women, and some men, from 134 registered NGOs participated in the hundreds of panels, along with the specific daily plenary sessions our planning committee organized, one of which featured a Maori woman leader. The Forum participants were predominately from the North Atlantic countries, with little representation of minorities or Indigenous people from those countries. There were small, but strong, representations from Africa, Asia, and Latin America. Our AAPSO delegation was made up of four women, from Cyprus, Sri Lanka, Cuba, and myself from the United States. Once at the Forum, we registered two women from the Polisario Front, the national liberation movement for independence from Morocco for their homeland, the Western Sahara, the Saharans being the Indigenous population of the region. Our AAPSO delegation organized an unscheduled panel for the Saharan women to speak publicly, only later to learn that POLSARIO was not a member of AAPSO as a liberation movement, as were SWAPO, the ANC and the PLO, because Morocco was a member. Few Indigenous women participated in the 1980 Forum but, by the time of the 1995 UN Fourth World Conference on

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15 This was my third book; I previously published *The Great Sioux Nation: Oral History of the 1868 Sioux-U.S. Treaty*. New York: Random House/Moon Books, 1977; and *Roots of Resistance: A History of Land Tenure in New Mexico, 1680-1980*. Los Angeles: University of California, Los Angeles, 1980.

16 The first World Conference on Women was held during the declared UN Women's Year of 1975 and was hosted by the Government of Mexico in Mexico City. A UN Decade was declared, so that the 1980 Copenhagen conference was a mid-decade review.

Women, hundreds of Indigenous women from all over the world, were leading and participating in dozens of panels daily for the two-week NGO Forum, and were featuring in several plenary sessions.

The focus of AAPSO was decolonization and development, and the organization had been deeply involved in the emergence of the initiative of the New International Economic Order (NIEO) during the 1970s, a project that I believed Indigenous nations in the United States and elsewhere could benefit from. As director of the Native American Studies programme at the University of New Mexico, 1978-1980, and in collaboration with the All Indian Pueblo Council and the Navajo Nation, I had established the Institute for Native American Development, a research institute within the university which included a Master's level seminar programme for tribal development officials. Thanks to AAPSO's close ties with UNCTAD, the United Nations' Conference on Trade and Development, I was able to bring UN development experts in to teach seminars. In addition, Dr. Lorraine Ruffing, a development economist with a doctorate from Columbia University, had attended the 1977 NGO conference in Geneva, where she had recently been transferred from a UN post in Chile. She taught tribal development seminars for the Institute, along with economist Phil Reno and others. Ruffing had written her doctoral dissertation on Navajo economic development and had also served as a consultant for the Navajo Nation and on the 1977 American Indian Policy Review Commission and the Alaska Native Claims Commission, both mandated by the U.S. Congress. Reno had written a five-year development plan for the Navajo Nation aimed at eliminating economic dependency on the U.S. government.

### **Birth of Neoliberalism and Neocolonialism: Implications for Indigenous Peoples**

The New International Economic Order was so-called in the 1974 UN General Assembly Resolution entitled, *Declaration for the Establishment of a New International Economic Order*. The goal was to replace the existing Bretton Woods system, which mainly benefited the United States economy. Central planning and nationalization of industry would replace "free" markets. At the initiative of Robert McNamara, president of the World Bank, "The Independent Commission on International Development Issues", made up of 18 members and headed by former German Chancellor, Willy Brandt, began work in 1977 in response to NIEO de-

mands. The Commission's final report, *North-South: A Programme for Survival*, issued in 1979 and published as a book in early 1980, called for a radical transformation of the world economic order, with a massive transfer of technology and development financing from the "North" (industrialized states) to the "South" (former European colonies and other non-industrialized states).

The UN General Assembly held a Special Session on Development in New York, 25 August - 15 September, to debate the report and NIEO demands. I was a member of the large AAPSO delegation. It was an enormous gathering, attended by heads of state from all over the world. I was in awe when I met and talked with Léopold Sédar Senghor, the liberation leader of Senegal and renowned poet and a founder of the *negritude* movement, at a small dinner which AAPSO organized. However, the Carter administration sent a low-level delegation to announce its refusal to accept the terms of the discussion and to generally disrupt the proceedings. It was not the first such behavior I had observed: the Carter administration had boycotted the UN Conference on Racism in 1978. This conference was even more significant, however, given the popularity and prestige of the Brandt Report, and the U.S. negation came as a surprise to many. Being one of the few U.S. non-governmental individuals attending the meeting, I was asked to explain. I did so by telling a U.S. history that people were unaware of, that the U.S. was a colonial power itself, the colonizer of the North American continent not the product of a national liberation movement as they thought. At that moment, the U.S. presidential election was less than three months away, and Ronald Reagan was campaigning against any kind of cooperation with the United Nations. Without U.S. political and economic support, the NIEO would be doomed, which in fact it was. That was the moment when the destructive neo-liberal agenda we are still living with was born.

A large and well-organized parallel non-governmental forum was held at the Waldorf-Astoria Hotel, only a few blocks from UN headquarters. Our AAPSO delegation worked in teams and covered all the meetings, governmental and non-governmental, sharing information at late-night meetings in preparation for the following day. After a few days, violent demonstrations materialized outside the hotel even making their way inside. The demonstrators were a group of Jamaicans who had been wreaking havoc in Kingston, the Jamaican capital, opposing the country's socialist prime minister, Michael Manley's outspoken leadership of the campaign for the NIEO. Most people assumed that the demonstration was a

Carter administration CIA operation with the goal of regime replacement in Jamaica (a goal that was soon achieved).

It was also at the Special Session on Development that I heard the first rumours of Indigenous opposition to the Sandinistas, who had taken power in Nicaragua a year earlier. I picked up a flyer that announced an anti-Sandinista meeting at the UN auditorium, a space that required a government request for its use. It turned out that the Canadian government had made the request on behalf of the National Indian Brotherhood of Canada. The theme was what the speaker termed the "Sandinista genocide" of the Miskito Indians of north-eastern Nicaragua. I knew little about the Miskito situation in the new Nicaragua; three Miskito professionals had attended the 1977 Geneva Indigenous conference, two years before the dictator Somoza was overthrown, but they had avoided talking about Somoza or the Sandinista insurgency that was raging at the time. After listening to the Canadian Indians tell their horror stories about Sandinista crimes against the Miskito people, I introduced myself to the speakers --Chief George Manual and Marie Marule -- and invited them to lunch to learn more. Over lunch I quickly figured out that they did not know much about the situation and had been reading from a script. It seemed our fledgling international Indigenous movement would be called upon to deal with this situation. And I realized that the U.S. government, intent on getting rid of the Sandinistas in Nicaragua, would also make use of the movement.

Immediately, I contacted Alejandro Bendaña, a diplomat I knew in the Nicaraguan Mission to the UN who had grown up in the United States and had a Ph.D. in History from Harvard. He was well aware of the Miskito situation and suggested I visit Nicaragua and see for myself. Alejandro had been active in the anti-Vietnam war and Latino movements as a student and had only returned to Nicaragua to help out with reconstruction and nation-building after the fall of the Somoza dictatorship a year earlier. He and many other Nicaraguan Sandinista activists in the United States had long supported the American Indian Movement and had attended annual Treaty Council meetings. The tie between the Sandinistas and the American Indian Movement had been created after the 1973 siege of Wounded Knee. AIM leaders were deeply touched when they received a letter of support from the co-founder of the FSLN, the Sandinista national liberation movement, Carlos Fonseca. So, the rumblings from a remote corner of Nicaragua involving a few hundred Christianized Indian communities did not count for much in AIM's big picture. My own fear was that the Central Intelligence Agency of the United States was up to its old tricks, fashioned in Southeast Asia when they armed the ne-



glected mountain tribes, a project that had a devastating impact on the Hmoung people in Laos and could force the Miskitos to pay a similar price.

Although my doctorate in history specialized in Latin American history, and I possessed a general knowledge of the entire history of South and Central America, my in depth research focusing on northern Mexico, and particularly the region that was taken militarily by the United States in 1848, becoming a territory of the United States. I began a crash course in the history of Nicaragua and particularly the Indigenous peoples there. Fortunately, I was referred to a young Stanford anthropology graduate who was in New York, where he had grown up, visiting his mother. Phillippe Bourgois knew everything there was to know about the Sandinistas' relations with the Miskitos in north-eastern Nicaragua, and it was not good news. In Central America researching his dissertation on migrant banana workers in Costa Rica, many of them Guaymi Indian contact workers from Panama, Phillippe visited Nicaragua soon after the revolution and spent several months in the Miskito region. He dismissed the allegations of massacres and genocide that George Manuel had levelled against the Sandinistas, but warned that the Miskitos could be the Achilles' heel of the revolution. This was where the United States would aim if it tried to destabilize the Sandinista government, a platform being openly touted by the Reagan presidential campaign.

The following spring I was to spend six weeks in Nicaragua, much of it in the Miskito region, travelling to dozens of villages. It would be the first of nearly a hundred trips to Central America over the decade, both to the Miskito region of Nicaragua as it became a war zone and to the Miskito region of Honduras, where thousands of Nicaraguan Miskitos were living in limbo as refugees. What with the 1981 genocidal military assault on the Mayans in Guatemala, forcing tens of thousands of them into Mexico, the situation of Indigenous peoples as refugees became a focus of my own work. While the international Indigenous movement easily unified around condemnation of the Guatemalan regime, in the case of Nicaragua, the movement was antagonistically divided throughout the 1980s. Cold War anti-communism reared its head in the midst of authentic concerns.

## **Dead End Road to Self-Determination**

I continued my research on the UN system, monitoring the 1980 General Assembly meetings and sitting in on the debates in the Third Committee, which deals

with human rights issues that are then taken to the General Assembly. At that time, unlike two decades later, security at UN headquarters was light, and registered NGOs and journalists could easily enter the diplomatic lounges to lobby or interview diplomats. I was mainly trying to learn and map out the UN system in order to better understand and explain it to others. I had briefly visited the General Assembly in the three previous years and had met supportive individuals. One was Rafael Anglada-Lopez, a Puerto Rican lawyer who was lobbying for the independence of Puerto Rico and who familiarized me with the workings of the UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples, known as the Special Committee on Decolonization or the Committee of 24. It was established in 1961 by the General Assembly to monitor the 1960 Declaration on Decolonization<sup>17</sup> and annually reviews territories applicable under the Declaration and makes recommendations. It allows statements from representatives of non-self-governing territories and also carries out on-site investigations.

This was the entity that Jimmie Durham envisaged as a site in which Indigenous nations could be included. Soon after the establishment of the committee, the U.S. government declared that Puerto Rico was not a colony. Nevertheless, thanks to the persistence of the Puerto Rican independence movement and its allies, it is annually reviewed by the Committee, and conducts hearings to hear speakers from all sides of the political spectrum – as it does in the case of the other listed territories. However, new listings would be difficult to push through. I continued to study the International Court of Justice's advisory decisions regarding Namibia and Western Sahara, which had led to the establishment of the UN Council on Namibia and, for Western Sahara, being added to the list of non-self-governing territories taken up by the Decolonization Committee. These routes would be of interest to particular Indigenous peoples whose governance and territories are claimed by a particular state.

Clearly, to establish general international law regarding Indigenous peoples, we would need to be creative and devise new proposals that fitted the circumstances. The first of these was to be a Working Group, eventually leading to the establishment of the Permanent Forum on Indigenous Issues and the UN Declaration on the Rights of Indigenous Peoples. I moved on from the General Assem-

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17 General Assembly Resolution 1514 (XV) of 14 December 1960.

bly to Geneva for the six-week - February through to mid-March 1981 - annual meeting of the UN Commission on Human Rights (UNCHR).

## **My First UN Commission on Human Rights**

I knew I was in for a rough first experience at the February 1981 Commission on Human Rights, with the Reagan administration firmly ensconced in power, but I was not prepared for what - or whom - I encountered there: ghosts of the disappeared, *los desaparecidos*. I met their relatives—mothers, husbands, wives, children, brothers, sisters, friends and colleagues of the disappeared, often themselves having been tortured, all of them forced into exiled lives. I spent hours in the circle of people who would gather each day around members of the Madres de Plaza de Mayo, which mothers of the disappeared in Argentina had begun two years earlier with their silent vigils in the plaza. Others who spoke for the disappeared were from Chile, Brazil, Bolivia, Uruguay and Paraguay -- the military regimes that had formed the infamous “Operation Condor” following the 1973 military coup in Chile, a sort of Latin American Interpol specifically designed by its U.S. creators to neutralize democratic opposition movements using torture, massacres and death as the tools of control. The regimes found the easiest way to neutralize their opponents was simply to make them disappear, dumping bodies in mass graves and into the depths of the ocean. This brilliant solution to political conflict was already being re-created in El Salvador, Guatemala and Honduras, and Argentine torturers would soon be sub-contracted by the Reagan administration to train Nicaraguan ex-national guardsmen in their techniques. I had read the reports, knew the numbers of disappeared, attended rallies condemning U.S. complicity. But meeting the torture victims who had managed to survive and escape face to face, and meeting the family survivors of the dead and disappeared was something I was not emotionally prepared for.

The Serpentine delegates' lounge next to the conference room where the Commission met was full of these wounded and traumatized people. This was the first time it really sank in that the UN human rights bodies were a matter of life and death, and not simply talk and bureaucracy. I realized that many governments took human rights accusations seriously, even though the United States did everything in its considerable power to prevent the U.S. public from knowing about the human rights proceedings. The Carter administration had tried to undermine

the Commission by turning it into a forum on the alleged repression of Soviet Jews and Soviet dissidents, particularly calling for the freedom of the banned physicist, Sahkarov, whose wife Elena Bonner epitomized the U.S. government's version of human rights.

The Reagan people continued this campaign and were even worse. The head of the U.S. delegation to the Commission was Richard Schifter, a corporate lawyer with the influential Washington D.C. firm, Kampelman, Shriver and Hoffman. Schifter struck me as an obnoxious and arrogant loudmouth who knew nothing about international human rights law and who cared even less—his role was to debunk and discredit human rights, not to participate in the proceedings.

Schifter's attitude reflected that of the Reagan administration when the Geneva "Democrats Abroad" chapter hosted Schifter for a two-hour lunch meeting. My friend, Lorraine Ruffing, who was active in the chapter, invited me to go as her guest. I took copious notes on his rambling rant, and afterwards typed them up and distributed the anonymous document widely, causing quite a stir, especially among the African delegates. Schifter had confided to his all-white U.S.-citizens only luncheon audience that, "Africa has no interest in human rights, only in their own issues." Of course, among "their own issues" was the apartheid regime in South Africa, for which the proposed solution of the U.S. was "constructive engagement", that is, investment in and support for the regime.

Schifter had begun his talk by stating that: "The UN Human Rights Commission exists for one purpose: to investigate human rights infringements by rightist forces in Latin America." However, Schifter called the Commission's investigations of Latin American atrocities "a narrow focus" and then tried to persuade the Commission to follow what he described as the much better U.S. policy of "gentle nudging" of the rightists towards an end to the killing. It sounded a lot like the "constructive engagement" he was promoting for the white supremacist South African regime. Nor did Schifter acknowledge how those "rightist" forces in Latin America had come to power and who had trained their militaries in the fine art of "interrogation" and counterinsurgency; he did not mention the U.S. sponsored military coups or the fact that murderous soldiers were trained at the infamous U.S. School of the Americas, then located in the Panama Canal Zone, later renamed and relocated to Fort Benning, Georgia where it carries on such training to this very day. Another main target of the Commission, Schifter argued, was the state of Israel. He launched into a history of the Commission and Eleanor Roosevelt's role in its initiation and her solid support for the partition of Palestine

and the establishment of Israel, arguing that the Commission had strayed far from its historical roots, evidenced by its condemnation of Israel for its occupation of Palestinian territory and blocking of the establishment of a Palestinian state. Schifter named three countries as “sincere countries that don’t act in their own interests” with regard to human rights: Denmark, Netherlands and Norway, without noting that they too had voted in favour of the resolutions condemning human rights abuses by Israel, the apartheid regime, and the Latin American dictatorships. He made clear that the Reagan administration was considering withdrawing from the Commission, and even the United Nations itself.

Reagan’s newly-appointed ambassador to the United Nations, Dr. Jeanne Kirkpatrick, “will be in policy-making more than any other UN representative,” Schifter warned. Kirkpatrick was especially known for her vehement hatred of the Sandinista government in Nicaragua, and her thesis regarding the difference between “authoritarian” rulers, which she claimed could change, and “totalitarian” ones that had to be crushed from the outside as they could not. Schifter took off in that direction, arguing that the Sandinista Ministry of the Interior (headed by one of the Sandinista founders, Tomás Borge) was “controlled by communists”, and that the FMLN opposition to the military-controlled regime in El Salvador was communist. Schifter echoed Kirkpatrick’s refrain that “once a country is in the Soviet orbit, it is lost for good”. He argued that: “Salvador’s problems are endemic to Salvador and no one outside is to blame, yet the U.S. is kindly taking responsibility to help build infrastructure and to stabilize El Salvador, while the Soviets exploit the endemic situation.” Finally, regarding Central America, Schifter said it was irrelevant, and that the real concern of the U.S. was Mexico and a possible communist takeover.

Schifter ended his long diatribe by alleging that Southeast Asia “has proved that the domino theory is correct, and were the trend lines of the 1970s to continue, the United States would not survive.” He was referring to the Vietnamese victory over the United States as having emboldened and awakened liberation movements all over the non-Western world. Instead of leaving the Commission and the UN, the Reagan administration would take the Carter administration’s call for “constructive engagement”, forge human rights into a hammer, and accompany those methods with pumped up paramilitary counterinsurgency along with the usual bribes and threats (euphemistically called “carrots and sticks”).

In those days, international non-governmental organizations had gained a considerable voice in the UN human rights field, not equal to states by any means

but they were allowed multiple 15-minute statements as well as written statements produced and translated into all five official languages of the UN. During the Reagan years, all those NGO privileges were swept away due to “budgetary considerations”. What happened to the money? UN dues are calculated according to member states’ gross national product, meaning that the U.S. is assessed the highest dues, nearly 50 percent of the UN budget at the time. The Reagan administration began withholding payments, and earmarking payments it did make only for particular purposes, never human rights.

In 1981, however, each NGO with UN consultative status was still allotted 15 minutes’ speaking time on each of a dozen agenda items. I spoke on behalf of AAPSO under several items. For most items, I read statements AAPSO had prepared on apartheid, Israeli occupation, the Cyprus question, peace and development as human rights issues. However, AAPSO also allowed me to speak and lobby on the Indigenous issue. It was my first time speaking to a roomful of diplomats from every country in the world. I was surprised when many different delegations asked to meet with me and learn more about the Indigenous peoples in the United States.

To my surprise, I met the recently appointed California Supreme Court Justice, Frank Newman who became an important mentor and friend. I had heard Frank speak in 1977 when he was still Dean of the University of California, Boalt School of Law. It had been at a United Nations Association forum, the audience filled with elderly retired diplomats and their spouses, plus a few perky law school students. During the question and answer session, I made a pompous statement about the 1977 Indians of the Americas Conference, and Frank drew a blank but graciously acknowledged the information. I had noticed news of his appointment by Governor Jerry Brown to the state Supreme Court, joining two other Brown radical appointees, former lawyers for Cesar Chávez’s United Farm Workers, Rose Bird and Cruz Reynosa. (With a right wing surge in California, as in the rest of the country, Judges Bird and Reynosa were voted out of office after Republicans took the state governor’s office in 1983, and Frank resigned and returned to Boalt rather than standing for re-election.) Despite his new high status position, Frank attended the UNCHR in 1981, as he had for two decades, beginning as a representative for ISMUN, the UN student organization. I introduced myself as the rude questioner at his lecture four years earlier, and he actually remembered, although not at all negatively. A big-hearted person if there ever was one, was Frank. We spent many hours talking during those six weeks and continued the

conversation until his death in 1996. Frank had been involved in helping design the Council for Namibia and explained in detail how new bodies could be built within the UN system.

I began to think of the UN as a giant “big top”, a many-ringed circus to which new rings could be added, but where existing ones were difficult or impossible to break into, except for the human rights ring. The intense six weeks at the Commission made me realize that, flawed as it was, the United Nations was the only institutional barrier to - imperialist domination. It was clear that the Soviet Union, although a straw man for U.S. justification of militarism and dominance, was just that, insignificant in power and lacking the will to control the world compared to the United States. The UN was the only recourse for peoples of the Third World and for the oppressed within the empire. I could not forget the *desaparecidos*.

Towards the end of the Commission, Bertrand “Bertie” Ramcharan, from Guyana, an international lawyer on the UN staff of the Commission, also a university lecturer, invited me to give a presentation on the aspirations of the incipient international Indigenous movement at the Geneva Institute. I thought a tiny group of academics might show up, so I was surprised to find dozens of attendees gathered around a huge seminar table, many of them from government delegations to the Commission. During the discussion, one person, a Swedish academic, commented that if the Indigenous aspirations I outlined were to be enacted, it would destroy the United Nations. I argued that the inclusion of Indigenous self-determination would serve the mission of the United Nations well and actually strengthen it.

### **Now or Never in the 1981 Sub-Commission**

By the time I landed at Geneva at the end of July 1981 for the month-long Sub-Commission meeting, I felt like a veteran human rights lobbyist. Little did I know what lay in store for me. Up until that time, I had observed and studied the process. In this meeting I would be called upon to act decisively and aggressively in concert with others, and to put into practice what I had learned abstractly. I had come directly from three months in Central America and Mexico, realities much on my mind, especially Reagan administration threats against the Sandinistas and the other liberation movements in Central America, with Mexico a highly vulnerable ally to those movements.

Theo van Boven was director of the UN Division of Human Rights (now known as the High Commissioner for Human Rights), which was based at the UN offices in Geneva. Van Boven is Dutch and a renowned specialist in international human rights law. Human rights advocates adored van Boven. He was appointed in 1977, so the first four years of his tenure paralleled the U.S. Carter administration's focus on human rights. Not surprisingly, he would be the first to go under the Reagan administration. Van Boven took two initiatives in the early days of the Reagan administration that would seal his fate. One was to make it possible to create a working group on the rights of Indigenous peoples; the second was to organize a UN seminar on racism in December 1981, to be held in Managua.

Early in the Sub-Commission, Bertie Ramcharan asked to meet with me, with a message from Mr. van Boven that if anything were to be developed for Indigenous peoples within the UN system, it would need to emerge from this meeting of the Sub-Commission. We had planned, since the 1977 conference, to get a foothold in the Sub-Commission, since it was a smaller and easier body to lobby than any other. And it was the UN human rights body most open to non-governmental participation and even the initiation of proposals, despite the complaints of both the United States and the Soviet Union about its activism. Most importantly, the Sub-Commission had initiated the Study on Indigenous Peoples. However, Indigenous organizations had planned to wait until 1982, the fifth anniversary of the 1977 conference, to mount our campaign. We had even planned a non-governmental conference on Indigenous land rights for September 1981, to take place after the Sub-Commission meeting, which we planned to use as a building block for the 1982 lobbying effort. Yet it seemed prudent to follow van Boven's advice, as he was not a man to make rash recommendations. The problem was that Mario Ibarra and I alone among the non-governmental participants present had ties with the Indigenous lobby, and I had credentials from the Afro-Asian Peoples Solidarity Organisation, from which I did not have a mandate to be active in the Sub-Commission beyond reading statements from the AAPSO secretariat.

Mario and I called the New York office of the International Indian Treaty Council and asked them to send someone. Bill Means, the IITC director, gave us permission to write a proposal on behalf of the IITC to circulate among the NGOs for them to sign on to, and said he would send Wally Feather over from Northern Ireland, where he was dodging British rubber bullets on a fact-finding mission. Wally, a young Lakota, arrived on the weekend of the first week of the four-week



session, rather traumatized and carrying on his leg a wound from a rubber bullet, belying its benign name. Wally, Mario and I wrote a statement calling on the Sub-Commission to establish a working group on the rights of Indigenous peoples based on the model of a half-dozen other working groups such as the Working Group on Slavery and Slave-like Practices. However, we proposed that the mandate of the group, unlike the others, be broad rather than narrowly legalistic. Also, unlike other working groups, we wanted it to be open to Indigenous organizations' full participation, whether or not they had official UN status. Finally, the working group was to have no time limit. We made copies of the statement in the form of a petition addressed to members of the Sub-Commission, which we asked other human rights NGOs to sign. Within a few days we had the signatures of two dozen NGOs and made copies to distribute to Sub-Commission members. Because I was representing the Afro-Asian Peoples Solidarity Organisation, and had been for the past three years, I was able to lobby the African, Arab and Asian members, whom I had come to know well. The Sub-Commission did not require consensus to take a decision but preferred it, so if a proposal were strongly opposed by any member, it would generally be tabled indefinitely. Theo van Boven and his assistants quietly talked it up with members, and the new Norwegian expert on the Sub-Commission, Asbjørn Eide, wholeheartedly supported it and began drafting a resolution. Everything was set.

No sooner had we gone through these painstaking negotiations and filed the NGO petition as an official document to be distributed to the Sub-Commission members in the five UN languages, a representative for the Indian Law Resource Centre (ILRC), Tim Coulter's organization, arrived from Washington D.C., demanding that the proposal be withdrawn because they had not been included. I pointed out that no one had barred them from arriving at the Sub-Commission meeting on time and suggested that they submit a letter supporting the proposal, which would also be an official document. The ILRC lawyer was quite angry and certain that we had deliberately excluded the organization. I assumed that this was about the rivalry that had been raging between the ILRC and the Treaty Council since the 1977 conference. The last time I had been in contact with Tim Coulter was early in 1978 when I tried to persuade him to join the North American delegation I was helping organize for the World Peace Council's conference on racism, which he had refused, Cold War fear I suspected at the time. At the time of the 1981 Sub-Commission when the proposal

for a Working Group was in the works, I was not aware that Armstrong Wiggins, a Nicaraguan Miskito leader, had left Nicaragua and joined the ILRC, or that the ILRC had embraced the anti-Sandinista agenda promoted by the Reagan administration. When I learned that, I realized that Coulter probably thought my involvement in initiating the working group was related to the Sandinistas somehow, although that was not in my mind at all. This was a preview of the vicious ILRC attacks I was to face the next seven years.

Despite ILRC complaints to Mr. van Boven, the Sub-Commission passed the resolution presented by Sub-Commission Expert Asbjørn Eide, who would be elected chair of the Working Group at its first meeting in 1982 and serve for the first four annual meetings.

## **NGO Conference on Indigenous Peoples and Land**

Another recommendation made by the 1977 NGO conference was to the NGO community to organize a second conference that would focus on the land and its relationship to Indigenous rights, broadening the geographical scope to global. The NGO Sub-Committee on Racism followed through with this directive and organized the International NGO Conference on Indigenous Peoples and the Land, which was held from 15-18 September 1981 at the UN in Geneva.

At the end of the Sub-Commission, we -- the same collection of organizations and individuals that had organized the 1977 conference in Geneva -- began compiling the documents and arranging logistics for the upcoming conference that was two weeks away. Although the conference included Indigenous peoples from all over the world, the majority were Indians from all parts of the Western Hemisphere, which made up the majority of the delegates.

The 1981 conference was organized into four commissions, whose individual reports made up the final report, covering the following areas: land rights, international treaties and agreements; land reform and systems of tenure; Indigenous philosophy; and the impact of nuclear arms build-up. Six Indigenous international and regional groups were invited to solicit and submit documentation for the conference and to organize delegations: the International Indian Treaty Council; the World Council of Indigenous Peoples; the South American

Indian Council (CISA); the Australian National Conference of Aborigines; the Indian Law Resource Centre (ILRC); and the Inuit Circumpolar Conference.<sup>18</sup>

Participants in the 1981 conference included 150 Indigenous representatives from the Americas, as well as aboriginal representatives from Australia and Saami delegates from Norway. Fewer governments participated officially than in 1977, due at least in part to the call by the Reagan administration for a government boycott of the conference. Among Western countries, only the Government of Norway registered, although other governments were present unofficially, and dozens of African, Asian and Latin American governments registered and attended. Nearly 50 international NGOs with consultative ECOSOC status registered. Dozens of scholars and experts participated as individuals.

A striking aspect of the 1981 conference was the active participation of national liberation organizations, including the Palestine Liberation Organisation (PLO) and the Southwest Africa People's Organisation (SWAPO), with the latter representative chairing the Commission on Transnationals.<sup>19</sup> The Farabundo Marti National Liberation Front/Revolutionary Democratic Front of El Salvador (FMLN/FDR) also participated, and special sessions were held on El Salvador, Angola, Namibia and Nicaragua.

The two-year-old FSLN (Sandinista) government of Nicaragua sent a special delegation headed by Comandante Lumberto Campbell, Vice-Minister for the Atlantic Coast, and representatives of the Miskito and Sumo Indigenous communities, while Miskito leader Hazel Law participated as an independent critic of the Sandinista policy. I had spent six weeks in Nicaragua three months earlier, most of that time in the tense northeast region, Miskito and Sumo Indian traditional territory. In campaign speeches for the presidency, Ronald Reagan had vowed to overthrow the "communist" Sandinistas, who had driven out the U.S.-installed and supported Somoza family dictatorship in July 1979. President Reagan lost no time in implementing his promise, and a counterinsurgency was being amassed

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18 *United Nations Document* No. E/CN.4/Sub.2/476/Add.5, 198a: 56. The ICC did not respond to the invitation. The invited Indigenous NGOs were selected due to their status as consultative NGOS with ECOSOC. During the 1980s and 1990s, numerous other Indigenous NGOS gained consultative status.

19 When SWAPO took power in Namibia and the African National Congress (ANC) in South Africa in the early 1990s, they developed a cooperative relationship with the international Indigenous movement, developing initiatives for the San people ("Bushmen"), who are the Indigenous people of Southern Africa.

across the northern border in Honduras, what came to be known as the “contra army”. The Miskitos and Sumos, whose traditional lands overlapped the border, were caught in the middle, and the border region was rapidly militarized on both sides. Several Miskito leaders, including Steadman Fagoth, Armstrong Wiggins and Brooklyn Rivera, had left the country to form an armed opposition to the Sandinistas. Hazel Law was critical of Sandinista actions and policies but never left Nicaragua. The issue of the Miskito people in Nicaragua divided the international Indigenous movement and its allies, as well as regional and national Indigenous and European and North American solidarity organizations, such as Survival International, Cultural Survival and the International Work Group on Indigenous Affairs (IWGIA). The Indian Law Resource Centre in Washington D.C. led the exiled opposition, with Miskito leader Armstrong Wiggins on the staff. The Treaty Council split over the issue, and one of the founding leaders of the organization, Russell Means, joined the armed opposition (MISURASATA) led by Brooklyn Rivera. Some Indigenous individuals in Latin America joined the anti-Sandinista campaign but, generally, they regarded the Sandinistas as an ally beleaguered by U.S. imperialist intervention.

The excuse given for the Reagan administration's call for a boycott of the land conference was the presence of Romesh Chandra of the World Peace Council (WPC) as president of the conference. The Reagan administration accused Chandra and the WPC of being a Soviet front, and Ms Ballantyne and WILPF of being Soviet dupes. This had not been an issue at the 1977 conference when Chandra was vice-president and Ballantyne president. With the Carter administration championing international human rights, it would not have been appropriate. President Carter's UN representative, Dr. Andrew Young, a high-profile African American civil rights leader, cooperated to some extent with the IITC in organizing the 1977 conference, although he expressed his displeasure at the initiative. The Carter administration sent two activist Native Americans, Kirk Kickingbird and Shirley Hill Witt, as members of the official U.S. delegation. At the time, IITC people were suspicious of the cooperation and kept the administration at arm's length in order to remain independent. The Reagan administration was just the opposite, even threatening to pull out of the UN, and the going was tough over the following eight years. Yet much would be accomplished thanks to having the Working Group on Indigenous Populations as a focal point to work from.

Despite, Cold War politics being played out in the background, the participants unanimously supported the conference's final declaration and resolutions,

which manifested solidarity with Indigenous peoples in their “just struggle for self-determination and for the right to determine the development and use of their land and resources, and to live in accordance with their values and philosophy”.

## **UN Human Rights Seminar on Racism in Managua**

During the second half of the UN Decade to Combat Racism, the UN Division of Human Rights, under Theo van Boven's leadership, organized regional seminars on racism, one being for Central America and the Caribbean. Nicaragua volunteered to host the seminar, which took place in Managua during two weeks in December 1981.

As it turned out, and perhaps not a coincidence, the seminar coincided with “Red Christmas”, the code name for the beginning of U.S. Central Intelligence Agency attempts to destabilize and overthrow the Sandinista government. In November 1981, the Reagan administration signed a “finding”, authorizing the CIA to spend USD 19.5 million on the Contra project. The Red Christmas attacks of 21 December 1981 made use of several thousand CIA-trained guerrillas—mostly Miskito Indians, followers of Steadman Fagoth who had left for Honduras earlier in the year -- and attacked Miskito villages along the Rio Coco border with Honduras. They were trained by former Somoza guardsmen and officers on loan from the bloody Argentine military dictatorship that had been established in 1976 under General Jorge Rafael Videla, followed in 1981 by General Roberto Viola, then Leopoldo Fortunato Galtieri, the masters of murdering civilians, torture and disappearances until their collapse in 1983. The aim of the Red Christmas attack was to create a militarized north-eastern front in order to draw the Sandinista military there, while the real Contra war would take place on the north-western Honduran border and the short southern border with Costa Rica. In western Honduras, former Somoza guardsmen were already operating as the FDN. The CIA's objective was to place civilians, Miskitos, in the crossfire so that the U.S. could accuse the Sandinistas of massacring the Indians.

Apparently, in order to launch Operation Red Christmas and announce their intentions to the world, on December 12, the day before the Managua seminar was to begin, Contras sabotaged the only international airplane Nicaragua owned, and which flew a roundtrip daily from Mexico City to Managua, stopping in San Salvador for passengers to board and disembark. The Mexican authorities

quickly determined that a passenger who had boarded in San Salvador that morning had placed C-2 explosive under a passenger seat after the aircraft landed in Mexico City and left the plane, never to be identified. The device had a timing mechanism set to go off when the plane was scheduled to be in the air, returning to San Salvador and on to Managua. However, the plane was delayed and exploded at the gate, killing a baggage handler and maiming a flight attendant. The explosion blew out the plate glass windows of the waiting area and fire took hold, quickly extinguished by very alert Mexican action. I was one of the waiting passengers.

With that traumatic near death experience haunting me, following the extended investigation by Mexican authorities, I made my way on a COPA flight, the Panamanian airline, to San Salvador, and was finally able to get on a TACA Salvadoran airline flight to Managua. It had taken two days with no sleep and no change of clothes as my checked bag had been destroyed by the explosion. I arrived the morning the seminar began, hailed as a survivor of terrorism.

It was a UN regional seminar for Central America and the Caribbean but I was invited as an outside observer, as were representatives of the International Indian Treaty Council, the World Council of Indigenous Peoples and the Indian Law Resource Centre, the three NGOs with ECOSOC status, along with a number of U.S. and Latin American anthropologists who were studying and working with Indigenous peoples in the Americas. In the context of the UN Decade to Combat Racism (1973-83), the UN Human Rights Secretariat organized regional seminars on "recourse procedures and other forms of protection available to victims of racial discrimination and activities to be undertaken at the national and regional levels". The papers presented, the documents and the Final Report comprise a rich collection of legal standards and protective measures for the colonized peoples of the region, both the Indigenous and the descendants of enslaved Africans. Largely ignored in subsequent literature, the Managua seminar was the first intensive discussion on Indigenous peoples to take place within the formal UN system, the previous two conferences having been organized by non-governmental organizations, and it served as a positive precedent for future activities.

In reviewing the problems encountered by Indigenous peoples, key issues were identified. The ruse adopted by many governments in the past was ruled invalid. The seminar found that legal provisions that establish formal equality, whether in international instruments or in national constitutions, are not effective means for protecting Indigenous peoples' rights unless certain preconditions are

met.<sup>20</sup> Another assumption about Indian communities, noted in the *Final Report*, was questioned in discussing their marginalization. First, it was pointed out that not all Indigenous peoples and nations had been marginalized and, secondly, that in nearly all cases where this had occurred, they had not sought such a situation themselves. Equally questionable was the assumption that integration was an effective response to marginalization. Indeed, the seminar concluded that integration often results in cultural alienation, and policies of forceful assimilation, incorporation or integration of Indian nations, peoples or communities entail forms of racism. The seminar noted that interference in the organizational structures of Indian nations and communities, whether by state authorities, organizations from the dominant society or transnational forces, always had the same effect -- destruction. It made no difference whether that interference came from inside or outside the country. This observation was in response to the concept of "internal colonialism" as a characterization of state practices towards Indian communities. If the destruction reaches a certain irreversible stage, it should be identified as "ethnocide", the term used in the San José Declaration from a recent UNESCO meeting of experts in Costa Rica.

In discussing measures to combat the negative effects being experienced by Indigenous peoples, a number of proposals were advanced. Some participants stressed the need for profound structural changes in societies. Others believed some measures were immediately feasible. For instance, the case of peoples who occupy territory that crosses two or more borders was viewed as particularly complex and acute. It was suggested that the question of self-determination for those peoples should be addressed urgently. As a minimum, respect and support for Indigenous peoples' own internal organization and governance and their cultural manifestations were seen as the starting points for addressing the issues. This would include Indigenous participation in the decision-making processes on all matters affecting them. The seminar recognized that there was an emerging realization that Indigenous peoples have national identities of their own, which go beyond mere solidarity in the face of discrimination and exploitation. It concluded that self-determination is the basic precondition for Indigenous peoples to enjoy fundamental rights.

The seminar looked at the recourse procedures available to Indigenous peoples and evaluated their effectiveness, especially with regard to cultural and lin-

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20 *Final Report*. UN Document No. ST/HR/SER.A/11.

guistic factors. A number of important points were raised. The experts concluded that the international human rights instruments do not take sufficient account of the particular realities of Indigenous peoples' needs and aspirations. Furthermore, recourse procedures must be devised that take into account the threat to the very survival of Indigenous peoples as peoples, and which include protection for their territories and the right to self-government. The experts noted that recourse procedures at the national level were either non-existent or even operated against Indians, and they were therefore necessary at the international level.

Participants felt that the problem of discrimination against Indian peoples was so complex that innovative approaches to devising recourse procedures had to be sought. The basic Indigenous demands for self-government, maintenance and protection of the land base and the preservation of culture necessitated a constant international presence in matters affecting Indigenous peoples. A proposal was made to press the UN General Assembly to establish an office of the International Ombudsman on the Human Rights of Indigenous Populations (this proposal was later realized in 2001 with the establishment of the Special Rapporteur on Indigenous Peoples).

The question of the extreme poverty of Indigenous communities and the lack of wealthy individuals among them brought the suggestions that provisions should be made to make financial and other assistance available for the investigation and execution of Indigenous complaints. Finally, the seminar noted that recourse procedures were temporary measures in many instances and that political, economic and social changes were necessary to remove the root causes of such discrimination.

The most urgent issue of racism in the region was what was already being described as the "genocidal" policy of the Guatemalan military government against the highland Mayan Indians, mainly Quiche speakers (Quiche being the language of the majority of Mayans, with 22 other Mayan languages among them). Two Mayan Quiche exiles participated in the seminar and provided information and evidence of a brutal counterinsurgency meant to destroy the Guatemalan leftist guerrilla movements by what we would now call ethnic cleansing of the Indigenous communities where the guerrillas, with significant numbers of Mayan fighters and village support, operated; through terror, torture and murder, the Guatemalan military aimed to force hundreds of thousands of Mayan civilians into exile across the border in the Mexican state of Chiapas, leaving the guerrillas with no population base in their liberated zones. Bad as things were there in De-



ember 1981, they were to get worse three months later when a military coup brought born-again Christian General Rios-Montt to power for 18 months of more determined ethnic cleansing, including the slaughter of whole villages, burning of homes and crops, pure terror, and tens of thousands of refugees illegally hiding in the Mexican state of Chiapas, with the Mexican army attempting to seal the border to prevent them from coming.

As a part of the UN seminar agenda, the Sandinistas had arranged for all the participants to fly out to Bilwi (Puerto Cabezas) in north-east Nicaragua on the Caribbean coast -- the only way to get there during rainy season -- and from there to drive to one of the nearby coastal Miskito villages, Krukira, which I had visited in the spring. There, we were hosted by the Miskito Moravian pastor of the village and entertained with traditional dances and songs. We were aware of the gravity of the situation - only 40 miles north of us Steadman Fagoth's armed Miskito group, MISURA, having received CIA paramilitary training for the past eight months, was preparing to attack the Miskito villages on the Nicaraguan side of the river border with Honduras. On our return to Managua, Theo van Boven, the UN Director of Human Rights and Chairman of the seminar, held a press conference, summing up the rather radical recommendations in favour of Indigenous peoples' rights. He also condemned "a certain state" for its aggression against the Nicaraguan government, which he viewed as disruptive to the advancement of the Indigenous peoples of the eastern region. Within a year, van Boven was forced out of his position as a UN official.

In talks with the Mayans, Miskitos and Sumos, Chockie Cottier (Lakota from South Dakota, associated with the San Francisco American Indian Centre) and I decided to establish an organization along with a bilingual newsletter that would publicize the situations of Indigenous peoples, especially those caught up in warfare in the context of international human rights. We would call the quarterly paper, *Indigenous World/Mundo Indígena*, publishing the first issue in March 1982. The following year we would apply, and in 1985 gain, ECOSOC-NGO status for the Indigenous World Association, which remains active in UN Indigenous work.

## **First Meeting of the Working Group on Indigenous Populations**

The UN Commission on Human Rights approved the proposed Working Group on Indigenous Populations (WGIP) in its 1982 session, as did ECOSOC. The

Working Group met for the first time the week preceding the 1982 meeting of the Sub-Commission, to which it would report. The mandate of the WGIP was spelled out in the UN resolution that established it.<sup>21</sup> The WGIP would meet annually up to five working days -- this soon increased to ten -- before the annual sessions of the Sub-Commission. Its task was to review developments concerning the promotion and protection of the human rights and fundamental freedoms of Indigenous populations, and "especially" information from Indigenous peoples. The conclusions from such reviews were to be submitted to the Sub-Commission. The terms of the resolution were open and broad, despite attempts by various governments to narrow the task to establishing legal standards and writing a convention, both of which could be taken up within the broader mandate. Importantly, the resolution called for open attendance by Indigenous representatives regardless of ECOSOC consultative status. The WGIP was made up of five members of the Sub-Commission, chosen by the Sub-Commission and appointed by its chairman.<sup>22</sup>

At its first meeting in 1982, with a small Indigenous attendance (each year afterwards, the numbers of Indigenous representatives increased and became hundreds, the largest working group in UN human rights history), the WGIP discussed its mandate and reiterated its broad nature. The problem of definition was discussed, as were standards. Several areas of concern were identified and discussed and these were summarized in the Final Report under seven categories: a) the right to life, to physical integrity and to security of the Indigenous communities; b) the right to self-determination, the right to develop their own culture, traditions, language and way of life; c) the right to freedom of religion and traditional religious practices; d) the right to land and to natural resources; e) civil and political rights; f) the right to education; and g) other rights.<sup>23</sup> Observers at the first meeting of the WGIP included the governments of Argentina, Australia, Brazil, Canada, India, Morocco, New Zealand, Nicaragua, Panama, Sweden, the U.S.A., North Yemen, and the Palestine Liberation Organisation. Also represented in the

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21 *United Nations Document No. E/CN.4/ Sub.2/L.772*, pp. 3. 1 September 1981.

22 Five is the minimum number of members allowed on UN Working Groups, as it is required that an equal number of representatives from the five UN regions be members of any UN body. These regions are: the Western states, including Western Europe, North America, Australia and New Zealand; the Eastern European states; Asia; Africa; and Latin America/Caribbean.

23 *United Nations Document No. E/CN.4/ Sub.2/1982/33*. 25 August 1982.

session were several UN specialized agencies, including the International Labour Office (ILO) and the High Commissioner for Refugees (UNHCR). The three Indigenous organizations holding UN consultative status were present, as well as ten Indigenous organizations without such status, eight of them from North America. The ECOSOC NGOs that had organized the 1977 and 1981 conferences sent representatives, as did numerous NGOs that had not previously shown an interest in issues concerning Indigenous peoples. Soon, they would take up Indigenous issues within their own organizations.

Despite the explosive and sensitive issues involved, a remarkable unanimity pervaded the establishment of the Working Group on Indigenous Populations and its first meeting, certainly due in large part to the excellent leadership of its elected chairman, Asbjørn Eide, a Norwegian and Sub-Commission expert member. Some observers pointed out that the presence and participation of representatives of Indigenous groups was the key factor that did not allow the WGIP to become politicized along East-West Cold War lines.

However, it was the presence and testimony of Rigoberta Menchú Tun, a Mayan Quiche leader in exile from Guatemala that galvanized that first meeting and set the tone of urgency that remained inherent to WGIP meetings. Menchu's parents and brother had been murdered by the Guatemalan military in 1980, driving her and her other siblings into exile where she became the most important spokesperson for the Mayan people in their struggle to survive the genocidal project of the Guatemalan military government. Allied with the Guatemalan military, the Reagan administration had successfully protected Guatemala from human rights accusations in the UN until Rigoberta Menchú arrived, changing the situation.

I had met Rigoberta earlier that summer in New York City at activities surrounding the UN Special Session on Disarmament, which included a march from the foot of Manhattan to a rally in Central Park numbering a million people. Rigoberta and I were invited to speak at a summer camp in Vermont for young people from poor backgrounds, where we were roommates for several days. I told her about a new Working Group and persuaded her that it would be useful for her campaign to publicize the situation of the Mayan people in Guatemala. I travelled to Geneva a week before the WGIP began and did not know if Rigoberta would show up. She did, in time for the first meeting of the Working Group.

Rigoberta, her persona and her urgent message about what had happened to her family and what was happening to the rural Mayan population as we spoke

-- she charged genocide -- riveted the five members of the Working Group and everyone in attendance. Amnesty International, although they were not aware that Rigoberta or any Guatemalan Mayan representative would be present, complemented Rigoberta's testimony with a detailed 19-page report of their investigation into Guatemala's human rights abuses, listing horrendous massacres of Mayan civilians, a refugee situation with tens of thousands of Mayans fleeing across the Mexican border, and interviews from a dozen eyewitnesses or victims. We had no problem initiating a strong resolution from the Working Group, condemning the Guatemalan government, which would be taken up and approved at the four-week Sub-Commission that followed. Rigoberta decided to stay for the Sub-Commission in order to help shepherd through the resolution.

The representative of Pax Christi, a very active Catholic NGO, took me to task for having brought Rigoberta under Indigenous auspices, rather than general gross human rights violations, arguing that the Indigenous issue was new (five years did not seem new to me) and had no future in the UN. I begged to differ, saying that the Guatemalan situation was clearly an Indigenous issue since it was the Mayan population that was being attacked *en masse*. I told Rigoberta about the conversation, and she agreed with me, insisting that she would continue to present her case as an Indigenous issue, a stance from which she never budged. Rigoberta's insistence on including the Mayan people in the Indigenous project gave credibility to the Working Group at its first meeting, and a boost to the Indigenous peoples' struggles in Latin America.

In the Sub-Commission, we were lobbying directly against the Government of Guatemala, and this brought that country's delegation into the fray, accusing Rigoberta of being a terrorist and a communist. No Sub-Commission member was from Guatemala but the member from Morocco, Halima Warzazi, took up the Guatemalan government's cause, consulting often with the Guatemalan ambassador. I assumed that the U.S. member would be a problem, too, but he had brought as his alternate a Lakota Sioux Indian from Pine Ridge, Charles Trimble, whose niece had been a student of mine. He recognized my name when I introduced myself because he knew my book, *The Great Sioux Nation*. I introduced Charles to Rigoberta and we had a long talk, gaining his commitment not to oppose the resolution.

Mario Ibarra and I launched a reception for Rigoberta, inviting all 18 members of the Sub-Commission, and all the governments and NGOs attending, timing it to coincide with the Indigenous item on the agenda. The Antislavery Society of

Great Britain (now Antislavery International) agreed to allow us to use their Geneva office for the reception, located only a few blocks from the UN. Surprisingly, all the Sub-Commission members attended, along with most of the NGOs from the Sub-Commission and even a few government representatives. Rigoberta gave an eloquent appeal for support of the resolution against Guatemala. After everyone had gone, several friends stayed for the clean-up, with Rigoberta washing the dishes and scrubbing the floors (she had worked as a maid in her teenage years, and was proud of her skills).

Rigoberta was invited to most of the government receptions that were staged during UN meetings, to which few NGOs were invited. In the end, we won the resolution. Even the Sub-Commission members opposed to it managed to be absent when the vote was taken and passed by consensus, which was required for passage. The chairman of the Sub-Commission, Bangladesh's first president and former Supreme Court Justice, Abu Sayed Chowdhury, who never revealed his opinion on the resolution during the session, waited to take the vote at a time when Madame Warzazi was out of the room.

### **Christopher Columbus at the UN General Assembly**

Given the success of the passage of the Sub-Commission resolution on Guatemala, Rigoberta wanted to attend the upcoming session of the UN General Assembly to lobby its Third Committee in preparation for the next UN Commission on Human Rights and asked me to accompany her and show her the ropes. Since I had a sabbatical year available at my university, I was able to stay for the entire session, then travel with Rigoberta to the six-week UN Commission on Human Rights in Geneva the following February and March 1982.<sup>24</sup>

I was pleased to meet international human rights law specialist Gudmundur Alfredsson at the 1982 General Assembly when he was representing his government, Iceland, before joining the UN staff. I had heard about him as he had written his Harvard doctorate in law dissertation on Greenlandic Inuit self-determination and Denmark's home rule over that people. He had just published a very useful

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<sup>24</sup> Rigoberta Menchú went on to receive the Nobel Peace Prize in 1992, and was appointed UN special ambassador for the UN Decade for Indigenous Peoples, 1995-2004.

article: "International Law, International Organisations, and Indigenous Peoples",<sup>25</sup> the first of its kind.

On the eve of the opening of the General Assembly, representatives -- all men and non-Indigenous -- of the Guatemalan opposition organizations arrived, making it clear that they did not want Rigoberta to dominate the UN lobbying and focus mainly on Indigenous peoples. The representative of the largest of the Guatemalan organizations that made up the URNG (Guatemalan National Revolutionary Unity) -- ORPA (Revolutionary Organisation of Armed People) -- came with a completely different lobbying strategy to the one that Rigoberta and I had formed, and the Indigenous issue was not a part of it. As ORPA saw it, only the Western European missions should be approached, not the non-aligned countries. I believed it was particularly important to lobby the African representatives since it was the African region's turn to chair the upcoming UN Commission on Human Rights that was to meet for six weeks beginning in February. The group had chosen Uganda UN ambassador, Olara Otunu. I had set up meetings with him and with other African ambassadors. ORPA was also not interested in the Indigenous resolution we had shepherded through the Sub-Commission and had brought one of its own, which spoke of "*campesinos*" rather than Mayans. Thanks to the efforts of Frank LaRue, a Guatemalan labour lawyer who had been forced into exile by death threats and actual physical attacks, we reached a compromise and merged the two resolutions as well as meeting with the African group. Frank was a great unifying force, non-competitive and open to new ideas, such as ally-ing with the international Indigenous movement. Having a U.S.-born Anglo father and a Guatemalan mother, Frank was bilingual and bicultural and an effective lobbyist. Frank would go on to serve as UN Special Rapporteur on various issues.

During the General Assembly, Rigoberta was invited to attend an American Indian Movement rally in the Black Hills, protesting Mt. Rushmore and Columbus in October. She accepted and went, much against the wishes of the Guatemala solidarity committee, which was organizing a speaking tour across the United States for her. Like the Pax Christi representative, they were dubious about linking the Guatemalan political/military situation to the fledgling Indigenous issue. They appeared to blame me for Rigoberta's decision to go to the Black Hills, but

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25 G. Alfredsson, *Journal of International Affairs* 36:1 (Spring/Summer 1982) pp. 114. Alfredsson replaced the beloved Augusto Willemsen-Díaz when he retired in 1985 from the UN Human Rights Secretariat in Geneva, taking over the responsibility for Indigenous peoples' issues, serving in that capacity until 1995.

it was her choice. She found the experience bracing and exciting, as she had never before set foot on sacred Native North American land.

I stayed at the General Assembly to monitor the Third Committee. I was sitting in the NGO section, nearly nodding off in boredom, when a proposal was submitted by the governments of Spain, Italy and the United States, along with the Vatican (Holy See in the UN), aimed at acknowledging the significance of the 500-year anniversary of the “encounter” of Europe and the Americas with the landing of Columbus on 12 October 1492. They proposed celebrating that event in the United Nations in 1992. It came as a complete surprise, and I could hardly believe what I was hearing. We had been calling for October 12 to be declared a day of mourning for the Indigenous Peoples of the Western Hemisphere since 1977, and we wanted 1992 to be declared the UN Year of Indigenous Peoples. I was shocked, then disgusted, when the Irish and the Norwegian ambassadors teased the Spanish that their countries had been the first to “discover America”. After a half hour of general hilarity, suddenly the head of the Africa group stood up and walked out of the room, followed by every other African representative. The chairman of the committee, obviously confused, called a ten-minute recess, and the Western European and North American delegates huddled in the back of the hall. I walked there and stood to the side. I heard one say, with apparent sincerity: “Why on earth would Africans even be interested in the issue?” When the African bloc returned an hour later, its elected spokesperson read a statement that condemned the call to celebrate the onset of “colonialism, the trans-Atlantic slave trade, and genocide” in the halls of the United Nations.

That killed the proposal but did not faze its supporters. The Vatican even wanted to expand the concept of “encounter” to include a phrase about the “gift” of bringing Christianity to the heathens. During the decade that followed Spain, the Vatican, Italy, the United States and all the Latin American countries they could bribe (only Cuba refused to join) brought full pressure on the African states to agree, but they refused. Meanwhile the international Indigenous movement and local Indigenous groups of the Western Hemisphere opposed it and insisted on a year of mourning. We won in the end. To pacify Spain and the Vatican for their total defeat, 1993 rather than 1992 was named the “UN Year for the World’s Indigenous Peoples”, followed by a UN Decade (1995-2004) by the same name. Rigoberta Menchú was appointed UN Special Ambassador for the year and the decade, and she was awarded the 1992 Nobel Peace prize, which she accepted in the name of the Indigenous peoples of the Americas and the world. ○

## CHAPTER 4

## The Inner Struggle of Indigenous Peoples

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*Russel Lawrence Barsh*

**A**t a closed-door session of the indigenous peoples' caucus nearly 30 years ago, a group of women from the North American prairies confronted the all-male delegation of Mi'kmaq from Atlantic Canada. "Where are your *women*?" they demanded. The eldest Mi'kmaq in the delegation answered sheepishly, "Who do you think *sent* us here?"

Emerging nations' inner struggles are unlikely to attract attention unless they turn violent. Indeed, emerging nations' inner struggles often contradict their carefully crafted outward appearances.

A universally recognized archetype of "indigenusness" and appearance of global unity were significant achievements of the world indigenous political movement that led to adoption of the Declaration on the Rights of Indigenous Peoples. Indigenous peoples themselves meanwhile discovered and contested their cultural and economic differences in the back rooms and restaurants of Geneva. The latter story remains largely untold.

Indigenous cultures differ in many ways but the status of women was often the focus of contention. At the regional and international levels, mobilizations of women and indigenous peoples coincided and frequently converged. Women were at the forefront of indigenous activism in most countries. Questions naturally arose: was gender equality a prerequisite or an objective of indigenous nations' emancipation? Was gender equality a distraction from indigenous identities, a "Eurocentric" conceit?

The salience of these questions was heightened by conditions within the United Nations system itself in the 1980s. The international civil service was still predominately male, especially in senior ranks—an embarrassing reality that Dr. Daes was to highlight in her address to the 1995 Beijing Conference on the status of women. Women at the UN Secretariat and in national delegations, albeit few, were nonetheless key actors in human rights organs generally and the indige-



nous rights debate specifically. Indigenous leaders approached an international forum digesting its own ambivalence towards gender.

Leading indigenous delegations in the 1980s included the “eastern confederacies” of North America—the Haudenosaunee (including Mohawks) and Wabanaki (including Mi'kmaq)—which have been and, to a great extent remain, *de facto* matriarchies along with the more traditionally decentralized societies of North America and Australasia, which maintained the appearance, if not the reality, of culturally-dictated male domination. Some speakers at UN meetings asserted traditional authority grounded in maleness while others represented institutions governed exclusively by women.<sup>1</sup>

The easy way out of this situation was to insist that it was an internal matter, and none of the business of nation states or the United Nations. This was also the response to the broader question of securing representative government and avoiding abuses of power in a world of liberated indigenous microstates. Most indigenous delegations objected to any application of human rights norms to conditions within indigenous territories. I would contend, however, that this tactical solution has unfortunate long-term consequences for the quality of indigenous governance on the ground. We have not acknowledged that there is a *quid pro quo* between national sovereignty and national responsibility, as I argued elsewhere for the North American context.<sup>2</sup>

In the closing days of the negotiation of ILO Convention No. 169, Canada made the purportedly “non-controversial” proposal that gender equality be acknowledged in the text. Indigenous delegations deemed this a deliberate provocation and they resoundingly (but not quite unanimously) opposed it. As anticipated, their response made many states and workers’ organizations uneasy. It would have been relatively simple to say, “This is a non-controversial proposal; equality has many different forms in our cultures, and we do not believe that, upon close examination, our ways of ensuring the dignity of women will be found lacking.” But many indigenous delegates believed that women *were* subordinate

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1 See, for example, the discussion of the role of gender in Mi'kmaq “checks and balances” in R.L. Barsh and J.B. Marshall., Mi'kmaq (Micmaq) Constitutional Law, pages 192-209 in Bruce E. Johansen, editor, *Encyclopedia of Native American Legal Traditions* (Westport, CT: Greenwood Press, 1998).

2 R.L. Barsh, The Challenge of Indigenous Self-Determination, *University of Michigan Journal of Law Reform* 26 (2): 277-312 (1993); R.L. Barsh, Indigenous Peoples and the Idea of Individual Human Rights, *Native Studies Review* 10 (2): 35-55 (1995).

while others feared that any admission of the possibility of discrimination or wrongdoing was a breach in the wall of self-determination they were building.

## Who belongs?

Gender was not the only issue within the international indigenous coalition that challenged consensus. From the start, indigenous representatives faced the challenge of determining the borders of indigenesness. As early as 1982, private meetings of indigenous representatives at Geneva debated membership in their evolving coalition. Scottish nationalists were not admitted. The Sami had a long struggle persuading Anglo-indigenous organizations of their authenticity. African and Asian tribal peoples continually raised questions, and the Roma and Tibetans eventually saved indigenous peoples some metaphysical headaches by relocating their efforts to other UN bodies.

The question "Who are we?" necessarily moved quickly beyond the facts of physical appearance, geography, even history, to the question "What do we believe?" Every color of humanity could be found at indigenous consultations by the 1990s, and as residents of most Member States. Although the revised ILO Convention and evolving Declaration reaffirmed indigenous peoples' right of self-definition vis-à-vis nation states, expanding membership of the international indigenous coalition continually challenged participants to reconsider what they deemed definitional.

In the final analysis, coalition membership was largely policed by self-selection. The exercise nonetheless produced some agreement on conceptions that found their way into the ILO revision, Agenda 21, the literature of the International Year and Decade and, ultimately, the Declaration. A "special relationship to the land" has become canonical, despite the fact that many self-defined indigenous peoples have been relocated, urbanized or dispersed. It can be defended as an ideal, a matter of values and belief, as opposed to an objective ecological test, leaving it difficult to verify except through action. The ideal of earth-centeredness continues to appeal to emerging indigenous nations globally. It is a way of identifying with but asserting moral superiority over scientists, environmentalists and progressive social movements that has an implicit class component: social as well as moral high ground.

It has proven difficult for indigenous nations to live up to this moral banner. Here in North America, some indigenous communities are leading the opposition to destructive energy mining, while others are demanding development and employment. Nearly all are demanding more financial support from governments that make a lot of their money from taxing mining and the manufacture and sale of environmentally-destructive products. It is easier to take a principled line when there is no choice to become an investor, a worker or a tax beneficiary of such activities.

### **Who rules?**

Communitality is the other half of the indigenous self-definition and ideal, and it is implicit in the entire UN indigenous rights project, although sometimes packed inside the notion of “sovereignty”. By communitality I mean the ideal that the individual must yield to the greater good of the group because the very essence of the individual is created and maintained by membership in the group. I have stated the proposition this way because I believe that it must be distinguished from the idea of “collective rights”. All of us enjoy collective rights by virtue of birth into a family, residence in a city or country, the choice of churches or social clubs, and employment. Rights that arise from belonging to groups are not as bizarre as the opponents of indigenous peoples’ rights generally make them out to be. Nor is it unusual for members of groups to assume enforceable responsibilities as a condition of membership. It can be argued that special burdens are acceptable as long as membership remains voluntary.

Rights and burdens associated with birth into a family and church continue to be important to many citizens of democratic countries. They can renounce their families and churches as a matter of law but not without significant emotional, social, even economic consequences. To the extent that membership is not really entirely free or contractual, it is not unreasonable that the power of families or churches over their members are limited by law—as are the powers of governments, of course.

What I call communitality is a more extreme position that rejects limitations on the power of the group over its members, often with the argument that members of the group are the only legitimate judges of their values, rights and responsibilities. It was the theme of the “little commonwealths” that initially grew from the

Protestant reformation in many northern European countries, and emigrated to New England and Atlantic Canada in the 17<sup>th</sup> century. The congregation listened only to its minister and the minister only to God. The same logic also underpinned many of the most repressive state regimes of the 20<sup>th</sup> century, and continues to be advanced by many cultural, ethnic and religious groups as a response to repression. The argument against an external oppressor sometimes becomes the justification for tolerating an internal one.

A majority of indigenous delegations objected to the application of international human rights standards to their own communities and institutions throughout the ILO and UN standard-setting exercises. No doubt this was driven in large part by the fear that nation states could use purported abuses of human rights to interfere with the legitimate internal affairs of indigenous nations. However, I also witnessed emotional arguments that individual rights were a “Western” or “European” conception that is alien to indigenous cultures and constituted malicious tampering with indigenous communities.

By so arguing, many indigenous representatives echoed arguments made since the 1940s by a growing number of UN Member States that the Universal Declaration and the Covenants were not applicable to non-European religions, cultures and countries. And they prevailed in the court of public opinion, if not in the official texts. National governments are unlikely to interfere in the internal administration of indigenous communities. At the time of this writing, Canadians are widely criticizing their federal government for raising concerns about financial corruption within particular indigenous communities. Reforms are publicly perceived as an internal affair of First Nations. At the same time, I suspect that most states are content to respect the internal sovereignty of indigenous nations as long as they are no threat to anyone but their own members (to borrow Shiva Naipaul’s assessment of international policy towards Third World tyrannies).

In North America, many indigenous leaders contend that “sovereignty” and “self-determination” mean non-reviewable authority to override the interests of individuals. There are impressive exceptions, such as the humanistic interpretations of customary law by the Supreme Court of the Navajo Nation, that thoughtfully balance the community’s interests with the responsibility of the community to respect the dignity of individuals. Perhaps the international movement of indigenous peoples was too quick, however, to de-link individual rights philosophically from collective recognition and self-determination.

## Who won?

I was in frequent contact with anti-apartheid organizations, which were observers throughout much of the build-up to the ILO Convention and the Declaration. Both ANC and PAC representatives urged indigenous delegations to “take what you can get” at each stage of the evolution of international support for indigenous rights. “You will get there eventually,” they advised, cautioning against making non-negotiable demands that would polarize and alienate Member States from the start. Remaining true to principle does not require the rejection of intermediate compromises that maintain momentum.

At approximately the halfway point in the deliberations of the Working Group on the draft text of the Declaration, when the “easy” topics had been addressed and only the “hard” ones (self-determination, autonomy and territorial integrity) remained, indigenous delegations became divided on strategy. Delegations from the Anglophone countries argued, for the most part, that the ILO revision and the draft Declaration should be rejected unless all indigenous aspirations were fully met. Latin American and Asian delegations were more willing to pursue an incremental approach, with successive legal instruments providing a series of stepping stones towards full realization of indigenous peoples’ rights. Canada’s “aboriginal peoples” cast the swing vote to continue negotiations.

This action led in turn to deep divisions and recriminations within the Canadian indigenous movement for years to come. Indigenous peoples from Canada and the US had also been divided over the strategy in the Inter-American system a few years earlier. Indigenous peoples reflect the national characteristics of their countries of origin, as well as their own historical circumstances and cultures. Differences were played down publicly but, as within the “club of states” itself, the differences generated a momentum of their own, diplomatically. Just as important, the differences among indigenous nations meant that engaging the UN led to different social outcomes on the ground. For instance, I have argued elsewhere<sup>3</sup> that their UN experience reconfirmed U.S. Indian Tribes’ all-too-American belief that the international system lacks muscle, and their satisfaction with the

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3 R.L. Barsh, The IX Inter-American Indian Congress, *American Journal of International Law* 80 (3): 682-685 (1986).

U.S. form of “Indian sovereignty”. In other countries, exposure to the UN fundamentally changed the domestic discourse on indigeneity—for example in Japan.

In Islamic philosophy, an important distinction is drawn between the “inner” and “outward” struggle to attain righteousness. Like individuals, emerging nations must also struggle inwardly as well as outwardly, for identity and self-respect. Energy is too often concentrated on the outward struggle of liberation and political recognition, which tends to be highly visible, at least partly, in a public arena such as the United Nations bodies, if not violent as well. Emerging nations consciously perform their desired identities and ideals on official public stages, seeking legitimization of their assertions of cultural authenticity and the merits of their cause.

The Mi'kmaq were unusual in linking the inner and outward struggles explicitly. They not only seized on international visibility and recognition as a tool for mobilizing grassroots resistance to being marginalized or forcibly integrated but also launched an internal struggle for individual human rights that included issues of gender, poverty and the environment. International human rights instruments were translated into Mi'kmaq, UN debates were widely disseminated, exchanges of artists and students were arranged with indigenous communities in other parts of the world, and the traditional confederacy council made more than a merely symbolic commitment to upholding the International Covenants of Human Rights through internal reforms and periodic reporting.

It fell to me to deliver the instruments of ratification personally to the UN Treaty Office. I was treated with the utmost respect and solemnity until the director of the office began reading the “whereas” clauses. His face changed expression several times and then he smiled and said simply, “This is good, this is really good” and accepted the documents. Our first periodic reports under the conventions were similarly received, with awareness that while the Mi'kmaq could not simply transform themselves into a state by adhering to international norms of human rights, they could set an example by which statehood implies internal responsibilities that are too often neglected in the rush to sovereignty. It was an example aimed as much at Mi'kmaq institutions as Canadian ones.

For Mi'kmaq, engaging the UN was a valuable element in a broad mobilization that included recovery of the Mi'kmaq language, increasing university enrolment, and publicly asserting a leadership role in economic and environmental issues affecting the Atlantic region of Canada and New England as a whole. On my departure for the first meeting of the UN Working Group in 1982, the eldest member of the Grand Council at that time took me aside. “I'm happy that the Mi'kmaq

people have finally decided to shoulder their responsibility as a nation.” I think it matters that leaders conceive of liberation as an assumption of responsibility rather than as an opportunity to increase their power and resources. In this respect, the indigenous world—the Fourth World as we called it—is fundamentally no different from the Third World, or the First. ○





THE UN WORKING GROUP  
AND THE DRAFTING OF  
A DECLARATION

## CHAPTER 5

## From Prevention of Discrimination to Autonomy and Self-determination: The Start of the WGIP, The Achievements Gained and Future Challenges

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*Asbjørn Eide*

**T**his contribution focuses primarily on the initiation and early work of the United Nations Working Group on Indigenous Peoples (WGIP) but also draws some conclusions concerning the achievements since, and reflects on some of the challenges ahead.

The proposal to establish the WGIP was made in a draft resolution I presented in 1981, together with a group of co-sponsors, to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The WGIP started its work in 1982. It was the first UN body specifically mandated to address the human rights of indigenous peoples on a regular basis. What was exceptional for its time, and which had an enormous impact on future developments, was that it was fully open to participation by indigenous peoples and their representatives. They were given the right not only to attend but to take the floor, present documentation and make recommendations. The WGIP thereby became a platform that indigenous peoples had sought since the 1920s when the Six Nations Confederacy (Iroquois of Canada) had unsuccessfully tried to obtain recognition by the League of Nations.

The platform provided by the WGIP had numerous consequences. It made it possible for indigenous peoples and their supporters to lobby for, and to succeed in, establishing the (First) International Decade of the World's Indigenous Peoples (1995-2004), since followed by the Second International Decade of the World's Indigenous Peoples. The WGIP took the initiative to establish the United Nations Voluntary Fund for Indigenous Peoples, the Indigenous Peoples' International Day (9 August), the Indigenous Fellowship Programme (initiated 1997) and, above all, the Permanent Forum on Indigenous Issues, which was established in 2000.

An even more important function of the WGIP has been that it served for many years as the basis for the development of a global indigenous movement, gradually encompassing indigenous groups from all continents. Through this mobilisation of the interests and values of indigenous peoples worldwide, it has been possible to influence political developments in many parts of the world.

Probably the most important product of the WGIP was the preparation of the draft Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly of the United Nations in 2007 as the United Nations Declaration on the Rights of Indigenous Peoples. With its adoption, a fundamental change had been completed since the time the process started in the 1970s and the main steps of which are described below.

Richard Falk has argued that two decisive effects of the process are evident: (1) the gradual acceptance of the fact that the plight of indigenous peoples is an appropriate item on the agenda for human rights and self-determination, and (2) the shift in indigenous rights discourse from the promotion of assimilation (in the face of discrimination) to the promotion of sustainable autonomy (in the face of assimilation). The normative solution of a generation ago has become the normative challenge of the current generation.

It has long been agreed that involuntary assimilation is incompatible with group rights anywhere. The Declaration takes it one step further, however: in distinction to minority rights, where a degree of integration is permissible provided that it does not amount to assimilation, the main thrust of the UN Declaration on the Rights of Indigenous Peoples is towards autonomy and a high degree of self-determination.

The normative challenges involved in implementing the indigenous right to self-determination are therefore briefly discussed at the end of this contribution.

## **Origins of and Background to the WGIP**

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities adopted its resolution 2 (XXXIV) on 8 September 1981, requesting authorisation for the Sub-Commission to establish annually a Working Group on Indigenous Populations (WGIP). The resolution was endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and the authorisation to set up the Working Group was given by the Economic and Social

Council in its resolution 1982/34. A new page in the human rights project of the United Nations was about to be turned.

In conformity with the draft resolution, the WGIP was given a twofold mandate by ECOSOC: to review developments at the national level concerning the promotion and protection of the human rights and fundamental freedoms of indigenous populations, to analyse such materials and to submit its conclusions to the Sub-Commission. The other part of its mandate was to engage in standard-setting activities concerning the rights of indigenous populations, taking into account the similarities and the differences in the situations and aspirations of indigenous populations throughout the world.

It was my first year as member of the Sub-Commission. I had been elected by the Commission earlier that year. During the early days of the session in August 1981, I became aware of the hopes and expectations among parts of the NGO community that a major new step was to be taken regarding the situation of indigenous peoples. I was easily persuaded to act. Through long conversations with Helge Kleivan, I had become fully aware of the gross violations being committed against indigenous groups in several Latin American countries. Kleivan was a Norwegian-born scholar-activist who played a major role within the academic community of anthropologists in changing their approach to indigenous issues. He played a predominant role in establishing the International Work Group for Indigenous Affairs, which in turn helped and encouraged the formation of international indigenous organisations such as the World Council of Indigenous Peoples.

I was also at that time involved, together with several colleagues, in promoting the rights of our own indigenous group, the Sami, in northern Norway. Their situation had become a front-page political issue due to controversies over the hydro-electric project on the Alta River, affecting the reindeer herding of the indigenous peoples. Now that I had the opportunity to act, I was easily persuaded to take the initiative to lobby for support among my colleagues in the Sub-Commission, and to submit the resolution. One of the strongest supporters among the members was Erica Daes who, as member of the Greek delegation to the UN General Assembly in 1980, had already suggested that such a working group should be set up.

Obviously, the initiative to establish the WGIP did not come out of the blue. During the second part of the 1970s, there had been a long range of initiatives that had prepared fertile ground for the Sub-Commission's initiative. Much of that background is described in other contributions to this volume, but some elements are also required here.

Within the human rights division of the UN Secretariat was a staff member from Guatemala who, over several years, had sought to bring the problems faced by indigenous peoples more fully onto the UN human rights agenda. His name was Augusto Willemssen-Díaz. Being aware of the harsh treatment of indigenous peoples in Central and South America, he had played a major role in persuading the Sub-Commission and the Commission to request authorisation to conduct a study on the problem of discrimination against indigenous peoples. While the Sub-Commission appointed a Special Rapporteur for this study, one of its members, Jose Martínez Cobo, the work of the study was in effect left to Willemssen-Díaz.

Over the years, Willemssen-Díaz collected an enormous amount of documentation on the situation of the indigenous peoples, and was in close contact with indigenous representatives (he has described his work in a chapter in the book "Making the Declaration Work").

During these formative years, several indigenous organisations were created or strengthened. The International Indian Treaty Council (IITC) and the World Council of Indigenous Peoples (WCIP) were at the forefront of the mobilisation of indigenous peoples worldwide. They were supported and assisted by a number of international non-governmental organisations such as the International Commission of Jurists, Survival International, and a range of other organisations.

One of the most important events leading up to the establishment of the WGIP was the convening of the International NGO Conference on Discrimination against Indigenous Populations in the Americas, held in Geneva from 20-23 September 1977. It was attended by more than a hundred indigenous representatives and a total of 400 participants. The conference attracted great interest and attention, including from many governments. It adopted a Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, which listed many of the concerns that were subsequently addressed by the WGIP. It called for the recognition of indigenous peoples as nations, and for a guarantee of their rights. It demanded that treaties and agreements made with indigenous nations or groups should be respected and adhered to, and that no state should claim or retain the territories of the indigenous nations or groups, except such lands as may have been lawfully acquired by valid treaty or other cessation freely made. A range of other demands were set out in the 1977 Declaration of Principles and were later pursued within the WGIP. After the conference, several indigenous representatives travelled to a number of countries to seek support for further work on indigenous peoples' rights.

The indigenous representatives at the 1977 conference also recommended that a tribunal should be formed to examine the allegations of gross violations of the rights of indigenous peoples. The purpose of the proposed tribunal would be to inform the world of the nature and effect of the gross violations carried out against indigenous peoples. This request led to the establishment of the Fourth Russel Tribunal, held in Rotterdam in 1980.

The Russel Tribunal concluded that indigenous peoples were suffering the most outrageous abuses of their rights. Some nation-states had adopted national policies designed to deny indigenous peoples the right to exist as distinct peoples of the world. The states had violated the rights of the indigenous peoples to practice their culture, to speak their language, to the peaceful possession of their territory and their right to a national identity. The indigenous peoples were found to experience the unlawful taking of their lands through national policies. The Tribunal heard witnesses provide evidence on mass executions, kidnapping, torture, rape and assassinations committed or permitted by the governments of some of those nation-states. The witnesses also brought evidence that some Christian missions were acting in partnership with governments in policies designed to dispossess indigenous peoples from their land.

The indigenous representatives at the Fourth Russell tribunal called on the Tribunal to denounce the genocidal scale of the repression of indigenous populations and their leaders; to denounce acts of ethnocide consisting of a denial of their culture, languages and culture, and to denounce the transnational corporations engaged in extracting the natural resources of the indigenous territories. Many of these issues re-emerged when the WGIP began its work.

The emergence of international indigenous organisations such as the International Indian Treaty Council and the World Council of Indigenous Peoples, and the holding of the 1977 conference and the 1980 Russell Tribunal, were some of the main factors in preparing the ground for the establishment of the WGIP.

A few days after the adoption of the resolution establishing the working group by the Sub-Commission in September 1981, an international NGO conference on "Indigenous Peoples and the Land" was organised in Geneva from 15-18 September 1981, convened by the Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization of the Special NGO Committee on Human Rights. In its conclusions, the conference strongly supported the Sub-Commission's request and welcomed it as an opportunity for indigenous nations and peoples to support their complaints and make their demands known. The NGO conference

in 1981 had a very wide attendance, with more than 300 participants from a broad range of indigenous and non-indigenous organisations who lobbied for the adoption of the Sub-Commission's resolution by ECOSOC.

## **Starting the Work, 1982 and 1983**

### **Whose Working Group was it?**

The work started in August 1982 and I was elected the group's Chairman. The first question was to decide on its composition. In formal terms, the WGIP was a working group under the Sub-Commission. Every working group of the Sub-Commission had five members, one Sub-Commission member from each of the five regions into which the United Nations divided the world at that time. However, the working groups were also open to observers with the right to speak and to make proposals, albeit without a right to vote. According to the existing formal rules, national governments were entitled to send observers to these working groups as were intergovernmental organisations. International non-governmental organisations could also send observers provided that the NGO concerned was accredited and had been given consultative status with the UN Economic and Social Council, in accordance with ECOSOC resolution 1296 (XLIV), adopted in 1968.

According to that ECOSOC resolution, non-governmental organisations seeking consultative status had to be "of representative character and of recognized international standing; it shall represent a substantial proportion, and express the views of major sections, of the population or of the organised persons within the particular field of its competence, covering, where possible, a substantial number of countries in different regions of the world." Very few indigenous organisations had succeeded in fulfilling those criteria by 1982. Without it, they had no formal basis on which to demand participation in the working group. And yet the WGIP had been anticipated by indigenous peoples with great expectations, and many had high hopes as to what it could achieve.

When the meeting started, I was faced with a request from several indigenous organisations who did not have consultative status but who ardently hoped and wished to be allowed to attend the working group. In my role as Chairman, I therefore decided on the opening day of the WGIP to break precedent and to open the group up also to the participation of indigenous organisations that did not have consultative status with ECOSOC. I argued that the best source of infor-

mation on the situation of indigenous peoples and the best source of ideas on standards to be developed would be their own representatives. To fulfil the mandate of the working group, I argued that we needed the presence of the most qualified experts, and that those most qualified were the indigenous representatives themselves. Fortunately, I was supported in this decision by the then Director of the UN Division on Human Rights, Theo van Boven, who had taken a strong personal interest in indigenous rights issues.

What I did by opening the WGIP up fully to the indigenous representatives turned out to have much greater significance than I could have imagined at that time. The working group from then on became the main platform and forum for the global indigenous movement and was to increase in significance year on year, culminating in a presence of nearly 1,000 participants at its height. Through that forum, global networks were created between indigenous peoples all over the world, giving them a significance they would otherwise not have been able to obtain. Through their presence and networking in the WGIP, they also managed to obtain a presence and voice in other United Nations organisations and to spread their influence far and wide. Building on that experience, many years later the UN created the UN Permanent Forum on Indigenous Issues, which brought the institutionalization one major step further; however, it was the step taken in 1982 that laid the foundations for it all.

### **Initial Human Rights Approaches to “Indigenous Issues”**

The WGIP, this new platform to examine indigenous affairs at the UN, was established within a human rights body of the United Nations. As a human rights issue, the initial focus was on problems of inequality and discrimination facing these populations within the states where they lived. International human rights as established at the end of World War II are based on the principle that every person shall be free and equal in dignity and rights (UDHR Article 1), and that every person is entitled to enjoy all human rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (UDHR Article 2).

The framework envisaged for realizing the freedom and equality of every person is the state. The international conventions on human rights are drafted on the basis that every state party to the conventions shall respect and ensure the equal enjoyment of human rights by every person within its territory. Any exclusion and



marginalisation shall be brought to an end; integration shall be based on equality and prevention of all forms of discrimination.

When the Universal Declaration of Human Rights was drafted, some participants in the drafting process recommended that it should also include the rights of minorities. This was not accepted by a majority of the members of the Commission on Human Rights or by the General Assembly. The majority held that the protection of group rights could lead to unequal treatment and hamper integration. There is consequently no reference to minority rights or to the rights of indigenous populations in the UDHR.

There was, however, a lingering concern that the issue should not be completely neglected. A special body of independent experts, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, was therefore established in 1947. As its name indicates, it was given a double mandate. For many years of its existence, however, the Sub-Commission focussed mainly on the first part, the prevention of discrimination. The Sub-Commission did pioneering work in this area, including drafting the Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the General Assembly in 1965. When the Sub-Commission tried to deal with the protection of minorities, however, it met with resistance from the Commission on Human Rights and from ECOSOC.

Prevention of discrimination was also the main concern when the International Labour Organization (ILO) began to investigate the exploitation of persons of indigenous origin. As discussed elsewhere in this book, the ILO carried out a comprehensive study on the situation of persons from indigenous populations in the labour market in 1953, which led to the adoption in 1957 of ILO Convention No. 107 on Indigenous and Tribal Populations. The focus of that convention was to facilitate a better integration of indigenous persons into the labour market through elimination of discrimination and improved vocational training. However, it also included an element that was an opening to the future: it was recognized that a major underlying cause of the vulnerability of these persons in the labour market was the widespread deprivation of the land from which they had previously made their living; better protection of the land would reduce their vulnerability. The convention therefore also called for an improvement in the recognition of the land rights of indigenous populations.

Within the Sub-Commission, a comprehensive study was undertaken during the final years of the 1960s on racial discrimination in the political, economic,

social and cultural spheres. The Special Rapporteur entrusted with this study was the Sub-Commission expert, Hernan Santa Cruz, from Chile. The study was completed in 1971 (UN doc. E.71.XIV.2). In practice, much of the work was carried out by the Secretariat staff member, Augusto Willemsen-Díaz, whose role has been described elsewhere in this book.

Based on his knowledge of the extensive discrimination facing indigenous populations in Latin America, Willemsen-Díaz managed to get a chapter included in the study dealing with the racial discrimination of indigenous peoples. This was the first time the concern for indigenous populations was addressed in the human rights bodies of the United Nations, albeit still within the framework of discrimination within the state.

The difficulty that the Sub-Commission had previously faced when seeking to deal with the second part of its mandate (minority protection) was somewhat reduced by the adoption of the International Covenant on Civil and Political Rights in 1966. Article 27 provides that, in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The Sub-Commission used this provision in 1967 as justification for its request to be authorised to conduct a study on the implementation of the principles contained in Article 27. This authorisation was initially given by ECOSOC in 1969, allowing the Sub-Commission in principle to appoint a special rapporteur to carry out the study in question.

When the matter came back to the Sub-Commission, the question arose as to whether the study should also include the situation of indigenous populations in the light of the principles enshrined in Article 27, or whether a separate study should be carried out on that subject. Augusto Willemsen-Díaz has himself described the instrumental role he played during the sessions of the Sub-Commission and the Commission regarding this discussion, making members of these bodies aware that the situation of indigenous populations, particularly in the Americas, was quite different from the situation of minorities, particularly those in Europe.

The outcome was that two different studies were recommended and, in May 1971, ECOSOC resolution 1589 (L) authorised the Sub-Commission to conduct a separate study on discrimination against indigenous populations. The study on minorities was entrusted by the Sub-Commission to its Italian member, Francisco Capotorti, while the study on discrimination against indigenous populations was

allocated to its member from Ecuador, Jose Ricardo Martínez Cobo, who in practice left most of the work to Willemsen-Díaz.

Although the mandate called for a study on discrimination, which would have implied a predominant focus on the elimination of obstacles to full integration for indigenous persons in the wider society, it became increasingly clear that this was not the best approach to take. Based on their own experience, representatives of the increasingly active indigenous organisations pointed out that the problem was different. Willemsen-Díaz recognized this as he expanded his collection of laws and policies around the world.

During the 1977 NGO conference on discrimination against indigenous populations in the Americas, in his welcoming remarks to the conference the then Director of the Division on Human Rights reflected on the plan for the study which, at that time, was well underway. Noting that the study had emerged from the conclusions and recommendations of the earlier study on racial discrimination, it was clear that the problem faced by indigenous populations could not be approached from the perspective of racial discrimination alone

“since also complex ethnic, social, cultural, linguistic and religious aspects and fundamentally distinct world views were very much involved. Pushed by the onslaught of conquerors, colonizers, and settlers into unprotected areas of what was once their land, indigenous peoples had become identified with depressed areas and had survived as marginal peoples for hundreds of years. .... Self-government, autonomy, and true political rights were either denied or shamelessly manipulated. Their land base was constantly eroded by abuse and encroachment forcing indigenous peoples to seek unwanted employment at least on a seasonal basis. Education and vocational training were imposed by the outside with alien conceptions and methods geared to cultural assimilation and integration into the mainstreams of the work force...”

These reflections by the Director of the division within the UN Secretariat were probably based on an analysis of the extensive material collected for the Cobo study by Willemsen-Díaz.

In the final resolution adopted by the 1977 conference, it was recommended that international instruments, particularly ILO Convention No.107, should be revised to remove the emphasis on integration as the main approach to indigenous problems.

It was quickly becoming clear in 1982, when the WGIP started its work, that the focus would have to be shifted from discrimination in general to issues of rights to land, natural resources, territory and autonomy or self-determination in the management of those resources. It became evident that the issue of indigenous peoples' rights had to move on quite a different track from that of the protection of minorities, which was the subject of the Capotorti study, finalised in 1977. The "Cobo report" was carried out with meticulous attention to detailed information and documentation over a period of 12 years and was finalised in 1984. In the meantime, the Working Group had been established and, from 1982 on, it provided a platform for indigenous representatives that reinforced the need to change the focus from an integrationist perspective to one of self-determination and control over their own natural resources.

There was, from the very beginning, a strong focus on the extensive violations of the right to life and other basic individual rights. In hindsight, it can be seen that the ongoing killings of indigenous persons were largely related to the efforts of the indigenous peoples to protect their territories from being taken over by various forms of non-indigenous entrepreneurial activities and corporations.

There was also important information on the violations or non-realization of the right to health, to food, to relevant education and to other basic social and economic rights. These violations were grounded in the marginalisation of the indigenous people, the taking of their land, and a neglect of their concerns by national decision-makers, partly due to the rural dispersal of the indigenous populations and partly due to outright discrimination.

There was much focus on their lack of effective political participation, and the reasons for this were presented both in background documents to the WGIP and by the speakers. This lack of participation was seen as a major cause of why their economic and social rights were so extensively disregarded.

During these first years, there was a strong focus on violations and neglect, particularly in Central and South America. There was the extreme case of Guatemala, where massive violations were taking place, and this information was strongly reinforced by Amnesty International, which presented a stinging description of the violence directed by pro-government militias against indigenous peoples as well as against democratic opposition groups. During these years, the violations under the Pinochet regime in Chile were also given much attention, in particular with regard to the violations against the Mapuche Indian population.

Violations of religious freedom and indigenous peoples' right to maintain their traditional practices were frequently highlighted in the discussion.

### **Developing Standards:**

#### **From Prevention of Discrimination to Autonomy and Self-Determination**

Using the WGIP as a platform, the indigenous representatives also managed to obtain representation – formally as observers – in many other deliberative bodies of the United Nations and enabled to bring their concerns to the attention of other organisations, such as the World Bank.

This process towards a changed focus developed step by step, with the WGIP at the centre of the developments.

In parallel, the International Labour Organization initiated the drafting of a new convention on indigenous and tribal peoples, based on the new perspective of greater autonomy for the indigenous peoples, recognition of their collective control over the land and natural resources used by them, educational rights based on their own cultural orientation and needs, and labour protection and vocational training more geared to the assumption that they would serve their own society and find employment there as well as in the wider society. The outcome was ILO Convention No. 169 on Indigenous and Tribal Peoples, adopted in 1989.

The mobilisation of indigenous representatives that was facilitated by the WCIP became a springboard for their attendance in numerous other settings as well, including the large summits organised during the 1990s – the Conference on Environment and Development (the Rio Conference) in 1992, the World Conference on Human Rights in 1993, Habitat in 1994, the Copenhagen World Summit on Social Development in 1995, the Fourth World Conference on Women held in Beijing in 1996, and the International Conference against Racism in 2001. Through that participation, they managed to get the concerns of the indigenous peoples reflected in the declarations and programs of action of several of these conferences, thereby also affecting the activities of many UN agencies.

Support was growing for indigenous rights. The World Conference on Human Rights, held in Vienna in 1993, requested an early completion of the draft Declaration on the Rights of Indigenous Peoples, and called for the proclamation of the Decade on Indigenous Peoples, which commenced in 1994 based on UN General Assembly resolution (A/RES/ 48/163), with the main objective of strengthening international cooperation around resolving the problems faced by indigenous people

in areas such as human rights, the environment, development, education and health. The theme for the Decade was "Indigenous people: partnership in action".

### **The Agenda as set out at the End of 1983**

At the end of the second session of the WGIP, a plan of action was drawn up with tentative items for its future sessions. It was agreed that the third session should deal with two major issues: (a) land and other natural resources; and (b) the definition of indigenous populations.

For future sessions, two sets of priorities were drawn up: the right of indigenous populations to develop their own culture, traditions, language and way of life, including the right to freedom of religion and traditional religious practices; and the right to autonomy and self-determination, including political representation and institutions, along with the duty of indigenous populations and their governing institutions to respect and ensure human rights. It was also decided to review developments concerning the right to education, health, medical care and other social services, the right to social security and labour protection, the right to association and the right to trade and to maintaining economic, technological, cultural and social relations within the indigenous communities.

I had worked on that agenda with the indigenous representatives, and it was broadly agreed that the main focus should be on land, territory and natural resources and on autonomy or self-determination in the management of those resources. This primary focus made it necessary to give more attention to the definition of indigenous people. It was clear that this was going to be a major source of controversy.

### **Follow-Up and Achievements**

My first term as member of the Sub-Commission ended in 1984. I had been confident that I would be re-elected for a new term but this was not to be. It has since become clear that the delegation of India played a major role in lobbying against my re-election, and it is also clear that this had to do with India's increasing scepticism as to the direction the WGIP was taking.

Concretely, the reaction from the observer delegation from India was related to the participation of a prominent representative of the Adivasis, the indigenous populations in India. India was becoming alarmed at the prospect of the Adivasis

being given the right to control the use of the natural resources and the land of the regions where they lived. A representative of the Adivasis had been invited by the International Commission of Jurists (ICJ) and given the right to speak on behalf of that NGO in the WGIP. When the Adivasi representative was introduced, the Secretary-General of the ICJ (Niall McDermot) stated that the Indian government had sought to prevent that representative from coming to the WGIP to speak. I commented as chair that it was regrettable that obstacles had been put in the way of the participation of this Adivasi representative. The observer from the Indian government there present reacted strongly, arguing that Niall McDermott's statement was unfounded and that I had, by my comment, confirmed an unfounded allegation against India. It was on this basis that the Indian government subsequently lobbied against my re-election although it was clear that it was the general drift of the WGIP that was causing concern for the Indian government.

There were several other governments at that time that were also rather antagonistic to the direction being taken by the WGIP, including the Brazilian and some other Latin American governments. The United States government observer was also rather sceptical. This was during the first period of the Reagan administration. The United States observer invited me for lunch and sought to impress upon me that the indigenous representatives from the United States were not truly representative of the interests and demands of that country's indigenous population. He argued that most of them wanted a good education in the same way as all other Americans and that they wanted normal jobs in a modern society, and that the demands for self-determination and preservation of cultural traditions were not what most American Indians wanted.

My role as an active chair of the WGIP had caused several governments to oppose my re-election. I was therefore not in a position to follow up the work in the WGIP. In 1987, however, I was again elected to the Sub-Commission and remained a member for another 17 years, being repeatedly re-elected until I decided in 2004 that I did not want to stand for re-election.

Fortunately, the work continued in the WGIP with a new and very dynamic chairperson, the Greek member of the Sub-Commission, Erica-Irene Daes. She performed that role admirably and with great commitment to the cause of the indigenous people in their struggle with the national authorities. When I was re-elected to the Sub-Commission in 1987, I did not go back to the WGIP but focussed on minority rights and was for ten years the Chair of the Working Group on Minorities, which I managed to set up in 1995.

At its third session (1984), the WGIP decided to pursue a standard-setting activity by initiating the drafting of the Declaration on the Rights of Indigenous Peoples. This continued until 1993 when the WGIP finalised its draft. Parallel to this drafting, a wide range of studies were carried out to facilitate the work and to deepen the understanding of the issues involved. Erica Daes, who chaired the WGIP from 1984 until 2000, prepared not only the first drafts of the Declaration under discussion, based on the concerns expressed by the participants, but also a range of studies of crucial importance to clarifying the issues involved. Additional studies were carried out by Miguel Alfonso Martínez, from Cuba, who replaced Erica Daes as chairperson in 2000.

The completion by the WGIP of the draft Declaration in August 1993 was a major achievement, made possible through the perseverance and commitment of the long-standing chair of the WGIP, Erica- Irene Daes, in collaboration with the indigenous representatives. The draft was endorsed by the Sub-Commission in its plenary session and handed over to the political body, the Commission on Human Rights, for endorsement and transmission to the General Assembly.

A working group was established within the Commission which subsequently met every year for more than a decade. Many governments were critical of some of its content, and negotiations turned out to be more difficult in the Commission (a political body) than in the Sub-Commission (composed of independent experts). The draft lingered on from 1994 to 2006 and was still not adopted when the Commission was abolished, even though substantive work had been done by the Chair of the Working Group to smooth out the controversies. The Declaration was adopted at the first session of the new Human Rights Council in 2006 and transferred to the General Assembly for final adoption. It was then widely expected that the adoption would take place in November-December 2006; however, it met opposition primarily from African states, which made it necessary to conduct additional negotiations between the indigenous caucus and those states, resulting in some changes to the previous draft. These changes meant it was possible to get it adopted by the General Assembly on 13 September 2007 – 25 years after the first meeting of the WGIP.

The controversial provision on the right to self-determination in Article 3 remained unchanged but its significance and scope was curtailed by a crucial addition to Article 46(1). In the previous draft, that Article had contained the traditional savings clause: "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to per-



form any act contrary to the Charter of the United Nations". The new addition, which must have been one of the main concessions the indigenous caucus had to make, has the following wording: 'or construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of any state'.

This draws on the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States", in UN General Assembly resolution 2625 (XXV) of 1970, which sets limits to the principle of self-determination. The impact of the change is to rule out any interpretation of the right to self-determination of indigenous peoples that might allow for secession and which would dismember or impair the territorial integrity of the state. Autonomy under the heading of self-determination under Articles 3 and 4 of the Declaration will have to respect the political unity of the state, the implication of which may be difficult to determine in the abstract.

### **The Definitional Issue and Scope of Application in Light of the Standards Set**

It has been noted above that the initial concern for indigenous issues within both the UN and the ILO focussed on prevention of discrimination, seeking to achieve an integration of indigenous persons into the wider society on a basis of equality. This was the prevailing concept for many states, including those Asian countries that ratified ILO Convention No. 107. While that convention uses both the terms "tribal" and "indigenous" populations, the original term used during most of its drafting was only "indigenous population", a term that was quite acceptable to India, for example, which had actively participated in the negotiations and had ratified the convention. The integrationist perspective changed fundamentally with the adoption in 1989 of ILO Convention No. 169 on the rights of indigenous and tribal peoples, which is geared towards autonomy over land and resources and is therefore not acceptable to India or some other Asian states and is looked upon with scepticism by many African states.

How did the change come about, and what was its effect? An expanding chorus of indigenous peoples during the 1970s, drawing on the achievements of decolonisation, was increasingly using the term "internal colonialism" to refer to the situation of groups living in territories beyond Europe that had been colonised by European states and where the descendants of those settlers were now in a majority, or at least in a dominant position, in independent countries in the Amer-

icas and in the Pacific. From this arose the “Blue water doctrine” as a basis for defining indigenous populations. The “blue waters” were those that Europeans had crossed in their colonising endeavours.

This is essentially the basis of the description given in the study by Martínez Cobo in his concluding report of the Study on the Problem of Discrimination Against Indigenous Populations (CN.4/Sub.2/1986/Add.4 para 379). He described indigenous populations or groups as those that

“having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other 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 systems.”

If this had been chosen as a definition, it would have been difficult to fit the Sami in Scandinavia into it, and population groups in Asia and Africa would appear to fall outside as well. If, on the other hand, the term “indigenous” were to be linked to the situation of the discrimination or marginalisation of the earliest or original inhabitants of independent countries, or to groups that had preserved a traditional lifestyle that was different from the way of life of the dominant groups in national society, then indigenous populations would be found almost everywhere. Then, however, it would be less clear-cut as to the most appropriate remedies to address the situation of the indigenous populations.

When the work started in the WGIP, it became clear during the very first session that the WGIP did not want to rush into a definition but wanted to remain open until greater clarity had been obtained concerning the standards to be developed.

Notwithstanding the fact that the “Blue water doctrine” was widely endorsed during those early years, when the WGIP started its work in August 1982 it was given a document prepared on behalf of the Special Rapporteur (Martínez Cobo) which was more open and flexible than the description above. According to the document submitted in his name in 1982, the WGIP was invited to consider the following provisional definition of indigenous peoples:

“Indigenous peoples include, but are not necessarily limited to, those peoples who have been identified as indigenous, for example, the Indians, Inuits, Eskimos, Metis and Aleuts of the Americas and Greenland; the Maoris and Aboriginals of the South Pacific; the Sami of Scandinavia, and such other groups as may from time to time be identified. These indigenous peoples, for the most part, share three basic characteristics in that they include those persons who (1) are in an identifiable group linked by language, heritage, traditions, or other common identity, (2) are autochthonous to the area where they now live or where they lived before they were forcibly removed, and (3) do not possess a large or controlling share in the government of the state or states in which they live”.

This was a very open-ended definition, and it served the subsequent discussions within the Working Group well, which attracted an increasing number of indigenous representatives from all corners of the world – Africa, Asia, Australia and the Pacific, as well as the Americas and Europe. When the UNDRIP was finally adopted in 2007 (see further below) there was no definition included. In practice, non-dominant and marginalised peoples in Africa and Asia have been included, but controversies continue to exist concerning its scope of application to different ethnic groups, as discussed in other contributions to this book (in particular the contribution by Felix Ndahinda).

## **The Challenges Ahead: Giving Content to Autonomy and Self-Determination within a World of Interdependence**

### **General Observations**

The seminar in Oslo in 2012 was held 30 years after the WGIP started its work, and provided a great opportunity to reflect on the achievements made and the opportunities and challenges ahead. The Working Group had generated a momentum far beyond any expectations the members of the group could possibly have envisaged at its start. Due in large part to the annual meetings of the WGIP, a worldwide indigenous movement had been fostered and increasingly consolidated.

Considerable success was achieved on the normative level. During its first years, it ran parallel with the finalisation of the Cobo study, which was completed in

1984 and, in the next few years, it also ran parallel with the overhaul and complete reorientation of the ILO's approach to indigenous peoples, leading to the adoption of ILO Convention No. 169 in 1989, as discussed elsewhere in this book.

The most direct and significant result of the WGIP's work was the UN Declaration on the Rights of Indigenous Peoples, forwarded by the WGIP in 1993 as a draft to the Sub-Commission in plenary and, when endorsed there, submitted to the Commission on Human Rights. As noted above, it lingered there for many years until the Commission itself was cancelled and replaced by the Human Rights Council. This latter quickly adopted the draft and, with amendments, was finally adopted by the UN General Assembly in 2007.

The task since then has been to make this normative achievement useful for the indigenous people in their daily life. This work is primarily led by the indigenous people themselves and is pursued both at the national and regional level and through several global channels. These include their participation and prominent role in the Permanent Forum on Indigenous Issues, in the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and through the reports and recommendations of the UN Special Rapporteur on the rights of indigenous people, a position that has been held since 2008 by an expert who is himself an indigenous person, Professor James Anaya from the United States. He submitted his final report in the fall of 2013 (A/68/317, 14 August 2013).

As an early contributor to this process, allow me to restrict myself here to some reflections on what I consider to be the main opportunities and challenges ahead. In terms of international law, UNDRIP has opened up wide spaces for further developments for and within the indigenous communities.

I will not discuss here the issue of the legal significance of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP). In his final report, James Anaya gave a forceful response to those that deny its legal significance on the grounds that it is "only" a declaration and not a convention. To quote his own words on this:

"Although technically a resolution, the Declaration has legal significance, first, because it reflects an important level of consensus at the global level about the content of indigenous peoples' rights, and that consensus informs the general obligation that States have under the Charter — an undoubtedly binding multilateral treaty of the highest order — to respect and promote human rights, including under Articles 1 (2), 1 (3), 55 and 56 of the Charter. The Declaration was adopted by an overwhelming major-

ity of Member States and with the support of indigenous peoples worldwide and, as noted earlier, the few States that voted against the Declaration each subsequently reversed their positions. Especially when representing such a widespread consensus, General Assembly resolutions on matters of human rights, having been adopted under the authority of the Charter itself, can and do inform Member States' obligations under the human rights clauses of the Charter." (para. 63 of the final report)

Going beyond the discourse on the legal significance of the Declaration, in which I fully agree with the views of the Special Rapporteur quoted above, I have found it useful to divide my comments into two major issues that need further discussion. One is to make the right to self-determination and increased control over land and natural resources work constructively for the indigenous communities themselves; the other is to explore the way in which this can be handled in their relations with the surrounding, non-indigenous communities, taking into account the fact that their self-determination will necessarily have to be reconciled with various degrees of interdependence with others living within the same territorial state.

### **Making Self-Determination Work for the Indigenous Communities**

One set of issues concerns cross-border cooperation and joint self-determination by indigenous peoples belonging to the same ethnic group but who, because of the way state borders are drawn now, live in separate countries. One major example could be the situation of the Sami in Norway, Sweden and Finland. In 2002, in a meeting with the Presidents of the Sami Parliaments of these countries, the government ministers responsible for Sami affairs established a commission of experts to draft a convention on this theme. In 2005, they presented their draft to a Nordic Sami convention. It is based on the premise that the Sami constitute one people albeit split by borders and now living in three countries; that as one people they have a right to self-determination; to this end, they should be enabled to pursue their cooperation across borders and pursue their common development, notwithstanding the fact that they are living in three different countries. The overall purpose is to allow for a high degree of integration of the Sami people in the Nordic countries. For the time being, these efforts are stalled; there are no indications that the draft will be accepted by the governments concerned any time soon.

Nevertheless, the draft convention provides highly interesting ideas and suggestions on how such cooperation could be organised and implemented.

In their exercise of their autonomy over land and resources, internal controversies within the indigenous communities have arisen and will continue to do so, e.g. on the use of resources, reflecting tensions between the preservation of traditional culture and the opportunities for material development. This will in part be a generational conflict, and may possibly be intensified by educational development.

One set of issues concerns challenges regarding the management of indigenous peoples' livelihoods, the economic and social rights of their members, such as the rights to health, to food, to education, and generally also to the way in which political participation is organised within their communities. In the area of health, the relationship between traditional healing and modern medicine needs to be explored. In the area of food, the relative weight of country food versus marketed food has much to do with the preservation or change of culture.

Concerning political participation, there will be divergences between the role of the elders and the role of formal democracy. In the area of education there may possibly emerge controversial issues regarding the enhancement of education in their own language(s) versus the place to be given to the national, official language and to internationally useful languages. This is important for the instrumental use of languages and for the opportunities and choices that will be open to the young generation. Education in general needs, on the one hand, to be socially relevant to the community in which the pupils live but will also determine the options for future choices of each individual. The degree of self-determination that women enjoy within communities, and the enhancement of their status, may be another issue that turns out to be controversial.

These and many other issues will primarily have to be worked out by the indigenous peoples themselves. The greater the scope of their self-determination, the more they will have to find their own solutions based on their own context, capacity and preferences.

There is a caveat or forewarning to be added to the above. As long as the indigenous people remain within a wider territorial state, the government of that state remains obliged to respect and to ensure the human rights of persons within the indigenous communities. This is also implicit in Article 46(2) of UNDRIP:

“In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

This gives some space for limiting individual human rights when considered necessary to maintain and strengthen the cultural rights of the indigenous community concerned, but this itself may create substantial controversy.

### **Between Self-Determination and Interdependence**

Exercise of the right to self-determination necessarily implies a degree of partial dissociation or separation from the territorial nation in which an indigenous people lives. Indigenous peoples have, to different degrees, been integrated into the larger national society – integrated in terms of social services, communication infrastructure (roads, railroads etc.). The scope of that integration depends to a large extent on the degree of development of the country in which they live. With the quest for self-determination come demands for partial dissociation. This can be controversial and may require patient negotiations. It underlines the need for representative, or at least legitimate, negotiators on both sides of that negotiation.

Many other issues arising from the development of indigenous peoples' rights have been explored or are now under discussion, such as the approach to and control over sub-soil or sub-sea mineral resources within their territory, external investments on their land by extractive industries and the issue of informed consent and the bargaining position of the indigenous peoples.

While UNDRIP clearly recognizes indigenous peoples' right to self-determination, complete self-determination is often impossible or impractical. One important question is whether the different indigenous peoples have sufficient resources within their control to ensure an adequate standard of living. This begs the question of what is understood by an adequate standard of living.

The main components, according to ICESCR Article 11, cover food, housing and clothing and, under ICESCR Article 12, also health. Each of these has its own

problems in terms of what is "adequate". Food must be not only of sufficient quantity (which can be measured) but also sufficient from a dietary or nutritional perspective and culturally acceptable. Food is a crucial component of health in that a sufficient and balanced diet is essential for the survival and growth of every child and for the adult life of every individual. Health is also about health services, however, and while there is much knowledge in traditional medicine it is rather obvious that health also requires various forms of intervention that require skilled and trained personnel and adequate technology along with essential drugs.

Indigenous communities are presently unable to ensure all of this today, based on their own control of their natural resources and their own income generation. It is quite possible that some groups would be better off than they are now if they were to fully govern themselves and to control the natural resources on their territory, provided they were also in control of the sub-sea and sub-soil resources. Left completely on their own, however, some of these communities might experience deterioration in their pre-existing standard of living. A gradual process of change is therefore necessary, taking the whole range of resources into account in the phasing out of pre-existing dependence.

For the time being, many indigenous peoples remain dependent, for better or worse, on transfers from the government of the territorial state. In parts of the world, such transfers are minimal and, at the same time, the area and resources left to them too limited to make an adequate standard of living possible. If they aspire to a significantly improved standard of living, they face some awkward choices between extended self-determination and continued transfers. Due to past colonisation or deprivation of land, it would take a considerable amount of time to develop their own capacity and skill to obtain a satisfactory livelihood based solely on their own resources.

We should nevertheless appreciate the great advancements in international law that have been made through UNDRIP and ILO Convention No. 169. The most important achievement is probably that the bargaining position of indigenous peoples in their relationship with the territorial state has been significantly strengthened. While they will have to work out practical arrangements that will entail many compromises on both sides of the negotiations, international law now provides them with standards and requirements that can no longer be ignored by their counterparts. ○





## Working Paper on the Relationship and Distinction between the Rights of Persons belonging to Minorities and those of Indigenous Peoples

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*Asbjørn Eide*<sup>1</sup>

### Categories of Rights: Some Initial Observations

**W**hile this paper deals with rights specific to minorities and indigenous peoples, it is useful to put it in the wider context, recognizing that four sets of rights are relevant:

- a) The general human rights to which everyone is entitled, found in the Universal Declaration on Human Rights and elaborated in subsequent instruments, such as the two International Covenants of 1966. They are all individual rights;
- b) The additional rights specific to persons belonging to national or ethnic, religious or linguistic minorities, found in article 27 of the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities (“Minority Declaration”), and in several regional

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1 This working paper is contained in UN document E/CN.4/Sub.2/2000/10. In resolution 1999/23, the UN Sub-Commission on the Promotion and Protection of Human Rights decided to entrust Erika-Irene Daes and Asbjørn Eide with the preparation of a working paper, without financial implications, on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, for submission to the next sessions of the Working Group on Minorities and the Working Group on Indigenous Populations and to the Sub-Commission at its fifty-second session in 2000. The part of the working paper written by Erica-Irene Daes is reproduced separately.

instruments dealing with the rights of persons belonging to minorities. They are formulated as rights of persons and therefore individual rights. States have some duties to minorities as collectivities, however;

- c) The special rights of indigenous peoples and of indigenous individuals, found in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and - if and when adopted - in the draft Declaration on the Rights of Indigenous Peoples ("draft indigenous declaration"), adopted by the Working Group on Indigenous Populations (WGIP) in 1993 and now before the Commission on Human Rights. They are mostly rights of groups ("peoples") and therefore collective rights;
- d) The rights of peoples as provided for in common article 1 to the two International Covenants of 1966. These are solely collective rights.

## Similarities and Differences between the Categories of Rights

### Category (a)

The general human rights as listed in the Universal Declaration and elaborated in other instruments are individual human rights and can be demanded by everyone, including persons belonging to minorities, indigenous peoples and other peoples. They constitute the foundation of the human rights system. They are based on the two basic principles set out in the Universal Declaration: article 1 (that everyone is born free and equal in dignity and rights) and article 2 (that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status). The individual rights include the right to integrity of the person, freedom of action, due process rights, political rights, and economic, and social and cultural rights. Their major function is to ensure social integration under conditions of equal dignity.

### Category (b)

The rights of persons belonging to minorities build on but add to the foundation rights set out in the Universal Declaration. The Declaration, in article 8.2, expresses this in the following words: "The exercise of the rights set forth in the

present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.”

The specific rights of persons belonging to national or ethnic, religious or linguistic minorities include the right to enjoy their own culture; to profess and practise their own religion; to use their own language, in private and in public, freely and without interference (ICCPR, art. 27; Minority Declaration, art. 2.1); to participate effectively in cultural, religious, social, economic and public life (Minority Declaration, art. 2.2) and to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live (*ibid.*, art. 2.3); to establish and maintain their own associations (*ibid.*, art. 2.4); to establish and maintain free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties (*ibid.*, art. 2.5). These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group, without any discrimination, and no disadvantage shall result for any person belonging to a minority as a consequence of the exercise or non-exercise of the rights set forth in the Declaration (*ibid.*, art. 3).

### Category (c)

The rights specific to indigenous peoples and members of indigenous peoples are spelled out in ILO Convention No. 169. The Convention is binding only on States that have ratified it; 13 States had done so by May 2000.

More far-reaching rights are proposed in the draft indigenous declaration which was submitted by the Sub-Commission to the Commission on Human Rights in 1994 and is now under consideration there for possible future adoption by the General Assembly.

ILO Convention No. 169 and the draft indigenous declaration recognize the foundation of individual human rights. The draft indigenous declaration in article 1 states that indigenous peoples have the right to full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. A corresponding provision can be found in the ILO Convention (art. 3).

The specific rights of indigenous peoples contained in the ILO Convention and the draft indigenous declaration are significantly different from those in the

Minority Declaration. The difference can probably best be formulated as follows: whereas the Minority Declaration and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development. Whereas the Minority Declaration places considerable emphasis on effective participation in the larger society of which the minority is a part (arts. 2.2 and 2.3), the provisions regarding indigenous peoples seek to allocate authority to these peoples so that they can make their own decisions (e.g. Convention No. 169, arts. 7 and 8; draft indigenous declaration, arts. 4, 23 and 31). The right to participation in the larger society is in the draft given a secondary significance and expressed as an optional right. Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them (draft indigenous declaration, arts. 19 and 20). The underlying assumption must be that participation in the larger society is not necessary when they have full authority of their own to make the relevant decisions.

Closely linked to this point is the difference concerning rights to land and natural resources. The Minority Declaration contains no such rights, whereas these are core elements in the ILO Convention (arts. 13-19) and in the draft indigenous declaration (arts. 25-30). Other examples could be mentioned to explain the fundamental difference between the thrust of the rights of persons belonging to minorities and those of indigenous peoples. It is logically connected to the basic point that the minority instruments refer to rights of (individual) persons, whereas those concerning the indigenous refer to rights of peoples.

#### Category (d)

What is the relationship between the minority rights and the rights of indigenous peoples, on the one hand, and the rights of peoples to self-determination set out in common article 1 to the International Covenants of 1966, on the other? For the rights of persons belonging to minorities, the answer is simple: the relevant instruments provide no right to group (collective) self-determination. The rights of persons belonging to minorities are individual rights, even if they in most cases can only be enjoyed in community with others. The duties of the State in protecting the identity of minorities may, however, include a duty to accept and encourage conditions for a degree of non-territorial autonomy in regard to religious, linguistic or broader cultural matters. Effective participation by minorities may be

facilitated by territorial devolution on democratic, not ethnic, grounds, but the relevant minority instruments do not impose a duty on States to devolve authority on a territorial basis.

The question of the rights of indigenous peoples is presently under debate. Are they "peoples" in the sense of article 1 common to the two International Covenants? If they are, they should be entitled freely to determine their political status and freely to pursue their economic, social and cultural development, and for their own ends freely to dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.

The controversy on this issue is still not resolved. While ILO Convention No. 169 uses the term "peoples", it emphasizes in its article 1.3 that the use of that term shall not be construed as having any implications as regards the rights which may attach to the term under international law. Quite clearly, the aim was to prevent "people" being used as an excuse to demand territorial separation. The draft indigenous declaration goes much further: it proposes in its article 3 that indigenous peoples shall have the right of self-determination and by virtue of that right be entitled freely to determine their political status and freely pursue their economic, social and cultural development. This formulation, based on common article 1 of the International Covenants, is one of the most controversial elements in the draft declaration. It has been discussed since the draft was transmitted to the Commission on Human Rights.

A long debate took place during the last session of the working group of the Commission set up to consider the draft declaration. The report of the working group is contained in document E/CN.4/2000/84. Representatives of indigenous groups argued in favour of a full-fledged right to self-determination, though that did not necessarily mean that the right would be used to secede from the States of which they now formed a part. Representatives of Governments were either opposed to inclusion of the right to self-determination or sought to give it a more limited meaning than was given to that right in the context of decolonization.

Two revised understandings of the right to self-determination are under discussion. One concerns so-called "internal" self-determination which essentially refers to the right to effective, democratic governance within States, making it possible for the population as a whole to determine their political status and pursue their development. The other seeks to equate the right to self-determination with the right to some - but unspecified - degree of autonomy within sovereign States.

Conceptually and in practice, territorial autonomy should be kept separate from cultural autonomy. Their respective benefits and risks should be discussed. Generally, it is difficult to accept a principle of territorial autonomy based strictly on ethnic criteria, since this runs counter to the basic principles of equality and non-discrimination between individuals on racial or ethnic grounds. There are, on the other hand, strong arguments in favour of forms of cultural autonomy which would make it possible to maintain group identity. What is special for indigenous peoples is that the preservation of cultural autonomy requires a considerable degree of self-management and control over land and other natural resources. This requires some degree of territorial autonomy. The scope of and limits to such autonomy are difficult to specify, however, both in theory and on the ground in specific cases.

Whatever position one might take on this subject, which is likely to remain controversial for some time to come, it is clear that the problem of self-determination does not arise in regard to the Minority Declaration, which neither limits nor extends the rights that peoples might have under other parts of international law. The rights under the Declaration may not be construed as permitting any activity contrary to the purposes and principles of the United Nations, including territorial integrity of States Article 8(4) of the Minority Declaration.

## **The Beneficiaries of the Four Categories of Rights**

Every individual, including any person belonging to a minority or indigenous group, is entitled to the human rights set out in the Universal Declaration and can claim them in regard to any authority which exercises jurisdiction over her or him. Should minority groups or indigenous peoples have a degree of self-government, their authorities are therefore also obliged to respect and protect universal human rights within their jurisdiction.

Special minority rights can be claimed by persons belonging to national or ethnic, linguistic or religious minorities, but also by persons belonging to indigenous peoples. The practice of the Human Rights Committee under article 27 of the ICCPR bears this out.

The rights of indigenous peoples, which, under present international law, are found only under ILO Convention No. 169, can only be asserted by persons belonging to indigenous peoples or their representatives. Members of non-indigenous minorities cannot assert the rights contained in that convention.

The ILO Convention No. 169 defines the indigenous in article 1 (b) as those “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.

There is still no consensus as to which collectivities are the beneficiaries of the right to self-determination under article 1. There is general agreement that the right applies to the populations of non-self-governing territories as determined by the relevant organs of the United Nations, and to the populations living in occupied territories. It also applies to the population as a whole of sovereign States. Beyond these categories, legal opinion is still divided.

## Concluding Observations

A dual track has emerged in United Nations standard-setting with regard to minorities and indigenous peoples.

General human rights have a distinctly integrative function. Minority rights are formulated as the rights of individuals to preserve and develop their separate group identity within the process of integration. Persons belonging to minorities often have several identities and participate actively in the common domain. Indigenous rights, on the other hand, tend to consolidate and strengthen the separateness of these peoples from other groups in society. The underlying assumption is that persons belonging to indigenous peoples have a predominantly indigenous identity and participate less in the common domain.

What is normally held to distinguish indigenous peoples from other groups is their prior settlement in the territory in which they live, combined with their maintenance of a separate culture which is closely linked to their particular ways of using land and natural resources.

The usefulness of a clear-cut distinction between minorities and indigenous peoples is debatable. The Sub-Commission, including the two authors of this paper, have played a major role in separating the two tracks. The time may have come for the Sub-Commission to review the issue again. One question is whether the distinction has global relevance. It has been argued that the approach to the



drafting of minority rights has been influenced mainly by European experience and that it therefore is profoundly Eurocentric, whereas the drafting of indigenous rights has been influenced mainly by developments in the Americas and in the Pacific region (the “blue water doctrine”) and therefore is America-centric. The “blue water doctrine” hold that the indigenous are those people beyond Europe who lived in the territory before European colonization and settlement, and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants. The Sami of northern Scandinavia and the Arctic peoples of the Russian Federation are widely held to be indigenous in spite of the fact that they are not covered by the “blue water doctrine”. Norway has ratified ILO Convention No. 169 on the understanding that the Sami are indigenous as defined in article 1 of that Convention. The distinction is probably much less useful for standard-setting concerning group accommodation in Asia and Africa.

Another question is whether all minorities, and all indigenous peoples, should be treated alike, or whether differentiation is required both between minorities and between indigenous groups. For persons of indigenous origin who have migrated to urban areas their separate identity may have to be combined with integration on a basis of equality within the city. Similarly, the needs of minorities who live compactly together and possibly form the majority in a particular region of a country are quite different from the needs of persons belonging to minorities who live dispersed, most of them in cities where persons of many different ethnic origins mingle together. ○

## CHAPTER 7

## Working Paper on the Relationship and Distinction between the Rights of Persons belonging to Minorities and those of Indigenous Peoples

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*Erica-Irene Daes*

In accepting the task to prepare a working paper with Mr. Eide on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, I am conscious, first of all, of the excellent and very comprehensive paper by Mr. Eide which constitutes Part I of the present working paper and of the work of a number of other legal scholars and competent bodies of the United Nations system that have preceded me and dealt with the subject matter or failed to resolve the complex question of the terms “minorities” and “indigenous” to the satisfaction of Governments and the groups concerned. My experience tells me that there is no simple solution in logic or in law concerning these terms. I do believe, however, that it is possible to simplify the argument over definition by presenting the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, identifying certain basic factors, reviewing a number of important characteristics and eliminating many misconceptions.

It might be useful to begin by identifying the factors which, singly or in some combination, have repeatedly been asserted as characteristics of either minorities or indigenous peoples:

- a) Numerical inferiority;
- b) Social isolation, exclusion, or persistent discrimination;
- c) Cultural, linguistic or religious distinctiveness;
- d) Geographical concentration (territoriality);
- e) Aboriginality (i.e., being autochthonous).

The term "minority" has sometimes been applied to any group that constitutes less than 50 per cent of the population of a State. It has been assumed that numerical inferiority places the group at risk, thus justifying special measures of protection. This may often be true, as in the example of African-Americans in the United States. However, a numerically small group may also be a dominant elite, as was the case of the Afrikaners during the *apartheid* regime in South Africa. The numerical superiority of indigenous peoples in countries such as Bolivia or Guatemala has likewise been no guarantee of their enjoyment of basic human rights.

For these reasons, most previous attempts to define "minorities" and "indigenous peoples" have emphasized their non-dominant status in national society, either as a sufficient criterion, or in conjunction with the criterion of numerical inferiority. This solution poses both methodological and logical problems. The measurement of dominance can be challenging. A group may nominally control the State apparatus yet be subordinate to another group that controls, for example, the lands, finances or military institutions of the country. *De jure* dominance may be *de facto* subordination. More seriously, applying non-dominance as a key characteristic of minorities or indigenous peoples results in the paradox that a group ceases to be a minority or an indigenous people when it realizes its human rights, or attains social and political equality. We are faced with a logical dilemma. Either we admit that the goal of equality will never be achieved fully, or we accept terms such as "minority" as purely situational and transitory. No minority or indigenous people has admitted that its legal status exists only at certain times, and in certain situations.

Is this merely a problem of language? A group asserts its rights when it feels that its rights are being violated. The problem for the international community is first to ascertain what rights a particular group may legitimately assert, as a matter of law, so that we can then determine whether legitimately claimed rights are being violated as a matter of fact. The question of whether a group is subordinate may be impossible to resolve until we agree on what kind of group it is. For example, if Afrikaners argue that they are entitled to special rights to their lands and autonomy, we must first determine whether they have a legitimate claim to being "indigenous". The fact that they lack any special rights to land cannot be a factor in deciding whether they are indigenous because that would make the exercise logically circular.

The existence of subordination is the reason why we need to have international instruments such as the 1992 Minority Declaration.

Cultural distinctiveness - whether it is linguistic, religious or ethnic - is widely assumed to be characteristic of both minorities and indigenous peoples, and is

generally asserted by both kinds of groups. Indeed, indigenous peoples worldwide contend that they share a special kind of culture that distinguishes all of them from other peoples and cultures. The leaders of minorities and indigenous peoples frequently assert that the enjoyment of their distinctive cultures is the reason they are seeking collective legal recognition and self-determination.

It is very challenging to evaluate culture and agree on the extent to which cultures differ. To a greater or lesser extent, all groups and cultures overlap and change over time, particularly in this age of global communications. Does a group gradually lose its rights as its culture changes? Or lose its rights when it exceeds a certain threshold of cultural similarity to other groups?

National minorities and "racial" groups pose additional problems of relationship and distinction of their rights. They may be distinguishable from other segments of the national society only with respect to their historical origins, names, or physical appearance. These distinguishing features may expose them to discrimination, but a group's visibility or identifiability may not be associated with the existence of a distinctive group culture. Skin colour prejudice may have nothing to do with the existence of cultural differences, for example. Likewise, a group may struggle against skin colour prejudice without aspiring to the perpetuation of a distinctive culture, but simply because its members wish to escape discrimination. It is probably safest to conclude that while cultural distinctiveness may often be the objective of groups that assert rights as minorities or indigenous peoples, it should not be a threshold criterion for the legitimacy of group claims.

In this regard, it should be appreciated that a "minority" can be created either by the actions of the State and its citizens, or by the group itself. Some groups choose to perpetuate a distinct collective identity, while others are satisfied to assimilate into national life but are prevented from doing so by official or unofficial prejudices. Both kinds of situations may result in abuses of human rights, serious violence, and threats to international peace and stability.

Aboriginality (i.e. the characteristic of being autochthonous, or the original human inhabitants of a territory) appears to be obvious as a distinguishing characteristic of indigenous peoples. However, it fails to clarify many situations, especially in Asia and Africa, where dominant as well as non-dominant groups within the State can all claim aboriginality. In such situations, previous studies have proposed the use of subordination and cultural distinctiveness as further criteria, distinguishing vulnerable groups from the dominant sectors of society. But this approach fails to distinguish between indigenous peoples and minorities within

African and Asian States, unless we are prepared to agree that the distinction is merely one of degree of aboriginality or cultural distinctiveness. In this case problems may arise from applying different approaches to different regions of the world: a qualitative standard in the Americas (aboriginality), and a quantitative standard in Africa and Asia (degree of aboriginality or distinctiveness).

The factor of aboriginality fails to clarify the situations of groups which were forcibly dislodged from their ancestral territories, compelling them either to disperse or emigrate across State frontiers. Are emigrant or diaspora groups "indigenous" at their point of origin, and "minorities" everywhere else? Every human lineage can trace roots to a territory in the world, but this does not entitle every group to assert rights as an indigenous people? On the other hand, it would seem unjust for a group to lose its claim to being indigenous at the moment it is forced to abandon its ancestral lands. How long does indigenous status survive a forced removal, and justify a claim to the right to return? Minorities and indigenous peoples share very similar experiences of oppression and displacement, but using the factor of aboriginality accords greater rights to groups that managed to remain physically in possession of their original territories.

Indigenous peoples contend that they not only continue to occupy parts of their original territories, but also that they have a special relationship with their lands. This is obviously a claim of cultural distinctiveness, but it may be seen as a refinement of the concept of aboriginality as well. It is a way of saying that living together in relationships is the core aspiration of the group, a *sine qua non* for the enjoyment of their human rights. It may not be the contemporary reality of the group as a result of intervention by State authorities and settlers, but attachment to a homeland is nonetheless definitive of the identity and integrity of the group, socially and culturally. This may suggest a very narrow but precise definition of "indigenous", sufficient to be applied to any situation where the problem is one of distinguishing an indigenous people for the larger class of minorities. However, there is an implication that the distinction may be merely one of degree and not of quality. Many groups that are identified or self-identify as "minorities" regard themselves as connected with a homeland within the State, or another State.

Although aboriginality is perhaps the key factor from the perspective of indigenous peoples, it must be borne in mind that many indigenous peoples in the industrialized countries have changed their human-ecological relationships profoundly, and a majority of them are no longer occupying their ancestral territories. Ancestral lands have retained considerable symbolic meaning and political signifi-

cance for indigenous peoples, even under the circumstances of industrialization and economic integration that prevail in countries such as the United States and in countries where the distinctions between indigenous peoples and minorities with respect to culture and aboriginality have become more matters of degree.

The facts remain that indigenous peoples and minorities organize themselves separately and tend to assert different objectives, even in those countries where they appear to differ very little in "objective" characteristics that distinguished them from the rest of the population of the State. At the same time, no definition or list of characteristics can eliminate overlaps between the concepts of minority and indigenous peoples. Cases will continue to arise that defy any simple, clear-cut attempt at classification.

In such cases, a purposive approach would seem appropriate. What are the legal consequences for a group being assigned to one or the other category? Which category is most consistent with the goals and aspirations of the group? Which category is consistent with what can realistically be achieved by the group?

Classification as a "minority" or as "indigenous" has very different implications in international law. Both categories of groups possess the right to perpetuate their distinctive cultural characteristics and to be free from adverse discrimination on the basis of those cultural characteristics. Both kinds of groups enjoy the right to participate meaningfully in the social, economic and political life of the State as a whole - as groups if they choose, and in any case without adverse discrimination. In my opinion, the principal legal distinction between the rights of minorities and indigenous peoples in contemporary international law is with respect to internal self-determination: the right of a group to govern itself within a recognized geographical area, without State interference (albeit in some cooperative relationship with State authorities, as in any federal system of national government).

Some minorities today enjoy limited self-government, either *de facto* or pursuant to national legislation. Only indigenous peoples are currently recognized to possess a right to political identity and self-government as a matter of international law.

The exercise of internal self-determination is impractical where the group concerned is highly dispersed, and lacks a principal centre of population and activity. The territorial element is central to the claims of indigenous peoples, and it should be given particular weight precisely because it is so closely related to the capability of groups to exercise the rights which they assert. On the other hand,

minority groups may increasingly make claims to autonomy based on the existence of discrete concentrations of their populations in particular regions of States.

Categorization of a situation as a "minority" problem or an "indigenous" problem will serve, at best, as a starting point for the international community to recognize the basic legitimacy of a group's desire for political recognition by a State, and promote a process of political engagement between the group and the State concerned.

On the basis of the above-mentioned analysis, the most helpful approach we can take is to clarify our understanding of the "ideal types" of each group (that is, "minorities" and "indigenous peoples"), rather than attempt to define a sharp conceptual boundary between the two groups.

Bearing the conceptual problem in mind, I should like to suggest that the ideal type of an "indigenous people" is a group that is aboriginal (autochthonous) to the territory where it resides today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory. The ideal type of a "minority" is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry.

From a purposive perspective, then, the ideal type of "minority" focuses on the group's experience of discrimination because the intent of existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the ideal type of "indigenous peoples" focuses on aboriginality, territoriality, and the desire to remain collectively distinct, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy.

Obviously there will be cases which satisfy both ideal types of "minorities" and "indigenous peoples" and which merit both kinds of protection. Thus, a group can be "indigenous" yet demand not only some degree of self-determination, but also the right to integrate freely into national society for some purposes. A group that is best characterized as a "minority" may nevertheless possess a limited degree of aboriginality and territoriality, and demand some form of autonomy as a reasonable means of protecting itself from discrimination. The inevitability of overlaps does not invalidate the approach that I am proposing or render it useless in practice. On the contrary, in my view, being practical and realistic necessitates an approach that is purposive, and links the characteristics of groups to their aspirations and to the rights they are entitled to and realistically can exercise. ○

## CHAPTER 8

## Oslo Conference Remarks and Personal Account

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*Dalee Sambo Dorough*

### **Initial Comments – Indigenous Peoples’ History in the UN**

**W**hen I think of history, my mind conjures up a timeline, a chronological record of pivotal events or momentous occasions where one pauses, recognizes that something significant in time has happened. Personally, this discussion starts at home and must return home. In 1973, at 14 years old, I got my hands on a copy of the US congressional legislation that promised to secure the future of Alaska Native peoples: the Alaska Native Claims Settlement Act of 1971. Clearly, this law was not born of the benevolence of the US government but rather because oil was discovered on Native land. Fortunately, the late Eben Hopson had the foresight to incorporate the North Slope Borough in 1972 in order to ensure that the Inupiat people got their slice of the pie in the form of a revenue stream from oil development.

The following year, the Arctic peoples’ conference took place in Copenhagen, bringing together the unconsciously united voice of circumpolar Indigenous leaders. Knowing that the Arctic was rapidly changing, Eben Hopson pursued a seat in the US Congress on the single-issue platform of the need for an Arctic Policy – very few listened. Undaunted, he went on to unite Inuit from Alaska, Canada and Greenland in Barrow, Alaska in June 1977 and, later in 1980, the world saw the formal organization of the Inuit Circumpolar Conference [(ICC) which later changed its name to the Inuit Circumpolar Council]. Their key objective: to ensure that the voices of Inuit are heard at the national and international level in all matters that affect them. Three years later, the ICC was granted UN ECOSOC non-governmental organization status, which has been actively employed to this day.

My role was to run the Alaska office of the ICC and to carry the human rights portfolio on behalf of the Inuit. Although the ICC was not formal a member of the



WCIP, I was sent on a "fact-finding mission" to Panama City to determine if the ICC should join the WCIP. We decided that no other organization could represent our distinct status, rights and interests and we, therefore, refused to officially join. However, I actively influenced the WCIP Declaration in a very small, sequestered drafting group that included, among others, Wilton Littlechild. I was then asked to present this Declaration to the UN WGIP in 1985, insisting that it be annexed to their report. I believe that we did effectively apply pressure upon the members of the WGIP to make progress in their work as well as providing them with a template of the fundamental issues that had to be addressed in the context of their final work product.

I clearly recall the 1985 WGIP session. For me, Erica Irene Daes was a concrete block, unmovable once she was focused on a target, with her firm, frequent use of the gavel, and her unflinching yet diplomatic ability to quiet someone while at the same time gathering the substance of their messages. It is unknown to me how she used our stories, in the back room, behind closed doors. However, it was clear to me that, eventually, she became a devoted, staunch and sometimes surgically fierce advocate for the human rights of Indigenous peoples. I also recall the intellectual weight carried by WGIP member Danilo Turk and, in particular, his dialogue on the right to self-determination. As an international lawyer, minority rights advocate, and UN Special Rapporteur on the realization of economic, social and cultural rights, he had a genuine interest in defining the necessary balance between attachment of this right to Indigenous peoples and the unfounded fears of UN member states. Of course, not only was the intellectual discussion a motivating factor; I cannot discount his potential personal motivation as a countryman of then Yugoslavia and eventual Slovenia following independence in 1991. While the backdrop for Indigenous peoples was the persistent discriminatory, convoluted and dishonest arguments of member state governments, Danilo Turk's successful presidency of that country was a remarkable outcome.

Another dimension of the 1985 WGIP session was the Indigenous peoples' preparatory meeting, wherein I was fortunate to chair one of the early and most heated debates about the substance of Indigenous human rights: whether or not the UN Declaration should make reference only to collective human rights, with no reference at all to individual human rights. Compelling arguments were made for such an approach. Indeed, the International Bill of Rights, as well as other universal human rights instruments, sufficiently address individual human rights. However, none have done so within an Indigenous-specific cultural context. More

significantly, Indigenous women like myself described the potential impacts of a lack of balance in relation to the nature of human rights and the constant tension between competing rights and interests. At the end of the day, a consensus emerged -- the Declaration should primarily address collective Indigenous human rights and, where necessary, include the individual human rights of Indigenous persons, including Indigenous women.

In 1986, the ICC was the only Indigenous peoples' organization present at the IUCN San José, Costa Rica gathering. I stood alone, in the standing room-only plenary session, arguing for Indigenous perspectives to be included in the World Conservation Strategy, only to be badgered and shouted down by the rabid animal rights organization members of the IUCN. What a stark contrast to my quiet opportunity to meet then President Oscar Arias, who spoke of his peace-loving nation!

Following my 1985 participation in the WGIP, on behalf of the ICC, I became dedicated to seeing the Declaration process through to its final adoption by the UN General Assembly. While engaged in this work, I began to hear about the ILO and its interest in revising C107. I was not convinced of the need to shift our focus to an organization dealing with labor issues. I took it upon myself to read C107 and was not motivated by its provisions nor the tripartite structure of the ILO.

However, following my first-hand observation of a British trade union representative aggressively raking the government of Brazil over the coals in relation to the staggering number of Yanomami Indian deaths at the hands of gold miners that had invaded Yanomami territory, I was convinced that revision of C107 was worth my time and energy. This dramatic and unforgettable scene took place within the Committee of Experts on the Application of Conventions and Recommendations and the representative was relying on information furnished primarily by Amnesty International. The resulting conclusions and recommendations of the Committee included directives to the Brazilian government to revise their constitution in favor of Indigenous peoples as well as to begin a process for demarcation of their lands and territory. As before, it has always been about "the gold" and in this case the clash of civilizations literally was about the gold.

Once convinced of the need to be involved, Mary Simon, then ICC President and myself, directly participated in the two-year revision process of C107 within the ILO. As noted in a later contribution, this was one of the most painful experiences that I have ever been involved in. It is unfortunate and ironic that, despite

the revision of C107, such actions continue unabated and in a seemingly more violent and antagonistic fashion with the apparent complicity of governments. The dynamics between the two standard-setting processes, in hindsight, were important, allowing Indigenous peoples to sharpen their arguments and also to shorten their latitude on the matter of tolerance.

Before leaving the discussion about the early days of the WGIP, it is important to underscore the fact that the Indigenous peoples' preparatory meetings were exactly that: preparatory meetings to ensure the preparedness of participants and to arrive at a unified strategy, positions and statements. They were open, democratic, inclusive and unified gatherings of Indigenous persons devoted to the cause of advancing Indigenous human rights. They were not meetings of the "Indigenous Caucus" and, more importantly, they were not politicized, exclusive, divided, undemocratic, donor-driven opportunities for individuals to concentrate power and control in order to advance self-interest. Questions and uncertainties as to the legitimacy of representatives and domination by one region of the world over another did not hinder these early preparatory meetings. In contrast, the present-day "Indigenous Caucus" is riddled with such difficulties, personalities and agendas. So much so that a growing number of individuals choose not even to participate in the so-called Indigenous Caucus.

For myself and many others, the major turning point in events was the transmission of the draft Declaration by the WGIP to the Sub-Commission, and later to the Commission on Human Rights. The instantaneous shift from the open, inclusive, democratic forum of the WGIP to the exclusive member-state control of the procedural and substantive work on the Declaration was a jolt. By 1994, through significantly more Indigenous involvement and a swell of personal commitment from the WGIP members, the draft Declaration reflected a forceful, fundamental set of minimum standards that it was critical to safeguard in the face of ignorant, often hostile government postures.

Looking back, it is evident that the commonwealth states within the Commission on Human Rights' Working Group on the Draft Declaration (CHRWGDD) and, generally speaking, the developed countries, were consistently present, with the US and Canada working as a herd, to control the debate at both the UN and the ILO. While the Latin American and Caribbean Group (GRULAC) representation was consistent, in the early days I do not recall it playing a central role in controlling the debates. And the least developed states were largely absent, with the exception of the diplomat from South Africa, who played a constructive role in

favor of Indigenous peoples in a few of the Geneva debates. One often entertaining element of the Commission on Human Rights (CHR) was the dynamic between China and the US, with China seemingly, and possibly unconsciously, representing the limits of tolerance of Asian states.

It is essential to footnote the bragging rights that the US claimed on the basis of being the member state that carried the resolution ensuring that the participation of Indigenous peoples in the CHR went beyond those accredited by ECOSOC with NGO status. I will never forget the pride with which they claimed this crucially important procedural change. However, it was agreed not without substantial pressure from Indigenous peoples as the beneficiaries of the Declaration and our moral force as well as our legal standing as both subjects and objects of international law.

## **Second set of comments – continuing historical perspective**

In the continuing debate on the right to self-determination, there were two marked departures that I recall. The first came from statements by the Government of Australia and their elaboration upon the right of self-determination in 1995. I personally know that Australian diplomat, Colin Milner, led an internal dialogue in Canberra with the objective of breaking the impasse between states on the content of the Declaration article on the right to self-determination. The second was a similar, stunning statement by Canada [1996 or 1997] on the right to self-determination, which we carefully studied, wholly driven by mistrust, searching for the trap that they may be setting. I also recall the genuine efforts of a Brazilian diplomat who came prepared to every session with a four-inch binder that she had personally compiled, containing all relevant international instruments on the right of self-determination. She was keen to find language that would be acceptable to all concerned and made numerous good-faith efforts to draft a fair and equitable provision on self-determination. This was a rare exercise within the CHRWGDD – I wonder where she is today.

Equally stunning was the 1996 walk-out led by Moana Jackson and other Indigenous peoples. Arriving too late to participate in the “Indigenous Caucus”, I was not fully aware of the purpose of the walk-out and its full import. If I understood correctly at the time, their rationale pivoted on the fact that member states would never honestly or effectively recognize the full content of the collective hu-

man rights of Indigenous peoples and, in particular, our right of self-determination. However, I do know that if Moana Jackson in particular had continued to engage in the Declaration debate, in all likelihood we would have gained an even better document than that adopted by the General Assembly in 2007.

Either that same year or the following, on behalf of the ICC, I made an intervention that highlighted the peremptory norms of international law and specifically underscored the matter of racial discrimination. This statement centered on the right to self-determination and the fact that those member states arguing for a different interpretation of this right within the framework of the Declaration and Indigenous peoples were practicing racial discrimination within the halls of the UN! Although Indigenous peoples did not participate in the original development of these norms – standards shaped by member states long ago – we understood their application far better than most member state representatives, many of whom had not even considered them or the importance of such peremptory norms.

One of our more effective tactics was the joint statement developed, practically overnight, as a compendium of member state governments' usage of the term "peoples" in their respective constitutions, laws, policies and regulations. As one might guess, there were numerous reasons as to why this matter had to be resolved in favor of Indigenous peoples. Sarah Pritchard, the late Andrew Gray and I undertook the preparation of this document on the basis of research, recollection and hasty inquiries of Indigenous and non-Indigenous individuals [including member state representatives]. It was an impressive and compelling list of evidence of state behavior, custom and practice that could not be undermined by their respective statements in Geneva. How could their own executives, parliaments, legislatures and agencies be wrong about recognizing and applying the term domestically and historically? This list of evidence was prefaced by a strongly worded but carefully crafted statement on the importance of the collective human rights of Indigenous peoples, nations and communities. If I remember correctly, we even asked that it be annexed to the report of the CHRWGDD. Likewise, the three of us undertook the preparation of a member state "report card" in an effort to more publically and popularly expose their ill will and actions in Geneva. The results were published in an IWGIA volume and, rather than grades or marks, we applied terms such as "hot, warm, lukewarm, cold, and in deep freeze".

Increasing frustration with not only member state opposition to various articles but also with the politicized Indigenous Caucus dynamics led a few of us to

initiate two small group meetings in Copenhagen and Montreal, which we were heavily criticized for on the basis of “exclusivity”. Yet, at the same time, we attempted to identify highly qualified and directly engaged participants from every region of the world, strictly to develop an overall strategy and corresponding tactics to make some progress on the finalization of the Declaration text. One clear and important outcome was stifling the debilitating dynamic of the purported single voice of the “global Indigenous caucus” by requiring discussion, debate and positions to be taken and to emerge through regional caucuses. Each Indigenous geopolitical region [Arctic, Russian North, Asia, Pacific, North America, Latin America & Caribbean] would meet, discuss and determine their views and positions on each and every provision of the Declaration. This was also complemented by another important turning point that was expressed in the open plenary.

On the Indigenous side of the table, the tactic of “no changes, amendments or deletions” to the WGIP draft created a deep division and chasm between Indigenous peoples’ representatives. Mick Dodson accurately identified that such a position was “unsustainable,” especially when we had a few member state allies doing everything possible to actually make improvements to the language. This led to his statement suggesting that Indigenous peoples and states should entertain changes to the draft language on the basis of principles consistent with the absolute prohibition of racial discrimination, equality and non-discrimination. Furthermore, that any proposals for change should actually improve the text or effectively raise the minimum standards beyond those adopted by the WGIP. This simple, straightforward statement broke the log jam and painted certain characters into a corner.

The new, more fluid dynamics allowed for Indigenous peoples themselves to prepare alternative language, especially in fundamental areas of concern to both Indigenous peoples and member states. Some of these positions were developed between formal CHRWGDD sessions in the form of statements that garnered a groundswell of support well before engaging states in the negotiation of changes. For example, the so-called “AILA proposal” on the right to self-determination was circulated and formally tabled. This resulted in crucial elements of the necessary balance on the right to self-determination being incorporated into the final Declaration text. In addition, an Indigenous-generated Conference Room Paper (CRP) was tabled. This daring tactic, construed by Vicky Tauli Corpus and Mattias Ahren, had an impact but did not attract the same level of support as it was prepared not in a vacuum but in a very exclusive fashion, not allowing for it to organically gain Indigenous support. And, although their CRP generated discus-

sion, I have not considered the extent to which it had an impact on the final outcome of the language.

Again, the new dynamics and, as noted above, the series of “informal, informals”, which were supposed to allow for member states to “let their hair down”, and make statements that were off the record and unattributed to any one state or geopolitical region helped to move the draft Declaration forward. We even shifted rooms in order for the psychological effect of a different course of action to settle in. Abandoning the rigid seating arrangements of the plenary hall, which tended to separate member states from Indigenous peoples’ representatives, I believe, did in fact create more of an environment of collective action and ownership of the enterprise. For example, at one point, the Government of Australia, reducing the entire part of the Declaration on lands, territories and resources, tabled a single, lengthy paragraph to cover these essential articles. Immediately, other member states and Indigenous peoples alike shredded their paragraph – it was literally laughable. Never before or after did I hear such mutually shared laughter rather than malevolence expressed in the context of the Declaration drafting. One must also draw attention to the personalities that chaired the sessions and the impact they had on the remaining Geneva-based discussions, in particular, Luis Enrique Chavez of Peru, who took the step of creating a matrix that included the original WGIP language, “the Chair’s text”, and other concrete proposals that had gained substantial support.

Another point that must be made was the role of allied member states as well as that category of states that was truly willing to see advances made that did not jeopardize the future of Indigenous human rights standards. Though few and far between, there were those that did, in good faith, enter into confidence-building measures with Indigenous peoples’ representatives in an open, transparent fashion. As I have stated before, in this way, Indigenous diplomacy effectively changed the so-called legislative rules of the UN, not only for our own benefit but for the benefit of all humankind. The accreditation resolution certainly made a major difference. Without the numbers, it might have been impossible for Indigenous peoples to apply the pressure needed, to push the limits of the UN member states, and to change the rules of the UN. This, in and of itself, was an extraordinary development. Other gains along the way included, for example, recognition of the Ainu in Japan, which did not come easily but through their presence, as well as gradual, direct dialogue with the Government of Japan; for them this was a fundamental and positive spin-off effect of the UN standard-setting process. In

addition, there were many more opportunities for cross-fertilization of ideas and standards – a synergy that developed between international debate and domestic developments due to the UN Declaration process. There are far too many to recount here. Yet, if one took time to ponder this dynamic, one would easily begin to identify them, and trace them back to an encounter or a moment in Geneva or New York.

As discussions and developments in Geneva were taking shape, another change in approach, of which I remain uncertain to this day, was the significant “provisional adoption” process, which was largely ushered through by the clever Norwegian diplomat. In the final phase of the Commission on Human Rights’ consideration of the Declaration and prior to the establishment of the Human Rights Council, the Commission on Human Rights Working Group (CHRWG) instigated a series of small working groups to focus on either parts or provisions of the Declaration text. This exercise was aimed at the eventual adoption of Declaration parts on a “provisional” basis. My uncertainty stems from the old ploy of “divide and rule”. In my opinion, there were insufficient numbers of Indigenous peoples prepared to have informed debates with member state representatives and, therefore, we could not cover the entire field of small group meetings being held. For example, I monitored the debate on the right to self-determination and related articles but there were few capable Indigenous peoples involved in the small group meetings where the all-important provisions on lands, territories and resources were taking place. These small group sessions were scheduled in an attempt to make progress on the Declaration.

And progress was made. There were a few remaining contentious areas, however, including the persistent opposition of a minority of states to the linkage between collective human rights and the political right to self-determination. The UK represented the face of the opposition but they were supported by Sweden, the Russian Federation and a few others. We were then asked by the Chairperson of the provisional adoption process [from the Government of Norway] to form a small working group to hammer out language that would satisfy their so-called concerns. This meeting took place at 11:00 p.m. in the evening and was chaired by Danish Ambassador Tyge Lehmann. Here, too, was another laughable moment: a senior, experienced statesman and diplomat in contrast to the young, inexperienced [but seemingly highly refined solely due to her English accent] UK government representative attempted to argue that collective human rights did not exist in international law. Ambassador Lehmann quickly but carefully enunciated



ated the various international instruments that embrace, specifically, the collective human right to self-determination as well as other rights. The final outcome is reflected in the clumsy language of Articles 1 and 2 of the Declaration text.

Furthermore, in the background to all of the Declaration work, the invaluable service and support of the Government of Denmark, represented by the engaging personality of Ambassador Tyge Lehmann, cannot go unmentioned. He played a direct and defining role in the working sessions that provided the primary framework for the creation of the UN Permanent Forum on Indigenous Issues. Many are happy to take credit for spawning the idea, yet it is crucial to note and give credit to Ambassador Lehman for his personal efforts and energy toward the realization of this mechanism within the structure of the UN. Not only his work toward establishing the PFII but also his leadership within the standard-setting debate remains unmatched to this day. I know that he also played an instrumental role in the formation of the United Nations Indigenous Peoples' Partnership (UNIPP), housed at the ILO, the work of which is too embryonic to yet determine its effectiveness within the Indigenous world.

Indigenous representatives, including myself, were however troubled by the fact that there were hurdles still remaining that seemed insurmountable. In this context, therefore, in dialogue with the Government of Mexico, I suggested that we hold informal, inter-sessional meetings completely outside of Geneva. They were intrigued by the idea and scheduled the Patzcuaro, Mexico meeting where we did make some progress on a few issues. I personally remained concerned about how tightly bound some members states were to provisions despite the high cost to Mexico to pursue this substantial confidence-building measure. The UK in particular put on a pretty face but remained problematic due to their wrong-headed interpretation of the individual and collective human rights of Indigenous peoples.

Equally significant are the gains made outside of the proper fora of standard setting: the creation of the UN Voluntary Fund for Indigenous Populations, the expansion of whose mandate to include the HRC, treaty bodies and EMRIP as well as a title change to the Voluntary Fund for Indigenous Peoples, are indicative of remarkable progress; the establishment of the UN Permanent Forum on Indigenous Issues, where consideration of a name change is on the table as well; the HRC's successful creation of the UN Special Rapporteur on the Rights of Indigenous Peoples; and the HRC Expert Mechanism on the Rights of Indigenous Peoples. These Indigenous-specific mechanisms are all testament to the vitality

and reality of Indigenous peoples and, ultimately, our role in the early work of the Declaration. Despite some of the unsavory outcomes of the highly politicized, undemocratic, donor-driven concentration of power and control, and the sketchy nature of representation in some Indigenous quarters, these positive developments are significant and worthy of grand celebration.

Because I had a constant focus upon the right of self-determination throughout my personal decades of Declaration-specific work at the UN, it is imperative for me to comment on the outcome. With regard to the right to self-determination, our clear and unequivocal efforts were to ensure that the right of self-determination in the text of the Declaration was identical to Article 1 of the two human rights Covenants, and that no distinction could be made in its application to Indigenous peoples. Hence the reference to the peremptory norms of international law. Again, the established norms, which we did not participate in the original iteration of, were and continue to be significant and solemn elements for interpretation and import of the Declaration's understanding. Fortunately, Indigenous peoples prevailed on this point despite the ongoing, unrelenting opposition of a minority of member states. The final outcome, as reflected in Article 3 of the Declaration, is the same right of self-determination as that of the International Covenants.

Also, as a direct participant in both the UN Declaration standard-setting process and the ILO revision process, it is important to point out that ILO C169 must be read together with the UN Declaration. Although, at the time of the ILO revision process, this body stated that it did not have the competence to address the right of self-determination, it has now come to understand and expound upon the fundamental linkages between these two Indigenous-specific human rights instruments. On the matter of self-determination, the indication in the actual report of the Committee at its 76<sup>th</sup> session was that they were leaving the right of self-determination to the UN to determine:

“The Chairman considered that the text was distancing itself to a certain extent from a subject which was outside the competence of the ILO. In his opinion, no position for or against self-determination was or could be expressed in the Convention, nor could any restrictions be expressed in the context of international law.”

Later, with the emergence of both instruments, ILO staff and partners have elaborated upon the interpretive and complementary dynamic between the two instruments:

“Differences in legal status of UNDRIP and Convention No. 169 should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples through advocacy, capacity building, research or other means....

...

The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing. The Declaration's provisions deal with all the areas covered by the Convention. In addition, the Declaration addresses a number of subjects that are not covered by the Convention.”

## **The Future – third set of comments**

These achievements are worthy of grand celebration. However, the opportunity for every Indigenous person and for every Indigenous community, nation and peoples to ultimately enjoy and exercise their individual and collective human rights as members of the family of nations remains elusive. Indeed, it seems that immediately following the 2007 adoption of the Declaration by the UN, the pressures on Indigenous peoples and hostility toward their rights to self-determination, lands, territories and resources, free, prior and informed consent is actually escalating rather than tapering off. Our present and future initiatives and work must be doubled, tripled and become more energized and infused with financial assistance.

I believe that the Indigenous world must be prepared for a re-assessment of where we place and expend our energies. One shift that should be undertaken is a decentralization of our respective work. We can only accomplish so much in the halls of the UN in Geneva, New York, Nairobi, etc. We should be effectively shifting away from the international fora and placing our focus on actual national and domestic implementation of the Declaration, ILO C169 and other human rights standards. For example, our limited resources should be expended upon what happens in capitals across the world. Regional Permanent Fora should be created in Latin America and the Caribbean, the Arctic, North America, Asia, the Pacific and elsewhere.

Those who have made a career out of the international work should continue to maximize the expansion of the Voluntary Fund's mandate by more critically engaging the HRC through the UPR process and their various sessions as well as the treaty bodies, by ramping up their monitoring of these activities. Where governments have acceded to C169, more must be done to utilize the recourse mechanism with the support of the Voluntary Fund as the ILO is in fact a specialized agency of the UN. In light of the complementary and interpretive dynamic noted above, it is only logical for the Voluntary Fund to directly use its resources not only for the UN mechanisms but also for those of the ILO. There is also a need for serious coordination of the various Indigenous-specific UN mechanisms. Such coordination and unification of purposes could be aimed at applying greater pressure on member states, and seeking ways to compel them to implement some or all of the existing and emerging human rights standards.

Indigenous peoples can also play a productive role by reinforcing the cross-fertilization of issues, ideas and standards in the outstanding fields of international organizations and international law. For example, the ongoing work of the World Intellectual Property Organization, UNESCO World Heritage Sites, and so forth. Not enough resources and Indigenous persons presently exist to cover and coordinate these advocacy efforts or to ensure consistency with or improvement upon the Declaration standards.

As I noted at the outset, this story begins at home and must return home; these same needs must be addressed in regional inter-governmental fora such as the Arctic Council. Despite the numerous comprehensive land claims agreements in Canada, which are positive and unprecedented developments, more must be done to compel the Arctic Rim nation states to uphold their human rights obligations. This is especially urgent due to the external forces of China, Japan, Singapore, India and other faraway nations that are eager to become a part of what they foresee as the ice-free, resource-rich new world frontier.

As for the Arctic, Inuit, Sami and other Arctic Rim Indigenous peoples ought to consider their future role and increase their cooperative and collaborative initiatives. In particular, they ought to consider an Indigenous international treaty addressing their status, rights and authority. Linking arms and establishing a formal agreement to force the world community to recognize their unity of purpose in this uncertain arena could potentially provide an important political announcement about the need to implement the Declaration standards circum-polar-wide.

In relation to the Arctic and elsewhere, one of the imperative and most urgent rights that requires full effect and recognition is the right to participate in all matters that affect Indigenous peoples, nations and communities. In this regard, the exigent elements of free, prior and informed consent need full elaboration and effect between Indigenous peoples, member states and others. Another serious area of concern is the rapid loss of lands, territories and resources being experienced by Indigenous peoples in every region of the world, especially at the hands of extractive industries. The impacts of globalization upon the Indigenous world are largely untold. Yet, like that first moment of contact with others, we know that they are devastating to Indigenous peoples.

Because of both the visible and invisible forces, there is a need for Indigenous human rights education at every level and for every person: from Indigenous political leaders to the parliamentarians to the Indigenous child to the man on the street to the corporate CEO and, especially, the world leaders who believe that they hold the future in their mighty hands. ○

## CHAPTER 9

## Consistent advocacy: Treaty Rights and the UN Declaration

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*Wilton Littlechild*

For many Indigenous Peoples, the need for our Treaty rights to be recognized and respected was key to our involvement in the international arena. After years of effort, the spirit and intent of our treaties, as understood by our elders, is now reflected in the United Nations Declaration on the Rights of Indigenous Peoples. In this chapter, I provide an overview of the history of the Treaty provisions in the document, and pay tribute to those who paved the way for the adoption of the UN Declaration by the United Nations General Assembly on 13 September 2007.

This chapter is dedicated to the warriors, particularly the law warriors, whose advocacy for our rights led to the adoption of the UN Declaration. I would especially like to honour the work of the late chiefs, Joe Mathias and George Manuel. In the 1970s, when we used to have annual meetings of Indigenous lawyers, we could have met in any restaurant in Canada at a table for five. There are now over 1,000 lawyers working as Indigenous professionals.

In 1975, my cousin, the late Ed Burnstick said to me, “Willie, get packing because we’re going to Wounded Knee.” I was in the middle of my law exams and was unable to attend. However, the seeds of the UN Declaration were sown there, at Wounded Knee, where Indigenous peoples began drafting their first statement of principles, which was to be the forerunner to the UN Declaration.<sup>1</sup>

My involvement in international advocacy began in July 1977. The Executive Director of the office of the late Chief George Manuel contacted me and said,

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1 Deer, Kenneth. “Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples” in Joffe, Paul., and Preston, Jennifer (2010) *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*. Saskatoon: Houghton Boston Printers and Lithographers, p. 18.

"Willie, there's going to be a meeting in Sweden, and we're looking for a chairman to convene a session on ILO Convention 107. But you don't have to tell us right away, we'll give you a couple of weeks to think about it and we'll phone you back." When they phoned back, I said, "Yeah, I'd love to go to Sweden. I don't know about this chairman thing, and what the heck is Convention 107?" "Don't worry about it," they said. "We'll fax it to you".

So there I was on a plane to Sweden with a Maskwacis delegation. Our elders had told us before we left to be always mindful of Treaty principles. In this case, they reminded us that "the sun, the water, and all the grasses, in particular, sweet grass" are Treaty principles.

The elders gave us the fundamental principles on which we were to go into the international arena. I am not sure how to say in English what those mean in terms of Treaty-making, but we have a word for it in Cree: *kâki-tipahakêk*. In 1979, for the first time, the elders started writing down the rights, based on the spirit and intent of Treaty as they understood it.<sup>2</sup>

When I look back to those first ceremonies in which the elders gave us their advice, I look fondly on the UN Declaration because it incorporates all the principles they gave us.

Treaties, in particular Treaty No. 6, were the reason we turned our attention to international advocacy. Our elders convened us before the Elders Council at Panee Agri Plex, Hobbema, and said, "We're very, very disappointed at how readily our Treaties are being violated, almost on a daily basis." It was therefore with a mission not only to protect and maintain our Treaties but also to strengthen them that we embarked on this journey in the international arena 32 years ago.<sup>3</sup>

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2 See "The Treaties at Fort Carlton and Pitt, Number Six," in Alexander Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon, Sask.: Fifth House Publishers, 1991), Appendix at 351 et seq. and "Adhesions to Treaty Number Six," at 360 et seq.

3 Declaration, 15<sup>th</sup> preambular para.: "[T]reaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States." See Appendix 1.

*Ibid.*, art. 7(2): "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples."

*Ibid.*, art. 43: "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." Art. 37 affirms our right to "the recognition, observance and enforcement of treaties... and to have States honour and respect such treaties."

We took every opportunity to assert our rights. In 1982, Canada patriated its constitution, which gave us an early venue in which to assert our rights. We went to Britain's High Courts in London, accompanied by Sharon Venne and Rodney Sooniias, legal consultants.<sup>4</sup> I remember days in court when there were 27 lawyers on one side defending Canada and five of us on the other defending our Treaty rights. Our Treaty had been negotiated and concluded with the Queen's representatives, and we did not believe this relationship could be unilaterally severed. We were also trying to make sure that, before the constitution was patriated, the Treaties were going to be entrenched in it.

Back then, ILO Convention 107<sup>5</sup> was the only international law explicitly relating to Indigenous peoples. However, its assimilationist language was outdated and "destructive".<sup>6</sup> When I studied the document, I realized that it did not contain one word about Treaties. It focused mainly on economic, social and cultural rights, while civil and political rights were largely omitted.

The International Labour Organization (ILO) adopted another convention in 1989: Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169).<sup>7</sup> However, we were told when the convention was being drafted that we could not include the right to self-determination because that responsibility fell to the UN. As the ILO explained, it had:

"worked for three years during the adoption of the Convention to decide whether or not to change the term 'populations' in Convention No. 107 to the term 'peoples' in the new Convention. It finally decided that the only correct term was 'peoples' because this term recognizes a specific social,

4 R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta [1982] 2 All E.R. 118.

5 Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 U.N.T.S. 247 (entered into force 2 June 1959).

6 "Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)" (Geneva, 1-10 September 1986), in International Labour Office, Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI (1) (Geneva: International Labour Office, 1987) Annex, para. 46: "... the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. ... [Integration] had become a destructive concept, in part at least because of the way it was understood by governments".

7 Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, ILO Official Bulletin Vol. 72, Ser. A, No. 2 (entered into force 5 Sept. 1991).



cultural and economic identity different from the rest of society. However, the ILO also decided that it did not have the legal capacity, inside the UN system, to decide what the term implied in the rest of international law... [Article 1(3)] does not mean that the right to self-determination is denied by ILO Convention No. 169; instead it is left to the United Nations to decide how the term should be interpreted in general international law.”<sup>8</sup>

The limitations of the ILO conventions inspired us to focus our efforts on the UN. To us, Treaty No. 6 was evidence of our right to self-determination. This is a crucial point for Canada and other states to understand. As an inherent part of our right to self-determination, we freely determined our relations in Treaty No. 6 with the Queen’s representatives. A central purpose of our Treaty was to ensure the security and well-being of the Maskwacis Cree citizens, for present and future generations. An essential element of our right of self-determination is a right to choose - a right to determine our own future. As the Royal Commission on Aboriginal Peoples confirmed, “Self-determination refers to the collective power of choice; self-government is one possible result of that choice.”<sup>9</sup>

If we did not have the inherent right of self-determination, we could not appear before international bodies as distinct peoples defending our Treaty and Treaty rights. As a 2009 Report of the Office of the High Commissioner for Human Rights affirms, “While the right to self-determination is a collective right held by peoples rather than individuals, its realization is an essential condition for the effective enjoyment of individual human rights.”<sup>10</sup>

For diverse reasons, then, it was important that we concentrated on developing a UN declaration. It was especially important that our Treaties and our right of self-determination were affirmed and protected in international and domestic law. In 1985, the Working Group on Indigenous Populations (WGIP) began to develop a draft Declaration on the Rights of Indigenous Peoples. In 1986, the meetings were cancelled due to budgetary reasons. Indigenous peoples around the world

8 International Labour Organization, *A Guide to ILO Convention No.169 on Indigenous and Tribal Peoples, Policies for Development Branch/Equality and Human Rights Co-ordination Branch* (Geneva, 1995) at 10.

9 Report of the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group, 1996) Vol. 2(1) at 175.

10 Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61 (15 Jan. 2009) at para. 39.

recognized that this might cause the drafting process to lose momentum, or even give states a chance to terminate the work of the WGIP.

We therefore convened our own meeting, paid for it ourselves, and rented rooms at the UN in Geneva. I had the honour of co-chairing that meeting, and it was there that we consolidated our previous work into one text, including the principles that came out of the 1975 meeting at Wounded Knee.<sup>11</sup> Indigenous representatives presented a joint statement that included Treaty principles to the chair of the WGIP. We argued that the WGIP should begin with these articles, especially those that represented an Indigenous declaration on Treaties. We did not succeed, unfortunately, and the WGIP began to draft from scratch.

In 1987, we again presented our statement of principles to the UN, and our efforts began to be noticed. In 1989, the UN Commission on Human Rights commissioned a study on Treaties. Based on the recommendations of the final report of this study<sup>12</sup>, two Treaty seminars were held, one in Geneva and one on the Maskwacis Cree territory in the Treaty No. 6 area.<sup>13</sup>

We sought to raise Treaty issues at other UN expert meetings. In 1990, an Expert Meeting on Indigenous Self-Government was held in Nuuk, Greenland, where our Treaties were explicitly considered.<sup>14</sup> Further UN expert seminars

11 *Supra* note 1.

12 Commission on Human Rights, Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations: Final Report by Miguel Alfonso Martínez, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1999/20 (22 June 1999) at para. 322(c).

13 Commission on Human Rights, Report of the Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous peoples (Geneva, 15-17 December 2003), UN Doc. E/CN.4/Sub.2/AC.4/2004/7 (1 June 2004); and Commission on Human Rights, Indigenous Issues: Note by the Secretariat (Conclusions and recommendations of the Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, held in Geneva 15-17 December 2003), UN Doc. E/CN.4/2004/111 (2 Jan. 2004). For documents relating to the second expert seminar on treaties held on 14-17 Nov. 2006 in the Samson Cree Nation of the Maskwacis Cree territory in Alberta, Canada, see: [www.treatycouncil.org/new\\_page\\_524122421222.htm](http://www.treatycouncil.org/new_page_524122421222.htm).

14 Commission on Human Rights, Report of the meeting of experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples: Nuuk, Greenland, 24 – 28 Sept. 1991, UN Doc. E/CN.4/1992/42 (25 Nov. 1991) at 12 (Conclusions and Recommendations): “Autonomy and self-government can be built on treaties, constitutional recognition or statutory provisions recognizing indigenous rights. Further, it is necessary for the treaties, conventions and other constructive arrangements entered into in various historical circumstances to be honoured, in so far as such instruments establish and confirm the institutional and territorial basis for guaranteeing the right of indigenous peoples to autonomy and self-government.”

were held on various key issues, such as public administration of justice (Spain), health (Geneva) and secondary education (Paris).<sup>15</sup> At each of those meetings, the Maskwacis Cree delegation presented interventions to ensure that there was a reference to Treaties in the reports of the meetings, because our elders had said, "These are Treaty rights."

In 1995, the Commission on Human Rights established another working group to further consider the draft Declaration.<sup>16</sup> In the last years of this intersessional working group, I was co-chair of the meetings on the provisions relating to Treaties, especially Article 37 (at the time Article 36).<sup>17</sup> A Canadian government representative was the other co-chair.

Our efforts, and those of many other Indigenous peoples and state representatives, ultimately resulted in significant provisions on Treaty rights in the Declaration. Virtually all the provisions of the Declaration can be related to Treaties.

Preambular paragraph 7 contains a reference to "recognizing the urgent need to respect and promote the inherent rights of indigenous peoples". It was important that the Declaration recognize our inherent rights. In addition, preambular paragraph 14 states, "Considering that the rights affirmed in treaties, agreements and the constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character." Again, our elders believed that the Treaties signed in the 19th and early 20th centuries were international in nature, made with Queen Victoria on behalf of the Crown of Great Britain and Northern Ireland. It was therefore important for us to make sure that the UN Declaration referred to the "international character" of treaties, and that it recognized "also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States."

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15 Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen: Addendum: Conclusions and recommendations of the expert seminar on indigenous peoples and the administration of justice, UN Doc. E/CN.4/2004/80/Add.4 (27 Jan. 2004).

16 Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214, ESC Res. 1995/32, UN ECSOR, 1995, Supp. No. 1, UN Doc. E/1995/95 (1996) 44.

17 Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1994/45, Annex, in Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 Oct. 1994) 103 at 114 (art. 36).

Article 37 of the UN Declaration on the Rights of Indigenous Peoples is the key article on Treaties. Article 36 of the text approved by the Sub-Commission on Prevention of Discrimination and Protection of Minorities on 24 August 1994 contained a reference to “the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent”.<sup>18</sup> The Indigenous Peoples’ Caucus removed the reference to “original spirit and intent” because we were concerned that states too often considered that the “original spirit and intent” of Treaties was to steal our land.<sup>19</sup>

We looked at the original spirit and intent of Treaties based on the principles our elders had conveyed to us regarding Indian government and nationhood. Our elders referred to the spirit and intent of Treaties in terms of such things as Indigenous institutions and administration, lands and water and other resources, education and health, social assistance, police protection, economic development, hunting, fishing, trapping and gathering, as well as the right to cross international boundaries, to meet in council, and the right to shelter, mutual consent, and implementation.

As adopted, the UN Declaration contains an article or a preambular paragraph relating to each of these elements. We felt that removing the reference to the “spirit and intent” of Treaties did not disadvantage us because this understanding could be read into all the articles. Such an interpretive approach would be consistent with the report from the first Expert Seminar on Treaties, held in December 2003, which concluded, “The experts note that historic treaties, agreements and other constructive arrangements between States and indigenous peoples should be understood and implemented in accordance with the spirit in which they were agreed upon.”<sup>20</sup>

The report emphasizes what is at stake: “The experts also note that treaties, agreements and other constructive arrangements between States and in-

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18 Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214, ESC Res. 1995/32, UN ECSOR, 1995, Supp. No. 1, UN Doc. E/1995/95 (1996) 44.

19 Tee-Hit-Ton Indians v. United States, 348 U.S. 272 at 289-290: “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”

20 *Supra* note 15 at para. 2.

indigenous peoples have not been respected, leading to loss of lands, resources and rights, and that non-implementation threatens indigenous peoples' survival as distinct peoples.”<sup>21</sup>

Although Canada, the United States, New Zealand, and Australia opposed the UN Declaration, not one state took the floor of the General Assembly to argue against Article 37. The current Conservative government of Canada has not opposed the Treaty provisions. In the last years leading to the conclusion of the working group in 2006, a Canadian government representative and I together led the informal consultations with states and Indigenous peoples on the UN Declaration's Treaty provisions. These consultations resulted in overwhelming agreement in the working group.

We tend to focus attention on the disagreements but we should not ignore the agreement that was present with regard to a substantial number of articles, including articles relating to Treaties, for there is widespread concordance among states on the Treaty article in the Declaration. The United States appeared to be the only country to oppose this article at the conclusion of the discussions in the intersessional working group in 2006. However, there are clear indications that President Barack Obama intends to take a supportive position on Treaties:

“My Indian policy starts with honouring the unique government-to-government relationship between tribes and the federal government and ensuring that our treaty obligations are met, and ensuring that Native Americans have a voice in the White House. I'll appoint an American Indian policy advisor to my senior White House staff to work with tribes.... So let me be clear. I believe that treaty commitments are paramount law.”<sup>22</sup>

First Lady Michelle Obama has further commented on the President's behalf:

“Barack has pledged to honor the unique government-to-government relationship between tribes and the federal government. And he'll soon appoint a policy advisor to his senior White House staff to work with tribes and across the government on these issues such as sovereignty, health

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21 Ibid.

22 Barack Obama, Speech on the occasion of his visit to the Crow Tribe in Montana (19 May 2008): <http://videos.billingsgazette.com/p/video?id=1888836>.

care, education - all central to the well-being of Native American families and the prosperity of tribes all across this country. So there is a lot of work to do - a lot of work."<sup>23</sup>

These statements are promising. I am hopeful that there will be positive changes in the position of the United States in relation to Treaties with Indigenous peoples.

In December 2003, the Canadian government acknowledged the importance of implementing treaties and resolving related disputes. At the UN Expert Seminar on Treaties, Canada concluded:

"Treaties establish ongoing relationships that require implementation planning, dispute resolution mechanisms and other ongoing mechanisms within the state to manage and sustain the treaty relationships.... Canada's negotiation policies and processes will need to continue to evolve to achieve workable treaties in different parts of the country."<sup>24</sup>

Yet the government frequently does not honour its Treaties with Indigenous peoples, regardless of whether the Treaties have been entered into in historic or modern times. Recently, Indigenous signatories of all of the 21 modern Treaties made in Canada since 1975 - known as the Land Claims Agreements Coalition - have emphasized to the UN "the ongoing failure of the Government of Canada to fully, meaningfully and universally implement the modern Treaties between it and the members of the Coalition":

"This failure is inconsistent with the Constitution of Canada, many judgments of the Supreme Court of Canada, and Canada's human rights obligations in international law, including the right of self-determination, the right to economic, social and cultural development and well-being, and

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23 "Remarks by the First Lady at the U.S. Department of the Interior" (9 Feb. 2009): [www.whitehouse.gov/the\\_press\\_office/RemarksbytheFirstLadyattheUSDepartmentoftheInterior/](http://www.whitehouse.gov/the_press_office/RemarksbytheFirstLadyattheUSDepartmentoftheInterior/).

24 Government of Canada, "Analysis of Principles, Processes and the Essential Elements of Modern Treaty-Making — The Canadian Experience," Background paper, Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples, 15-17 Dec. 2003, UN Doc. HR/GENEVA/TSIP/SEM/2003/BP.9 (undated) at 13-14.

other particular collective rights belonging and applying to indigenous peoples.”<sup>25</sup>

Canada's highest court has emphasized that the Treaties with Indigenous peoples are sacred.<sup>26</sup> Yet, in relation to our own Treaty No. 6, the court has set a very low standard for the Crown when managing revenues in trust. The Supreme Court of Canada held that the Crown had an obligation to guarantee that the trust funds of the Samson and Ermineskin Nations would be preserved and would increase, but this did not mean there was any duty to invest the funds so as to obtain a higher return. Under Treaty No. 6, the court ruled, there was no Treaty right to investment by the Crown. As a result, the interest paid by the federal government on the monies of the two Nations was well below the returns generated through diversified trust portfolios, long-term bond portfolios, or the pension plan of the federal government's own public servants.

In such challenging times, we recall the wisdom of our elders, and will persevere with our advocacy to safeguard our Treaty rights for present and future generations. We must ensure that the standards of the UN Declaration are applied in a manner that honours our Treaties and ensures the full and effective enjoyment of our Treaty rights.

Article 42 of the Declaration is a critical provision that deals with the international and domestic implementation of our rights:

“The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

The Permanent Forum on Indigenous Issues (UNPFII), an advisory body to the UN Economic and Social Council, has begun to examine how it can best fulfill

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25 “Universal Periodic Review of Canada: Submission of the Land Claims Agreements Coalition (LCAC) to the United Nations Human Rights Council” (8 Sept. 2008) at paras 1, 3: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/LCAC\\_CAN\\_UPR\\_S4\\_2009\\_LandClaimsAgreementsCoalition\\_JOINT.pdf?](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/LCAC_CAN_UPR_S4_2009_LandClaimsAgreementsCoalition_JOINT.pdf?)

26 *R. v. Badger*, [1996] 1 S.C.R. 771 at 793, Cory J.: “it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred”.

its responsibilities to promote the implementation of the UN Declaration, including those provisions relating to Treaties. In January 2009, the UNPFII hosted an International Expert Group Meeting on the Implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples. The implementation of the provisions relating to Treaty rights was a focus of the meeting. Participants emphasized that the UN system “should continue its work on the treaties between States and indigenous peoples,” and “suggested that a seminar or conference on this subject be undertaken, to be hosted by a tribal nation or assembly in North America.”

The UNPFII can play an important role in promoting the implementation of the UN Declaration in the context of Treaties and agreements between Indigenous Nations and states. I suggested at the expert meeting, that “perhaps the UN Permanent Forum could call on Treaty parties to jointly work on an implementation mechanism(s) for Treaties given the preambular paragraphs 8, 14, 15 and article 37 of the UN Declaration.”

Article 42 holds a great deal of promise for the full implementation of Indigenous peoples' rights but implementation can only be achieved in conjunction with Indigenous peoples, at both national and international level.

In the preamble, the Declaration is described as “a standard of achievement to be pursued in a spirit of partnership and mutual respect.” This applies equally to our Treaties. A principled implementation of the Treaties can only encourage harmonious and co-operative relations with states. Implementation of both the Declaration and the Treaties is a crucial element for the full and effective realization of our human rights. ○





## Representing Australia

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*Ruth Pearce*

**A**n exceptional experience in my nearly 40-year diplomatic career was to be the Australian government's first representative to engage with the mandate of the UN Working Group on Indigenous Populations (WGIP), inaugurated in 1982.

The WGIP proved to be a role model and opportunity for national governments, UN officials, civil society and indigenous peoples around the world to share experiences and challenges and work together to develop a “landmark” Declaration. It shaped a working culture that was not covered by existing standards and practices. One basic starting point was that the UN had no definition of the term “indigenous peoples”. In celebration of the fifth anniversary of the Declaration in 2012, the Australian UN Permanent Representative recognized that it was the first time a significant human rights statement had been developed collaboratively between governments and indigenous peoples. The result was “transformative”—a symbolic and practical commitment to address the historical injustices faced by indigenous peoples around the world.

The WGIP began its challenging and exciting mandate to draft a Declaration to protect and promote the rights of indigenous peoples in 1985. I was there from the beginning, and for the next three years. The opportunities and challenges gave my diplomatic life an exceptional human and political framework and, in particular, practical exposure to the direct interaction between foreign policy and life at home. It especially taught me the essential value of “advocacy”: developing networks right across the diverse range of players interested and engaged in issues central to indigenous peoples.

My WGIP experience also provided me with knowledge and practical skills that I could apply in the wider UN world. I was directly involved in the Commission on Human Rights (CHR), the broad international human rights agenda and UN-

HCR, with its challenging humanitarian issues. WGIP's innovative agenda and procedures were an exceptional learning experience for my multilateral life.

We were all new to the "game" and the initial focus was to define expectations across a diverse range of "actors", to establish networks through which to understand ambitions, motives, differences of experience and expectations. Connecting with UN representatives, academics, NGOs and governments was the first "big building block" on the road to the WGIP's ambition, realized in the UN's adoption of the Declaration in 2007. So it was to prove a long road but a powerful "building block" experience for us all.

One very valuable experience for me was to engage with and learn from my fellow Australian indigenous representatives, most of whom had never travelled outside of Australia before. Indeed, without the Voluntary Fund for Indigenous Populations, established by the UN General Assembly in 1985, many indigenous representatives from across the world would not have been able to participate in the WGIP. I was on a steep "multilateral learning curve", so it was not difficult to imagine the challenges facing them in learning about the UN system. The exceptional opportunities the WGIP offered were very quickly appreciated, however, not least the direct contact with their colleagues from other countries. The empowerment this enabled was amazing, directly facilitated by the WGIP's flexible rules of procedure. The Working Group's culture, led by Chairperson Erica-Irene Daes and supported by a proactive UN team, not least Gudmundur Alfredsson, offered a very positive working environment. Over my three-year period with the WGIP, I saw stronger interaction by indigenous Australian representatives with a constantly developing, comprehensive agenda. And, importantly, we all learned the essential value of applying our WGIP experience at home, with its ambitions very directly helping to set the agenda for change and reform in Australia.

Indeed, I believe that through their engagement with the WGIP and its connections, our indigenous leadership was empowered with increasing national and international partnerships. Professor Mick Dodson, Professor O'Donoghue, Tom Calina, Les Malezer, Megan Davis are all exceptional examples of Australian indigenous leadership, at home and internationally.

The big issues were quickly shaping the road ahead for the Declaration: for example, as noted above, the lack of a recognized definition of the term "indigenous peoples"; the concept of self-determination; control over traditional indigenous lands and resources, the status of indigenous customary law, education, employment and health concerns -- a huge and complex agenda. It was a special

challenge for Australia, with the WGIP road constantly motivating and enabling change. By 1991/92, our position on self-determination had shifted to a more positive approach, with the focus on how self-determination and state territorial integrity could work together. Lowitja O'Donoghue, Chair of the Aboriginal and Torres Strait Islanders Commission (ATSIC), supported this approach at the 1992 WGIP session.

The Australian High Court's famous Mabo decision in 1992, which overturned the "terra nullius" concept of Australian law by recognizing traditional land title rights, was officially seen as a valuable demonstration of international law's influence over domestic norms, in furtherance of indigenous peoples' claims. A few weeks after the Mabo decision, the Minister for Aboriginal and Torres Strait Islanders Affairs officially passed a copy of it to the WGIP.

This was not, however, sufficient to enable the Australian government to support the Declaration in 2007. Nonetheless, the historic 2008 Apology that came less than a year later could be directly linked to the WGIP's success. My WGIP experience was uppermost in my mind as I stood outside the Australian Parliament in Canberra on 13 February 2008 with thousands of fellow Australians, watching on a big screen as the Australian government formally apologized to the indigenous peoples of Australia "for the laws and policies of successive Parliaments and Governments that have inflicted profound grief, suffering and loss on these our fellow Australians". The road to this Apology was very directly linked to the WGIP and its priorities - and most importantly - the government's decision, a year later, on 3 April 2009, to formally endorse the UN Declaration on the Rights of Indigenous Peoples.

Moreover, at the UN General Assembly in 2010, Australia's Prime Minister Rudd declared pride in the Apology and in Australia's support for the 2007 Declaration. The interaction was reconfirmed. He highlighted how Australia was making major efforts to improve the treatment of our indigenous peoples but that "we still have a long way to go". The government has established the "Closing the Gap" strategy, which sets ambitious targets to reduce indigenous disadvantage within a generation. Consistent with the rights-based approach of the Declaration, it is a practical and empirical strategy that sets targets holding the government to account with regard to achieving its aims. The government is also supporting initiatives such as the Stolen Generations' Working Partnership and the Aboriginal and Torres Strait Islander Healing Foundation.

The UN's achievements on the rights of indigenous peoples, from the first session of the WGIP to the UN Permanent Forum on Indigenous Issues to the 2007 Declaration, have been a central influence for change in Australia. The interaction so strongly evident in the WGIP culture underpins our commitment to principles of justice and to achieving practical measures to promote and protect indigenous rights. And, as Australia's UN Permanent Representative emphasized in his address to UNGA in 2012, the journey of "reconciliation" is a long one and we, both nationally and internationally, must constantly be alert to new ways of translating the Declaration's aspirations into concrete benefits for all indigenous peoples, especially women and girls.

The planned World Conference on Indigenous Peoples in 2014 is a further road to travel down, drawing on the WGIP role model so that all of us can share experiences and challenges and work together to develop and implement best-practice solutions. ○

## CHAPTER 11

## The Drafting Process and Adoption of the UN Declaration on the Rights of Indigenous Peoples

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*Petter F. Wille*

**T**he long and cumbersome path in the United Nations towards adoption of the Declaration on the Rights of Indigenous Peoples started in the Working Group on Indigenous Populations in 1985. This working group was an expert body established by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

After almost 10 years of work, the working group agreed in 1993 on a draft Declaration on the Rights of Indigenous Peoples, which it submitted to its parent body. The Sub-Commission endorsed the draft and submitted it to the Commission on Human Rights which, in turn, established a working group to consider the draft. For most governments, the drafting process began with the establishment of this intergovernmental working group in 1995.

From that point on, it took 12 years before the draft Declaration was adopted. This was not a particularly long time compared to the drafting of certain other international instruments, i.a. the International Covenants of 1966 and the Declaration on HR Defenders, which was adopted in 1998.

The establishment of the working group at the level of the Commission was adopted by consensus. The same was the case with the annual renewals of the mandate of this working group. This was somewhat surprising, given the divergent views on the substance of the matter.

Approximately 60 states participated in the working group although less than half of them were active. Some of those who were not active, or did not participate at all, held the view that they did not have indigenous peoples and that this process thus did not concern them. One of these states was China, which expressed the need to define the term “indigenous people” and provide clearly for the scope of application of the draft Declaration.

In an intervention in the working group, China emphasized that it was important to reach a clear understanding of the group of people to whom the Declaration would apply. In arriving at a definition of indigenous peoples, China emphasized that, in its view, the issue of indigenous peoples had emerged under specific historic circumstances: it was mainly the result of the colonial policies pursued by the European countries in other regions of the world, particularly in the Americas and Oceania. The purpose of this intervention was obviously to state that the Declaration did not concern China, and thus explains why China was not particularly active in the drafting process. Some other states, among them Bangladesh, expressed similar views, although this was not repeated later in the process.

One of the first challenges was to define the modalities for indigenous participation, i.e. because only very few indigenous organizations had consultative status with ECOSOC, and there were considerably more indigenous representatives than states participating in the process. The procedure that was adopted made it possible for indigenous peoples' organizations to participate regardless of whether they had consultative status or not (see Annex to Res. 1995/32). It came as a surprise to many that it was not more difficult to adopt this procedure which, in practice, almost put indigenous organizations on a par with governments in the process.

The fact that the majority of the participants were indigenous representatives also represented a challenge in itself. Many of them came very well prepared and they dominated parts of the discussions. At the same time, many governments were represented at a fairly low level, and were not particularly active, at least during the first years of the process.

At the opening of the first session of the working group, a joint statement by the Indigenous Caucus called for the immediate adoption of the draft Declaration without amendment. This view was only supported by three governments: Bolivia, Fiji and Denmark, this latter, for the most part, represented by the Greenland Home Rule Government in the working group.

The fact that the indigenous organizations were for several years unanimous in demanding the adoption of the draft by the Sub-Commission without amendment was a big challenge to progress. The first years of the working group were therefore dominated by procedural discussions and what was called the demand for "no change". It should also be added that the discussions were, to a large extent, influenced by a mistrust and lack of confidence between some governments

and indigenous representatives. This was particularly noticeable during the first sessions of the working group.

## Other Challenges

For many of those who represented governments, this drafting was a new experience, not only because of the special procedure but also because of the substance. This substance was dominated by issues such as lands, territories, resources and self-determination.

Many of the words and expressions that were used, caused difficulties for states. One example was the term “collective rights”, which created problems for some delegations. The word “traditional” reflected a desire on the part of indigenous peoples to have their traditions recognized, including traditional relationships with their lands. Many governments had concerns that this expression could result in possible claims. “Territory” was another difficult word with different meanings in the national legal systems. “Subsurface resources” was yet another challenge. The working group had long discussions on the terms “reparation, restitution and redress”. The question of a military presence in “the lands and territories of indigenous peoples” (Art. 30) was another difficulty. Many governments felt that the expressions “free, prior and informed consent” (Art 28) and “obtain their free and informed consent”(Art 32) were ambiguous.

Self-determination became the single most difficult issue, dominating the debates in virtually all sessions of the working group. Here we had a great variety of views, and many states held the view that the alternatives should be either no reference to self-determination or a clear statement that the Declaration could not be used as an argument for secession. In this connection, many states expressed a need to clarify the issue of territorial integrity.

In an effort to facilitate the process, the Nordic countries presented a paper in which it was proposed to reorganize articles and cluster them according to their relevance for determining the content of the right. This was to a certain extent accepted in the Declaration in Articles 3 and 4.



## Adoption of the Declaration

During the last two sessions of the working group, there was a move towards broad support for a text proposed for adoption by the Chair. This positive development received a boost in 2004 when the Nordic countries, together with Switzerland and New Zealand, submitted a package of proposals for amendments to the draft, aimed at identifying a possible consensus. This proposal created momentum in the process and was welcomed by a majority of the governments, as well as a number of indigenous organizations, as a constructive initiative. At that point, several indigenous organizations abandoned their “no change” position and engaged in constructive discussions of the proposals.

From the fifth session of the working group on, the Chair developed a rolling text which demonstrated that the differences were being narrowed. The progress made during the 2004 session also made it possible for the Chair to make his own proposals.

The eleventh session in 2005 started under heavy pressure to reach an agreement on the outstanding issues. Norway was the facilitator of the informal negotiations and, by the end of that session, most of the articles were ready for adoption. There was, however, still a lack of agreement on certain fundamental issues. Not surprisingly, Article 3 on self-determination was among these. There were also remaining articles on land, territories and resources. What became Article 19 in the Declaration adopted by the General Assembly, on the question of the free, prior and informed consent of indigenous peoples before decisions are taken that affect them, was also among the unsolved issues.

Thanks to proposals from the Chair (Luis Enrique Chavez from Peru) regarding these outstanding issues, it was possible to submit a comprehensive text to the Human Rights Council. This was of crucial importance because it was not possible to extend the mandate of the working group to include a session in 2006 given that the Commission on Human Rights no longer existed and had been replaced by the Human Rights Council.

When the draft Declaration was adopted by the Human Rights Council at its first session in June 2006 there were, however, some controversial ambiguities still remaining. This was i.a. reflected in the resolution accompanying the adoption. The title of the resolution was “Working Group of the Commission on Human

Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994”.

Canada and Russia voted against. It should be noted that the USA, New Zealand and Australia were not members of the CHR that year. Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia and Ukraine abstained (most of these states had not participated actively in the process).

There are many theories as to why the African initiative (Botswana and Namibia) managed to stop the adoption of the Declaration during the General Assembly in 2006. Was it an African initiative, or were other states behind it? An indication of this was given in a joint statement by Australia, New Zealand and the USA in the Human Rights Council in connection with the adoption of the draft Declaration. In this intervention, it was stated that the three governments had discussed the draft Declaration in many capitals and that, “It has become very clear that others share our concerns.”

One thing is for sure, neither Botswana nor Namibia played an important role in the drafting process, and no African states voted against the Declaration in the Human Rights Council. Following a considerable amount of pressure and consultations, the Declaration was adopted in 2007, with some amendments to the text adopted by the Human Rights Council, most notably Article 46. It has been argued that, although Article 3 remained unchanged, it has been curtailed by the addition to Article 46 (1), which states that nothing in the Declaration may be “construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of any state”.

The Declaration was adopted in the General Assembly with the following vote: 143-4 (Australia, Canada, New Zealand and the USA)-11 (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine). The four states that voted against later changed their position and made it clear that they would accept the Declaration.

In connection with the adoption, 38 states plus the EU made statements, including those who voted against the Declaration. Many of these statements concerned the interpretation of the articles concerning self-determination. Among the Nordic countries, separate statements were made by Finland, Norway and Sweden. Norway gave an explanation of the vote concerning self-determination, Article 26 and Article 30. Sweden gave an explanation of the vote in order to

express its view on self-determination and the inclusion of collective rights in the Declaration.

## Some Conclusions

There are reasons to believe that this drafting process would have been no easier if it had started today. It is also unlikely that it would have been possible to adopt a “stronger” Declaration today than the one adopted in 2007. One reason for this is that, over the last few years, many states have become more reluctant to adopting new international instruments, as well as to entering into new international obligations. In addition, states with a more restrictive human rights profile have become more active in the UN. This change in climate might also have made it more difficult to gain acceptance for the same level of participation of indigenous representatives.

There is no doubt that the UN Declaration on the Rights of Indigenous Peoples is a landmark instrument, not only for indigenous peoples worldwide but for the development of international human rights law in general, as demonstrated by the fact that the Declaration has already assumed its place among the universal human rights instruments. ○

## CHAPTER 12

## Walking the Talk? Including Indigenous Peoples' Issues in Intergovernmental Organizations

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*Elsa Stamatopoulou*

**T**he world of international intergovernmental organizations (IGOs), global or regional, can be seen as its own “universe”, complex, seemingly out of reach to the non-governmental world, “the man and woman in the street”, often cumbersome and bureaucratic, at times ignorant about and even hostile to indigenous peoples’ issues and their voices. It can be also seen as “too political”, meaning that it is about politics among states or regions and about strong international economic interests. Looked at from the outside, the intergovernmental system may appear to follow the economic and political waves of our globalized world, begging the questions “what does this all have to do with me?”, “isn’t everything too predictable, how states and IGOs will behave?”, and provoking a cynical attitude.

These were my thoughts until I joined the UN in 1979. During my studies, the chapter on international organizations was full of difficult-to-remember acronyms, and, while the mandates of the organizations we learned about made me want to work there, the whole enterprise appeared like a far away, unreachable world. It took me about three years of working in the human rights area of the UN to start to change these perceptions. After joining the Division on Human Rights, as the precursor to the Office of the High Commissioner for Human Rights (OHCHR) was called in 1980, I could gradually see the impact that non-governmental organizations (NGOs) had on the UN’s human rights work—such that the way the UN human rights system developed and is still developing would be unimaginable without that input, struggle, diplomacy and engagement. Theories of institutions<sup>1</sup>

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1 Cornelius Castoriadis pointed out that, as the conscious questioning of society’s instituted representations, philosophy develops hand in hand with politics, which Castoriadis described as

and observation of the power structures of the UN made me wonder and imagine what people with some power could do under the UN Charter. There is a lot of politics in the UN, but is this not to be expected in any interstate institution? And there is good politics one can push for in any case. The possibility for human ingenuity and initiative within the bureaucracy became obvious. More than anything else, the contradictions in the UN also became obvious. As in any human enterprise, there are various tendencies, forces and actions that come into play such that the result can almost never be predicted in exact terms, which means that there is always room and possibility for people to try out options. Moreover, there is an international normative framework that surrounds the UN. The point is how to promote the implementation of the Charter, the human rights instruments, peace and development and all that the UN stands for, despite the obstacles that some state politics may pose among states and created synergies for their institutional establishment. The non-governmental world pioneered a number of human rights instruments. The adoption of the very first UN human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, was a powerful example of "one man's struggle", that of Raphael Lemkin.<sup>2</sup> Other major NGO initiatives range from the creation of the human rights complaints procedures, the preparation of the Convention against Torture and Other Degrading Treatment and Punishment, the Convention on the Rights of the Child and its optional protocols, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the Declaration on *the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* to the UN Convention for the Protection of All Persons from Enforced Disappearances and the UN Declaration on the Rights of Indigenous Peoples (UN-DRIP). There has hardly been any more empowering experience than to see up close international institutions and international law being reshaped

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society's lucid attempt to alter its own institutions. In his book *The Imaginary Institution of Society*, published in 1975, he demonstrates that the world and its institutions is not articulated once and for all but is constantly subjected to human creativity (English translation 1998, the MIT Press, Cambridge, Massachusetts).

2 Bartolome Clavero, *Genocide or Ethnocide, 1933-2007: how to make, unmake and remake law through words*, Milano, Giuffrè Editore, 2008.

through the dynamic interface between the increasingly powerful indigenous peoples' movement and the UN system.<sup>3</sup>

One afternoon in 1981, soon after I had joined the Division of Human Rights of the UN in Geneva, the office quiet was interrupted by the sound of drums coming from the yard surrounded by the buildings of the Palais des Nations. I leaned out the window and saw a procession of Indians, dressed in traditional clothes, marching ceremonially through the yard. I noticed that at the very front of the procession were old people leading the ceremony, walking slowly and with some difficulty due to their age. The procession and the drumming lasted for some time. It was an extraordinary sight and many UN staff came to their windows or went down to the yard to watch. Impressed and intrigued, I decided to find out who these people were, why they were at the UN and whom they would meet - only to discover, to my delight, that they were in fact visiting the Division of Human Rights. In a few hours I had found the colleague who was the focal point for this, it was Augusto Willemsen Díaz, a Guatemalan political refugee, the first UN staff member to deal with indigenous peoples' rights and someone who became my mentor in indigenous affairs.

While these early UN experiences were formative for me as a person and as a professional, I could hardly imagine that, in the mature days of my work with the UN, I would be dealing directly with this: the reshaping of international agencies so they would include indigenous peoples' issues, which is a major challenge for the UN Permanent Forum on Indigenous Issues that I serviced. It was the greatest privilege of my life to be part of the beginning of the UN's relation with the indigenous peoples' movement, to walk together over the years and see the results, including the adoption of UNDRIP, the establishment of the Special Rapporteur on the rights of indigenous peoples, the UN Permanent Forum on Indigenous Issues (UNPFII) and the Expert Mechanism on Indigenous Peoples' Rights, two International Decades of the World's Indigenous Peoples, an International Year of the World's Indigenous Peoples and other policy breakthroughs. I do not wish to abuse the reader's patience or the editors' generosity with the personal anecdotes of a former civil servant. Some experiences are presented here as part of

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3 I told this story in the first article I wrote, "Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic", *Human Rights Quarterly*, pp58-81, The Johns Hopkins University Press, Feb. 1994, Vol.16.1.

“a young person’s opening her eyes to the world”-type of story, remote to me by now over time and possibly relevant to younger generations of UN workers.

As is well known, mainstreaming an issue that has been long neglected and rendered invisible is no easy task: it involves changing public policies, laws and resource allocations. More than anything, it involves a change of hearts and minds, a change of institutional culture on a specific public interest issue. Mainstreaming is also about public officials, international and national, gaining an in-depth understanding of the issue that is to be mainstreamed. The United Nations system has had these experiences with human rights<sup>4</sup> and with gender, originally. Later the strategy of mainstreaming became popular for many topics. The word “mainstreaming” has sometimes been used to indicate the need to be multidisciplinary in public policy analysis and methodologies. Although mainstreaming processes at the international level might seem esoteric and bureaucratic—and they sometimes are—there is a lot at stake behind them for the public good. They represent a site to debate and mold ideas that will then be launched into the world; they are the tip of the iceberg, an important indicator of where major currents of public policy are headed, and those currents eventually do have an impact on human beings and communities.<sup>5</sup> Mainstreaming processes therefore deserve attention, input and critique.

This essay is about the story of the uphill battle to mainstream indigenous peoples’ rights in the work of intergovernmental agencies, the lessons that can be

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4 Since the late 1990s, the UN Secretary-General has established four Executive Committees, i.e. internal bodies to coordinate specific issues: one on peace, one on humanitarian affairs, one on economic and social affairs and one on development (the latter called the UN Development Group, UNDG). The Secretary-General, in consultation with the High Commissioner for Human Rights, decided that, instead of establishing a separate committee on human rights, human rights would be mainstreamed into the work of all the other committees. As part of the New York Office of the High Commissioner, I was closely involved in those processes and later focused more on mainstreaming human rights within development, which eventually resulted, in 2003, in the adoption of the human rights-based approach to development by UNDG.

5 To show the currents of ideas, ideologies and interests that surface in mainstreaming debates, let me mention that, while in the 1990s the concept of “decentralization” was used to measure democracy, by 2008, OECD, the Organization for Economic Cooperation and Development, had pushed “harmonization” as the ideal, which was essentially advocating, albeit indirectly, for centralization. It was no surprise that the launch of “harmonization” coincided with most of the European Union and other Western countries, except the Nordics, implicitly abandoning their advocacy of the human rights-based approach to development (which is strong on participation and decentralization) and their political engagement with social policies.

drawn and what is at stake for the future. It is presented in two parts. The first part is about the institutional foundations, conceptual issues and evolution of the mainstreaming of indigenous issues in the intergovernmental system. It also discusses some highlights in this process and underscores the significance of the adoption of the UN Declaration on the Rights of Indigenous Peoples. The second part attempts a systematization of the practice of mainstreaming indigenous issues, identifies facilitating factors as well as challenges and opportunities for the future.

The discussion of the topic is far from exhaustive. It is a general overview and focuses more on perspectives learned through UNPFII and does not cover in any detail interesting experiences within a number of agencies. In addition, this essay does not include how indigenous peoples themselves view and evaluate these mainstreaming processes. Such a survey still remains to be done and should be done. What matters most in the last analysis is what effect the mainstreaming of indigenous issues in intergovernmental processes will have on indigenous peoples' rights and in improving their lives.

### **Institutional foundations for the integration of indigenous peoples' issues in intergovernmental organizations**

From the 1960s to the early 2000s, indigenous issues were dealt with mainly by the International Labour Organization (ILO) and OHCHR (previously called the Center for Human Rights and Division of Human Rights). After the establishment of the Working Group on Indigenous Populations (WIGIP) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982, the ILO was the only organization to attend the meetings and interact with indigenous participants and experts of the Working Group on Indigenous Populations for a number of years. This had beneficial effects on the ILO's work on indigenous peoples' rights. Indigenous peoples had the opportunity to voice their critique of ILO Convention 107 on Indigenous and Tribal Populations as assimilationist, in light of the higher human rights standards that were in the making through the drafting of the UNDRIP by the Working Group. In the long-run, the participation of ILO in this global dialogue with indigenous peoples at WIGIP paved the way for the adoption



by the ILO of the much stronger ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries.<sup>6</sup>

Starting in the later part of the 1980s, some UN agency representatives would arrange informal meetings among themselves to discuss indigenous peoples' issues. In addition to the Centre for Human Rights - precursor to the Office of the High Commissioner for Human Rights - and the ILO, representatives of the UN Development Programme (UNDP), the UN Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization (WHO) would also start joining. These meetings were mostly the result of the initiative of staff with commitment and engagement on indigenous peoples' rights, rather than part of any institutional arrangements.

The first International Decade of the World's Indigenous Peoples, proclaimed by the UN General Assembly in 1993, had the goal of strengthening international cooperation to solve the problems faced by indigenous people in such areas as human rights, the environment, development, education and health. Yet, in the reports on the first Decade by the Office of the High Commissioner for Human Rights,<sup>7</sup> it was found that in spite of important advances during the first Decade in the area of inter-agency cooperation, various activities connected with the Decade and institutional developments, the indigenous peoples in many countries continued to be among the poorest and most marginalized. States expected a mobilization of international agencies around the goal of the first Decade. With a few exceptions, based on committed individuals' initiatives, the UN agencies were unable to engage in an adequate way, although the Decade managed to increase awareness of indigenous peoples' issues. It is of course known that UN Decades constitute "soft" mandates for UN agencies, they are unfunded by any regular budget allocations and rely heavily on the goodwill and initiative of UN agency actors and government donors.

In 2000, the Economic and Social Council established the UNPFII,<sup>8</sup> with the central mandate of integrating indigenous issues in the UN system. According to the enabling resolution, the Permanent Forum is to serve as an advisory body to the Economic and Social Council "with a mandate to discuss indigenous issues

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6 For a recent discussion of this "transition" in the ILO's dealing with indigenous peoples see Athanasios Yupsanis, *The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples*, 49 *Canadian Yearbook of International Law* (2011), pp. 117-176.

7 E/2004/82, A/59/277, E/CN.4/2005/87.

8 Economic and Social Council resolution 2000/22.

within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights; in so doing the Permanent Forum shall: (a) Provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council; (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system; (c) Prepare and disseminate information on indigenous issues..." [emphasis added ]

The Permanent Forum has a number of unique elements. It is composed of state-nominated and indigenous-nominated members and it has a major focus on the UN system. Taking the mandate literally, one might think that UNPFII's main goal is to do what previous UN actions have failed to do: i.e. integrate indigenous issues into the UN system. While this seemingly more inward-looking language, i.e. within the UN, and the mandate of the Permanent Forum, may appear narrow, I hope to show the potential that the process of mainstreaming unleashes through a dialectic approach and the impact it can have beyond the UN system, in countries and at grassroots level. In other words, if one sees the UN system as the entry point that needs to be influenced in order to integrate indigenous issues, there can be a compounded, spiral effect on public policy much beyond the originally-targeted agencies. This makes the mainstreaming effort worthwhile.<sup>9</sup>

A number of questions arose very soon after the establishment of the Permanent Forum given the very complexity of intergovernmental organizations. Does their mandate fit indigenous peoples' issues? What leeway do IGOs have to interpret their mandate? What is the limit of action by the secretariats, the civil servants, of these agencies? Do states not have the ultimate power of decision-making in IGOs through the established governing bodies of each agency? What about political obstacles that could be placed by such governing bodies on the integration of indigenous issues in specific agencies?

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9 In this essay I use "agencies" in a broad manner, to include UN agencies, funds and programmes, offices and departments, but also other inter-governmental organizations, such as the European Union (EU), the Commonwealth and a number of international financial institutions (IFIs) which, although not part of the UN system like the World Bank and IFAD, have shown an interest in the work of the UNPFII, attended its sessions and joined the Inter-Agency Support Group on Indigenous Peoples' Issues. Sometimes the term "intergovernmental organizations" (IGOs) is used to encompass all the above.

A colleague from an agency asked me once, with a grave sense of doubt, how I expected the agencies to implement free, prior and informed consent (FPIC) for indigenous peoples, since states have the upper hand and ultimate power and they are generally reticent to accept the principle. His question suggested that agency bureaucracies would be overruled by their governing bodies if they moved outside of prescribed political boundaries and limits. I responded that, in my view, within the parameters of their action in their practical work, agencies have a responsibility to follow UN principles and standards and that, in this case, that meant following the UNDRIP, which clearly recognizes free, prior and informed consent.

Linked to this type of question were other, more practical, obstacles to mainstreaming. How should agencies be approached that had never dealt with indigenous issues, i.e. agencies that had no information, knowledge or expertise? How could they be convinced to overcome their formal position of "our agency has no mandate on indigenous issues" to understanding that they actually do, that it is a matter of interpretation, of making indigenous peoples visible in their work, after they - the agencies themselves - see and recognize indigenous peoples and their issues as part of the society the agencies are supporting, so that the agencies can then relate to indigenous peoples as subjects, with their own voices and representative institutions and requiring respect as individual human beings and as collectivities.

Let me pause here for some brief theoretical reflections in order to underline what I referred to earlier as the contradictions of the UN, a phrase I use in a positive way. Any student of international relations will know that the UN as an organization is not just the sum of its constituent parts, i.e. the states that comprise it, but something beyond that sum, brought together under common goals, as stated in the UN Charter. On the other hand, the UN is an organization of states, that presumably only look after their own limited interests, as understood by the governments in power, and who want to avoid criticism of their behavior internationally. At the same time, those very states, however, acting under the principles of the UN Charter, have adopted international human rights treaties by voting at the UN General Assembly and have subsequently ratified them, thus subjecting themselves to the scrutiny of the UN human rights treaty bodies. Far from a simplistic approach, learning to see, then, that the UN system is not a monolithic entity and focusing on the potential it offers through the numerous actors at play is crucial for any mainstreaming effort of indigenous issues.

Borrowing liberally from the concept of relative autonomy in political theory,<sup>10</sup> we can also see that the various institutions within the UN system have relative autonomy. For example, the Secretariat of the UN is one of the organs of the UN under the Charter and, as such, it not only carries out the orders of the political bodies of the UN, such as the Human Rights Council or the General Assembly, but has the possibility to act in ways that are relatively independent—thus Article 101 proclaims the independence of the international civil service. This means that agency officials have the capacity, within some parameters, to act with a certain autonomy.<sup>11</sup>

When the UNPFII was ready to hold its first session in 2002, the UN High Commissioner for Human Rights, whose Office was servicing the Forum at its first session, established the Inter-Agency Support Group (IASG) on Indigenous Issues. Its mandate was to support and promote the mandate of the UNPFII within the United Nations system. This mandate was later expanded to include support for indigenous-related mandates throughout the intergovernmental system. The IASG Chairmanship rotates annually so as to strengthen the engagement of each agency on indigenous issues. In a gesture of solidarity and advocacy, the IASG later changed its name to the Inter-Agency Support Group on Indigenous Peoples' Issues. Originally composed of nine agencies, the IASG had become, by 2012, a group composed of 35 UN and other intergovernmental entities, including International Financial Institutions (IFIs).

The formalization of the IASG from 2002 onwards strengthened its capacity to act alongside the focal points within each agency. The UN Permanent Forum on Indigenous Issues and the Inter-Agency Support Group on Indigenous Peo-

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10 According to the Oxford Dictionary of Politics, relative autonomy is the theory that any social totality has four separate and distinct sets of practices—economic, political, ideological, and theoretical—which act in combination, but each of which has its own relative autonomy according to the limits set by its place in the totality.

11 There is considerable literature on International Organization (IO) theory and Organization Theory (OT), which both study the phenomena of organizations. Authors also explore the anthropology and psychology of organizations. A discussion of these is beyond the scope of this essay. An interesting article of Sungjoon Cho, "Toward an Identity Theory of International Organizations" was published in the American Society of International Law Proceedings 101 (2007). He points out that the paradigm shift in perceiving an international organization from a passive, inorganic tool to an autonomous, organic entity provides us with a theoretical foundation under which we can delve into a unique and case-specific institutional development of an international organization.

ples' Issues opened the horizon to new opportunities for integrating indigenous issues and these have become more extensive since the adoption of the UNDRIP.

The UN agency colleague who wondered about the limitations of the agencies' capacity to respond to the UNPFII's recommendations to mainstream indigenous issues also had another concern. Why was the explicit mandate of the Forum to address agencies and not states directly? Was that not too narrow? Entering the "minds" of states, one could say that obviously many states did not necessarily want to establish a high-level body, such as the Permanent Forum, with indigenous participation, to make recommendations to them directly about how they should deal with indigenous peoples' issues across the board. Making the agencies the targeted recipients of the Forum's recommendations was a step removed from states, plus the agencies could certainly improve their performance on the topic and do some good on the ground, thus also lightening some of the burden of states.

At the same time, although agencies could undeniably act in ways that would improve indigenous peoples' lives on the ground, agency action alone would not be enough to change the situation. Governments would need to change their laws, policies, programs and budgets in order to respect indigenous peoples' rights and improve their livelihoods. The Forum realized this restriction in its mandate early on but, by interpreting its mandate creatively, it has not hesitated to address recommendations to states. This practice has met with the overall acquiescence of the Economic and Social Council (ECOSOC) when "governments" or "states" are addressed in a generic way in the Forum's recommendations. However, the ECOSOC has been more reticent to accept the Forum's recommendations in case a specific state is addressed by name, mostly due to the political sensitivity for states of human rights matters that the Forum has dealt with. The practice at this point is that, if the Forum wishes to address a recommendation to a state by name, that state must first agree beforehand, i.e. a voluntary and cooperative approach is followed. Although an extensive analysis of the human rights practice of the UNPFII is beyond the scope of this essay,<sup>12</sup> it should be added that

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12 For some reflections on the Forum's human rights mandate see E. Stamatopoulou, "The United Nations Permanent Forum on Indigenous Issues", in *International Human Rights Monitoring Mechanisms: Essays in Honour of Jacob Th. Moller*, 2009, Martinus Nijhoff Publishers/Kluwer Law International.

the Forum retains within its mandate and intention the capacity to raise a moral voice in cases of egregious violations of indigenous peoples' rights.

Most of the Forum's recommendations are thus addressed to the UN system and other intergovernmental organizations, in general or by name. This work of the Forum and its long-term impact should not be underestimated in terms of changing state attitudes. UN agencies, especially those operating on the ground, can set good examples and create paradigm shifts in government policy and action.<sup>13</sup>

After the IASG was established, the UNPFII and agencies started developing synergies to strengthen each other. The IASG also became a support group of professionals who could give each other tips and strategize on how to raise awareness, overcome obstacles and promote the mainstreaming of indigenous issues within their organizations. IASG membership started to spread and its annual meetings became the focus of specific indigenous issues of inter-agency cooperation.

It was a memorable moment when the IASG was hosted by UNDP in 2004 to prepare for the special theme of the fourth session of the Forum, the Millennium Development Goals (MDGs) and Indigenous Peoples. The IASG, a group of independent civil servants, took the initiative and responsibility to make a critical review of the MDGs,<sup>14</sup> the highest-profile topic on the international agenda at that time. A large part of the IASG's breakthrough statement was repeated later by the Forum in its own recommendations. Excerpts appear below:

“...The Inter-Agency Support Group on Indigenous Issues considers that indigenous and tribal peoples have the right to benefit from the Millennium Development Goals, and from other goals and aspirations contained

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13 Some good practices were documented in *Indigenous Women and the UN System: Good Practices and Lessons Learned* (18 cases studies submitted by SCBD, FAO, IFAD, ILO, UNFPA, UNIFEM and UNDP), United Nations Department of Economic and Social Affairs, New York, 2007, Sales No. E.06.1.9 and in a study done under the aegis of the Secretariat of the UN Permanent Forum on Indigenous Issues and Tebtebba Foundation, Victoria Tauli-Corpuz ed., *Good Practices on Indigenous Peoples' Development*, Baguio City, Philippines, 2006. See also IFAD's Policy of Engagement with Indigenous Peoples, [http://www.ifad.org/english/indigenous/documents/ip\\_policy\\_e.pdf](http://www.ifad.org/english/indigenous/documents/ip_policy_e.pdf)

14 Statement of the IASG on Indigenous Issues regarding Indigenous Peoples and the Millennium Development Goals, 30 September and 1 October 2004, UN doc. E/C.19/2005/2, Annex II, <http://social.un.org/index/IndigenousPeoples/InterAgencySupportGroup.aspx>.

in the Millennium Declaration, to the same extent as all others. However, as the 2005 review of the implementation of the MDGs nears, it appears from the available evidence that indigenous and tribal peoples are lagging behind other parts of the population in the achievement of the goals in most, if not all, the countries in which they live, and indigenous and tribal women commonly face additional gender-based disadvantages and discrimination.

Detailed information and statistics describing their situation are often lacking... Lack of adequate disaggregated data is a problem for the achievement of the MDGs. Nevertheless, the information available – both statistics that do exist and experience acquired in the course of our work – indicates that these peoples rank at the bottom of the social indicators in virtually every respect.

Concern has also been expressed that the effort to meet the targets laid down for the achievement of the MDGs could in fact have harmful effects on indigenous and tribal peoples, such as the acceleration of the loss of the lands and natural resources on which indigenous peoples' livelihoods have traditionally depended or the displacement of indigenous peoples from those lands. Because the situation of indigenous and tribal peoples is often not reflected in statistics or is hidden by national averages, there is a concern that efforts to achieve the MDGs could in some cases have a negative impact on indigenous and tribal peoples, while national indicators apparently improve.

While the MDGs carry a potential for assessing the major problems faced by indigenous peoples, the MDGs and the indicators for their achievement do not necessarily capture the specificities of indigenous and tribal peoples and their visions. Efforts are needed at the national, regional and international levels to achieve the MDGs with the full participation of indigenous communities – women and men -- and without interfering with their development paths and holistic understanding of their needs. Such efforts must take into account the multiple levels and sources of discrimination and exclusion that indigenous peoples face”.

The IASG also made a number of recommendations addressed to the UN system and to states. It pledged to support the UNPFII's efforts to analyze and comment on the ongoing review of the implementation of the MDGs by the international

system. The IASG also requested that the concerns expressed in its statement, and the situation of indigenous peoples in relation to development and the achievement of the Millennium Declaration and the MDGs, should be brought to the attention of the Secretary-General and the Chief Executives Board (CEB).<sup>15</sup> In this and other pronouncements made that year, the IASG took a strong position, critiquing the system “from within”. It is also of great strategic significance that the IASG was supported by the Permanent Forum in this work, including members of the Forum that always participate in its annual meetings.

The adoption of a solid statement on the MDGs by the IASG and its endorsement by the Forum proved that the agency focal points on indigenous peoples' issues could have a voice and an impact. Moreover, it gave UN officials the moral courage to continue the uphill battle of integrating indigenous issues into their organizations.

## **Significance of Articles 41 and 42 of UNDRIP**

The adoption of the UNDRIP in 2007 signaled a new era for UN agencies' work on indigenous peoples' rights, by explicitly referring to UN agencies in two articles:

### **Article 41**

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

### **Article 42**

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

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15 CEB: a body established by the UN Secretary-General, composed of all the UN agency heads and Under-Secretaries General and chaired by him.



The IASG held an extraordinary meeting in 2008, before the seventh session of the UNPFII, to discuss the impact of the adoption of the Declaration on the work of the agencies. The ILO and OHCHR hosted this meeting in Geneva. Each agency was invited to prepare a paper with reflections on the implications of the adoption of the Declaration on its work.

In its report to the Permanent Forum<sup>16</sup> that year, the IASG included another strong statement and critique, this time on the topic of integrating the Declaration and ILO Convention No. 169 into UN system operational programmes. Some paragraphs are quoted below:

“...Recent research has shown that the inclusion of indigenous peoples’ rights into CCA/UNDAFs, PRSPs as well as the strategies to reach the MDGs remains weak. Broader development policies on aid efficiency (harmonization and alignment) as determined by OECD-DAC<sup>17</sup> have not yet addressed indigenous peoples’ issues. The differentiated mandates and institutional arrangements, for example with regard to field presence and/or presence of specialized staff or earmarked resources to indigenous issues provide for differentiated opportunities and limitations within the agencies. However, in the context of UN reform, the role of the UNCTs<sup>18</sup> as well as the Resident Coordinators has become crucial.

A number of common operational and institutional challenges were identified. These include conflicting priorities within agencies; competition over limited resources; limited low capacity of staff; absence of indigenous staff; lack of institutionalized mechanisms for dialogue with indigenous peoples and for coordination among agencies at national or regional levels; absence of screening and tracking systems and; limited reflection in strategic plans and budgets.

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16 E/C.19/2008/CRP.7, see website of the SPFII, [www.un.org/indigenous](http://www.un.org/indigenous), under the documents for the seventh session.

17 CCA stands for Common Country Assessment, UNDAF stands for UN Development Assistance Framework (both UN-system related), PRSPs stand for Poverty Reduction Strategy Papers (World Bank-related) and OECD-DAC stands for Organization for Economic Cooperation and Development-Development Assistance Committee (“venue and voice” of the world’s major donor countries, including the IMF and World Bank).

18 UNCT stands for UN Country Team (composed of agencies represented in a specific country).

On the positive side, a number of achievements and opportunities were also identified, most prominently the momentum created by the adoption of the Declaration and the UNDG Guidelines, which have already created tangible results. In addition, the establishment of the database on indigenous professionals; ongoing policy developments and commitments of donors; and the existence of an increasingly solid knowledge base and experiences on indigenous issues constitute good practices and achievements upon which agencies can build on.

In line with the provisions of the Declaration and ILO Convention No. 169, agencies will need to find ways and means of ensuring the participation of indigenous peoples. Some agencies have experiences with the establishment of institutionalised mechanisms for participation of indigenous peoples which can serve to inspire more comprehensive efforts in the future.

“The participants recommended that:... senior management to support, at the level of United Nations System Chief Executives Board for Coordination (CEB) the mainstreaming of indigenous people’s rights in the UN system;...the IASG along with the UNPFII seek to engage in a dialogue with the OECD-DAC for inclusion of the Declaration and Convention No. 169 into broader development policies; IASG members include indigenous issues explicitly in their strategic management plans and budgets; IASG members make use of specialised programmes and staff to promote mainstreaming of indigenous issues and to develop operational guidelines and tools to assist field staff in adequately implementing institutional policies; IASG explore ways and means of establishing institutionalised mechanisms for indigenous peoples’ participation in the planning, implementation and evaluation of UN country programmes affecting them, e.g. through national consultative bodies;... IASG establish regional resource groups and organizes joint staff training for UNCTs and Resident Coordinators at country, sub-regional or regional levels...; IASG members prioritise training and capacity-building for meaningful participation of indigenous peoples in decision-making at the national level; IASG members include the concern for indigenous peoples in human resources policies and provide internships and other opportunities for indigenous representatives;... IASG members continue to translate internal guidelines and policies relating to indigenous peoples and make them available to indigenous peoples in order to enhance accountability....”

The above statement of the IASG demonstrates the boost that the adoption of UNDRIP and the synergies with the Permanent Forum gave to the mainstreaming of indigenous issues. Even though not all ideas materialized in the short-term, they captured trends in actions that agencies expressed the will to follow in the mid- to long-term.

The adoption of the UNDRIP brought new dynamism into the relationship between the IASG and the UNPFII and between individual agencies and the UNPFII as well. In 2009, at its discussion of Article 42 of the UNDRIP and the question of how the Forum would approach its new mandate under this article, the Forum adopted general comments on the legal validity of the Declaration and its own mandate under Article 42.<sup>19</sup> After asserting that the purpose of the Declaration was to constitute the legal basis for all activities in the area of indigenous issues, meaning the activities of agencies also, the Forum pointed out that the task of the Permanent Forum on Indigenous Issues in the years to come would be to act within its capacity to transform the Declaration in its entirety into living law. Implementation as living law would be fulfilled when the indigenous peoples had achieved practical results on the ground. The Forum stated that the Declaration formed a part of universal human rights law and that the basic principles of the Declaration were identical to those of the main human rights covenants and that the Declaration was a general instrument of human rights.

Following this new responsibility under Article 42, the Permanent Forum has made it a standard practice to ask UN agencies, in a questionnaire circulated annually and in the public dialogues it holds with them during the Forum's sessions, what they are doing to carry out their obligations under Articles 41 and 42. The Forum has made it clear that the Declaration is the basis and measure of all action by IGOs on indigenous peoples' issues. In public dialogues that the Forum started with states in 2009<sup>20</sup> under the Declaration, the Forum, in addition to states and indigenous peoples, also invites UN Resident Coordinators to participate, thus signaling a partnership with governments, indigenous peoples and the UN to catalyze action on the ground.

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19 E/2009/43, Annex, General Comments on Article 42 as basis for a new function of the UN Permanent Forum on Indigenous Issues.

20 In 2010, at the eighth session of the UNPFII, Bolivia and Paraguay submitted reports ( E/ C.19/2010/12/Add.1 and E/ C.19/2010/12/Add.2 respectively) and held a public dialogue with the Forum. A mission of the Forum to Bolivia and Paraguay had taken place in 2009 regarding the slavery-like situation of the Guarani and other indigenous peoples in the Chaco region.

Another strategy that clearly emerged from the Forum early on was that the Forum would intervene and promote the integration of indigenous issues at every major international debate of relevance taking place in the UN system, such as the Millennium Development Goals, the information society, climate change or women. The substantive rationale of this position is that indigenous issues are indeed multipronged and require attention in most if not all areas of international concern. The strategic basis of this position has to do with political timing, namely that no opportunity should be lost to bring indigenous peoples' issues to the fore when the whole international community's attention is focused on a topic. In addition to providing substantive policy input on topics on the global agenda, this strategy also helps raise awareness of indigenous issues among intergovernmental organizations and states. This approach by the Forum does not mean that the Forum's whole attention is absorbed by the overall international agenda. Instead, the Forum has at the same time pursued an integration into the UN agencies' work of other topics that constitute core concerns of indigenous peoples, including free, prior and informed consent, lands, territories and resources, indigenous traditional knowledge, indigenous languages, indicators of well-being, development with culture and identity, self-determination, data collection and disaggregation, among others.

### **Systematization of practice, challenges and opportunities for the future**

Having discussed some theoretical issues, major strategies and some highlights in the efforts to mainstream indigenous issues in the UN system, this part will attempt to systematize this practice and reveal some facilitating factors as well as gaps, challenges and opportunities for the future.

The integration of indigenous peoples' issues into intergovernmental work can be viewed from a multilateral perspective, i.e. initiatives targeting all or most agencies, and from a bilateral perspective, i.e. efforts targeted at specific agencies.

At the multilateral level, as mentioned earlier, the Inter-Agency Support Group on Indigenous Peoples' Issues was established in 2002. Its membership has continued to expand within the UN system and outside it. The Permanent Forum has repeatedly recommended that all agencies appoint focal points on indigenous

issues, with a work plan and resources, so that agency staff formalize their functions and raise the profile of indigenous issues. Thirty-five UN entities were part of the IASG as of 2012,<sup>21</sup> albeit it with different levels of engagement, and many of them have formally appointed focal points on indigenous issues, although not all on a full-time basis. It is interesting to note that non-UN-related agencies have gradually started joining the IASG, even as observers. Among them, the Commonwealth Secretariat and the European Commission's External Action Service. IFIs have also joined, including the World Bank, the Inter-American Development Bank and the International Fund for Agricultural Development (IFAD). Annual meetings under a rotating chairing agency are used to discuss in-depth issues, such as the upcoming theme of the Permanent Forum, to prepare a common inter-agency paper for submission to the Forum and to discuss ways of strengthening inter-agency cooperation. IASG papers, which also contain recommendations, have often created an important basis for the Forum itself to draw on in its own recommendations, such as on the Millennium Development Goals, on free, prior and informed consent and other matters. The annual meetings also serve to raise awareness and the profile of indigenous issues at all levels of the hosting organization. Some members of the Forum are present at these sessions, signaling the synergy between the IASG and Permanent Forum. In addition, the IASG holds closed meetings with the UNPFII during the Forum's annual sessions to discuss and strategize on issues of common interest and on how to improve processes of cooperation. The result of this relationship between the UNPFII and the IASG has been one of mutual reinforcement.

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21 Commonwealth Secretariat, Department of Economic and Social Affairs (DESA), Department of Political Affairs (DPA), Department of Public Information (DPI), Economic Commission for Latin America and the Caribbean (ECLAC), the European Commission's External Action Service, Food and Agriculture Organization (FAO), Fondo Indígena, Inter-American Development Bank (IADB), International Fund for Agricultural Development (IFAD), International Labour Organization (ILO), International Land Coalition, International Organization on Migration (IOM), Office of the Coordinator for Humanitarian Affairs (OCHA), Office of the High Commissioner for Human Rights (OHCHR), Secretariat of the Convention for Biological Diversity (SCBD), UNAIDS, UN Conference on Trade and Development (UNCTAD), UN Development Program (UNDP), UN Environment Program (UNEP), UN Education, Science and Culture Organization (UNESCO), Secretariat of the UN Framework Convention on Climate Change (UNFCCC), UN Forum on Forests (UNFF), UN Population Fund (UNFPA), UN-HABITAT, UN Children's Fund (UNICEF), UN Industrial Development Organization (UNIDO), UN-Women, UN Institute for Training and Research (UNITAR), UN Staff College, UN University Institute for Advanced Studies (UNU-IAS), World Food Program (WFP), World Health Organization (WHO), World Bank.

These IASG processes have had a number of spin-off effects that have promoted the integration of indigenous issues in the agencies' work.

The most notable was the cooperation among IASG members around the adoption of the UNDG (UN Development Group<sup>22</sup>) Guidelines on Indigenous Peoples' Issues in 2008.<sup>23</sup> Given the complexity and high profile of the UNDG, it was a major achievement that IASG was approved to draft these guidelines and that the UNDG subsequently adopted and formally disseminated them to all UN country teams. The Guidelines, which reflect and operationalize the UNDRIP and highlight the elements of a development with culture and identity, have since become the subject of training for the UN country teams spearheaded by the Secretariat of the UNPFII, with funding from IFAD. Another side result of the IASG has been the creation of a regional Indigenous Consultative Group composed of indigenous leaders for the UN system in Latin America. Originally launched by UNICEF, it has now become a group that advises all UN agencies. From a national perspective, an interesting experience with respect to national UN programs has been developed in Nicaragua, where a program advisory committee has been set up between the UN system and indigenous peoples' representatives,<sup>24</sup> constituting a strategic space for the fulfillment of the provisions of the UNDRIP regarding self-determination, inclusion and consultation. National advisory committees have also been established in both Kenya and Bolivia; however, at present neither of these committees is functional.<sup>25</sup>

The existence of the IASG, which includes three IFIs, as mentioned above, has also given the Forum the impetus to pursue a "diplomatic offensive" with oth-

22 The UNDG is one of the four thematic Executive Committees established by the UN Secretary-General in the 1990s (see footnote 4 above). The UNDG brings together all the UN agencies, funds and programs as well as departments of the UN Secretariat that deal with development, more specifically at operational level. The UNDG, at Principals level, adopts policy directives addressed to UN country teams around the work, promotes training and offers a global supervision of the UN's development work on the ground. UNDG processes are cumbersome and political, with considerable push and pull from various agencies and, implicitly, states, and require a lot of time and skill investment to get results.

23 See [http://www.un.org/esa/socdev/unpfii/documents/UNDG\\_guidelines\\_EN.pdf](http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf)

24 Programme committee established jointly by OHCHR and UNDP.

25 "National Civil Society Advisory Committees to United Nations Country Teams: Assessment Report", UNDP 2009. For further information see [http://www.ipacc.org.za/uploads/docs/UNIPACK\(1\).pdf](http://www.ipacc.org.za/uploads/docs/UNIPACK(1).pdf) and Report of the United Nations Development Programme: Contribution to the Study by the Expert Mechanism on the Rights of Indigenous Peoples, on Indigenous peoples and the right to participate in decision-making.

ers in order to sensitize them to indigenous peoples' issues. Visits and meetings with IFIs and Permanent Forum members have taken place on various occasions with IFAD and the European Investment Bank, as well as a meeting with a group of some 20 IFIs, facilitated by the World Bank.

Another multilateral, multi-agency initiative sprang out of the dynamism of indigenous women's issues and indigenous women themselves at the Permanent Forum. Indigenous Women became the special theme of the Forum's third session and has been a perennial topic at the Forum ever since. 2005 marked a significant turn, when 60 indigenous women leaders from all regions traveled to New York in connection with the 10-year review of the Beijing Conference on Women and achieved the adoption of the first ever resolution on indigenous women at the Commission on the Status of Women.<sup>26</sup> In 2004, a group of agencies took the initiative to form a Task Force on Indigenous Women under the Inter-Agency Network on Women and Gender Equality (IANGWE). The Group worked for three years and completed a survey of how indigenous women's issues are addressed by the UN system and also issued a collection of good practices and lessons learned in the work of UN agencies with indigenous women.<sup>27</sup>

Bilateral relations to promote the integration of indigenous peoples' issues have been pursued by the Permanent Forum and agencies in a number of ways. Permanent Forum members distribute portfolios among themselves on the topics of its mandate, as well as other topics of interest that have emerged, such as indigenous women, indigenous children, data collection, indicators, urban issues, traditional knowledge and other areas. Portfolios also include being focal points for specific agencies. This means that each Forum member undertakes to develop relations with a specific agency, to consult with the agency regarding recommendations and also to visit the agency when an official visit is scheduled. Such official Forum visits, i.e. 2 or 3 members, take place periodically and are another method by which the Forum pursues the engagement of agencies, including at a high level, with indigenous issues.

The adoption of specific policies on indigenous peoples' issues has been a standard and perennial recommendation of the Permanent Forum since its early

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26 Resolution 49/7, "Indigenous women beyond the ten-year review of the Beijing Declaration and Platform for Action", see website of the Secretariat of the Commission on the Status of Women, <http://www.un.org/womenwatch/daw/csw/>

27 For the text of this publication, see website of the Secretariat of the UNPFII, <http://social.un.org/index/IndigenousPeoples/LibraryDocuments.aspx>

sessions. As a result, a considerable number of agencies have adopted or revised such policies, among them UNDP (its policy predates the establishment of the Permanent Forum and is due for revision in 2013); IFAD, EBRD, and World Bank Agency reports to the Permanent Forum have been an important way for agencies to engage with indigenous issues. Such reports are submitted annually, detailing activities on indigenous issues and the follow-up given to the Forum's recommendations. However, a more targeted and focused system was inaugurated in 2009 when the Forum introduced the practice of holding public dialogues with UN agencies. It was a memorable moment at the eighth session of the Forum in 2009 when six UN agencies submitted reports and sent high-level delegations for a public dialogue with the Forum in the presence of states and indigenous peoples. After examining agency reports, the Forum then adopts conclusions and recommendations regarding each agency.<sup>28</sup> Resembling something like the periodic dialogue between human rights treaty bodies and states, this new method of work has the potential to become a strong tool for the integration of indigenous issues into agency work, especially if indigenous peoples and governments also participate more actively. This practice also gives agencies the opportunity of stating how they are implementing their obligations under Articles 41 and 42 of the UNDRIP as well as the Forum's recommendations. It is also obvious that when the agencies report to the Permanent Forum, states not only demonstrate political interest by participating as observers in the UNPFII's sessions but may also enrich their policy know-how for integrating indigenous issues in national policies.

In addition to the public dialogues with the Forum, monitoring of how the agencies implement the Permanent Forum's recommendations is also done through an analytical database of recommendations updated annually by the Secretariat of the UNPFII and placed on its website.<sup>29</sup> Reports by the Secretariat of the Permanent Forum periodically indicate the percentage of Permanent Forum recommendations that have been implemented, are in the process of implementation or recommendations where implementation has not been reported or started.<sup>30</sup>

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28 For the recommendations on the first six agencies that held a public dialogue with the Forum, see E/2010/43, Annex.

29 See [http://social.un.org/unpfii/UNPFII\\_Recommendations\\_Database\\_list.asp](http://social.un.org/unpfii/UNPFII_Recommendations_Database_list.asp)

30 Such reports are prepared every two years, the 2011 report can be found in document E/C.19/2011/13.



Over the years, the Secretariat of the Permanent Forum has also analyzed MDG country reports, programming papers of select UN country teams, papers of the Common Country Assessment and UN Development Assistance Framework, as well as UN Resident Coordinator reports and human development reports in order to ascertain whether these are integrating indigenous peoples' issues or including indigenous peoples' participation. The analysis has demonstrated that, with very few exceptions, indigenous peoples' issues are not part of these development processes. This has led to the realization that, at this point, training of many UNCTs is urgently required, i.e. up-scaling of the training that is offered at the moment, which has been limited to a small number of UNCTs. Such training, together with the momentum of the UNDRIP and the UNDG Guidelines on Indigenous Peoples' Issues, should strengthen action for the integration of indigenous issues where it matters most, i.e. at national and local level.

On a more political level, the Permanent Forum has pursued formal representation at meetings of intergovernmental bodies and conferences, such as for example the World Trade Organization (WTO), the Commission on Sustainable Development, UNESCO, the Commission on the Status of Women, the Governing Council of IFAD, WIPO and others. Negotiating such representation has not always been easy and at times has not been achieved, such as for example in the first two bodies mentioned above, either due to procedural difficulties or the political reticence of states.

### **Facilitating factors in the integration of indigenous peoples' issues into the UN and other intergovernmental agencies**

A number of modest achievements have been made in mainstreaming indigenous peoples' issues within intergovernmental agencies and the most important ones have been captured above. Much more remains to be done and it is crucial to keep in mind that, as in any political process, achievements are not permanent unless supported continuously. In other words, it is possible to slip backwards as well.

The most important facilitating factors in mainstreaming have been the UN Permanent Forum on Indigenous Issues and the UN Declaration on the Rights of Indigenous Peoples. As analyzed before, the Permanent Forum carries the integration of indigenous issues within its core mandate and has developed strategies and methods of work to engage the agencies actively, especially under Arti-

cles 41 and 42 of UNDRIP. The strength of the Forum, however, lies not just in its 16 member experts but also stems from the presence of numerous indigenous peoples' representatives and many states that annually attend its sessions and follow its work in various ways throughout the year. And the strength of such participation also has an impact on agencies.

The UN system's previous experiences of mainstreaming human rights since the late 1990s have facilitated the effort to mainstream indigenous issues. The adoption of the Common Understanding for a Human Rights-based Approach to Development by the UNDG in 2002<sup>31</sup> created a model for the adoption of the UNDG Guidelines on Indigenous Peoples' Issues in 2008. Inter-agency and intra-agency processes could and can thus be targeted in a more informed way so as to pursue a faster inclusion of indigenous issues.

The IASG has played a positive role in mainstreaming, creating a spirit of "strength in unity" and spearheading catalytic initiatives, such as the adoption of the UNDG Guidelines on Indigenous Peoples' Issues. The existence of an increasingly solid knowledge base and experience on indigenous issues constitutes good practices upon which agencies can build. The experiences of some agencies in establishing institutionalized mechanisms for the participation of indigenous peoples can facilitate more comprehensive efforts in the future. The expanding awareness of indigenous issues within the agencies is yet another facilitating factor, and the training efforts on indigenous issues, launched by the Secretariat of the Permanent Forum, can play a positive role.

The interest, advocacy, pressure and engagement of indigenous peoples themselves with the agencies plays an irreplaceable role and underscores the moral prerogative for the agencies to carry out their obligations under the Declaration and to be relevant to groups in society, i.e. indigenous peoples, who need and are entitled to their support. The continuing commitment of states as policy facilitators and catalysts, and as donors, is a major facilitating factor for the integration of indigenous issues. Lastly, since international organizations are "living things" in which people can make a difference, one should not underestimate the facilitation that committed individuals, including indigenous persons who work in agencies, can offer in taking risks and "piercing" bureaucracies.

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31 See <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>

### **Gaps, challenges and opportunities for the future**

The effort to integrate indigenous issues, or any other subject, into an intergovernmental agency is complex. Those who pursue the integration - for example the UN Permanent Forum on Indigenous Issues, its Secretariat, indigenous peoples themselves - must have good knowledge of the agency they are trying to integrate the issue within, in order to see the potential and obstacles and develop networks and strategies. This requires time and staff resources, but also persistence, collegiality, strength and long-term vision, so as not to lose steam from attitudes that are negative, ignorant, dismissive or simply come from overworked people.

Lack of awareness and knowledge of indigenous issues among UN officials and the reluctance of agencies to accept recommendations of the Permanent Forum are challenges. Particularly challenging is the occasional reluctance that stems from high-level agency officials, due to the politicization of indigenous issues.<sup>32</sup> It is also true that agency governing bodies may be reticent on indigenous issues and some states may try to put pressure on agency secretariats and that this may limit agency action or progress in indigenous affairs. Although awareness and knowledge have improved, the combination of a high rotation of UN agency officials and the slow pace of training compared to the need on the ground has resulted in an inability, until now, to adequately respond to this challenge. Reluctance on the part of some agencies to accept the Forum's recommendations is gradually being faced through an understanding that long-term processes of realization are required, as well as through improved monitoring of the agencies' work on indigenous issues, as explained above.

UN programming processes at headquarters and at country level lack adequate inclusion of indigenous peoples' own voices, despite some good examples.<sup>33</sup> This difficulty is coupled with insufficient human and financial resources for

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32 For example, in the process of preparing statements for a high official, I had to respond to comments in the margins of the drafts that questioned whether indigenous peoples were facing discrimination, whether it was a matter of social justice to deal with their issues, whether the UN and states had to protect indigenous peoples' way of life and whether it was important to disaggregate data, including in the area of the MDGs so that the adverse situation of indigenous peoples was not hidden behind national averages.

33 Good examples of the inclusion of indigenous peoples in consultation and decision-making processes at headquarters level can be found in IFAD's creation of the "Indigenous Peoples' Forum at IFAD", a platform of dialogue between IFAD staff, Indigenous Peoples and Governments' representatives, and in the UN-REDD Program's inclusion of indigenous leaders on its Policy Board, the highest decision-making body.

indigenous issues in the UN system. MDG-related actions lack adequate inclusion of indigenous peoples and their issues.

The situation of indigenous peoples in countries in armed conflict and post-conflict situations needs more attention. Indigenous issues have still hardly been integrated into the work of the UN in the area of peace and humanitarian work and this represents a significant gap.<sup>34</sup>

Engaging a number of intergovernmental agencies in the Permanent Forum's work and thus achieving the integration of indigenous issues in their work is still a challenge. This includes the WTO, the International Tourism Organization, the African Development Bank, the International Monetary Fund and other IFIs.

Changing agencies' operational culture to "see" those who have been marginalized by the states remains a major challenge. Agencies must take many steps to change their ways of working and to recognize indigenous peoples as groups and subjects of human rights, both individual and collective, to recognize indigenous peoples' governance structures and to include them as interlocutors around the table.<sup>35</sup>

The Human Rights-Based Approach to Development (HRBA) in the UN system has been a facilitating factor for indigenous issues on the ground for some time, as it advocates strongly for empowerment, non-discrimination, attention to the most vulnerable, participation and accountability. Unfortunately, the weakening of the HRBA in the UN in the last five years, due to states' interventions, including donors, has also taken away this facilitating factor for the inclusion of indigenous issues. In the 2012 *Global: Global Evaluation of the Application of a Human Rights-Based Approach to UNICEF Programming (HRBAP)*<sup>36</sup> it becomes

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34 Notable exceptions were the statement of the UNPFII after the disastrous tsunami in Indonesia on 31 January 2005 and the efforts of the Permanent Forum to engage with the UN Department of Peace-keeping Operations (DPKO) through the adoption of recommendations and meetings, albeit with poor results. The Forum was asking DPKO to develop a system of screening for UN peace-keepers involved in crimes against indigenous people in their home countries, so that they would be prevented from serving as UN troops.

35 Involvement with some operational projects in the UN regarding indigenous peoples made me realize that one of the most difficult points to convince UN officials about is that the indigenous peoples themselves should be asked what should be the content of the project and that free, prior and informed consent should be respected, instead of assuming somehow that UN staff would know better and should act accordingly.

36 [http://www.unicef.org/policyanalysis/rights/files/UNICEF\\_HRBAP\\_Final\\_Report\\_Vol\\_I\\_11June\\_copy-edited\\_translated.pdf](http://www.unicef.org/policyanalysis/rights/files/UNICEF_HRBAP_Final_Report_Vol_I_11June_copy-edited_translated.pdf), pp 106-111. The evaluation was presented to UNICEF's Executive Board in January 2013.

clear that the HRBA is being considerably weakened in an agency that used to be at the forefront of the efforts in this area.

Despite the benefits of institutionalizing indigenous issues so that they are an integral part of agencies' attention and action, it is imperative to recognize the danger of over-institutionalization and bureaucratization and the need to avoid being boxed into a "normality" that leads to the loss of the topic's particularities. People working on indigenous issues in agencies should not be lulled into seeing them as routine. There is, in most cases, an urgency about indigenous peoples' issues, given the adverse situations into which they have been forced as a result of systemic discrimination, marginalization, loss of culture and livelihood and other effects of settler colonialism over the centuries. It is a moral imperative for agencies therefore to have an active and dynamic attitude towards the integration of indigenous peoples' issues, keeping an open avenue of communication with indigenous peoples themselves. Integrating advice from UN bodies and secretariats will become stale unless agencies also develop the sensibility that makes them want to be relevant to the people they are meant to support, i.e. the indigenous peoples.

This essay has been focused on the dynamics, efforts, practice and gaps and challenges of integrating indigenous peoples' issues into the UN system and other intergovernmental organizations. There is one big question that the essay does not cover, as mentioned earlier: how do indigenous peoples themselves view all the above? A study on this very topic is certainly timely and it could be done, for example, on the occasion of the end of the Second International Decade of the World's Indigenous Peoples or the World Conference on Indigenous Peoples.

At the sessions of the Permanent Forum and outside, in their countries, indigenous peoples engage with the agencies. Agencies' programs and projects have sometimes had results that indigenous peoples have been involved in and welcomed. IFAD has made considerable efforts to establish good practices with indigenous peoples' own participation.<sup>37</sup> Indigenous peoples have also used the sessions of the Permanent Forum to develop relations with UN agencies, to promote global or national indigenous issues, and to seek the intervention of the

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37 Some of these good practices were documented in a study done under the aegis of the Secretariat of the UNPFII and Tebtebba Foundation, Victoria Tauli-Corpuz ed., *Good Practices on Indigenous Peoples' Development*, Baguio City, Philippines, 2006. See also IFAD's Policy of Engagement with Indigenous Peoples, [http://www.ifad.org/english/indigenous/documents/ip\\_policy\\_e.pdf](http://www.ifad.org/english/indigenous/documents/ip_policy_e.pdf)

Forum in order to change some agency policies and practices.<sup>38</sup> No agency likes to be critiqued by indigenous peoples publicly and this offers room for diplomacy. There is, however, untapped potential for indigenous leaders to weigh in and present critical, albeit constructive, evaluations of agencies in the public space of the Forum and to achieve results.

## Conclusion

Including indigenous peoples' issues within intergovernmental organizations is a worthwhile enterprise, given the role that can be played by international public institutions in this era of globalization.

The result of such efforts is far from predictable because of the interface, conflict or synergy of various actors with political power, namely states, indigenous peoples, UN bodies, such as the Permanent Forum on Indigenous Issues, and agencies themselves. Since international organizations have relative autonomy within this equation, there is room for initiative and creativity on their part. The contradictions that emerge in organizations are also an ingredient of "the possible".

The strategy of integrating indigenous issues into intergovernmental public policies and, eventually, government public policies that will halt the marginalization of indigenous peoples will therefore need to be multipronged. The interaction between the indigenous movement and the UN over the past four decades and the adoption of the UN Declaration on the Rights of Indigenous Peoples places the United Nations at the forefront of helping to reverse historical injustice and move from guilt for the past to responsibility for the future. ○

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38 One example in 2003 was the critique by indigenous leaders from the Chittagong Hill Tracts of Bangladesh regarding a UNDP program that had not respected free, prior and informed consent (FPIC) of the indigenous peoples, a principle established in UNDP's policy on indigenous peoples (the UNDRIP had not yet been adopted at the time). The indigenous leadership appealed in writing for the Forum's intervention to stop the program until FPIC could be achieved. The diplomatic intervention of the Forum's Chairperson, Ole-Henrik Magga, resulted in an evaluation mission and a subsequent postponement of the UNDP program for about a year.



## CHAPTER 13

## Working Group on Indigenous Populations 1985-91

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*Gudmundur Alfredsson*

The headquarters of the United Nations in Geneva, at the Palais des Nations, was transformed each year for one week at the end of July and the beginning of August during the lifetime of the UN Working Group on Indigenous Populations (WGIP). The hundreds of indigenous delegates - who regularly outnumbered the diplomats, NGO representatives and international staff members present - had a colorful appearance. Some were clad in traditional dress. Prayers were said in non-UN languages. Their outspoken speech-making did not necessarily follow diplomatic protocol. Music was played in the corridors and posters and paintings hung on the walls. I recall one Aboriginal snake painting with the seal of Geneva Canton at the center!

Calls came to the UN Secretariat from Swiss immigration officers at Geneva airport who had in front of them indigenous delegates with their own rather than national passports, notably the Haudenosaunee, who carried beautiful diplomatic passports for the chiefs and ordinary passports for the rest of the delegation. The border guards wanted to know whether these persons were expected at UN meetings. And UN security officers would call from the entrance gates of the Palais asking whether they could allow armed delegates to enter the building - spears and shields rather than more modern weaponry. We said yes to all such questions.

Over the years, thousands of indigenous persons participated in the WGIP and in related UN meetings and lobbying efforts. There is no that doubt these delegates had a major impact throughout the UN deliberations, not merely on the atmosphere in the building but also particularly on the content and, eventually, the adoption of the Declaration and other international initiatives relating to indigenous rights.

The weight and consistency of the indigenous arguments constituted a major reason as to why the drafting of a UN Declaration on indigenous rights continued



at a steady if slow pace and with content that significantly reflected indigenous demands. Other steps taken, such as the appointment of Special Rapporteurs for research and monitoring purposes, also came about as a result of indigenous politicking. Indigenous lobbying was responsible for an international year and for the decades for the promotion of the indigenous cause.

The indigenous lobbying skills coincided with a guilty conscience that some Western diplomats certainly felt in terms of the past and ongoing performance of their own states and with a willingness on the part of some countries in the South (and East) to embarrass their Western counterparts. Non-involvement based on lack of interest or ignorance also persisted in the non-Western regional groups of states, which only discovered late in the process that they would also be affected by the adoption of international standards on indigenous rights.

The performance of many of the indigenous delegates was often very impressive. Many came to the meetings with superior knowledge not only about the situations facing their peoples but also about international standards and the workings of the UN. They were thoroughly prepared.

A long list of indigenous representatives could follow. In addition to the authors and editors of this volume, I will mention just a few. Aboriginal lawyer Paul Coe was one of the few who could make a large UN conference hall fall silent when he spoke. I also remember a thundering speech he made at a dinner engagement about the Icelanders as a nation with a state of their own while indigenous peoples were denied the same. Chief Oren Lyon of the Haudenosaunee observed with regard to the slow pace of deliberations in the WGIP that a delay of 20 years was nothing; his indigenous people had been waiting for centuries. Chief Ted Moses spoke with dignity and passion. Lawyer Leif Dunfjeld deserves a special tribute for effective lobbying; he was the first indigenous person to take up residence in Geneva for the purpose of representing an indigenous people - the Sami. Also living in Geneva was Mario Ibarra, a Mapuche refugee. Both he and Leif were frequent visitors to my office.

Non-indigenous supporters, activists and experts were also active in the meetings and in the corridors. Names such as Bob Epstein, Tony Simpson, Maureen Davies and Howard Berman come to mind. A few diplomats were helpful although careers could be hurt if they were to be identified by name at this early stage of the recollection!

Two expert members dominated the proceedings during the period I served as secretary of the Working Group (1985-90). These were Erica-Irene A. Daes

as the chairman/rapporteur of the WGIP and Miguel Alfonso Martínez. They were both active in stating their opinions on a multitude of issues, reacting to arguments and demands brought up by indigenous delegations, formulating the relevant standards and maintaining close contact with the different delegations. Both of them also served as Special Rapporteurs with research assignments on a number of indigenous rights issues.

There was nothing in the WGIP mandate about country visits but that did not stop Erica, as WGIP chairman, from accepting the invitations of a number of indigenous peoples to visit them on fact-finding missions which amounted to de facto monitoring operations. Critical reports were usually written and circulated to the parties concerned but, in the absence of a formal mandate, they were not issued as UN documents. Erica solicited the necessary invitations from governments and she single-handedly raised the funding for travel and accommodation. On this and other occasions, she successfully stretched the WGIP mandate. If staff members were not immediately released to travel with her, she went to the top of the bureaucracy and got it done. She was tireless in reaching out to indigenous communities and promoting UN work in this field.

I accompanied Erica on some of these visits, to Australia, Canada, Japan, New Zealand and Norway. In her autobiography (*Indigenous Peoples. Keepers of Our Past - Custodians of Our Future*, Copenhagen: IWGIA, 2008) she dwells on some of these journeys. Excerpts from her reports on fact-finding visits to Australia and Brazil are reproduced in another book (*Justice Pending. Indigenous Peoples and Other Good Causes. Essays in Honour of Erica-Irene A. Daes*, The Hague: Martinus Nijhoff Publishers, 2002).

Asbjørn Eide was the first chairman of the Working Group. His initial moves on substance and procedure continued to be very much an ongoing influence on the WGIP. It was he who opened the conference room doors to indigenous participation, giving them the opportunity to speak and distribute documents without the NGO consultative status that was and is generally required for participation in other UN human rights meetings. As first chairman of the WGIP, and for a long time as an expert member of the parent body, that is the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, his spirit and encouragement were constantly present. It is highly appropriate that this book is dedicated to him.

The first secretary of the WGIP was Augusto Willemsen Díaz. He had retired from the UN Secretariat before I joined the Centre for Human Rights, as the

office was then called. He was the real author of the Martínez Cobo study on discrimination against indigenous populations. As a graduate student in the early 1980s, I visited him at the Palais des Nations and, from the piles of documents and books in the two offices that he occupied, he was able to locate whatever I asked for right away.

Unfortunately his document collection was destroyed by fire some years later, where it was stored, in an annex to the Palais Wilson (later the seat of the office of the High Commissioner for Human Rights). Much later, in 2003, I had the opportunity to meet Augusto again for a long chat, this time in Guatemala City. He was still involved in and concerned about indigenous rights, and he was very much up-to-date on what was happening at home and abroad. Augusto retired from UN service in 1984, and he was replaced as secretary of the WGIP by Elsa Stamatopoulou.

During the period 1985-91, when Elsa left for new assignments in New York, I took over and served as WGIP secretary. I had a number of supervisors. For much of my time in this job, it was Horst Keilau (from East Germany) who was genuinely helpful and supportive, and I never felt that geopolitics came into it. Emmanuel Mompoin (from Haiti) was also supportive although French and American chiefs were either indifferent or hostile; one of them complained that I was "spending too much time on the Indians". Yes, mid-level bosses in the human rights secretariat were called chiefs, not be confused with the other chiefs attending meetings in the building. My successor as secretary of the WGIP was Julian Burger.

Today, several UN staff members work on indigenous rights issues both in Geneva and New York. This was not the case in my time when it was a partial assignment for one staff member, and I had a number of other tasks in the Research and Legislation Branch of the Centre for Human Rights. In addition to servicing the WGIP, the Board of Trustees for Voluntary Fund for Indigenous Populations, seminars on indigenous rights, Special Rapporteurs of the Sub-Commission on cultural properties, treaties and other arrangements between states and indigenous peoples, and preparations for the international year for indigenous peoples, I recall also being secretary of the drafting group on a minority rights declaration and preparing a variety of documents and servicing meetings on, *inter alia*, the realization of economic, social and cultural rights, independence of the judiciary, rights of the child, human rights defenders, the right to development, the environment and human rights, the mentally ill, contemporary forms of slavery, and methods of human rights verification.

The issues discussed in the WGIP at this time were much the same as in subsequent years. Terminology questions were persistent. As evident from the name of the Working Group, the term 'indigenous populations' was still in use but it was changed to 'indigenous peoples' in response to indigenous demands, as explained elsewhere in this book. At one point, following a proposal put forward by a Canadian diplomat, an attempt was made to employ 'indigenous people', that is deleting the last 's' from indigenous peoples, like in people in the bush or people on the street, in order to shift the focus to individual rights and away from self-determination and collective rights. While this expression 'indigenous people' found its way into a number of resolutions, even the 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, the 's' came back soon enough. This was in part thanks to the persistence of indigenous participants in the WGIP and the expert members and in no small part thanks to ILO Convention No. 169 which came with the 's' when it was adopted in 1989; the argument was that standards set in a declaration should not fall below a treaty on the same subject.

An informal proposal by Ivan Tosevski, then chairman of a Working Group on Minorities under the Commission on Human Rights, and which was also drafting a declaration albeit on minority rights (adopted in 1992), could have brought about another terminology complication. Ivan was a good minority rights advocate but he was worried that separating indigenous rights from minority rights would cause difficulties for states and international organizations and so he wanted indigenous rights to form part of the minority rights discourse. While some diplomats liked and expressed support for this idea, the WGIP kept going without interruption. Furthermore, many of the rights that indigenous peoples were seeking recognition of had never been a part of minority rights. The working papers by Asbjörn Eide and Erica-Irene Daes reproduced in this book contributed to keeping the two drafting exercises, on the rights of indigenous peoples and minorities, moving on separate paths.

Substantive issues that dominated the debate in the WGIP in the early years were land and natural resource rights and the right of self-determination. Developments in another UN forum favorably influenced the debate, namely case law from the Human Rights Committee under the International Covenant on Civil and Political Rights. Communications No. 197/1985 (Ivan Kitok v. Sweden) and No. 167/1984 (Chief Bernard Ominayak on behalf of the Lubicon Lake Band v. Canada) recognized that the rights to land and traditional economic activities were

protected under Article 27 of the Covenant when these were part and parcel of the groups' cultures. Again, the argument went, a declaration could not fall below treaty provisions, or authoritative interpretations thereof, on the same subjects. Two of my UN colleagues, Jakob Th. Möller and Alfred de Zayas of the Communications Unit in the Centre for Human Rights, deserve much credit for these and subsequent decisions on indigenous rights by the Human Rights Committee.

There is an extensive written record of indigenous rights moving through the UN system. Production of a paper trail is one thing that international organizations do well. These include the annual reports of the WGIP and of the Board of Trustees of the Voluntary Fund, plenty of working papers and other documents submitted to the WGIP, documents prepared for and resolutions adopted by the Working Group's parent bodies, that is the Sub-Commission, the Commission on Human Rights, the Economic and Social Council and, eventually, the General Assembly, summary or verbatim records of debates, a series of studies and working papers undertaken by Special Rapporteurs and experts of the Sub-Commission and WGIP, several UN seminar reports, and a variety of findings by monitoring mechanisms that have addressed indigenous rights.

In addition to the official UN documentation there is plentiful academic literature (with several books and articles listed in the bibliography of this book) and government reports. Hans Jakob Helms has provided unusual insight into the UN and ILO discourse, with honesty and humor, in two novels ("Dansen i Genève" of 2004 and "Hvis du fløjter efter nordlyset" of 2011, both from Milik Publishing in Copenhagen). Hans Jakob was a participant in many of the UN and ILO meetings and, in his skillful hands, the novel turns out to be a useful format for describing sensitive moments in contemporary history. One chapter from each book is reproduced in English translation in this volume.

At the United Nations, it is fair to say, indigenous rights have been much more successful than minority rights, in terms of both substantive coverage in the standards adopted and the monitoring bodies engaged. Why is that? A few possible reasons come to mind. While minority rights involve and raise concerns for practically every member state of the UN, fewer countries are involved as far indigenous peoples are concerned. Those states that do not or claim not to have indigenous groups within their borders do not mind creating problems for those that do. For many participants in the meetings, there is also a romantic glow attached to the indigenous peoples, who are so colorful and so different even from their majority populations, let alone the diplomats present. This glow, combined

with the rampant discrimination and maltreatment that indigenous peoples have long faced and the guilty conscience acknowledged by many, has undoubtedly facilitated progress. Another factor in the comparison, probably more important, is the very strong and effective indigenous presence while the minorities, notoriously unorganized and uncoordinated, have made much more limited use of UN lobbying and monitoring processes.

Challenges remain. What does the right of self-determination mean in the context of indigenous peoples? What will be the role of free, prior and informed consent as set out in the UN Declaration? How do we encourage and facilitate improvements in domestic implementation of the international standards concerning the rights of indigenous peoples, not least land and resource rights? As with the drafting of the standards, the answers are likely to emerge as a result of continued indigenous efforts on both legal and political fronts. ○



## CHAPTER 14

## Indigenous Peoples and Human Rights: A View from the Podium

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*Julian Burger*

Probably everyone connected with the contemporary history of indigenous peoples and their voyage through the UN has a memory of their first encounter. Mine was in Geneva, 9 August 1982. My part-time lecturing had been whittled down due to some stringent budget cuts in what were deemed radical universities teaching useless things such as the social sciences. The Prime Minister Margaret Thatcher was triumphant following her victory in the so-called Falklands War and she was well placed to win the next election, which she did in 1983. With my PhD hot off the press, I had expected to while away my years in a university; however, it soon became clear that a few hours of teaching would never cover my costs and those of the little family that was emerging. I had to get a job. These were the days of more or less full employment for graduates, and post-doctoral degrees were rarer and seen as a sign of superior intelligence! I applied for a research job in an NGO from the history books – the Anti-Slavery Society (now renamed Anti-Slavery International). Within days, I was offered the job and, before even starting the position officially, was invited to set off to the UN in Geneva to cover a new working group, accompanying the newly-appointed Director Peter Davies, who would follow the session of the Working Group on Slavery. My brief was to read a statement on the Chittagong Hill Tracts of Bangladesh, an issue that impassioned the Board of the Society, at the first session of the WGIP.

I knew nothing of indigenous peoples let alone the Chittagong Hill Tracts although I was later to co-author a book about the long-suffering tribal peoples of this region of Bangladesh. However, I knew I had a week in Geneva, there was sunshine and an enticing lake and I had a job. On reflection, I had no knowledge or special interest in the lives of indigenous peoples, or indigenous populations as the UN preferred it at this time. I had spent over 15 months in Chile during the



Allende presidency and up to the terrible coup d'état on 11 September 1973 that ended three years of social progress in what was known as the Chilean path to socialism. While I was there I had travelled to Temuco in the south of Chile where the majority of the Mapuche lived but had not taken note of their struggle as my interest lay in the national efforts to take control of the economy, improve the living conditions for the majority and hold back the extremism of the privileged elite. A few years later I won a research award to do fieldwork for a doctorate on the social history and economy of the north-east of Brazil. In Brazil, with its rich indigenous diversity, the nearest I ever came to indigenous peoples was buying some souvenirs, including a rain stick that I gave my parents and guaranteed them would ensure that our islands would always stay wet – a promise that has been honoured for many years. Added to this entirely negative background, I was a Londoner, had no attachments to my birthplace and could not have cared whether I lived in Fulham, Clapham or Camden, as long as the rent was affordable. Nor was I a lawyer (the preferred option for the human rights community) or an anthropologist. In short, I was particularly unsuited to working on the human rights of indigenous peoples although that is precisely what I did from 9 August 1982 on. For the professional and personal fulfilment that I have gained over nearly three decades, I sometimes silently thank Margaret Thatcher whose policies curtailed my academic career and got me involved in the politics of human rights and indigenous peoples.

My memories of the early working groups are in snatches. The first sessions of the Working Group were remarkable open spaces of dialogue and revelation, thanks to the bold and unprecedented decision of the first chairman, Asbjorn Eide, and members to permit all representatives of indigenous peoples to take part. Ms Erica-Irene Daes, who became the Chairperson-Rapporteur in 1984 and for many years thereafter referred to them as "Agoras". In so doing, she captured the idea that the WGIP was not only a place of uncensored political debate but also a spiritual and philosophical entity – a place where indigenous peoples could not only claim their rights but explain their cultures, visions, cosmology, relationship with the natural world, view of history and so forth. In those early sessions, when delegates from governments and indigenous peoples numbered less than 100 or so people, there was plenty of time for reflective, thoughtful, detailed presentations. In time, speakers were pressed to make their statements in three minutes or less, avoid irrelevant background information, make clear points and propose recommendations. From the great acclamatory oral traditions, indigenous

peoples were soon persuaded to adopt the UN way, write down what they wanted to say, be brief and fit everything that mattered into a strict time limit. Indigenous peoples did this with goodwill, knowing that to master the UN beast, they needed to learn and comply with its rituals.

It was a pity, but probably inevitable, as more and more indigenous peoples participated in the WGIP, that time constraints would reduce the originality of this new assembly. It means that today there will never be time in the business-like meetings on indigenous peoples, for a Mario Juruna – the Xavante who became the first Federal MP from Brazil's indigenous peoples – to indulge in a lengthy speech including a detailed description of everything he would do when he was Secretary-General of the UN while his wife whispered incessantly in his ear and picked at his hair and clothes. We would not have the time to hear, at length and in painful detail, about the atrocities perpetrated by the Guatemalan government against her people and her family, which so shocked the first sessions of the WGIP when Rigoberta Menchu took the floor. There is no time to hear the profound, poetic and patiently recounted explanation of the meaning of land to the Lakota elder who concluded his philosophy lecture – for that was what it was – by telling us how our religions can travel and be established with buildings, mosques, churches and temples anywhere, even on the moon, but for his people the spiritual spaces were the hills, rivers, skies, trees and animals of their ancestral homes.

Many of the first comers were street fighters. They had battled it out at home in an environment of widespread discrimination and police oppression. The Aboriginal people from Australia set new standards for straight talking in the UN with its cautious, non-confrontational lingua franca. I recall participants such as Paul Coe and Marcia Langton laying into the Australian government with a vengeance even though, at the time, its policies were much more conciliatory than those of the later Howard period and, a few years later, under the left-leaning Aboriginal Minister Robert Tickner became positively chummy.

It was necessary to speak out, too. In 1982, the Rios Montt dictatorship had initiated genocide against Guatemala's majority indigenous populations; in the CHT of Bangladesh the army and Bengali colonists were murdering and burning the homes of the indigenous hill people whose land they wanted; in the Philippines, the Marcos dictatorship was instigating a war against its own indigenous peoples in the Cordillera. Not much was being done by the UN about these crimes and, notoriously, some even spoke positively of the efforts of governments, as

was the case of the report by the UN Rapporteur, Lord Colville, on Guatemala in his presentation to the Commission on Human Rights. Even the major human rights NGOs, such as Amnesty International, were quiet on the CHT, the violence against indigenous peoples in the Philippines and indigenous peoples in general, as they were still focusing on prisoners of conscience.

Internationally, these were invisible peoples. They were also the victims of a new wave of destructive policies of colonisation. This time, though, it was not only being implemented by the West but by the governments of the South. From the 1960s onwards, stimulated by programmes of national development and underwritten by investment from the international financial institutions, in particular the World Bank, as well as foreign investors, swathes of lands from Amazonia to the Arctic and the forests and hills of Asia were being opened up for hydro projects, logging, mining and oil and gas extraction, and intensive export-oriented commercial farming. It was the beginning of the post-war rush for resources that has continued to the present day. Inevitably, indigenous peoples were at the forefront of this development bulldozer, as they still are and, as noted by the anthropologist and former World Bank staff member Shelton Davis, they were to be the victims of the development miracle.

It seemed to me, as I tried to make sense of the statements I heard from indigenous peoples, that I had stumbled into a world that was both terrible and magnificent, of peaceful communities with unique cultures shattered by powerful destructive outside forces. If I had thought that the colonisations of the Americas or of Australia were violent but distant events from the past, I soon learned that the consequences of these incursions were part of the daily reality of millions of people. Racism was prevalent in countries such as Australia and Canada, whose human rights reputations were considered unassailable, and there appeared to be no country where indigenous peoples' lands were not under intense pressure from outsiders.

The WGIP had a mandate to consider possible new human rights standards for indigenous peoples and to hear about their situations in the light of an earlier report by a Special Rapporteur of the UN's expert body on human rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The so-called Cobo report on discrimination against indigenous populations represented a major effort to gather information on indigenous peoples and devoted chapters to land, housing, employment, health, education and so on. Even as it was published, it was quite out of date, relying on data provided by states that

was 10 or even 20 years old and much of it unreliable. Its impact was nonetheless undoubtedly critical in stimulating further action by the UN in the shape of the WGIP and its mandate to find out more about the living conditions of the world's indigenous peoples.

As a newcomer to the issue, I felt quite ignorant of what was a significant area of injustice. With the best will in the world, however, it was impossible to learn from the academic literature. Scholarly articles and books on the contemporary situation of indigenous peoples were few and far between at that time. Information had to be dug out and pursued, and resided with a handful of human rights activists and some newly-created NGOs such as the Danish-based IWGIA, Survival International in London, the Society for Threatened Peoples in Germany, the Workgroup on Indigenous Peoples in the Netherlands or Cultural Survival in the US. Of course, there was plenty of literature on the cultures, traditions and social organizations of indigenous peoples written by ethnologists but these works were remarkably silent on the threats to the continuing existence of indigenous peoples as distinct peoples or, indeed, of their active and courageous efforts to resist.

Inevitably, given the dearth of reliable information about indigenous peoples and their rights from other sources, the WGIP became a vital space for accessing and giving visibility to their issues. In due course, indigenous peoples would get their messages across effectively to a wider international audience, especially from 1992 onwards when a series of events brought indigenous peoples to the forefront. This related in particular to the two world conferences on the environment (Rio, 1992) and human rights (Vienna, 1993), the 500 year Columbus anniversary, Rigoberta Menchu's unexpected Nobel Prize and the General Assembly's decision to proclaim an International Year of the World's Indigenous People (1993). From then on, indigenous peoples with 10 years of international experience chalked up were no longer newcomers, had developed a broad coalition of international support and had honed their international identity and political programme.

A decade later, by 2002, indigenous peoples had gained considerably in stature in the UN, eventually obtaining a Special Rapporteur dedicated to their issues in 2001, the Permanent Forum on Indigenous Issues (2002) and, finally, the Expert Mechanism on the Rights of Indigenous Peoples (2008). Together with the Declaration on the Rights of Indigenous Peoples adopted in September 2007, indigenous peoples had cause to be pleased with their progress. By gaining three specific international mechanisms dedicated to their concerns, at a high level in the hierarchy

of the UN and with decision-makers drawn from their own peoples, was almost an object lesson on how to take on the UN behemoth and come out on top.

To add to these achievements, indigenous peoples were given the cherry on the cake in the form of an expanded Voluntary Fund on Indigenous Populations able to provide travel grants to indigenous delegates to take part not only in the sessions of the Permanent Forum and Expert Mechanism but also in the Universal Periodic Review process of the Human Rights Council and the deliberations of the Treaty Bodies monitoring the covenants and conventions binding on governments. Plenty in civil society were admirative, none more so than the Afro-descendant organizations, which lobbied for equivalent recognition by human rights bodies.

All this could not have been predicted in the formative 1980s. Even discussion of the declaration was churlish, with governments objecting to references to self-determination because it was deemed to be outside the remit of the WGIP. The expert members who took on the first draft, with all the sympathy they had for the indigenous cause, were reluctant to accord indigenous peoples an unqualified and therefore non-discriminatory right to self-determination. In 1993, the Chairperson-Rapporteur was proposing an alternative qualified right, albeit with the absolute determination of indigenous peoples not to accept anything less than the right accorded all other peoples and with a WGIP membership feeling they ought to finalize their draft as a contribution to the International Year. Article 3 acknowledging indigenous peoples' rights to self-determination was therefore adopted in the version requested by indigenous delegations, to triumphant cheers.

In the period leading up to the adoption by the WGIP of its draft of the declaration, I had moved from the comparative liberty of an NGO, able to say what I wanted, to a position in the UN where I was expected to be a neutral onlooker. It was never my intention to work at the UN. My few days at the WGIP and its parent body each summer more than satisfied my appetite but I had become an expert. At the Anti-Slavery Society, we had produced a series of highly critical books on the Philippines, Guatemala, the Chittagong Hill Tracts, West Papua and dozens of brief papers on other countries in which governments were berated for their appalling and occasionally genocidal policies towards indigenous peoples. The World Bank was seen as complicit by funding the dams in the Philippines and the transmigration programmes in West Papua, and even the UN did not always come out well. In 1987, I took a lengthy tour of Australia to look at the human rights situation of the Aboriginal people on the eve of the bicentenary and this resulted in a

short book. In the absence of any kind of general overview of indigenous peoples' situations, I was invited to fill this gap and, in 1986, wrote "Report from the frontier", which complemented the only other comparative publication available at that time, a ground-breaking book by John Bodley called *Victims of Progress*. A year later, I was producing a long report on indigenous peoples for a Geneva-based think tank established at the request of the General Assembly called the Independent Commission on International Humanitarian Issues. The report, together with recommendations from the high-level members of the Commission, was later published as the book "Indigenous peoples: a global quest for justice". It was this exotic institution that brought me to Geneva to work on its final report for submission to the General Assembly.

Three years later, I was the secretary of the WGIP, organizing an expert seminar in Nuuk, Greenland (1990), being the human face of the UN as it received indigenous delegations, arriving in ever greater numbers and trying to navigate the bureaucracy with its strange hierarchies, rules, time-consuming memoranda and formulaic writing. The Centre for Human Rights, as it was then, was short on staff and, as the sessions of the WGIP swelled to more than 1,000, interns were the only human resource available. Photocopiers rarely had paper and furniture, filing cabinets and office decorations were in a state of utter dilapidation. While the outside world was beginning to use word processing and the Internet, with Microsoft reigning supreme, the Centre was hooked on an obscure software called Wang. When Atencio Lopez from the Kuna people of Panama came into my office and asked where he could plug in his modem I could only smile wanly and ask what he was talking about. Why wouldn't indigenous peoples be on a higher technological plane than the UN?

As everything was new, each event and every proposal held a certain innocence. Why not ask for an international year? Why not ask for seminars on subjects such as land rights or treaties? Why not call for an indigenous rapporteur or chairperson for the expert seminars? Why not address the General Assembly in the celebrated Assembly Hall? Once you knew the way the system worked, anything was possible. By the 1990s, meetings on indigenous peoples were among the largest being held at the Palais des Nations in Geneva. Speaking at world fora was nothing new: pioneered by Marcus Terena, representing Brazil's indigenous people at the Earth Summit in June 1992, indigenous representatives spoke at the General Assembly in December 1992 at the opening of the International Year, and in June 1993 at the Vienna Conference. Indigenous experts were

regularly chairing international seminars. By the mid-1990s, however, as the work on the draft Declaration began in earnest in a governmental working group, these achievements seemed to count for little.

There was hostility to the open participation of indigenous peoples in the proceedings of the new working group of the Commission on the declaration as a matter of right. A pointless and discriminatory rule was adopted forbidding any indigenous organization from participating if its government objected. The proposal for joint chairing of the sessions by a governmental and indigenous representative was rejected. Indigenous peoples were driven to staging walk-outs to obtain some control over the final report so that it reflected their points of view. Two articles of the declaration were agreed upon in the first year – the only two dealing with individual rights – but otherwise there was no progress on adoption for nearly a decade. The chairman, attentive to his own government in Peru under the controversial presidency of Alberto Fujimori (since imprisoned for authorising human rights violations), to the utterly negative position of the United States and to the ambiguous stance of Canada, was unwilling to push even for the provisional adoption of articles.

It seemed to me that indigenous peoples, over-alert to the procedures and initially locked into a no-change position, let slip opportunities for strengthening the declaration when they were occasionally forthcoming from governments. There was a real sense of stagnation, with a handful of governments unwilling to accept the collective rights that underpinned the text, others outright rejecting the right of indigenous peoples to self-determination, and still others having difficulties, as it was termed, with the cluster of articles on land rights. Sitting on the podium, it sometimes felt as if the entrenched positions would prevent any progress. Progress there was in the end, however, due largely to the shift in the real work of the sessions from the plenary meetings to the informal discussion groups co-chaired by governmental and indigenous representatives. Instead of the confrontation of the formal meetings, trust was restored in franker and more result-oriented exchanges outside the room. In a short time, 20 or so articles were provisionally agreed upon. Norway's initiative to try to find agreement among the diverse positions, and Mexico's spirited efforts to move the project forward, particularly by bringing many of the contentious parties to a week's retreat in the pleasant colonial backwater of Patzcuaro in the state of Michoacan, were instrumental in giving a sense of direction to the proceedings. By 2006, however, time had run out. Eleven years was considered enough and, with the reconfiguration of the

human rights machinery, there was a risk that, unless a proposal was made, the declaration would die a death.

From a technical and even political point of view, the presentation by the chair of the working group of his own proposal to the newly-created Human Rights Council was unsatisfactory. The draft was riddled with small infelicities and duplication and several articles would more logically have been grouped elsewhere in the document. Ideally, a technical review was in order but that was not to be. Politically, indigenous peoples and governments had every right to feel that they had been denied the opportunity to seek convergence when, finally, everything was going so well. In the event, and to the credit of the Chairperson, a carefully balanced draft was submitted to the Council that, on the whole, met with limited opposition with the exception of the CANZUS group of Australia, Canada, New Zealand and the USA and a vote against from the Russian Federation.

Despite the fact that it would be more than a year before the General Assembly finally adopted the declaration and that there would be further negotiations, especially with African states, the deadlock had been broken and major regional groups – Latin America and the Caribbean, the EU, Asia and much of Africa – were either in favour or else not going to oppose. Twenty-two years after the first steps had been taken within the WGIP, the UN Declaration on the Rights of Indigenous Peoples was adopted in September 2007. Although it was not exactly an indigenous declaration, all but one of the articles (article 46 was proposed by states rather than indigenous peoples) were at the initiative of the indigenous delegations that had participated over the years and, as such, could claim to be in large part its creators.

Looking back over 30 years of indigenous peoples' activism at the UN and seeing much of what happened, firstly as an advocate and later as one of the principal international civil servants dealing with indigenous peoples, it seems appropriate to recognise the leap forward made on this issue at the international level. It is even a pleasant feeling to know that one has been present and even made a contribution to this historic development. Yet there is also a niggling feeling that the international indigenous movement has reached an impasse. It may be that the work that can be done with intergovernmental bodies is now exhausted, or at least has reached its peak. The Permanent Forum, for all its high visibility and brouhaha, directs its attentions, as it is mandated to do, not at governments but at the UN agencies and their staff whose capacities to generate change in communities are limited. The Expert Mechanism has not yet received the enthusiastic



support of indigenous peoples as much as might be expected given its high level in the hierarchy and potential to influence the Human Rights Council. The efforts of the Special Rapporteur to engage with governments directly and stimulate a more fruitful dialogue with indigenous communities have been successful but, ultimately, rely on governments and the political and economic forces that sustain them for their implementation – a state of affairs that most commentators consider far from achieved.

While the spaces available for the participation of indigenous peoples have broadened considerably, there are curiously fewer opportunities for an indigenous representative to raise human rights concerns in these fora. The mandates and practices of both the Permanent Forum and Expert Mechanism inevitably promote a thematic and cooperative (often regional) approach that focuses on proposals and recommendations. It is now likely to be the indigenous chair who calls a delegate to order when he or she speaks about human rights violations in the community. And why not, you could ask? There is now a Special Rapporteur who can act on these cases. Or are we to conclude that governments now feel a little protected from public denunciation given that there is a buffer zone composed of indigenous peoples themselves. In the last years since the adoption of the Declaration, there appears to have been no new international project although attempts to lobby for indigenous rights in the frustrating, and ultimately disappointing, discussions on climate change constitute a brave if so far fruitless goal. Even the World Conference on Indigenous Peoples grew out of a governmental proposal and was embraced rather reluctantly by indigenous peoples. Interestingly, there is not yet momentum for the elaboration of a convention on the rights of indigenous peoples, and even a certain amount of trepidation among indigenous peoples who fear that opening up further discussion might undermine the rights that are already established. In fact, though, the process of drafting a binding instrument might get governments to focus on implementation, clarify areas where there is ambiguity, such as over the principle of free, prior and informed consent, and put to bed any suggestion that indigenous peoples' rights are an option rather than an obligation.

The future of indigenous rights at the UN is, however, in the hands of a new generation of indigenous activists, well informed and experienced in international affairs in ways that were not available to those feeling their way forward in the 1980s and 1990s. It is this generation that will decide whether further commitment at the UN can bring benefits or is merely a distraction from the vital work to be done nationally. ○

## CHAPTER 15

## Remembering Miguel Alfonso Martínez

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*Isabelle Schulte-Tenckhoff*

*This short contribution is organised around a few quotes taken from an interview that I conducted with Miguel Alfonso Martínez shortly after the hand-in of the final report of the UN Study on treaties, agreements and other constructive arrangements<sup>1</sup>. The interview took place in Montreal in December 1998 and was published in a Quebec specialised journal in 1999<sup>2</sup>. At the time, Miguel Alfonso Martínez (1935-2010) was a member of the now defunct Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations, as well as the Special Rapporteur of the UN Study on treaties between indigenous peoples and states. The interview covered a range of subjects that are not all included here. My selection is based on Miguel Alfonso Martínez's contribution with regard to the fundamental issues of treaties, self-determination, and the role of the United Nations in the promotion of indigenous rights. Unfortunately it is no longer possible to engage with him in person, so this is a way of recalling his voice in the context of this volume.*

*I had the privilege of working intermittently as a researcher for Miguel Alfonso Martínez all through the 1990s. This collaboration made it possible for me to pursue my interest in treaty-making involving Indigenous*

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1 *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations. Final Report by Miguel Alfonso Martínez, Special Rapporteur, UN Doc E/CN.4/Sub.2/1999/20.*

2 I. Schulte-Tenckhoff, L'Etude des Nations Unies sur les traités entre peuples autochtones et Etats: entretien avec Miguel Alfonso Martínez, Rapporteur spécial. *Recherches amérindiennes au Québec* XXIX (1) (1999): 109-114.

*peoples - a topic that was introduced to me as early as the 1977 NGO conference on the situation of Indigenous peoples in the Americas, that I participated in as a (student) volunteer. From then on, I spent many hours with Indigenous representatives from communities in Canada and the United States, and later Aotearo-New Zealand. I started to travel extensively in North America, and subsequently lived in Canada for about a decade. There I taught at different universities and undertook various mandates for, and teaching activities in, Indigenous communities. My learning process has therefore been a long one, and it is reflected in some of my publications<sup>3</sup> as well as in my teaching at the Graduate Institute. Although my work is not confined to the field of Indigenous rights, my experience in researching Indigenous treaty-making under the guidance of Miguel Alfonso Martínez, including the various challenges he threw my way over the years, was a properly formative one. It has allowed me to understand better the effects of enduring injustice, as well as what critical Latin American scholars call coloniality<sup>4</sup>.*

*Miguel Alfonso Martínez had both a sense of the past and a vision for the future of Indigenous peoples.*

## **On the role as Special Rapporteur**

“...My understanding of the indigenous issue was greatly enhanced by my various field trips. As UN Special Rapporteur I visited seven countries. To the exception of two (Fiji and Aotearoa-New Zealand), these missions were financed entirely by indigenous peoples and organisations. These were determined to invite me in spite of their limited means. I wish to express to them, once again, my profound gratitude. Without exaggerating, I can say that the opportunity thus offered to witness first-hand how some indigenous nations lived was an eye opener for me.

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3 E.g. I. Schulte-Tenckhoff, Reassessing the paradigm of domestication: the problematic of Indigenous treaties, *Review of Constitutional Studies* 4 (1998): 239-289; I. Schulte-Tenckhoff I., Treaties, peoplehood and self-determination: understanding the language of indigenous rights, in *Indigenous Rights in the Age of the UN Declaration* (E. Pulitano ed.), Cambridge University Press, 2012, p. 64-86.

4 That is, the long-standing patterns of power that emerged as a result of colonialism.

But I should not forget the importance of the annual meetings of the Working Group on Indigenous Populations in Geneva. These afforded me innumerable occasions to converse with hundreds of indigenous leaders, as well as a variety of experts (whether indigenous or not), much more knowledgeable than myself about the different aspects of the indigenous issue.

In reality, my two functions have always informed each other. As I became familiar with the problems encountered by indigenous peoples through the interventions of their delegates at the WGIP sessions, and in speaking with them directly, I gained a better understanding of the fundamental role that any juridical relation with the state - whether historical, actual or future-oriented - meant for them ... Similarly, as I progressed with my research on indigenous treaties, I was able, because of my newly acquired knowledge, to improve my contribution to the various UN bodies I have been involved in, such as the WGIP and the Sub-Commission..."

## **On treaties, self-determination, and justice**

"...ultimately, most problems affecting the relationship between indigenous peoples and states may be explained by the reductionist view that prevails with regard to this relationship. It is a relationship initially conceived of as one between subjects of international law having sovereign rights .... But at this juncture, only one party (or its successor) involved in the original relationship, namely the nation-state..., has retained its sovereignty. The other - indigenous - party finds itself relegated to the condition of an ethnic and cultural minority, and its members are - at least in the eyes of the law - simply state citizens subjected by force of circumstance to state legislation and state institutions. This is the process of domestication of the indigenous question, that is, its confinement to the internal legal order....

The right of peoples to self-determination, as recognised by the UN Charter to all peoples on this planet without exception, and its practical application, are not necessarily identical with the claim to statehood. Nonetheless, some pretend that this right does not exist for indigenous peoples... Experience shows that the establishment of just and durable relations between the indigenous and non-indigenous sectors in plurinational societies is strongly compromised, not only because of *ex post facto* reasoning .... meant to justify domestication, but

also because of the negative effects this process has entailed. In this manner, the 'promotion and protection of human rights' (a field much too narrow ... to allow for the implementation of indigenous rights) that nominally all citizens may claim within the internal order of the state, does not necessarily offer further recourse, neither in political and legal terms, nor in economic and social ones. ... The fundamental problem of the recognition and protection of indigenous rights (here we have an expression whose semantic field is much vaster than that of 'human rights') is not the lack of adequate international mechanisms. More troubling is the inefficiency (if not the inexistence) of mechanisms within the internal jurisdiction to resolve the conflicts frequently engendered by a state order that has never succeeded in avoiding such conflicts, nor in resolving these to the satisfaction of all parties involved, in a spirit of equity and justice. ... Our priority must be to create such mechanisms where none exist, and to ensure that already existing mechanisms offer a genuine contribution to conflict resolution. ... The problem - as much as the solution - boils down to the political will of all parties involved, without leaving aside the responsibility that indigenous peoples themselves have in establishing the foundations of such mechanisms (where they must be represented on an equal footing), nor the responsibility that accrues to the various levels of state authority to ensure that these mechanisms endure and operate efficiently. Such a task is not an impossible one. It is even less so if we consider the possible result of failing in this endeavour: there are many cases where such a failure has brought about dramatic consequences.

This being said, we should not exclude outright the possibility of establishing an international mechanism of conflict resolution, preferably within the United Nations and with full indigenous participation. Such a body ought to receive a clearly defined mandate allowing it to reach effective decisions binding all parties involved... It would be a mechanism that parties to a conflict could refer to once all internal legal means have been exhausted, and on condition that such recourse has failed to bring about a satisfactory solution for all. I think the moment has come to explore seriously the advantages and disadvantages of establishing such an international mechanism."

## On the Permanent Forum on Indigenous Issues<sup>5</sup>

“... I wish to underline once again (as a matter of fact I have been voicing this concern for five years now) that this initiative troubles me profoundly, if only for the fact that it is not one initiated by indigenous peoples themselves, contrary to what certain government delegations to the Commission have implied. As far as I know, since the initial steps taken at the Vienna Conference (in which I participated at the time in my capacity as chairman of the Sub-Commission), this idea was launched by the government delegations of several European countries (especially Denmark). It immediately achieved great success with certain indigenous delegations, notably those of the autonomous government of Greenland (under Danish domination) and of the Sami of Norway and Sweden. Still in Vienna, these delegations in turn set out to convince their fellow delegations to support their endeavour.

From the start, some indigenous organisations were enthusiastic about the establishment of a new body active in the field of indigenous rights, despite the fact that in Vienna the characteristics of such a body had not been identified. For example, what were its purpose and mandate? How to avoid that the role given to this new ‘permanent forum’ would not duplicate the tasks carried out by the Working Group on Indigenous Populations since its inception...? According to which modalities would indigenous peoples be represented there, and what would be their representatives’ competences? In other words, would indigenous peoples benefit from the same generous rules of participation in the ‘permanent forum’ than in the Working Group on Indigenous Populations? How to fund not one but two bodies devoted to the same issue, considering the limited resources available and also the fact that the concern in question has been of the lowest priority in the budget that the Centre for Human Rights submits every two years to the UN General Assembly (to this must be added the artificial financial crisis which has haunted the United Nations since well before the United States decided not to contribute their part to the UN budget)? Furthermore, if the creation of such a forum can be envisaged without affecting the functioning of the Working

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5 See also Schulte-Tenckhoff I., A. Hasan Khan, The permanent quest for a mandate: assessing the UN Permanent Forum on Indigenous Issues. *Griffith Law Review* 20 (3) (2011): 673-701.

Group on Indigenous Populations, what would be the relationship between both bodies? And what about the institutional set-up of the new forum: would it be part of the bureaucratic and administrative structure of the UN human rights system, or a body empowered to deliberate and to formulate recommendations (like the Working Group on Indigenous Populations), or a body endowed with jurisdictional or enforceable competences including the power to oversee the implementation of its decisions regarding indigenous rights (competences and powers that the Working Group does not possess)?

A number of states, notably those having serious problems with indigenous peoples living within their borders, have shown themselves to be unhappy with certain achievements of the Working Group, especially the draft Declaration on the Rights of Indigenous Peoples. Thus, the idea to create a new forum devoted to indigenous issues, to be located at a higher level in the UN structure than the Working Group on Indigenous Populations, is a properly ingenious one. Is it not additional proof of the capacity of states to manoeuvre successfully at the UN ... and to maintain strict control over what is conceded to indigenous peoples, or rather, what is not conceded to them at this level?

No doubt, the political price which the countries in question - all self-declared 'enlightened defenders' of human rights - have been asked to pay was already too high for them in 1993 since they set out to eliminate purely and simply the Working Group on Indigenous Populations, with the support of other governments, but without showing the least concern for the resistance manifested by a number of indigenous delegates active at the United Nations.

As to whether the 'permanent forum' is likely to help improve the implementation of treaties between indigenous peoples and states, I would say the following: if it were to be endowed with sufficient powers to tackle disagreements over the provisions of such treaties and to be able to enforce its decisions, this would be evidence that it is not meant to compete with the Working Group (which does not fulfil such functions). However, I cannot help but conclude on a pessimistic note: I have no information that would allow me to affirm that the governments in favour of the establishment of such a 'permanent forum' are actually prepared to give it this responsibility. Only time will tell !"

## On treaties with Indigenous peoples as international instruments

“The treaty understood as a document that defines the mutual rights and obligations of the contracting parties does not suffice per se to ensure that the rights and obligations it sets out are actually applied. The Vienna Convention on the Law of Treaties clearly establishes that agreements shall be kept, *pacta sunt servanda*. Experience shows, however, that failure to respect either their provisions or their intent is a frequent occurrence. This breach of the law can be observed not only in the case of treaties between indigenous peoples and states but also in the case of important multilateral instruments...

To ensure respect of a treaty (or, for that matter, of any legally binding instrument), two conditions must be met. On the one hand, the treaty parties must have the political will to apply its provisions; on the other hand, there must be mechanisms providing for binding powers to sanction any violation of the clauses of the treaty, and to ensure that the defaulting party is held responsible, at the national or international level, for having violated or failed to implement the provisions it has subscribed to.

Similarly, unless otherwise proven, the existence of a treaty (whether ‘historical’ or actual) between an indigenous people and a state bears testimony to the enduring quality as international subject of each of the contracting parties. In insisting on the expression ‘unless otherwise proven’, I wish to highlight the legally inadmissible nature of the assertion that an illicit act (such as the recourse to, or the threat of, the use of force) terminates the international personality of the contracting parties.”

## On the future

“... each day indigenous people become increasingly aware that they may not have exhausted all the possibilities offered by the multilateral system of the United Nations. Indeed, this system may serve as an adequate tool to contribute to the complex task of turning around five centuries of dispossession, discrimination and marginalisation of indigenous peoples. This does not mean, however, that the future destiny of indigenous peoples ought to depend on the goodwill of the United Nations or the Organisation of American States. Their destiny lies in their own hands. It depends on their fight for their rights in their own territories, not on the shores of Lake Geneva or on the banks of the East River in New York.” ○



THE ILO CONVENTION  
DRAFTING AND ADOPTION

## CHAPTER 16

## Development of the ILO Conventions

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Lee Swepton<sup>1</sup>

All contemporary discussion about the rights of indigenous peoples in international law begins with the ILO's work on this issue. The ILO has adopted the only two international Conventions dealing with indigenous and tribal peoples – in the modern sense of “indigenous”, as compared to the pre-Second World War meaning of the term when applied to “native” workers in colonial settings: the Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169). These norms reflect two conflicting paradigms in the approach to indigenous policies during the last century. The first is based on the principle of assimilation; while Convention No. 169 presents a human rights-based approach to indigenous policies from the standpoint of multiculturalism.

The concern with the rights of indigenous and tribal peoples by the ILO is far from evident at first glance. As stated by Virginia Leary, “[t]he ILO's adoption of Conventions on indigenous peoples ..., Conventions which are not limited to labour issues, might be interpreted as an anomaly”.<sup>2</sup> Leary was expressing the conventional wisdom of a human rights expert on this point, but it should be viewed in a different way. Nearly all the reservations that have been expressed about the ILO's role in this area – not only by outside observers but at important junctures also by parts of the ILO constituency as well – overlook the fact that many indigenous and tribal peoples are the very model of the informal economy with which the ILO has become concerned in more recent years. These instru-

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1 What follows is a mix of reporting on the development of the international law, and personal reminiscences by the author, who was closely involved for many years in these developments. The reader is asked to excuse the use of “I” in this article.

2 V.Leary: *La utilización del Convenio No. 169 de la OIT para proteger los derechos de los pueblos indígenas* (San Jose de Costa Rica, Instituto Interamericano de Derechos Humanos, 1999).

ments have provided guidance on what needs to be done to allow groups who are either outside or at the margins of national societies and economies to survive in the face of other economic and social models. Their situation is thus beyond the experience of the ILO's usual constituency of ministries of labour, and employers' and workers' organizations.

In addition, both Conventions deal with the fact that when these groups do enter the workforce, they are almost always at the bottom of the scale, and uniquely vulnerable to abuses that are tied closely to their social situation and within the ILO's area of responsibility. And these peoples are found in most parts of the world – some 350 million in all.

## Before World War II

The ILO had worked on the indigenous issue since the 1920s, but before World War II it was in a very different context from what has been done since then. The ILO's first approach to this question was to begin for the first time to regulate the use of forced labour by so-called 'native' populations in the overseas territories of the colonial powers. These same powers had deliberately excluded any mention of racial equality from the Covenant of the League of Nations in 1919, in order to protect their perceived right of exploitation. And these exploitative nations were in fact the very ones that had been in the forefront of the creation of the concept of human rights at their own national levels – the United Kingdom and France foremost among them, with the United States following their lead at this point after World War I.

Rodríguez-Pinero notes that "the notion of 'native labour' was a translation of the notion of 'trust of civilization' into the ILO's realm of activity, referring widely to the duty of protection over 'indigenous workers' living in a 'lower scale of civilization', both in formerly colonial territories and in post-colonial states."<sup>3</sup>

This work resulted in a series of ILO Conventions known as the 'Native Labour Code'. The first of them was the ILO's Forced Labour Convention, 1930 (No. 29). This Convention is still in force and today is a cornerstone of the ILO's human

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3 L. Rodríguez-Pinero, unpublished paper submitted to the ILO Century Project Workshop, 2008. See his much more extensive and authoritative *Indigenous peoples, post-colonialism and international law. The ILO regime (1919-89)* (Oxford, Oxford University Press, 2006).

rights work as one of the so-called Fundamental Human Rights Instruments. However, when it was adopted it contained provisions restricting the use of forced labour and regulating it in colonial settings, but not requiring its immediate abolition – the forced labour of the ‘natives’ was too important to the profitability of the colonies for countries with overseas holdings to accept an immediate prohibition. The Articles requiring its gradual elimination and regulation have now, however, been declared out of date and are no longer valid.<sup>4</sup> The ILO went on to adopt the Native Labour Code instruments which laid down a set of rights – albeit lower than for other workers – that for the first time placed restrictions on the abuses being practised in the colonies and began a transition to full recognition of these workers’ rights.<sup>5</sup>

Just before the end of the inter-War period the focus began to change to correspond more closely to present-day concerns. The ILO’s First American Regional Labour Conference took place in 1936. The American States asked that the working and living conditions of “indigenous populations” be prioritized in the region – which, in their case referred to the relevant populations inside their own countries rather than to populations of dependent territories. For two decades, the “living and working conditions of indigenous populations” was a distinct item on the agenda of the periodic American and Asian regional conferences, leading to the first international expert missions and the first reports ever published by an international organization concerning indigenous peoples. This period is marked by the influence of “indigenism”, a transnational community linking academics and policy-makers in the search for a “scientific” solution to the so-called “Indian problem.” The ILO assumed the main tenets of the movement, including the objective of social and cultural integration, recourse to cultural anthropology, and the emphasis on development intervention, and turned them into international law.

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4 This is a very rare instance of an ILO Convention being constructively amended by consensus and by supervisory action. The ILO does have an often-used procedure for amending conventions, unlike other international organizations, but until recently had elected not to use it in this case. However, this deletion was rendered formal by the adoption of the Protocol of 2014 to the Forced Labour Convention. See the ILO web site [www.ilo.org](http://www.ilo.org), under ‘Labour Standards’.

5 D.R. Maul: “The International Labour Organization and the struggle against forced labour from 1919 to the present”, in *Labor History*, 48, No. 4 (Nov. 2007), pp. 477–500.

## After World War II – the new UN system

In 1952 the ILO passed from theoretical studies to specific action, with the launching of an historic coordinated development effort – the Andean Indian Programme (AIP). In 1953 the ILO backed up the AIP with academic study when it published *Indigenous Peoples*,<sup>6</sup> a world-wide survey of what was termed indifferently indigenous peoples and indigenous populations, and also established the short-lived ILO Committee of Experts on Indigenous Labour which met in 1951 and 1954.

The AIP was an ambitious macro-development project, led by the ILO and involving several other parts of the new UN system. It lasted for nearly two decades and covered six countries, and its explicit objective was to promote the integration of indigenous populations in the Andean region. This was, of course, the orientation of the entire international system of the time, just beginning to grasp the complexities of development policy and practice. Despite the shortcomings of this first generation of international development projects, the AIP was relatively effective in showing the benefits – in terms of “development” as understood at the time – of the ILO’s further involvement in these issues. And it consolidated the ILO’s leadership role on this issue vis-a-vis other international organizations and agencies, including the UN. None of the other organizations in the UN system took up the situation of indigenous peoples for another two decades.

One of the recommendations of the second session of the ILO Committee of Experts on Indigenous Labour in 1954 was the adoption of a “comprehensive recommendation” formulating “general standards of social policy” in relation to indigenous populations. At the peak of the AIP, the Conference adopted the Indigenous and Tribal Populations Convention (No. 107) and its accompanying Recommendation (No. 104) in 1957. These international standards aimed well beyond the Americas, as a number of nations of Africa and Asia expressed their positive desire to be covered; and it extended well beyond the ILO’s own immediate mandate. The rest of the UN system took part in the deliberations and encouraged the ILO to incorporate portions of their own mandates into the new ILO standards. (It was intended that they would participate in supervision of the Con-

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6 ILO: *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries* (Geneva, ILO, 1953).

vention as well, though in fact they never did so.) The Convention is conceived as an applied anthropology handbook to lead states' development policies towards indigenous groups. Under the general objective of integration – a notion that incorporated simultaneously notions of development, cultural change, and nation-building – the Convention and its accompanying Recommendation contain practical guidance on a wide range of issues, including land reform, education, health, professional training and micro-industry. It did go well beyond the ILO's usual mandate, but the idea was that the ILO was acting as the standard-setting proxy for the United Nations system as a whole.

Convention No. 107 was eventually ratified by only 27 countries, 14 of them in Latin America, but also included an interesting selection of other countries including India, Pakistan, Bangladesh (on separation from Pakistan), Iraq, Egypt, Ghana and Malawi. It is interesting that today increasing interest in the subject of indigenous and tribal peoples, has led the ILO's main supervisory body (the Committee of Experts) to raise questions with a number of these other countries about why they have failed to acknowledge the presence in their countries of the populations covered by Convention No. 107, and urging them to examine the possibility of ratifying Convention No. 169.<sup>7</sup>

Although C107 is now acknowledged to be seriously out of date, its utility should not be disregarded when it is the only tool available. It provides the only international supervision of the situation of 'tribals' in India and Bangladesh, for instance, who attempted to remove themselves from international discussions on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and on other matters concerning these peoples, maintaining that they have no populations who are more indigenous than any others. They cannot deny, however, that they have tribal populations (see below for an explanation of the two terms), and these populations are subject to serious discrimination, and attempts at compulsory integration – sometimes involving force and violence. The ILO supervisory bodies have focused on the protective provisions of this Convention in countries still

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7 These comments can be consulted on the ILO web site, <http://www.ilo.org>, under 'Labour Standards', in the NORMLEX data base. This is not the place to go into detail on ILO supervisory mechanisms, which are considerably more detailed than corresponding UN ones. Reports are due at five-year intervals, and the Committee of Experts or the ILO Conference may ask for more frequent reports if they find there are serious questions – this often happens with Conventions Nos. 107 and 169. More information on how to consult, and to use, these procedures is also on the web site of the ILO.

bound by it. See, for instance, the detailed and quite severe comments made to El Salvador and India in 2011, and to Bangladesh and Panama in 2009.<sup>8</sup>

### **Toward the adoption of Convention No. 169<sup>9</sup>**

As concepts began to change toward a UN-system-wide embracing of more generalized rural development and agricultural reform, without favouring designated groups, the AIP ended in 1972, and there was progressively less interest in Convention No. 107.<sup>10</sup> The end of the AIP meant, in practice, the end of the Organization's indigenous policy and the dismantling of internal structures that were responsible for the subject. In addition, the integrationist focus of Convention No. 107 began to run afoul of other developments. This left Convention No. 107 as the only remaining vestige of these policies.

It was at this point that I joined the ILO, in October 1973. Interest in indigenous and tribal peoples had faded in the ILO. No one in the Office was interested in it, because the concept of working with specific population groups such as indigenous peoples, was being replaced by more general notions of 'rural development' and – in Latin America in particular – *reforma agraria* (agrarian reform). These movements had a profoundly assimilationist impact, even more than C107 which did at least have a protectionist background. Agrarian reform continued an

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8 Ibid. When discussing the adoption of Convention No. 169 during the Oslo meeting, Dalee Sambo – who has real reservations about the adoption process, explored below – said that attending a meeting of the ILO Conference when Brazil was called before the Conference and very severely criticized for its implementation of C107, was what convinced her that it was worthwhile to take part in the ILO process of revising C107.

9 What is discussed below is a revision of Convention No. 107. Under ILO law, when a revising Convention is adopted, countries ratifying it replace their ratification of the older Convention – known as 'automatic denunciation'. The older instrument is then closed to further ratification. If they fail to ratify the newer instrument, they remain bound by the older one. This may make life complicated for ILO supervision, but often it means that States are bound by some obligations rather than none.

10 When I joined the ILO in 1973 I was assigned responsibility for this Convention, among others, and began exploring its potential. My chiefs allowed this, in spite of the fact that it was distant from the ILO's usual preoccupation at this time with industrial relations in the formal economy; this was the reason I became active on behalf of the ILO in the international discussions that were soon to start. They allowed it in part because of the attitude of Francis Blanchard, to which we return below, and the fact that he became ILO Director-General at about the same time.

earlier trend of destroying indigenous communities' own governance structures and replacing them with uniform *alcalde* structures.

It was at this point that the international indigenous movement began to form in the mid-1970s, and the first institutional moves in this realm by the United Nations Centre for Human Rights were organized around the Martinez-Cobo study. The ILO's indigenous policy began to awaken from its relatively brief state of lethargy. Convention No. 107 was rediscovered as being the only international instrument dealing with indigenous and tribal peoples, and started being targeted by newly-established indigenous groups and activists as the embodiment of the assimilation policies they sought to reverse. The ILO, on its side, began to use C107 more aggressively to question the policies of ratifying countries, focusing on the protective aspects of the Convention instead of on the push for integration. It also began to take an active part in the emerging discussions at the international level, attending as many of the series of meetings beginning in 1975 as the one responsible staff person could manage.

What this meant with regard to C107 is that the ILO Committee of Experts, its main supervisory body, began to pursue the application of C107 more actively. These comments got more detailed fairly quickly, though surprised governments were slow to reply to them. We began also exploring the parts of the equation that had never worked – such as trying to get other parts of the international system to examine the governments' reports and give us information on them, as was envisaged when the Convention was adopted. Mostly these requests found no reply at all, though UNESCO once replied that they thought it would be wrong to comment on governments' reports to the ILO. What it really meant was that they were not yet interested, and had their own agendas to pursue, which did not include indigenous peoples (still universally referred to as 'populations' at that time). If my memory is correct, the only other person in the UN system actively working on this issue was Augusto Willemsen Diaz, who was doing the staff work for the so-called Martinez Cobo study which finally was completed in 1981.<sup>11</sup>

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11 My ILO colleagues thought I was pursuing something so far outside the ILO's 'real' agenda that I was isolating myself and ruining my chances of a career, and this was true enough in its way. In order to keep myself on the career track I had to add other specialties and work on indigenous issues only in my 'spare time' inside and outside the Office. Indigenous issues at this point amounted practically to a strange hobby which I had spare energy to pursue – partly because it was more interesting to me than the details of labour law which were my primary responsibility.



In addition, a former Assistant Director-General named Jef Rens of Belgium began to write to his old friend Francis Blanchard, a fairly new ILO Director-General. The two men had worked together on the Andean Indian Programme, and Rens was the principal architect of C107. 'Cher ami', wrote Rens, 'the time has come to reconsider C107, which has the wrong approach'. These letters filtered down to this very junior official – me – who ventured to write to the DG that what we already had was unique and after all not too bad (remember we were still early days in awareness-raising), and that the political climate was such that if we re-opened this subject we might not keep even what we had. My opinion then – on the basis of my four or five years' experience – was that the integrationist approach could be minimized and that the protective potential was high. Remember that no ILO constituents were on board to weigh in on this, and that the indigenous movement was both small and of unproven legitimacy at this point. To my lasting regret, it was not for several years that I finally accepted that C107 was a lost cause, and began to support revision. Win or lose the revision process, C107 could not stand.

Luis Rodriguez-Pinero, who is practically alone in researching this period of the ILO involvement with the subject, has written<sup>12</sup> that the Office was essentially reacting to a perceived threat to its primacy from the sudden interest of the UN in the subject, and that subsequent ILO work was intended to pre-empt UN action on it. My own recollection is that the ILO was reacting, just as was the UN, to a change in the international climate and to the criticism of Convention No. 107. Perhaps there was some inter-agency rivalry, but it was not determinant. The ILO has always regarded the Conventions and Recommendations it adopts as the principal purpose of the Organization, and takes a great deal of pride in either ensuring that its standards are up to date, or shelving them as being obsolete. The time had not yet come to abandon completely the ILO's history with indigenous and tribal peoples, even if the institutional concern had diminished.

The 'interagency rivalry' was very muted at the time, if it existed at all. Interest among NGOs and indigenous groups began to grow through the 1970s, especially in Latin America, Canada and Australia, and there started being criticisms of the ILO from them. This meant nothing to the ILO hierarchy, which at the time was almost entirely outside the UN system's human rights discussions – these statements were in press releases from NGOs with which the ILO had no rela-

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12 See Rodriguez-Pinero, *The ILO regime*, op cit.

tions, and the ILO's core constituency of employers' and workers' organizations were not interested at all. Or they came from small regional meetings of UNESCO, which also did not interact in any way with the ILO's real concerns.

This said, I might well have included in my growing advocacy of re-examination a few mentions of other agencies' growing interest in what had been the ILO's exclusive patch – any argument might serve to allow my chiefs to let me continue working on this – but I do not recall this having any real influence.

I have written elsewhere<sup>13</sup> that: "There was also a concern that the UN's intention to adopt new standards could encounter political obstacles with which the ILO's tripartite processes might be able to deal better – which proved prescient." This was not a sufficient reason in itself, of course. Director-General Francis Blanchard allowed the work to proceed. Reacting to severe criticism from the emerging indigenous movement and from other observers of the integrationist and colonialist orientation of Convention No. 107, the Office proposed to the Governing Body a Meeting of Experts to consider revising the Convention.

The ILO did not start working on this meeting until pretty late in the process of the UN taking the issue seriously. The proposals would have begun to be considered sometime in 1984. By then the UN had been working on this for several years. Indigenous issues began to surface in the UN Working Group on Contemporary Forms of Slavery in the 1970s. This was an issue of real concern to the ILO, and I began to accompany the ILO's representation there, and to bring up evidence of forced labour we were seeing under C107 as an addition to the ILO's concerns on forced labour under ILO's other Conventions on that subject. This helped indigenous issues to be taken more seriously inside the ILO – they actually touched on real ILO problems from time to time!

Also, the ILO had taken official notice of the UN human rights agenda for the first time in years when the two Covenants came into force in 1976. A Human Rights Coordinator had been appointed to make sure that the UN's supervision of the Covenants took full account of the ILO's primacy in the subjects under its mandate. This was real interagency rivalry, not the inconsequential questions on indigenous populations – the ILO had practically drafted chunks of the Covenants, and began to interact with the UN on human rights in a way it had not done for years. I took over full responsibility for this Coordinator job in 1991, but I had

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13 See Rodgers, Lee, Swepston and van Daele, *The International Labour Organization and the quest for social justice, 1919–2009* (ILO, 2009), pp. 85 *et seq.*

been assisting in it for many years by then, which helped give credibility to the ILO's interest in indigenous issues and integrate it into a human rights framework.

The colourful Meeting of Experts in 1986 was the first exposure of the emerging international indigenous community to the ILO (and of most of the ILO to that movement, as well), as the usual tripartite participants were supplemented by indigenous members of trade unions, employers' organizations and government ministries, and by a selection of concerned non-governmental organizations. When we began the meeting we had little idea of what to expect, but as it was a Meeting of Experts and not (yet) a Conference discussion the Office was allowed to submit information to it from many sources – this was not so easy once an actual Convention adoption was under way, because of the rules of such discussions. Rodolfo Stavenhagen of Mexico, later the first UN Special Rapporteur on the subject, was invited as an expert, and was asked to chair the meeting.

Indigenous participation was tricky, as the ILO always expects that its activities will essentially be tripartite (government, employer and worker). In this meeting, as in the later Conference discussions, the Office felt we had been creative, innovative and inclusive by inviting so many participants from outside the usual circles. The indigenous representatives had their first taste of the ILO, and found that they did not have the same kind of access as at the United Nations, because the ILO's own institutional NGOs filled that space. This set up tensions that were to continue into the future.

The Governing Body had agreed to the proposals the Office put forward to invite some non-ILO NGOs to this meeting and to begin consultations with them on an informal basis. Non-ILO readers will have little idea of how jealously the workers' and employers' representatives in the ILO guard their prerogatives as the only NGOs with ILO standing – the NGO participation had to be undersold to get approved, to allow them in the door. If we had said that the employers and workers were simply not representative of the interests of the indigenous peoples and that they should stand aside, the meeting would never have been approved. We hoped that once the indigenous representatives were there a sense of fairness would mean that the employers in particular would pay attention to what they had to say.

Some of the indigenous representatives recognized that an understated approach would work best, while others felt a sense of outrage that they were not being taken seriously. I will never forget Kenneth Running Deer asserting that he represented a government, even if the ILO did not accept that assertion, and consequently he could not sit with the NGOs. He took up a seat in the empty rows

between the NGOs and the governments in the ILO meeting room – which all the regular ILO parties regarded with bemusement.

This was the first contact of the NGOs, both indigenous and indigenist, with the ILO. The first problem was for the ILO to select and invite NGOs with a certain 'legitimacy' to these meetings, while not inviting too many of them at this early stage so as not to frighten the employers and workers – not to mention governments. This was a recipe in some ways for NGOs' dissatisfaction, but I still can see no alternative that would have allowed their participation at all. The indigenous representatives quickly took the dominant position among the NGOs, and consigned the indigenist NGOs, such as Survival International, to a support role.

The Meeting of Experts concluded that Convention No. 107 should be revised to remove its integrationist tone – although positions differed on how far the revision should go. To everyone's surprise, the Governing Body decided to place the item on the Conference agenda for 1988 and 1989. It seems that what propelled it to the front among the choices was that the workers' and employers' sides of the Governing Body so disliked each others' first choices for standard-setting Conference items that they voted against those options and put the C107 revision as their second choice, causing it to come first.<sup>14</sup> When the results of the vote were announced, everyone was stupefied, me first among them. Director-General Blanchard scanned the room and saw me in the back row. He gestured for me to come behind the podium to meet with him and his top advisers. His advisers were all stunned by the outcome, and his Chief of Cabinet said to him, 'But DG, there is absolutely no support for this!' Blanchard replied, 'Si, moi.' And this was really all the support from the Office that we needed, in the end.

The adoption of a Convention by the ILO is a major work item, and it almost entirely consumed the next two years of my life. As there was no structure for this subject in the Office, I was allowed to hire outside help, and managed to get the help of Roger Plant, a human rights field man with whom I often worked afterwards.<sup>15</sup> We began to work on what needed to be done, substantively and procedurally. As concerns substance, what the GB had approved was a 'partial revi-

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14 Leif Dunfield was at that time representing the Sami full-time in Geneva, and had attended the Meeting of Experts. He was the only indigenous representative at the November 1986 Governing Body session, as far as I remember. He has told me of doing extensive lobbying among the Nordics, and of concluding an agreement with an exiled South African trade unionist for support. I was aware of none of this, and hope he will tell the story in more detail.

15 He was later head of the ILO's Special Action Programme on Forced Labour, among other things.

sion', the idea being that there would be a relatively simple discussion that would flip the Convention from integration to consultation. Little did we know. In the end, the new Convention did follow almost the same structure as the 1957 Convention, and comparatively few words were changed – but every step was difficult, and every choice was full of ambiguity.

**Indigenous participation.** One of the most problematic questions in the adoption of the Convention once it got onto the Conference agenda was indigenous participation. It was obvious that the traditional tripartite composition of conference committees would not be seen as legitimate beyond the ILO's doors, but there were also strict restrictions on who was allowed by the Standing Orders of the Conference to take part. This was complicated by the fact that the ILO standard-setting process is strictly limited in time, with only a little over two and a half years between the decision to discuss a new standard and its adoption by the Conference. This put difficult demands on the relatively new indigenous organizations that they were simply not able to meet, with limited resources and time, and having to face the question of why they should attend meetings of the International Labour Organization at all. Indigenous participation ended up by being lively, but limited.

I have written in the past that indigenous representatives had the highest degree of participation in this process that they have ever had in international standard setting; and that it was more direct participation than in the UN. I stick with this statement in strictly legal terms, but it does not correspond with the perception of indigenous representatives and has to be qualified. The problem lies in the fact that there is a strict set of protocols in the ILO, which adopts standards as part of its annual business. The ILO allows a far higher degree of participation by NGOs than does the UN, and at the committee level in the ILO Conference they can actually outvote governments.<sup>16</sup> But the NGOs who can participate are accredited delegates of workers' and employers' organizations, and not the broader sweep of civil society that can take part in UN meetings. Asbjorn Eide had of course unintentionally complicated life for the ILO when he opened up participa-

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16 Under ILO procedures, workers' and employers' representatives each have 25% of the voting power in the plenary of the ILO Conference, while in committees there is a 1:1:1 voting distribution among the three groups. At the end of the second Conference discussion, when everyone was exhausted and there were still a number of Articles that had been adopted in draft in the first discussion but not yet rediscussed, the workers and employers decided between themselves that they would simply withdraw any remaining amendments to the remaining Articles and adopt them, and the surprised governments were unable to argue with this.

tion in the UN Working Group on Indigenous Populations to nearly any indigenous NGO, creating expectations that the ILO was unable to meet. Civil society NGOs beyond workers and employers<sup>17</sup> are limited to the right to request the floor, and to be allowed to speak only if (1) they are international NGOs who have taken care to request an invitation to the Conference several months in advance, and (2) the chairperson and the workers' and employers' vice-chairpersons of the concerned committee consent to their taking the floor. In practice, this is normally a rare event in the ILO. This was a recipe for frustration for indigenous delegates.

We adapted and even bent the rules as far as possible. First, in the questionnaires sent to Member States on the possible new standards, the Office recalled that while governments are obliged by the ILO Constitution to consult employers' and workers' organizations on their replies, it would be desirable in this case to consult indigenous organizations as well – not required, but recommended. We hoped that if governments included the results of their consultations in their reports, this would allow us to incorporate indigenous views directly into the Conference proposals – something we were specifically not allowed to do unless we received information on their views from governments, employers or workers. The Office tried to help in this process by organizing or supporting gatherings of indigenous peoples in the Americas to discuss the proposals (we knew of no such organizations in other parts of the world, nor did the UN whom we consulted). In the end only a few countries complied with this suggestion, Canada foremost among them. Canada's incorporation of detailed indigenous views on the proposed Convention allowed us to use these views directly, in a way we were not allowed by Conference Standing Orders to do for any other country. We tried to avoid some of these restrictions by making compilations of indigenous declarations and demands available as Conference room documents, but they had no official status. It did mean that anyone who wanted to be could be well-informed on the tenor of the emerging indigenous demands, however.

The invitation to the Conference sessions also noted that this subject was outside the usual purview of ministries of labour and of trade unions and employers' organizations, and suggested that in forming their delegations they might want to find indigenous representatives among their staff and membership. This happened in some cases, with the US employers, for example, finding an actual indigenous employer, and the Canadian Labour Congress inviting indigenous members of their

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17 And it must be said that trade unions are the largest NGOs in the world by a factor of many thousands.

organization to take their seat at the Conference. Some governments followed this practice as well. Denmark appointed a representative of the Greenland Home Rule government as its government member, who was the only representative of an indigenous power structure with official membership status in the Committee - though he was in fact not ethnically Inuit. He became the Rapporteur of the Committee.

As for intervening in the discussion, the officers of the Committee, used to an orderly process involving only the ILO's tripartite constituents, would not contemplate an unrestricted right to speak by the NGOs of indigenous peoples. They decided to allow an intervention before the consideration of each major subject by a representative chosen by the indigenous representatives present. This precluded further requests for the floor during the deliberations, and the deal was reluctantly accepted by the non-governmental representatives. The Officers felt they were making a major concession, while the indigenous representatives felt that the debates would go on with no right for them to speak their minds on individual proposals. Later, indigenous representatives were allowed to address the plenary of the Conference when it considered the Committee's reports - again, highly unusual in ILO practice. Apart from this, the NGO participants had the usual prerogative of NGOs in international meetings: lobbying the delegates to support their positions.

One further measure was taken by the Workers' group in the Committee. They recognized that most of what was being discussed was outside their usual competence, and began meeting regularly with the indigenous caucus. The practice quickly emerged that the Workers would assume as their own all proposed amendments to the working draft that were submitted to them by the indigenous caucus. The secretariat began receiving draft amendments with 'submitted by the indigenous peoples' crossed out and 'submitted by the workers' group' replacing it. To my knowledge, no draft amendment submitted by the indigenous caucus to the workers' group ever failed to come before the Committee for discussion and vote (though in accordance with the strict Conference rules the secretariat was not present in the meetings between the indigenous representatives and the workers, so this is not something of which I have personal knowledge).

At a crucial point in both the first and second discussions the delegates felt they could not hold open discussions, and a 'package' on land rights was negotiated behind closed doors. These crucial points were concluded on a take-it-or-leave-it basis, in meetings from which even the secretariat was excluded. This crucial subject, on which there had been extensive discussion in the 1988 session, was thus decided without direct indigenous input - leading to an even more heightened

sense of exclusion. But the closed door deal on this subject included agreement on the use of 'peoples' instead of 'populations' in the new Convention – see below.

And so there was frustration on all sides. The ILO felt it had been enormously accommodating and had adapted its rules more than in its entire history, which it had – while the indigenous felt that they had less input than at the UN and were unable to argue their positions. As Dalee Sambo commented during the Oslo meeting, 'We sat there and saw our rights flying out the window and could say nothing!' And of course the decisions were being taken and votes cast by governments, workers and employers, and not by the indigenous peoples themselves. This is course exactly what happens at the United Nations as well, though there votes are limited to governments, but this does not lessen the frustration – and in 1988 and 1989 the indigenous representatives had not yet had time to learn the process as well they did by the time the UNDRIP was finally adopted in 2007.

This can best be expressed by what some of the indigenous representatives said to the Conference plenary, as reported in the Record of Proceedings. Here is one extract that sums up the bitter feelings left by the discussions:

Mr. CRATE (*representative of the International Organisation of Indigenous Resource Development*) ... We did not come here to be passive observers while diplomats, labour leaders and executives decided what to do with us. We did not come here to give your deliberations our tacit approval by our presence. Finally, we did not come here so that the International Labour Organisation could tell the world it had consulted indigenous peoples during the revision of Convention No. 107. Because in point of fact we have not been consulted. ... Over and over again I have listened to arguments that a particular human right cannot be recognised for indigenous peoples because it would conflict with the national laws in some States. ... I say that you have forgotten the objective of international human rights law, the objective of standards setting. International human rights standards have been established specifically because States do approve domestic legislation that legalises the abuse of human rights. How can we forget that Hitler's Jewish Decrees were valid domestic German law? German domestic law between 1939 and 1945 legalised murder and torture. We as indigenous peoples have as our objective the establishment of international law that will encourage States to revise,



improve, and raise their standards for the protection of human rights. We thought that was also your objective here. ...<sup>18</sup>

And Sharon Venne, speaking for the International Work Group for Indigenous Affairs added:

Firstly, we want to raise the issue of the sorely inadequate ILO procedures that relegated us to an indirect and demeaning level of participation during the ILO Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), in September 1986 and during the two-year revision process. We appreciate the efforts of the workers who put forward amendments which reflected our positions. It must be pointed out, however, that the most critical provisions were not agreed upon in an open and viable fashion within the Committee on Convention No. 107. Instead, amendments were negotiated in private where we were barred. This is true for all the land and resource provisions which are the "soul" of the proposed Convention. The issue of indigenous peoples was determined in the same fashion: behind closed doors. Critical matters regarding our fundamental economic, social and cultural rights have been discussed and decided by Government, Employers' and Workers' delegations. We were silent observers as our rights were bartered and settled. It is an indescribable feeling to sit and have people who know nothing about us make decisions and judgements. The pain of being invisible in a room makes one wonder about the state of mankind.<sup>19</sup>

This was hard to hear at the end of what we felt had been a successful outcome to a remarkably difficult adoption process, and personally I never felt it was really fair even while understanding the frustration that led to it. When the new Convention was presented to the following session of the UN WGIP, a month after it was adopted, there was a substantial (though partial) walkout by indigenous delegates in protest. In a number of countries, outraged indigenous representatives have ever since cam-

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18 International Labour Conference, Record of Proceedings, Thirty-fourth sitting, Monday, 26 June 1989, REPORT OF THE COMMITTEE ON CONVENTION NO. 107: SUBMISSION, DISCUSSION AND ADOPTION. This is a verbatim transcript of the proceedings, and is available on the ILO web site.

19 Ibid.

paigned against ratification, which has helped keep ratification numbers down in some of the most developed countries. Over time the feelings have become somewhat attenuated, and the contents of the Convention are better appreciated. For instance, Jim Anaya, an indigenous representative during the adoption and now the UN Special Rapporteur, regularly promotes the ratification and adoption of the Convention in his reports, alongside the UN Declaration. Personally, I think this kind of process is almost exactly what happened in the United Nations when the Declaration was adopted – the indigenous peoples had their say, but were unable to amend or vote on it. The process remains inherently unfair. Can it be different? My sad conclusion is that it cannot, while States hold the exclusive power in international organizations, and indigenous peoples have the status in intergovernmental organizations of NGOs. International agreements remain agreements among States.

### **Selected provisions of C169<sup>20</sup>**

**Indigenous and tribal.** Two points of vocabulary in Article 1 of Convention No. 169 are signals for much more profound decisions. With regard to coverage, the ILO position has always been to look beyond the notion of “first nations” prevalent in the Americas – and later in the United Nations – and to focus on the social situation of the people concerned, rather than on descent. Conventions Nos. 107 and 169 therefore cover indigenous *and tribal* populations/peoples – or what might be described as tribal populations, whether or not they are indigenous in the anthropological sense of the term. In the rest of the international system, the term “indigenous” is now being used to refer to the same peoples as those covered by Convention No. 169. However, the rejection by countries such as India – which has some 80 million people designated in the Constitution as ‘tribals’ – of the notion that any population group in the country precedes any other, has allowed a number of countries to claim that international standards using the term “indigenous” alone do not apply to them. Politically, its importance is that the UN discussions beginning in the mid-1970s reflected a bottom-up initiative from groups who considered themselves “first nations”, with claims built on prior occupancy rather than the ILO’s “social policy” focus. For instance, the ILO standards apply by their

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20 It is not practical to discuss the entire convention here, and we concentrate on a few points. Extensive information is available on the ILO web site.

terms to groups such as the “garifuna” in Central America, descendants of escaped slaves who live in a way similar to Amerindians but who clearly are not indigenous. In some countries, Roma are covered.

When this was being discussed in the ILO, most of the official delegates had no particular problem with this broader coverage. Some of the indigenous representatives, however, said during the ILO discussions and later that the term ‘tribal’ was a demeaning one. These speakers invariably came from countries where they based their legitimacy on the ‘first nations’ argument – no problems with the use of ‘tribal’ in the Convention have been expressed by African and Asian indigenous peoples, in my experience, even if people from those countries have increasingly been describing themselves as ‘indigenous’.

In practical terms, the only result of the difference between these standards is that the wording of the ILO Conventions avoids the question of prior occupancy in Africa and Asia in particular. This is more important in a ratifiable instrument than in relation to the Declaration.

This is a difficult question to raise and discuss openly. There have been and are clear divisions among indigenous representatives in international meetings, especially in the early days when only a few wealthier and more politically secure indigenous groups could afford to take part in the discussions. As it happens, these came mostly from ‘First Nations’ countries, particularly those from North America and Australia, and of course the Nordic Sami. This was a very important influence in the UN’s decision to follow a ‘first nations’ philosophy that does not entirely stand up to objective analysis. There is a certain parallel here to pre-decolonization discussions in UN-system organizations, when the majority of the States that now are Members were still legally colonies without an independent voice in making decisions. Fortunately, the discussions in the UN lasted long enough that representation broadened considerably.

The second point is the word “peoples” in Convention No. 169, which replaces “populations” in Convention No. 107. The adoption of this term has marked discussions in international forums since the mid-1980s. It is important in law because both the UN International Covenants on human rights provide that “All peoples have the right to self-determination”. The use of the term “peoples” therefore carries potentially heavy consequences. And it is important in terms of respect for the continuing existence of indigenous cultures. The ILO was the first to be able to adopt the term “peoples” – although it was a tremendous fight throughout the adoption process. Until literally the last moment the draft instrument incorporated the

term 'populations/peoples', signifying that no decision had been reached. What tipped the balance was the inclusion in Article 1 of the following paragraph 3:

The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

This was qualified by many of the indigenous representatives as excluding and undermining the notion of self-determination. The ILO felt, and I maintain the same position today, that it simply indicated that the ILO was not the competent body to determine what the term meant, but felt it right to extend this recognition of status to the indigenous peoples. Nothing was lost beyond the bounds of the Convention, and if the UN were to decide later that using the term implied self-determination that would settle the question in the forum where it belonged. Paragraph 3 allowed a number of countries to ratify the Convention that otherwise would not have done, which was of course its purpose. It seems likely that it eased the path for the use of the term 'peoples' in the UN Declaration – could the UN be seen to adopt standards below the ILO Convention's terms? Whatever legal analysis tells us, it was another point of discontent for some indigenous representatives with the ILO text.

This was one of the bitterest points of contention, based to a certain degree on the fact that compromises were being made to which the indigenous representatives would not have agreed – and could not have agreed, given the political orientation of their movement. Art. 1(3) does not qualify the term "peoples" directly, though it does limit its impact to what the ILO itself could decide. Part of the indigenous representatives' negative reaction was based on sheer frustration on what they saw as having a partial victory compromised, and part on a lack of understanding of the role of a specialized agency inside the UN family. We are left with the fact that without paragraph 3, C169 would not have used the term 'peoples', or would simply not have been adopted – and if it had been adopted without this paragraph it would have been ratified by only a tiny fraction even of the number that have now ratified it.

**Consultation and participation.** Convention No. 169 followed the orientation given by the Meeting of Experts and the Governing Body, and rejected the notion of integration as the basis for national policy. This was replaced by respect, consultation and participation, and recognition of the continued right of these peoples to

exist. The discussions around the notion of consultation and consent were as fraught as many others. The war between the ideal and the achievable was played out again on this point. It was felt that governments would never ratify a Convention that provided that they had to have the consent of indigenous and tribal peoples to undertake development measures. However, they could accept the notion of putting into place procedures that would oblige them to seek the consent of these peoples in good faith, and this became Article 6 – the core of the instrument. The second paragraph of this Article was the subject of significant difficulty:

The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

The debate over this provision highlighted the idea that a convention could not incorporate the concept of consent as a requirement, though it set it out as an objective. The idea of good faith met with scepticism among many of the participants, and would not have been acceptable to the ILO without an awareness of the supervisory process that was to help governments into applying it properly. And in fact, the ILO Committee of Experts has been severe with countries that undertake or require formal consent that does not meet the good faith requirement. See in particular the Committee of Experts' 2011 General Observation on consultation (the ILO equivalent of the General Comments often made by UN Treaty Bodies).<sup>21</sup> This prefigured the concept of 'free, prior and informed consent' that later was incorporated in the UNDRIP and others, such as the International Finance Corporation's Performance Standard No. 2.

Comparing the process of adopting a Convention with that of adopting a Declaration is instructive. A Convention must incorporate more compromises of principle than would a Declaration, which is amply demonstrated by comparing the ILO and UN instruments. A Convention necessarily includes 'minimum' standards – that is, a floor below which ratifying countries may not descend – while a Declaration expresses what 'ought' to be the policies. This is, indeed, why it is essential to have two instruments, one binding and one aspirational. This is a principle the ILO itself often follows when adopting a Recommendation to go along

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21 Report of the Committee of Experts 2011. See on the ILO web site at [www.ilo.org](http://www.ilo.org) under NORMLEX.

with a Convention, combining what States should be able to ratify with a statement of what would be best if it could be achieved – and which some States will gradually follow. It is certain that if the Declaration had been adopted first, it would have been psychologically impossible to adopt the Convention after, with its more restricted standards.

The feelings of disappointment felt by indigenous peoples during the adoption of C169, parallel those regularly felt by workers' representatives when an ILO Convention does not go as far as they had hoped, and employers and governments when they believe they have gone too far. As experienced bargainers, however, workers' representatives in the ILO know that they must pursue the minimum that they can accept to be able to bargain at the national level for what they want to achieve. The representatives of indigenous and tribal peoples had to swallow this in 1989 in the ILO, and use it as a springboard for the UNDRIP and for national practices that go beyond the Convention's requirements.

### **The impact of Convention No. 169**

Later developments have shown that the Convention has been serving its intended purpose, and that the hard bargaining was not wasted. Those who were the most disappointed were those who had entered the process with positions of principle (not to mention unrealistic expectations based on the UN, without having learned much about the ILO) which they were unwilling to compromise – and they were able to maintain these principles when pushing for the non-binding Declaration in the UN negotiations. But the Convention has been embraced most fervently by indigenous peoples in countries where their lives and very existence are at stake, where the Convention is an enormous leap forward from their present situation. Convention No. 169 has twice served as a starting point for resolving situations of armed conflict, in Guatemala and Nepal.<sup>22</sup> Following its ratification, a number of countries have adopted requirements of consultation, land titling, and even legal and constitutional reform to recognize their 'plurinational' character (or

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<sup>22</sup> See in particular ILO: *ILO Convention No. 169 and Peace Building in Nepal*, 2006, available to be downloaded at [http://www.ilo.org/indigenous/Resources/Publications/WCMS\\_100657/lang-en/index.htm](http://www.ilo.org/indigenous/Resources/Publications/WCMS_100657/lang-en/index.htm).

other similar statements). It is an unanswerable question whether these countries would have done so if they had not ratified the Convention, and faced the unflinching supervisory processes of the ILO, backed up with practical assistance in how to resolve problems that arise. Cause and effect cannot be so closely associated, and certainly the long negotiating process towards the Declaration and its emerging status as reflecting accepted principles have played a huge role as well. As one of the participants in the Oslo workshop said, the adoption of Declaration has carried with it a more general acceptance of the acceptability of facing up to the existence of indigenous peoples and the need to respect their rights – resulting among other things in an improved climate for the ratification of C169.

As of early 2012, the Convention has been ratified by only 22 countries, which suggests that its standards are still too strict for many countries to accept without a period of preparation and reflection. One of the major problems is the land rights and resources provisions, which provide that indigenous and tribal peoples have rights over the lands they traditionally occupy, and that they have the right to participate in the exploration, exploitation and use of natural resources found on their lands. Many countries simply have not evolved an awareness that it is possible to recognize the existence of different communities within a country without compromising the notion of a national identity. There are however several good prospects for ratification in the next few years.

The Convention has had a major impact in countries in the process of formulating or re-examining their policies towards indigenous and tribal peoples, even when it has not been ratified. It has been my own contention that in developed countries the Convention can also have an unexpected positive impact. The influence of the Convention in Norway has been acknowledged by both the Government and by the Sami Parliament to be a positive one, in that it has compelled the parties to look beyond momentary political currents to submit the national decision-making process to international scrutiny. In other countries, such as Australia and Canada, where indigenous policies are highly-developed but also solidly entrenched and not necessarily positive, an objective comparison of the Convention's requirements with national law and policy would probably begin a discussion leading to a decision to ratify.

Part of the premise of the Oslo meeting was that those who have taken part in the development of the international law on this subject are still available to discuss how it all happened. And indeed, so are those who were severely disappointed in the adoption of C169. This means that governments that are not keen

to ratify international human rights standards – particularly Australia, Canada and the United States – can take refuge behind this partial rejection by indigenous representatives to avoid taking on new international commitments. Twenty-five years have now passed – perhaps the time has come when a cold analysis of the applicable international law should be done in all these countries, to discover what would best serve the indigenous peoples in them. (The failure of Finland and Sweden to ratify is based more on internal divisions about what the Convention requires, coupled with a determination never actually to ask the ILO for clarifications.)

Its influence on both national and international policies has far exceeded the expectations that the number of ratifications might imply. Convention No. 169 has served as the foundation of international development guidelines affecting indigenous peoples – e.g., the International Finance Corporation's first Performance Standards on projects affecting indigenous peoples, adopted in 2006 (and revised in 2011), and the UN Development Group's Guidelines concerning indigenous peoples. Following the adoption of C169, the ILO and the UN together established in 1990 what evolved into an Inter-Agency Support Group on Indigenous Affairs, a coordinating body at the Secretariat level that has exercised a considerable influence on UN-system deliberations.<sup>23</sup>

Finally, ILO action on fundamental rights at work has also been influenced. It is no coincidence that indigenous and tribal peoples suffer more from workplace abuses than any other identifiable ethnic group. Denmark, and later the European Union and others, have funded an ILO project to promote Convention No. 169, which has carried out both studies and practical assistance to communities and to countries. This is known as PRO169, and has as of this writing been absorbed within a system-wide effort known as the United Nations-Indigenous Peoples Partnership (UNIPP). Surveys by the ILO's Special Action Programme on forced labour have identified problems affecting these peoples in particular. And both the Global Reports under the ILO Declaration on Fundamental Rights and Principles

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23 Contrary to the assertion on the UNPFII web site, the IASG was established before the UNPFII had been imagined, let alone established. It was a real effort at interagency coordination that has accomplished its purpose, and since then has taken on a broader role – perhaps unfortunately concentrating on serving the UNPFII. The initiators of it were Gudmundur Alfredsson and me.



at Work, and the Committee of Experts have frequently remarked on discrimination against them.<sup>24</sup>

## Concluding remarks

The ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169) is not the highest possible expression of the rights of these peoples – the UN Declaration of 2007 comes closer to that ideal. It is, however, the highest achievable expression of these rights *in convention form*, now and for the foreseeable future. When we began to revise Convention No. 107, few of us at the ILO thought that this would be the only Convention on the subject 25 years later. We thought we were adopting a Convention that would provide an essential bulwark against retrogression for a time, then be replaced by a UN convention. It has not happened that way. Instead, the two major pieces of international law on this subject are the complementary ILO and UN instruments. This is not a bad thing – indeed, it is certainly healthy to have a more widely shared responsibility for it at the international level.

The difficulties and the successes outlined in this article were replicated in the UN process, and at the national level in many countries around the world. The points of principle that were stated and maintained, and the compromises that had to be made, are those encountered in each country facing this question.

The essential point is that in just over 40 years, the question of the protection and development of indigenous and tribal peoples has gone from a neglected and marginal issue, to being central to development, to biodiversity, to human rights and to respect for human dignity in the international system and in a number of countries. The international indigenous movement has been born and come to maturity, and those who presumed to speak for it have been tested and sometimes relegated to a back seat. The discussion has evolved from protectionist to militant to developmental.

What a remarkable thing to have lived through. ○

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24 See, e.g., ILO: *Eliminating discrimination against indigenous and tribal peoples in employment and occupation - A Guide to ILO Convention No. 111, 2007*, available on the same web site.

## CHAPTER 17

## The Revision of International Labour Organization Convention No. 107: A Subjective Assessment

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*Dalee Sambo Dorough*

*Note: The perspectives contained herein stem from my direct participation in the revision process as a representative of the Inuit Circumpolar Conference.<sup>1</sup> I was one of two lead spokespersons on behalf of the “Indigenous Rights Group”. This descriptive, personal account aims to provide some insights and draw attention to the shortcomings in the ILO standard-setting process as it relates to Indigenous peoples. It is not intended to be a comprehensive analysis of ILO procedures or the final text of the Convention.*

This paper intends to examine the 1988 and 1989 process of the International Labour Organization (ILO) in its “partial” revision of Convention 107 -- Indigenous and Tribal Populations (1957). The purpose of this discussion is to illustrate how the contentious issues related to the term “peoples” and the articles addressing lands, territories and resources were dealt with in this highly politicized forum, in the hope that it will be insightful to the interpretation of the United Nations Declaration on the Rights of Indigenous Peoples and to those engaged in the ongoing negotiation of the Organization of American States’ Proposed American Declaration. There are a number of points about the substance and procedures of the ILO revision process that may be instructive to other standard-setting processes or policy development concerning the human rights of Indigenous peoples, including matters related to timeframe, state government positions and procedures, selection of leadership, e.g. chairpersons, closed meetings, procedures employed to arrive at “consensus”, and so forth.

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1 An ECOSOC accredited Non-Governmental Organization representing the Inuit from the Russian Federation, Alaska/United States, Canada, and Greenland. They effected a name change and are now referred to as the Inuit Circumpolar Council.

The two-year revision process involved many diverse aspirations and political interests. Because of the task of revising an “outdated” convention within this tripartite organization, and the attempt to accommodate these diverse interests, the result of the process was both too much and too little, depending upon whom one was representing. Unfortunately, the final product did not reflect a consensus on any one issue, and there were many of them.

## Setting the stage

The process began with a September 1986 Meeting of Experts, convened by the Governing Body of the ILO, to discuss the possible revision of Convention 107. The participants in the Meeting of Experts consisted of representatives of employer (businesses and industry) and worker (trade unions) organizations as well as nation-state government members of the ILO. However, the ILO Governing Body, in a break from the norm, also chose to invite two NGO representatives to join the meeting. The result of this decision was the direct participation of representatives from Survival International and the World Council of Indigenous Peoples (WCIP).

This step was seen as an important development. However, it later became clear throughout the negotiation process that it was more of a political move than a genuine desire to gain direct indigenous participation. Unfortunately, at the time, the WCIP was a fractionalized and relatively non-representative organization with many internal political problems. WCIP leaders were criticized for accepting funds from oppressive governments and being detached from genuine or legitimate indigenous communities. Throughout the revision process it was asserted by some that the role of the WCIP was to keep the indigenous peoples divided and, thereby, much easier to defeat.

Survival International, as a worldwide support organization, helped to bring attention to the many critical issues facing indigenous peoples. Ironically, Survival International, as a non-indigenous support group, played a more useful role than the WCIP. They did not yield to the government, employer and Secretariat pressure and maintained their integrity and independence throughout. These “political” dynamics contributed greatly to the process of negotiation, with both good and bad results. In addition, a number of other indigenous and support organization representatives attended the Meeting of Experts as Observers.

The result of the September 1986 Meeting of Experts was a series of recommendations to the Governing Body, including the decision to revise Convention 107. The matter was then placed on the June 1988 (75<sup>th</sup> session) agenda of the International Labour Conference. According to ILO procedures, the Conference discusses an issue for a two-year period, thereby dictating the scheduled adoption of the revised Convention by June 1989 (76<sup>th</sup> session). The report of the Meeting of Experts stated that "Convention 107 was in urgent need of revision to remove its integrationist approach and to reinforce its provisions on land rights." This report established the objectives or overall framework for the revision process.

The Office (or Secretariat) subsequently prepared a draft text of the Convention based on the discussions of the Meeting of Experts; the report was labeled Report IV(1). The report was then distributed, as a questionnaire, to governments. The Office sent along copies to some of the established indigenous organizations and support groups on request. The Office requested that governments consult "the most representative organizations" (worker and employer organizations and not specifically indigenous peoples' organizations) about whether they had any amendments, suggestions or comments to make to Report IV(1). From the outset, the process was facilitated by the Secretariat of the ILO. The report contained a draft text which was the starting point for discussion. Many indigenous peoples who reviewed the proposed language felt that the Secretariat had favored governments in the drafting stage.

Domestically, little or no consultation with indigenous peoples took place. For example, in the United States, the Department of Labor, the Department of Interior (responsible for Indian affairs), the employer organizations and unions, were all involved in the process. However, none of them instituted any formal consultation process with Indigenous peoples or their respective Indigenous governments and political institutions despite the fact that Indigenous peoples were the "subjects" and supposed "beneficiaries" of the final instrument.

This purported "consultation" process shaped the proposed text to be tabled at the first session. In ILO practice and negotiation, it is customary, because of the two-year revision process, to have a starting point: a draft text to focus on and respond to. However, a draft text developed without broad consultation and without a comprehensive review by all concerned provided a poor starting point for the ultimate objective of "reinforcing" and strengthening an admittedly "outdated" document.

From an Indigenous perspective, the initial draft text, as presented to the 75<sup>th</sup> session of the International Labour Conference Committee on Convention 107 (1988), was far from satisfactory. This view was shared by many, including government representatives. The draft Convention contained nine parts and a total of 35 articles. Briefly, some of the issues present for negotiation included the replacement of the term “populations” with the term “peoples” (Article 1); customs and traditions of indigenous and tribal peoples (Articles 8-9); environmental protection of indigenous territories; indigenous rights to lands and resources (Articles 13-19); control of indigenous peoples over their economic, social and cultural affairs (Articles 22, 25 and 27); implementation of the revised Convention (Article 32); and the general clauses and interpretation of the revised Convention (Articles 33-34).

### **Critical issues to be negotiated**

It is important to illustrate two of the most critical issues present in the text which, in turn, influenced the behavior of all negotiating parties and produced entrenched positions, lead players, coalitions, good guys, bad guys, working groups, private negotiations, “pressure drops”, threats, etc. This description, because of space and the focus of this section, will tend to be somewhat superficial. However, the reader will be able to grasp the relative importance of the issues to all stakeholders.

As discussed above, the first and most contentious issue was the use of the term “peoples” versus the term “populations”. Furthermore, the entire part dealing with lands, territories and resources was equally contentious. The provisions included ownership and possession, protection of ownership rights, control over natural resources, consent of indigenous peoples before undertaking any exploitation or exploration of mineral and other subsurface resources, prohibition of removal from lands, unauthorized intrusion or use of lands, alienation of lands, respect for traditional customs for transferring lands, and the provision for a land claims settlement mechanism.

Given the diverse political situations and stages of development in the countries involved, especially in Latin America, it was clear that many of these articles posed major difficulties for numerous State parties. In particular, the provisions

requiring the “consent of the peoples concerned” for resource exploitation and alienation of lands, territories, and resources caused great dissension.

Indigenous peoples felt that, if Convention 107 was to be transformed into a useful instrument, Indigenous peoples’ land and resource rights had to be fully respected by the Convention’s terms. Indigenous peoples asserted that effective recognition and protection of these basic rights was viewed as fundamental to any serious recognition of indigenous economic, social or cultural rights. In the context of the ILO Convention, Part II on Lands, was considered the “soul” of the Convention.

## **The actors**

With the draft text in place, and replies received and commentaries submitted, the actual revision process began and the actors quickly emerged and became a part of the landscape over the two-year period. First of all, there was the Secretariat or, as mentioned above, often referred to “the Office”. The Secretariat consisted of the Liaison Point for NGOs, Lee Swepston; an ILO Assistant Director in Latin America; the Legal Advisor; and several interns from various law schools and numerous staff persons.

The key person at the Secretariat dealing with Indigenous issues was Mr. Lee Swepston, who had experience and knowledge of indigenous affairs. He was viewed by many indigenous representatives as the person directly responsible for the many “closed door” decisions made with regard to indigenous representation at the sessions and political “deal-making” that took place in the closed working group meetings to which Indigenous peoples had little to no access.

## **The Governments**

The Committee itself was made up of 41 government members, 10 employers’ members and 23 workers’ members, in all a total of 74. The governments involved were varied and from all parts of the globe. In particular, North, Central and South America were heavily represented -- having two or more delegates in place at a time. For instance, Canada had five delegates seated in the room at all times. Most of the representatives came from their respective Departments of Labor or the equivalent. Unfortunately, very few delegations included individuals who had

any background in Indigenous affairs, human rights or domestic issues concerning Indigenous peoples. There were a couple of exceptions, however. Portugal, Colombia and Ecuador sent individuals with particular expertise in the area of indigenous human rights and who were very knowledgeable and supportive of indigenous concerns. Norway and Sweden actually had Sami individuals serving in the capacity of official delegates or advisors to the delegation. And the United States' delegation included a sole American Indian.

The selection of representation was critical to this process. It was clear which governments were prepared to participate in the forum in order to diminish indigenous rights and those that were there to defend them. Many delegates were simply sent from the local Mission or the Embassy offices with "instructions" and "orders" on key issues. Others were sent with few, if any, instructions and were eager to learn about the process, indigenous human rights and the conditions facing indigenous communities in order to do what they felt was right and within the limits of their own domestic laws, political conditions, as well as political and legal climates.

There were many times when delegates demonstrated a woefully inadequate knowledge of the issues and a lack of preparation for the negotiation and Committee meetings. As a general rule, government delegates were insufficiently informed on indigenous issues, both prior to and during the negotiation process. In relation to the timeframe, it would have been useful to hold an appropriate "education" or information process, with effective, direct indigenous input in order to generate understanding between the parties and, more importantly, the significance of the Convention to indigenous peoples. This is one area of contrast between the ILO and the processes of the UN and the OAS. The latter two standard-setting initiatives have ensured more cross-cultural education, one-on-one lobbying and sharing of information, which ultimately propelled critical issues forward. Within the rapidly-moving ILO process, no such opportunity existed. Ignorance of indigenous peoples and their distinct status, interests and rights also applied to the worker and employer delegates as well (to be addressed below).

## **The Employers**

The employers' delegations consisted of organizations such as the Employers' Confederation of Gabon and the Confederation of Industrial Chambers (Mexico),

the Japan Federation of Employers' Associations, and the National Confederation of Industry in (Brazil). These organizations were primarily concerned with private industry in their respective countries. The majority of employer delegates had no knowledge of indigenous status, rights, interests or conditions. Their view was that indigenous peoples should be dealt with as any other kind of "employee" or "worker". For example, Article 4, paragraph 1 of the Convention states:

"Special measures shall be adopted as appropriate for safeguarding the institutions, persons, property, labor and environment of the peoples concerned."

The response of the National Confederation of Industry to this article, as recorded in Report IV(2A), stated:

"This Article should be drafted to avoid the possibility of more favorable treatment being given to these communities than to other workers."

The following example will further help to illustrate the views of the employers, which relates to the objective agreed upon by the Governing Body when deciding to undertake the revision process. Article 5 states that:

"due account shall be taken of the cultural and religious values and practices of these peoples..." and "the integrity of the values, practices and institutions of these peoples shall be respected."

The Japan Federation of Employers' Associations (NIKKEIREN) responded to this language by stating:

"(g)iving too much priority to the protection of peoples and to the enhancement of their social status may discriminate against other citizens. The instrument should provide for equal rights."

The Japanese government expressed the same view. Similar arguments concerning equality without a cultural context emerged in the UN process as well. Again, one of the main objectives of the ILO process was to remove the integrationist approach of the Convention, and thereby remove such govern-



ment policies that would ultimately affect the internal decisions and policies of employers. In sum, the employers were not responsive, in any way, to the objective of the negotiation process from start to finish. There were two exceptions in the employer delegation: 1) the First Nations Financial Project, a U.S. Indian employer organization that worked with Indian tribes and Nations throughout the United States, whose delegate to the ILO session was an American Indian; and 2) an Australian Aborigine working with a major company in Australia.

## **The Workers**

The workers' delegation was a diverse array of individuals and they emerged, quite naturally, as the strongest allies of indigenous peoples. The workers' delegation included unions such as the Australian Council of Trade Unions (ACTU), National Confederation of Agricultural Workers (Brazil), Danish Federation of Trade Unions (LO), Swiss Workers' Union (SGB), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), General Confederation of Workers (CGTP, Peru), and the General Council of Trade Unions of Japan (SO-HYO). Diversity existed, as well as a measure of solidarity and sensitivity to indigenous peoples and, in particular, to "group" or "collective" rights issues. Some of the worker delegates were in fact Indigenous, including Maori (New Zealand), Sami, Australian Aboriginals and Canadian First Nation representatives -- all serving as official worker delegates.

Yet, the worker delegation sympathy was not enough. Here again, even the head of the workers' delegation was unable to properly convey indigenous positions on specific amendments in an effective manner. This was due to ignorance as well as a lack of negotiating skill, with the emphasis on the former. The indigenous peoples' representatives had originally hoped for an advance session with the workers to conduct an effective information and education process. However, there was never sufficient time nor funds available. Such preparation would have gone a long way towards helping to conduct "meaningful negotiations". The indigenous/worker coalition was the strongest coalition and it weathered many battles until the final hours of the 76<sup>th</sup> session.

## The Indigenous Peoples and “representation”

The indigenous delegation, referred to as the “Indigenous Rights Group” comprised several indigenous NGOs and indigenous leaders and peoples from around the globe. The NGOs involved were the Four Directions Council, Inuit Circumpolar Conference, the National Indian Youth Council, Nordic Sami Council, (ICC), and the World Council of Indigenous Peoples (WCIP). Regional organizations included representatives from the Metis, the Prairie Indian Alliance, Assembly of First Nations (Canada), the Ainu Association of Hokkaido (Japan), and the National Coalition of Aboriginal Organizations (Australia). As noted earlier, the WCIP and the role it played in the Meeting of Experts caused many indigenous organizations to question its legitimacy as a representative international indigenous peoples’ organization. This matter came up again in the Indigenous Rights Group sessions and it created disunity within the indigenous coalition, which was extremely detrimental in the 1988 session.

The issue of participation in the process was always a heated discussion within various fora, both indigenous and international, beginning in 1986. During the 1987 Indigenous Peoples’ Preparatory meeting at the UN in Geneva, indigenous organizations discussed the ILO revision process and agreed unanimously to express to the UN its opposition to the way in which the revision was taking place and to further recommend that the ILO delay work on the Convention until the issue of greater indigenous peoples’ participation was properly dealt with.

At the 1988 ILO session, indigenous participation was minimal. Under ILO rules only NGOs affiliated with the ILO or accredited as “observers” may make oral or written submissions. However, permission to do so had been granted only in rare circumstances. Furthermore, only international NGOs were eligible for ILO accreditation. As a result, indigenous organizations that function at the community or national level and, consequently, are most directly representative of and knowledgeable about the actual conditions and aspirations of indigenous peoples were excluded from direct participation in the 1988 session. The few indigenous organizations sufficiently international in character to gain ILO accreditation were able to negotiate (for each) a ten-minute presentation at the close of business on the second day of deliberations of the Committee on Convention 107. In addition, the Indigenous organizations collectively were granted one ten-minute presentation for each category of articles placed before the Committee.

The lack of direct participation was extremely unfortunate, especially in light of the fact that the Convention Preamble itself urges recognition of the aspirations of indigenous "peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions". Overall, indigenous input was inadequate, which contributed to the lack of more uplifting standards and overall quality in the final instrument. Here again, the contrast with that of the UN process is significant. Lack of open and direct Indigenous peoples' participation in the ILO generated an inadequate document. The OAS has improved upon this point of procedure, which will be critical to the final text of the Proposed American Declaration. However, problems remain. In contrast, the UN allowed for open, inclusive participation, even at the Commission and later the Human Rights Council level, and the Declaration reflects such participation through its more comprehensive and far-reaching norms.

Despite the lack of broad and direct indigenous participation in the ILO process, the natural "coalition" of workers and indigenous peoples minimally increased indigenous involvement in the process. However, this created another level of negotiations. The workers agreed to allow a limited number of indigenous representatives to attend their private delegate meetings. The result of these negotiations was the submission of amendments for consideration by the Committee that embraced indigenous positions, views and aspirations. Sometimes, indigenous peoples were successful in convincing the workers to submit amendments and, at other times, they were not.

Very informal coalitions also developed between the employers and some governments; in these cases, the indigenous rights group attempted to break these coalitions, without success.

By the end of the 1988 process, the matter of indigenous representation had still not been satisfactorily dealt with and was re-visited in the fall of 1988 and early 1989. Despite the inadequacy of the procedural measures to ensure direct indigenous peoples' participation, it is important to underscore the impact of the presence of indigenous peoples in the room when the Committee proceedings took place. Governments, employers and workers were all very aware of the presence of indigenous peoples and the fact that they were listening, thinking, lobbying, formulating positions and, most importantly, watching. Without the mere presence of indigenous peoples in the room, surely, more harm would have been done to the document.

## **Non-Indigenous Support Groups**

In addition to the governments, employers, workers and indigenous organizations, non-indigenous support groups were present and played a useful role in aiding the Indigenous Rights Group in its lobbying efforts to gain votes and more direct participation in the process. The two groups present were Survival International and the International Work Group on Indigenous Affairs (IWGIA). Both organizations assisted by documenting the proceedings and generating awareness about the process and issues during the 1988 and 1989 inter-sessional period.

## **Selection of the Committee Chairperson**

Selection of the Committee Chairperson was a major factor in the proceedings and it directly shaped the final outcome of the Convention. The workers and employers, respectively, selected a Vice Chair to be their spokesperson during Committee sessions, and the full Committee (governments, workers and employers) selected the Chairperson from the government delegates present, for the entire discussion. Throughout the proceedings, each government had an unfettered voice. The workers and employers could only speak through their Vice Chairperson. Hence, the selection of the Chairperson was an important decision in the process, setting the overall tone of the proceedings.

Much to the disgust and opposition of the indigenous peoples, the Committee selected the government delegate of Bolivia as Chairperson. This was a deliberate move on the part of several governments to ensure greater control over the direction of the entire revision process. In particular, the government of Canada set up a group of supporters who seconded the nomination and spoke in support of the Bolivian delegate. The government of Bolivia ratified Convention 107 in 1962 and, for a relatively long period, repeatedly violated many of its provisions. From the view of indigenous peoples, it was unconscionable that, simultaneously with the Committee on Convention 107, the government of Bolivia was under review by the Committee of Experts on the Application of Conventions and Recommendations for not supplying information about their treatment of indigenous peoples in Bolivia, as well as direct violation of Articles 7, 11, 12, 13 and 14 of Convention 107. At the time, the specific violations included incursion onto indig-

enous lands for the purposes of development and settlement by non-indigenous peoples or, in short, the colonization of indigenous homelands and territories. Again, in 1989, Bolivia was under review for Convention 107 violations but the Committee again seated the government representative of Bolivia as the Chair.

The intention behind the selection of an offending government representative for the position of Chairperson should be clear to any independent observer. Indigenous peoples looked on with incredulity as the Committee confirmed this nomination. There was no way of effecting a change. Because of this decision, a great amount of suspicion, lack of confidence and mistrust was generated, which lasted throughout the entire process. The workers, as allies with only one-third of the votes, were not able to effect a change either.

## **The Negotiating Process**

The method of work between the coalition of workers and indigenous peoples can be described as follows: 1) the indigenous rights group would meet, with draft Convention in hand, to discuss each point, improve the wording, discuss the strategy and arguments to give to the workers; 2) a single representative of this group would then meet privately with the workers, present their positions and arguments, hoping that the workers would approve the amendments for introduction on the floor; 3) a discussion and negotiation with the workers would take place and they would then approve the amendments, occasionally with alterations and sometimes with indigenous positions completely lost; 4) these indigenous/worker amendments were then submitted to the Secretariat for inclusion in the entire packet of amendments for discussion by the Committee.

Amendments to the draft were transmitted to the Secretariat by governments and employers separately. The work was broken down into manageable sections of three to four articles at a time. In some cases, amendments were discussed internally by the Secretariat and combined if there were duplications. These amendments were then submitted to the full Committee. In 1988 alone there were 284 amendments proposed to the 35 provisions of the draft Convention.

The timeframe was much too short for real "negotiation". An Indigenous Rights Group meeting would last up to two hours and the session with the workers would be over within an hour (often less). Simultaneously, the governments and employers were conducting their private meetings with no indigenous par-

ticipation, with the exception of the few indigenous employer and government delegates. Everything moved very rapidly, providing little or no time to effectively deal with the issues in a comprehensive fashion.

Following this, amendment packages would be prepared by the Secretariat and were made available at a central desk. Delegates would pick up the packages, review them, then hold a second round of private meetings to discuss how to vote on the amendments. The indigenous representatives would also re-join the workers and provide them with "fall-back" positions if the workers' amendments failed on the floor. These were to be strictly confidential positions and would not be proposed unless it became clear that a worker amendment was going to fail. Sometimes these "fall-back" positions would be variations of the worker amendments or some form of improvement on the government or employer amendments. At times, it was clear that an avalanche of amendments on a particular issue would be coming up and a series of descending strategies were developed.

Following the private caucuses, the Committee would be seated and the discussion would open. Before any new Part of the Convention was discussed, spokespersons for governments, workers, employers as well as the Indigenous Rights Group, would make short statements concerning the upcoming articles. This was kept to a minimum. The amendments were numbered and dealt with in order of extremity: if they were major amendments they appeared first, lesser amendments were dealt with later. Again, the amendments would come up quickly in Committee and positions would be lost almost immediately, with no recourse whatsoever. The workers' Vice Chair was the spokesperson for the indigenous cause and had to debate the amendments with the employer Vice Chair and governments. Decisions were made by so-called "consensus" or majority vote.

Regarding dialogue within the Committee, it was kept to a minimum and very well "dictated" by the Chair. Often, he re-directed the discussion or simply chose "not to notice" someone who might speak in favor of an amendment. This made dialogue nearly impossible. At times, the Colombian or the Portuguese delegate would speak up and demand that more dialogue take place in order to draw out the real positions of other governments or to draw attention to extremely detrimental language. In part, this was done to ensure inclusion of the extremely oppressive views of some governments in the session record and also to show how governments were not being responsive to the objective of the revision process. The only way in which opposing governments could freeze discussion was to

deflect it. If matters were going from bad to worse (for indigenous peoples), the workers would call a recess to allow for time to lobby and re-formulate strategy. This approach was useful to a certain degree. However, it was rarely engaged. In this way, Indigenous human rights would fly out of the window, never to be addressed again.

## **Voting -- how it can hurt or help**

The ILO voting procedure was extremely complicated and could be used very effectively if, and once, thoroughly understood. Each tripartite delegate had one vote. The votes were weighted to ensure that the aggregate total number of votes available to each group was equal. Thus the worker and employer delegates of a state voting together on an issue could outvote their own government. In practice, the worker and employer representatives separately form highly disciplined caucuses that vote as a bloc. When the workers and employers agree on a point, it will automatically carry, even in the face of large-scale government objection. It can also be disastrous. If the workers and employers block each other out, the governments can decide the issue on their own.

Here is where a new coalition that was not readily apparent in the beginning began to emerge. The employers and certain governments were collaborating on positions. It was only after a series of votes that indigenous peoples identified a pattern developing and eventually determined which governments were working with the employers. As stated earlier, it was nearly impossible to break this coalition. However, one attempt was made.

The spokesperson for the indigenous rights group requested a meeting with the employers and was subsequently invited to one of their private caucuses. This was a major break from tradition. They had a brief opportunity to explain the positions of the indigenous peoples with respect to the lands and resources provisions, and further explained that, in many cases in North America and elsewhere, indigenous employers, like that of the First Nations Financial Project, could be found, particularly in Alaska where there were many (e.g. Native regional corporations). Furthermore, it was pointed out that many indigenous governments were recognized by States, which function like any other municipal or county government. This was followed by a question and answer session and then a general discussion about the role of the employers and their objectives in the process.

Nearly everyone was convinced that the aspirations of the “subjects” of the Convention should be yielded to. The exceptions were the Vice Chair and his legal assistant. The employers applauded the effort and stated that they would be flexible and would like to hear future positions.

However, because of the entrenched position of the Vice Chair and the already developed coalition, the effort was futile and indigenous peoples were never invited back to brief them on other positions. Too often the employers assumed a “government role”, and were not influenced in any way by the Indigenous employer delegates. The indigenous employer delegates were forced to vote with the bloc, against the positions of indigenous peoples. Their only alternative was to simply be “absent” when a critical vote came up. In extreme cases, the indigenous employer delegates could cast a no vote or abstain from voting. This was rarely done, however. Although it appeared useful to have indigenous peoples represented in the employer delegation, it had little effect. In this regard, it was clear that it was highly discriminatory and unfair to stereotype indigenous peoples only as “workers”, and deny the indigenous rights group representation and/or participation in the employer and government delegation meetings.

When indigenous peoples saw the possibility to win a vote on a critical issue, for example on the matter of “consent”, they requested that the workers call for a roll-call vote. This was an extremely tedious task but did, on occasion, work in favor of Indigenous peoples, especially if there were employer and government delegates out having coffee in the lounge or “absent” for one reason or another. Fortunately, the workers always made sure that they had more delegates in the room than needed, even if they had to borrow them from another Committee. This also reflected the fact that no real and meaningful negotiation took place. However, indigenous peoples were in such a weak procedural position that anything that could be done to improve the situation was taken advantage of.

Numerous decisions were made by so-called “consensus”. People would tire or it was clear that the workers did not have the votes to carry an amendment and would yield to the majority. On some occasions, deals or compromises would be struck between the employers and workers during the Committee meeting. This was done despite the outrage and objection of indigenous peoples – more often than not, the employers did not live up to their end of the deal. Once agreed, the issue considered resolved, the Committee swiftly moved on to the next item. On two occasions the employers openly reneged on an agreement struck with the workers. This bred mistrust, suspicion, and a complete lack confidence.



The short timeframe for revision did debilitate the “negotiation” process and the positions of the workers/indigenous peoples. People were tiring; frustration, impatience and anger mounted. There was never an opportunity to “cool off”. The indigenous peoples, in particular, were working around the clock even though they were not direct parties to the negotiation. They had to be one step ahead of the entire process, in addition to working with the media. Another factor was the lack of human resources and basic necessities such as phones, typewriters, paper, photocopiers and so on [this was well before use of the Internet, laptop computers, etc.]. The workers, employers and governments had computers, phones, secretarial pools, legal advisors, and supplies made available to them within the ILO complex. The Indigenous Rights Group was provided with one office and a room to meet as a group, and this had to be scheduled in advance before each proposed meeting.

In summary, the public negotiation process included the draft text, amendment process, private caucus meetings, time pressure, governments, workers, employers, indigenous rights group, non-indigenous support groups, Chairperson, consensus decision-making, voting, worker/indigenous coalition, coalition of employers and some governments, and the Secretariat.

### **Closed meetings: Lands and “Peoples”**

There were also parallel “closed” working group negotiations taking place. This was the result of two dynamics. First, the governments had submitted so many amendments to the lands and resources sections that it was impossible for the Committee to review all of them in a comprehensive fashion. The Committee therefore decided to establish a “lands and resources” Working Group. In addition, the issue of “peoples” versus “populations” generated so many proposals that the Committee agreed to establish a smaller “peoples” Working Group. Secondly, the entire Committee had to complete its work within a 21-day period, creating a hard and fast deadline.

Indigenous peoples were not allowed in the closed working group sessions, unless they were a delegate selected by their respective group to participate. There were a total of 15 working group members, five from each tripartite member. From the workers group, three indigenous delegates were selected to participate in the lands and resources Working Group. The government members of

the Working Group included Canada, Australia, Argentina, India and Norway. The governments' and employers' group provided for no indigenous delegate participation. Again, the lands and resources section was considered the "soul" of the Convention by indigenous peoples and a major objective of the revision process was to strengthen the land rights provisions. The closed Working Group meetings also contributed to the fact that little meaningful negotiation took place. More distressing was the fact that indigenous peoples were not even observers to these meetings. This is another example of the gross inadequacy of direct indigenous participation in a process that impacted Indigenous peoples' lives and homelands, resulting in provisions that were more favorable to governments than to the "beneficiaries" of the Convention.

Because of the actors involved, the Working Group negotiations skewed the outcome of the text. The governments involved in the lands and resources working group were clearly those who took a leadership role in diminishing indigenous rights, in particular, India and Canada.

The working group on "peoples/populations" comprised even fewer delegates and there is no actual record of the formal creation of this working group because of its eventual demise due to the flurry of "corridor" negotiations and the vast numbers of proposals to limit the term "peoples" in the Convention. And the closed working group negotiations differed greatly from the public negotiation process within the Committee: a limited number of key delegates involved (five each on lands and resources, two each on peoples), no independent indigenous involvement, influence exerted by the Secretariat and Legal Advisor, little communication with the rest of the Committee until the final draft was completed and finally, only specific articles were being re-drafted, leading to provisions being taken out of context.

## **Back to center stage**

The Working Group on lands and resources reported to the full Committee and discussion ensued. It was clear that the Working Group itself could not accommodate the diverse views of the governments and the result was no consensus on the entire chapter dealing with lands and resources. In addition, the issue of "peoples" and "populations" achieved no consensus and left the Secretariat in a peculiar state of indecision. The final decision, as suggested by the Secretariat, was to draft the text of the Convention with the terms "peoples/populations" in

parenthesis and italicized throughout. It is ironic that these two decisions about a lack of consensus were made by consensus.

Throughout both of these discussions, governments and employers wanted the indigenous peoples present to compromise, very similar to the arguments made by states in the UN Commission on Human Rights working group, where they attempted to portray indigenous peoples as intransigent and unwilling to compromise. Yet never once did states compromise, give in or put themselves in the shoes of indigenous peoples. Governments would change the wording of a particular article, or come back and say to indigenous peoples: "Look we've budged and you haven't". Indigenous peoples would read their changes and the language would have the same intent or sometimes would be worse than the original text. Regarding communication, governments always spoke in terms of fear when focusing on indigenous positions. They never spoke about their own interests, motives or positions -- they always elaborated upon the interests and positions of indigenous peoples and how such wording would create problems for them.

The final report of the Committee (1988), prepared by the Rapporteur, did not include the entire lands and resources (Articles 13-19) section and contained the ambiguous use of the term "peoples/populations". As soon as the draft was issued, government representatives proceeded to amend it extensively. This was an exercise in the re-writing of government statements regarding their national policies in order to ensure that the formal record would not characterize them as being negative or oppressive. The governments of India and Japan submitted the most extensive re-writes of their very own interventions.

## **The role of the media**

The Indigenous Rights Group, though few in numbers, remained active with the media in order to apply pressure on governments by sharing with "people at home" what their respective governments were actually stating at the international level. This was very effective, especially in the case of Canada, which took a hard-line approach to both the lands and resources provisions and the use of the term "peoples". Nearly every day, indigenous peoples would issue a press release about the positions taken by governments, with quotes from diverse Indigenous representatives to illustrate the impact that Canada was having on In-

indigenous peoples' human rights universally and not simply in Canada. The releases were faxed out to the press worldwide and others at home would fax the printed stories back for distribution at the Conference. After several press releases, journalists became curious as to what was happening at the ILO. They started coming over from the office of the UN Press Agency [Geneva] as well as from the local newspapers. Indigenous peoples also held a couple of successful "meetings with the press" at the UN Press Agency. The Canadian government representatives would see the articles from their national press outlets and immediately go into private caucus on how to proceed. It created the illusion that the whole world was watching and, therefore, governments had better be careful about their votes, decisions and positions. Even more dramatic was the response of indigenous peoples who could not attend the ILO sessions but commented for the press at home about how such positions could harm them and their way of life. This provided for the immediate application of government positions to real-life situations that few could ignore.

Unfortunately, it worked in reverse on the Japanese government delegates. They resisted open confrontation with the Ainu Association of Hokkaido. However, once they saw the press clippings that were being printed in Japanese newspapers, they became more entrenched in their positions and proceeded to confront the Ainu openly in their remarks to the Committee. This was then met with aggressive attacks by the Ainu observers, going back and forth for some time. Overall, the media and the pressure generated by this strategy greatly assisted indigenous peoples in the already asymmetrical conditions.

### **The plenary stage**

The Indigenous Rights Group was also able to make a presentation to the full plenary of the International Labour Conference. This was another opportunity to apply political pressure and call upon delegates present to discuss these issues. Some of the more sensitive delegates were able to persuade their colleagues to scale back their attack on indigenous rights. This did not happen often but, when it did, it was useful. It also caught the attention of those more informed about Indigenous human rights issues, who subsequently appeared at the Committee meetings to observe or to directly participate. The plenary presentations thus created their own political pressure.

Following the close of the 75<sup>th</sup> Session, the Secretariat started the process all over again for the second and final discussion in 1989. The first task was to re-draft the text based upon the 1988 report. Here, liberties were taken by the Secretariat in the interpretation of the report, which tended to lean towards the views of governments. Governments were again invited to provide the Secretariat with any amendments or comments after consultation. In addition, they were encouraged to consult with indigenous peoples. Although this was not a formal request on the part of the Secretariat, it did help in the consultation process and, to some extent, this changed the role of indigenous peoples and indigenous NGOs in the revision process. Following the receipt of comments from governments, the Secretariat published Report IV (2A) and Report IV (2B). Report IV (2A) was the proposed new text and (2B) included the comments of governments, workers, employers and indigenous peoples. This alone was a significant development -- the Secretariat included indigenous comments and amendments in the official report of the Office. However, many were of the view that this was not done out of a sense of altruism but rather as the result of persistent efforts of Indigenous NGOs to express their concerns about the lack of direct Indigenous participation in the process. These statements were made in the Committee, in the Plenary session, in the press, at the UN Working Group on Indigenous peoples, and at home. With this small but important change, the 1989 Revision Process began.

### **The second and final act**

As stated above, the Committee selected the government delegate of Bolivia as Chair (and once again, the government of Bolivia was up for violations of Convention 107). The government of Canada made a statement about their faith and full confidence in the Bolivian delegate and the importance of continuity and consistency. This comment was echoed by a number of other Latin American governments as well. This signified to the Indigenous peoples present that governments were preparing to play hardball.

Because of organizing efforts on the part of indigenous NGOs, there were several more indigenous participants in 1989 than had appeared in 1988. There was also a greater sense of unity throughout the session. The majority of indigenous representatives realized that if indigenous peoples did not act as a united front, massive losses would occur. The WCIP representatives (who were not co-

operating) were neutralized by the fact that there were more grassroots leaders present. Indigenous peoples also felt that they had partially achieved the goal of being more directly involved in the process and, furthermore, because of the 1988 proceedings, they would be taken seriously by governments and employers.

The same amendment process was put in place and the "coalition" meetings of the workers and indigenous peoples began almost immediately. Most of the delegates were the same participants as the previous year, with a few minor changes. Everyone knew that cooperation and time were critical and pledged to work as efficiently as possible. The worker/indigenous coalition developed in the 1988 session made the 1989 session run much more smoothly. Where trust and confidence was built, it remained.

### **The lead role: the Lands and Resources Working Group**

From the outset, the Committee realized that the lands and resources section would be attacked from all sides and so it immediately set up a working group to once again deal with the many amendments. However, because of the time limit and the fact this was the final discussion on the matter, the Working Group was instructed by the Chair to negotiate a "package deal" that would be responsive to all the amendments tabled by governments, workers and employers. This tended to "lock in" all parties. All were determined to see that their positions went into the package deal. The same issues emerged: ownership of lands and resources, surface and subsurface resources, consent and so forth.

The "peoples/populations" issue had to be resolved this time around also. Regarding the all-important lands and resources section, it was likely the most painful part of the process. The workers would come to the indigenous rights group with draft texts of the package deal. Indigenous peoples' representatives would counsel them on what was non-negotiable. They would meet again, and the text would be even worse. The worker delegates involved were not quick on their feet and they did not have any legal experience whatsoever. Dreadful outcomes also reflected their poor bargaining position in the process. Indigenous peoples had no access to the private working group and were only seeing the results of the so-called "bargaining." Not knowing exactly what was happening behind closed doors and only hearing second-hand from worker delegates was nearly an impossible position for indigenous peoples to bear. In this step-by-step

process, tempers began to flare; as the workers realized their weak position, they began to turn on the other half of the coalition: the Indigenous Rights Group. The workers did not want to take responsibility for the low standards emerging in the "package deal" process and they were looking for scapegoats. When the ultimate worst text surfaced, the workers held a caucus and invited two indigenous representatives in to hear the opinion of the Secretariat on the lands issue. This was their way of legitimizing their position on the "package deal." This is also an example of how the Secretariat was used in a situation where they were not impartial or objective.

### **Possible walk-out**

Simultaneously, indigenous peoples were working the press and doing all they could to effect changes in the "package deal" negotiations. They were temporarily able to convince the workers that they did not have to go along with the package deal and requested that they discuss the possibility of a "walk-out". The indigenous rights group had already agreed to walk out after making a statement on lands and resources. They did so and it had a dramatic effect on the governments and employers, who suddenly became silent and started to re-group. The workers explained that a walk-out at an ILO Conference was a major decision, unlike walking out of labor negotiations, although they were willing to discuss the matter. They then held a private "workers only" caucus. Somehow, word got out that the workers might walk out or threaten a walk-out from the Committee and, if so, no revised Convention would be adopted and a third year would have to be scheduled. Here again, this was highly unusual within the ILO system. Other worker delegates attending other Committees heard the rumor and came over to the worker caucus to express their solidarity. The governments and employers got even more nervous and they began to re-consider their positions and wonder if they ought to be a little more reasonable.

The workers decided that they could not walk out and the workers' Vice Chair requested a private meeting with an Indigenous Rights Group representative. He proceeded to berate the Indigenous Rights Group and blamed the indigenous peoples for the condition of the lands and resources section, further stating that the workers had unanimously decided against a walk-out and did

not want to discuss the matter any further. This was an unexpected outcome. It became clear to Indigenous peoples that the Vice Chair could not handle the pressure of being the sole spokesperson for the workers or the responsibility of negotiating on behalf of the workers. Later, Indigenous peoples learned that the "no walk-out" decision did not have unanimous support and did in fact enjoy substantial backing. It should be noted that even the simple discussion of a walk-out had quite an effect on the governments and employers but it was much too late for the working group to re-open the package deal text. And, in the end, the actual walk-out by indigenous peoples had minimal to no impact.

### **Closing act**

The Chair then decided that the Committee had better vote on the package deal before anything else happened. Despite the objections of the Indigenous Rights Group, it was adopted albeit not by a large majority. The Committee then also adopted the language on the term "peoples". This was immediately followed by government statements and reservations about Article 1(3). These closing moments of the Committee were the most revealing as to the interests and motives of governments. For example, the government of Brazil stated that it went along with the package deal because of the "consensus" and pressure to complete the revision process; however, it did not believe that indigenous peoples should ever own land, and certainly not subsurface resources.

Very little time was left for the remainder of the Convention articles. Therefore, no negotiation whatsoever took place after the adoption of the so-called "package deal" (Articles 13-19), leaving no substantive discussion on the merits of Articles 20-35, many of which were important to the interpretation of the overall Convention, including the General Provisions (contained in Articles 33 and 34).

The game was not completely over, though. The International Labour Conference as a whole then had to adopt the revised Convention. Although it would be difficult to persuade such a large and varied audience, the indigenous peoples' speech to the plenary had to be carefully crafted so as to be useful. The Indigenous Rights Group also lined up other worker delegates to make presentations at the plenary, and the effect was positive but again not enough. The Plenary narrowly adopted the Convention.



## **Revision procedures and their relevance to the OAS and UN drafting processes**

Regarding representation, governments, employers and workers should have done more to ensure the participation of delegates knowledgeable about the issues and prepared to take on the task of high-pressure, fast-moving negotiations. Delegates should not simply come from the local Foreign Office or Embassy. The issue of indigenous participation is critical in any forum where the rights of indigenous peoples are being addressed. There is obviously room for direct, full and meaningful participation by indigenous peoples in these important fora, consistent with the standards established by the UN Declaration on the Rights of Indigenous Peoples. However, the lesson of all three processes of the ILO, OAS and the UN is that the matter should be formalized and unequivocal. It is clear that indigenous peoples have made some headway. However, in every instance, more can be done to further genuine and direct participation of Indigenous peoples as an element of their collective political right to self-determination.

Within the ILO, the matter of selecting the Chairperson for the proceedings, as stated earlier, was a critical factor in how the Committee proceeded. In other settings, there should be greater care taken with regard to this issue. Governments who violate the human rights of Indigenous peoples and others should never be allowed to serve as chairpersons of a multilateral negotiation process. It is akin to asking a character such as the late Slobodan Milosovic to revise the Genocide Convention. Governments may be hard-pressed to find such representatives. However, what took place within the Committee on Convention 107 was unethical and should be disallowed. At the ILO, the Chairperson openly favored governments and employers. There was little objectivity shown. The workers, on a number of occasions, called attention to this fact only to be met with a dismissal of their concern.

Formal closed working groups should be disallowed. This had a significant impact on the process and caused pressure where it could have been avoided. Unfortunately, the same practice was employed within the UN, with states holding closed meetings to discuss and agree upon amendments to furnish to the Commission on Human Rights working group despite the harsh criticism of Indigenous peoples, resulting in little state response and no actual effect.

Consensus negotiation, in the case of the ILO, UN, OAS and elsewhere, has its pros and cons. At times, parties never have to explicitly pronounce their positions or elaborate upon their rationale, resulting in lack of understanding and an incomplete discussion of the interpretation and content of fundamental matters. In addition, this approach may not accommodate the expression of diverse views because the majority view appears to be well-rounded when, in fact, all that emerges is a so-called consensus over one political extreme or another, often leading to the lowest common denominator. In this way, the employer and government self-interests prevailed over urgent and critical indigenous rights and concerns. The notion of "consensus" allows for the final outcome to be constructed around the worst or most extreme position, causing even governments who support indigenous peoples' human rights to dispense with their alternate proposals in order to join the "consensus" over diminished text or language.

Clearly, package deal negotiations are extremely dangerous and do not allow for comprehensive discussion of all the dimensions of a particular article or human right. This approach is also indicative of the dangers of placing time constraints on the drafting of important standards. Rather, more time spent in genuine, interactive dialogue and debate has furthered understanding rather than stifled it. If all the stakeholders do not have the luxury of time, everyone can plan on losing something, unless you know that you have the upper hand. In relation to both procedural as well as substantive matters, all discussions should be comprehensive and ample time should be guaranteed to address matters in an in-depth fashion, one by one. The one example of a "package deal" in the UN Declaration process took place in one of the "informal informals" where the government of Australia tabled a proposal that collapsed all of the lands, territories and resources provisions into a single paragraph. Fortunately, governments and Indigenous representatives alike immediately shredded the proposal.

The Secretariat or, in the case of the ILO, the Legal Advisor should also have been completely impartial in the proceedings. Although this has never been raised formally in the UN or the OAS, such a matter must be discussed and agreed upon as a basic principle before any dialogue or negotiation. At the ILO, everyone assumed that this would be the case and did not explicitly state the need for objectivity on the part of the Secretariat. The discussion of fair and equitable standards and procedures, at the international level or anywhere else, should not be taken for granted.

## Conclusion

Although only 22 Member states have ratified Convention 169, the Committee and the Plenary Conference have adopted a resolution aimed at assisting adequate input of indigenous peoples in supervising, monitoring and implementing the new Convention. Significantly, the ILO devotes funding and positions to the promotion of Indigenous human rights for those states that have ratified the Convention as well as promoting its ratification by those that have not yet done so. Additionally, the facilitation of Indigenous peoples' access to supervisory and complaint mechanisms could be a useful future measure. Consistent with its mandate, as the sole international legally-binding treaty specifically concerning the rights of Indigenous peoples, the UN Voluntary Fund should make resources available to Indigenous peoples to allow for the elucidation of the important ILO Convention standards in the real lives of Indigenous communities, especially in light of the fact that the ILO remains a specialized agency of the UN.

It is also crucial to point out that, with the adoption of the UN Declaration, a number of outstanding, troublesome matters stemming from the ILO revision process have been more fully clarified consistent with international law and the aspirations of Indigenous peoples. Recall the matter of the right of self-determination, indigestible to Member states in the context of the revision process, leading the Office to extend a view that essentially safeguarded all points of view. Fortunately and more significantly, since 1989, the UN Declaration has affirmed that we are "peoples" despite the efforts of some States to deny this fact and of those who went even further in their attempts to deny the equal application of the right of self-determination to Indigenous peoples. Both within the ILO revision process and the UN standard-setting process, a number of States attempted to create a distinction between Indigenous peoples and all other peoples through racially discriminatory and intellectually dishonest means.

The UN Declaration expressly affirms that Indigenous peoples are free and equal to all other peoples and ILO Convention 169 expressly uses the term Indigenous "peoples". ILO Convention 169 must now be read together with the UN Declaration, as confirmed by the ILO and others. Through these specific provisions (and all other provisions of the Declaration), the group or collective human rights of Indigenous peoples are affirmed and, as such, the legal personality of Indigenous peoples is affirmed. Indigenous peoples are rights' holders as groups

and also holders of responsibilities (or duties) as such. The sources of Indigenous legal personality, possessing rights and duties (or responsibilities) and, increasingly, Indigenous capacity to bring claims concerning such rights have been recognized by the UN human rights regime and other regional inter-governmental human rights regimes. In addition, nation-states have recognized the legal personality of Indigenous peoples as peoples through their constitutions, national legislation, agreements, Treaties, policy and other instruments.

Recognizing the important linkage between “peoples” and the right to self-determination within international human rights law, scholars and State government representatives have increasingly moved away from a purely State-centered conception of the term “peoples”. In this regard, Indigenous peoples have affirmed and repeatedly asserted that they are the “self” or the subjects, as peoples, who are free to determine their political status and pursue their economic, social and cultural development. The UN Declaration language, together with Article 7 of ILO Convention 169 affirming the right of Indigenous peoples to determine their own priorities for development, makes clear that the right to self-determination attaches to Indigenous peoples, consistent with equality and international law.

With the adoption of the Declaration, as the normative framework for the protection and promotion of our fundamental human rights, the international community, not least of which treaty bodies, have taken note of these crucial human rights norms. The treaty bodies have begun to interpret their respective instruments against the backdrop of the Declaration, taking into consideration the distinct cultural context of Indigenous peoples when faced with issues and communications that directly impact them. Despite the painful revision process of the ILO, these are all extraordinary and positive developments, complemented by the number of mechanisms and UN activity concerning Indigenous peoples now, which is in marked contrast to 1988 and 1989.

Unfortunately, few Member states have ratified ILO Convention 169, reflecting a lack of political will to uphold genuine respect for and recognition of Indigenous human rights, largely based on the same ignorance and unfounded fears that drove government positions in the revision process. Yet, at the same time, the text of ILO Convention 169 and its potential force within those States that have ratified it is very real. More must therefore be done to invigorate the ILO recourse mechanism essential to this legally-binding instrument, not to mention a vital campaign to increase ratifications.

It may be that the exercise of revising Convention 107 provided a useful guide for the ongoing and remaining work of uplifting Indigenous human rights standards far beyond those of the UN and the OAS in a manner that is just, fair and equitable. This is especially needed in relation to those standard-setting processes that appear to have fallen short of maintaining the minimum human rights standards embraced by the UN Declaration, including the WIPO, World Bank, CBD, the post-2015 MDGs and others. One certainty is that the work of protecting and promoting the human rights of Indigenous peoples is a constant, inter-generational endeavor. Future generations of Indigenous peoples presently have a glimpse into the past and hopefully, through these stories, they will learn what to avoid and, more importantly, what to strive for. ○

## CHAPTER 18

## The Drafting of ILO Convention 169: Some Perspectives from a Governmental Side

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*Petter F. Wille*

Lee Swepston has explained how the Governing Body of the ILO, to everybody's surprise, decided to put the item "revision of Convention 107" on the conference agenda for 1988 and 1989. As a participant in the process from the governmental side, I can confirm that governments were also surprised and, with few exceptions, not prepared for this revision process. Additionally, it was also a challenge that most of the issues we were faced with in the revision process were outside the usual competence of the governments' ILO experts.

Very few governments had indigenous expertise or human rights experts in their delegations, despite the fact that this was suggested in the invitation to the conference. One reason for the lack of expertise could be due to the fact that the interest in, as well as the knowledge of, indigenous issues was much less than it is today. As a matter of fact, governments tended to have more expertise on the particular situation in their respective country rather than on indigenous rights in international law. This law was also much less developed at that time than it is today.

Another factor that came as a surprise to many governments was that indigenous representatives seemed to be well prepared on the substance while also establishing a strategic alliance with the workers. The workers' group met daily with the indigenous representatives and often acted on their behalf in presenting their proposals.

The high degree of participation by indigenous representatives we saw in this process was a novelty in international standard-setting. This process was also of historical significance in that sense and gave an impetus to the further development of the indigenous organizations.

Seen in retrospect, it is amazing that, despite all these challenges and uncertainties, we managed to succeed in the revision of the outdated Convention

107. It came as no surprise to us that the chapter on land rights became the most difficult part to agree on. This issue, which dominated the negotiations in 1989, was also the most difficult issue for my government.

Another difficult issue was the use of the term “peoples”. Lee Swepston explains how the ILO was the first to be able to use this term, which was a great achievement. It was the qualification in Article 1 paragraph 3 that made this possible. Another element that should not be forgotten is that we avoided lengthy discussions on the scope of application of the revised convention as well as on the question of defining the terms “indigenous” and “tribal”. These are issues that potential “spoilors” of the process could easily have been tempted to use.

I would also add that it is amazing that the drafting of the other parts of the convention went relatively smoothly. Several of the issues dealt with in these parts could have become much more controversial than was the case, i.a. Article 6 on consultations and Article 9 on recognition of customary practice for dealing with offences, as well as some of the provisions on language.

Again in retrospect, perhaps the timing of this revision process was not so bad after all. Despite all the challenges, and the many actors that were taken by surprise, the international climate was still quite positive to drafting new international instruments. Today, governments are far more reluctant both in terms of new standard-setting as well as undertaking new international obligations. So maybe what we managed in 1989 would not have been possible to achieve in 2014. ○

## CHAPTER 19

# The Sami Airforce<sup>1</sup>

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Hans Jakob Helms

## 1985, Geneva, Switzerland

Ron stood there, big and round in a dark suit, blue shirt and yellow tie below the smooth-shaven face and talked, as his polished shoes competed with the shiny floor in the lobby of the ILO building.

We sat around him – curiosity written in our faces. Aslak, the Sami lawyer from Norway, stationed in Geneva by the Sami Organisation, Denise, the secretary for the Inuit Arctic Organisation, Henry, from the Australian Aborigines and the Icelandic secretary from the UN Working Group on Indigenous Populations.

What he was explaining was how the ILO worked.

A tripartite organisation. Governments, employers and trade unions. Created to establish international rules for the global labour market. Such as, for example, Convention No. 107 from 1957, dealing with the protection and social integration of indigenous populations and tribal members.

As I sat there, taking notes, I thought about all the things I didn't know anything about in this world. Fortunately, all the others looked as if they felt the same.

What he wanted to say was that a motion had been tabled to revise Convention 107 at the coming ILO General Assembly. He wasn't certain that it would happen but, if the Convention were to be changed now, it would have an influence on the draft for a UN Declaration of the Rights of Indigenous Peoples which the working group was already discussing. We should, therefore, be aware of this fact.

He then dealt out the papers containing the wording of the Convention and started to go through them.

It was hard work sitting there with the sun streaming in from the blue Geneva sky. He ended by repeating that he didn't have much faith in the General Assem-

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1 This text is an extract from a story first published in Danish in the book *Dansen i Geneve: Fortællinger fra Verden* (The Geneva Dance) by Hans Jakob Helms, RIES: 2004



bly actually initiating any changes in the convention. But, if they did, it would require a process stretching over two years and would mean that a special working group would be set up to carry out the revision. This type of group would normally work for one month a year. It would meet in this building and, of course, all three parties would be present. His office would be the Secretariat.

We walked along the curving road to the UN building.

The Secretary left us. "If they start on that revision," he said, "you must get on to your governments like a shot. It's really important."

We nodded and sank down in the soft leather chairs together with two lawyers from the American Indian Law Resource Center. They sat with the working group's new draft for a UN Declaration and shook their heads. I asked what was wrong.

"If not even the members of the working group dare to say that we are "Peoples" and grant us rights of ownership to the land," one of them said, "how on earth will we get the governmental representatives in the meeting to do it?"

Afterwards, we made our way back to the meeting and found our places in the observer rows.

The five members of the working group sat on the podium and listened to a number of speeches from the governmental representatives.

They were all professional diplomats who read from well-prepared proposals.

The South Americans, in particular, emphasized how important it was to integrate the native Indians and their territories into the state and its identity as a whole. As far as they were concerned, they were all one people and all citizens within their borders were, of course, treated according to the same set of international regulations.

The previous day, representatives of their Indigenous Peoples had presented a report about forced displacement, ethnic cleansing programmes, political imprisonment and paramilitary death patrols.

The diplomats denied all this. They referred to the right of a sovereign state to defend itself from disruptive elements. They talked of sabotage and disingenuous propaganda concerning companies which, by using the country's resources, were ensuring the economic survival of the nation.

Their governments could not accept that individual groups within the population should take precedence over others, and absolutely not when this led to special rights in relation to the UN.

As I listened to the diplomats' attempts to erase from their national maps the cultures which had first owned it, I thought of the International Whaling Commis-

sion. Only a few months before, the same states' representatives had defended the whales' right to international protection, conservation areas and humane treatment.

Up on the podium, the members of the working group were busy making notes and thanking the speakers for their valuable contributions. Thus went the time until the working day was over.

Aslak had found two other Sami representatives in the working group, Pekka from Finland and Eino from Sweden. He invited us to dinner.

During dinner, he explained the problems in the UN working group. "Concerning the land rights," he said. "If they let go of those rights they have no control over the economic advantages they expect from the areas we live in and they can't ensure their own settlers' income."

But the problem with the concept of "Peoples" is that it is bound up in the UN Constitution. According to the UN, all peoples have the right to freedom, independence and their own land, and to make use of their own resources. All member states signed up to this at a time when it was good for their own security. Now they fear that we will get these same rights to use against them.. "That's the principal point," he said, taking his glass.

"The rest of the negotiations," he continued, "are all about how much the individual country is willing to offer in terms of money and power in connection with establishing special regulations and reservations, or home rule, as you call it. But the real problems are all about legal status within the UN and land rights."

## **1988, Geneva, Switzerland**

The Embassy Secretary came back from the podium once more and looked at me, worried.

"I've registered you now," he said. "Are you sure you can manage it?"

"Yeah, yeah," I replied and straightened the knot in my tie as I watched the stream of delegates finding their places in the bright meeting room.

Ron sat up on the podium, talking to a black-haired man in an olive-green suit. Next to him sat a dark-skinned Indian gentleman, calmly surveying the room full of delegates.

The hall was split into three sections, one for employers, one for governments and one for workers. The observers were round the sides.

I put one hand on Denmark's sign and held out the other to the Secretary to say goodbye.

"We have agreed on the Chairman's post in advance," he said. "It will be the Colombian Ambassador. The one sitting up there. You just have to give your support."

I nodded.

"OK," he said. "You are Denmark now. Look after our good name and reputation."

I went and greeted Ron. He gave a friendly smile trying to look as if he remembered me. I then found my seat among the governmental representatives.

Looking towards the observers, I saw Denise come in and give a surprised glance in my direction.

Ron rang a bell and got the meeting to settle down while the doors were closed. He then started by explaining the background to this meeting, the story behind the present convention and the General Assembly's desire for a renewal and revision that would be more in line with the spirit of the times.

He said that the Secretariat had prepared a first draft, which lay on our desks, and that the first day should be considered as an inaugural meeting where we would choose those responsible for further progress. Before he continued to the election of the Chairman, he presented the staff. There were two to take the minutes as well as the elderly Indian gentleman, Amir, who the ILO had persuaded to assist with the work of this group, in spite of his retirement.

Amir smiled pleasantly as we all clapped.

Shortly afterwards, the Colombian was elected as Chairman. The rest of the time was taken up with the election of the Deputy Chairmen from the other two groups and an introduction of the registered delegates. The only thing left to do was to elect a Rapporteur to be responsible for presenting the work of the group to the General Assembly.

Ron exchanged whispers with the Chairman and asked if we could put off this point until the next day.

He then declared the day's meeting ended.

I stood up, a bundle of papers in my hand, and looked around to find the other Nordic delegates. They were easy to find because they were all accompanied by a Sami in traditional dress. To my great pleasure, I saw that they were Aslak, Pekka and Eino. So they were all "government" now too. They waved.

I was making my way over to them when someone tapped me lightly on the back. I turned round, to find Amir smiling at me.

"You represent the Greenlandic People, as far as we understand?" he queried.

I nodded, a little confused.

"So you are the only negotiator who directly represents an Indigenous People."

"Er, yes," I said. "But it is actually Denmark..."

"Yes, yes," he said. "We are aware of that. But we would like to ask you to be Rapporteur for the group. That would send a good signal regarding the intentions behind our work. Would you be so kind as to accept?"

I surveyed the buzzing hall and wondered if I had heard him correctly.

"You don't have to worry," he said. "We will do all the writing. You just have to give it your approval. It's not a lot of work. But we would be honoured if you would accept."

I shook my head. "I can't," I mumbled. "I haven't got the mandate for it."

He looked very serious and I hastened to thank him for his kind offer.

"Think about it," he said. "We won't make a decision before tomorrow."

A man with a long beard and check shirt came walking towards us. He greeted Denise and she introduced him as a professor of anthropology from Boston, specializing in the rights of indigenous populations.

He gave me an angry look and asked me if I was aware of what I doing. Denise left.

I asked him what he meant.

"As far as I can see," he said, "it's just an attempt to give governments more powers to exterminate the indigenous populations."

I looked at him in amazement.

"Your so-called revision," he continued, "is just an attempt to give governments more powers to remove the indigenous populations from the face of the earth. You're paving the way for genocide."

"Sorry," I said, "but I find that difficult to see."

"Well, you're only the government's lackey," he replied, "You don't even really know what you're doing."

"But you do?" I asked.

"The old convention was much better as a protection for the indigenous populations. That's why they want it revised. But you probably haven't realised it yet," he said and pulled a book from his bag. "What about finding out what it is that you're doing?" he said, showing me the book. It was all about the old convention.

His name was on the spine.

"I'm just saying that you are running the risk of sharing responsibility for genocide."

"We're not even half way through the revision," I said and felt the muscles tightening in my neck.

"Give me a break, man," he said, "it's all agreed in advance. Stop pretending to be so naïve."

"Have you read about this?" I asked, "Or are you just psychic?"

"I know what I'm talking about," he said, "as opposed to some others."

"Who do you actually represent here?" I asked and was aware of my voice shaking as I turned to the bar.

The Canadian negotiator was standing there. She was a stocky, blonde, extremely pale woman who had quickly assumed the position of Chair of our informal coordination group.

The Canadians were in the middle of their own internal constitutional negotiations and the results of our work were not to go any further than what was being agreed on the home front. She spent a lot of time on the phone to Canada.

Apart from that, she also had her own, political, feminist agenda, which she aired by demanding the addition of a new paragraph against the discrimination of women and a ban on sexual harassment in the convention.

The representative for the Mohawk Indians, who was one of the observers, had come to me asking for help. His tribe was matrilineal. They found her suggestions insulting.

"Hmm," I said to her. "I've just been accused of an attempt at genocide. All I need now is sexual harassment."

She looked at me, irritated. "Sexual harassment is a serious issue," she said. "It's important to include it. Especially in those kinds of culture."

"Yes," I said, "I hate it when it happens to me too."

I picked up the President of the Inuit Arctic Organisation at the hotel opposite the railway station and asked the taxi driver to take us to the best fondue restaurant in the old town.

We ordered wine and fondue, while I thought of all the times I had been to meetings in the organisation when she had hardly noticed my existence, while I had followed every one of her smooth movements out of the corner of my eye.

Now, not only did she look at me, she saw me, and I melted like the fondue in the shiny copper pot between us.

"So you're government now then," she said and smiled at me. "How does it feel?"

"Strange," I said. "A bit unreal actually."

"But you can vote," she said. "You've got power now. That must feel real enough."

"One vote doesn't give much power. Only if the others are on board."

"What do you do about that?" she said, breaking the bread into small pieces.

I dipped the fork with the bread into the melted cheese and looked back at her. She held her gaze directly into my eyes until I looked down, dropping my bread in the pot.

"I hope that you realise that we are to be called 'Peoples' from now on," she said. "It's a great responsibility you have. You do realise that?"

I took a gulp of the local red wine. She sipped hers.

"What about land rights?" I said. "That's also important."

"We can win the land rights at home," she said. "You just have to ensure the right formulations so that they can't prevent it. Right now it's a question of our international identity. Our dignity in the face of the world. That's far more important."

"Of course," I said. "I can well understand that."

"Can you?" she said. "Do you really understand what it is like to be robbed of the right to be the People you are and be forced to be a part of another People's identity? To be judged to be merely a minority, removed from the forum of international law?"

I gazed down and shook my head a little.

"We are Peoples," she said, "not a mere population under the care of a foreign power. We have our own cultures, our own language, our own history, and our own land. We are Peoples. Not populations."

Her fork scraped the bottom of the copper pot.

I concentrated on the circles the bread was making in the fondue.

"We are Peoples," she said again. "Peoples, like the Danes, the Swiss and all the rest of you. If this doesn't get through in the new Convention it's all irrelevant. Do you understand that, even if you are a European?"

"Yes," I said. "I think I understand it, actually. But what about Canada?"

A faint flush spread across her cheeks. "They must," she said. "They're going to have to."

"I haven't heard them make that decision yet," I said.

"You make sure of the Nordic countries," she said, "and I'll take care of Canada."

I raised my glass and looked back at her. "We have a deal," I said. She took her glass. "Yes, we have," she said.

The Swedish delegate was a friendly man with pale cheeks below his nut-brown hair. He once again referred to his instructions, which he, unfortunately, was unable to explain. He kept saying that he was sorry.

He swore that he had both written and called home several times to get new instructions, w. Without result. Anyway, he wasn't the only one in the group. Canada hadn't changed its position either and, by the way, he hoped that he wouldn't get chosen for this job next year.

Eino stood behind him and shrugged his shoulder.

I left them and walked behind the stairs where the Secretariat was. I sank down in one of the chairs and looked with resignation out over the room.

Ron and Amir came in and looked at me. They wanted to know what was wrong.

"Listen here," said Ron. "Tomorrow, all those who don't want to use the term 'Peoples' will try to provoke a vote so that the question can be settled and stifled this year. But there is a chance that we could get it postponed until next year's meeting, if you play your cards right."

"What do you mean?" I asked.

"He spoke rapidly in French to Amir.

I think that we can get the Chairman to propose that the question be postponed until next year. It will be a proposal from the chair and that normally goes through without a vote. As long as there is no-one who provokes a situation which could create a demand for one.

I felt my muscles start to relax.

"But if someone makes a fiery speech about the right of Indigenous Peoples to be called 'Peoples', there are others who will immediately demand a vote. Then the hammer will fall," said Amir, looking seriously at me.

"Thanks," I said.

"What we wouldn't do for a good Rapporteur," he said, and smiled.

"By the way," I said. "I could use some help with my speech to the General Assembly the day after tomorrow. Would you, perhaps?"

"I could probably prepare a draft," he said.

"It'll be Greenland's National Day," I said. "Do you imagine that the Presidency will mention it?"

"You can imagine it as much as you like," he said, "and there's always a

chance that some things come true in this strange world of ours. But there are no guarantees.”

“As long as I’m together with you, gentlemen,” I said, “I believe in anything.”

They laughed.

I sat at the little table beneath the rostrum to the left of the podium. Amir sat next to me. He rested a calming hand on my shaking arm.

In front of us, the UN building’s old plenum floor spread out, covered in an enormous arc of tables and chairs, where country after country was represented by their delegates.

The annual session was coming to an end, and working groups were presenting their reports to the ILO General Assembly. Conclusions were passed, rejected or approved for further processing.

The visiting politicians, diplomats, their local ambassadors and union representatives, observers and press all sat there, earphones on their heads, listening to the speeches and evaluating them, either by voting, vocal comments, reports or articles.

My gaze wandered from the golden podium to the hundreds of faces, all looking towards it. In just a moment I would be standing there, talking to all of them.

My hand, clutching Amir’s manuscript, shook so much that the papers became muddled. He tightened his fingers on my arm. The papers calmed down.

The speaker left the podium and the meeting’s president, who was sitting on the raised rostrum at the back, tapped his gavel on the desk and declared that we would now move on to the next point on the agenda.

I got the feeling that one of my shoelaces was undone and that I was certain to trip on the way to the lectern. I looked feverishly under the table as I heard the president point out that the hall would now hear the report from the working group for the revision of ILO’s Convention 107.

As I looked at my shoe, which was not undone, I heard his voice continuing from the loudspeaker behind us:

“But before I give the floor to the group’s Rapporteur, who represents the people of Greenland, I will ask you all to join me in a greeting to Greenland as today is their National Day. We wish them a good day.”

I looked up and noticed a gleam in Amir’s smiling eyes. The assembly clapped and the president gave me a friendly nod. Amir leaned towards me and whispered



in my ear: "Take your time. Get your breathing under control. Remember to acknowledge the President." He let go of my arm.

"You'll manage," he said, as I stood up. "You'll do very well."

I stepped up to the lectern, adjusting the microphone as I placed the papers in front of me. I then turned and nodded to the President, who gravely nodded back. I turned round and surveyed the hall one last time.

The faces all floated together in the glare of the powerful lamps hanging from the vaulted ceiling. All sounds disappeared and it was as if I had been seized by one, huge breath, rolling towards me, just waiting for my voice to make it burst into life.

I let my index finger glide over the microphone and felt the noise like a ripple over my fingertip. I then closed my eyes for a split second, took a deep breath, breathed out and started.

At the first sentence a feeling of calm spread through my body. The grip of my hands on the lectern became firm and steady as the wonderful rhythm of Amir's words spread throughout the hall and I felt a joy to equal the intoxication of a first kiss.

Halfway through, I had the strength to raise my eyes and look out over the sea of faces. I straightened my back and felt the entire hall listening. They saw me. They heard me. They took in my message. They would spread it over the whole world. Together we were creating history. We were its absolute epicentre. Here and now.

I could have danced for joy.

The last sentence disappeared from the paper and I looked up. Now they sat, serious and silent, waiting for the conclusion.

So I took a deep breath, pushed the papers from me and said: "Finally, I would like to thank you for the greeting which you, and the President, have sent to the People of Greenland. I am proud to represent a country whose citizens have once again won the right to be recognised as a People on an equal footing with all of you here today. I am certain that you understand what it means to lose that right. Next year's big challenge for the working group will be to find the necessary compromises to ensure that the other Indigenous Peoples of the world will feel that they, on an equal footing with all of you, will be included in the shared global struggle for peace and freedom, for all peoples, which form the foundation of this very building in which we find ourselves today. I am certain that we will succeed. Thank you."

The applause began as I almost stumbled from the lectern, nodded to the President and, blushing, staggered down the three steps to the hall floor.

Amir gave me his hand as he whispered: "I said you could do it."

"I said more than was in your text," I whispered. "Did I go too far?"

He shook his head. "Not as far as I'm concerned," he said. "But I don't know about Denmark. As far as the UN is concerned, I guess they have never...." His words stalled. He shrugged his shoulders and smiled. "You said what you believed in. That doesn't happen very often here. It was fine."

Ron was there too. He gave me a pat on the back.

I then found my way to the Danish delegation. The Secretary to the Ambassador sat in the last seat. He stood up and shook my hand. "Well done," he said. "You did really well." He looked strangely confused.

I looked at the Ambassador. He didn't grace me with a single glance.

The Secretary to the Ambassador directed me to a chair behind him.

The next item was apparently important for Denmark, as the entire delegation sat with their heads in their papers, whispering together without looking at me. So I sank down in the chair and felt my body crying out for a cigarette.

The Ambassador failed to acknowledge me as he left the hall. Neither did he smile.

I walked all by myself down the hill to my hotel.

## **1988, Sameland, Northern Norway**

Outside, it was flat and white with snow. Inside, the smell of reindeer soup blended with the moist air of sweating bodies and resin in the school gym.

Representatives of the local Sami organisations sat side by side on wooden benches as they listened, eyes serious in their sunburned faces.

There were almost the same number of men as women, and they were obviously making an effort to understand what it was that Ron was trying to explain from the chair behind the square table against the end wall.

As his voice took me back to our first meeting, I was aware of the listeners' attempts to understand the world outside which lay behind the international agreements and the endless, repeated sessions in Geneva.

It didn't look easy up here, beneath the winter darkness in the vast expanses of Sameland, where their days were filled with wandering alone through the wilderness with their reindeers, their sleds, lassos and tents. Many of them were fighting to keep their eyes open. Aslak wriggled nervously in his chair and coughed at Ron.

He got the message and finished his lecture, whereupon Aslak gave me the floor. The Rapporteur, as he called me in serious tones. I stood up and, as quickly as I could, tried to give a résumé of the negotiations which had taken place up to now and the problems we faced in the coming year. In the quietness of this little room, the whole thing seemed almost absurd and I couldn't help but speculate about the pictures that must be going through their minds as I spoke.

They gave a friendly round of applause and I was finished.

Most of the questions afterwards were about the new Sameting and what kind of influence our new convention could have on that.

I let Aslak and Ron answer.

After that we sat in the dining room and were served boiling hot reindeer meat in wooden bowls.

Sitting at our table were Ron, Aslak and myself together with the Norwegian negotiator and the Chairman of the local council. He thanked us many times for travelling the long way to their town and regretted that Ron couldn't stay to see all the wonderful things they had to offer.

Ron apologized for having to leave so early.

The Chairman once again expressed his regrets. He would have liked to have shown Ron how they lived up here, so that he could see that they were a completely different people from those in the south.

"We have our own way of life," he said. "We are not like the other peoples here in Norway."

Ron nodded, he understood that.

"But can anyone understand such things without seeing it for themselves?" asked the Chairman, fishing a piece of meat out of the bowl with his fingers. "I often think about that when I am out there," he said and nodded towards the window.

Ron promised to come again another time.

After we had eaten we went into one of the classrooms, carrying a pot of coffee.

We waited for Ron to say something.

"If you don't manage to get the Nordic group together we won't be able to get it through," he said. "Neither the question of 'Peoples' nor decent wording regarding land rights. You'll have to do something. The Nordic votes are the key to the whole thing."

He looked at the Norwegian negotiator, who shrugged his shoulders. "It's not us," he said. "It's Sweden."

"You'll have to solve that yourselves," said Ron. "If you do, we have a chance. The Africans and the Asians are more or less indifferent. They see it as a European or North American problem. The Canadians are on the point of changing their attitude towards the 'Peoples' question. They even use the term themselves in their negotiations about their Constitution and, for once, it looks as if the USA is following them. But they will demand a footnote."

We looked at him, puzzled.

"A footnote that states that the term doesn't confirm any rights in relation to international law," he said. "You'll have to live with that. What's more, they don't want it in the plural."

The Norwegian negotiator looked relieved. The rest of us didn't understand a thing.

"In English there is a difference between the words 'People' and 'Peoples'," he said. "The first is a term referring to ethnicity without any relation to land rights while the second is the definition used in the UN. By removing the 's' you remove any direct connection to international law. But the international recognition of you as 'A People' and not just 'a population' will be confirmed."

Aslak had lit a cigarette. The Norwegian negotiator sat making notes in a little black book. I drank coffee.

"So that just leaves the South Americans," he said. "You will have to negotiate with them. They are worried that they won't be able to move the Indians in the rainforests so that they can get to the forest resources. The solution is called relocation, which is better than extermination, even if it doesn't sound nice. But I am sure we'll get both the right to hearings and compensations included. The key person is the Chairman and it's possible to talk to him." He looked at the Norwegian negotiator once again.

"I'm from the Ministry of Agriculture," he said. "It's not us."

Ron shrugged. "Get Sweden on board," he said, "and demand Peoples with an 's' for as long as possible. You're going to have to have something to offer in the end. Sell it when it becomes necessary."

None of us said a word.

He looked at us one by one as he drank his coffee. "Remember," he then said, "that the ILO has the right of inspection. We can actually make a difference as long as we ensure the necessary openings to look over governments' shoulders. When it comes down to it, this is first and foremost about the Indigenous Peoples who are really under threat – for their lives."

He finished his coffee. "And as far as I can see, it's not really you," he said and smiled at Aslak as he waved his hand towards the school building. "But thank you for letting me come."

## 1989, Geneva, Switzerland

Ron sat by the Chairman, as usual, and arranged the papers for his speech. Amir was no longer there and the two minutes secretaries were new.

Otherwise, most of the people in the hall were those from the year before. The Sami sat in their colourful national dress behind their government negotiators. Aslak's hair had become grey and tousled and his gaze was distant. The Swedes had sent a new negotiator but Eino was there again, as was Pekka.

They waved discreetly when they caught my eye.

The Canadian was new. He had withdrawn the proposals concerning the discrimination of women and sexual harassment in advance.

Denise was there but not the President of the Inuit Organisation.

The professor from Boston had a new knitted tie.

On our way to the meeting, the professor stopped us. He wagged his finger.

"No," I said and looked him in the eyes. "You're wrong."

His raised hand fell to his side. Then we went in.

I stood in the lobby and looked out over the park and the enormous globe. Behind it the white peaks of the Alps towered to the misty blue European sky. I held my speech in my hand. Soon I would go through the huge doors behind me to once again stand before the lectern in the hall of the General Assembly.

There I would talk about the last Peoples on this earth who still hadn't had their rights recognised as equal partners in the global legal system. But, in the new Convention, they would at least be called "People".

Because, even though the footnote had become a paragraph in the actual text at the last, heartrending minute, they would forever more be designated as People in the world's terminology.

It had come about after the negotiations had stalled in the meeting and had been replaced by long, closed sessions between the chairmanship and the spokesmen for the employers and employees.

The rest of us had to wait outside for many a smoke-filled hour while we shot glances towards the door of the meeting room and waited for an occasional

glimpse of something new. It came when Ron emerged, sometimes tired and grey, sometimes humming one of his operetta melodies.

I managed to catch him in the offices behind the stairs and got news of the latest wording.

It was land rights that were causing the delays. And the footnote that was to save nervous states from the convoluted consequences of using the word "people". Even without the "s".

They tried again and again with various texts, with new wording, and he could tell us that, in the process, the Colombian Chairman had become so nervous that he might have to announce a total breakdown to the ILO that he had spilled his Coca-Cola over the entire table.

But, finally, out they came. All together, smiling and shaking hands. Except Ron, who was sweating as he almost ran into the Secretariat to get the document transcribed and ready to be distributed.

I went in and read it. They had done what they could to ensure that the wording was as vague as possible. The footnote had been moved up into the main body of the text and the concept of "People" separated from any link to international law. The State's sovereignty and basic rights of ownership over its territory was, and remained, untouched.

But the word "People" remained in the heading and throughout the entire Convention. There were no longer any indigenous populations in the ILO.

I opened my speech and read the end.

"A step forward", I had written, "in recognition of the Indigenous Peoples' value for global diversity. An international promise that they would no longer be robbed of their right to be the people they were and forced into others' identities. A new epoch, where the demand that they integrate would be replaced by respect for diversity.

The fact that this step has been taken here, in Geneva, shows that we still find ourselves at the epicentre of history. And the common dream of freedom, shared respect and mutual peace still lives and grows around us here.

All that is left to be done, ladies and gentlemen, is ratification big enough to make even this part of the dream a reality. That is the message you must take home to your Government." ○



## CHAPTER 20

## Indigenous Peoples' Rights in Norway and the International Indigenous Movement

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*Ole Henrik Magga*

This is a personal account of how Saami rights issues, especially land rights issues, evolved and developed in Norway and Scandinavia and how they were connected to the international indigenous movement's development and developments within the UN system.

I will concentrate on the significance of the ILO conventions to developments on a national level in Norway, and then move onto how the Permanent Forum was organized in the first three years.

Seen from the Saami perspective, their contribution to the international indigenous movement has developed in several stages. The first pan-Saami meeting in 1917 was already, in itself, international, with participants from at least two countries. With the first Saami Conference in 1953 and the founding of the Saami Council in 1956, the Saami movement had clearly become international, with organizations from three countries as members.

For 15 years, the Saami Council was run by academics with the modest participation of the grassroots and young people. However, the initial stages of the 'Tax Mountain case' in Sweden was already a great inspiration to young people. This was clearly demonstrated at the 7th Saami Conference in 1971. One reason for this was that, in the meantime, a new Saami organization, the Norwegian Saami Association (NSR), had been established and a new spirit and new aspirations made this conference unforgettable, with its political program stating that: "We are Saami, no less and no more than other peoples in the world". The conference not only dealt with ideology but organized practical work, with research and language planning. The Nordic Saami Institute was one of the outcomes of this conference.



The idea of international cooperation with other indigenous groups was not entirely new. Immediately after World War II, contacts had already been established with European minorities through FUEN (the Federal Union of European Nationalities), founded in 1949. It was not until the Arctic Peoples' Conference in Copenhagen in 1973, however, that the concept of 'indigenous peoples' began to be regarded within the Saami movement as a central political concept. The World Council of Indigenous peoples (WCIP) was then established in 1975 at the initiative of the president of the National Indian Brotherhood in Canada, George Manuel, on Vancouver Island. This was a major event in the movement's international development. I was a delegate to both of these first conferences and I remember very clearly the vision expressed by the first secretary general of the WCIP, Sam Deloria, that we, the indigenous peoples, would one day be welcomed as equals among other peoples at the United Nations. This inspired all of us in our work over the following years in order to make this dream come true.

Up until the 1970s, the Norwegian authorities were not taking Saami demands seriously, even though the Norwegian parliament accepted the principles of a 1959 report to the government on Saami rights as early as 1962. Then, in 1979, however, came the confrontation over the Kautokeino-Alta hydro-electric dam construction and the government was forced to establish two commissions to review Saami rights. All this happened with the very active support of the international indigenous peoples' movement. Over the course of the 1980s, several reports were prepared for the government and the parliament. And Norway's possible ratification of ILO Convention 107 from 1957 came up. Until then, Norway's position had been that there were no "indigenous populations" in the country. Our answer was also 'NO' to the question of ratification - but with the addition that we wanted a new up-to-date convention built on respect for indigenous values. The Saami Council, which had become a major actor on the international scene, was very active in the preparatory work for the new convention 169 and the Norwegian government also supported this work.

As a result of the Sámi Rights Commission, the Norwegian Parliament passed an amendment to the constitution in 1988 with the following wording: "It is incumbent on the governmental authorities to take the necessary steps to enable the Sámi population to safeguard and develop their language, their culture and their societal life".

The main legislative measures aimed at protecting Sámi needs as a whole were included in the Sámi Act from 1987, with regulations regarding the work of

the Sámi Parliament and the right to use the Sámi language being its main content. Legislative regulations have also established in fields of special interest to Sámi culture and population such as education, reindeer herding, land ownership, cultural heritage, place names, taxation and municipal planning processes.

The Saami Parliament was opened by the late King Olav V in 1989 and with this a more efficient participation in political processes became possible. However, it took some time before the parliament could develop its international activities. In the meantime, the Saami Council continued to play a pivotal role in the negotiations within the Working Group on the Draft Declaration over the ten years from 1995 to 2005.

The strength of the international indigenous movement was based on a genuine awakening among young people. It was also a painful process, not least because the older generation had been forced into subservience for so many generations. A survival strategy had developed with no space for open conflict with the authorities - not even verbally. The background to this was the nationalization policies pursued by all the Scandinavian countries, with Norway in a leading position.

In a surprisingly short time, a new awareness of Saami needs has developed. 1992 was a year of breakthrough for the Saami language in terms of its official use, with new legislation introduced both in Norway and Finland. 2005 was another important year, with the adoption of the Finnmark Act recognizing Saami ownership of most of the land in Finnmark. Several decisions from the High Court have demonstrated a new will to understand Saami needs. Decisions on Saami rights in the rest of the country are, however, still pending. Without the international indigenous movement, however, all this would never have happened.

Very early on, it was concluded within the Saami Council that there was a need for a Universal Declaration on indigenous peoples' rights that could develop into a convention, an assembly of representatives from the indigenous peoples and also a reporting system that could monitor the development in individual countries. The Council focused much of its resources on this work.

At the same time, progress was being made at home in terms of developing new legislation, a parliament and practical work in many fields. This has involved some most fruitful interaction between the local, national and international levels. Increasing numbers of people have realized that many questions have to be dealt with on several levels at the same time. In Norway, we are especially grateful to professor and former chief justice and former member for the Forum, Carsten

Smith, for the way he taught the whole political system of Norway “the best reasons” making it necessary to accept the conclusions he had presented to the government and parliament of Norway.

From the Saami side, there is all reason to congratulate the international indigenous movement for its achievements and to thank all those who have supported its work, including individuals such as Helge Kleivan, Asbjørn Eide and Erica Irene Daes, and many others, along with organizations such as IWGIA etc.

Saami land rights became a national issue with the Alta/Kautokeino dam-building project in the 1970s, culminating in the hunger strike in Oslo in 1979. In the following years, two commissions worked on the question of Saami rights and several reports were produced. With Norway's ratification of ILO 169, a new platform was created that proved to be very important both politically and for the detailed solutions and compromises, the Finnmark Act being one of the main outcomes.

The overall picture of the Nordic countries' position in the international process is a positive one, at least in theory. Norway and Denmark have both ratified ILO Convention 169, while Sweden and Finland have not. Both Norway and Denmark have taken legal and practical steps to develop some kind of self-determination for their indigenous peoples. In Norway, Finland and Sweden, the status of the Saami people is recognized in the constitution, while this is not the case in Sweden. The Swedish government has stated that the Saami people have the right to self-determination but this still largely remains in theory. There is an elected Saami assembly (Sámediggi) in all three countries.

The ways in which the relationships between the Nordic states and their minorities have developed show both similarities and differences. The dividing of Sápmi happened as result of a competition between Denmark (including Norway), Sweden (including Finland) and Russia. When the border was drawn between Sweden and Norway (which was a part of Denmark), there was an addition to the border treaty aimed at preserving “the Lappish Nation”. Sweden had long respected Saami rights in the north. The 18<sup>th</sup> century was a very positive period for the Saami in Sweden. Sweden had been an empire in the 16<sup>th</sup> and 17<sup>th</sup> centuries, which had left traces when it came to its way of thinking about the languages and cultures of other peoples. Denmark (Copenhagen) was too far away to make any difference. Things changed in the 19<sup>th</sup> century. Romanticism, nationalism and social Darwinism defined the majority as the superior group, and the Norwegian state in particular used this opportunity to launch a harsh nationalization program that formally lasted for

100 years and which created an anti-Saami wave still noticeable among the majority population. This was to significantly frame the picture Saami individuals developed of themselves and of the Saami people as a whole for many years.

The new developments since the 1970s can be understood at least partly against this background. Norway needed to adjust the image of its policies to fit better with its own image of Norway as a democratic and free country. Sweden and Finland did not have that same need - or at least nothing would force them to become aware of such a need. Norway had the Alta/Guovdageaidnu case, which forced people to ask questions that should have been asked a long time ago and, not least, to come up with answers.

There has been a dramatic change for the better over the last 30-40 years in terms of the way Norway officially handles indigenous issues. This is changing, however. In Norway and now also in Sweden and Finland, new nationalist movements have developed and have gained strong support through democratic elections. The rhetoric from the 19<sup>th</sup> century is re-appearing on the official stage. Part of the explanation is that a new generation has taken over that was not involved in the protest marches and demonstrations that were part of the democratization movement of the 1960s and 1970s. The Bush war on "terror" has made all political activity on the part of minorities suspicious, especially in the US but also with consequences for other parts of the world.

All this has changed the climate for indigenous and minority political activity. Implementation of the international obligations has still many shortcomings. A series of questions remains unsolved for the Saami people in the Nordic countries. I have sketched out a picture against this backdrop; the work on these issues will be no easy task.

Fishing rights for the Sea Saami are still unsolved. Even a thorough report from a commission chaired by former chief justice and former member of the Forum, Carsten Smith, has not helped. The question of Saami rights to mineral resources also remains unsolved. The rights of Saami people outside Finnmark are also still only at the reporting stage within the Saami Rights Commission. The rights of reindeer-herding Saami to their traditional pasture lands in the middle parts of Sweden has long been disputed. A favorable decision in one court case farther north gives some hope but, as a whole, the old way of driving the Saami away from the mountains in the south, which has also happened in Norway, seems to be continuing as it was one century ago.

The work on a Nordic Saami convention, which came up against difficulties for some time because of the position the Finnish representatives had taken in the preparatory work, now seems to have come to a halt, according to rumors, this time because of the Norwegian government's position. Norway has launched a "go north" initiative with content that is wholly similar to the initiatives of the old colonial powers.

It is obvious that there are many outstanding questions in the Nordic countries that need international attention and support from a strong international indigenous movement and the UN system.

With the establishment of the United Nations Working Group on Indigenous Populations (WGIP) in 1982, indigenous issues within the UN system were dealt with under, and limited by, the umbrella of human rights.

As an advisory body to the Economic and Social Council, the Permanent Forum on Indigenous Issues has a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

These six mandated areas in principle cover most of what ECOSOC was dealing with, so it has meant an open door into the whole UN system. The UN had not previously adequately addressed indigenous issues, even though some UN bodies had engaged quite actively in this field, so with the Forum there was a hope that it would provide a previously lacking holistic approach to indigenous issues in the UN system. It seeks to ensure that all UN bodies, in all their activities, take the particular needs and concerns of indigenous peoples into account. The United Nations has thus increasingly come to recognize that there is an urgent need to take a more overarching approach towards indigenous issues, that it is necessary to consider the specific situation of indigenous peoples in all its activities. New York has been selected as the location for the secretariat in order to make it clear that the Forum deals with more than simply human rights which, thus far, have been associated with the High Commissioner for Human Rights in Geneva.

The Forum differs from earlier bodies in that it is intended to be permanent and its position is at the highest possible level within the UN system. The composition of the Forum is also something new. Eight of its members are nominated by indigenous organizations and eight by governments from seven regions. They serve in their personal capacities as independent experts. This is also seen as a sign of more equality between indigenous peoples and the states, a sign that indigenous peoples are being accepted as entities in international law and not only

as individuals. Of course, the Forum cannot represent indigenous peoples but it does mean recognition by the international community of the fact that, without the participation of the indigenous peoples themselves, it is not possible to adequately address the particular needs and concerns of our peoples.

The Forum has had no secretariat in the beginning. The Office of the High Commissioner for Human Rights organized the first session. Most of the first year was spent working on the secretariat question. I was under the impression that the High Commissioner's Office in Geneva would assist the Forum until a secretariat was established in New York. At a meeting with Mary Robinson in the summer of 2002, she told me that their understanding was that their assistance would be limited to the organizing the first session and the report from that session. For the rest of that year, I therefore expended much energy on working with the Department of Economic and Social Affairs (DESA) and the Office of the UN Secretary General. A secretariat unit, with a staff of three employees, was established by the end of January 2003 within the DESA at UN Headquarters in New York. I am very grateful to Kofi Annan himself for the outcome of these efforts. We took with us a couple of people from the High Commissioner's Office. Elsa Stamatoupolou was already in New York. The support from the Saami Council was invaluable in this process, although there was little support from the UN agencies. The support of the Swedish Embassy was also very helpful in this process.

Most of our work in the early years consisted of establishing good working relations with ECOSOC, the UN agencies, governments and international organizations - and with indigenous peoples' organizations. We met with all UN agencies located in New York and I travelled to UNICEF in Madrid, to UNESCO in Paris, to FAO and IFAD in Rome, the World Bank in Washington and ILO, WIPO and WHO in Geneva to discuss future cooperation. We immediately established good and fruitful cooperation with the Special Rapporteur, which has since been further developed. Since we were not supposed to take over any UN agency's responsibilities, we generally recommended that all branches of the UN system should formulate development policies for indigenous peoples that affirmed their identity and included the participation of indigenous citizens in order to highlight and initiate programmes and projects based on a perspective of the indigenous way of life. Several of the UN bodies, initially under the leadership of the Office of the High Commissioner for Human Rights, organized their support for the Forum and the Inter-Agency Support Group (IASG), which is a mechanism for inter-agency cooperation on indigenous issues in relation to the Forum, on a voluntary

basis and with their own resources. A reporting system was developed for indigenous organizations, UN agencies and governments. We also met with the ECOSOC Bureau in New York several times and they invited the Forum to the annual meetings of the functional commissions, which was quite noteworthy.

One of the most important issues was the several reports on atrocities committed against indigenous peoples, among them the Pygmy people in the Democratic Republic of Congo and the Kuna people of Panama, the indigenous peoples in Colombia, the Sudan, Ethiopia and Indonesia. We urged "the entire United Nations system, including the relevant bodies, to take appropriate action". We had meetings on these questions with bodies at the highest level, among them the President of the Security Council. In my travels, I heard several oral reports about violence and killings, such as the events in Bolivia in 2003. The states in question were not happy about such information being relayed and they referred to ECOSOC rules that give them a right of reply. I always gave them the opportunity, in the name of dialogue. It was, however, frustrating not to be able to do more than this.

The work within the Forum itself went quite well and even people who had previously not worked much with each other made huge joint efforts in the preparations and to prepare reports, especially in the first period. Problems with translating the report annoyed the Spanish-speaking members and nearly led to an internal crisis in the process of adopting the first report within the Forum.

Finally, I must also mention that it was obviously not easy for some of our own indigenous friends outside the Forum to come to terms with the new situation, namely that it was now New York that was the center for international indigenous activities. I noticed this at the first meeting of the WGIP after our first session. I was even more surprised that the chair of the WGIP kept repeating that it was not at all clear which body dealing with indigenous issues would be the permanent one within the UN system. As I saw it, there could be no doubt that it would be the Forum, as the name said.

As I conclude, it is easy to see that there has been an extremely fruitful interaction between the development in the Nordic countries, especially in Norway, and the international development in the field of indigenous peoples' rights from the 1980s to the establishment of the Permanent Forum in 2002 and the adoption of the Declaration on the Rights of Indigenous Peoples in 2007. I am grateful that I have had the privilege to work together with many of the best qualified indigenous leaders in the world and with many supporters of the international indigenous movement. ○





UN AND ILO MONITORING

## CHAPTER 21

## Being a Special Rapporteur on the Rights of Indigenous Peoples

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*Rodolfo Stavenhagen*<sup>1</sup>

**B**y Resolution 2001/57 of 24 April 2001, the Commission on Human Rights decided to appoint, for a period of three years, a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people with the following functions: (a) to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples themselves and their communities and organisations, on violations of their human rights and fundamental freedoms; (b) to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people; (c) to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights.

This mandate was set up within the framework of the Special Procedures adopted by the Human Rights Commission in the 1970s when it became clear to its member states that certain situations concerning human rights could not be dealt with in routine fashion by the Commission, which needed to be better informed before proceeding to adopt specific resolutions that might lead to further action. These special procedures included country-specific and thematic mandates. The mandate on indigenous rights is of the latter type, meaning that information must be gathered worldwide although references to particular countries or specific issues are expected to be included in the special rapporteur's annual reports.

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<sup>1</sup> Rodolfo Stavenhagen was the first UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people, holding the mandate between 2001 and 2007

The establishment of this mandate was long in the making. Indigenous representatives at the Working Group on Indigenous Populations (WGIP) had frequently asked for it, and at the Vienna Conference on Human Rights in 1993 it was formally proposed. Indigenous and civil society organizations were lobbying for the mandate at the same time as they were pushing for the Declaration on the Rights of Indigenous Peoples (UNDRIP) and the establishment of a Permanent Forum on Indigenous Issues (PFII) at the United Nations itself. Some member states had expressed their interest and support, whereas others were skeptical about its usefulness. As work on the draft Declaration progressed slowly in the CHR, and evidence of violations of human rights of indigenous peoples in various parts of the world piled up year after year at the sessions of the WGIP, the time had come to take some action on establishing the mandate.

This Working Group set an important precedent in UN practice by allowing extensive participation of indigenous representatives in its annual sessions in Geneva. Coming from many different countries, speaking in the name of numerous civil society, human rights and indigenous peoples' organizations, they became an articulate lobby for indigenous human rights in the corridors of the United Nations. The Working Group also produced a number of additional reports on specific concerns of indigenous peoples such as, for instance, the Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations in 1999, by Miguel Alfonso Martínez, and Indigenous Peoples and their Relationship to Land, by Erica Irene Daes, long-time chairperson of the Working Group.

Within the regional bloc of Latin American and Caribbean member states of the Commission (GRULAC), several delegations expressed their will to support an indigenous rights agenda. The Peruvian delegate had been chairing the working group on the draft Declaration for several years. Guatemala had adopted a pro-indigenous rights stance since the signing of a peace accord putting an end to 30 years of civil war in that country in 1996. And in Mexico, a new government was seeking closer relations with the UN human rights mechanisms across the board. This set of circumstances made it easier for GRULAC to initiate conversations with other member states and propose the adoption of Resolution No. 57, which was also supported by a large number of states, notably the Western European group. Once adopted, the call went out for candidates to occupy this position. My name —along with other candidates—

was presented to the Commission's chairman who, after consultation with other members of the "Bureau" of the Commission, decided to appoint me as the first Special Rapporteur on the rights of indigenous peoples.<sup>2</sup>

I took up my mandate in the summer of 2001, when I arrived in Geneva to attend the annual session of the WGIP and to receive a briefing from the secretariat of the UN Office of the High Commissioner for Human Rights, headed by Mary Robinson, former president of the Irish Republic. She expressed her great personal interest in the human rights of indigenous peoples, especially of indigenous women, and offered me the full support of the Office for my task. I also established a firm working relationship with the Indigenous Peoples and Minorities Section of the Office, then headed by Julian Burger. I soon realized that I was very fortunate to be able to count on the technical support and advice of this small Section in the Office because not all Special Procedures (as we mandate holders were referred to in UN parlance) were able to receive this kind of support from the Office.

My first official mission that year was to attend the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance that took place in Durban, South Africa in September. This Conference marked the third United Nations Decade to combat racism and racial discrimination and concluded with an important final Declaration and Programme of Action in which references were made to indigenous peoples in various contexts, although indigenous representatives who participated in the parallel conference of non-governmental organizations (NGOs), which drew hundreds of participants from all over the world, were not satisfied with the results.

My time was mostly spent drafting my first report to the CHR to be presented at its 58<sup>th</sup> session the following spring. In this document (E/CN.4/2002/97) I presented my general views on the situation of the human rights of indigenous peoples, based on earlier work done by the United Nations and its specialized agencies (which turned out to be much richer than I had imagined), and proposed a provisional work plan for the subsequent years of my mandate.<sup>3</sup> Special rapporteurs are usually provided by the Office with an assistant who organizes their country visits, helps gather information, prepares briefs, handles official cor-

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2 My candidacy was first presented by Mexico and Guatemala to the Latin American group. At the time the Chairman of the CHR was a noted human rights lawyer from Argentina.

3 The appointment was for three years, and was renewed for another term in 2004.

respondence and aids in the drafting of the annual and topical reports.<sup>4</sup> From the beginning, I insisted on doing most of the drafting myself, as did some of the other colleagues among the special procedures.

Contrary to ordinary belief, special rapporteurs do not get paid for their work at the UN and they are not considered employees or officials of the UN secretariat.

Nor are they representatives of their countries, although they may have been supported or proposed by their government (as was my case). They are expected to work out of their own offices, institutions, organizations or homes, as the case may be, but be present at the UN for periodic meetings of various kinds and spend as much time on the mandate as they possibly can. I continued to maintain my tenured professorship at El Colegio de Mexico, but with a reduced teaching-load and the full support of the institution's authorities. My successor, Professor James Anaya of the University of Arizona (appointed in 2007), was able to build up more institutionalized support for his activity at that university. Not all special rapporteurs are that privileged. Some are human rights lawyers or activists who must continue their regular professional activity for personal reasons and who may find their rapporteur's tasks too burdensome to maintain over an extended period of time.

To be sure, travel expenses for the special rapporteurs' multiple international activities are covered by the UN secretariat. Occasionally, these activities may also be funded by governments, foundations or civil society organizations when necessary, but they must in no way interfere with the SR's independence or judgment.

From the beginning of the exercise of the mandate, we had to figure out a methodology for obtaining, classifying and analyzing the information and documentation relevant to the objectives determined in the Commission's resolution. In accordance with working guidelines and the activities carried out by other mandate holders, there are three main lines of research available. The first are in loco country visits. This is the most significant way of obtaining information on the human rights violations of indigenous peoples. From the beginning of my mandate, I was literally besieged by invitations from indigenous organizations

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4 During the seven years that I held the mandate, I had three different assistants who were hired by the Office to fill the slot, Jon-Gil Woo, Pablo Espiniella and Luis Rodríguez-Piñero, to whom I owe a vote of thanks for their enthusiasm and cooperation.

the world over. Country visits must be carefully planned beforehand and usually imply an intense agenda over a few days only, as each visit is generally limited to ten or twelve days at most. An official visit to any country can only be arranged at the invitation of the government. If forthcoming, then the special rapporteur suggests an agenda and itinerary, based on previous knowledge of the situation in that country. This is then amended, accepted or rejected by the government. On several occasions I had to negotiate my agenda in the country carefully with government officials before reaching an agreement. Usually the SR proposes a visit after consultation with indigenous and human rights organizations in the country, whereas the government may be less interested in having the SR visit places of conflict and would prefer him/her to receive more briefings from government officials. Being in a country on a tight schedule and for a limited time only, an extra day with government officials means one less day in an indigenous community. Just as there are governments that provide full support to a visiting rapporteur, so also there are cases where officials would prefer to ignore the presence of the special rapporteur rather than host him. This should not surprise us, to the extent that rapporteurs are expected to report on human rights violations and propose remedies or recommendations that may embarrass people in power.

Besides visiting government offices and receiving information from official sources, the rapporteur usually establishes contact with the diplomatic corps and international agencies that may be working in the country, such as UNDP, ILO and sometimes a local representative of the OHCHR. If there is one in the country, a visit to the national human rights commission will be scheduled, as well as conversations with members of the judiciary, especially if there is judicial activity concerning the rights of indigenous communities. From my perspective, the most productive conversations were held during visits—however brief—to indigenous communities involved in conflicts or litigation over human rights issues, as well as meetings and consultations with civil society associations, human rights defenders and indigenous movements and organizations. During spare moments, which are few, the SR will be able to hear complaints and receive further information from interested parties that request a meeting outside the official schedule. From my first country visit, I organized meetings with academics and research institutions conducting studies into the country's social problems and ethnic diversity, whose experience usually turned out to be highly valuable for a better understanding of the local situation. I always tried to give a talk or lecture on the mandate of the special rapporteur and on indigenous rights issues. From these encounters

I obtained a wealth of information, which was later carefully reviewed in order to incorporate the most significant findings into my country reports. Unfortunately, only a small fraction of the information obtained during these visits would find its way into the reports because of formal reporting requirements and limited space provided for oral presentations by the UN administration. This underutilization of important information and documentation was to be one of my many frustrations during the mandate.

A second major source of information is the documentation provided by governments, UN agencies and civil society and indigenous organizations at the request of the OHCHR and the SR. Every so often, we would send out letters and questionnaires requesting information on specific topics related to the thematic focus of the SR's forthcoming annual report. Much valuable information was obtained in this way, even though not all member states of the Commission answered such requests as diligently as would have been expected.

A third source of information is the various "communications" between the SR and specific governments on particular cases of alleged human rights violations involving indigenous individuals or communities. Communications are generally kept confidential until made public in the SR's annual report. Usually the exchanges of communication with governments over alleged violations of human rights stretch out over many months and only occasionally are there any documented satisfactory solutions to the complaints presented by indigenous people. More often, governments inform the SR that they are taking care of the problem and then nothing more is heard from them. Nevertheless, the SR needs to inform the Commission in his annual report about the state of communications with member states. Additional information comes to the attention of the SR from symposia and meetings organized by the OHCHR in support of the SR's thematic concerns. Thus, during my mandate, the Office - in collaboration with national institutions - organized a number of such meetings where the specific human rights concerns of indigenous peoples were analyzed and discussed, such as for example, education, legislation, and administration of justice.

For instance, in 2003 the Office organized an Expert Seminar on Indigenous Peoples and Administration of Justice (HR/MADRID/IP/SEM/2003/BP), which provided an overview of current issues facing indigenous peoples in this area. This enabled me to draw some general conclusions which, together with other sources of information, allowed me to draft a full report to the CHR in which I concluded that "the obstacles indigenous people face in the justice system are

merely symptoms of a larger picture of complex social problems related to a history of discrimination, marginalization and social exclusion, including poverty and unemployment, which is often expressed through alcoholism and drug abuse, homelessness and violence. Indigenous women are even more affected by socio-economic factors. Incarceration often occurs in the context of intolerably high levels of family violence, over-policing for selected offences, ill-health, joblessness and deprivation. Studies on indigenous women in prison reveal life experiences fraught with danger from violence.

Discrimination against indigenous peoples in the justice system (as well as against other minorities of all kinds) is a widespread occurrence. While it is often related to the personal prejudice and subjective attitudes of judges, magistrates, attorneys, prosecutors and government officials, it is more importantly related to systemic rejection of indigenous cultures and identities. The justice system does no more than express the dominant values of a society and, when these are biased against indigenous peoples (as is so often the case), the courts tend to reflect them. Only in recent years, and to a great extent as a result of developments in the international arena, has the atmosphere begun to change.

As I prepared my first systematic activities as special rapporteur in late 2001, I had to consider different options. The mandate as described in Resolution No. 57 opened up several possibilities, although it was clear enough that the CHR wanted me to look at the human rights violations of indigenous peoples. To be sure, the UN had done some prior work on the subject. There were the two decades of annual sessions of the WGIP, the famous but not widely known Martínez Cobo report, and the ILO's Convention 169 adopted in 1989, which many considered—erroneously—to be mainly restricted to the traditional field of labour protection as understood by that specialized organization. Yet I knew that, overall, the diplomatic delegations present at the regular meetings of the Commission had little prior knowledge of (and perhaps not that much interest in) indigenous peoples and their rights. On the other hand, as soon as I had been appointed special rapporteur, indigenous and human rights organizations began to provide me with a constant stream of material involving precisely the human rights violations of their constituencies and expressing their expectation and hope that I would be their spokesman at the gathering of diplomats in the Commission. I realized how important this could become, especially since the Commission was much more concerned with the highly political human rights issues that were emerging from a number of authoritarian or totalitarian states or relating to the Occupied Territories



of Palestine. Furthermore, the Commission had finally taken action, after many decades, on the rights of minorities by adopting the Minority Rights Declaration in 1992.<sup>5</sup> Numerous diplomats considered that indigenous populations would be well served by this Declaration and questioned their insistence on the need to produce the Indigenous Rights Declaration that was still being discussed in the Commission.

I decided that it would be useful to draw some of these loose ends together and to provide the Commission with some relevant information on the current situation of indigenous peoples and their human rights before exploring more specific topics related to indigenous human rights, such as detailed legal questions or concrete conflictive issues in particular countries. Consequently, my first report to the Commission, presented in March 2002, provides a panorama of the major human rights issues confronting indigenous peoples worldwide.<sup>6</sup> These were grouped under various categories:

- Rights to land and territory and access to and control over natural resources. Based on information from different countries and other UN reports, I argued that “land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples” (Para. 57)
- Education, cultural and language rights, and issues of multiculturalism
- Social organization, local government and customary law
- Poverty, levels of living and sustainable development
- Finally, political representation, autonomy and self-determination

On these complex and interrelated issues I observed that: “A new approach seems to be taking hold in international discourse: human rights-centered sustainable development, meaning that unless development can be shown to improve the livelihoods of people within the framework of the respect for human rights, it will not produce the desired results.” (Para. 83)

Regarding numerous communications on specific cases of human rights violations, the report also mentions the problem of a “protection gap” between exist-

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5 Alfredsson, Gudmundur, and Ferrer, Erika. *Minority Rights: a Guide to United Nations Procedures and Institutions*. London, Minority Rights Group, 1998.

6 E/CN.4/2002/97

ing human rights legislation and specific situations facing indigenous peoples as being of major significance and presenting a challenge to international mechanisms for the effective protection of human rights.

The problem of the human rights implications for indigenous peoples of major development projects was raised as the main focus of my second report to the HRC in 2003.<sup>7</sup> I concluded, from an overview of much available information on this issue, that the principal human rights effects of these projects for indigenous peoples relate to the 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 violence against indigenous persons.

The report recommended to governments that “the human rights of indigenous peoples and communities must be considered of the utmost priority when development projects are undertaken in indigenous areas. Governments should take the human rights of indigenous peoples as a crucial factor when considering the objectives, costs and benefits of any development project in such areas, particularly when major private or public investments are intended. Potential long-term economic, social and cultural effects of major development projects on the livelihood, identity, social organization and well-being of indigenous communities must be included in the assessment of their expected outcomes, and must be closely monitored on an ongoing basis. This would include health, nutrition, migrations and resettlement, changes in economic activities, levels of living, as well as cultural transformations and socio-psychological conditions, with special attention given to women and children.”

Moreover, the issue of extractive resource development and human rights involves a relationship between indigenous peoples, governments and the private sector which must be based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources. This in turn implies the exercise of their right to self-determination. Sustainable development is essential for the survival and future of indigenous peoples, whose right to development means the right to determine their own pace of change, consistent with their own vision of development, including their right to say no. Free, prior, informed consent is essential for the human rights of indigenous peoples in relation to major devel-

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7 E/CN.4/2003/90

opment projects, and this should involve ensuring mutually acceptable benefit-sharing and independent mechanisms for resolving disputes between the parties involved, including the private sector.

The impact of megaproject development on the human rights of indigenous communities has now become one of the most controversial issues pitting indigenous peoples against government authorities, private enterprise and international financial agencies. Indigenous peoples are increasingly using legal strategies and judicial remedies as well as political lobbying and direct action to make their point, and are often suffering from government repression and the criminalization of their activities as a consequence. In some instances, they have won reprieves or restitution in the courts but, in others, the cards are stacked high against them. In my 2003 report I tried to make this situation clear to the CHR and made a number of recommendations to governments and development agencies. On these crucial issues of survival and well-being, indigenous peoples increasingly claim their right to free, prior and informed consent, which has become Article 19 of UNDRIP since its approval in 2007.

In 2004 my report focused on the obstacles, gaps and challenges faced by indigenous peoples in the realm of administration of justice and the relevance of indigenous customary law in national legal systems. On the basis of research and numerous sources of information, the report indicated that: "Indigenous people tend to be overrepresented in the criminal justice system, are often denied due process and are frequently victims of violence and physical abuse. Indigenous women and children are particularly vulnerable in this respect. Numerous cases of criminalization of indigenous social and political protest activities have come to the attention of the Special Rapporteur. Language and cultural differences play their role in this pattern of discrimination, and they are not always sufficiently addressed by the state. Some countries have made progress in recognizing the specific needs of indigenous people in the field of justice and have adopted laws and institutions designed to protect their human rights. Indigenous customary law is being increasingly recognized by courts and lawmakers, as well as by public administration. Some countries are experimenting with alternative legal institutions and conflict resolution mechanisms, with encouraging results."<sup>8</sup>

In several of the countries visited, I came across situations where there appeared to be an incompatibility between human rights legislation pertaining to

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8 E/CN.4/2004/80

indigenous peoples and other sectoral laws (such as legislation regarding the environment or the exploitation of natural resources, or the titling of private landholdings). When asked to rule on competitive claims on such issues, the courts may sometimes render judgments that protect the rights of indigenous communities but, just as often, they may hand down rulings that are detrimental to these rights. Whenever necessary, I recommended that the rights of indigenous peoples as set out in national and international law should have priority over any other interests and called upon governments to make efforts to adjust their legislation accordingly.

The widespread lack of access to the formal justice system due to ingrained direct or indirect discrimination against indigenous peoples is a major feature of the human rights protection gap. The overrepresentation of indigenous people in corrective institutions is often linked to over-policing in areas where indigenous persons live and to the intense focus by enforcement bodies on indigenous activities, which leads to higher levels of arrests. Studies show that indigenous people are charged with more offences than non-indigenous, are more likely to be denied bail, spend less time with their lawyers and receive higher sentences when pleading guilty.

One of the more serious human rights protection deficiencies in recent years has been the trend towards the use of laws and the justice system to penalize and criminalize social protest activities and legitimate demands made by indigenous organizations and movements in defence of their rights. Reports indicate that these tendencies appear in two guises: the application of emergency legislation such as anti-terrorist laws, and accusing social protestors of common misdemeanours (such as trespassing) to punish social protest.

An ominous trend in current affairs is that human rights abuses occur not only during states of emergency or in authoritarian non-democratic regimes but also within the framework of the rule of law in open transparent societies, where legal institutions are designed to protect individuals from abuse and to provide any victim of alleged human rights violations with mechanisms for access to justice and due process. Rights abuses committed against indigenous people often happen in the context of collective action initiated to press the legitimate social claims of marginalized, socially excluded and discriminated against indigenous communities. Private vested interests and beleaguered authorities belonging to local power structures often use the law to dismantle such movements by penalizing prominent leaders either through the application of common criminal stat-

utes and regulations or by invoking politically motivated anti-terrorist legislation. I strongly urged that legitimate social protest activity of indigenous communities not be so penalized by the arbitrary use of criminal legislation designed to punish crimes that endanger the stability of democratic societies, and urged states to use non-judicial means to solve social conflicts through dialogue, negotiation and consensus.

Through my study of the issue, and especially through my country missions, local visits and dialogue with leaders and individuals in the various communities around the world, I found that a human rights protection gap with regard to indigenous peoples results from the operational deficiencies of the justice system, particularly in the area of criminal justice, and largely explains the widely reported lack of confidence of indigenous peoples in their national systems of administration of justice.

The right to education figures prominently in United Nations human rights concerns and 2004 was also the last year of the UN's first international decade on human rights education. For this and other reasons, it was appropriate to devote my 2005 report to the right of indigenous peoples to education. An international seminar was held on indigenous peoples and education in 2004, organized in conjunction with UNESCO (E/CN.4/2005/88/Add.4). Together with copious data from other sources in a large number of countries, my 2005 annual report focused on this topic. Thus, in my 2005 annual report (E/CN.4/2005/88) I wrote:

"In all the countries visited by the Special Rapporteur during his mandate indigenous communities and organizations complained that the authorities were not doing enough for them in the area of education. Education for indigenous peoples would seem to be the "ugly duckling" of national education programmes and in general to be assigned low priority and inadequate budgets at the national level. Such complaints were heard by the Special Rapporteur during his missions to the Philippines, Guatemala, Mexico, Chile, Colombia and Canada. He has also received information and documentation from many other countries in which similar situations exist.

Indigenous education, adapted to indigenous peoples' cultures and values, is the best way of ensuring the right to education; it does not mean

shutting out the outside world or ignoring the challenges posed by national societies or the global economy, but is in fact viewed by indigenous communities themselves as a necessary tool for the full personal, social and cultural development of aboriginal peoples.”

The right to education is critical for millions of indigenous people throughout the world, not only as a means of extricating themselves from the exclusion and discrimination that have historically been their fate but also for the enjoyment, maintenance and respect of their cultures, languages, traditions and knowledge. The systems of formal education historically provided by the state or religious or private groups have been a two-edged sword for indigenous peoples. On the one hand, they have often enabled indigenous children and youth to acquire knowledge and skills that would allow them to move ahead in life and connect with the broader world. On the other, formal education, especially when its programmes, curricula and teaching methods come from other societies that are removed from indigenous cultures, has also been a means of forcibly changing and, in some cases, destroying indigenous cultures.

This situation has several aspects. First, there are the difficulties many indigenous people experience in gaining access to academic institutions. Secondly, many problems exist with regard to the institutionalization of educational services for indigenous people. Most problematic of all, however, is the fact that throughout much of history the fundamental goal of education has been to assimilate indigenous peoples into the dominant culture (“Western” or “national”, depending on the circumstances), a culture that is alien to them, with the consequent disappearance or, at best, marginalization of indigenous cultures within the education system. To a large extent, this is still the prevailing view in some countries’ education systems, despite the existence of legislation that sets specific objectives in this area.

Aside from problems of discrimination in access to schooling, which are still widespread despite government efforts to eliminate them, an as yet unresolved human rights issue is that, traditionally, schooling for indigenous children had the purpose of assimilating them into the dominant society and separating them from their own cultures. An instance of this approach is provided by the story of the Residential Schools in Canada, which are now recognized as having done irreparable cultural damage to indigenous children in that country. The alternative approach to indigenous education in recent years has been to foster bilingual and

intercultural education with respect for the cultures and languages of indigenous peoples. The main obstacle to full enjoyment of the right to education has been assimilationist models of education and education systems' ignorance of or failure to appreciate indigenous languages and cultures. In recent years, this situation has begun to change, and there are now several countries that officially recognize indigenous cultures and agree on the need for bilingual and intercultural education. Indigenous peoples are demanding recognition of their right to an education that is taught in their own language and adapted to their own culture.

Over the last two decades, numerous constitutional and legislative reforms have been carried out in many countries to recognize indigenous peoples and their civil and political rights, particularly their economic, social and cultural rights. Some of these legislative provisions are broader than others; in some cases, recognized rights are limited and subordinated to the interests of third parties or wider national interests. In my 2006 report, I drew attention to two types of problems in such a situation; firstly, there are many cases in which legislation on indigenous issues is inconsistent with other laws. Secondly, in most documented constitutional reforms there is a delay in the adoption of statutory and secondary laws. The main problem, however, is the "implementation gap", that is, the vacuum between existing legislation and administrative, legal and political practice. This divide between form and substance constitutes a violation of the human rights of indigenous peoples. To close the gap and narrow the divide is a challenge that must be addressed through an adequate human rights policy and focused programs of action.<sup>9</sup> When the HRC asked me to stay on an additional year because the Council had not yet fully reorganized itself, I made a country mission to Bolivia and prepared the final report of my mandate, this time focusing not so much on ongoing human rights violations as on the human rights-based development and best practice that several UN resolutions had called for over the years. (A/HRC/6/15)

My general thematic reports to the Human Rights Council were presented together, on each occasion, with the reports of the official country visits carried out during the year, which included Guatemala and Philippines (2002), Mexico and Chile (2003), Colombia and Canada (2004), South Africa and New Zealand (2005), Ecuador and Kenya (2006), and Bolivia (2007). I also attended follow-up meetings in the Philippines, Guatemala and Canada, organized by local institu-

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9 E/CN.4/2006/78

tions some time after my initial visit, which were intended to evaluate the results and local impact of my earlier missions. My country reports were annexed to the annual thematic report.

The 11 country mission reports, three evaluation reports and several other non-official visits to other countries provide a good overview of the human rights situation of indigenous peoples in the seven years (2001-2007) of my mandate as special rapporteur. The country reports include specific recommendations to distinct actors (governments, indigenous peoples, international agencies etc.) whereas the recommendations in the thematic reports are of a more general nature. At the time of the oral presentation of my annual report to the Commission/Council, the delegations of the countries concerned had already received my country reports and had usually prepared written statements about them. Their interventions were usually very cordial and supportive of the SR's work but they might also point out certain issues on which they disagreed. In one case only during all those years did a state representative (Philippines) express outright hostility to me personally and question my good faith, professional standards and moral integrity. He was immediately rebutted by an indigenous organization from his own country, which strongly supported my report, and I later received a letter of apology from a close adviser of the country's president.

As country reports are submitted to their government for comments prior to the final draft, there were always minor details or corrections to be made in the text. As the full responsibility of the report belongs to the expert himself, however, I was surprised to receive, from another country, an almost entirely rewritten report in which probably an official of the foreign ministry or some other department had included his/her own ideas regarding indigenous rights. Obviously, I had to disregard this unwarranted interference, which was surely offered in good faith.

The Council session's timetable would allow for a few minutes of "debate" on my annual report, which was usually limited to a few questions and answers with a small number of government delegates. As far as I am aware, the Council did not act any further on my proposals and recommendations. In time, I was overcome by a growing sense of frustration at not being able to follow-up on my country visits and reports. Occasionally, I was informed that, in one or another, certain measures had been or were being taken to put into practice one or several of my recommendations. Yet the general feeling I had (and still have) is that things continue more or less the same regardless of a country visit. Still, some positive results were achieved and this is because indigenous and other human



rights organizations were able to use my reports as one more instrument in their struggle for human rights. In their hands, these reports were sometimes very useful when lobbying or negotiating with the authorities or making their claims widely known to the public, and are frequently quoted in public debates. The UN, as is well-known, does not possess any enforcement mechanisms for its resolutions, and this is particularly so in the field of human rights. As the saying goes among the delegates and the specialists, the best we could hope for was “blame and shame”. This also has its limits, however. As time goes by, when human rights violations occur, although the blame remains, states are becoming increasingly immune to the “shame” that goes with it.

A few final reflections are in order. When, as an interested observer, I attended several sessions of the WGIP and the Sub-Commission in the early 1980s, the indigenous presence was scant. Only a few indigenous representatives from North America and northern Europe –and a few other countries-- were well-enough organized to bring specific proposals to these international bodies and engage in a dialogue with government delegates. Thanks to the WGIP’s decision to open up its sessions to the participation of indigenous persons, the indigenous presence became more numerous and more diverse, better-informed, increasingly assertive and diplomatically savvy. This development took place in good measure as the result of steady and persistent organizational activity, political guidance, technical and financial support of interested and concerned civil society associations and NGOs, in turn often supported by sympathetic governments and international donor foundations. The NGO presence became stronger over the following two decades and throughout the whole process of indigenous participation, from the drafting of position papers to the organization of training seminars to the underwriting of trips to Geneva from faraway countries. For the indigenous participants –some of whom became steady visitors to the CHR for many years—attending the meetings in Geneva became an important learning experience, a process of *concientizacao*, to use Paulo Freire’s term.

As these various activities became more institutionalized within the UN structure, there came moments when it was difficult for observers –and some participants— to distinguish between the “indigenous discourse” and the agendas of a number of NGOs. Some government delegations –in private conversations-- would express their unease at these seeming partnerships between indigenous spokespersons from distant lands and cultures and the specific interests of mainly Western NGOs. Even some indigenous delegates would occasionally question

whether their interests were being well served by their close relationships with these organizations. On the other hand, it was clear to everyone that, without NGO support, the indigenous peoples would not have been able to carve out their space in the United Nations as they did.

As special rapporteur, I became a direct beneficiary of this process. The support of civil society organizations (CSOs) was essential to the success of my country missions in every single case, and I believe that their contribution to the emergence of indigenous peoples as international actors cannot be underestimated. This was especially so in the long drawn-out process that led to the adoption of the UNDRIP.

After the adoption of the UNDRIP, the Council instructed the Special Rapporteur to also promote the Declaration and further its implementation. In 2007, my second term ended and a new special rapporteur, Professor James Anaya, a well-known human rights lawyer, was appointed. His work has contributed precisely to this direction, to making the Declaration better known and helping convert it into a strong and effective international instrument in the cause of the human rights of indigenous peoples. The satisfaction remains that indigenous peoples who have long struggled in vain for their inherent rights now have in the UN Declaration a most important instrument for their recognition and protection, the full implementation of which still lies in the future. The mandate of the Special Rapporteur is a small but significant contribution to this process.<sup>10</sup> ○

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10 Parts of this text are included in R. Stavenhagen, 'The United Nations Special Rapporteur on the Rights of Indigenous Peoples', *Routledge Handbook on Indigenous Rights* (to be published).



## United Nations Human Rights Treaty Bodies and Indigenous Peoples' Rights

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*Pei-Lun Tsai*<sup>1</sup> and *Michael O'Flaherty*<sup>2</sup>

The United Nations (UN) human rights treaty bodies are mandated to monitor States parties' implementation of the respective treaties and form an integral part of the UN human rights machinery. As issues concerning indigenous peoples' rights receive increasing attention within the UN,<sup>3</sup> the treaty bodies have also, on many occasions, elaborated on how the core international human rights treaties<sup>4</sup> can be used to protect the rights of indigenous peoples. Such elaboration can be

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3 For an overview of the work of the UN related to the rights of indigenous peoples, see Julian Burger, "Indigenous Peoples and the United Nations" in Cynthia Price Cohen (ed), *The Human Rights of Indigenous Peoples* (Transnational 1998) 3-16; Elsa Samatopoulou, "Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic" (1994) 16 *Human Rights Quarterly* 58, 61-70.

4 Core international human rights treaties include: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention against Torture, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities, and the International Convention for the Protection of All Persons from Enforced Disappearance.

particularly observed in treaty bodies' general comments/recommendations<sup>5</sup> and concluding observations<sup>6</sup> as a part of the reporting procedure and in the views adopted in individual communications.<sup>7</sup>

This chapter first provides an overview of the protection of indigenous peoples' rights within the system of the core UN international human rights treaties and then examines the impact of the International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention) and the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) on the work of the UN human rights treaty bodies. We conclude with observations on how the treaty bodies can better make use of the two instruments.

## Indigenous Peoples' Rights under the Core International Human Rights Treaties

Although most core international human rights treaties do not specifically refer to the notion of indigenous rights,<sup>8</sup> various treaty provisions are in fact closely related to the rights of indigenous peoples. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) on minority rights is one such example. As the ICCPR itself does not define the term "minority", the definition provided by the former Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti, has often

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5 General comments/recommendations are the "means by which a UN human rights expert committee distils its considered views on an issue which arises out of provisions of the treaty, whose implementation it supervises, and presents those views in the context of a formal statement". Philip Alston, "The Historical Origins of 'General Comments' in Human Rights Law" in Laurence Boisson De Charzournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff Publishers 2001) 764.

6 Concluding observations contain treaty bodies' evaluation of the implementation of obligations under the respective treaties and corresponding recommendations. Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies" (2006) 6 Human Rights L Rev 27.

7 Most individual communications concerning the rights of indigenous peoples have been brought before the Human Rights Committee, invoking Article 27 of the International Covenant on Civil and Political Rights.

8 With the exception of the Convention on the Rights of the Child and the Convention on the Rights of People with Disabilities.

been referred to and appears to have been reflected in the jurisprudence of the Human Rights Committee (HRC).<sup>9</sup> Under this definition, a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics different from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>10</sup>

Although “minority” is not a synonym for “indigenous people”, this provision has often been invoked in situations involving indigenous peoples. In General Comment No. 23 adopted by the HRC, references are made to indigenous peoples as the Committee analyses how the culture of a minority can manifest itself in the form of a way of life associated with the use of land and resources.<sup>11</sup> In terms of individual communications,<sup>12</sup> the Committee’s first case, *Lovelace v Canada*, in fact involved a dispute regarding membership of a tribal community.<sup>13</sup> Subsequently, the Committee has examined complaints involving issues such as the life and personal integrity of indigenous leaders,<sup>14</sup> traditional customs of indigenous communities,<sup>15</sup> protection of languages,<sup>16</sup> participation in public affairs,<sup>17</sup> and the protection of traditional activities.<sup>18</sup>

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to take part in cultural life. Although cul-

9 *Ballantyne, Davidson, McIntyre v Canada*, Communication Nos. 359/1989 and 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993) para 11.2.

10 Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979) para. 568.

11 Human Rights Committee (HRC), General Comment No. 23: The right of minorities (Art. 27), UN Doc CCPR/C/21/Rev.1/Add.5 (1994) paras 3.2, 7.

12 For detailed discussions on the protection of indigenous rights under the Covenant, see Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester UP 2002) 116-75.

13 Ibid 154-7; *Sandra Lovelace v Canada*, Communication No. 24/1977, UN Doc CCPR/C/13/D/24/1977 (1981).

14 E.g. *José Vicente et al v Colombia*, Communication No. 612/1995, UN Doc CCPR/C/60/D/612/1995 (1997).

15 E.g. *Francis Hopu and Tepoaitu Bessert v France*, Communication No. 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1. (1997).

16 E.g. *Ballantyne, Davidson, McIntyre v Canada*, Communication Nos. 359/1989 and 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

17 E.g. *J.G.A. Diergaardt et al v Namibia*, Communication No. 760/1997, UN Doc CCPR/C/69/D/760/1997 (2000).

18 E.g. *Jouni E Lämsman et al v Finland*, Communication No. 671/1995, UN Doc CCPR/C/58/D/671/1995 (1996).

tural rights are not exclusive to indigenous peoples, as noted in General Comment No. 21 adopted by the Committee on Economic, Social and Cultural Rights (CESCR), the importance of the communal dimension of indigenous peoples' cultural life and of their association with ancestral lands warrants special consideration by States parties in their implementation of Article 15.<sup>19</sup> Adopting a similar approach, the Committee on the Elimination of Racial Discrimination (CERD), in its General Recommendation No. 23, reiterates that "discrimination against indigenous peoples fall under the scope of the [International Convention on the Elimination of All Forms of Racial Discrimination]".<sup>20</sup> In this general recommendation, the importance of indigenous peoples' communal lands, territories and resources is highlighted.<sup>21</sup>

The rights of indigenous peoples are explicitly recognised in the Convention on the Rights of the Child.<sup>22</sup> According to Article 30 of this Convention, an indigenous child "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion or to use his or her own language". Articles 17 and 29 of the Convention refer to the language and educational needs of indigenous children. The rights of indigenous children are further elaborated by the Committee on the Rights of the Child (CRC) in its General Comment No. 11, where issues such as the general principles of the Convention, civil rights and freedoms, family environment and alternative care, basic health and welfare, education and special protection measures are analysed in light of the special needs of indigenous children.<sup>23</sup>

The treaty bodies' engagement with indigenous rights can be further observed in various stages of the periodic reporting procedure.<sup>24</sup> Firstly, the treaty

19 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/21 (2009) para 36.

20 Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples UN Doc A/52/18, Annex V (1997) para 1.

21 Ibid paras 3, 5.

22 Burger (n 1) 14.

23 Committee on the Rights of the Child (CRC), General Comment No. 11: Indigenous children and their rights under the Convention, UN Doc CRC/C/GC/11 (2009).

24 For an overview of the reporting procedure and relevant recent developments, see Michael O'Flaherty and Pei-Lun Tsai, "Periodic Reporting: The Backbone of the UN Treaty Body Review Procedures", in M. Cherif Bassiouni and William A. Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia 2011); Office of the High Commissioner for Human Rights (OHCHR), Overview of the human rights treaty body system and working methods related to the review of States parties UN Doc HRI/MC/2013/2 (2013).

bodies adopt guidelines to advise States parties on the form and content of their reports, and many such guidelines specifically require information on indigenous peoples. For instance, both the HRC and the CESCR request that States parties indicate the protection of indigenous peoples' right to the lands and territories they traditionally occupy when reporting on the implementation of the right to self-determination under Article 1 common to both Covenants.<sup>25</sup> The CRC requests statistical data regarding indigenous children and information on the measures taken to ensure their full enjoyment of rights.<sup>26</sup>

Three committees: the HRC, the Committee against Torture (CAT) and the Committee on Migrant Workers, have adopted a new optional reporting procedure whereby they invite States, rather than submitting a normal periodic report, to respond to a list of issues intended to help them prepare a more focused report in a timely manner (the procedure is known by the acronym LOIPR).<sup>27</sup> Of the three committees that have adopted LOIPR, the HRC and the CAT have used the mechanism to request States parties respond to specific questions or concerns regarding members of indigenous communities. For instance, in its LOIPR for the fifth periodic report of Uruguay, the HRC asked the State to provide information regarding measures taken to "ensure equitable access to courts and to administrative bodies for indigenous persons and persons of African descent".<sup>28</sup> In the CAT's LOIPR for the fifth periodic report of Australia, various issues regarding indigenous peoples were raised: access to sexual assault services, high rate of incarceration, impact of mandatory sentencing, mental illness, limited access to justice, and the provision of culturally-appropriate legal aid and justice services.<sup>29</sup>

25 HRC, Guidelines for the treaty-specific documents to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, UN Doc CCPR/C/2009/1 (2010) para 28; CESCR, Guidelines on treaty-specific documents to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2008/2 (2009) para 8.

26 CRC, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc CRC/C/58/Rev.2 (2010) para 24, Annex paras 1, 5.

27 OHCHR (n 22) paras 72-3. For a more detailed description of the procedure, see OHCHR, Treaty bodies' lists of issues prior to reporting (targeted/focused reports): Overview of a new optional treaty-body reporting procedure, UN Doc HRI/ICM/2010/3 (2010).

28 HRC, List of issues prior to consideration of the fifth periodic report of Uruguay, UN Doc CCPR/C/URY/Q/5 (2013) para 18.

29 CAT, List of issues prior to the submission of the fifth periodic report of Australia, UN Doc CAT/C/AUS/Q/5 (2011) paras 13, 28, 30, 31 and 37.



Subsequently, the report submitted by Australia did indeed provide information relevant to these aspects.<sup>30</sup>

Indigenous issues also arise in the actual dialogues between treaty bodies and State delegations. Important developments and concerns discussed during this process and corresponding recommendations are then reflected in the final concluding observations adopted by the treaty bodies. A large number of concluding observations adopted by the HRC, the CESCR, the CERD, the CAT, the CRC, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of Persons with Disabilities contain recommendations intended to promote the rights of members of the indigenous communities. A survey of these concluding observations shows that those issues of indigenous rights that have attracted most attention from the treaty bodies include: self-determination,<sup>31</sup> acceptance of international norms (such as participation in the ILO Convention No 169),<sup>32</sup> cooperation with human rights mechanisms (including treaty bodies, special procedures of the Human Rights Council and other international mechanisms),<sup>33</sup> the collection and reporting of data and statistics,<sup>34</sup> discrimination,<sup>35</sup> administration of justice,<sup>36</sup> right to partici-

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30 Fifth periodic report of Australia to the Committee against Torture, UN Doc CAT/C/AUS/4-5 (2013).

31 E.g. Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation, UN Doc E/C.12/1/Add.94 (2003) para 39; Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland, UN Doc CERD/C/FIN/CO/20-22 (2012) para 12.

32 See *infra* notes 60-62 and accompanying text.

33 E.g. Conclusions and recommendations of the Committee against Torture: Mexico, UN Doc CAT/C/MEX/CO/4 (2007) para 24; Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana, UN Doc CERD/C/BWA/CO/16 (2006) para 22; Concluding observations of the Committee on the Elimination of Racial Discrimination: Panama, UN Doc CERD/C/PAN/CO/15-20 (2010) para 16.

34 E.g. Concluding observations of the Committee on the Rights of the Child: Gabon, UN Doc CRC/C/15/Add.171 (2002) para 15(a); Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana, UN Doc CERD/C/GUY/CO/14 (2006) para 8.

35 E.g. Concluding observations of the Committee on the Rights of the Child: Myanmar, UN Doc CRC/C/MMR/CO/3-4 (2012) 96-7; Concluding observations of the Committee on the Rights of Persons with Disabilities: Peru, UN Doc CRPD/C/PER/CO/1 (2012) paras 12-3.

36 E.g. Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador, UN Doc CERD/C/ECU/CO/19 (2008) para 12; Concluding observations of the Human Rights Committee: Guatemala, UN Doc CCPR/C/GTM/CO/3 (2012) para 26.

pate in public affairs,<sup>37</sup> right to an adequate standard of living,<sup>38</sup> right to work,<sup>39</sup> right to health,<sup>40</sup> right to education,<sup>41</sup> rights related to lands and natural resources<sup>42</sup> and cultural rights.<sup>43</sup>

Attention to indigenous issues may also be found in the application of treaty body procedures to follow-up on concluding observations. For instance, in the CERD's concluding observations of the 17<sup>th</sup> to 18<sup>th</sup> periodic reports of Norway, the Committee commented on the Finnmark Act, a law establishing procedures to promote the Saami people's right to participate in the decision-making process affecting the land and resources in the areas occupied by them.<sup>44</sup> The Committee recommended that the legislation should address the protection of "certain highly vulnerable indigenous groups, namely, the East Saami people".<sup>45</sup> Also in the concluding observations, Norway was requested to inform the Committee of follow-up developments in this regard within a year.<sup>46</sup> Upon receiving Norway's

37 E.g. Concluding observations of the Human Rights Committee: Nicaragua, UN Doc CCPR/C/NIC/CO/3 (2008) para 20; Concluding observations of the Committee on the Elimination of Discrimination against Women: Chile, UN Doc CEDAW/C/CHL/CO/5-6 (2012) paras 24-5.

38 E.g. Concluding observations of the Committee on the Elimination of Racial Discrimination: Costa Rica, UN Doc CERD/C/60/CO/3 (2002) para 11(c); Concluding observations of the Committee on the Rights of the Child: El Salvador, UN Doc CRC/C/SLV/CO/3-4 (2010) para 91.

39 E.g. Concluding observations of the Committee on Economic, Social and Cultural Rights: Guatemala, UN Doc E/C.12/1/Add.93 (2003) para 13; Concluding comments of the Committee on the Elimination of Discrimination against Women: Suriname, UN Doc CEDAW/C/SUR/CO/3 (2007) para 28.

40 E.g. Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand, UN Doc E/C.12/1/Add.88 (2003) paras 18, 33; Concluding observations of the Committee on the Rights of the Child: Bolivia, UN Doc CRC/C/BOL/CO/4 (2009) para 53.

41 E.g. Concluding observations of the Committee on Economic, Social and Cultural Rights: Costa Rica, UN Doc E/C.12/CRI/CO/4 (2008) paras 29, 50; Concluding observations of the Committee on the Rights of the Child: Paraguay, UN Doc CRC/C/PRY/CO/3 (2010) paras 60, 61(f), 79.

42 Concluding observations of the Committee on the Elimination of Racial Discrimination: Venezuela (Bolivian Republic of), UN Doc CERD/C/VEN/CO/18 (2005) para 20; Concluding observations of the Committee on Economic, Social and Cultural Rights: Cameroon, UN Doc E/C.12/CMR/CO/2-3 (2012) para 24.

43 Concluding observations of the Committee on the Rights of the Child: Viet Nam, UN Doc CRC/C/VNM/CO/3-4 (2012) paras 39-40; Concluding observations of the Committee on Economic, Social and Cultural Rights: Jamaica, UN Doc E/C.12/JAM/CO/3-4 (2013) para 32.

44 Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway, UN Doc CERD/C/NOR/CO/18 (2006) para 6.

45 *Ibid* para 17.

46 *Ibid* para 28.

response,<sup>47</sup> the Committee Chair sent a further follow-up letter to request more information.<sup>48</sup>

#### Impact of the ILO Convention No. 169 and the UN Declaration on the Work of the UN Human Rights Treaty Bodies

Among various categories of output produced by UN human rights treaty bodies, the impact of the ILO Convention and the UN Declaration is mostly observed in general comments/recommendations and concluding observations of State reports. Even though many States parties to core international human rights treaties are not parties to the ILO Convention, and the UN Declaration does not in and of itself impose binding legal obligations upon States,<sup>49</sup> the treaty bodies do at times use these two instruments when interpreting the obligations of States under the respective treaties. As already observed, four treaty bodies have adopted general comments/recommendations on issues regarding the rights of indigenous peoples,<sup>50</sup> and, among them, General Comment No. 21 of the CESCR and General Comment No. 11 of the CRC make explicit reference to the ILO Convention and the UN Declaration. The former, addressing the right to take part in cultural life, recognises the relevance of the ILO Convention and the UN Declaration to the States parties' implementation of their obligations under the ICESCR.<sup>51</sup> This general comment notably relies on the Convention and Declaration in its discussion of the association between cultural rights and the ancestral lands of indigenous peoples.<sup>52</sup>

General Comment No. 11 of the CRC focuses on the rights of indigenous children, and provisions from the ILO Convention and the UN Declaration are referred to for the interpretation of both the general principles of the Convention on the Rights of the Child and the provisions specifically related to indigenous chil-

47 Information provided by the Government of Norway on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination, UN Doc CERD/C/NOR/CO/18/Add.1 (2007).

48 CERD, Follow-up letter sent to the State party (7 March 2008) <[http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT\\_CERD\\_FUL\\_NOR\\_11976\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_FUL_NOR_11976_E.pdf)> accessed 10 August 2013.

49 Megan Davis, "The United Nations Declaration on the Rights of Indigenous Peoples" (2007) 11 *Australia Indigenous L Rev* 55, 55.

50 General Comment No. 23 of the HRC (1994); General Recommendation No. 23 of the CERD Committee (1997); General Comment No. 11 of the CRC (2009); General Comment No. 21 of the CESCR (2009). Additionally, General Comment No. 20 of the CESCR also briefly touches upon the rights of indigenous peoples.

51 CESCR (n 17).

52 *Ibid* paras 36-7.

dren.<sup>53</sup> The two instruments are cited to support the CRC's interpretation of States parties' obligations in areas such as determination of the existence of indigenous peoples,<sup>54</sup> consultation with indigenous communities for the consideration of policies affecting indigenous children,<sup>55</sup> prevention of the deprivation of ethnic identities of indigenous children,<sup>56</sup> provision of healthcare<sup>57</sup> and the development of education programmes.<sup>58</sup>

The impact of the ILO Convention and the UN Declaration is notably visible in the treaty bodies' concluding observations adopted in the periodic reporting procedures. For example, the treaty bodies have welcomed the States parties' ratifications of the Convention,<sup>59</sup> and a large number of recommendations in concluding observations have been devoted to encourage ratification<sup>60</sup> or expedite domestic processes towards ratification.<sup>61</sup> In relation to States parties who have already ratified the ILO Convention, the treaty bodies have noted the States' failure to properly implement the Convention and further made specific recommendations as how to better fulfil their obligations, especially in the context of matters regarding the lands of indigenous peoples.<sup>62</sup> Such recommendations include

53 CRC (n 21).

54 *Ibid* para 19.

55 *Ibid* para 20.

56 *Ibid* para 45.

57 *Ibid* paras 51, 52.

58 *Ibid* paras 60, 62.

59 E.g. Report of the Committee on the Elimination of Racial Discrimination, 58<sup>th</sup> and 59<sup>th</sup> sessions, UN Doc A/56/18(SUPP) (2001) para 46.

60 E.g. Concluding observations of the Human Rights Committee, UN Doc CCPR/C/SLV/CO6 (2010) para 18; Concluding observations of the Committee on the Elimination of Racial Discrimination: Sweden, UN Doc CERD/C/304/Add.103 (2001) para 13; Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland, UN Doc CERD/C/FIN/CO/19 (2009) para 14; Concluding observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, UN Doc CERD/C/RUS/CO/20-22 (2013) para 22; Concluding observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo, UN Doc E/C.12/COD/CO/4 (2009) para 14; Concluding observations of the Committee on the Rights of the Child: Kenya, UN Doc CRC/C/KEN/CO/2 (2007) para 70(b).

61 Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland (n 29) para 19; Concluding observations of the Committee on the Elimination of Racial Discrimination: Sweden, UN Doc CERD/C/SWE/CO/18 (2008) para 21.

62 E.g. Concluding observations of the Committee on the Elimination of Racial Discrimination: Argentina, UN Doc CERD/C/ARG/CO/19-20 (2010) para 26; Concluding observations of the Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/MEX/CO/4 (2006) para 28.

enacting legislation to implement the ILO Convention,<sup>63</sup> establishing mechanisms for consultation with a view to obtaining free, prior and informed consent from communities affected by the exploitation of natural resources,<sup>64</sup> and ensuring that policies related to the use and ownership of ancestral lands of indigenous peoples are in line with the Convention<sup>65</sup> and the relevant recommendations from the ILO.<sup>66</sup> Even when reviewing reports by States that have not yet ratified the ILO Convention, the CERD has recommended that the State in question use the Convention “as guidance”<sup>67</sup> or “take [it] into account”.<sup>68</sup>

As the UN Declaration was only adopted in 2007, fewer references to it can be found in the work of the treaty bodies. The CERD is the body that most often refers to it. Even prior to its adoption, the CERD had encouraged a State party to commit to it.<sup>69</sup> Both the CERD and the CRC have welcomed States parties' support for its adoption<sup>70</sup> and commended its use at the domestic level.<sup>71</sup> Some treaty bodies have also recommended that the State party concerned “implement” the UN Declaration.<sup>72</sup> In certain instances, the treaty bodies have provided

63 Concluding observations of the Committee on the Elimination of Racial Discrimination: Argentina, UN Doc CERD/C/65/CO/1 (2004) para 16.

64 Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador, UN Doc E/C.12/1/Add.100 (2004) para 35; Concluding observations of the Committee on the Elimination of Racial Discrimination: Colombia, UN Doc E/C.12/1/Add.74 (2001) para 33.

65 Concluding observations of the Committee on the Elimination of Racial Discrimination: Chile, UN Doc CERD/C/CHL/CO/15-18 (2009) para 21.

66 Concluding observations of the Committee on the Elimination of Racial Discrimination: Colombia, UN Doc CERD/C/COL/CO/14 (2009) para 20.

67 Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan, UN Doc CERD/C/304/Add.114 (2001) para 17.

68 Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland (n 29) para 13.

69 Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc CERD/C/CAN/CO/18 (2007) para 27.

70 Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon, UN Doc CERD/C/CMR/CO/15-18 (2010) para 7; Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan, UN Doc CERD/C/JPN/CO/3-6 (2010) para 4; Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname, UN Doc CERD/C/SUR/CO/12 (2009) para 4; Concluding observations of the Committee on the Rights of the Child: Cameroon, UN Doc CRC/C/CMR/CO/2 (2010) para 82.

71 Concluding observations of the Committee on the Elimination of Racial Discrimination: New Zealand, UN Doc CERD/C/NZL/CO/18-20 (2013) para 3(e).

72 *Ibid*; Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc CERD/C/CAN/CO/19-20 (2012) para 5; Concluding observations of the Committee

more specific recommendations on implementation, including incorporating the definition of indigenous peoples provided by the Declaration into relevant domestic legislation,<sup>73</sup> and establishing or improving mechanisms for consultation with indigenous peoples, especially in relation to policies affecting their identities, use of natural resources, relocation, settlement of disputes, etc.<sup>74</sup> The treaty bodies have at times expressed or implied that the UN Declaration enshrines binding legal principles. Notably, the Sub-Committee on the Prevention of Torture “remind[ed]” Mexico of Article 13 of the UN Declaration, “which establishes the obligation of States to take effective measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means”.<sup>75</sup>

## Conclusion

We have demonstrated that the rights of indigenous peoples are of concern to the UN human rights treaty bodies and that a wide range of rights have been explored in the course of their monitoring work. Even in relation to rights not exclusive to indigenous peoples, the treaty bodies have attempted to review the relevant matters in light of indigenous issues and vulnerabilities. As the treaty bodies develop new tools, such as the LOIPR mechanisms and the follow-up procedures, these are already being employed to ensure that situations of indigenous peoples are better reported and examined. In this regard, the ILO Convention and the UN

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on the Elimination of Racial Discrimination: Japan (n 70) para 20; Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua, UN Doc E/C.12/NIC/CO/4 (2008) para 35.

73 Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon (n 70) para 15; Concluding observations of the Committee on the Rights of the Child: Cameroon (n 70) para 83(a).

74 Concluding observations of the Committee on the Elimination of Racial Discrimination: Fiji UN Doc CERD/C/FJI/CO/18-20 (2012) para 14; Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala, UN Doc CERD/C/GTM/CO/12-13 (2010) para 11; Concluding observations of the Committee on the Elimination of Racial Discrimination: New Zealand (n 72) para 18.

75 Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, UN Doc CAT-OP-MEX-1 (2010) paras 259, 346.

Declaration constitute comprehensive frameworks, and can be of great support for treaty body analysis. That said, it can be concluded that the two instruments are inadequately cited in treaty body findings and other outputs.

With regard to the ILO Convention, the majority of the references do not extend beyond recommendations for ratification. It is clear that there is much unexplored room to better integrate the Convention in the legal analysis undertaken by the treaty bodies. For instance, while the UN treaty bodies are not mandated to interpret States' obligations under the ILO Convention, they could, nevertheless, make use of the findings of the ILO Committee of Experts on the Application of Conventions and Recommendations to reinforce their recommendations to States on how better to ensure the protection of indigenous peoples' rights.

Article 42 of the UN Declaration states that "[t]he United Nations, its bodies ... and states shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration". The human rights treaty bodies are well placed to serve such a function. It has been argued that the Declaration has roles to play in relation to the individual communications procedures: providing guidance for the interpretation of indigenous rights and opening up the opportunity for the right of self-determination to be litigated through individual communications.<sup>76</sup> Additionally, treaty bodies might better take the UN Declaration into consideration as they review States' reports on implementation or in the conduct of country visits.

It may thus be concluded that the impact of the Convention and the Declaration on the protection of the human rights of indigenous people through the operation of the treaty body system is as much a matter of potential as it is of achievement. ○

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76 Clive Baldwin and Cynthia Morel, "Using the United Nations Declaration on the Rights of People's Litigation" in Stephen Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2010) 127-9.

## CHAPTER 23

## Supervision of ILO Standards and Indigenous and Tribal Peoples

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*Lee Swepston*

**B**eyond the adoption of international standards protecting indigenous and tribal peoples, it is necessary to supervise their application and assist governments to apply them if they are to have the desired effect. The supervisory process of the International Labour Organization is detailed and extensive, and it has had a significant effect on the rights of these peoples at both national and international levels. This involves direct supervision of the two ILO Conventions on indigenous and tribal peoples, as well as supervision of other Conventions – and even the ILO Constitution itself - that have an effect on their rights.

This supervision has drawn attention to many violations of indigenous and tribal peoples' rights, put pressure on governments to correct them, and drawn international assistance across a wide range of problems. ILO supervision has been invoked by the UN Special Representative on Indigenous Peoples' Rights and by UN and regional supervisory bodies, and has resulted in further attention and help. Supervision of such Conventions as those on forced labour, child labour and discrimination has focused further attention and help on indigenous peoples' rights.

The ILO does not act alone. Its supervision draws on reports to the United Nations and other international bodies, and its recommendations result in shared action.

This supervision is not enough to resolve the abuses of rights or the problems revealed but it is a vitally important part of international action, and the ILO carries out the most detailed and specific supervision of the rights of indigenous and tribal peoples.



## Brief Description of ILO Supervision

ILO procedures are predicated on the submission of reports by States on the Conventions they have ratified, supplemented by comments from employers' and workers' organizations, and by complaints mechanisms of different kinds. Under the ILO Constitution (art. 22), reports are to be submitted on most Conventions (including those on indigenous and tribal peoples) at five-year intervals, although those on a group of 12 human rights Conventions are due every three years. These intervals can be reduced following requests by ILO supervisory bodies or because of other factors, including non-receipt of reports when due.

Reports on all ILO Conventions are examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), a body of 20 independent experts appointed by the ILO Director-General with the approval of the ILO Governing Body. The CEACR may make two kinds of comments: observations, which deal with more serious matters and are published in the Committee's annual report; or direct requests, which mostly concern requests for additional information, questions or points of application that do not at this stage require publication.

The report of the CEACR is put before the Committee on the Application of Standards (CAS) at the annual International Labour Conference. This is a tripartite committee composed of representatives of employers, workers and governments. It usually calls before it around 25 governments to discuss the observations made by the Committee of Experts – these often include at least one case relating to indigenous and tribal peoples, either under C169 or other related Conventions.

There are also complaints procedures, of which the first two described below are provided for in the ILO Constitution. Employers' and workers' organizations may file representations alleging that a Convention is not being correctly applied by a ratifying State (articles 24 and 25 of the ILO Constitution). These are referred to a specially-appointed committee of the Governing Body, which names one representative each from employers, workers and governments to examine the representation. The reports of these committees are inevitably approved by the Governing Body, and referred to the CEACR for follow-up. This is the complaints procedure that has been used most often concerning C169.

In addition, complaints may be filed by another State that has ratified the same Convention, by the Governing Body itself, or by a delegate to the Inter-

national Labour Conference (articles 26 et seq. of the ILO Constitution). This procedure has not yet been used for C169 or as concerns indigenous and tribal peoples.

The third complaint procedure allows complaints of violations of freedom of association to be filed by employers' or workers' organizations against any member State of the ILO, regardless of whether the country concerned has ratified any of the ILO's Conventions on this subject. These complaints are examined by a tripartite committee of the ILO Governing Body composed of three members each from the employers', workers' and government members of the Governing Body. This is probably the most active human rights complaints body in the international system, and on a number of occasions has been used to defend the rights of indigenous and tribal peoples to organize and bargain collectively.

## **Supervision relating to Indigenous and Tribal Peoples**

There are three kinds of supervision to detail here. The first is the supervision of the two ILO Conventions aimed specifically at these peoples and covering their rights in a comprehensive way. This goes into significant detail but covers only the relatively small number of countries that have ratified one of these two Conventions.

As indicated above, the second is supervision of more general instruments whose application has a particular effect on indigenous and tribal peoples. This relates in particular to human rights instruments such as those on discrimination, forced labour and child labour the effects of which are expanding on indigenous and tribal peoples as parts of the national population. This kind of comment touches on the rights of these peoples as workers more specifically than do comments on the two indigenous Conventions, which deal with a much wider range of issues. Almost all ILO Member States have ratified these Conventions such that indigenous peoples in most countries are affected if the need should arise.

## **Supervision of the Indigenous Conventions**

The ILO supervises the two Conventions on indigenous and tribal peoples in the same way as it does other Conventions but the comments adopted by the CEACR

and under the complaints mechanisms tend to be longer and more detailed than for other Conventions because of the complexity of these instruments. At the moment, there are 22 States Parties to C169, and 17 remaining ratifications of C107.

Some of the countries that ratified each Convention did so with the position that while they had no indigenous and tribal peoples inside their own territories they were ratifying in order to express solidarity or to direct their assistance to developing countries. This is the case of Belgium and Cuba as concerns C107; and the Netherlands and Spain for C169.

Some other countries that ratified C107 have never reported on the situation in their own countries or have denied its applicability, although the ILO supervisory bodies believe it does have a practical application. This is the case, for instance, in Egypt, Ghana, Iraq, the Syrian Arab Republic and Tunisia. However, the Committee of Experts is pushing these countries to re-examine how the Convention is applicable to them. In these circumstances, 20 of the 22 ratifying States for C169 are the subject of supervision, as well as Bangladesh, India and Pakistan under C107.

## **Convention No. 107**

Very little attention is paid to C107 outside the ILO but it merits renewed attention as long it is acknowledged to still be applicable to these important countries. It should be noted first that India, and then Pakistan and Bangladesh, ratified the Convention recognizing that it was applicable to the tribal people within them, as provided under both ILO Conventions, whether or not they are indigenous. Indeed, all of them have denied, sometimes vehemently, that they contain populations that are more indigenous than others, stating that they are covered by the term "tribal". While their positions are sometimes not as firm in international discussions as they once were on this point, and they recognize at least occasionally that the term "indigenous" is not meant literally in all cases and may be understood to apply to their situations, this nevertheless remains contentious in internal debate.

It is also worth remembering that C107 applies to a great many tribal populations in these countries, in the absence of C169. There are, for instance, some 40 million tribal people in India, which is greater than the total number of indigenous people in North and South America combined.

The most serious of the problems examined are in Bangladesh, where there have been systematic violations of tribal peoples' rights that have been cited by the Committee of Experts. The most recent comments by the Experts were made in 2009<sup>1</sup> and they relate to the situation in the Chittagong Hill Tracts. The systematic violations of tribal peoples' rights and the resulting armed insurgency by a part of these populations are related to the government's persistent failure to implement, or amend as necessary, the Chittagong Hill Tracts Peace Accord of 1997. The ILO based its position in particular on a commissioned study comparing Bangladesh law and practice to the Convention. Among many other questions, the Committee noted from the government's own National Strategy for Accelerated Poverty Reduction II (2009–11) that indigenous communities are subject to extortion by "land grabbers", and that the formulation of a policy to address issues affecting indigenous communities was envisaged. It is worth noting that the ILO and various national organizations have held repeated public discussions on indigenous rights and have openly discussed and promoted ratification of C169 – although this is still probably unlikely for now.

As concerns India, among many other matters, the most recent comments on C107 (2011) recalled a communication from the International Trade Union Confederation (ITUC) concerning the situation of the Dongria Kondh indigenous community and the bauxite mining project to be developed on the lands traditionally occupied by them, and asked for measures to be taken to protect this community. It expressed its concern over the reported adverse impact on the Dongria Kondh of the bauxite mining and expressed serious concern at the apparent lack of involvement of the tribal communities affected in matters related to the project, which affected them directly. The government replied with a list of planned protective and developmental activities, and the Committee has asked to be informed of whether these activities are actually carried out. The Experts also welcomed the adoption of recent land rights legislation concerning tribal peoples, and again asked for information on whether and how it was being implemented in practice – this will no doubt be the subject of comments again. It expressed particular concern over the possibility of removing tribal peoples from their traditional lands. It requested that the government provide updated information on

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1 Note that throughout this article the references are to the situation as it stood in 2012 when it was drafted. The Committee of Experts continues to examine reports under both Conventions Nos. 107 and 169 each year and in most cases the situation has evolved.

the number of persons belonging to the tribal population displaced from the land they traditionally occupied as a result of the Sardar Sarovar Dam Project and the measures taken to guarantee their resettlement and compensation in conformity with Articles 12(2) and (3) of the Convention. The Committee noted the government's statement specifying that, as of 31 December 2009, only 322 families out of 46,700 remained to be resettled.

## **Convention No. 169**

Because of the length, complexity and number of ILO supervisory comments on C169, this section can only give examples. Further information is readily available on the ILO website under Labour Standards, and then the full-text database NORMLEX. Moreover, as for C107, all ratifying States are required to submit new reports on the Convention's application in 2013, so new Committee of Experts' comments will appear early in 2014. For the moment, what is below should be taken as indicative and not exhaustive.

## **Representations on C169**

The explanation of this procedure is outlined above. Since the early 1990s, when the Convention came into force, there have been a large number of representations on C169, filed by both national and international trade unions, and the reports on all these representations are published on the ILO website. Representations have been filed against Argentina (2008), Bolivia (1999), Brazil (2009), Colombia (2001), Denmark (2001), Ecuador (2001), Guatemala (2007), Mexico (7 times since 2008) and Peru (1998 and 2009). Almost all the representations alleged, and proved, failure by the governments concerned to involve the indigenous peoples correctly in consultations, as required by Article 6 of the Convention, either on land rights and resource exploitation or on constitutional, legislative and administrative amendments that directly affected their interests. This has resulted in a considerable amount of assistance being requested and provided by these governments, and in the detailed development of the best practices to be followed in carrying out consultations. This is because most of these procedures have shown that, to one degree or another, governments have been will-

ing to consult but were uncertain on how this should be done. There have also, however, been cases in which governments have not made serious efforts to consult, and these have also been pointed out and sometimes corrected. There are also a number of cases in which companies exploiting natural resources have not consulted fully, and in which the governments have not required this as they should under the Convention. It should be noted that every representation is then followed up by the Committee of Experts, and that the International Labour Office provides implementation assistance.

In the same connection, the International Organization of Employers (IOE) submitted comments on a series of government reports in 2012, pointing out that the requirement for consultation was complex and expensive, and could slow down both privately and publicly funded development projects, even when done correctly. While the Employers' Group of the Conference has sometimes stated that the Committee of Experts has asked too much of governments in this respect, their most recent comments ask for both an understanding of the difficulty of consultation and continued assistance to carry it out. They have noted problems, for instance, in "the identification of representative institutions, the definition of indigenous territory and the lack of consensus of indigenous and tribal peoples, and the importance for the Committee to be aware of the consequences of the issue in relation to legal security, financial costs and certainty of both public and private investment." This should be understood not as a protest against supervision but as the contribution of the business community to appreciating the difficulties of compliance.

Another major subject of Committee of Experts' comments has been the lack of coordinated and systematic action by governments to apply the Convention, as is required in Article 2 of C169. This points out the lack of serious attention to the subject in a number of countries, as well as low levels of government spending compared to the needs. In a number of cases, the ILO has provided assistance in organizing such coordinated action, and the Committee of Experts has noted improvements in some cases following this help.

The Committee of Experts has paid a great deal of attention to land rights in particular. Indigenous communities continue to lose the lands they have traditionally occupied, and their right to these lands often has little basis in national legal systems because of a lack of title or other recognition. In far too many cases, their lands have simply been stolen from them, by government or private actors, without compensation or assisted relocation, and usually without advance notice or participation by the indigenous communities in the process.

A related question is the right of indigenous and tribal peoples to natural resources under Article 15 of the Convention. This Article provides that indigenous people have rights related to these resources, while noting that this complex subject has to be settled at the national level taking into account the Convention's requirements. Governments have been called to task for failing to protect indigenous peoples' rights to benefit from these resources and participate in their management, and this has sometimes resulted in action to protect and even to restore these rights.

These are merely examples and general characterizations. Many other comments, too numerous to mention here, have been made under C169 on subjects such as traditional economic activities, education, workplace discrimination and healthcare.

## **Supervision of Other ILO Conventions**

As mentioned above, the situation of indigenous and tribal peoples as workers falls under a number of other ILO standards, and their situation is evoked regularly.

The ILO published a compilation of such comments entitled "Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions - A compilation of ILO Supervisory Bodies' Comments 2009-2010", giving an overview of this subject at that point. Comments continue to be made and assistance given, as outlined below concerning some more recent comments.

## **Forced Labour**

Indigenous peoples around the world are, unfortunately, subject to forced labour of many kinds. The ILO has two principal Conventions on forced labour - the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), both of which have been ratified by more than 165 countries.

Some examples are given here but they are far from the only cases. For instance, in a 2012 observation concerning Paraguay under Convention No. 29, the Committee of Experts evoked reports of debt bondage of indigenous commu-

nities in agricultural ranches in the Paraguayan Chaco. On the basis of several comments made by workers' organizations, this case was raised before the Conference Committee on the Application of Standards in 2008 and the report "Debt bondage and marginalization in the Chaco of Paraguay" was published. There was also technical assistance provided to Paraguay by the ILO Special Action Programme to Combat Forced Labour. The Committee noted that the government had taken a number of measures, including the creation of the Commission on Fundamental Rights at Work and the Prevention of Forced Labour, which developed an action plan including: awareness-raising activities and training for labour inspectors; the establishment of an office of the Department of Labour in the locality of Teniente Irala Fernández (central Chaco); and the adoption (with the support of the ILO) of the Decent Work Country Programme, of which the eradication of forced labour is an important component. The Committee emphasized that these measures were a first step and that they had to be reinforced and lead to systematic action commensurate with the gravity of the problem. More developments have been reported in the most recent report, in particular the relief activities undertaken in the context of the National Programme for Indigenous Peoples (PRO-NAPI). Nevertheless, there have been reports based on interviews with representatives of indigenous organizations of the Chaco that the problem of forced labour in agricultural ranches and factories in the Chaco persists, and that the State has not adopted effective measures to eliminate these practices. The Committee of Experts has asked for further action, and will continue to follow the case.

In another observation in 2012, concerning the application by Peru of Convention No. 29, the Committee of Experts noted the approval of the National Plan to Combat Forced Labour and the creation of the National Committee to Combat Forced Labour (CNLTF) and of various other institutions dealing with forced labour, in particular in the labour inspectorate and the police. Many of the reports of forced labour concern indigenous communities, as in other countries of the region, and the ILO has continued to press for action.

A direct request addressed to Bolivia in 2011 noted information provided by the government itself concerning the existence of forced labour practices in the country, mainly in the sugar cane and nut harvests, as well as in plantations and stock-breeding ranches. Such practices affect indigenous populations of Quechua and Guaraní origin in particular. The Committee noted the detailed information provided by the government, which confirmed the existence of the problem but which was also said to demonstrate the government's efforts in combating it.



The Committee asked the government to continue to make efforts to eradicate forced labour and servitude practices, and particularly to protect and assist victims. Among other things, it requested the government provide information on the impact of ongoing projects and on the implementation of the Development Plan for the Guaraní People, and to report on the measures adopted to strengthen the capacity of labour inspectors in order to ensure that labour inspections are carried out correctly in the areas identified as being of high incidence of forced labour and servitude, indicating the number of inspections carried out.

Other active discussions are ongoing with Colombia, El Salvador and Papua New Guinea on the same subject.

## Discrimination

A number of problems of discrimination against indigenous and tribal peoples have been raised under the ILO's premiere Convention on this subject, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which has been ratified by 172 countries (as of November 2013). This means that – as is true for the forced labour Conventions - far more countries are covered by this Convention than are covered by the specific Conventions on indigenous rights. Among other things, the Committee of Experts monitors statistics on the employment and occupation of indigenous peoples, as it does for other ethnic components of national populations.

The Committee of Experts naturally focuses directly on discrimination in the labour market based on indigenous origin. In a 2012 observation to the Russian Federation, for instance, the Committee noted “the Government's acknowledgement that there is a need for measures promoting non-discrimination in employment and occupation based on ethnic or national origin and to promote tolerance between the various ethnic groups in the country”, referring directly to the indigenous populations in the country. It asked the government to increase “measures to promote equality of opportunity and treatment of members of all ethnic groups with respect to access to vocational training and guidance, placement services, employment and particular occupations, and terms and conditions of employment” and to report back on the measures taken.

The Committee of Experts has considered that discrimination preventing access to the components of equal opportunity and treatment at work can consti-

tute discrimination under the Convention. For instance, denial of land rights for indigenous communities may amount in some cases to discrimination, resulting in the loss of capacity to earn a living. One example of this is found in a Direct Request of 2012 to Nicaragua, in which the Committee noted the adoption of new legislation on “dignified and fair treatment for indigenous and afro-descendant peoples”. In the same comment it noted the adoption of “measures ... to improve education, for example by increasing the number of teachers in the region and increasing teachers’ wages, and producing school textbooks in indigenous languages. Due to these measures, the illiteracy rate has dropped from 58 to 18 per cent”. It also noted that copies of the Labour Code had been distributed in the Misquito language.

Another factor is that the Committee takes account of the fact that indigenous women are often subject to double discrimination, on the basis of both sex and ethnicity. In a 2012 direct request to Panama, for instance, the Committee referred to “the serious situation faced by indigenous women due to, among other reasons, their low level of education, which prevents them from accessing activities which generate sufficient income to provide them with a decent standard of living”. The Committee noted that the UN Committee on the Elimination of Discrimination against Women (CEDAW) had raised similar concerns, and that both committees endorsed a number of measures taken by the government to improve the situation.

## **Child labour**

Indigenous children may be particularly vulnerable to child labour, as noted by the Committee of Experts in a 2012 observation to Honduras under the ILO’s Worst Forms of Child Labour Convention, 1999 (No. 182): “Recalling that the children of indigenous peoples are often victims of exploitation, which takes on very diverse forms, and are a population at risk of being engaged in the worst forms of child labour, the Committee reiterates its request to the Government to intensify its efforts to protect these children from the worst forms of child labour and to provide information on the results achieved in its next report.”

In a 2012 Observation to Bolivia, the Committee took note of allegations of child labour in sugar cane and Brazil nut harvesting submitted by the International Trade Union Confederation (ITUC), stating “that over 10,000 children work with

their parents in the sugar harvest in the country. The tasks performed by children vary: boys work with the men in cutting sugar cane, and girls and young children work with the women in gathering, stripping and bundling the cane. They work very long hours, suffer from respiratory ailments and sustain injuries through the use of machetes. ... in the case of the Brazil nut harvest, children start at the age of seven helping their parents in plantations, assisting with picking and processing the fruit. The work they do is hazardous because they use machetes to crack the nuts and extract the kernels, and they have to walk for hours to find the fruit-bearing trees and work begins in the middle of the night. According to the ITUC, child labour in the sugar industry and in the nut harvest is a practice similar to slavery because the children have no alternative but to work with their parents. They therefore have joint liability with their parents for the debt and are compelled to work to help their parents repay it.”

## **Freedom of Association and Collective Bargaining**

In addition to the Committee of Experts, the other major ILO supervisory procedure is for complaints of violations of freedom of association, in a procedure that does not depend on ratification of any Convention but only on membership of the ILO. One of the gaps in indigenous rights in many countries is that they find it difficult to join or form trade unions, and that their right to bargain collectively is often not respected. Without going into detail on individual cases, the ILO Committee on Freedom of Association has received and dealt with complaints on such violations in a number of countries with significant indigenous populations – in particular Guatemala, Costa Rica, Venezuela and others.

## **Concluding Remarks**

ILO supervision, like that of other human rights bodies, is intended to take account of whether international law is being properly applied or not, and point out both problems and improvements. Supervision of these rights is not, limited to conventions that specifically deal with indigenous and tribal peoples, and nor can it be, but must extend to the broader range of human rights treating indigenous peoples as human beings. Supervision is a vital part of the international role in

protecting indigenous rights, and must also be supplemented by information, assistance and moral pressure.

What is clear even from a cursory examination of the supervisory work mentioned here, is that international supervision often pushes governments to make improvements to comply better with international standards. This applies, of course, to supervision by the United Nations treaty bodies and to bodies such as the Inter-American Court of Human Rights, as well as to ILO supervision. Advocacy bodies for the rights of indigenous and tribal peoples need to be aware of the potential of such supervision, to follow it up and to contribute to it. ○

COUNTRIES AND REGIONS

## CHAPTER 24

## The Unforeseen Consequences of Ratification: Norway and ILO Convention 169 on Indigenous and Tribal Peoples

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*Anne Julie Semb*

Human rights treaties regulate relations that traditionally belong to the prerogatives of sovereign states, namely the relationship between the state and its citizens or sub-sections of its citizenry. ILO Convention 169 (C169) concerning Indigenous and Tribal Peoples in Independent Countries is the only international human rights treaty that explicitly aims to regulate the relationship between states and groups with the status of indigenous peoples. C169 was adopted in 1989 and succeeded C107 dating from 1957. As the very first state, Norway ratified C169 one year later, in June 1990. The decision to ratify was based on the assumption that Norway's domestic law fulfilled C169's requirements, including its requirements on land rights and consequently that ratification would not affect the work of the so-called Sami Rights Commission, beyond what followed from the Commission's mandate and binding statements (Vik and Semb, 2013).

15 years later, in June 2005, the Norwegian parliament, the Storting, passed the so-called Finnmark Act. This Act assigned a registered title to land in Norway's northernmost county, Finnmark, that was previously formally owned by the Norwegian state, to a new body: the Finnmark Estate. The area amounts to approximately 96 per cent of Finnmark's total area of 48,649 square kms, or roughly 1.5 times the area of Belgium.

The Storting's decision marks a temporary end-point in a protracted political process related to the issue of Sami land rights in Norway that came to the forefront of the domestic political agenda in connection with the Alta affair in Nor-

wegian politics.<sup>1</sup> The Finnmark Act is a highly interesting act that addresses the pressing issue of Sami lands rights under Finnmark County's demanding demographic conditions, and the act has already attracted scholarly interest (Hernes and Oskal, 2008). One important and interesting feature of the act has so far not been fully analyzed, however, namely the decisive impact of the previous Norwegian ratification of ILO Convention 169 on the process that preceded the Storting's final adoption of the act as well as the final content of the act. The steadfast growth in the number of international organizations and international treaties has created new channels of political influence for several groups, including indigenous peoples worldwide (Peterson 2010). And one of the features that characterized the process that preceded the Storting's final adoption of the Finnmark Act in 2005 was that the Sami had, to a considerable degree, invoked an international treaty, i.e. C169, vis-à-vis the government and national parliament, the Storting, in their local struggle for a higher degree of control over land (Josefsen 2010). The aim of this chapter is to analyze how the prior Norwegian ratification of C169 impacted on the process as well as the content of the final Finnmark Act in ways that were clearly unforeseen by the Storting as well as by the government in 1990. Through an analysis of the process that preceded the final adoption of the Act, I will identify and discuss some of the mechanisms that linked the prior ratification to the domestic political and legal changes on a largely inductive basis. The mechanisms whereby treaty ratification affects domestic changes will become even clearer by an ad hoc contrasting of the Norwegian case with Sweden and Finland. Sweden and Finland have not ratified C169 but changing Swedish and Finnish governments have stated that their long-term goal is to ratify this convention, provided it proves possible to remove ratification hurdles through changes in domestic legislation prior to ratification. So far, this has not been possible. The legal as well as political terrain that surrounds the claim for Sami land rights in Sweden and Finland therefore differs significantly from the Norwegian situation: the very dynamic interplay between international norms embedded in ratified human rights treaties and domestic political and legal change, which has been a characteristic feature of the relationship between the Norwegian state and the Sami in recent decades in Norway, is lacking in the Swedish and Finnish case.

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1 The Alta affair refers to the political controversy surrounding the damming of the Alta River in the late 1970s and early 1980s. The river flows through central parts of Finnmark, Norway's northernmost county, considered by many to be the core Sami homeland.

The claim that the process that led to the final act and content of the Finnmark Act was heavily influenced by the previous Norwegian ratification of C169 involves an implicit counter-factual assumption, namely that the process and content of the Act would have been different in the absence of the prior ratification. It has been pointed out that scholars who want to study the effect of treaty ratification on state behavior encounter problems of endogeneity and selection (Simmons, 2010, p. 275). Human rights conventions, just like other international treaties, are designed to regulate specific purposes, and "...it is hard to know how much causal weight to attribute to the treaty versus the underlying purpose" (ibid.). In-depth single case studies are often based on sources that allow the researcher to develop a richer and more nuanced picture of the political processes being studied than is feasible in large-N studies. This increases the prospect that researchers are able to demonstrate that particular processes and outcomes may be attributed to treaty ratification rather than the underlying purpose regulated by the treaty.

## From C107 to C169

ILO Convention 169 On Indigenous and Tribal Peoples succeeded ILO Convention 107 On Indigenous and Other Tribal and Semi-tribal Populations. When ILO Convention 107 was adopted in 1957, the Norwegian government voted in favor. Norway never ratified this convention, however, since its view at that time was that the Sami did not qualify as an indigenous population, as defined in this convention, and it therefore deemed the content of the convention irrelevant to Norwegian domestic affairs. C107 was also never ratified by Sweden or Finland.

C107 was, however, renegotiated during the 75<sup>th</sup> and 76<sup>th</sup> International Labour Conferences in Geneva, partly as a response to claims by indigenous peoples that C107 was overly assimilationist.<sup>2</sup> All the Nordic countries participated actively in this negotiation process. The Norwegian, Swedish and Finnish government delegations included Sami members, and the Sami were also represented in the Workers Union delegations from these countries. One of the most difficult parts of the negotiations was the issue of land rights, and the entire section that address-

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2 See Rodríguez-Pinero (2005) for an interesting analysis of the factors that triggered the revision process.



es land rights was carried over from the 1988 conference and negotiated during the 1989 conference. The work on the section on land rights proved extremely time-consuming and difficult. The negotiations were protracted and included several failed attempts at reaching an agreement. In the end, however, the chairman managed to present an entire compromise "package" on land rights after numerous personal meetings with representatives of the governments, workers and employees. The revised convention, C169 On Indigenous and Tribal Peoples, was approved by the 76<sup>th</sup> Labour Conference in June 1989.<sup>3</sup>

The final compromise consistently employs the term 'peoples' rather than 'populations' and includes measures that aim to recognize these groups' rights of ownership and possession over the lands that they traditionally occupy. The Convention also contains measures aimed at safeguarding usufruct rights to areas which are also inhabited by other groups but to which indigenous peoples have had access for the traditional use of natural resources. In addition, the convention contains an article on governments' obligation to consult indigenous peoples on a wide range of matters. The objective of these consultations is to achieve agreement to the proposed measures.

Written comments to the draft convention that was worked out by the ILO Office based on the negotiations in 1988 (ILO 1989a), as well as Nordic propositions put forward during the 1989 negotiations, demonstrate that both Norway, Sweden and Finland clearly preferred to equate "usufruct rights" with the "rights of ownership and possession" in the main article on land rights. This was in accordance with the Ministry of Foreign Affairs' (MFA) instructions to the Norwegian government delegation, which instructed it to work actively to change C107 in a way that would make it possible for Norway to ratify the revised convention (Minde 2003, pp. 118-19). The desire to reach a solution that could be ratified must be seen not least against the domestic political situation at the time. Legislation to establish a Sami representative body, the Sami Parliament, had been adopted in 1987, and the first elections to the new body were scheduled for September 1989. Moreover, in 1988 the Storting had adopted a new paragraph in the Norwegian constitution, §110A, which states that: "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life."<sup>4</sup> Norway was thus in the midst of a process

3 The revised convention is available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>

4 Translation by the Royal Norwegian Ministry of Foreign Affairs.

of redefining the political and legal status of the Sami in Norway at the time, and the desire to be able to ratify must be seen against this background. However, the instruction from the MFA also stated that Norway could not ratify a convention that demanded recognition of rights of ownership and possession over lands which indigenous peoples had traditionally occupied (Minde 2001:119).

The proposals to equate “user rights” with “rights of ownership and possession” triggered massive protests by the workers’ representatives and was ultimately withdrawn in an effort to reach a compromise. According to Minde, a clarification paper from the Norwegian MFA’s Office of (Human) Rights (1. Rettskontor) had made it clear that the delegation at least had to express their reservations and reasons for the vote, if it proved impossible to reach a satisfactory solution on the issue of land rights (*ibid.*). In an intervention on behalf of the governments of Norway, Sweden, Finland and Denmark during the plenary session on 26 June 1989, which preceded the adoption of the final text, one member of the Norwegian government delegation, Mr. Arne G. Arnesen, emphasized that none of the Nordic states had ratified C169’s predecessor, C107. The reason for the non-ratification was its “... integrationist approach and paternalist form, which is acceptable neither to our indigenous peoples nor to our governments. In our countries, we try to establish a situation of cooperation and mutual respect between governments and indigenous peoples, with self-identification and cultural freedom as keywords” (International Labour Conference Provisional Record 76<sup>th</sup> Session, 31/13). By stating that C107 was assimilationist and that this was the major reason why the Nordic states had been among the non-ratifiers, the Nordic states were distancing themselves from the era of assimilation and signaling that the on-going domestic changes in the Nordic states were built on a desire to strengthen Sami (and in the Danish case: Inuit) culture rather than eradicate it. In addition, Arnesen’s Nordic intervention contained the special reasoning behind the vote, specifying how these governments interpreted the controversial measures on land rights. The point about the need for flexible implementation of the convention and that the convention’s measure on indigenous peoples’ right to ownership and possession of the lands traditionally occupied by them did not necessarily imply a formal title to land was emphasized: “In the course of our work, the need for flexibility in the instruments’ provisions and in the national implementation has been repeatedly pointed out. Given the enormous variations of national circumstances and of the position of the indigenous peoples, flexibility stands out as a sheer necessity. This is especially true in the part dealing with land rights”

(*ibid.*). Mr. Arnesen also referred to the Committee of Experts' interpretation of the term "ownership" in the ILO Convention 107 and, in particular, to that Committee's conclusion that while it "had not found an exact equivalence between 'possession' and 'ownership', it had not found the firm assurance of possession and use to be in violation of the requirement for ownership" (*ibid.*, 31/13-14).<sup>5</sup> The substantive content of the land rights was thus emphasized.

## The Storting's decision to approve ratification of ILO Convention 169

C169 was negotiated under the highly demanding ILO international tripartite structure in Geneva but was, obviously, to be implemented in a domestic context. The legal arrangements which regulated the rights of ownership and possession of the land in Finnmark at the time the Storting was asked to approve ratification of ILO 169 were premised on the view that the Norwegian state owned all areas over which no private ownership had been established. The area that was formally owned by the Norwegian state comprised approximately 96% of Finnmark's total area of 48,649 square km. The recommendation to the Storting to approve Norwegian ratification of the ILO Convention was prepared by the Standing Committee on Municipal and Environmental Affairs, on the basis of a proposal worked out by the Ministry of Municipal and Labour Affairs (St.prp.nr. 102 (1989-1990)). It goes well beyond the scope of this chapter to give a detailed account of the process that preceded ratification.<sup>6</sup> Suffice it here to argue that the Ministry of Justice's statement about how to interpret the measures on land rights played an important role in the process. That statement concluded that Article 14(1) was considerably more flexible than Article 11 in C107, and that Article 14(1) could be fulfilled not only by granting the Sami ownership rights to the territory in question but also by recognizing usufruct rights to those areas. Moreover, the Ministry of Justice also argued that it would be unfortunate to ratify C169 now, if the ratification were to constrain the Sami Rights Commission's *lex ferenda* discussions

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5 The intervention is printed *in extenso* in the Norwegian delegation's report from the negotiations, which was included in the recommendation to the Storting to approve ratification of ILO Convention 169, St.prp. nr.102 (1989-90).

6 See Vik and Semb, 2013, for such an account.

beyond what followed from the Commission's mandate and existing guidelines as well as binding statements, instead arguing that ratification would hardly have such an effect.<sup>7</sup> The recommendation to ratify was presented to the Storting as a unanimous recommendation by the Standing Committee on Municipal and Environmental Affairs (Innst.S.nr. 197 (1989-1990)).

The Storting debated the proposal to ratify ILO Convention 169 on 7 June 1990. The person responsible [saksordfører] for this case, Karita Bekkemellem (Labour), stated that the Ministry of Justice regarded it as "not unlikely" that the state could continue its ownership of land in most parts of Finnmark County. She stated that the Law Group under the Sami Rights Commission might conclude otherwise but that it was too early to be able to know. She then added that it would not be desirable to ratify ILO Convention 169 now, if a consequence of ratification were that this would affect the legal evaluations done by the Sami Rights Commission, beyond what follows from Norwegian laws and statements by Norwegian public authorities. The point that ratification of the ILO Convention would not significantly constrain the work of the Sami Rights Commission was then emphasized: "I believe it is important to underline that a Norwegian ratification will not constrain the Sami Rights Commission's *lex ferenda* discussions beyond those guidelines that follow from binding decisions and statements by Norwegian public authorities" (Stortingstidende 1989-90, p. 3962-3963, author's translation).

Only three MPs, in addition to the relevant Minister, took part in the Storting's discussion of ratification of ILO Convention 169, and the unanimous recommendation to ratify it made by the Standing Committee on Municipal and Environmental Affairs was unanimously approved by the Storting.

## The Sami Rights Commission's work

One of the mechanisms through which ratification of human rights conventions may affect domestic politics is agenda setting: ratification may lead a government to change its priorities and initiate reforms and rights policy as a response to the ratification, even if it has not changed its preferences (Simmons 2009, p.

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7 The Ministry of Justice also recommended that St.prp. nr.102, as well as the Royal resolution on Norway's ratification, be translated to English and sent to the ILO Secretariat to explain how Norway interpreted the requirements on land rights. This was never done, however.

127-128). This mechanism does not seem to be relevant in the case in question: the issue of Sami land rights was already firmly on the domestic political agenda when Norway ratified C169. The Sami Rights Commission had postponed the issue of Sami land rights and instead concentrated on the question of establishing a separate representative body for the Sami as well as a constitutional amendment, issuing its first report in 1984 (NOU 1984:18). However, the Commission continued the work on land rights and was in the midst of this work when C107 was revised. In September 1984, a group of legal experts, later named the Law Group (Rettsgruppen), was appointed to clarify the legal status of the existing land ownership and usufruct arrangements in Finnmark. The Law Group published its report in 1993 (NOU 1993:34). The majority of the group concluded that Articles 14 and 15 in C169 were not immediately relevant to Norwegian affairs, as the Sami did not fulfil the conditions for claiming "ownership and possession" to lands in Finnmark (*ibid.*, pp.53-55). When interpreting the measures, the Law Group paid close attention to the statement by the Ministry of Justice that was included in the recommendation to the Storting that Norway could and should ratify C169 (*ibid.*, p. 54).

The Law Group's conclusions triggered protests, not least from Sami organizations, who argued that it had not paid sufficient attention to Sami legal traditions and had given an inadequate interpretation of the Norwegian state's obligations under international law. Partly as a response to these protests, the Sami Rights Commission appointed a new group, the International Law Group (Folkerettsgruppen). This group was to put more emphasis on Sami legal traditions and specify Norway's obligations under international law. The group's report was published in 1997 (NOU 1997:5). The International Law Group's conclusions deviated from those of the Law Group, as the International Law Group concluded that the Sami did fulfil the conditions for claiming "ownership and possession" of lands in parts of Finnmark. Moreover, according to a majority of the International Law Group, many of the Ministry of Justice's conclusions, as well as some of the Law Group's conclusions, "cannot be correct" (*ibid.*, p. 36 and 37), or were "obviously wrong" (*ibid.*, p. 38). The sources considered relevant for the exposition of Norway's treaty obligations do not include the proposal that constituted the sole basis of the Storting's decision to approve ratification of C169 (*ibid.*, p.22).

The second report by the Sami Rights Commission was issued in 1997 (NOU 1997:4), and this report concentrates on the issue of land rights in Finnmark. A majority of the Sami Rights Commission recommended that land that was for-

mally owned by the Norwegian state in Finnmark should be transferred to a new independent legal entity, Finnmark grunnforvaltning, with a Board of Directors consisting of eight members, four to be appointed by the Sami Parliament and four to be appointed by Finnmark County Council. The report includes a lengthy discussion of the relationship between Article 14(1) and the proposal to establish the new legal entity (*ibid.*, pp.90-93).

## **The Government bill on land rights in Finnmark**

The report by the Sami Rights Commission was issued in 1997. As is common practice, a large number of interested parties, including organizations and municipalities, were invited to submit written comments in a public hearing after publication of the report. The deadline for submitting these statements was 1 March 1999. Mr. Odd Einar Dørum, Minister of Justice in the center-right minority government 2001-2005, eventually decided to go ahead with the issue of land rights, well aware that he was entering a mine-field (Dørum and Meyer 2008, p. 213). The government bill (Ot.prp. nr. 53 (2002-2003)) was completed in April 2003 and was then sent to the Storting's Standing Committee on Justice. The bill built on, but was not identical to, the proposals in NOU 1997:4. The bill proposed the establishment of a new management arrangement, Finnmarkseiendommen [the Finnmark Estate], for the land in Finnmark for which no private ownership was established. The title to the land in question was to be transferred to the Finnmark Estate. The bill further proposed that the board of the Finnmark Estate consist of seven persons, three appointed by the Sami Parliament and three appointed by Finnmark County Council. The government would appoint one member without the right to vote. In the case of a tie, the board member appointed by the government could ask the relevant Ministry to make a decision and, in such cases, the decision by the Ministry was to have formal status as a decision by the Board.

## **Domestic political mobilization in the aftermath of treaty ratification**

Simmons suggests that one of the most important ways in which treaty ratification affects domestic politics is through domestic political mobilization (2009, p.135-

148). The crux of her argument is that ratification of human rights treaties affects the probability that individuals will mobilize politically, as ratification affects both the probability that mobilization will be successful and the value individuals place on succeeding. Ratification increases the probability that mobilization will in fact be successful in various ways. The chance that individuals and groups will mobilize politically, i.e. formulate a set of political demands and organize to have those demands met, also increases when they perceive that there is a gap between the rights embedded in international treaties to which the government has voluntarily and publicly committed and their current perceived rights situation. Ratified human rights conventions define the size of the perceived rights gap and thus the perception of what can be gained by mobilization. Ratification thus also affects the value individuals and groups place on succeeding. As we shall see, a number of these mechanisms seem to have been operating in the current case.

The government bill led to a massive mobilization on the part of the Sami Parliament. It discussed the bill at its meeting in May 2003 and criticized the content as well as the process that preceded its completion (Sametinget 2003). After lengthy discussions, the plenary of the Sami Parliament adopted a declaration on the bill, with only three opposing votes, stating that the bill fell short of many measures in C-169, e.g. it did not contain any measures on recognition of existing rights. Moreover, in a comment on the process rather than the substance, the declaration stated that the Sami Parliament could not agree to the Storting adopting the bill in its current form, arguing that the Sami Parliament had to be consulted in the process ahead in order to ensure that it would find the final solution acceptable. The Sami Parliament's declaration thus firmly criticized the bill for not fulfilling Norway's obligations under international law, and claimed that its demands were not merely consistent with but rather required by treaty obligations.

### **How ratification increases the prospect of successful political mobilization**

The Sami Parliament's strong reaction to the bill and its consistent claims that its demands were not merely consistent with but rather mandated by Norway's treaty obligations seemed to create uncertainty among the members of the Standing Committee on Justice as to whether or not the bill was actually in accordance with Norway's obligations under international law, and this led the Committee to

initiate some highly unusual moves and to process the government bill in a way that would be more or less unthinkable in the absence of prior ratification of C169. In a letter dated 19 June 2003, the Committee asked the Ministry of Justice to appoint a group of independent legal experts with the mandate to assess the bill from an international law perspective. As will be recalled, the Storting had unanimously recommended that the government ratify C169 13 years earlier, in 1990. The Standing Committee was therefore pre-committed to taking the demands of the Sami Parliament seriously (cf. Simmons 2009, p. 144). The treaties listed as most relevant were the ICCPR (Article 27) and ILO Convention 169. A few days later, the Ministry of Justice appointed an independent two-person group consisting of two law professors from the University of Oslo, Geir Ulfstein and Hans Petter Graver. The Sami Parliament also worked actively to attract international attention to its case (Josefsen 2008, p. 102). In its concluding observations on Norway from August 2003, the Committee on the Elimination of Racial Discrimination criticized the government bill and expressed its concern that "...the recently proposed Finnmark Act will significantly restrict the control and decision-making powers of the Saami population over the right to own and use land and natural resources in the Finnmark County..." and "...recommends that the State Party find an adequate solution concerning the control and decision-making powers over the right to land and natural resources in the Finnmark County in agreement with the Saami people" (CERD/C/63/CO/8). And, in October 2003, the Standing Committee on Justice decided to initiate formal consultations with Finnmark County Council and the Sami Parliament in order to comply with the requirements of Article 6 of C169. To be sure, there had been previous contact between the Sami Parliament and civil servants in relevant ministries regarding the bill but the Sami Parliament had refused to recognize this contact as consultation properly speaking, due to the nature and scope of the contact (Henriksen, 2008, pp. 11-12). Formal consultations with the Sami Parliament (or any county council) is not included in the Storting's Rules of Procedure but the President of the Storting still approved this extraordinary procedure.

The Graver/Ulfstein report was completed early in November 2003. The report concluded that the bill did not fulfil the substantive requirements of C169 as it did not give the Sami the degree of control over territory that is required by Article 14(1) (Justisdepartementet 2003a). In a press release issued by the Ministry of Justice on the same day as the publication of the Graver/Ulfstein report, the Minister of Justice declared that he took note of the fact that the Standing Commit-



tee had decided that it wanted to initiate consultations with the Sami Parliament and Finnmark county council in further work on the bill (Justisdepartementet, 2003b).<sup>8</sup> Furthermore, the Ministry stated that since the bill had now been presented to the Storting and the Standing Committee, and the request for an independent assessment of the bill had come from the Standing Committee, it was up to the Storting and Standing Committee on Justice to determine how much emphasis should be placed on the report in the further work on the bill (ibid.).<sup>9</sup> In December 2003, however, the Standing Committee asked the government to state its opinion on the Graver/Ulfstein report and to outline alternative institutional solutions that would be compatible with the requirements of international law on a range of other issues, including the composition and decision-making rules of the Board of Directors of the Finnmark Estate. The government's answer came in two separate letters, one dated 6 April 2004 and one dated 14 June 2004. The answer was based on a letter from the Department of Law in the Ministry of Foreign Affairs to the Ministry of Justice, as well as on a review by the government's special advisor on international law. The letter to the Standing Committee on Justice dated 6 April stated that the government did not agree with all the interpretations in the Graver/Ulfstein report and thus also not with all the report's conclusions. It further said that the government regarded the existing bill as firmly based on international law but still believed that it might be appropriate to consider "supplementary measures" to meet the C169's requirement that existing individual and collective rights should be identified. The letter dated 14 June included a specification of how the process of identifying existing rights could be organized and a discussion of the composition and decision-making rules of the proposed board. The government's pre-commitment thus seems to have made it politically close to impossible to ignore or deny the significance of the alleged shortcomings of the government bill. In his autobiography, the Minister of Justice writes that, in sum, the government exercised self-criticism in the sense that it pointed at the need for supplementing the original bill from 2003, which is far from common in Norwegian political life (Dørum og Meyer 2008, p. 218).

Rather than returning the bill to the Ministry of Justice, which would have been the normal procedure in cases where the Standing Committee disagrees with

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8 My translation. The press release is available at [http://www.regjeringen.no/nbs/dokumentarkiv/Regjeringen-Bondevik-11/jd/Nyheter-og-presse-meldinger/2003/folkerettslig\\_vurdering\\_av\\_finnmarkslove.html?id=234061](http://www.regjeringen.no/nbs/dokumentarkiv/Regjeringen-Bondevik-11/jd/Nyheter-og-presse-meldinger/2003/folkerettslig_vurdering_av_finnmarkslove.html?id=234061)

9 My translation.

large parts of a government bill presented by a coalition minority government, the Standing Committee on Justice started the time-consuming and challenging work of revising the bill itself – in close cooperation with the Sami Parliament and Finnmark County council. A total of four formal consultations took place over the period March 2004 to April 2005. The Sami Parliament worked out position papers prior to the consultations.<sup>10</sup>

The fact that the Standing Committee on Justice chose not to return the government bill to the Ministry of Justice is one of many intriguing features of the process that preceded the final adoption of the Finnmark Act. The situation in fact offered the Storting an excellent opportunity to embarrass the minority coalition government, one that was not seized. One of the reasons for this may have been the nature of the matter: the legislators may have considered it inappropriate to turn the issue of Sami land rights, which had been an unresolved issue for decades, into a matter of pure party politics.

The Standing Committee received a great deal of input from several actors in the course of the work. One interesting feature of the process that followed the presentation of the government bill was the very active involvement of lawyers, not least lawyers from the academic world. With almost no exceptions, these lawyers belonged to the pro-rights coalition and fiercely criticized the bill for building on an inadequate interpretation of the nature of treaty obligations under C169 and for violating the requirements that the Norwegian government, with the unanimous support of the Storting, had voluntarily subjected itself to little more than a decade earlier. The relevance of rather vaguely formulated provisions in international treaties to specific local and national conditions will, with few exceptions, be contested and lawyers within academia were very active in “interpreting” the meaning of some of the most contested articles in a local, regional and national context.

It has been pointed out that the external enforcement mechanisms connected to most human rights treaties are weak and that such treaties also lack the defining features of self-enforcing treaties (Simmons, 2010, p. 275). The most impor-

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10 These documents are available at <http://www.samediggi.no/Artikkel.aspx?Ald=249&back=1&MId1=3296&MId2=3296&MId3=3296&>

The procedures for consultations between the state and the Sami Parliament were later specified in a Royal Resolution which stipulates that the aim of the consultations is to reach an agreement between the Sami Parliament and the relevant state authority (Kommunal- og regionaldepartementet 2005). The practice of consulting the Sami Parliament during the preparation of the bill was termed “a constitutional novelty” in the recommendation (Innst.O.nr. 80 – 2004-2005, p. 15).

tant stakeholders with regard to human rights treaties by far are consequently not other states but rather domestic actors that are likely to use the treaty as a tool for obtaining their political goals (cf. Simmons, 2009). Although the external enforcement mechanisms connected to C169 were indeed weak, the ILO Committee of Experts issued a report in 2004 which stated that the government bill would “replace the rights of ownership and possession recognized by the Convention with a right to a large share in the administration of the region” (CEARC: Individual Observations concerning Convention No.169, Indigenous and Tribal Peoples, 1989 Norway (ratification: 1990) Published: 2004, section 17). The report then argued that the bill would meet the requirements of C169 provided the Sami Parliament agreed to the proposed solutions: “The process and the substance are inextricably linked in the requirements of the Convention, and in the present conflict. It appears to the Committee that if the Sami Parliament, as the acknowledged representative of the Sami people of Norway, were to agree to the proposal, they could accept this solution as a resolution of the claims of land rights which have long been the subject of negotiation between the Sami and the government. The adoption of the Finnmark Estate without such agreement amounts, however, to an expropriation of rights recognized in judicial decisions in Norway and under the Convention” (*ibid.*, section 19).

The result of the Standing Committee’s work, which lasted for more than two years, was a recommendation to the Storting’s lower chamber (Innst.O. nr.80 – 2004-2005) from the majority of members of the Committee which, on a number of points, deviated significantly from the bill presented by the government in April 2003.<sup>11</sup> Among the most important changes were the inclusion of an entirely new chapter on the identification and recognition of existing rights to the land formally owned by the Finnmark Estate, in order to accommodate one of the requirements of Article 14 of C169.<sup>12</sup> The Standing Committee maintained that the basis of this identification was to be domestic law and legal practice. Other important differences between the government bill and the final recommendation by the

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11 The minority consisted of the representative from the Socialist party and the representative from the right-wing Progress party. These MPs presented separate and diverging proposals for several articles in the bill.

12 The mapping of existing rights by the independent Finnmark Commission has started and is likely to be time consuming. Decisions taken by the Finnmark Commission may be appealed to a special tribunal, the Uncultivated Lands Tribunal, which was established in connection with the appointment of the Finnmark Commission.

Standing Committee were significant substantial changes in the article on the purpose of the new act, the removal of the state representative from the Board of Directors, and changes in the decision-making rules of the board in order to strengthen the Sami Parliament's influence over decisions concerning changes in the use of uncultivated land in the inner parts of Finnmark.<sup>13</sup> Moreover, C169 was partially incorporated into the Finnmark Act in new Article 3, which states that the Finnmark Act shall apply within those limits that follow from ILO Convention 169 and that it shall be applied in compliance with the provisions of international law concerning indigenous peoples and minorities. As Norway is a dualist state, the partial incorporation of C169 into the Finnmark Act strengthened the role of C169.

The majority of the members of the Standing Committee argued that the revisions that had been undertaken had been necessary to accommodate Norway's obligations under C169, Article 14, and stated that it was startling that the Socialist party, which has traditionally been strongly in favor of fulfilling Norway's obligations under international law, was "against a bill that is necessitated by our obligations under ILO Convention 169, article 14" (Innst.O.nr. 80 – 2004-2005, p.15).<sup>14</sup>

The processing of this recommendation was also unique. In a letter to the Storting's President from the President of the Sami Parliament dated 8 April 2005, the latter requested the opportunity to let the Sami Parliament process the draft recommendation and make a decision on the case before the Storting's lower chamber processed the final recommendation – a procedure that contradicts the Storting's Rules of Procedure. The President of the Sami Parliament justified the request by referring to ICCRP and Articles 6 and 7 of C169. Five of the six persons that constituted the Storting's Presidency recommended to the Storting that the request by the Sami Parliament be accommodated, referring to paragraph 64 of the Rules of Procedure, which allows for exceptional procedures in exceptional cases (Innst.S nr. 169 (2004-2005)). The recommendation refers to the fact that the Standing Committee had had "consultations" with the Sami Parliament, referring to the meetings between the Standing Committee and Finnmark County Council as "hearings". (ibid.). Even though the Presidency referred to the meetings with Finnmark County Council as "hearings", however, it recommended the Storting approve a procedure that implied that Finnmark County Council, as well

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13 See John B. Henriksen, 2008, for a detailed account and analysis of the main differences between the government bill and the final Finnmark Act.

14 My translation.

as the Sami Parliament, would process the draft recommendation by the Standing Committee before the final recommendation was presented to the Storting's lower chamber.<sup>15</sup>

The Storting's lower chamber debated the recommendation on 24 May 2005, and the Finnmark Act was adopted on 8 June 2005, despite massive local protests in Finnmark, and against the wishes of the Socialist party, the Progress party and the small Coastal party. Simmons has argued that "[r]atified treaties offer opportunities to increase the size of the pro-rights coalitions in ways that would be less available without the ratified treaties" (2009, p. 145). Ratified treaties provide legitimacy to political demands, and they may be particularly important sources of individuals' perceptions of normative acceptability when the rights standards are new, in question, or in flux (cf. Simmons, 2009, p. 147), i.e. under those conditions that surrounded the entire question of Sami land rights in Norway. It is extremely hard to determine whether the size of the pro-rights coalition within the Storting increased during the Standing Committee's work on the bill or not. It is, to be sure, not unlikely that individual MPs (or Ministers) changed their mind about the rightfulness of the standards embedded in C169 during the course of the process and thus firmly belonged to the pro-rights coalition when the Storting passed the Finnmark Act. However, based on the debates in both lower and upper chambers, it seems fair to conclude that several MPs voted for the Finnmark Act not primarily because they belonged to the "pro-rights constituency" but because they belonged to the larger "pro-compliance constituency" (cf. *ibid.*, p. 146). For MPs belonging to this larger pro-compliance constituency, voting in favor of the recommendation was primarily a matter of fulfilling existing obligations under international law. Although the MPs from the Progress party neither belonged to the pro-rights constituency nor the pro-compliance constituency, their position is still interesting for the purposes of this chapter: they explicitly belonged to an ad hoc anti-compliance constituency. The Progress party primarily wanted to reject the bill or, alternatively, make support for the bill conditional upon popular support for the bill in a referendum in Finnmark. The Progress party disputed the interpretations of the requirements of C169 that had informed the work of the Standing Committee also stating that international reactions to non-compliance would probably amount to mere statements of disapproval, which they considered a low

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15 Finnmark County Council processed the draft recommendation on 12 May 2005, while the Sami Parliament did so on 13 May.

price to pay to avoid conflict in Finnmark. The Progress party also suggested that Norway retract its ratification of C169 as soon as possible.

A brief comparison with the Swedish and Finnish cases illustrates the significance of treaty ratification. Neither Sweden nor Finland has ratified C169. However, different Swedish and Finnish governments have stated that their long-term goal is to ratify this convention, provided it proves possible to remove ratification hurdles through changes in domestic legislation prior to ratification. So far, this has not been possible. Both in Sweden and in Finland, a number of reports and studies on the issue of Sami land rights have been prepared but there is massive opposition in both countries. The size of the pro-rights coalition in Finland and Sweden has so far not been large enough to secure a majority for domestic legal changes that would make it possible to ratify it (Semb, 2012). And, in the absence of ratification, there is no (larger) pro-compliance constituency that could have pushed for, or at least not opposed, legislative change on land rights, even if they were not necessarily part of a pro-rights coalition. The strategy that has proved rather successful in the Norwegian case, namely to turn norms embedded in ratified international human rights treaties, not least C169, against national authorities in order to press for regional and local political change, is simply not available to the Swedish or Finnish Sami Parliaments, and Sami land claims in Sweden and Finland remain an unresolved issue.

## **Treaty ratification and the value of successful mobilization**

The prior ratification of C169 undoubtedly contributed significantly to the success of the mobilization. Beth Simmons has suggested that ratified treaties can change individuals' and groups' self-understanding, including their understanding of their interests, and thus also increase the value these actors place on succeeding in their mobilization (2009, pp. 139-144). If this is so in the case under consideration, we should therefore find that ratification of C169 contributed to altering the way in which many Sami conceived of themselves and their interests, as well as their relationship with the Norwegian state, and that this motivated the Sami to mobilize. Since C169, in contrast to C107, employs the term "indigenous peoples" and emphasizes these groups' land rights, one could expect that the ratification might have contributed to fostering a collective identity as a separate people with a distinct culture intractably connected to specific ways of relating to and using

nature in a specific area or historical homeland and thus to have affected the perceived size of the rights gap.

It is extremely hard, not to say impossible, to determine whether ratification of C169 actually contributed to fostering an identity as a separate people with a distinct culture unable to survive on a “cultural marketplace”, and whose relationship to land is considered “more natural and sacred” (Gaski 2008, p. 228) and therefore among the most crucial interests to secure. A perhaps equally plausible assumption is that the very active role, formally as well as informally, played by the Sami in connection with the renegotiation of C169 in 1988 and 1989 and the subsequent mobilization is at least partly explained by the prior existence of such a self-understanding, at least at the elite level. The ideas in C169 can hardly be described as new ideas in the context of indigenous politics. One rather powerful indication that the Sami Parliament did place a high value on succeeding in the mobilization is the fact that the two largest political parties at the Sami Parliament managed to reach a compromise solution in the meeting in May 2003 – despite initial and considerable political disagreement (Mellingen 2004, pp. 141-144). However, it remains an open question as to whether the value placed on succeeding was linked to changes in the self-understanding caused by ratification of C169.

On one point, however, C169 seems to have had an undisputed “educational function”: it provided the benchmark for the new demand that the Sami, qua separate people, should be consulted in important political processes. The ratification has, on this assumption, been among the most important driving forces behind the desire to regard the relationship between Sami and non-Sami Norwegian citizens as a relationship between two separate peoples rather than between a minority and a majority and the corresponding institutional implication that the Sami Parliament has to serve as an institutional intermediary between individual Sami voters and citizens and national political bodies.

## Conclusion

Treaty ratification affects domestic politics in ways that may be extremely hard to foresee at the time of ratification. The Norwegian government's decision to ratify C169 in 1990 had an impact on the process that preceded the final adoption of the Finnmark Act as well as the content of that Act that were clearly unforeseen by the government as well as by the Storting at the time of ratification. The prior

ratification is an important part of the explanation as to why the mobilization by the Sami Parliament was so successful, and the ratification may also, at least to some extent, have affected the value placed on success. Beth Simmons has argued that “the political world differs in important ways on either side of the ratification act” (2009:13), and the current case demonstrates that this holds true, even in a mature democracy such as Norway. ○

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## CHAPTER 25

# The Future of Indigenous Rights in Africa: Debating Inclusiveness and Empowerment of Collective Identities

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Dr. Felix Mukwiza Ndahinda

An ever-growing academic and non-academic literature has explored the genesis and current configuration of the indigenous rights movement on the African continent.<sup>1</sup> Since the first decade of the 21st century, the African Commission on Human and Peoples' Rights (ACHPR), the institutional human rights body created under the African Charter on Human and Peoples' Rights, has produced a number of general or country-specific reports and also adjudicated on various aspects of indigenous rights.<sup>2</sup> Prior to the ACHPR's involvement in issues of con-

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1 See among many others: S. A. Dersso (ed.) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*, Pretoria, Pretoria University Press (PUP, 2010), F. M. Ndahinda, *Indigenoussness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities*: The Hague/Berlin, Asser Press/Springer; D.L. Hodgson (2011), *Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World*, Bloomington, Indiana University Press; D. L. Hodgson, "Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas", (2002) *104 American Anthropologist* 4, 1037-1049, at 1042; S. Saugestad, *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari* (Nordic Africa Institute, 2001) pp. 52-54; A. K. Barume, *Heading towards Extinction? Indigenous Rights in Africa: The Case of the Twa of the Kahuzi-Biega National Park, Democratic Republic of Congo* (IWGIA Document No. 101, 2000); J. Igoe, "Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics", (2006) *105 African Affairs* 420, 399-420; K. N. Bojosi, "Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights", (2006) *6 African Human Rights Law Journal*, 382-406.

2 For relevant documents, mostly produced jointly with IWGIA, see: <http://www.iwgia.org/regions/africa>, <http://achpr.org/mechanisms/indigenous-populations/>, visited on 9 May 2012. On what is commonly referred to as the Endorois Case, see: *Centre for Minority Rights Development (Ken*

cern to claimant indigenous communities in Africa, the International Work Group for Indigenous Affairs (IWGIA) had already become the leading organization producing an extensive literature on various general or specific aspects of indigenous peoples and rights on the continent.<sup>3</sup> Increased participation on the part of activists or representatives from African communities in global indigenous forums, such as the former United Nations Working Group on Indigenous Populations or the United Nations Permanent Forum on Indigenous Issues, coupled with the relevant work of the International Labour Organization in Africa, testifies to the fact that the indigenous rights movement has taken root on the continent.<sup>4</sup>

Representatives from particularly vulnerable communities, essentially composed of hunter-gatherers and pastoralists, have increasingly adopted an indigenous rights discourse in the quest for their collective empowerment. Problems of marginality, dispossession and the demise of certain lifestyles such as hunting-gathering or transhumant pastoralism are hardly disputed. Numerous factors, mostly linked to the advent of contemporary statehood in Africa and its “development-modernization project”, have contributed to the progressive shrinking of the lands and resource-base upon which the traditional livelihoods of most communities enlisting in the global indigenous movement rested.<sup>5</sup> Equally undisputed is the fact that the enrolment of activists or representatives from certain African communities in the global indigenous movement has somewhat contributed to the empowerment of beneficiary communities as their cause and grievances gained more visibility.

In spite of the undeniable benefits arising from the inclusion of African communities in the global indigenous movement, the recognition and implementation of indigenous rights in specific African countries still raises some unanswered questions. Under the very etymology of the concept “indigenous”, certain individuals or groups are considered as more connected to specific lands or territo-

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*ya*) and *Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003 (2009).

- 3 For the various frequent publications, including in the *Indigenous World and Indigenous Affairs*, see; <http://www.iwgia.org/publications/publications-by-language/english-publications>, visited on 9 May 2012.
- 4 On the involvement of various bodies, see: Ndahinda 2011, pp. 56-62; and ; F. Viljoen, “Reflections on the legal protection of indigenous peoples' rights in Africa”, in S. Dersso, *supra* note 1, pp. 75-93.
- 5 On the link between indigeness and development discourses, see: J. Ngugi, “The Decolonization-Modernization Interface and The Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa”, 20 *Wisconsin International Law Journal* (2002), pp. 297-351.

ries than others. The contemporary indigenous rights framework therefore seems to ascribe rights to individuals or communities on the grounds of their historical and special connection to land. On an African continent harboring close to 2,000 different ethno-cultural groups this, and also the other criteria for identifying indigenous peoples, remain either relative or rather subjective.<sup>6</sup> As a result, the recognition and implementation of indigenous rights - primarily in multiethnic countries or in countries with several competing indigenous claims - generally clashes with nation-building policies pursued since decolonization. The politics of belonging have plagued a continent made up of countries characterized by political boundaries that group communities together by shared colonial past rather than by common roots or a process of historical integration of various communities into a single state. Accordingly, claims for special legal protection on the grounds of autochthony raise fundamental issues that go far beyond the sole realm of indigenosity as they intersect with other collective claims by ethno-cultural groups that seek recognition of their cultural, religious or land-related rights.

While the struggle for recognition and implementation of indigenous rights in Africa is thus part of a global dynamic, contextual realities in some countries make it quite complex to recognize and enforce such rights. Meaningful recognition and implementation of indigenous rights still has to overcome several questions relating to semantic and substantive representations of indigenosity in Africa. Among many other recurrent questions, some of which are not specific to the African context, are: who is indigenous and who is not? Which specific lands or territories are subject to indigenous claims by (a) given group(s)? Who is or is not included in the group? What individual and collective rights shall be recognized to the group and its members? What exact form of empowerment does a group need? Who exactly is involved in making this determination? How does this fit into local, national or regional landscapes? What is the exact meaning of indigenous self-determination in a specific context? How does this right, and also the other collective rights of indigenous peoples, intersect or clash with other rights or policies in broader than indigenous constituencies? Most importantly, what is the future of indigenous rights in Africa, against the backdrop of other identity debates

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6 On the generally invoked identification criteria, see: E-I A. Daes, Working paper by the chairperson-rapporteur on the concept of "indigenous people". UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 69; ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (IWGIA, Copenhagen, 2005), pp. 86-103.

on the continent? Many of these questions are examined in this inquiry, which tentatively intends to discuss the future of indigenous rights on a continent that is still struggling with a crisis of identity and multilayered identity crises.

## The Current Reality of Indigenous Rights in Africa

### From Global to Local

Representatives from communities such as the Khoe-San (Bushmen), the Batwa-Pygmyes, the Maasai, Mbororo and Tuareg - among many other hunter-gatherer and pastoralist groups - are currently regular participants in global networks and forums dedicated to furthering indigenous rights. The process of domestication of indigenous identification and narratives on the African continent began at the end of 1980s and early 1990s with a still limited participation of African actors in global indigenous platforms.<sup>7</sup> Global actors, both individuals and institutions, were instrumental in “stirring up” and furthering indigenous identification and organization on the continent.<sup>8</sup> After roughly two decades of indigenous rights activism, the central narratives of contemporary indigeneity are an integral part of socio-political discourse across the continent. The sources of the predicament of African communities currently enrolled in the indigenous rights movement certainly predate their adoption of the indigenous rights language to reclaim socio-legal protection and empowerment. From the pre-colonial era on, hunter-gatherer groups such as the Batwa Pygmyes, the San or East African foragers were increasingly pushed to the margins by communities that asserted political control over their lands through the establishment of

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7 On the genesis of the indigenous rights movement in Africa, see more generally: R. Niezen, *The Origin of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Berkeley, 2003), pp. 20 *et seq.*; Ngugi, *supra* note 5, pp. 297-351; F. M. Ndahinda, “Historical development of indigenous identification and rights in Africa” in R. Laher and K. Sing’Oei, *Indigenous People in Africa: Contestations, Empowerment and Group Rights*, Pretoria, Africa Institute of South Africa (2014), 24-44.

8 IWGIA, “Editorial”, *Indigenous Affairs* 3 (1998), p. 4; see also: J. Igoe, “Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics”, (2006) *105 African Affairs* 420, 399-420, p. 407; Ndahinda, *supra* note 1, pp. 61-62.

more or less powerful kingdoms.<sup>9</sup> Among other groups that dominated hunter-gatherer communities in pre-colonial Africa were the so-called Bantu but also pastoralist groups such as the Maasai, whose marginality is mainly tied to the demarcation of, and policies pursued under, the colonial state.<sup>10</sup> Similarly, relationships between the Khoe and the San peoples – currently referred to as Khoesan under the indigenous rights movement – have been characterized more by inequalities than by harmonious coexistence and cooperation throughout history.<sup>11</sup> Not surprisingly, the homogenizing tendencies to equate the historical experiences of marginalization, discrimination and dispossession of all claimant African indigenous peoples have rather been questioned.<sup>12</sup>

The involvement of African communities or representatives in indigenous rights activism was a culmination of different stages of mobilization. Towards the end of the 1980s and early 1990s, a number of grassroots organizations emerged aimed at addressing the socio-political and developmental challenges facing specific communities.<sup>13</sup> They sought to improve the livelihoods of community members through local development projects. The globalization of the indigenous

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- 9 See: R.B. Lee and R.K. Hitchcock, "African Hunter-Gatherers: Survival, History, and the Politics of Identity", (2001) *Supp. 26 African Study Monographs*, 257-280; R. Blench, 'Are the African Pygmies an Ethnographic Fiction?', in K. Biesbrouck et al. (eds.), *Central African Hunter-Gatherers in a Multidisciplinary Perspective: Challenging Elusiveness* (CNWS Publications, 1999), at 41-60; J.S. Solway and R.B. Lee, "Foragers, Genuine or Spurious? Situating the Kalahari San in History", (1992) *33 Current Anthropology*, 187-224
- 10 L. Cronk, "From Hunters to Herders: Subsistence Change as a Reproductive Strategy among the Mukogodo", (1989) *30 Current Anthropology* 2, 224-234; G. Lynch, "Kenya's new indigenes: negotiating local identities in a global context", *Nations and Nationalism* 17 (1), 2011, 148-167.
- 11 S. Saugestad, "The Indigenous Peoples of Southern Africa: An Overview", in Hitchcock and Vinding, *Indigenous Peoples Rights in Southern Africa* (IWGIA Document No. 110, Copenhagen, 2004); pp. 22-41.
- 12 See for instance: D.L. Hodgson, "Precarious Alliances: The Cultural Politics and Structural Precipitants of the Indigenous Rights Movement in Tanzania", (2002) *104 American Anthropologist* 4, 1086-1097. See also: R.B. Lee, "Twenty-First Century Indigenism", 6:4 *Anthropological Theory* (2006), pp. 455-479 on the different historical experiences between the San and what the author calls the Khoe and Neo-Khoe.
- 13 For relevant literature, see: J. Igoe, "Scaling up Civil Society: Donor Money, NGOs and the Pastoralist Land Rights Movement in Tanzania", 34:5 *Development and Change* (2003), pp.863-885; M.H. Kaldor, "The Ideas of 1989: The Origins of the Concept of Global Civil Society", 9 *Transnat'l L. & Contemp. Probs.* (1999), pp. 475-488; J S. Robins, "NGOs, 'Bushmen' and Double Vision: The Khomani, San Land Claim and the Cultural Politics of 'Community' and 'Development' in the Kalahari", 27 *Journal of Southern African Studies* (2001), pp. 833-853; E. Hutchful, "The Civil Society Debate in Africa", 51:1 *International Journal* (1995-1996), pp. 54-77.

rights movement reached the African continent around this time. A number of actors from some hunter-gatherer but mostly pastoralist communities readily saw the benefits of aligning their grievances with those of indigenous peoples around the world. They engaged in a process of "indigenization", adopting indigenous rights narratives when formulating their demands vis-à-vis the state. The first step in the process of indigenization consisted of enrolment in global platforms advocating for recognition and protection of indigenous rights.<sup>14</sup> Activists from groups such as the Maasai, the Batwa, Hadzabe and (Khoe) San became some of the early participants in global networks and platforms furthering indigenous rights. Besides attending global conferences and engaging in global networks advocating for the recognition and protection of indigenous rights, an increasing number of representatives from African communities became regular participants in the gatherings of the now defunct United Nations Working Group on Indigenous Populations and, since the early 2000s, the Permanent Forum on Indigenous Issues.<sup>15</sup> Alongside IWGIA, several bodies – such as the United Nations Voluntary Fund for Indigenous Populations - have stimulated and (financially) facilitated the participation of African representatives in global indigenous platforms. The concept of "representatives" may also be misleading. Participants in indigenous forums were not (and are not) always mandated by the communities they claim to represent and, in some cases, such status remains heavily disputed.<sup>16</sup> Moreover, far from being a grassroots dynamic, participation in indigenous platforms was (and remains) rather an elite-driven process as participants in global platforms and initiators of indigenous communities' projects are mostly educated members of these communities. Some of these (so-called) local advocates of indigenous rights are based in urban centers and are thus somewhat disconnected from the daily realities of claimant indigenous peoples. A closer scrutiny of the functioning

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14 J. Dahl, *IWGIA: A History* (IWGIA Publications, Copenhagen, 2009), pp. 65-67.

15 A. Muehleback, "Making Place' at the United Nations: Indigenous Cultural Politics at the U.N. Working Group on Indigenous Populations", 16:3 *Current Anthropology* (2001), 415-448, p. 420; F. M. Ndahinda, "Introduction: Contrasted perspectives on recognition and implementation of indigenous rights", 18 *International Journal on Minority and Group Rights* (2011), pp. 413-418; Viljoen, *supra* note 4, pp. 75-93.

16 During the sixth and seventh sessions of the United Nations Permanent Forum on Indigenous Issues, the author met participants from DR. Congo who purported to represent the Batwa Pygmies while not belonging to these communities.

of some indigenous projects sometimes shows that the boundary between self-interest and advocacy of communal interests is not always clearly demarcated.<sup>17</sup>

## Domestic and Regional Dynamics

Using the experience gained through participation in global indigenism but also relying on the solidarity of an ever-expanding international movement, representatives from a number of communities that became regular participants in global indigenous forums initiated domestic battles for recognition as indigenous peoples. There are successful examples of recognition and adjudication of indigenous rights in countries such as South Africa,<sup>18</sup> Botswana,<sup>19</sup> Central African Republic<sup>20</sup> and Republic of Congo.<sup>21</sup> In conjunction with orthodox human rights campaigners, international and domestic indigenous rights advocates have engaged in strong pushes for recognition and protection of indigenous rights by various African states with claimant communities. However, in most other cases, African countries have disputed the domestic relevance of a framework that they consider to be unsuited to the historical realities of the continent. The substantive arguments for non-recognition of indigenous rights will be explored in the follow-

17 For a critical analysis of the relationship between the emergence of NGOs and donor politics, see: Igoe, *supra* note 13, pp.863-885; S. Robins, "NGOs, 'Bushmen' and Double Vision: The ≠Khomani, San Land Claim and the Cultural Politics of 'Community' and 'Development' in the Kalahari", 27:4 *Journal of Southern African Studies* (2001), pp.833-853.

18 On recognition of indigenous rights in the landmark Richtersveld cases, see: *Richtersveld Community and Others v. Alexkor Ltd and Another*, 2001 (3) SA 1293 (LCC) (Land Claims Court Judgment); *Richtersveld Community and Others v. Alexkor Ltd and Another*, 2003 (6) SA 104 (SCA) (Supreme Court of Appeal Judgment); *Alexcor Limited & Another v. The Richtersveld Community & Others*, 2003 (12) BCLR 1301 (CC) (Constitutional Court Judgment); and *The Richtersveld Community v. Alexkor Ltd and Another*, 2004 SA 151/98 (LCC) (Land Claims Court's second Judgment).

19 See: *Roy Sesana Keiwa Setlhogogwa and Others v. The Attorney General*, (hereafter, *Roy Sesana v. Attorney General*) High Court of Botswana held at Lobatse, Misc. No. 52 of 2002, 13 December 2006, <http://www.iwant2gohome.org/files/ruling.doc>, visited on 18 May 2012.

20 On the first ratification of ILO Convention 169 by an African country in 2010, see: [http://www.ilo.org/global/standards/WCMS\\_126250/lang-en/index.htm](http://www.ilo.org/global/standards/WCMS_126250/lang-en/index.htm), visited 18 May 2012.

21 On the adoption of domestic law promoting and protecting indigenous rights, see: Loi n° 5 - 2011 du 25 février 2011 *portant promotion et protection des droits des populations autochtones*, <http://faolex.fao.org/docs/pdf/con105791.pdf>, visited on 18 May 2012. Article 1 of this law refers to indigenous peoples as "populations which differ from other groups constituting the national population by their cultural identity, their lifestyle and their extreme vulnerability".



ing section. Beyond struggles for formal recognition as indigenous peoples, however, participation in global indigenous platforms provided a much needed visibility for groups that had always been on the margins of society and of socio-political processes in the countries where they live. Over the last two decades, various projects aimed at improving the living conditions of members of claimant indigenous communities have readily been funded by various donor countries and institutions.<sup>22</sup> They range from small associative initiatives aimed at generating income for impoverished indigenous peoples to infrastructural development (schools, water supply, improvement of farming techniques...) and housing. The adoption of indigenous rights narratives – on the grassroots nature of the indigenous organizations, conservationism, participatory development - by representatives from these communities has contributed to the relative success of these empowering activities.

Domestic processes of negotiating recognition of indigenous rights in Africa were boosted by the involvement of the ACHPR in the promotion of indigenous rights on the continent. Alongside the appropriation of global indigenous discourses by indigenous rights advocates in Africa, the active involvement of the ACHPR represented a very important step in the process of “Africanization” of the indigenous rights framework. In very close collaboration with the Copenhagen-based IWGIA, which has been instrumental in securing funding for joint activities relating to indigenous rights, the ACHPR has played a significant role in furthering indigenous rights. It has adopted resolutions on indigenous populations/communities in Africa, set up a working group on the subject which, in addition to producing a landmark report in 2005 summarily discussing indigeneness on the continent, has generated several country reports covering various aspects of issues of relevance to claimant indigenous communities.<sup>23</sup>

Besides its long-lasting collaboration with IWGIA, the ACHPR has increasingly benefited from the support of other actors such as the International Labour Organization (ILO), which has recently undertaken promotional activities for its

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22 For some illustrations, see; Ndahinda, *supra* note 1, pp. 235-240 and 279-283. See also more generally the relevant periodic reports by IWGIA at <http://www.iwgia.org/regions/africa>, visited on 29 May 2012.

23 For a wealth of ACHPR and IWGIA documentation, see; ACHPR and IWGIA, *supra* note 6; and more generally: <http://www.iwgia.org/regions/africa>, <http://achpr.org/mechanisms/indigenous-populations/>, visited on 29 May 2012.

1989 Convention 169 on Indigenous and Tribal Peoples.<sup>24</sup> The end of the 1990s saw a coalescence of efforts to mainstream indigenous rights on the African continent. For instance, the first session of the UN Permanent Forum on Indigenous Issues (UN PFI) in 2002 encouraged the International Labour Organization (ILO) to “continue to urge ratification of ILO Convention No. 169 concerning indigenous and tribal peoples in independent countries, particularly by African and Asian countries, none of which have ratified it”.<sup>25</sup> The successful adjudication of the Endorois Case by the ACHPR and the prescribed remedies therein reveal the empowering potential of using indigenous claims when advocating for collective redress for ethno-cultural communities.<sup>26</sup>

## Challenges to Indigenous Rights Recognition and Implementation in Africa

### Recognition and Challenges

More than two decades of indigenous rights activism in Africa have generated a very dynamic movement that has achieved numerous successes. It has drawn attention to the plight of mainly (former) hunter-gatherer but also pastoralist communities, whose lifestyles have become increasingly unsustainable due to the state's development/modernization project, which threatens the remaining boundaries of traditional society. Like indigenous peoples from other parts of the world, claimant indigenous communities in Africa invoke their socio-political and economic marginality, differing socio-political and cultural institutions as well as special connection with ancestral lands and territories.<sup>27</sup> The central focus of the indigenous rights legal framework on the right to

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24 The various projects undertaken by, and reports produced as a result of, the ILO collaboration with the ACHPR can be seen at: [http://www.chr.up.ac.za/chr\\_old/indigenous/](http://www.chr.up.ac.za/chr_old/indigenous/), visited on 18 May 2012. On ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (International Labour Conference, 76<sup>th</sup> Session, 27 June 1989), see: <http://www.ilo.org/ilolex/english/convdisp2.htm>, visited on 18 May 2012.

25 Economic and Social Council (ECOSOC), Permanent Forum on Indigenous Issues, Report on the first session (13-24 May 2002), E/CN.19/2002/3/Rev.1, para. 25 (a).

26 On the Endorois Case, see *supra* note 2.

27 See; A. Cook and J. Sarkin, “Who is indigenous?: Indigenous rights globally, in Africa, and among the San in Botswana”, 18 *Tulane J. of Int'l & Comp. Law*, pp.93-130; J. Gilbert, “Indigenous

self-determination precisely seeks to capture these differing attributes of claimant indigenous groups, namely their socio-political, cultural and economic institutions and practices. The substantive rights recognized in instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) or ILO Convention 169 are intended to protect both individual and collective aspects of indigenous peoples in a clear departure from previous tendencies to assimilate them. The indigenous rights legal framework clearly embodies the only mechanism that departs from individual-centric legalism tied to enlightenment ideals by offering comprehensive legal protection to non-dominant collectives with differing socio-political, economic and cultural attributes.

Interestingly, the central substance of collective indigenous rights appears, *prima facie*, unproblematic in Africa. Discourses on the socio-political matrix of the continent have always emphasized the historically prevailing communitarian values held across the continent, which survived the homogenizing tendencies of the colonial and postcolonial state, the ethno-cultural diversity of the continent and the historical connection of specific communities to (ancestral) territories.<sup>28</sup> Since this description fits numerous ethno-cultural groups, many of which have not (yet) adopted the "indigenous people" identity, the search for coherence in the conceptualization of indigenous rights in Africa, beyond self-identification, proves to be very challenging.

Beyond dogmatic application of global indigenous rights narratives to the precarious conditions of African hunter-gatherers and pastoralists, the indigenous rights framework is still struggling to overcome a fundamental deficit in terms of context-specific substance. It is a fact that (self-)identification of hunter-gatherer, transhumant pastoralists and other communities as constitutive of indigenous peoples fulfils one of the determining criteria for global recognition as indigenous people. Yet a determination of indigenesness on a continent inhabited by around 2,000 different ethno-linguistic groups, many of which may equally fulfil the rather

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Peoples' Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples' Rights", 60 *International & Comparative Law Quarterly* (2011), pp. 245-270.

28 See, for instance, debates over conceptions of human rights in Africa between the 1970s and 1990, as can be found in: K. M'baye, *Les Droits de L' Homme en Afrique*, (2nd ed., Pedone, Paris, 1992); U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff, 1997), F. Ougergouz, *La Charte Africaine des Droits de l'Homme et des Peuples: Une Approche Juridique des Droits de l'Homme entre Tradition et Modernité* (Presses Universitaires de France, Paris, 1993).

loose and mostly subjective or relative criteria for indigenesness, is quite challenging. Hodgson captures the main difference between Africa and a number of other battlegrounds for recognition and protection of indigenous rights when she states that:

“Indigenous activists and organizations have a long history in North, Central, and South America in which their status as ‘first peoples’ is generally uncontested. In Africa, by contrast, where the term indigenous has been adopted much more recently as a tool for social and political mobilization, the contemporary lack of a dominant colonial population converges with long histories of conquest, assimilation, migration, and movement to make the criteria for deciding who is ‘indigenous’ far murkier”.<sup>29</sup>

Challenges to recognition of specific African communities as constitutive of indigenous peoples in Africa are rooted in two socio-political and historical considerations. First, in a still rather recent past, the concept of indigenesness was used across the continent in reference to institutions and practices considered as authentically African in opposition to imports from elsewhere, mostly from (colonial) Europe. In spite of the “Christening” of the concept under the contemporary configuration of the global indigenous movement, the framework historically has a rather negative connotation in its application to all descendants of peoples that inhabited Africa prior to the European encounter.<sup>30</sup> The positive attributes currently attached to indigenesness (mainly their purported eco-friendly lifestyles) have not yet succeeded in washing away either the negative connotation of a concept considered as a euphemistic translation of the old notion of primitiveness or the historical application of indigenesness to all descendants of pre-colonial African communities.<sup>31</sup>

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29 See: D.L. Hodgson, “Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas”, (2002) *104 American Anthropologist* 4, 1037-1049.

30 J. Bowen, “Should We Have a Universal Concept of ‘Indigenous Peoples’ Rights’? Ethnicity and Essentialism in the Twenty-First Century”, 16:4 *Anthropology Today* (2000), 12–16, p. 14.

31 This is more extensively discussed in A. Barnard, and Kenrick, J. (eds.), *Africa’s indigenous Peoples: ‘First Peoples’ or ‘Marginalized Minorities?’*, (Centre for African Studies, University of Edinburgh, 2001); Ndahinda, *supra* note 1, pp. 19-26 and 91-93; A. Kuper, “The Return of the Native”, 44:3 *Current Anthropology* (2003), pp. 389- 402; A. Kuper, *The Reinvention of Primitive Society: Transformations of a Myth*, (Routledge, 2nd ed, 2005); J. Kenrick and J. Lewis, “Indig-

Second, several countries on the African continent are inhabited by communities with competing aboriginality claims. As a consequence, the appropriation of the “indigenous” or “aboriginal” attribute by specific communities has become quite controversial in African countries.<sup>32</sup> Several land-related conflicts in Africa have revolved around concepts of aboriginality, indigenoussness or authentic citizenship that depict some members of society as belonging more to the soil than others.<sup>33</sup> Among many other examples, the notion of authentic Ivorian citizenship or “Ivoirité” has been central to the crises in Ivory Coast since the end of the 1990s. Similarly, before but mostly since the early 1990s,<sup>34</sup> Katanga and Kivu provinces of the Democratic Republic of Congo have witnessed crises that place communities claiming to be the authentic owners of the land in opposition to groups of relatively new (but increasingly powerful) settlers.<sup>35</sup> In Kenya, the Kalenjin and Maasai of the Rift Valley Province have constantly engaged in campaigns aimed at keeping members of other communities, mostly the Kikuyu, from their lands, even where the transfer of land is operated through a “willing buyer,

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enous Peoples” Rights and the Politics of the Term ‘Indigenous’”, 20:2 *Anthropology Today* (2004), 4-9.

- 32 For alternative constructions of indigenoussness, see the various contributions in: A. Cutolo and P. Geschiere (Coord), “Enjeux de l’Autochtonie”. 112 *Politique Africaine* (Paris: Karthala, December 2008).
- 33 For an overview of the linkage between the language of autochthony and conflict in a number of African countries, see: J-F. Bayart, P. Geschiere and F. Nyamnjoh, « Autochtonie, démocratie et citoyenneté en Afrique », 10 *Critique internationale* (2001), pp 177-194. The authors explore the role of the language of autochthony in such countries as Cameroon, Rwanda, Kenya, DR Congo, South Africa, Nigeria, Liberia, Guinea-Bissau, Senegal and Ivory Coast.
- 34 See: A. Cutolo, “Modernity, autochthony and the Ivorian nation: the end of a century in Côte d’Ivoire”, 80:4 *Journal of the International African Institute* (2010), pp. 527-555; E. Comarin, “Ivoirité: un concept devenu une mine flottante », 17 January 2003, at [http://www.rfi.fr/actu/fr/articles/037/article\\_19288.asp](http://www.rfi.fr/actu/fr/articles/037/article_19288.asp), visited on 28 May 2012.
- 35 On the crises of identity in DR Congo, mainly in Katanga (expulsion of Kasaians) and Kivu (contestation of Congolese citizenship of people of Rwandan and Burundian descent), see: K. Vlassenroot (2002). Citizenship, identity formation & conflict in South Kivu: the case of the Banyamulenge. *Review of African Political Economy* 29 (93), pp. 499-516; M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press, Princeton, 2001), pp. 234-263; F. M. Ndahinda. The Bemba-Banyamulenge case before the ICC: From individual to collective criminal responsibility. 7:3 *International Journal of Transitional Justice* (2013) 476-496; D. dia Mwemba, «L’épuration ethnique au Katanga et l’éthique du redressement des torts du passé», 33 :2/3 *Revue Canadienne des Études Africaines* (1999), pp. 483-499 ; P. Mathieu and A. Tsongo, «Guerres paysannes au Nord-Kivu (République démocratique du Congo) 1937-1994». 38 :150-152 *Cahiers d’études africaines* (1998), pp. 385-416.

willing seller" transaction.<sup>36</sup> Against this backdrop, a legal framework erected on the notion of indigenosity (still) lacks the conceptual neutrality needed to foster the collective empowerment of communities that are indeed marginalized and dispossessed. Some literature has attempted to establish a distinction between the contemporary meaning attributed to indigenosity and the concept of autochthony but, given the historical and semantic associations between these two notions and persistent claims by indigenous people using the language of autochthony, the differentiation remains an ambiguous one.<sup>37</sup>

Next to the contemporary meaning ascribed to indigenosity by international (human rights) scholarship and activism, academic and non-academic literature still extensively uses "indigenous" as a qualitative adjective in reference to groups, crops, traditions, cultures, economy, farming, livestock or plants, among others. The concept emphasizes that the referent is native to, originates from or is characteristic of a specific area. Naturally, words and meanings evolve but the mere fact that indigenosity is still widely used in Africa to capture a variety of realities constitutes a challenge in contextually making sense of which exact collectives constitute indigenous peoples in Africa. Faced with arguments that it is difficult, if not hazardous, to distinguish between the competing aboriginality claims of numerous African communities, advocates of indigenous rights insist on the situational characteristics - marginality, dispossession, non-dominance, differing cultural attributes - of claimant indigenous communities as compared to other groups. Under this narrative, "indigenous peoples" is construed as a framework "of great normative power for many relatively powerless groups that have suffered grievous abuses, and it bears the imprimatur of representatives of many such groups who are themselves shaping it while being shaped by it".<sup>38</sup>

Indigenous rights advocates therefore insist on "the need to refocus the term 'indigenous' to refer primarily to 'marginality...and perhaps 'self-identification'... rather than to 'aboriginality' or 'priority in time'".<sup>39</sup> The pragmatism underlying this

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36 For some relevant literature, see: G. M. Wachira, *Vindicating indigenous peoples' land rights in Kenya* (PhD Thesis, University of Pretoria, 2008), at <http://upetd.up.ac.za/thesis/available/etd-01212009-162305/unrestricted/00front.pdf>, visited on 28 May 2012.

37 See; M. Pelican, 'Complexities of indigeneity and autochthony: An African example', 36:1 *American Ethnologist* (2009), 52-65, p. 54; Bowen, *supra* note 20, pp. 12-16.

38 B. Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 *American Journal of International Law* (1998), 414-457, p. 415.

39 Viljoen, *supra* note 4, p. 76.

disregard for semantics over indigenesness is grounded in a perceived empowering potential of the indigenous rights movement. In the words of Lee, a renowned anthropologist and San rights advocate, the term indigenous “along with its equivalents, aboriginal, native, First Peoples, Fourth World and countless local variants, is marvelously polysemic. Whatever uneasiness anthropologists may have about the term, what it implies and who it applies to, the fact remains that, politically and socially, nationally and internationally, the concept of indigenous has become a powerful tool for good”.<sup>40</sup> Yet, a reconceptualization of indigenesness in its application to the African continent still struggles to overcome not only the semantic meaning of the concept but also its historical institutionalization since the colonial era. Moreover, a closer scrutiny of the process of indigenous identification in Africa suggests that the main sources of indigenous claims on the African continent may relate to a more or less recent history of marginality than to clearly definable attributes that demarcate claimant communities from “dominant mainstreams”.

## **From Recognition to Implementation of Indigenous Rights in Multiethnic Africa**

In 2006 and 2007, debates surrounding the adoption of the UNDRIP clearly demonstrated the still contentious nature of the indigenous rights legal framework in many parts of Africa.<sup>41</sup> Until the end of the 1990s, most, if not all, African states still considered themselves - but were also widely considered - as falling outside the theoretical scope of domestic applicability of the emerging indigenous rights framework.<sup>42</sup> Conventional wisdom held that Africa was inhabited by a multitude of ethno-cultural communities with differing histories of settlement on currently

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40 Lee, *supra* note 12, pp. 457-458. For the opposite argument, see: A. Kuper, ‘Culture, Identity and the Project of a Cosmopolitan Anthropology’, 29:3 *Man* (1994), pp. 537-554, and more generally Kuper, *supra* note 31.

41 W. van Genugten, “Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems” 104:1 *American Journal of International Law* (2010), pp. 29-65; Ndahinda, *supra* note 1, pp. 144-152; D. G. Newman, “Africa and the United Nations Declaration on the Rights of Indigenous Peoples” in S. Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, Pretoria, 2010), pp. 141-154.

42 For an early rejection of the applicability of the concept of indigenesness to Africa, see for instance J. Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (Cultural Survival Report No 28, Zed Books Ltd., 1987), pp. 162-176. See also: B.K.R. Burman, “Indigenous and Tribal Peoples in World System Perspective”, 1:1 *Stud. Tribes Tribals* (2003), 7-27,

occupied lands and territories. Historical records confirm or suggest that some of these communities have been established on currently occupied lands or territories for centuries or millennia, while others settled on current territories in a relatively recent past, just before or even during the colonial era. The majority of these communities were nonetheless considered as indigenous mainly as opposed to European settlers since the colonial encounter. There were still very few African actors who were regular participants in global indigenous networks and platforms by the early 2000s. In spite of the fact that the UNDRIP had been under negotiation for more than two decades,<sup>43</sup> it still came as a surprise for the majority of African states that the text tabled before the UN General Assembly for adoption in 2006 codified norms of domestic applicability. As the train leading to the adoption of the UNDRIP was in full motion, a late African awakening was therefore responsible for the move to defer the adoption of the text and belatedly search for a common position in order to request a renegotiation of the text. More than anything else, pressure from international actors – mostly human rights organizations and donor countries - was instrumental in breaking African resistance during the final stages of the adoption of the text of the UNDRIP. In spite of slight modifications suggested by the African bloc of countries, a number of their central demands - including for a definition of who is indigenous – remained unmet.<sup>44</sup> A reading of the summaries of discussions in the final phases of discussions over the wording of the text adopted in 2007 reveal that some countries were simply uninformed about a text they ended up voting for.<sup>45</sup>

After two decades of activism, many African countries are currently wrestling with questions on what to do with this new legal framework and category. Obvi-

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on non-involvement of Africans in the erection of the contemporary global indigenous rights architecture.

43 For an extensive discussion of the background to and process of adopting the UNDRIP, see: H Minde, A Eide and M Åhrén (eds.), "The UN Declaration on the Rights of Indigenous Peoples: What made it possible? The Work and Process beyond the Final Adoption", 4 *Gáldu ála – Journal of Indigenous Peoples Rights* (2007), pp. 9-139.

44 See: African Union (AU), *Decision on the United Nations Declaration on the Rights of Indigenous Peoples* (Doc. Assembly/AU/9 (VIII) Add.6), Assembly/AU/Dec.141 (VIII) 29-30 January 2007, para. 6.

45 On the minutes of discussions surrounding the adoption of the UN Indigenous Rights Declaration, see UN Docs. A/61/PV.107 and A/61/PV.108, 13 September 2007. On Benin's and Namibia's explanations in voting for the text, see: Ndahinda, *supra* note 1, p. 147, note 184, referring to the position of Benin, which voted in favour of the UNDRIP on the understanding that: "It is most important to note that the text has numerous imperfections, but that it remains desirable for it to be implemented on an interim basis while improvements are introduced so that it can be endorsed by all delegations" - UN Doc. A/61/PV.107, p.16).



ously, depending on the prevailing socio-political and economic conditions, but also on the level of ethno-cultural fragmentation, recognition and implementation of indigenous rights is more challenging in some countries than others. Debates over domestic applicability of indigenous rights in specific African countries are dominated by doctrinal arguments versus discursive narratives.

Doctrinal arguments build on the fact that indigenous rights have now gained global acceptance in an overwhelming majority of states.<sup>46</sup> Some 144 member states of the United Nations voted in favor of the UNDRIP in 2007; a text that to date represents the most comprehensive codification of indigenous rights at the international level.<sup>47</sup> This global majority was formally reflected in the African vote whereby a significant majority of states – 35 in total – voted in favor of the UNDRIP while only three abstained and 15 were listed as absent.<sup>48</sup> The overwhelmingly positive vote of African states on the UNDRIP is interpreted as embodying their commitment to domestically recognize and implement indigenous rights where applicable.<sup>49</sup> Moreover, over the last decade, representatives from several dozen groups from different African countries have become regular participants in indigenous rights platforms and are increasingly recognized by global and regional (but also, in limited cases, national) actors as constitutive of indigenous peoples. The developing jurisprudence in some domestic jurisdictions (such as South Africa and Botswana) but also in the promotional and adjudicatory work of the ACHPR of relevance to claimant African indigenous groups somewhat suggests that the indigenous rights framework is irreversibly implanted in Africa.

More discursive narratives denounce the narrowness of the indigenous rights activism and framework in tackling problems of (historical) marginality, dispossession and disempowerment of particular communities in Africa.<sup>50</sup> Even the most

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46 See: S.J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford University Press, New York, 2004); pp. 61-72.

47 UN Doc. A/61/PV.107, p.19-20. For further comments on the process, see: S. Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples", 41 *Vand. J. Transnat'l L.*, (2008), 1141-1176.

48 *Ibid.* in Ndahinda, *supra* note 1, p. 150, I erred in counting only 31votes in favor and 14 absent states.

49 Not all African states have claimant indigenous communities involved in global, regional or domestic indigenous rights forums.

50 See: D. L. Hodgson, "Becoming Indigenous in Africa", 52:3 *African Studies Review* (2009), pp. 1-32; R. Sylvain, "Disorderly Development: Globalization and the Idea of 'Culture' in the Kalahari", (2005) 32 *American Ethnologist* 3, 354-370; Igoe, *supra* note 1; pp. 399-420; G. Lynch, "Be

vocal critics of the framework agree with the fact that claimant indigenous groups in Africa – mostly the roughly estimated half a million of hunter-gatherers - seriously suffer from patterns of discrimination and are socio-politically and economically the most marginalized members of the societies in which they live.<sup>51</sup> Yet, on a continent whose ethnic fragmentation has been a source of many identity-driven conflicts (ethnic, regional, religious), representations of self-identified indigenous peoples fail to capture the complexity of collective grievances. Moreover, romanticized ideas about indigenous peoples fail to capture the complex dynamics both within and between various communities in Africa whereby identities are subject to constant redefinitions. Hence, in the case of the San of Southern Africa, Sylvain denounces “primordialized and essentialized representations of primitive “Bushmen” [that] are being vigorously reasserted in mainstream media and NGO rhetoric”.<sup>52</sup>

Just as the voting in favor of the UNDRIP by a majority of African states is formally interpreted as a clear sign of their formal commitment to the substance of the instrument,<sup>53</sup> the ambiguities underlying positions adopted by different African countries raise questions over the political will to domestically apply such rights to claimant groups. Whether they voted in favor (Namibia), abstained (Kenya, Nigeria) or chose not to participate in the final voting process (Rwanda), the positions taken by these countries throughout the process of the adoption of the UNDRIP suggest that they have some misgivings over the applicability of the instrument to the sole claimant communities.<sup>54</sup> The statement of Nigeria explaining

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coming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois', 111:442 *African Affairs* (2012), pp. 24–45.

51 For elaborations thereon, see: R.B. Lee and R.K. Hitchcock, “African Hunter-Gatherers: Survival, History, and the Politics of Identity”, *Supp. 26 African Study Monographs* (2001), pp. 257-280; D.V. Joiris, “The Framework of Central African Hunter-Gatherers and Neighbouring Societies”, *Supp. 28 African Study Monographs* (2003), pp. 57-79;

52 Sylvain, *supra* note 43, p. 354.

53 See more generally: J. Corntassel, “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse”, 33 *Alternatives* (2008), 105–132, p. 111; N. Crawhall, “Africa and the UN Declaration on the Rights of Indigenous Peoples”, 15:1 *International Journal of Human Rights* (2011), pp.11-36.

54 See: General Assembly, “Third Committee, Summary of Record of the 53rd Meeting”, UN Doc. A/C.3/61/SR.53, 28 November 2006; UN Docs. A/61/PV.107 and A/61/PV.108, 13 September 2007. J. Suzman, *Regional Assessment of the Status of the San in Southern Africa: An Introduction to the Regional Assessment of the Status of the San in Southern Africa* (Legal Assistance Centre, Report No. 1 of 5, Windhoek, April 2001), pp. 2 *et seq.*, at <http://www.lac.org.na/projects/lead/Pdf/sanintro.pdf>, visited on 28 May 2012; Ndahinda, *supra* note 1, pp. 144 *et seq.*

the reasons for abstention during the vote on the UNDRIP raised questions that are generally avoided in doctrinal elaborations on the need to recognize indigenous peoples in Africa. The country's representative raised concerns over provisions on self-determination and on control of lands, territories and resources before declaring:

"My country's national institutions, national laws - including its national human rights commission - and the principle of federal character - under which we established the Federal Character Commission - all ensure national integration. They will continue to promote the issue of the human rights, culture and the dignity of indigenous peoples. Indeed, those provisions affect all the rights of all Nigerians. In addition, the slogan 'Unity in diversity' continues to be the guiding principle in the management of the more than 300 ethnic groups in Nigeria, which speak more than 300 languages".<sup>55</sup>

Namibia raised similar concerns both before and during the vote on the UNDRIP but it nonetheless ended up voting for the text.<sup>56</sup> Notwithstanding the many positive developments on the African continent with regard to recognition of indigenous rights, it remains to be seen how many countries will be able to meaningfully implement the provisions of the UNDRIP to the benefit of the sole claimant indigenous groups.

## **Collective Empowerment, the Kalahari Debates and the Future of Indigenous Rights in Africa**

### **Indigenous Rights and the Kalahari Debates**

The Kalahari debate over the identity and future of the San Bushmen of Southern Africa embodies the substance of the persistent questions over the direction of

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55 General Assembly, 61<sup>st</sup> Session, 108<sup>th</sup> Plenary Meeting, 13 September 2007, UN Docs. A/61/PV.108, p. 6. See also: Genugten, *supra* note 33, pp.48-49.

56 For a relevant analysis of the Namibian versus Nigerian positions, see: van Genugten, *supra* note 35, p. 49.

indigenous rights in Africa.<sup>57</sup> Traditionalist studies consider(ed) “the !Kung[San] of the 1950s and ‘60s as independent, affluent foragers...[revisionists] challenge this view by depicting Bushmen as a dispossessed and marginalized proletariat cut adrift from the surrounding economies in which they once played a more significant role”.<sup>58</sup> The contrasted reading of the history of the San as evidenced by the Kalahari debates has some relevance in the contemporary construction of indigenesness in Africa not only for the San but also for many other claimant indigenous groups across the continent. Essentialization of claimant indigenous groups’ modes of production somehow ignores the changes that have occurred and continue to take place in terms of their lifestyles. Collective labeling of entire communities as hunter-gatherers or pastoralists hardly matches more complex realities of (members of) communities that are either in transition or have, for several decades if not centuries, engaged in or adopted other modes of production.<sup>59</sup> Accordingly, it is essential to avoid both romanticized and chauvinistic views of claimant indigenous groups.

Central to the contemporary quest for empowerment of indigenous people is their right to self-determination consisting, among other things, of a “right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (Art. 5 UNDRIP). How much this distinguishes claimant indigenous communities from other (mainly rural) African communities is not quite clear yet. What is clear is that claimant indigenous communities in Africa are at a crossroads between their traditional lifestyles or modes of productions and dominant means of livelihood in postcolonial, increasingly globalized societies. The extent to which they are able to safeguard

57 J. Solway (ed.), *The Politics of Egalitarianism: Theory and Practice* (New York/Oxford: Berghahn Books, 2006).

58 K. Sadr, “Kalahari Archaeology and the Bushman Debate”, 38:1 *Current Anthropology* (1997), 104-112, p. 105. See also: A. Barnard, “Kalahari Revisionism, Vienna and the ‘Indigenous Peoples’ Debate”, (2006) 14 *Social Anthropology* 1, 1-16; J.S. Solway and R.B. Lee, “Foragers, Genuine or Spurious? Situating the Kalahari San in History”, (1992) 33 *Current Anthropology*, 187-224. M. Guenther et al., “The Concept of Indigeneity: Discussion”, (2006) 14 *Social Anthropology* 1, 17-32; M.J. Shott, “On Recent Trends in the Anthropology of Foragers: Kalahari Revisionism and Its Archaeological Implications”, 27:4 *Man (NS)* (1992), 843-871.

59 On the case of the Batwa in Rwanda and, to some extent, in Burundi, the majority of whom can no longer accurately be described as hunter-gatherers, see: J. Lewis, *The Batwa Pygmies of the Great African Region* (Minority Rights Group International, 2000); Ndahinda, *supra* note 1, pp. 215-250.

their socio-political and cultural attributes in a future mostly shaped by dynamics beyond their control is still quite uncertain. For many communities, a re-creation of the ancestral world (e.g. a return to forest life for foragers) is either a utopian dream or simply undesirable.<sup>60</sup> Indigenous rights activism in Africa needs to move beyond romantic constructions of "the indigenous" in a quest for practical solutions to the real problems faced by hunter-gatherers, pastoralists and other claimant indigenous but also non-claimant communities in Africa in need of similar attention.

### Indigenoussness and Human Rights for All

Roughly two decades of indigenous rights activism in Africa have generated two competing understandings of the problems facing claimant indigenous communities in Africa. They determine the differing conceptualization of empowerment for these communities.<sup>61</sup> For some, marginality, peripheralization and lack of access to economic and developmental resources in modern states are the defining characteristics of claimant indigenous (but also other) communities. Inclusive policies giving them equal access to communal resources and fair representation would constitute the appropriate empowerment course for individuals and their collectives. This view is shaped by an overall reading of relatively recent African history whereby, until the 19<sup>th</sup> century, the continent was formed of a mosaic of people whose socio-political and economic systems certainly differed from the contemporary state structures to which they belonged. Dominant ways of life in most contemporary states are therefore more a result of colonial history than an imposition of the socio-political attributes of particular communities over others.

For others, claimant indigenous groups have distinctive characteristics that require special protection to prevent their annihilation. Indigenous rights standards, as codified in the UNDRIP or in ILO Convention 169 are clearly premised on the idea that the beneficiaries have historical, cultural and other distinctive attrib-

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60 See: Ndahinda, *supra* note 1, pp. 215-250 for a discussion on the future of the Batwa of Rwanda for instance.

61 B. Clifford, "Political Process Theory and Transnational Movements: Dialectics of Protest among Nigeria's Ogoni Minority", (2002) 49 *Social Problems*, 395-415; Ndahinda, *supra* note 1.

utes that need special protection. However, the absence of a truly cognizable definition of indigenous peoples that can meaningfully be applied in the complex African landscape leaves open questions over who should be included and excluded from this legal framework.

It is tenable to argue that a quest to protect differing cultures and institutions in Africa could be widened to cover numerous identities whose claims are currently not or cannot be channeled through the indigenous rights framework without diluting its significance, especially for beneficiary communities in the initial battlegrounds for recognition of indigenous rights (Americas, Australasia and the Arctic region). In African countries with several dozens or hundreds of ethno-cultural groups, issues of socio-political marginality, economic dispossession and cultural distinctiveness are shared by numerous communities many of which are not enrolled in the indigenous movement. For instance, in spite of a history of persecution, mostly under the Sani Abacha regime in Nigeria, there is no objective reason why the Ogoni have long been listed as the sole indigenous group in Nigeria.<sup>62</sup> An ILO/ACHPR-sponsored report published in 2009 added the Ijaw (current President Goodluck Jonathan's ethnic group) and the Fulani (the ethnicity of his deceased predecessor, Umaru Musa Yar'Adua) to the list of the indigenous peoples in Nigeria.<sup>63</sup> On the basis of the statement by the representative of Nigeria following the vote on the UNDRIP, stating that the country was inhabited by some 300 different groups, there are simply no objective criteria under which the Ogoni, Ijaw and Fulani should be the only recognized indigenous peoples in Nigeria. Furthermore, using the criteria of discrimination, marginality and dispossession, there is no objective evidence showing that these three ethnic communities are the most marginalized collectives in the country. The same can be said about several other multiethnic African countries.

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62 See for instance: ACHPR and IWGIA, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* (IWGIA Publications, Copenhagen, 2006), p. 16.

63 ILO/ACHPR, *Nigeria: constitutional, legislative and administrative provisions concerning indigenous peoples*, International Labour Office (ILO, Geneva, 2009), p. 3 at [http://www.chr.up.ac.za/chr\\_old/indigenous/country\\_reports/Country\\_reports\\_Nigeria.pdf](http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Nigeria.pdf), visited on 28 May 2012. The report acknowledges that "Nigeria's uniquely complex ethnic composition suggests that this list is not closed".

## Conclusion

Two decades of activism have resulted in an increasingly strong dynamic for recognition and protection of communities that self-identify or have been identified as constitutive of indigenous peoples. Numerous (former) hunter-gatherer, pastoralist and small-scale or farming groups have endorsed the indigenous rights banner in a quest for collective empowerment. Initiated at the global level, the struggle for recognition of indigenous rights registered notable successes with the involvement of the ACHPR in the promotion and positive adjudication of indigenous rights based on the normative and institutional framework of the African Charter on Human and Peoples' Rights. A few countries have interpreted existing constitutional or legal norms as protecting indigenous rights while a few others have embarked on legal reforms aimed at accommodating indigenous rights. The vote for the UNDRIP by the majority of African states in 2007 implies at least a formal commitment to uphold the principles and rights prescribed therein. There are undoubtedly certain benefits for individuals and communities currently active in indigenous rights platforms. The Endorois case further shows that redress for violations of the land rights of entire collectives is possible, using global and comparative norms, theory and jurisprudence on indigenous rights.

Residual questions over the contemporary configuration of indigenous rights activism on the African continent relate to a long-term legacy that the movement will have on the continent. Advocates for recognition and implementation of indigenous rights in specific African contexts have so far failed to address some semantic and substantive questions over the scope of applicability of those rights. In essence, debates on the recognition of indigenous rights in Africa are generally dominated by legal scholars and activists whose analytical positioning somewhat disregards the complexity of the wider socio-political structures in which indigenous rights are framed. After two decades of pragmatic inclusion of African activists and community representatives within the indigenous movement, there is an urgent need for deeply researched studies clarifying what it means to be indigenous in Africa today. So far, recognition of indigenous rights in Africa has been dominated more by a dogmatic belief in the empowering potential of this global framework than by rigorous, context-specific or sensitive scholarship. After more than two decades of activism, the future of the movement is contingent on its ability to clarify the boundaries of contemporary indigenosity in multiethnic Africa. ○

## International Law Cannot Protect the African Environment

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*Michelo Hansungule*

**A**frica has the least capacity in the world to destroy the environment. And yet a sustainable environment defines the lives of millions of indigenous peoples, particularly in Africa. Even with South Africa and Nigeria being among the world's biggest emitters of greenhouse gases, Africa's overall contribution to high temperatures is nothing compared to that of the industrialized countries.

With the full collaboration of African states and corrupt individuals, Europe has been dumping toxic wastes on African soil. Innocent people have died from toxic and other wastes due to greed. Africa does not dump toxic waste in Europe or elsewhere, however, like the industrial countries do in Africa. This is simply not possible. The irony is that Africa is the most vulnerable of all regions to the negative effects of climate change. This is the problem. Africa is a poor continent. It does not have the money or the basic technology to mitigate the effects that come with climate change, let alone fight the change.

Africa suffers from serious, related, capacity weaknesses. This is due to various factors, including historical. The African state lacks the basic means a modern state needs to fight climate and related change. Consequently, although Africa has concluded several agreements and binding instruments to protect the environment, most of them are gathering dust on the statute book, unimplemented. From this precedent, it will be impossible for the majority of African states - on their own - to implement the cost of any agreement on, for example, the emissions reduction agreed by the global system. Africa needs a great deal of assistance – both technical and monetary – to ensure it has the adequate capacity to mitigate the negative consequences of a climate change of which it is the main victim. Quite clearly, international law, as it stands, cannot protect the African environment.



However, because it is the most vulnerable region, compared to others, Africa will bear the brunt of rising world temperatures. The African environment is already under extreme pressure due to natural and human factors. Africa experiences prolonged droughts in the Sahel and in various parts of the continent. Although it does not produce greenhouse gases, Africa and Africans “consume” these gases. This is mostly due to a number of man-made factors. Greed is one factor. Bad governance both locally and internationally is another. In collusion with their African puppets, rich people in Western countries are dumping toxic waste in Africa. Besides killing people, toxic waste destroys the environment. While natural factors are also known to have destroyed the environment, good governance could improve nature's capacity.

There is no will among the political authorities in Africa to ensure effective implementation of regimes for protection of the environment. Because African rulers depend on Western resources for their development programmes, it is difficult for them to enforce the law against environmental destruction. Balancing foreign investment, on the one hand, and the environment, on the other, is a huge challenge in Africa.

This article will show that while there are still huge policy deficits on environmental protection, Africa has developed a number of policies and laws, especially at the regional level; the problem now is implementation. There is no political will to enforce the law in order to protect the environment.

### **Catastrophic government failure in this regard**

Besides the policy deficit, poverty also has a negative impact on the environment. A desire to promote development and, therefore, fight poverty leads to some of the environmental disasters the continent has witnessed in recent years. Governments have approved and even protected projects that clearly offend nature and humans. The perennial thirst for foreign exchange from both public and private investors has seen many a government ignoring their own laws aimed at protecting people and nature. This is exacerbated by the fact that, until recently, African courts have either not been mandated to enforce actions based on environmental disputes or judges have not ensnared into interpreting and applying what are generally regarded as “soft norms” of law. However, the African Commission on Human and Peoples' Rights, which has a watchdog role on human rights on the

continent, has delivered a ruling with far-reaching implications for environmental concerns in Africa. This article seeks to probe the extent and effect of the African Commission's decision in the *SERAC & Another v. Nigeria* case.

Climate change is a major problem for Africa, as it is for the rest of the world. If truth be told, however, Africa does not produce the greenhouse gases that have destroyed the environment. President Obama's government has admitted that Africa is not fully integrated into the world economy. This confirms what Africa itself has been saying all along: that it is marginalized. The New Partnership for Africa's Development (NEPAD) in fact started from this chorus in the very first paragraph, namely, that Africa's main challenge - in terms of poverty - is its marginalization. Again, the Obama administration has conceded that Africa's role in world trade is no more than 2%. This 2% in fact relates to Nigerian oil and South African mining, in the latter case by the Oppenheimer mining family. It is a notorious fact that Nigeria's oil is mined by the Western-based Shell Oil mining corporation. We mention this to emphasise that these two countries - South Africa and Nigeria - have been exposed as being among the main greenhouse gas producers in the world. This is due to this 2%, in the case of Nigeria, from oil while, for South Africa, it is from mining and a nascent manufacturing industry. The rest of Africa does not produce anything that might threaten nature to any significant degree.

However, even for South Africa and Nigeria, their contribution overall is nothing compared to what industrial countries release into the atmosphere. More than anything else, it is the industrialized countries that have destroyed the environment. Even if these two countries were to shut off all their main economic activities, which will happen at some stage because both metal and oil mining are not sustainable, damage to the environment will not have been fixed. As long as the factories of Europe and America remain smoking deadly toxic waste unpunished, talk of green is a pipedream. This is why the "Copenhagen Summit" was wrong to try and aim for a multilateral solution to a problem that is clearly Western. Historically, it is the West that under-developed Africa and, therefore, created the conditions in which Africa is both a recipient of aid and of greenhouse gases. Again, for historical reasons, the state in Africa has no capacity to implement whatever cuts or standards might be agreed at the international level. Europe can implement its standards because they have the money needed to achieve the highest standards. What Europe does not have, however, is the political will to commit to high

or any standards, particularly when this is going to affect European lifestyles. This is the gist of the failure of Copenhagen and before it, Johannesburg and Bali.

With respect to climate change, there is a consensus that the brunt of the most devastating effects of climate change will be borne by Africa and the poor. This is even though Africa is responsible for the least emissions of those greenhouse gases that are contributing to climate change.

While we recognize that saving the planet is an over-arching responsibility for every nation, we firmly believe that responsibility is differentiated. For us, the planet needs to be saved, together with its people. Therefore it cannot be that the developing world is now expected to sacrifice its development. The developed countries have a responsibility to cut their emissions much faster. They can afford to do so and it is also morally correct, unless they are paying lip service to the question of saving the planet. The planet has to be saved by us from ourselves. In reality, each generation is supposed to bequeath better conditions than it found to the next, but in an effort to do just that we seem to have ignored the need to balance development against preserving a healthy environment.

Speaking at the opening of the World Summit on Sustainable Development, which South Africa had the honour to host in 2002, President Mbeki summarised this complexity as follows: "Understanding the umbilical cord that ties us to the planet earth, we are determined to do everything possible to save the earth from ourselves, to ensure that as it took millions of years for humanity to evolve and emerge, so must humanity survive and develop for millions more years on the basis of a healthy partnership between people and the planet, on the basis of a sustainable relationship between a prosperous world and a healthy environment."

It is by now an established fact that climate change and global warming are affecting weather patterns, as witnessed by severe typhoons, cyclones and hurricanes and resulting in serious drought, desertification and flooding, the effects of which are all too apparent to all of us. It also impacts on agricultural production, health e.g. malaria, biodiversity and results in rising sea levels (melting polar ice caps), which is threatening island states and low-lying coastal regions. The consequences are quite disastrous for the survival of the human race. To save the planet and still develop, which we must, energy security is very essential.

Clean and renewable energy needs to progressively become dominant in the energy mix, which could include the following list. All these depend on a technology transfer and bridging the cost gap between coal and these types of energy:

- Nuclear;
- Hydro energy (in Africa is important because it is both renewable and clean and there is great potential for it);
- Solar (Africa has sunshine in abundance);
- Wind and wave energy; and
- Cleaner coal technology.

With respect to nuclear energy, South Africa is a signatory to the Non-Proliferation Treaty (NPT). We believe that the balance articulated in that treaty between nuclear disarmament, non-proliferation and technology transfer for the peaceful use of nuclear power is the best way forward. This is why we continue to voice our concerns about any inclination to close the space for enabling developing countries to use nuclear energy for peaceful purposes under appropriate safeguards implemented through the International Atomic Energy Agency (IAEA). Biofuels and biodiesel are also to be explored, provided that due regard is taken not to compromise food security.

The World Bank estimates that food prices have risen by an average of 83% in the past three years, and warns that at least 100 million people could be tipped into poverty as a result. A range of factors have been blamed, including poor harvests, partly due to climate change, rising oil prices, steep growth in demand and the dash to produce biofuels for motoring at the expense of food crops.

Due to extreme poverty, it is not going to be possible to protect the environment in Africa in the way it would be protected in the rich north. Because people have no jobs, their crops are either scotched in the unbearable sun or submerged in floods due to climate change and natural factors. It is not possible to convince people not to cut or clear trees for domestic energy or to grow food. Energy is a major problem in Africa. The majority of the African population is not connected to the national grid. The small number that are privileged to be connected cannot pay the high bills, hence their electricity is disconnected. The question is how do they live? Charcoal is not an alternative. It is the only energy available.

Similarly, the state has a responsibility to spearhead development. The difference is that Europe does not need to develop, Africa does. Europe can afford to shout all epithets of environment because it developed a long time ago. The West and Europe, in particular, developed at a time when there were no rules, no conventions, stipulating what could and could not be done and how. Europe developed in a *laissez faire* environment, to use "environment" in this particular con-

text. There was no international environmental regulatory regime when Europe and the other Western countries were involved in exploiting the resources of the south in order to sustain the levels of economic growth that are destroying the environment today. Conventions have come since their development, which is unfair both to the environment and to developing countries.

For developing countries, the issue is to find the necessary balance rather than not exploit the environment at all. Until poverty is addressed in Africa and the south, it appears any commitment not to harm the environment is rich rhetoric and nothing more. Human history shows that, when pressed in a corner, people will fight to survive and this is what is happening each time a tree is cut down or an animal killed despite the existence of a policy or law criminalizing it. Man cannot die from hunger in the full glare of life-saving resources in front of him.

Minister Dlamini Zuma correctly noted: "This creates a vicious cycle whereby our need for accelerated development could be contributing to climate change and global warming, which in turn affects food production and prices." The irony, however, is that these negative consequences tend to affect the developing and developed countries disproportionately. While we currently talk of a global food crisis, in reality it is a food crisis affecting the majority of people in developing countries and the poor in developed societies.

The need for food security has therefore taken a different dimension. It is clearly going to be difficult for developing countries to concentrate on climate change and environmental issues if they are threatened by a huge increase in poverty and food riots because of high prices. For the poor, food and energy security are the first steps towards saving the planet. If the rich ignore this reality there will be little progress.

The UN High Level Panel report in 2006 carefully pointed to the interconnections between development, security and the advancement of human rights. We subscribe to this linkage. We also subscribe to the view that the threats confronting us require the collective attention of the international community, working in unity.

For our world to perish, all that is required of us is to do nothing. It is possible to integrate environmental protection and poverty eradication in a sustainable synergy. In beating poverty and in building prosperity we must not sacrifice our future by pillaging the planet. The timing of this ceremony could not be more significant. With the UN Commission on Sustainable Development meeting at the same time here in New York, we are demonstrating that the needs of people and

the needs of our planet are one and the same. Sanitation, fresh water resources, global warming, climate change, biodiversity loss, desertification - these are all intertwined and interconnected challenges, shared by both the developed and the developing world.

To combat desertification, the international community must support and implement the UN conventions in countries experiencing serious drought, land degradation, and desertification - particularly in Africa - and take further action to meet the overall challenge of Africa's food-security needs. One of our most urgent priorities as a global community of nations must be to convince all countries to join and support the international effort to reduce greenhouse gas emissions and build our capacity to adapt to the adverse impacts of climate change.

I have no doubt that the next few years will be crucial to move us beyond the approach of stalling, of avoidance, and of excuses to a position whereby we all accept our responsibility to deal with climate change within an inclusive multilateral international framework. Climate change is a global scourge and requires a unified global partnership for action.

## **The African Setting**

The African environment is one of the worst affected by climate change. Even though Africa does not generally generate greenhouse and other gases and, therefore, pollution on the scale produced in industrialized countries, it is an easy victim of industrially induced extreme temperatures. Opening the second National Climate Change Summit, in Pretoria, South Africa in March 2009, the then South African President, Kgalema Motlanthe, now Vice President, said: "Africa is one of the regions least responsible for climate change, but it is the most affected and least able to afford the costs of adaptation."<sup>1</sup>

Due to global warming, the changed atmospheric pressures have not spared Africa. For example, during the tsunami, the East and Horn of African coasts burst with unwanted waters from the high atmospheric temperatures induced by the global warming. On the African continent, extreme weather temperatures have often led to prolonged rainfalls resulting in floods in Ghana, Uganda, Mozambique, and in various parts of Africa. In summer, Africa is turned into a chimney as

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1 [www.rivatlas.org/renews/issues/02/04.php](http://www.rivatlas.org/renews/issues/02/04.php)

humans burn the grass and trees in hunting expeditions or due to ill-advised preparations for farming. Poaching is nature's number one enemy. Because of a lack of will and capacity to fight the poacher, rare animal species have disappeared.

In addition to global warming, Africa has formed a rubbish bin for the rich countries, Western companies and individuals to dump their deadly toxic waste on the continent. This is an extremely serious development. Due to tough environmental laws in Western countries, which do not tolerate the dumping of toxic and other waste within the borders of the toxin-producing nations, Western governments and producers take advantage of African poverty to negotiate illegal agreements with greedy governments and citizens in Africa to allow Westerners to dump their toxic waste in Africa.

Further to this, African conflicts have wrought extremely negative impacts upon the environment of the continent. Take, for instance, the 1994 genocide in Rwanda, when the perpetrators of genocide dumped hundreds of thousands of dismembered bodies and body parts of their rivals - the Tutsi ethnic group - into Lake Victoria so "that they can go back to where they came from"! For years, Lake Victoria, which sustains the livelihoods of millions of people around the Great Lakes Region, was contaminated. In the Democratic Republic of the Congo (DRC), chimpanzees have borne the brunt of the war as fighters on both sides kill them in pursuit of their enemies. As indicated above, hundreds of thousands of hectares are set alight every year during and as a result of conflicts.

Poverty in Africa has exacerbated the plight of the environment. As people try to eke out a living from barren soils based on ill-advised policies, nature is the loser. Poor farming methods, including inefficient livestock rearing methods, leave nature overexposed to soil erosion and depredation of nature. This is compounded by a lack of prioritization of the environment in African governance. Environment is a marginal category that hardly attracts attention in Africa's schemes of governance. Unlike sectors such as defence and public payments, which take a large chunk of limited public resources, environment has often been ignored by African politicians and planners. Governments only allocate paltry sums hardly enough to implement the aggressive programmes which are required to protect the environment.

The historical legacy of Africa is one in which, for hundreds of years, was under colonial rule and serving the commercial interests of Western countries, the continent emptied of its rich natural resources. After hundreds of years of mining,

Africa is yawning with large holes that cannot be converted into anything more useful for present and future generations.

Last but certainly not least, limited resources is a major factor which hinders effective environmental protection. The legal and institutional frameworks governing environmental protection require adequate funding to achieve. Frameworks without a budget proportionate to the mandate are useless. While protection without resources is not altogether impossible, some minimum resources are necessary for effective implementation.

## **Marginalized and Divided Africa at Copenhagen<sup>2</sup>**

The internationalization of environmental challenges as a strategy has not worked for Africa. One of the reasons for this is that Africa enjoys a marginalized position on the international scene. The last United Nations Climate Change Conference (Copenhagen Conference) brought this particular problem to the surface. Africa lost out on all its demands, including a binding legal agreement on emissions limits and especially mitigation aid. Africa has been complaining all along that one of its main problems in the international community is that it is not being treated equally with the rest of the world. The New Partnership for Africa's Development (NEPAD) could not have put the case more eloquently when it complained of the "marginalisation of Africa from the globalization process....".<sup>3</sup>

The Copenhagen Conference<sup>4</sup> may have failed to strike a deal as had been hoped by many but it was successful in at least one respect: in exposing Africa's vulnerability. Africa's Chief Negotiator to the talks, late Ethiopian Prime Minister Meles Zenawi, and South Africa were accused of betraying the continent after being perceived as siding with the position of the European Union and United States respectively. Lumumba Di-Aping, the Chief Negotiator of the Group of 77 block of 130 countries, which includes all African countries, publicly accused both Prime Minister Zenawi and South Africa of selling the continent to the rich coun-

2 [www.ynetnews.com](http://www.ynetnews.com). Divided climate talks end in Copenhagen; Divided Climate Talks End with Compromise Deal – US News and World Report; [www.usnews.com](http://www.usnews.com) Dec 19, 2009.

3 [www.nepad.org](http://www.nepad.org)

4 [www.untcc.int/meetings/coppehagendec\\_2-009/meetings/6295.php](http://www.untcc.int/meetings/coppehagendec_2-009/meetings/6295.php); [www.cop15copenhagenclimateconference.org/issues/Articles](http://www.cop15copenhagenclimateconference.org/issues/Articles), date accessed, 20 December 2013.



tries for a pittance. This was echoed by Mithika Mwenda of the Pan-African Climate Justice Alliance, who lashed out at Zenawi: "The IPCC science is clear – 2 degrees is 3.5 degree in Africa – this is death to millions of Africans ... if Prime Minister Meles wants to sell our lives and hopes of Africans for a pittance – he is welcome to – but that is not Africa's position". This was after Zenawi and French President Nicholas Sarkozy had shared a platform at which they made statements mirroring each other. The two proposed a halving of global CO<sub>2</sub> emissions by 2050 compared to 1990 levels. This would require developed countries to commit to an 80% emissions reduction by 2050. What incensed Africans most were the mild proposals the two put forward on the mitigation side. They proposed adopting "a fast-start fund' of \$10 billion per year covering the next three years". Later, Zenawi sought to justify this in the following terms: "I know my proposal today will disappoint those Africans who from the point of view of justice have asked for full compensation for the damage done to our development prospects. My proposal drastically scales back our expectation with regards to the level of funding in return for more reliable funding and a seat at the table in the management of such funds".

During the preparations for Copenhagen, Africa had worked out mitigation subsidies that reflected full compensation from developed countries to meet the costs of emission cuts. During a debate by Heads of State and Ministers organized by the media, when it became clear the talks were failing, South African Minister of Environment Buyela Sonjika restated Africa's position, namely, the expectation that Africa would be fully compensated and that the agreement would take into account Africa's development needs.

Accounting for a combined 90% of the emissions on the continent, South Africa and Nigeria are the main emitters of greenhouse gases in Africa. Of this, Nigeria produces almost 45%, which puts South Africa slightly ahead. In March 2009, current South African President Jacob Zuma, then leader of the ruling African National Congress (ANC) warned about South Africa's emission of greenhouse gases. He said:

"As the pace of development increases, countries such as South Africa are contributing an increasing amount to the concentration of greenhouse gases in the atmosphere".

South Africa, which ratified the United Nations Framework Convention on Climate Change (UNFCCC) three years after its freedom in 1997, has, in the Greenhouse Gas Inventory, eloquently identified the country's sources of emissions as:

- Public electricity and heat production;
- Road transport;
- Energy consumption;
- Iron and steel production (process emissions); and
- Enteric fermentation.

Nigeria's 45% constitutes 20 billion cubic meters of gas annually, which accounts for 13% of the global 150 billion cubic meters of gas flares every year. This places it in second position in the world after Russia.<sup>5</sup> Nevertheless, huge as they seem, both Nigeria and South Africa's emissions do not compare with those of Europe, which have been emitting gas into the atmosphere for over 150 years.

This is why South Africa has been arguing that the West has a moral duty to lead in the emissions reduction.

Until the Social and Economic Rights Action Centre (SERAC) and *Another v. Nigeria* case, scholars, legal practitioners and members of the public across the world had no idea of the African Charter on Human and Peoples' Rights. SERAC broke the silence and made people aware of the existence of the African Charter and Commission, the principal organ in the monitoring of the state implementation of the continent-wide Charter on Human and Peoples' Rights.

Instead of sticking with her African colleagues, South Africa, on the one hand, joined the Group of 20. The Group of 20 was dominated by rich Western countries led by President Obama. Contrary to the Third World Group of 77 countries' position, which called for binding agreement or nothing, Obama pressed for any agreement saying "a weak agreement is better than nothing". President Jacob Zuma joined the Group of 20 in endorsing Obama's proposal, quite against the position of the Group of 77.

What all this shows is that Africa is not like Europe or the West. The West, especially Europe, can at least pretend to have a common position in international negotiations and to stand by that position. Due to its vulnerability, however,

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5 S I Efe1, Spatial distribution of particulate air pollution in Nigerian cities: implications for human health, Volume:7, Issue:2, 2008.

Africa easily slides from its position to the one of the highest bidder. Marginalization is thus caused by the West but also by Africa itself. Nevertheless, at regional level, Africa has succeeded in crafting agreed legally-binding positions on environmental protection. Copenhagen may have shied away from producing a legally-binding treaty, as was hoped for by millions of poor people, but this is not one of Africa's problems when at home. As demonstrated below, Africa has, over time, built a complicated maze of legally-binding instruments on environment. What happened at Copenhagen was not Africa's experience over the past 50 years when discussing a framework for the protection of the African environment. If anything, Africa has over-legislated on environment, as it has on other cases.

The issue in Africa is implementation failure. Although adequate environmental treaties exist, none have been implemented, which leaves the problem either the same or getting worse. Environmental instruments on the African statute book are therefore mere decoration, not meant to benefit the environment. One small step, however, was the adoption by the African Union of the African Charter on Human and Peoples' Rights in 1981. The Charter and, more especially, the African Commission's monitoring body established therein, has rekindled the dim hopes with regard to protecting the African environment. The Commission's seminal case on environment is *SERAC & Another v. Nigeria*.

## The SERAC Case<sup>6</sup>

The fact that SERAC did not involve the determination of a dispute around a so-called "traditional human right" assisted the Commission to come to a *sui generis* determination in purely uncharted waters. Previously, the Commission had decided on a number of communications but no one had raised their profile, partly because they were not out of the ordinary. The Commission, in those other communications, rebuked states again and again in the name of the African Charter for their high-handed actions against the press, torturing perceived opponents as well as ordinary prisoners, prolonged detentions, arbitrary arrests, extra-judicial executions, not allowing peaceful assemblies, etc. However, this did not attract

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6 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria.

the attention of the international community or even the African community, which the decisions were directed at. For the African state, it was business as usual.

Although, ironically, the complaint did not expressly invoke the Charter's Article 23, which specifically deals with the environment, SERAC was the first communication to address the environment at the level of the African Union. It was also the first to raise serious questions about the activities of a powerful multinational corporation, Shell Oil Mining Company, and one of Africa's most powerful states – Nigeria. It is even more important to observe that when the Non-Governmental Organization (NGO) SERAC decided to go to the African Commission to draw its attention to the grotesque environmental degradation caused by Shell and Nigeria in the internationally famous Niger Delta Region, Nigeria was under the no-nonsense dictatorship of General Sani Abacha. Clearly, NGO officials were taking extreme personal risks by taking on army generals in a country in which many who had dared complain had disappeared without trace.

The mere submission to the African Commission of the communication therefore constituted a major development. Second, it was a unique development to lay a claim on the right to the environment because this class of rights, though enshrined in the Charter, had never been claimed in the Commission. Third, the quality of the decision by Commissioner Professor Victor Dankwa of Ghana on behalf of the Commission made Africa and the Commission, in particular, proud. Professor Dankwa captured most of the principles of international human rights law and articulated the environmental problems complainants brought for legal surgery in the best way possible. Although the African Commission, not being a fully-fledged court, is not bound by its past decisions, SERAC has created an admirable precedent not only for the Commission and the recently inaugurated African Court of Human and Peoples' Rights but for the outside world as well.

## **SERAC Claims**

SERAC made a number of claims in the communication against Nigeria in relation to oil production. Although the action was against Nigeria, as the State Party to the Charter, the communication named the Nigerian National Petroleum Company (NNPC), the state oil company which held majority shareholding on behalf of the government, as one of the two main culprits of the stated violation. Shell

was represented by Shell Petroleum Development Corporation (SPDC). The two had forged a consortium to mine the lucrative oil.

According to the communication, the operations by the two actors had “caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people”.

The complainants alleged that the consortium had exploited oil reserves in Ogoniland without any regard for the health or environment of the local people. It accused the company of releasing toxic wastes into the environment and local waterways, used by local people, in complete violation of international environmental standards binding on Nigeria. The two companies were accused of neglecting or failing to maintain their facilities thereby causing a host of avoidable spills in the nearby villages. Contaminated water, soil and air resulted in serious short and long-term health impacts on the local population, which made them susceptible to skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems. The detailed claim accused the Nigerian government of condoning and facilitating these violations by placing the legal and military powers of the state at the disposal of the two oil companies. In support of this, the complainants produced a memo from the Rivers State Internal Security Task Force, calling for “ruthless military operations”.

The communication accused the government of not monitoring the operations of the oil companies and of not ensuring that safety measures considered standard procedure within the industry. It observed: “The government has withheld from the Ogoni communities information on the dangers created. Ogoni communities have not been involved in the decisions affecting the development of Ogoniland”. Specifically against the Nigerian government, the communication alleged that it had not required the oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. It alleged: “The government has even refused to permit scientists and environmental organizations from entering Ogoniland to undertake such studies to undertake such studies. The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders”.

Furthermore, on the duty to consult, SERAC alleged that the Nigerian government had not required the oil companies to consult local communities before embarking on operations, “even if the operations pose direct threats to commu-

nity or individual lands". The army, in particular, came in for a severe battering in the communication:

"...in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air force, and the navy, armed with armoured tanks, and other sophisticated weapons...".

It went on to accuse the government of also using private militia and persons to orchestrate violence against peaceful local communities:

"In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces".

The communication accused the government of fostering impunity. It alleged that the government had not bothered to investigate let alone punish any of those people responsible. It argued: "The Nigerian army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for 'ruthless military operations' and 'wasting operations coupled psychological tactics of displacement...".

Complainants submitted video evidence in support of their claim showing one Major Okuntimo, at the time head of the Task Force, describing the repeated invasion of the Ogoni villages by his troops, how unarmed villagers running from the troops had been shot from behind, and how the homes of suspected MOSOP activists were ransacked and destroyed. In the video, Major Okuntimo stated his commitment to rid the communities of members and supporters of MOSOP.

Finally, the communication alleged that the Nigerian government had destroyed and threatened Ogoni food sources through a variety of means. It alleged that the government had participated in irresponsible oil development that had poisoned much of the soil and water upon which Ogoni farming and fishing depended. It averred: "In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farm lands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities".

### **Endorois Decision<sup>7</sup>**

More recently, the African Commission was confronted with a case even more directly related to indigenous peoples' challenges. The Endorois are a Kenyan ethnic group, one of the first to inhabit their land. Because, like all other African people, their "title" to their land was defined according to their ancestral law, they remained vulnerable to dispossession by those with more stronger state title from colonial times through to an "independent Kenya". Indeed, colonialism evicted them, affording them no legal recourse nor internationally recognized compensation given that the colonial and modern systems would not recognize their land claims. A few were paid unilaterally-decided pittance at the time of their eviction. Consequently, after they were denied remedy in the local courts, the group communicated their grievances i.e. arbitrary eviction from their ancestral lands by the colonial state without free, prior and full consent or compensation, to the African Commission. After pondering their plight, the Commission in a historical ruling made the following precedent-setting recommendations to Kenya and, through Kenya, to all African countries with indigenous peoples.

In view of the above, the African Commission finds that the Respondent State is in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter. The African Commission recommends that the Respondent State:

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7 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

- a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.
- b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- c) Pay adequate compensation to the community for all the loss suffered.
- d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- e) Grant registration to the Endorois Welfare Committee.
- f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- g) Report on the implementation of these recommendations within three months from the date of notification.

To reiterate, the main reason used at the time to justify the high-handed action resulting in loss of their land for grazing of their cattle as cattle-keeping communities, cultivation, religious practices, etc., was that as holders of so-called indigenous or native title, like most Africans, they did not actually own the land, which was vested in the state through local councils. Although not specifically called upon in the complaint to pronounce on Article 23, the Commission nevertheless pronounced on Article 22 on the right to development, especially on the failure to consult the people and to let them participate in decision-making on the decisions which affected them and then on the effects of those decisions, including denying Endorois people their grazing lands, fishing areas, access to the lake and forests for religious ceremonies, etc. Given that the Kenyan government has since not produced a credible plan to implement any of the recommendations made, the African Commission recently passed an unprecedented resolution calling on a State Party to immediately implement the decision and to report back to the Commission at its next sitting.

## **African Union Architecture on Environment**

The African Union has established a highly-developed normative framework for the promotion and protection of the environment. In an ideal situation, there should be no problem in promoting and protecting the African environment be-



cause all the norms that this requires have long been enacted and are in place on the African Union statute book. However, in practice, this is not the case. There is a huge difference in Africa between the law and the practice. Often, the two proceed in two different and opposing directions. This is the case here.

Nevertheless, unlike the domestic scene, where the ground remains inadequately provided, the international scene has seen a plethora of African-based environmental instruments. Some of the more important environment-specific African instruments include:<sup>8</sup>

- African Convention on the Conservation of Nature and Natural Resources;
- African Charter on Human and Peoples' Rights, 1981;
- African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty), 1996;
- Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991;
- Convention of the African Energy Commission, 2001;
- Others are more general but encapsulate the issue of the environment and include:
- Constitutive Act of the African Union, 2000;
- Convention for the Establishment of the African Centre for Fertilizer Development;
- Phyto-Sanitary Convention for Africa; and
- The New Partnership for Africa's Development (NEPAD), 2001

Paragraph 12 of the NEPAD Framework Document provides that: "Africa has an important role to play with regard to the critical issue of protecting the environment. African resources include rainforests, the virtual carbon dioxide-free atmosphere above the continent and the minimal presence of toxic effluents in the rivers and soils that interact with the Atlantic and Indian Oceans and the Mediterranean and Red Seas. The New Partnership for Africa's Development will contain a strategy for nurturing these resources and using them for the development of the African continent while, at the same time preserving them for humanity".

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8 [www.african-union.org](http://www.african-union.org)

Regarding local communities and the environment, it states: "It is obvious that, unless communities in the vicinity of the tropical forests are given alternative means of earning a living, they will cooperate in the destruction of the forests. As the preservation of these environmental assets is in the interests of humanity, it is imperative that Africa be placed on a development path that does not put them in danger". On Section B4, entitled "The Environmental Initiative", which sets out the NEPAD Initiative on Environment, the Framework Document states: "It has been recognized that a healthy and productive environment is a prerequisite for the New Partnership for Africa's Development. It is further recognized that the range of issues necessary to nurture this environmental base is vast and complex, and that a systematic combination of initiatives is necessary to develop a coherent environmental programme. This will necessitate that choices be made and particular issues be prioritized for initial intervention".

It further recognizes that the core objective of the Environmental Initiative is to combat poverty and contribute to socio-economic development in Africa. Consequently, the Environmental Initiative revealed that it had targeted a total of eight sub-themes for priority interventions:

- Combating Desertification;
- Wetland Conservation;
- Invasive Alien Species;
- Coastal Management;
- Global Warming;
- Cross-Border Conservation Areas;
- Environmental Governance; and
- Financing.

The reference to "invasive alien species" echoes regional concerns in Africa's oldest convention, namely, the Phyto-Sanitary Convention for Africa. Originally concluded by the colonial powers in London in July 1954, for sub-Saharan Africa, the 1967 revised Phyto-Sanitary Convention recognizes the need for cooperation among the African States in controlling pests and diseases of plants and plant products and in preventing their introduction and spread across national boundaries.

Article 3 (j) of the Constitutive Act, which establishes the African Union, provides among its objectives a duty to "Promote sustainable development at the

economic, social and cultural levels as well as the integration of African economies". Providing for sustainable development among the objectives of the continental Union plan underscores the importance the continent attaches to the promotion and protection of the environment. In other words, African countries are committing themselves to economic, social and cultural development which is sustainable or which takes the interests of the environment into account.

Previously, the then Organization of African Unity, precursor to the African Union, adopted a far-reaching treaty establishing the African Economic Community (AEC) with the primary objective of creating an African single market. Just like Europe, Africa realized the importance, in pursuance of the development paradigm, of ridding itself of the truncated economic models it inherited from former colonial powers in favour of a wider economic space in which trade was not haunted by the artificial boundaries that characterized the current model. The Abuja Treaty, as the AEC is also known, ultimately became the basis of the African Union. Alluding to sustainable development, paragraph 3 of the Treaty recalled the duty to develop and utilize the human and natural resources of the continent for the general well-being of the African peoples. There are several references in the treaty text to sustainable development but the most straightforward one is in Article 4 (2) (0) which explicitly provides for the "harmonization and coordination of environmental protection policies" among the objectives of the Community.

Even more relevant to environmental concerns is the singularly important African Convention on the Conservation of Nature and Natural Resources, as amended. Predictably, the treaty opens with the following words in the preamble: "Conscious that the natural environment of Africa and the natural resources with which Africa is endowed are irreplaceable part of the African heritage and constitute a capital of vital importance to the continent and humankind as a whole.....".

It is particularly important that the preamble acknowledges the "irreplaceable" nature of the natural environment as a guiding principle for policy formulation. Most of the natural environment has already been lost through the activities of man and it is sad that it will never be replaced. This means Africa has lost its most important capital and, therefore, the means to fight poverty.

Paragraph 5 seeks to incorporate international law, particularly international environmental law, into the African-wide environmental legal framework. In other words, it recognizes the importance of collective rather than isolated efforts to promote and protect the environment. According to the paragraph, the African

Union re-affirmed that, in accordance with the Charter of the United Nations and the principles of international law, “a sovereign right to exploit their own resources pursuant to their environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limit of natural jurisdiction”.

This establishes the principle of liability for actions in one jurisdiction that may cause danger in another jurisdiction. In the next paragraph, the duty underscores the “responsibility of States” to protect and conserve the environment and natural resources “and [use] them in a sustainable manner with the aim to satisfy human needs according to the carrying capacity of the environment”.

Along this line, the Environmental Treaty incorporates important instruments such as the Charter of Economic Rights and Duties of States, Final Act of Lagos, Stockholm Declaration and Agenda 21, and the African Economic Community Treaty, all important international initiatives to promote and protect the environment.

Article 11 provides the objectives of the Convention, which are stated to be:

- to enhance environmental protection;
- to foster the conservation and sustainable use of natural resources; and
- to harmonize and coordinate policies in these fields.

The aim behind these objectives is to achieve ecologically safe, economically sound and socially acceptable development policies and programmes. Based on these, Article 11 states the principles of the Convention:

- the right of all peoples to a satisfactory environment favourable to their development;
- the duty of States, individually and collectively to ensure the enjoyment of the right to development; and
- the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.

Article IV states the fundamental obligation of States Parties to the Convention which is expressed as being to “adopt and implement all measures necessary to

achieve the objectives” of the Convention “through preventive measures on the application of the precautionary principle’.....”.

Among others, the Convention obliges States Parties to take effective measures to prevent land degradation, to conserve and improve the soil, and also to ensure sustainable management of land resources. It compels States Parties to the Convention to establish land-use plans based on both scientific investigation and local knowledge and experience, to improve soil conservation and control erosion and pollution caused by agricultural activities, including aquaculture and animal husbandry, etc.

In the field of water conservation, the Parties are, among other things, obliged to manage and maintain these at the highest possible quantitative and qualitative levels. Other duties include the need to take measures to prevent damage to human health and pollutants, prevent excessive abstraction, and maintain water-based essential ecological processes. The Parties are obliged to take necessary measures to conserve vegetation cover, identify factors that cause depletion of animal and plant species that are threatened with extinction, and prevent, mitigate and eliminate the detrimental effect on the environment, etc.

Article XIV provides for sustainable environment and natural resources. According to this article, the Parties are under an obligation to ensure that:

- conservation and management of natural resources is treated as an integral part of national and/or local development plans; and
- in the formulation of all development plans, full consideration is given to ecological, as well as to economic, cultural and social factors.

These obligations are meant to promote sustainable development.

The Convention has reserved a role for the “traditional rights of local communities and indigenous knowledge” systems. In other words, besides using modern means of promoting and protecting the environment, traditional African society also has a role to play - as it had for centuries prior to the advent of modern society. Relevant parts of Article XVIL (3) provide that: “The Parties shall take the measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources”.

Again, it is important that there is active local participation by the local communities in managing natural resources and that they are not ignored as is the case in many countries, under the mistaken belief that local communities cannot have ideas for the sustainable management of their resources. The Convention encourages a combination of both the local and pre-modern together with modern methods.

A specific concern addressed by the Convention is the issue of the effect of military operations on the national environment. Given that Africa has been a theatre to many conflicts, it follows that of all the warring parties, the environment has been the greatest loser. To redress this, the Convention directs that "Parties are under obligation during military armed conflicts to protect the environment against harm". It goes on to say that: "Methods or means of combat which are intended to cause widespread, long-term or severe harm to the environment are banned". Parties must prevent combatants from using the destruction or the modification of the environment as a means of combat. Consequently, Parties are obliged to restore and rehabilitate areas damaged in the course of armed conflict.

Related to the last paragraphs, the African Nuclear Weapons-Free Zone Treaty (Pelindaba Treaty) was introduced to confirm the 1964 Denuclearization of Africa Declaration. Paragraph 10 of this treaty stipulates the African countries' determination to: "... keep Africa free of environmental pollution by radioactive waste and other radioactive matter". Article 7 prohibits the dumping of radioactive waste, as provided in the earlier Bamako Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes "within Africa insofar as it is relevant to radioactive waste". The second limb of the same article forbids the Parties from assisting or encouraging the dumping of radioactive waste or other radioactive matter "anywhere within the African nuclear-weapon free zone".

## **Hazardous Waste Regulation in Africa**

Hazardous waste has been dumped in Africa with deadly consequences for human life. We have all read about Chernobyl in Russia and Bhopal in India, which hit the headlines in the 1980s. Africa, however, already poor, has been turned into a dumping site by wealthy countries. They do not care. Some commentators have quite rightly likened this to racism. Fatal toxic waste was dumped in crowded

areas in Abidjan, the capital city and most populated part of Ivory Coast, resulting in unnecessary deaths and illness among innocent souls all because some rich fellow in Europe decided to pay his African puppets to take the disaster to Africa. It has also happened in Uganda and in various other African countries. For example, in 1988, the Benin government negotiated a bilateral deal with the French government to import radioactive and industrial waste for an advance of US\$1.6 million and 30 years of economic assistance. When confronted by NGOs, Benin defended the decision as a "matter of survival". Similarly, Guinea-Bissau negotiated the receipt of US\$20 million from a similar arrangement but was forced by public pressure to cancel the deal. Trafigura, an international oil company, reportedly offered to compensate 31,000 people who said they became ill from toxic waste dumped in Ivory Coast.

In response to public pressure and pressure exerted against African countries and Western companies, Africa, under the Organisation of African Unity, adopted the Bamako Convention on the Ban of the Import into Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes within Africa. The Bamako Convention is an excellent instrument to fight this scourge, which had by then become the main way, even before tax, for most poor African countries to generate revenue with which to administer their governments. Paragraph 2 of the preamble to the Convention justifies the Convention as the "most effective way of protecting human health and the environment from the dangers posed by such wastes". It stated that reducing the production of waste is important in addressing the risks this poses to human health and the environment. Paragraph 14 of the preamble uses Copenhagen-day language when it enjoined Parties to the Convention to strive to promote the development of "clean production technology methods", including "clean technologies" for the "sound management of hazardous wastes produced in Africa....". It called on African countries "to minimize and eliminate the generation of such wastes". Article 1 (5) defines the term "clean production methods" as "production or industrial systems which avoid, or eliminate the generation of hazardous products in conformity with Article, section 3 (f) and (g) of this Convention". Article 4 enjoins the Parties to take measures including legal and administrative to "prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties", a loose reference to Europe from where most of the imports of hazardous wastes originated. In addition, Article 4 (3) provides for an elaborate system to deal with waste generation in Africa itself, including the duty of Parties to ensure that waste generators sub-

mit reports to the Secretariat regarding the waste they generate in order to enable the Secretariat to produce a complete hazardous waste report. Other conditions imposed under this clause include the duty of Parties to:

- impose strict unlimited liability as well as joint and several liability of hazardous waste generators;
- ensure that the generation of hazardous waste within the area under its jurisdiction is reduced to a minimum, taking into account social, technological and economic aspects; and
- ensure the availability of adequate treatment and/or disposal facilities for the environmentally sound management of hazardous waste, which shall be located, as far as possible, within its jurisdiction, etc.

The Convention provides for the precautionary principle that the Parties should aim to prevent rather than act after the fact. It restates the importance of Parties taking “precautionary measures to implement the precautionary principle to pollution prevention through application of clean production methods, rather than the pursuit of permissible emissions approach based on assimilative capacity consumption”. The Convention contains several safeguards protecting human health and the environment in relation to toxic waste in Africa.

## **The law in the future**

The most difficult challenge, as always, however, is to ensure implementation of this regime. Although Africa has a splendid legal regulatory regime to promote and protect the environment, it has often not been implemented. It is therefore ironic that Africa’s environment is adequately protected in theory but, in practice, abuses and violations are the order of the day. In other words, most if not all of the various legislative interventions have not been felt on the ground.

As indicated above, however, a significant change only occurred with the SERAC case against Nigeria. SERAC was the result of the African Charter on Human and Peoples’ Rights. This is a unique instrument that guarantees both human and “peoples’ or group rights” and subjects them to the absolute non-discrimination clause of Article 2. After reiterating the traditional civil and political or personal rights of the European philosophers, the Charter articulates economic,



social and cultural rights, first recognized internationally by the Universal Declaration of Human Rights. These economic, social and cultural rights are closely followed by the collective, group or what the Charter uniquely calls “peoples” rights running from Article 19 to 24. Article 24 guarantees the right to the environment in the following terms: “All peoples shall have the right to a general satisfactory environment favourable to their development”.

Although not specifically stated by the complainants in the SERAC case, Article 22 encapsulates development as a right of peoples as follows:

- All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind; and
- States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

As indicated, SERAC did not evolve into a right to development claim by the Ogoni people. Claimants were intent on complaining to the African Commission against the activities of Shell and the Nigerian government based on the right to the environment. However, violation of the right to development was implicit in the complaint.

Reading the decision of the African Commission, Commissioner Dankwa observed, *inter alia*, that, as guaranteed in Article 24, the right to a generally satisfactory environment “recognises the importance of a clean and safe environment that is closely linked to economic and social rights insofar as the environment affects the quality of life and safety of the individual”. He went on to quote from Alexander Kiss who opined that: “An environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development of personality as the breakdown of the fundamental ecologic equilibria as harmful to physical and moral health”.

Further, the Commission observed: “The right to a generally satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore, imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. ... The right to enjoy the best attainable state of physical and mental health enunci-

ated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article 24) already noted, oblige governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventions conduct from the state, for example, to desist firm carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual”.

Related to the Bamako Convention above, the Commission observed: “Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publishing environmental and social impacts prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities, and providing meaningful opportunities to individuals to be heard and to participate in the development decisions affecting their communities...”. With these background comments, the Commission proceeded to find Nigeria to be in breach of several provisions of the African Charter due to the way in which it had conducted itself in the oil mining project.

So what is the effect of this historic decision, in its broader reach, as the first authoritative pronouncement on the African environment? Many would argue that SERAC was in fact “lost” and that the Ogonis came out the losers from it and there would be some truth in this. If a court or quasi-court decision fails to impact positively on the lives of the people that brought the case, what would be the proper term for it? Like most African Commission decisions, or even court decisions as recently witnessed at the effectively defunct SADC Tribunal at Windhoek, they mean nothing to states adjudged to be in the wrong. It was business as usual in Ogoniland post-SERAC as far as Shell and the other oil mining companies were concerned. Apart from its jurisprudential value, therefore, it is highly doubtful as to whether SERAC impacted in any meaningful sense on the lives of the people of Ogoni, including children, women and other vulnerable groups.

## Conclusion

This chapter has attempted to establish the truism that, until recently, environmental challenges were never really taken seriously in Africa. Africa operated on

the principle that there were other priorities that needed attending to immediately and the environment was not considered one of them. No one attempted to link problems of poverty to the environment as is the case today.

However, the chapter shows that, even with scant knowledge, the African state, still felt compelled to “legislate” on the environment from very early on. Land-related legislation, for example, took the form of far-reaching conventions as discussed in this chapter. The aim was to protect nature, and the African Union came out with all guns blazing, imposing obligations on members as to how to use Africa’s natural resources, especially land for future generations. This was prophetic given the intensified global activity around this very issue since then. The main lesson, of course, is that although Africa is the least polluter of the environment due to the under-developed nature of its economy, it is the main victim of the activities of multinationals such as Shell and other oil mining companies and Western industrialization. ○

## CHAPTER 27

## The Chinese Dilemma: Institutionalizing Peoples' Rights in the Nation-Party-State Building Process

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Zhou Yong

“Nation-state” and “peoples’ right to self-determination” are among a few key Western concepts that have influenced political developments in China since the beginning of the 20<sup>th</sup> century. The threat to China’s survival at the end of the Qing Dynasty (1644-1911) provoked the Han nation-state building process led by Sun Yat-sen and his followers. However, the claims to self-determination and the independence movements of various peripheral peoples have been continuously pressuring the institutionalization of peoples’ rights in China. Four models were proposed over the century, and regional national autonomy (RNA) was adopted 65 years ago as a basic political and legal framework based on the self-determination of Chinese peripheral peoples.

The peoples’ right of self-determination is adopted as the *common* and the *first* article in both the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR). Although it is considered as one of the most important “roots”<sup>1</sup> of modern international human rights protection and “an essential condition”<sup>2</sup> for the effective guarantee and observance of individual human rights, the right of self-determination has been one of the main obstacles to Member States of the UN adopt-

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1 Manfred Nowak (2005), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> revised edition, N.P. Engel, p.6.

2 General Comment 12, The right to self-determination of peoples (Article 1), Human Rights Committee, UN doc. A/39/40 and Corr.1 and 2, pp.142-143.

ing any human rights instruments including this rule.<sup>3</sup> The self-determination rule serves not only to grant statehood to oppressed peoples but also to disrupt existing state structures.<sup>4</sup>

It has been acknowledged that the main function of self-determination in post-colonial time is the advancement of democracy.<sup>5</sup> However, the forms of democratic governance based on the substantial and procedural aspects of this right are far from concrete. In China, ethnic policy/law has been swinging between the Han Chauvinism and a certain degree of multiculturalism. Despite the ratification of various human rights conventions, including the CESC. since the 1990s,<sup>6</sup> the implementation of self-determination and other human rights norms through domestic practice has been at stake. The escalating ethnic tensions, in the form of terrorist attacks, separation movements and the claims of “*real*”, “*high degree*” or “*meaningful*” autonomy led by Uyghur, Tibetan and Mongolian peoples or other “national minorities”<sup>7</sup> within China reveal serious challenges to the legitimacy of the existing autonomous arrangement - *regional national autonomy* (RNA) in terms of accommodating the distinctive cultural and ethnic communities within the unitary system of the Chinese state.<sup>8</sup> An examination of the Chinese case can

3 The politics and debates on drafting Article 1 of the two Covenants is a classic example. In addition, the everlasting case is the relevant discontent on the rule in the UN Declaration on the Rights of Indigenous Peoples over the last two decades. The UN General Assembly finally adopted the *Declaration on the Rights of Indigenous Peoples* on 13 September 2007.

4 A. Cassese, *Self-determination of peoples*, Cambridge University Press, 1995.

5 Asbjørn Eide, *Peaceful and Constructive Resolution of Situations Involving Minorities*, The United Nations University, Tokyo, 1995, p.39.

6 On 27 October 1997, China signed CESC. On 28 February 2001, the Standing Committee of the 9<sup>th</sup> National People's Congress ratified China's accession to the Covenant. CESC articulated the self-determination rule in Article 1.

7 In China, 56 nationalities are recognized formally by the State as “Minzu” in Chinese. With the exception of the Han, 55 are “shaosuminzu”, normally translated as “national minorities”. However, this translation is not appreciated in reference to those terms used in the international documents such as ethnic, linguistic and religious minorities or peoples. Among these 55 national minorities, some of them are indisputably recognized by the international community as “people”, such as the Tibetans, while other groups are more controversial. In view of the lack of a universally accepted definition of “people” or “peoples” in legal instruments, this paper uses the terms people, peoples, peripheral peoples, culturally distinctive peoples, national minorities and distinctive cultural or ethnic communities in an interchangeable sense for the convenience of different contexts.

8 While the role of RNA is announced by the Chinese State in successfully maintaining State unity and effectively protecting national minorities' rights, with its spirit of the self-determination rule, this institution has been accused of being a mechanism for minority exclusion and State control. MRG report, 2007.

explore the institutional obstacles to realizing the peoples' right to self-determination in the process of nation-state building.

The research presented in this paper follows a basic assumption: although the self-determination rule has evolved from a political principle to the legal norm articulated in the Chinese Constitution, RNA Law, and established by ratification of relevant international conventions, the nation-state building process led by the Chinese Communist Party (CCP) constrains the institutionalization and realization of the peripheral peoples' rights.

While the *state* and *nation* building processes are closely related, it is important to view them separately when observing the contradictions in the institutionalization of self-determination as a people's right. *State building* responds to the challenges of political and administrative integration problems in a given society. Political elites create new normative principles, structures and organizations designed to penetrate society in order to regulate behaviour and draw more resources from it. On the other hand, *nation building* highlights cultural identity aspects within the political unit. It refers to the process by which individuals or peoples transfer their commitment and loyalty from smaller family clans, tribes, villages or minor territories to the larger group identity within a political system.

In this paper, as a starting point, it is helpful to take an oversimplified view of *state building* as being related to structural issues, while *nation building* relates to cultural aspects of the political system.<sup>9</sup> By observing a parallel process of (CCP) *party building* in China and the dominant role of the CCP in the Chinese political power structure, *state building* in China should be understood as *party-state building*. The term "*nation-party-state*" building is therefore suggested in this analysis as a key concept by which to observe the political and legal developments in relation to peoples' rights in China.

## Four Proposed Models of State-making and Nation-building in Modern China

The modern Chinese nation-building and state-making process started with the racial revolution of the Han aimed at dispelling the "barbarian Man people" and

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9 Gabriel A. Almond and G. Bingham Powell, Jr., *Comparative politics: a developmental approach*, p.36, Little, Brown and Company, Boston, 1966.

reviving the Han people's state at the beginning of the 20<sup>th</sup> century. There are three main proposed models. The existing RNA, as the fourth model, has been practised from 1949 to the present day in the People's Republic of China (PRC).

#### Model 1: *Han nation-state*

This model is to establish a state owned only by the Han people. The territory is suggested as the scope of the Han Dynasty. Whether peoples were inside or outside this state was based on the ancient concept of the “*wufu*” – five division system (五服制) in *Shangshu*.<sup>10</sup> This was a system of dividing the realm into five concentric circles with the capital as centre. It distinguishes the degree of relationship of peoples according to the “five mourning dress code” coinciding with the geography. The five divisions were called *dian fu* (甸服 capital division), *hou fu* (侯服 enfeoffed division), *sui fu* (绥服 pacified division), *yao fu* (要服 strategic division) and *huang fu* (荒服 peripheral division), in descending order. According to this system, the Tibetans, Moslems (Hui) and Mongolians are classified as the *huang fu* in relation to Han. They should therefore be free to choose whether they want to join the Han state, while Korea, Vietnam and Burma are closer and should be a part of the Republic of China. This idea was representative of most of the revolutionaries before the anti-Man revolution of 1911.<sup>11</sup>

#### Model 2: *Five Nations' United Republic*

This form of state was established in 1912. It was based on the consideration that the Republic of China had to inherit and maintain the integrity of the former Qing Empire's territory. It has a clear link with the modern concept of state sovereignty and territorial integrity, which was introduced into China in the mid-19<sup>th</sup> century. This proposal was quickly changed because it implied the grant of equal status to five nations (Mongols, Tibetans, Hui, Man and Han). Based on it, other parts of the Qing Empire's territory could be separated from China. Both the initiation and

10 Book of History, a compendium of documents in various styles, making up the oldest extant texts of Chinese history, from legendary times down to the times of Confucius. It is among the Four Books and Five Classics of Confucianism.

11 It was presented clearly by Zhang Taiyan in 1907, “Explaining ‘The Republic of China’”, *Minbao*, No. 15, Tokyo, July 5, 1907.

change are the same consideration, not based on the peoples' self-determination but on how to build a state within the Qing Empire's territory.

*Model 3: United federation of nations or peoples*

This was the Chinese Communist Party (CCP)'s proposal during the 1920s – 1930s. The right to national self-determination was first put forward as a fundamental policy to deal with the national problem in the *Manifesto of the Second National Congress of the CCP* in 1922.<sup>12</sup> The proposition put forward to deal with the national problem and state building by the CCP in its early years was influenced by the then Soviet Russia's national policy, which was characterized by the right to national self-determination and federalism.<sup>13</sup> Furthermore, it has been proved, too, that the CCP proposition can be traced back to the Comintern proposition concerning the problem of colony and nationalities and to Lenin's thought on national self-determination and federalism.<sup>14</sup> In terms of practice, the national self-determination in this sense was expressly set forth in the *Constitutional Outline of the Soviet Republic of China*, which was set up by the CCP in Ruijin, Jiangxi Province in 1931.<sup>15</sup>

12 In the third part of the Manifesto entitled "The CCP's Tasks and Present Striving Goals" seven goals were listed. The fourth item declares that: "Mongolia, Tibet and Xinjiang should practice autonomy and become the democratic state of self-governance." In the fifth, it advocates "unifying China proper with Mongolia, Tibet and Xinjiang in a form of free federation and setting up the Federal Republic of China." *The Party Program* passed by the Third National Congress of the CCP prescribes that "nationalities in places like Tibet, Mongolia, Xinjiang and Qinghai could determine on their own the relations with China proper". *Minzu Wenti Wenxian Huibian* [A Collection of Documents concerning the Nationality Problem] (CCP Party School Publishing House, Beijing, 1991), pp. 21-22.

13 See the expressions about the rights of national self-determination in the 1918 Declaration of the Rights for Nationalities in Russia and the regulations about federalism in the Constitution of the Soviet Republic of the Russian Socialist Federation.

14 Wang Ke, *Minzu yu Guojia* [Nationality and State] (Chinese Social Sciences Publishing House, Beijing, 2001), pp. 249-252.

15 The 1931 Constitutional Outline of the Soviet Republic of China, Article 14 reads as follows, "[t]he government of the Soviet Republic of China recognizes the right of Chinese minority nationalities to national self-determination, insofar as to the right of the weak and small nationalities to separate from China and establish their own independent countries. Whatever nationalities living within the territory of China, such as the Tibetans and the Miaos, have the complete right to national self-determination, either to join or separate from the Soviet Federation of China, or to set up their own autonomous regions. The government of the Soviet Republic of China, at the present stage, strives to help the weak and small nationalities get rid of the oppressive rule by Kuomintang, warlords, local nobility, rulers, and so on, and gain the complete freedom and



#### Model 4: A unitary state with regional national autonomy (RNA)

The historical examination of RNA in the Chinese context shows the process of CCP's policy shifting from the concept of "national self-determination" (*minzu zijue*, 民族自决) to "national autonomy" (*minzu zizhi*, 民族自治) or RNA (*minzu quyue zizhi*, 民族区域自治). In other words, Lenin's concept of "national self-determination", which comprises two aspects - external self-determination (i.e. secession or separation) and internal self-determination (i.e. self-governance or autonomy) to entitle all national minorities in China was changed. RNA only entitles the internal aspect of self-determination. The unity of P.R. China is thus the highest priority of the world's largest unitary state. From the perspective of state teleology, having experienced the practice of international and domestic political struggles, the system of RNA became a "key" of the CCP to solve the national problem within the limits of the guarantee of state unity and territorial integrity.<sup>16</sup> The system advocates that minority nationalities in China become "their own masters" in the area in which they live in concentrated communities, and for group rights of the minority nationalities to be safeguarded properly. Meanwhile, the system also claims to safeguard the unification of the unitary state, so as to avoid a loose state form such as the national federal republics in the Soviet Union. In this way, the interests of the state and the group interests of minority nationalities are balanced rationally. A comment by Mao Zedong on the relationship between the Han majority nationality and the minority nationalities is especially relevant from the perspective of the state in the early period of P. R. China. According to him, "minority nationalities assist the

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independence. And moreover, the Soviet government will develop their own national cultures and languages among the nationalities." This principle is restated in the document with the same title adopted at the Second National Soviet Congress in 1934. See: *Minzu Wenti Wenxian Huibian* [A Collection of Documents concerning the Nationality Problem], (CCP Party School Publishing House, Beijing, 1991).

16 Li Weihai, "Ganyu Jianli Zhuangzu Zizhiqu Wenti de Yixie Kanfa he Yijian" [Some Comments on the Establishment of the Zhuang Autonomous Region], in *Tongyi Zhanxian Wenti yu Minzu Wenti* [The United Front Problem and the Nationality Problem], (Renmin Publishing House, Beijing, 1981), p.484.

Hans a great deal politically. Their joining the big family of Chinese nationalities means the political assistance of the Han people".<sup>17</sup>

### **Constructing a State of the “Chinese Nation (中华民族)”: Sun Yat-sen’s Heritage**

The idea and efforts to construct a modern Chinese nation-state were initiated by the founding father of the Republic of China, Sun Yat-sen, and his followers. “The principle of nationalism”, was one of the three principles of the Nationalist Party for the Chinese nation’s salvation and renewal. The Chinese nation as a concept in Sun’s instrumental interpretations of his nationalism, as a part of the “Three Principles of the People”,<sup>18</sup> has three different versions during different periods of the nation-state building.

During the period of organizing the anti-Manchu revolution before 1911, the Chinese nation meant Han Chinese only.<sup>19</sup> The aim of the revolution was to overthrow the Manchu emperor and to revive the Han Chinese state (model 1). However, after the successful revolution, because the establishment of the state was based on the territory of Qing Empire, the Chinese nation was interpreted as a combination of the “five nations” within the territory for the unity of the Republic of China (model 2). In fact, the risks of separation were real threats.<sup>20</sup> In response to

17 Mao Zedong, “Zai Zhongguo Gongchandang Quanguo Daibiao Dahui shang de Jainghua” [Speech at the Congress of the Chinese Communist Party], in *Zhongguo Gongchandang Zhuyao Lingdaoren Lun Minzu Wenti* [Major Leaders of the Chinese Communist Party on the Nationality Problem], (Minzu Publishing House, Beijing, 1994), p.113.

18 Other translations are “the triple demism” or “*San Min* Principles” (in Chinese 三民主义).

19 The revolution of 1911 was organized under a slogan which reflected a strong trace of racism, i.e. “drive out the Tartar slaves, and revive the Chinese Nation”. This slogan serve the main purpose of the revolution well, which was to topple the government established by Manchu people (here called by Han Chinese “Tartar slaves”).

20 With the outbreak of the Chinese Revolution of 1911 and the collapse of the Manchu Empire, the Republic of China was convinced of its right to inherit the territories ruled by the Manchu. However, Tibet claimed independence in 1913. The Mongols, as one of the non-Han peoples which had ruled the whole of China for around 90 years in the 13<sup>th</sup> -14<sup>th</sup> centuries, claimed that the fall of the Manchu should have left them independent. In 1921, the Mongolian revolution and Soviet

the goal of unifying the state in the context of the peoples' claims to self-determination, Sun interpreted the principle of nationalism as constructing the Grand Chinese nation with the Han Chinese at the core. This is the revised model 1 nation-state. As the result of the Han's assimilation of other peoples, the Chinese nation is regarded as a superior unit.

Sun's nationalism can be seen as a case of an awaking national consciousness among the Han Chinese in response to the Western concepts of nation-state, self-determination and sovereignty during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Faced with the non-Han Chinese (Manchu) ruling and political domination of the West, Sun explained his proposed "principle of nationalism" as equivalent to the "doctrine of the state". In his lectures, he said: "We face a tragedy—the loss of our country and the destruction of our race. To ward off this danger, we must espouse nationalism and employ the national spirit to save the country." He observed that: "The Chinese people have shown the greatest loyalty to family and clan with the result that in China there have been family-ism and clan-ism but no real nationalism. ...The family and the clan have been powerful unifying forces... But for the nation there has never been an instance of the supreme spirit of sacrifice." In order to save China and to resist Might, "we must espouse nationalism and in the first instance attain our own unity."<sup>21</sup>

To sum up, no matter what the different interpretations of nationalism proposed by Sun, constructing the Chinese nation with Han Chinese as the core or centre was Sun's heritage, institutionalized by law and practice during the period of the Republic of China.<sup>22</sup> This brought institutional oppression of other peripheral peoples' rights because this principle denied equal status between Han and other culturally distinct peoples in China.

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occupation of Outer Mongolia resulted in the permanent independence of the country. The Manchu State was also established in 1932 and ended in 1945. The Uyghur people primarily inhabit in Xinjiang (called East Turkistan by those Uyghur nationalists) region. They have competing loyalties and there were two short-lived attempts at independence (in 1933 and 1944). At present, the international campaigns for rights of Tibetans, Uyghur and Mongols and possible independence have become increasingly well organized, putting political pressure on China in international forums.

21 Sun Yat-sen, *San Min Chu I: The Three Principles of the People*, China Publishing CO. Taipei. 1963. p. 20.

22 Article 1 of the Constitution of the Republic of China (1946) and the latest revision in April 2000 reads: "The Republic of China, founded on the Three Principles of the People, shall be a democratic republic of the People, by the people, and for the people."

It was a substantial change when the CCP revolution and its ethnic policies promoted Lenin's principle of national self-determination. During the revolutionary period, the CCP recognized all nationalities' right to self-determination (including the right to secession). The CCP's policy in its earlier period of time (from 1920s to 1930s) also supported the claims to separation or independence on the part of distinctive peoples based on self-determination. It announced that national minorities in China had rights to self-determination and even to establish their own countries.

In all the PRC Constitutions after 1949, the Chinese nation (*Zhonghua Minzu* 中华民族 in Chinese) is never used as a legal term. Instead, the terms usually used are "*the people of all nationalities in China*", "*the Chinese people of all nationalities*", "*the people of all of China's nationalities*", referring to "*zhongguo gezu renmin* 中国各族人民" in Chinese.<sup>23</sup> For example, the start of the preamble to the PRC Constitution (1982) reads: "The people of all nationalities in China have jointly created a splendid culture and have a glorious revolutionary tradition." "All nationalities in the People's Republic of China are equal."<sup>24</sup>

However, contradictions have been observed in the PRC between the Party's Constitution and the State Constitution. After the 16<sup>th</sup> National Congress of the CCP in 2002, the revised CCP Constitution not only employs the term "Chinese nation" but also links it with the nature and aims of the CCP. According to the CCP Constitution, "[T]he Communist Party of China is the vanguard both of the Chinese working class and of the Chinese people and the Chinese nation."<sup>25</sup> The recent Report at the 18<sup>th</sup> National Congress of CCP in 2012 reads: "[L]ooking back at China's eventful modern history and looking to the promising future of the Chinese nation, we have drawn this definite conclusion: We must unwaveringly follow the path of socialism with Chinese characteristics in order to complete the

23 The legal documents include all the Constitutions from 1954 to the latest amended version in 2004. They also include the first constitutional document - Common Program adopted by CPPCC in 1949.

24 Article 4, PRC Constitution (1982).

25 1982 was the year that China adopted the new Constitutions both of the State and the Party. It was a milestone event that the CCP Constitution stated that the CCP has to act according to the State Constitution and law. The CCP is only the vanguard of the Chinese working class. In 2002, at the 16<sup>th</sup> National Congress of the CCP, the revised CCP Constitution newly added that the CCP was the vanguard not only of the Chinese working class, but also "of the Chinese people and the Chinese nation".

building of a moderately prosperous society in all respects, accelerate socialist modernization, and achieve the great renewal of the Chinese nation.”<sup>26</sup>

The Party-State of the PRC has been taking negative and positive measures in pursuing Chinese nation building while weakening the institutionalization of peoples' rights. Sun Yat-sen's heritage to the PRC can be listed as follows:

1. Betrayed Lenin's principle of national self-determination while insisting on “the principle of democratic centralism ” to build the party-state.

The right to secession was expressly excluded in the law of the PRC. In addition, to use the term “right to self-determination” is politically wrong in China when talking about ethnic affairs. National minority cadres who were labeled as “local nationalists” during the 1950s were linked with reading Lenin's paper on national self-determination.<sup>27</sup> One of the most serious events during the “Cultural Revolution” was the Neo-Inner Mongolian People's Party case in which 30,000 Mongolian victims were accused of being separatists. “The principle of democratic centralism” is articulated not only in the CCP Constitution but also in the RNAL.<sup>28</sup>

2. Undertook “socialist civilization projects” in culturally distinctive communities.

The party-state penetrated the peripheral peoples' communities by initiating series of political movements, such as the “democratic reform” and the “socialist reform” of the late 1950s and the “Cultural Revolution” of the 1960s-1970s. As a result, most of the traditional social organizations were changed and new party-state authorities established. There was resistance from certain peoples' communities, such as Liangshan Yi and Tibet. Large numbers of

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26 II. Achieving New Victory for Socialism with Chinese Characteristics, The Report at the 18th National Congress of CCP, 2012.

27 Phunwang told his story about this in 1958. Melvyn C. Goldstein, Dawei Sherap, William R Siebenschuh, *A Tibetan Revolutionary, The Political Life and Times of Bapa Phüntso Wangye*, p. 227, University of California Press, 2004.

28 Article 3 of the RNAL.

Tibetans fled from their homeland and remained an unsolved self-determination problem.<sup>29</sup>

### 3. Non-recognition of indigenous peoples in China

“China has no indigenous peoples, and therefore there is no such issue of indigenous peoples’ rights in China.” This official stand point expressed by China at various international (especially UN) and domestic levels can be traced back to the 1980s with no change to date.<sup>30</sup> This has excluded the possibility of Chinese peripheral peoples participating in UN mechanisms on indigenous peoples.<sup>31</sup>

### 4. Stopped the processes of identifying new nationalities and establishing new regional national autonomous areas

The process of identifying nationalities was reinstated in the 1980s after the end of the Cultural Revolution. However, this process - together with the establishment of new regional national autonomous areas based on the claims by various peoples - was halted in 1990. More than 800,000 unidentified populations remain without a recognized group identity. The number of 56 nationalities in China is fixed and the state is not willing to increase the number in future. In the ongoing urbanization process, RNA areas have to choose whether to retain the title of “xx autonomous county”, or take the new title of “xx city” without “autonomy”. There is no will on the part of the central authorities to change the norms for adopting the new urban development.

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29 There are three UN General Assembly Resolutions on Tibetan issues related to the self-determination of the Tibetan people, UN General Assembly *Resolutions* 1353 (XIV) 1959; 1723 (XVI) 1961; 2079 (XX) 1965.

30 The latest expression of this statement can be found at UNPFII, May 2014.

31 One case examined by the Special Rapporteur (June 2009 – July 2010) can be found. A/HRC/15/37/Add.1, 15 September 2010. Also see <http://unsr.jamesanaya.org/cases-2010/12-china-situation-of-mr-cao-du-a-mongolian-from-china>.

5. Refusing to empower RNA areas by tabling RNA legislation at the regional level

According to RNAL, the people's congresses of national autonomous areas have the power to enact regulations on the exercise of autonomy in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned.<sup>32</sup> However, 30 years on since the adoption of RNAL, there has been not one "autonomous regulation" adopted at the regional level of RNA areas. There is therefore no legal basis for the separation of power between the central authorities and RNA authorities at the regional level in terms of exercising autonomy.

6. Appointed Han Chinese only as CCP Party Secretary - the overall leader of all five RNA regions

There were initially examples of cadres of national minority origin as the leaders in the five RNA regions. However, this situation changed in 1990s. In some RNA areas where ethnic conflicts exist, the CCP Party Secretary positions are assigned only to Han Chinese from the regional down to the township levels. Within the social and political context of the Chinese party-state, this phenomenon must not be neglected in observing the implementation of RNA law and the implications of Chinese nation party-State building.<sup>33</sup>

7. Promoting the "blood" (common ancestors and inter-marriage) and "tongue" (language) of Han Chinese as the main identities of the Chinese Nation.

By observing various nation-building practices, scholars draw a distinction between liberal *civic nations* and illiberal *ethnic nations*. *Ethnic nations* take the reproduction of a particular ethno-national culture and identity as one of their most

<sup>32</sup> Article 19, RNAL.

<sup>33</sup> Lundberg & Zhou Yong, "Article 17 of China's Regional National Autonomy Law: Its Implementation and Implications", in Asbjørn Elde & JT Moller (ed.), *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson*. Martinus Nijhoff Publishers, Chapter 35, 2011.

important goals. *Civic nations*, by contrast, are neutral with respect to the ethno-cultural identities of their citizens, and define national membership purely in terms of adherence to certain principles of democracy and justice.<sup>34</sup> The above-mentioned Chinese nation building is a typical *ethnic nation* building process. All the Chinese population are said to be the descendants of the same legendary ancestor who is commonly regarded as such by the Han Chinese. In addition, inter-marriage between Han and other peoples is encouraged by the state, being given preferential treatment. In the meantime, the Han Chinese language – Mandarin – has been promoted by law while the use of other peoples' languages has been decreasing even in their RNA areas.

Although most of the Han Chinese refer to themselves as the “descendants of Yan and Huang” (Yan Huang Zisun 炎黃子孫 in Chinese), there is no solid evidence to prove whether Emperor Yan or Emperor Huang were persons or gods in history. In addition, it is obvious that these legendary ancestors are not the ancestors of all the other peoples in China. Since 2004, the annual memorial ceremony of Huangdi (Yellow Emperor) as the common ancestor of all the Chinese peoples has been regarded as the “national event” organized and funded by the state. At least one person who belongs to the “Leaders of the Party and State of China” shall participate, together with officials from the State Council and various levels and regions of the state. This common ancestor's construction was even institutionalized within the education system. In 2010, the Ministry of Education, as one of the organizers of the programme “New Year's Kowtow to Motherland” noticed that all students at all kinds of educational institutions were mandated to participate in the kowtowing to the ancestors – Yan and Huang Emperors during the Spring festival. The stated purpose of the activity was to “increase national cohesion by concentrating sentiments of patriotism”.<sup>35</sup>

The “blood” element of building the Chinese nation is not limited to constructing the legendary common ancestors but also aimed at promoting inter-marriage between Han and other peoples. “Mixing blood” has been a very popular pro-

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34 Asbjørn Eide, *Peaceful and Constructive Resolution of Situations Involving Minorities*, The United Nations University, Tokyo, 1995, p.39.

35 The programme “New Year's Kowtow to Motherland” was jointly overseen by the Central Spirituality Civilization Bureau, the Ministry of Education, the Central Political Department of the People's Liberation Army, the All-China Federation of Trade Unions, the Communist Youth League and the All-China Women's Federation and timed for the PRC's 60<sup>th</sup> Spring Festival.



posal for exploring the causes of and solutions to the escalating ethnic conflicts. This racist idea was presented through the TV and other public media,<sup>36</sup> and also became a policy, especially in Tibet and Xinjiang, in order to strengthen the unity of the nationalities and the state. According to the incentives adopted in 2014 in Qiemo County, local government shall pay 10,000 RMB a year for five years to newly married couples in which one member is Han and the other is from one of China's 55 ethnic minorities.<sup>37</sup> This measure also provides healthcare, housing, employment, educational and other benefits for intermarried households. While the Chinese officials used this to contribute to the realization of the "Chinese dream" - the great renewal of the Chinese nation - there are comments on it as being the party-state seeking to "breed out" Uighurs through inter-marriage with Han Chinese.<sup>38</sup>

The "tongue" is another key element of group identity. While the party-state promotes Mandarin teaching in schools, there is much resistance from peripheral peoples to the educational reform plan aimed at abolishing their mother tongue as a language of teaching. The 2010 Qinhai Tibetan language confrontation was one of these cases.<sup>39</sup>

These forceful assimilation measures have no justification in the existing PRC Constitution, RNA law or international human rights conventions (CERD for example) that have been ratified by China. The melting pot model is not suitable for the non-immigration state either. A culturally neutral state and civic nation do not exist in China now. It is still uncertain whether such a system can be constructed within the multi-national state. Establishing certain kinds of autonomous mechanism for various peoples could be a way to counter-balance the dominant Han Chinese state and culture.

36 [http://phtv.ifeng.com/program/xwjrt/detail\\_2014\\_03/12/34685347\\_0.shtml](http://phtv.ifeng.com/program/xwjrt/detail_2014_03/12/34685347_0.shtml).

37 The couples will also get priority consideration for housing and government jobs, as well as other benefits. Their households will receive as much as US\$3,200 a year in healthcare benefits. The children of these mixed marriages will have free education from kindergarten through to high school. Children attending vocational schools will receive almost US\$500 a year in tuition subsidies, and those attending university will get an annual tuition subsidy of US\$800. Incentive Schemes for the Han-Minority Intermarried Families (Trial), <http://news.sina.com.cn/c/2014-09-02/120030782337.shtml>

38 <http://www.worldbulletin.net/world/143748/china-seeks-to-breed-out-ughurs-through-intermarriage>.

39 <http://www.bbc.co.uk/news/world-asia-pacific-11634364>

## **Institutionalizing peoples' rights: RNA for realizing (internal) self-determination?**

The Chinese RNA is claimed to be an institutional arrangement for safeguarding the minority nationalities so that they can be in control of dealing with their internal affairs in their homeland. It is obvious that peoples' rights as group rights are recognized under RNA. However, the exercise of self-determination as a group right depends on three key aspects: the subject of the right (who), group representation organs (how), and the power entitled for exercising the right (what). By observing related issues of RNA in the ongoing Chinese Nation Party-State building, this part tries to disclose the institutional obstacles for exercising (internal) self-determination under RNA in relation to democratic government and group autonomy.<sup>40</sup>

## **The vague subject of RNA: the "Nationality Exercising Regional Autonomy"**

The subject of RNA is a minority nationality group or groups which can be seen normally from the name of RNA areas.<sup>41</sup> According to RNAL, a RNA area should be named in sequence of place name, nationality name and administrative status.<sup>42</sup> Taking the Qiandongnan Miao and Dong Autonomous Prefecture as an example, here, the minority nationality groups, Miao and Dong are the nationali-

40 The debates on these two main lines of thinking mirror the interpretations of the meaning of internal self-determination in international law. See G. Alfredsson, "The Right of Self-Determination and Indigenous Peoples", in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, 1993. p.50.

41 Actually, there are some exceptional ways to name the autonomous areas. In some cases, two or three or even four ethnic minorities are designated to practice joint autonomy in an area. In other cases, no ethnic group is specially designated to exert autonomous rights but, instead, the general term "all nationalities" is used, as in the example of the Longsheng All-Nationalities Autonomous County. Besides this, there are cases such as "the West Tibetan Autonomous Region" (normally called the Tibet Autonomous Region in English) and "the Inner Mongolia Region" where the group names are included in the place name. In some other autonomous area, no place name is used, as in "the Oroqen Autonomous Banner."

42 RNAL, Article 13.

ties “exercising regional autonomy” in Qiandongnan area. In relation to the issue of the group as the subject of RNA, there are therefore at least three relationships between the various groups: (1) the relationship between the group of “nationality exercising regional autonomy” and the other groups of people inhabited in the RNA area; (2) the relationship among several nationality minority groups which are jointly “exercising regional autonomy”; and (3) the relationship among the subgroups of the group of the “nationality exercising regional autonomy” in or outside the RNA area. The conflict interests among all above-mentioned groups raise legal challenges as to how to regulate the relations among them appropriately under RNA.

1. The relationship between the “nationality exercising regional autonomy” and other inhabitants such as the general public in RNA area

Forms of autonomy can be classified into territorial (or regional) and non-territorial autonomy.<sup>43</sup> Regional autonomy can also be further classified into autonomy made for the general interests of all local inhabitants or especially designed for the interests of certain groups in that area. Due to historical and other causes, territorial or regional autonomy can be set up for reasons independent of any ethnic considerations, such as the recent cases of the establishment of the Special Administrative Region in Hong Kong and Macao or the old cases of the “joint provincial autonomy movement” in the 1920s.<sup>44</sup> In contrast to regional autonomy for the general interests of all local inhabitants, the interests of certain special groups are introduced into regional autonomy under RNA. The purpose of the establishment of regional autonomy is stated as being to respect and protect the interests of one or several minority nationality groups. This institutional arrangement requires proper solutions to very complicated relationships of interests such as the issue of representation of the minority nationality group that is the subject of RNA and other groups such as the general public in that area in the auto-

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43 See: Hans-Joachim Heintze, “On the Legal Understanding of Autonomy” in Markku Suksi (ed.), *Autonomy: Applications and Implications*, (Kluwer Law International, 1998).

44 For example, the autonomy of Hunan province was established under the claim of “Hunanese govern Hunan” based on its first drafted provincial constitution during that movement in the 1920s.

mous authorities. RNA has to provide a delicate mechanism to balance the conflicting interests among them.

2. The relationship between or among several minority nationalities which jointly “exercise regional autonomy”

The issue can be more difficult in the situation where there is more than one ethnic group forming the nationalities “exercising regional autonomy”. Of the existing 155 RNA areas in China, 43 are joint autonomous areas. The joint autonomy can be seen from the names of the areas. In some cases, two, three or even four minority nationalities are designated to practice “regional autonomy” there, such as Shuangjiang Lahu, Va, Blang and Dai Autonomous County where four minority nationalities - Lahu, Va, Blang and Dai - are jointly exercising regional autonomy. In addition, there are two areas where no specific ethnic group but “all nationalities” are designated to exercise regional autonomy, as in the example of the Longsheng All Nationalities Autonomous County.

One important symbolic rule to show the subject of RNA is stipulated by RNAL and this is that the head of the government of the autonomous area should be a post held by persons belonging to the group of “the nationality exercising regional autonomy”.<sup>45</sup> This rule causes tensions among those minority nationalities jointly “exercising regional autonomy” there. RNAL has no specific articles to regulate the arena of those other positions within the local autonomous authorities.

3. The relationship among the various subgroups within the group of the “nationality exercising regional autonomy”

There are enormous diversities in language, religion and even lifestyle within the “nationality exercising regional autonomy” accorded to various minority nationalities. The diversities are sometimes beyond the differences of “subgroups” of the given “nationality” politically recognized by the state. In addition, although there are 55 minority nationalities that have been identified by the state, there is no or-

<sup>45</sup> RNAL, Article 17.

ganization that can be regarded as the legitimate representative organ of the minority nationality in terms of formulating the group will or making decisions representing the interests of the minority nationality. The crux of the problem lies in the fact that there has been limited space in which to explore the possible solutions from a group rights perspective according to law.

## **Unjustified group representation under RNA**

As we have seen from the above discussion, the combination of “national” and “regional” autonomy under RNA is shown by the name of the area. Based on the ethnic composition of the regional population as the indicator, the RNA areas in China can be classified into two kinds: one in which the population of minority nationality exercising regional autonomy in the given area makes up a majority of the population, with the Han nationality (as the dominant group in the country) or other regionally dominant ethnic group is demographically a minority group there; the other one is one in which the population of minority nationality exercising regional autonomy in the given area has less population than the Han nationality or other regionally dominant ethnic group living in that area. The existing situation is that the second kind of RNA areas is the most usual case and much more common than the first kind of RNA area. It is estimated that the RNA areas in which the population of nationality or nationalities jointly “exercising regional autonomy” make up less than 50% of the whole local population exceed more than 70% of all the RNA areas. Among the five most important RNA areas of Mongolian, Tibetan, Uyghur, Hui and Zhuang nationality at the provincial level respectively, only the Tibetan Autonomous Region has a population (Tibetan) that forms a the majority in that area.

There are legal challenges to be responded to through some concrete normative rules in relation to elections, participation and decision-making procedures from a group rights perspective. First, can territorial-based autonomy be regarded as an appropriate institutional mechanism for these religious minority groups?<sup>46</sup> Secondly,

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46 Forms of autonomy should be based on the real and justified needs of various minorities in relation to their distinctive ethnic origin, religious belief or linguistic features. It should be recognized that not all minority groups need a territorial based autonomy or regional autonomy. Religious minorities, for example, do not have to practice regional autonomy to realize the management of their internal religious affairs. By turning various minority groups into 55 state-recognized “minor-

is it a prerequisite that the minority nationality “exercising regional autonomy” in a given area should constitute a majority of the population there? How do you solve the problem of “*inversion of the majority*” caused by this institutional arrangement?<sup>47</sup> Thirdly, in the second kind of situation in which the population of the minority nationality “exercising regional autonomy” in the given area is less than 50% of the whole local inhabited population, how can issues of representation in the local autonomous authorities concerning the minority nationality “exercising regional autonomy” be solved? How many seats of the local congress should be legitimately reserved for the minority nationality “exercising regional autonomy” there? In what way can the deputies of the local congress or the head of local administrative government of the ethnic origin of the minority nationality “exercising regional autonomy” be regarded as the reliable representatives of the group interests?

The existing RNA has been taking an overly simplified response to the above issues. In the institutional arrangements, the priority is given to the *ethnicization* (minzuhua, in Chinese 民族化) of the organs of self-government.<sup>48</sup> The *ethnicization* of the organs of self-government involves measures in relation to minority cadres and minority language use. The “major symbol” or “central link” of this is regarded as the *ethnicization* of the composition of the cadres.<sup>49</sup> This expression is understood in the following manner. It is through the participation of the members of ethnic groups in the work of the local organs of self-government that “national autonomy” is transformed from group right to autonomous power. It is the

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ity nationalities” and building territorial based autonomy for these groups, essential legitimate problems have been caused along with legal challenges to the stated rationale of RNA.

47 This means that a previous minority nationality at the rank of a country becomes a majority at the rank of a local society and thus acquires dominant social status and power. This will probably result in the new oppression of the other minorities in the area. In addition, by requiring their RNA area to be established and to become the majority in population, some minority nationalities may claim a re-definition of the state administrative division so as to change the ethnic structure of population, or to practice ethnic cleansing to realize an ethnically pure or dominant territory. Undoubtedly, this will result in tensions or violent conflicts among ethnic groups in the given country. Consequently, legal measures against ethnic discrimination must be established as a necessity, side by side with the arrangements for autonomy. In China, considerations must be given to the historical fact that the smaller ethnic groups (or “minor minority groups”) have suffered discrimination not only from the Han people, but also from the larger ethnic groups in the locality as well.

48 *Wulanfu Lun Minzu Gongzuo* [Wulanfu on Nationality Work], CCP Party History Publishing House, Beijing, 1997) p. 265.

49 *Wulanfu Lun Minzu Gongzuo* [Wulanfu on Nationality Work], Beijing, (CCP Party History Publishing House, 1997), Beijing, 1997) p. 265.

fundamental means by which ethnic minorities can become the genuine masters of their own affairs in their autonomous areas.<sup>50</sup>

So the proportion of minority cadres became a central problem in adjusting the relationship of interests between various groups. Taking the Guangxi Zhuang Autonomous Region as an example of the implementation of RNA in a region where the Han makes up a majority in proportion, Zhou Enlai once instructed that proper arrangements should be made for the personnel of various nationalities in the administration and legislature of the Region. He writes:

“[s]ince this is the Zhuang Autonomous Region, the administrative leader should be Zhuang in origin. And on account of the fact that the Han people constitute the majority in population, the proportion of the Han deputies to the People’s Congress should be in agreement with the proportion of their population. And it can be deliberated that the chairman of the Standing Committee of the People’s Congress can be a Han. This will be suitable to the actual conditions and will help play a function of mutual restriction”.<sup>51</sup>

As for the relevant problems, Li Weihan gave more detailed opinions:

“[i]n terms of the proportion of various nationalities in Guangxi, the Region’s organs of self-government also have a character of coalition government ... The cadres of the Han, Zhuang and other minority nationalities should all have a certain, necessary status ... In accordance with the present law on election, the constitution of the deputies to the Region’s People’s Congress should be based on the proportion of the population, but a proper favor can be given to the minority nationalities ... Because of the larger proportion of the Han people in the total population, the percentage of their deputies will certainly be larger ... The percentage of the Zhuang personnel ... in the members of the Region’s People’s Commission

50 *Wulanfu Lun Minzu Gongzuo* [Wulanfu on Nationality Work](CCP Party History Publishing House, Beijing, 1997) p. 265.

51 Zhou Enlai, “Minzu Quyu Zizhi Youyiyu Minzu Tuanjie he Gongtong Jinbu” [The Regional National Autonomy will Benefit the Unity between nationalities and Their Common Progress], in *Zhongguo Gongchandang Zhuyao Lingdaoren Lun Minzu Wenti* [Major Leaders of the Chinese Communist Party on the Nationality Problem], (Minzu Publishing House, Beijing, 1994) p. 155.

as well as in the offices at the level of department under the Region government ... can be around or a little less than 50 percent. As for the government officers of other nationalities, no percentage should be fixed.”<sup>52</sup>

Their opinions cited above turned out to be the foundation for policy and guiding thoughts on the establishment of RNA areas, not only in Guangxi, but also in China as a whole. It has been shown clearly that RNA is aimed at the participation of minority nationalities as individuals (instead of groups) in local (rather than group) affairs. In this framework, much attention is paid to the proportion of various nationalities in government, but little thought as to whether or not the officials of minority nationalities are able to represent the interests of the ethnic group they belong to.

There are other alternative measures to take, especially to guarantee the interests of the nationality or nationalities jointly “exercising regional autonomy”, even in the second kind of RNA area mentioned above. These measures could be, for instance, establishing the lawful parliament of the specific minority nationality in order to formulate and represent their group interests, and to empower the deputies from that specific group or groups to have exclusive rights to present proposals and a necessary power of veto in the local people’s congress on those affairs or decisions which may have an influence on their group identities. Without such effective special measures, to call the second kind of RNA area an “autonomous area” of a certain minority nationality or nationalities may just increase confusion over the term “regional autonomy” as well as “national autonomy”.

### **Exercising autonomous power: mixing internal affairs of groups with affairs of locality**

The organs of self-government of national autonomous areas, namely the people’s congresses and people’s governments at the different levels are the agencies aimed at exercising the power of autonomy. According to the law, the organization and work of the organs of self-government of national autonomous

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52 Li Weihai, “Ganyu Jianli Zhuangzu Zizhiqiu Wenti de Yixie Kanfa he Yijian” [Some Comments on the Establishment of the Zhuang Autonomous Region] in *Tongyi Zhanxian Wenti yu Minzu Wenti* [The United Front Problem and the Nationality Problem] Renmin Publishing House, Beijing, 1981), p. 500.



areas shall be specified in these areas' regulations on the exercise of autonomy or separate regulations.<sup>53</sup> In addition, the congresses of national autonomous areas have the power to enact regulations in the light of the political, economic and cultural *characteristics of the nationality or nationalities* in the areas concerned.<sup>54</sup> Drafting regulations on the exercise of autonomy or separate regulations is therefore a special autonomous power and an essential legal basis on which the self-government authorities are able to exercise regional and national autonomy. In reality, however, none of the five RNA regions in the provincial level have their autonomous regulations. From the regional autonomy perspective, this phenomenon implies that there is no clear division of power between the central and local authorities on autonomous affairs. There is no legal basis on which the local autonomous authorities can defend their autonomy (i.e. "autonomous regulations"), particularly when referring to the stipulation in RNAL that "[T]he people's governments of all national autonomous areas shall be administrative organs of the State under the unified leadership of the State Council and shall be subordinate to it".<sup>55</sup>

The problematic aspects in relation to combining "regional" and "national" autonomy can here be examined both from the procedural requirements of *approving* the "autonomous or separate regulations" and from the content of them. Under the legal framework of China, there are two-level and three-level administrative forms for RNA areas. The former can be exemplified by the case of Muli Tibetan Autonomous County, Liangshan Yi Autonomous Prefecture in Sichuan province. The latter case is the hierarchical administration of Chabu Xibe Autonomous County, Ili Kazak Prefecture, Xinjiang Uygur Autonomous Region.<sup>56</sup> According to the law, only the congresses at the *national* or *provincial* levels can ratify these autonomous legislations.<sup>57</sup> This means that those autonomous legis-

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53 Article 15, RNAL.

54 Article 19, RNAL.

55 *Ibid.*

56 Ao Junde, *Zhonghua Renmin Gongheguo Minzu Quyu Zizhifa Shiyi* [Explanation of the Law of the People's Republic of China on Regional National Autonomy], Minzu Publishing House, Beijing, 2001).

57 Article 19 of RNAL reads "The regulations on the exercise of autonomy and separate regulations of autonomous regions shall be submitted to the Standing Committee of the National People's Congress for approval before they go into effect. The regulations on the exercise of autonomy and separate regulations of autonomous prefectures and counties shall be submitted to the

lations that are the result of a certain nationality exercising regional autonomy at the lower level (county, prefecture or region) must be judged by higher level legislative organs dominated by another ethnic group. Similarly, if a resolution, decision, order or instruction of a state organ at a higher level does not suit the conditions in a national autonomous area, the organ of self-government of the area may either implement it with certain alterations or cease implementing it, but after reporting to and receiving the approval of the state organ at a higher level.<sup>58</sup> So, from the angle of group right, we find that the two most important autonomous powers of the ethnic minorities, i.e., to become master of their own and to administer their own internal affairs, may both be impossible to realize by means of organs of self-government. This is because the final decisions are not made by the ethnic minorities practising autonomy in the existing autonomous framework but by other organs.

In the context of these autonomous legislations, there is also no distinction as regards exercising legislative power between those internal affairs of certain minority nationality groups or the affairs of the locality in general. This mix can also be found in the normal practice of authorities in the RNA areas. There is no distinction in the function of the RNA authorities when they deal with "internal affairs of the nationality exercising regional autonomy" or other local affairs, even when the organs of self-government are going to exercise the "alteration power" articulated in the law.<sup>59</sup>

In addition to all the above ambiguities under RNA, the party-state does not want to strengthen the "defence" function and "permanent" feature of RNA. The legitimacy of RNA comes from the principle of the neutrality of the state with regard to ethnicity and the right to self-determination.<sup>60</sup> The state power should be neutral in promoting (or de-promoting) those affairs in relation to specific cultural values and ways of life in a multi-ethnic society like China. However, in fact it is virtually impossible for the state at the central level to remain neutral with respect to ethnicity, e.g. in relation to language use, and therefore to resist the unfavourable decisions made by the majority through the state apparatus at the central level. The existing constitutional arrangement cannot prevent the majority ethnic

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standing committees of the people's congresses of provinces or autonomous regions directly under the Central Government for approval before they go into effect..."

58 RNAL, Article 20.

59 RNAL, Article 20.

60 W. Kymlicka, *Multicultural Citizenship*, (Clarendon Press, Oxford, 1995), Chapter 6.

Han group from making decisions unfavourable to other minority nationalities at the national level of the state. This can be illustrated by looking at the proportion of deputies and the decision-making mechanism in the National People's Congress (NPC), China's highest legislative organ. First, the deputies from all 55 stat-recognized minority nationalities constitute only 12% of the total number of NPC deputies. This means that even if all the deputies from the various ethnic groups organize together, they will still be a minority in relation to the ethnic Han deputies in the NPC.<sup>61</sup> Second, majority rule is the dominant principle in the decision-making process of the NPC, without any special measures for minority nationality groups or affairs. This means the deputies of ethnic minorities are unable to exert essential influence even over affairs directly related to the interests of their nationalities.

Minority nationalities therefore have to establish their autonomous organs in the locality where they live in concentrated communities and constitute the majority so that they can ensure an institutional guarantee to exercise their rights to make their own decisions on affairs related to their group identity. The autonomous institutional arrangement established in this sense should emphasize the *defence* function against any interventions of higher or any other authorities from outside. It is by no means a temporary measure. Accordingly, the requirement for the institution of "national autonomy" should be regarded as *inherent* and *permanent*.

The rationale for establishing RNA was on many occasions expressed by the major leaders of the CCP and the institutional designers as a means of eliminating the oppression, hatred and separation among nationalities in the past, prior to the PRC.<sup>62</sup> Since "[T]he minority nationalities were deprived of the right to administer their own affairs,[...] regional national autonomy is practised in order to return the right to the minority nationalities."<sup>63</sup> The stated rationale of RNA from the group rights perspective in China is quite similar to the justification given for pro-

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61 According to the existing regulation set down since 1982, the minority deputies to the national People's Congress should number around 360. It varies according to ethnicity. Among the 55 minority nationalities, 35 of them have only one deputy assigned to each of them, while the Zhuang has the largest number of deputies in NPC, totalling 44.

62 Wu Lanfu, Report on the Implementation Guidelines of Regional National Autonomy of PRC, 1952.

63 Li Weihai, 'Ganyu Jianli Zhuangzu Zizhiqu Wenti de Yixie Kanfa he Yijian'[Some Comments on the Establishment of the Zhuang Autonomous Region], in *Tongyi Zhanxian Wenti yu Minzu Wenti* [The United Front Problem and the Nationality Problem], (Renmin Publishing House, Beijing, 1981) p. 484.

viding remedies for the historical institutional discrimination in the academic legal debate.<sup>64</sup> In order to realize the political principle of “equality among nationalities”, the legal remedies could be two kinds: one relates to the measures that are usually called a “preferential policy” or affirmative action. These measures are directed at the prolonged obstruction of the group’s expression of their opinions and interests in political and other public affairs. The legitimacy of these measures can be judged by the appropriation of the purpose and means while aimed at correcting the principle of formal equality in order to achieve factual equality in the “common domain” of public and social life.

The other kind of remedy can be called “special measures” which are exercised in the “separate domain” of public and social life, such as maintaining the languages or exercising the religious beliefs of those minority groups. One of the essential differences between these two kinds of measure is that preferential policies are temporary measures and need to be abolished when the elements of “factual equality” have been achieved. “Special measures”, on the other hand, are permanent means by which minority groups themselves decide on their own internal affairs.

In the Chinese context, these two above-mentioned different measures are actually used without distinction in the existing RNAL. Chinese RNA institutions include both of these measures. This has created a confusion of the needs and real functions of RNA. On the understanding that RNA, as a kind of preferential policy which takes survival from political oppression or discrimination as its prerequisite, then it should cease as soon as the oppression disappears. Otherwise, it would hinder the principle of equality for all nationalities. Consequently, the regional and national autonomy that has been established on the basis of this justification is no more than a temporary measure. The proper establishment and application of RNA as the “special measure” must depend on the correct evaluation of the groups, with their distinctive identities that have been oppressed and discriminated against institutionally.

There are various forms of autonomy that could be employed to solve the above tensions. Some kind of personal autonomy, cultural autonomy or other form known as functional autonomy could supplement the existing territorial-based institutional mechanism of RNA. In essence, these forms of autonomy are

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64 For the classic study on social institutional discrimination, see also: L. Knowles and K. Prewitt, *Institutional Racism in America*, Prentice Hall, 1969.

legitimate as the agency of decision-making for these distinctive groups in relation to their internal affairs, such as their language, culture, education, religions, folkways and customs.

## Conclusion

Han Chinese nation-state building in modern history came into being under pressures from external imperialism and the internal nationalism of the peoples. Although the establishment of RNA in the PRC marked a turning point in recognizing peoples' right to (internal) self-determination, the party-state building has inherited the Chinese nation concept and continuously constructed a nation with a core of Han Chinese "blood" and "tongue". This *ethnic nation* building, which aims to reproduce Han cultural identity as its goal has been shedding blood and violating human rights law. Building a liberal super-entity - *civic nation* - above all culturally distinctive peoples, if this is possible, can only be achieved in the long run by institutionalizing peoples' rights based on the self-determination rule.

The institutionalizing of peoples' rights is a crossroads: one road leads to the building of the Chinese nation by abolishing RNA and all the other policies/laws which support group rights, while the other is aimed at strengthening various forms of functional and real autonomy by which to respect the cultural identities of various groups. The Chinese case shows that, to build a nation (the Chinese nation) within the party-state may not be the right way to maintain the unity and peace of the country. Institutionalizing peoples' right to self-determination through concrete procedural forms of democratic governance must be considered an essential part of future Chinese constitutional reform. ○

## Seeing and Not Seeing the Communal Authority: Indigenous Law and State Law in Guatemala

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*Stener Ekern*

This book celebrates the creation of ILO Convention 169/1989, a piece of international law which, 24 years after its birth, continues to be regarded as the strongest human rights instrument in its field. As an internationally acknowledged legal text, it has exerted considerable influence over the way state power works, particularly in South and Central America but also in Northern Europe. As a Norwegian citizen, I have personally had the good fortune to participate in harvesting what was sown through its adoption; not by being an indigenous person but by being a government employee charged with supporting indigenous peoples in poor countries when, for many years, I coordinated a special programme for development cooperation with indigenous peoples' organisations in Guatemala, Peru, Paraguay, Brazil and Chile. This was started up by the Norwegian government parallel to its diplomatic efforts within the ILO.<sup>1</sup> Without the Convention, it would have been far more difficult for the many indigenous organisations that received government support from Norway to carry out their work; a wave of constitutional amendments and new legislation all over South and Central America during the early 1990s had opened up the necessary legal and organisational spaces. It would also have been more difficult for the Norwegian government to allocate the comparatively small sums involved directly to indigenous institutions in faraway countries.

In the social sciences, such partnerships between Northern governments and Southern NGOs are often ascribed to globalising forces constructed around hu-

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1 This was the Norwegian Programme for Indigenous Peoples (NPIP), which began life in 1983 as an earmarking of Norwegian aid funds destined for "international organisations" and which continued as a special programme located in NORAD (from 1986 to 1992, and since 1997) and FAFO (1992-1997). It is now again an earmarking of funds allocated by the Norwegian embassies in Guatemala City and Brasília.

man rights, multiculturalism and neoliberalism and are investigated accordingly.<sup>2</sup> Indigenous peoples often figure as favourite cases because of the way these peoples are both poor and culturally distinctive. The task here, however, is to discuss the specific impact of Convention 169 in Guatemala rather than contributing to ongoing research into the broader processes of state formation. I ask how the treaty has affected life in the indigenous society and, in line with current thinking in the social sciences, I analyse the impact of the text in question by regarding its application as a social process wherein the treaty's terminology and stipulations inform the practices of all the actors involved, in this case Guatemala's indigenous communities and state, as well as outside actors such as foreign aid agencies. Right from the start, then, we must note how Guatemala's decision to ratify Convention 169 was taking place within the broader context of a peace process and the consolidation of a democratic, rights-based state. For all practical purposes, the implementation of Convention 169 in Guatemala is deeply connected to the implementation of the 1996 Peace Accords and its human rights- and development-oriented agenda.

The Guatemalan peace process is, in turn, part of a wave of democratisation in South and Central America that has sparked many debates about the role of indigenous peoples in emerging "multicultural" and "neo-liberal" democracies.<sup>3</sup> Again, I must point out that, given the task of gauging the impact of Convention 169, we must here concentrate on the immediate uses of the treaty rather than assessing the advances of democracy. I will trace recent developments in the practices of self-rule in the Mayan communities of Guatemala, and show how local authorities are informed by the rights-based language of C169 as they reconstruct the autonomy of their communities, internally as well as externally. I will also investigate the relations between these local authorities and the state by following a particular lawsuit in which both claimant and defendant are Mayas and actively using C169 to back up their arguments. Even as the treaty's stipulations about respecting and promoting indigenous political and legal traditions, so to

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2 See e.g. Thomas Blom Hansen and Finn Stepputat (eds.), *States of Imagination: Ethnographic Explorations of the Postcolonial State* (Durham, NC: Duke University Press, 2001).

3 See e.g. Rachel Sieder (ed.), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Basingstoke: Palgrave Macmillan, 2002); Deborah J. Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005); Donna Lee Van Cott, *Radical Democracy in the Andes* (Cambridge: Cambridge University Press, 2008).

speak, force the state to open the necessary political and legal spaces, its right-based language also challenges Mayan political and juridical custom.

I argue that the incorporation of Convention 169 into Guatemalan law has had three major effects. All human rights treaties contain an implicit “blueprint for building a good society”—naming the state as the key duty holder, using contractual formats for ordering social relations and stressing individual autonomy. The first claim is that this way of framing politics works to provide Mayan institutions with increasingly more of the characteristics of representative, interest-based organisations, i.e., traditional forms of government yield to modern ones.<sup>4</sup> For, as we shall see, there are important differences between the way a Mayan society organises itself into a tightly-knit community whose “spirit” (*k'ux*) everyone is a part of, and the way NGOs (including Mayan NGOs) and political parties in Guatemala and elsewhere use their human rights-backed associational freedoms, and this gives rise to intricate conflicts. Secondly, I maintain that the adoption of human rights shapes the overarching state structure as such; indeed the Peace Accords which, since 2005, have had the rank of constitutional law, read as a recipe for making Guatemala an ever more “modern” and “multicultural” society in which not only the individual citizen but also certain social and cultural groups are entitled to special state protection.<sup>5</sup> Throughout the article, we shall see how Mayas utilise Convention 169 to conquer spaces in Guatemalan politics, particularly through the so-called Mayan movement, a rapidly-growing collection of NGOs run and staffed by educated Mayas and thus a category of organisations very different from the Mayan community institutions that this article otherwise focusses on.<sup>6</sup> Whereas the latter is the contemporary expression of age-old forms of local government, the work of the former organisations starts on the premise that the Mayas constitute a disadvantaged group within the nation-state. My third claim is more indi-

4 Much has been written about whether human rights—of which ILO 169 undoubtedly is a part, also philosophically—are “universal” or “Western; a better perspective is that offered by Nickel and others who see human rights as a response to modernity, independently of where “modernity” is situated; see James Nickel, *Making Sense of Human Rights* (Malden, MA: Blackwell Publishing, 20097). However, this also means that human rights do refer to a specific kind of society that will stand in contrast to, for instance, a tradition-bound indigenous society.

5 Decree no 52-2005, *Ley Marco de los Acuerdos de Paz*, signed by President Oscar Berger.

6 See e.g. Kay Warren, *Indigenous Movements and their critics: Pan-Maya Activism in Guatemala* (Princeton, NJ: Princeton University Press, 1997) and Santiago Bastos and Roddy Brett (eds.), *El Movimiento Maya en la Década Después de los Acuerdos de Paz* (Guatemala City: F y G Editores, 2011).



rect: using a group's identity rights to strengthen the rights of individuals reinforces ethnic cleavages because social barriers are re-conceptualised as ethnic boundaries when political measures are initiated as cultural grievances. Using C169 to support local democracy among indigenous populations will accentuate ethnic divisions.

We will discuss the first two claims by analysing recent changes in Mayan communitarian institutions as they move from a "rule of the elders" to a "rule of the vice-mayors". The third claim, about an increasing "ethnification", comes to the fore in the section that discusses the lawsuit. We note how, where one party sees power abuse and mob violence, the other sees a legitimate authority executing the will of the community, and the interesting detail is how in this case both sides resort to the culture-based language of C169. I argue that the conflicting references to the treaty have their roots in the different ways in which "indigenous law" is imagined by the users of the treaty. Contradictory interpretations are bound to emerge because the inhabitants of modern, state-based societies will spontaneously imagine the indigenous law that is to be respected as a set of unwritten customary rules, in contrast to their own text-based and bureaucratised legal system. To the extent that indigenous law adopts similar institutional arrangements, they will appear as less authentic and perhaps even false and this is precisely the argument of the prosecution in the case at hand. Eventually, having circulated for four years in the Guatemalan courts, in November 2012, the Supreme Court accepted that a "modernised" community government was also indigenous and hence a legitimate authority in the way that Convention 169 stipulates.

In the section that looks at recent developments in community government, I use data gathered from following the work of the communal authorities of the 48 communities or "cantons" of Totonicapán on annual visits since the mid-1990s and prolonged fieldwork in 2000.<sup>7</sup> In 2007 and 2011, I complemented this work with interviews with key personnel at the prosecution service (*Ministerio Público*), the courts, the free legal aid agency, IDPP (*Instituto de Defensa Pública Penal*), the Human Rights Ombudsman and the police.<sup>8</sup>

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7 This work resulted in a doctoral dissertation in which I discuss the changing structure of the communal authorities. The work has been published in Spanish in Guatemala, see Stener Ekern, *Chuwí Meq'en Ja': Comunidad y Liderazgo en la Guatemala K'iche'* (Guatemala City: Cholsamaj, 2010).

8 In 2004, after violent reactions by enraged inhabitants in the community of Chiyax following the capture of young delinquents *in flagranti*, the joint organisation of the 48 cantons and the provincial delegations of the abovementioned law enforcement institutions agreed to respect each

Located in the Western Highlands, Guatemala's indigenous zone *par excellence*, Totonicapán is the country's fifth most populous municipality and consists of 48 sub-divisions referred to as cantons, which double as Mayan as well as state-ordained units of governance. A large majority of Guatemala's indigenous population—speaking one of approximately 20 different Mayan languages—live in such cantons in the approx. 170 of Guatemala's municipalities that have a Mayan majority population. One could say that Mayan Totonicapán consists of 48 small republics where annually rotating authorities execute indigenous self-rule, being simultaneously government-appointed auxiliary mayors within the municipality and locally elected *alkalt*, communal or auxiliary mayors (i.e., auxiliary to the municipal mayor).<sup>9</sup> And just as previous initiatives from shifting state administrations have forced and inspired local leaders to accommodate new outside demands with old internal practices—the present-day office of auxiliary mayor did in fact emerge in the 1930s as a response to the government's need to establish a citizen's register. Today the communities are starting to view themselves as “Mayan” and as disadvantaged groups with special rights due from the state.<sup>10</sup> To explore how Mayan juridical practices are changing under the influence of ILO Convention 169, in addition to studying the Mayan movement, we must look at the ways communal leaders make use of the Convention when they govern their communities, and the way outside forces deal with the communities when they apply this text.

## Indigenous Government in Transition

Above, I stressed the hybrid nature of indigenous self-rule in Mayan Guatemala, somewhat at the cost of the way most Guatemalans—Mayas as well as *Ladinos*, as the Spanish-speakers are generally referred to in Guatemala—imagine two culturally-distinct political traditions whereby one of them dominates the other. Historically, however, over the last 30 years or so, the local authority structure of the 48

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other's work and cooperate more systematically. The focus of the interviews was to find out why this agreement had had so little impact.

9 For discussions of Guatemala's indigenous authority systems, see also Robert Carmack, *Rebels of Highland Guatemala. The Quiché-Mayas of Momostenango* (Norman: University of Oklahoma Press, 1995).

10 See Ekern, *supra* note 7, and Efraín Tzaquitza, Pedro Ixchíu and Romeo Tíu, *Alcaldes Comunes de Totonicapán* (Guatemala City: Serviprensa, 2000).

K'iche'<sup>11</sup> Mayan communities of the municipality of Totonicapán have undergone a profound process of transformation no less dramatic than the transition from military rule to fledgling democracy at the national level. Briefly told, it has been a change from a clan-based gerontocracy where the elders ruled and judged in accordance with the “word of the ancients”, to an increasingly democratic system in which a communal mayor and a team of office-holders are elected annually to direct the affairs of the community in line with what the popular assembly decides. Nowadays “defending the community”—which is how “upholding law and order” as referred to in Mayan idiom—is done by making references to written rules and decisions taken at general assemblies and entered into the books of the community—although references to what the ancients said do still remain the ultimate argument, similar to how human rights are referred to in international politics.

Already, here, we see the origins of conflicting conceptions of local judicial and political practices. Are today's popularly-elected authorities that we find in the majority of the 48 cantons of Totonicapán less authentically Mayan or indigenous than the descent-based informal council of family elders that still controls local government in many cantons? Insofar as “Maya is as Mayas do” (to quote anthropologist and specialist in matters Mayan, John Watanabe)<sup>12</sup> we should welcome the democratising trends in indigenous political life. At the same time, as Western scholars, we must be aware of the romantic impulse to identify a “radical otherness” in and perhaps even a “really existing alternative” to our own modern, consumerist and class-ridden societies located in indigenous communities at the margins of the Western world, and accept dubious practices.<sup>13</sup> The goal here, however, is not to reveal and condemn, but to get a hold on the wide gamut of interpretations of Guatemala's indigenous authority system among those who work with Mayan development, and understand how, not least, the middle-class Ladinos that staff the national law enforcement sector imagine the work of the communal mayors and the not-so-visible elders that dominate political life in the

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11 K'iche' (spelt *quiché* in Spanish) is the name of the biggest Mayan language group; Totonicapán is an important K'iche'-dominated municipality along with, for instance, Momostenango, Santa Cruz del Quiché, Chichicastenango and Quetzaltenango.

12 John Watanabe, “Unimagining the Maya: Anthropologists, Others, and the Inescapable Hubris of Authorship”, *Bulletin of Latin American Research* (1995), pp. 321-340.

13 For debates about “the good Indian”, see Alcida Rita Ramos, “The Hyperreal Indian”, *Critique of Anthropology* (1994), pp. 153-171 and the articles in Kay B. Warren and Jean E. Jackson (eds.), *Indigenous Movements, Self-Representation, and the State in Latin America* (Austin: University of Texas Press, 2002).

cantons. A brief overview of how the dual political system in which Mayas live will enable us to follow how, for instance, Guatemalan judges and prosecutors interpret communitarian practices as backward or barbarian rather than indigenous or Mayan and, consequently, something to be superseded. In turn, this enables us to understand why it has taken so long for Convention 169 to be heeded.

The political context in question is “dual” in the sense that the approx. 40 per cent of Guatemalans that speak a Mayan language as their first language and that reside in one of the country’s approximately 9,000 rural communities have their identities tied up with two different communities. In the first place, people live in a canton which, among Mayas, used to be thought of as kinship alliances (*al-axik*) of between 3 to 15 different descent groups (patriclans) that governed themselves through a council of elders from each clan and endogamous marriage rules that, in effect, turned all “sons and daughters of the community” into in-laws as well.<sup>14</sup> Second, at least since 1950 when Mayan women and illiterate Mayan men obtained the right to vote, people in the cantons have been full citizens of the Republic, too, and hence equal members of a unitary state. Previously—before independence in 1821—the Mayan community had been governed through the so-called “Indigenous Mayorality”, a quasi-representative institution comprising all the elders from all the cantons.<sup>15</sup>

Actual arrangements varied greatly, with local conditions and specific histories of political compromise between Ladino politicians and local Mayan leaders; in Tonicapán, the Indigenous Mayorality is known as “The 48 Cantons” and consists of several associations of different office-holders. It used to be presided over by the association of elders, which in turn was run by the four “heads” (*ca-bezantes*), i.e., the principals of the four quarters of the town that also counted as cantons. Formally, this apartheid-like system was abolished with the promulgation of Guatemala’s first municipal law in 1947;<sup>16</sup> however, realising how in reality

14 Carmack, *supra*, note 9 and Ricardo Falla, *Quiché Rebelde. Estudio de un movimiento de conversión religiosa, rebelde a las creencias tradicionales, en San Antonio Ilotenango, Quiché (1948-1970)* (Guatemala City: Editorial Universitaria, 1970).

15 For a thorough study of the Indigenous Mayorality over the centuries, see Lina Barrios, *La Alcaldía Indígena en Guatemala* (Guatemala City: Universidad Rafael Landívar, 1998) (three volumes).

16 This is a simplification. Guatemala’s liberal presidents made several attempts at merging what during colonial times was known as “the two republics”, i.e., separate governments for Spanish-speakers and Indians, but these edicts were usually ignored by the Mayas, and conservative presidents often reinstated the dual system. In 1927 the dual system was formally abolished and, until the Revolution in 1944, the President named all mayors directly. Then, in 1947, the Revolution

the elders continued to control political life in the cantons, the political parties which, from that year on, were to compete for the new, unified mayoralties through free elections, quickly learnt to accept that position no. 4 on the electoral list was to be reserved for a man designated by the *cabezantes*. In this way, the office of “Indigenous Mayor” continued in the form of a “Fourth Councillor” who was always a Maya and, in reality, the channel through which the cantons and their resources were governed and national political allegiances sought—until 1987. In that year, it was discovered that the *cabezantes* were involved in the illegal sale of timber from the communal forest. Coupled with increasing scepticism over the rule of the elders in many cantons, due to advances in development and modernity (school, health clinics, and ideas of a better future) and the way many elders had been involved in army recruiting during the civil war—this led to what came to be known as “the fall of the principals”. Ten years later the Indigenous Mayoralty was revived and now the institution is led by the association of communal mayors. Their rule is more associated with development—visualised through the various infrastructure projects that international aid brings—than the equilibriums of a rightful world that the elders purported to uphold.

One more important aspect needs to be stressed and that is how the authority structure in question obeys a Mayan rather than a “Western” organisational logic; indeed, in the anthropological and historical literature about Mesoamerica, the whole “*cargo* system” is usually presented as a quintessential characteristic of the indigenous cultures of the region.<sup>17</sup> Also known as “services” or “burdens”, ordered hierarchically and rotating annually, the *cargos* are performed by all the men (or households, the wife also has a great deal of additional work during a year of service) of the community. Like all kinds of communal work—participating in development projects, doing road maintenance, etc.—assuming a *cargo* is al-

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instituted municipal democracy. Successive municipal codes stipulated that “auxiliary mayors” were to be named by the elected mayor; however, as far as I know, all the way up to the 1970s, elected mayors in Mayan areas always respected the decision of local community leaders. The current law, from 2002, says that indigenous communities are free to select “auxiliary” mayors—from now on to be known as “communal”—in accordance with their own customs.

17 See e.g. Sol Tax, ‘The Municipios of the Midwestern Highlands of Guatemala’, *American Anthropologist* (1937), pp. 423-444; Douglas E. Brintnall, *Revolt Against the Dead. The Modernization of a Mayan Community in the Highlands of Guatemala* (New York: Gordon and Breach, 1979); John Watanabe, *Maya Saints & Souls in a Changing World* (Austin: University of Texas Press, 1992); Carmack, *supra*, note 9.

ways *ad honorem*, i.e., for free, and all related expenses are shared on an *ad hoc* basis, in sharp contrast to the bureaucratic organisational and financial routines one finds in e.g. national party politics. Before, the elders would appoint the *cargo* holders and keep track of their performance; nowadays office-holders are elected at public assemblies where women also vote. The election is, however, done in a way that ensures that all men do their service at least three times during their life. It is the responsibility of the outgoing *cargo* holders to “pass on the orders”, i.e., train the newcomers in how to carry out all the various tasks necessary to “defend the community”.

In this way, the communal mayoralty unites all the households of the canton as effectively as any marriage rule at the same time as ensuring and perpetuating a social order revolving around principles such as respect for seniority, taking on of communal tasks by sharing them and, not least, putting the survival of the community above all else. In fact, free-riding is considered a severe transgression, in K'iche' Maya the same word (*itzel*) means both “evil” and “uncooperative”. In this way, the exercise of political office is a builder of Mayan selves, as it were, and a marker of local indigenous identities on a par with women's dress and a distinct language. So, whereas outsiders, focussing on how the *cargo* system is usually encapsulated within a system of domination, may see it as gerontocratic and deeply undemocratic, and many Mayan activists, particularly during the civil wars (ca. 1960-1990), regarded it as a system of colonialism and exclusion from the national political scene, locally this practice of sharing the burdens of government is highly valued as it embodies a trustworthy “us” in contrast to the “politicking” of the state—as embodied in tricky Ladinos (*mu's*) and their political parties.<sup>18</sup> This perhaps colourful contrast turns into a knotty real-world problem, however, when we contemplate how most communal mayors are capable of solving most cases much more speedily and satisfactorily than the national law enforcement system—yet at the same time violate fundamental human rights by functioning simultaneously as judge and prosecutor when community order is broken.

With this understanding of how the system whose protection Convention 169 calls for is as contested as it is indigenous, and particularly bearing in mind how

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18 The way participation in community government as such functions as an ethnic marker even if actual forms change has also been noted in Ecuador, see Tanya Korovkin, “Reinventing the Communal Tradition: Indigenous Peoples, Civil Society, and Democratization in Andean Ecuador”, *Latin American Research Review* (2001), pp. 37-67.

a modern, non-local Mayan identity as a dominated group—which is how many urban, educated Mayas, and indeed most foreigners, see the situation—stands in an uneasy relationship to a key marker of a community-based Mayan identity,<sup>19</sup> we stand prepared to take a closer look at the areas in which Guatemala's adoption of Convention 169 is particularly important for life in the Mayan community. As the inhabitants of the many small communities that share varieties of the *cargo* system become ever more integrated into national politics as marginalised citizens, can the *cargo* system become a source of ethnic pride and a pillar in a multicultural federation in the way that voices in the Mayan movement are calling for?

### Between Human Rights and Mayan Local Law

As a document that on the one hand “[recognises] the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development” yet on the other stresses that these customs and institutions can be rightfully retained only when they “are not incompatible with fundamental rights defined by the national legal system and with international human rights”, it is immediately clear that “establishing means for the full development” of Guatemala's indigenous mayoralties will be a difficult enterprise.<sup>20</sup>

This is the moment to note how the international aid system—UN organisations, foreign embassies, including the abovementioned Norwegian Programme for Indigenous Peoples—which channelled relatively large funds to the Guatemalan peace process in the second half of the 1990s—and the Mayan movement have paid little attention to the indigenous mayoralties. It was the members of the movement, with their modern-type organisational arrangements, that captured the attention of the international public and that fitted liberal organisational requirements. As a representative of Norwegian aid I was in fact prohibited from making contracts with the mayoralties because they did not possess the necessary *personería jurídica* (registration as a legal entity).

Thus, even as the group rights discourse of C169 rapidly became an enormous boost for the Mayan movement by guaranteeing spaces for their spokes-

19 See Elisabet Dueholm Rasch, “Representing Mayas—Indigenous Authorities and the Local Politics of Identity in Guatemala”, unpublished doctoral diss., University of Utrecht, 2008, for an interesting discussion of how to represent “Mayanness”.

20 ILO Convention 169, Preamble, Art 8 and Art 6c.

persons at virtually every level of the peace process, as the text was put into practice in society at large, beyond the corridors of the capital city, the ambiguous nature of Guatemala's communal indigenous institutions came to the forefront—should they be respected and developed at all? What are the permitted forms of self-rule and how should the state promote them in the age of C169? Moreover, within this wider question of whether the existing system of canton-based autonomy is “colonial” or “authentic” hide a number of specific points of recurring, acute tensions between human rights law and local law, such as equal rights between the sexes and age groups, a sanctioning regime that lacks formalised defence and that, moreover, is often quite harsh and, finally, a political system where everyone—at least all the men—is forced to participate actively; not without reason do Ladinos refer to communal labour as forced labour.

After 20 years of active promotion by an international community which, in accordance with the tenets of multiculturalism, came to view the colonial aspects of Guatemala's state to be a fundamental cause of war and hence made support to Mayas a vital aspect of the Peace Accords, the text of the ILO Convention is widely known in Mayan Guatemala. All leaders of all modern Mayan organisations—by the 2000s also the local and traditional—routinely refer to C169 when they confront the state because the text clearly argues that they are sovereign to do so, just as the state is obliged to give them this space. And, in the areas of highly visible tension between indigenous communities and the state, such as conflicts over land and natural resources, C169 certainly strengthens the indigenous hand. At the same time, however, local leaders typically disregard references to e.g. gender equality and fair trial in their own governing practices; indeed, I have often heard men in this category explain that “the problem with human rights is that they were written in another country”. And, at the other end of the text, so to speak, the question for the Guatemalan authorities is who among the wide variety of Mayan organisations shall count as “the institutions of the Mayan people”?

To illustrate these problems, I shall recapitulate a seminar series with the communal mayors of “The 48 Cantons” in Totonicapán, organised by the urban-based Mayan NGO CPD (*Centro Pluricultural de la Democracia*) with money from a Swedish aid agency, and designed to strengthen “local government” by focusing on leadership and the new municipal code that was under preparation at the time. For the Swedes, supporting seminars with indigenous leaders was a perfect way of achieving the superior goal of helping Guatemala's Mayan people and, at



the same time, promoting local democracy and gender equality in line with standard human rights discourse. For CPD, as an organisation of young, educated Mayas, it remains an important goal to reach rural, poor, tradition-bound and inward-looking communities with messages of how local pride can be incorporated into a broader ethnic pride with existing forms of cooperation at the base, a kind of *ethnodevelopment*. Their alliance with “The 48 Cantons” and various other indigenous mayoralities in the Western Highlands was a unique opportunity for simultaneously reaching the grassroots and attracting international aid money. For the communal mayors, however, the alliance with young activists and foreign donors was also a potential threat to their images as respectable leaders—always busy defending their home cantons rather than “the Mayan people”. As the seminars proceeded from one group of cantons to the next, the leaders of “The 48 Cantons” did their utmost to hide the fact that all the money for food and transport was coming from an “alien” agency and that the course instructors were being paid by CPD rather than volunteering for “The 48 Cantons”, as indeed they themselves were doing. Accepting pay for carrying out a communal service would amount to acting like a Ladino or a politician.

Probably a majority of the approximately 1,700 men who, in a given year, perform their service in one of Totonicapán’s canton government teams attended the seminars so the answers formulated through the various group exercises give a good indication of popular opinion about, for instance, gender equality. My counting showed that around 30 per cent answered that “only men can carry out the service” whereas 50 per cent were of the opinion that women could also do it “as long as their tasks permit”, i.e., women may take on political work once they have cooked and taken care of the children. After years of visiting and living in Totonicapán, I take these figures to be an indication of the advance of modernity as well as the strength of traditional gender roles insofar as this was a setting in which everyone knew that the politically correct answer was that men and women have equal rights.

There is a similar scepticism with regard to youths taking on political roles without first having founded a family and having served in the lowliest *cargos*. What do unmarried men know about life, and what do people educated elsewhere know about our culture? Thus what to modern eyes is a discrimination against young talent is intimately bound up with the conflict between Mayan conceptions of politics as a burden to be shared by rotation and the way modern organisations ensure institutional capacity and memory by employing a permanent secretariat

and paying top positions. Young Mayas are acutely aware of the need to professionalise their institutions if they are to build a space in a modern, multicultural republic and, here, it must be added that a majority of the supreme leaders of “The 48 Cantons” that had hired CPD belonged to the same generation of reformist Mayas as CPD itself. Even after having controlled almost all of the boards of “The 48 Cantons” since 1997, however, when they managed to revive the institution after the fall of the elders, by 2012 still only a handful of cantons had endeavoured to build a permanent administrative capacity, and that of their joint organisation (i.e., “The 48 Cantons”) remains rudimentary.

In other words, even though several foreign donor organisations and, not least, Guatemala’s own free legal aid agency (IDPP) have tried to sponsor the formation of stronger municipal Mayan institutions through seminars and workshops of the kind described above, the institutional spaces Convention 169 calls for continue to be empty—and hence they are filled by urban-based NGOs like CPD with the brain power but dubious political legitimacy at the grassroots because of their *kaxlan* (alien) work-style.

The ambivalent attitude to C169 can also be gleaned from the written, constitution-like rules (*reglamentos internos*) mentioned above which are now fast replacing oral orders (*consignas*) in the most dynamic cantons. To date, around 10 cantons have elaborated such texts and perhaps half that number are in the process of writing them. Having visited all these cantons many times, I think it is safe to say that, on the whole, residents are satisfied with this modernisation, not least because it diminishes the room for conflicting interpretation and “politicking”. The *reglamentos* also visualise a modern and capable “us”, on a par with Ladinos. Dynamic—“advanced” is the local term—cantons like Paxtocá and Xolsacmaljá, with their clean streets and footpaths and tidy office buildings, speak of a local administration that functions better than both state and municipality. On the other hand, just as the *reglamentos* in their preambles invoke the kind of national unity-with-common-history that C169 and European nation-based international law invites us to do, by making references to a glorious past, colonial rupture and the need for future development, most of the actual rules deal with the sanctioning regime and how various forms of “anti-social” behaviour shall be punished. Such behaviour is *awas*, a K’iche’ word that can mean sin as well as crime and offence

and could refer to verbal aggression, theft and domestic violence as well as all forms of free-riding, including an unwillingness to participate in communal work.<sup>21</sup>

It is here, in the area of law and order, that existing Mayan autonomous institutions most frequently clash with Guatemalan institutionality, whether in the form of the human rights-based “fundamental rights” the latter purports to enshrine, or in the ways these rights are implemented through a rather deficient law enforcement sector whose personnel are ignorant about Mayan community life, have little incentive to learn about it and, moreover, tend to see it as backward on an evolutionary ladder that they themselves are significantly further up.

In Totonicapán, the typical conflict that rural residents bring to the prosecutor—both in terms of frequency and in the way underlying logics are revealed—is the decision of a communal mayor to “cut the water” (*cortar el agua*), i.e., sanction a household that, for instance, refuses to participate in communal labour by blocking its connection to the canton-wide pipe system, whereupon the offended report the communal mayor for “depriving them of fundamental rights”. The next section is dedicated to one such case in particular.

## A Case of Cutting the Water Supply

As discussed above, existing canton government arrangements in Totonicapán (and neighbouring municipalities) do share basic traits even though details vary significantly from one community to the next. The processes that drive the change are uneven and in some cantons “reform”—i.e., the successful ethnodevelopment from gerontocracy to democracy outlined above—may stall and even fail. To understand this variation, the 48 units in question can be grouped into four categories in accordance with where they appear on, first, a scale of economic and social development (measured by levels of formal education and diversity of employment), referred to locally as going from “poor” (and rural) to “rich” (and urban), and second, one that runs from a “conservative” to a fully “reformed” authority structure, i.e., from cantons where the principals still rule and the communal may-

21 In the final analysis, this reflects a *weltanschauung* in which the social relations involved are the subject matter for the judge to consider rather than the characteristics of the act—in order to determine how “the right order” can be reconstructed. For an insightful discussion of Mayan law, see Jane F. Collier, “Analyzing Witchcraft Beliefs”, in June Starr and Mark Goodale (eds.), *Practicing Ethnography in Law* (London: Palgrave Macmillan, 2002), pp. 72-86.

ors are their liaisons with the municipal mayor, to cantons whose *cargo* holders' teams are elected and even might have a small secretariat in operation, charged with collecting money to carry out the numerous development projects that are the signs of modernity.

To the extent that the rich cantons are also reformed, they will have a well-functioning government and be known as "strong" or "more advanced". The abovementioned Paxtocá and Xolsacmaljá are good examples of such dynamism. Poor cantons with conservative governments also tend to be stable (but authoritarian); however, "rich" cantons without a reformed authority also tend to be among the most socially unstable of the communities of Totonicapán—possibly because there has been a power vacuum since the fall of the elders.<sup>22</sup> Locally, this variation is understood as a question of leadership, i.e., the reason why the canton of e.g. Chotacaj is "strong" and neighbouring Juchanep is "weak", even though both are among the richest of the 48, is that the former has had a succession of strong and intelligent leaders.

Situated on the main road that runs from Totonicapán to the regional capital of Quetzaltenango, the canton of Poxlajuj belongs to the group of rich but weak communities. Since the fall of the elders in the late 80s, groups of young reformists have tried to revive the local authority with limited success. One reason is that the comparatively many professionals that reside here (typically teachers, lawyers and accountants; these belong to the first generation of Mayas who received an education in the 50s and 60s) are not inclined to cooperate with their uneducated cousins; they routinely invoke the law that exempts government employees from participating in communal labour. Another reason is the broken topography of the canton and the continuing presence of clans that were never united around the management of a common resource base like the communal forests that are so important in Totonicapán (the crucial difference between the abovementioned well-organised Chotacaj and disorganised Juchanep lies precisely in the fact that the former's forest remains a communal enterprise). In other words, in Poxlajuj,

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22 During my investigations in 2011 (*supra*, note 8), I discovered that none of the law enforcement institutions in Totonicapán were registering the geographical location of the crimes they were investigating below the level of municipality. My belief that there is a correlation between "weak" government and social instability is, however, widely shared and is corroborated by the personal experiences of prosecutors and judges.

the conditions are favourable for internal conflicts to escalate; of such cantons others will say that their people are *conflictivos*, or troublesome.

As this is written, two lawsuits from Poxlajuj are winding their way through Guatemala's legal system.<sup>23</sup> Socially and politically, it is one conflict, it revolves around whether a querulous leader and his allies have the right to determine what to do with a piece of land they first acquired for development purposes, and what their fellow communitarians are allowed to do to prevent what they see as unilateral action now that the original project is terminated. The piece of land in question and the house that stood on it have served as the seat of a small NGO whose president is the claimant in one of the cases—he insists that the land belongs to him and hence the community cannot prevent him from fencing it in. In the other case, the claimant is a board member of the same NGO who wrote a letter to the authorities of a neighbouring canton in which he insinuated that the authorities of Poxlajuj were re-selling the water they received from that canton.

After the fall of the elders in the late 80s, many young and aspiring K'iche's in Totonicapán were beginning to think that the old communal mayoralties were also on the wane and, consequently, they directed their energies towards starting up development associations or NGOs. In strong cantons, these activities were gradually brought under the control of a revitalised authority; however, in Poxlajuj this had not happened yet—and what is more, while the leader of this small NGO was holding the post of communal mayor one year in the late 1990s, he took the opportunity to transfer the house and the plot to the community. In reality, however, he sold the land to himself and, moreover, the change of ownership was sealed with a provisional title deed (*título supletorio*) in his own name in the municipal land register—a formalisation that is often not done at all in the case of intra-communal land transfers in Totonicapán as the cantons keep their own records. A few years later he tried to sell the same land once more, with the acquiescence of the communal mayor. That year, however, as the fraud became known, this man was deposed and then the newly elected communal mayor intervened when the claimant started to erect a fence around it. Backed by various *actas*, assembly decisions, and after repeated attempts at negotiating the matter, the communal mayor, megaphone in hand and accompanied by 400 residents

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23 The case involving blocking the water supply has file no C-160-2008; the parallel case that revolves around a piece of land in the centre of the community has file no C-51-2008. Copies of both files are also in the author's possession.

proceeded to uproot the posts and load them onto a pick-up. This happened twice, in June 2006 and December 2007. On the last occasion, it became quite a dramatic event because the claimant had informed his lawyer—a K'iche' from the town centre who had also provided the provisional title deed a few years earlier—the police, the prosecutor and even the Office of the Human Rights Ombudsman so that they would come and witness how, that day, he would be aggrieved by a “mob” and thus deprived of his fundamental rights. The invited government agencies did not intervene; however, the prosecutor documented the event and, at the request of the claimant and his lawyer, opened a case against the communal mayor for “inciting 400 residents to commit illicit actions” and the “crime of usurping property” (case C-51-2008).

Parallel to this, and as mentioned above, the canton authorities decided to cut the water supply of another of the leaders of the NGO in question when it was determined that he had written a letter to the neighbouring canton of Paquí, in whose forest the springs are situated, alleging corrupt uses of this “imported” water in Poxlajuj. This man went to see the same lawyer, who helped him file a claim at the public prosecutor’s in which they interpreted the event as “coercion” and an “arbitrary sanction” that “goes against his human right to life” i.e., his constitutional rights to water and due process (case C-180-2008).

With the knowledge presented here about changing authority structures in mind, the two cases evidently rest on the premise that the “mob” in question actually is a mob, led by a private individual who takes arbitrary and violent action against fellow citizens—and this is precisely what most Ladinos see when they venture into a Mayan community on such an occasion. In my discussions about these cases at the prosecutor’s branch office in 2011, the director and the woman who had been assigned to the case—both Ladinos from Quetzaltenango, like most of the 30 employees at the Totonicapán office—recognised that the indigenous people of the area had “their own ways of living” and even “their own organisation”; however, they regarded the two cases in question as ordinary civil processes and thus found themselves obliged to protect the constitutional rights of everyone involved, Mayas or not. The problem, they reasoned, was that many communal mayors use threats and violence and, moreover, their decisions are arbitrary and probably obey personal agendas. On the other hand, they admitted that they “hadn’t heard a word about customary and indigenous law at the university” and found it “interesting” when I told them how collective decisions are almost always followed up by collective action in the communities, in everything

from depositing communal money in banks to inspecting boundaries and visiting relatives in hospital. For their part, the communal authorities I have interviewed regarding these and similar cases always complain about the prosecutors for their “excessive formalism”, “drive to catalogue and classify everything” and disregard of investigative work *in situ*, relying on written statements. In fact, both the police and the tribunals generally enjoy a higher standing among the K'iche's of Totonicapán because their agents “show more respect” and accept the results of local investigations and proceedings. “They have government,” as the provincial governor put it during a visit to the canton of Paxtocá in 2010—whereupon the prosecutor dropped a case related to cutting the water supply in this strong canton.

### Through the Courts

On 25 March 2008, the First Instance Court of Totonicapán rejected the claim by the man who had had his water cut in Poxlajuj, citing ILO Convention 169 and observing that the action had been taken in conformity with local, indigenous law; thus justice had been done and, in any case, it could not be done twice. However, assisted by the K'iche' lawyer, the claimant challenged the verdict. Similarly, on 24 March 2009, the same judges ruled that the accused communal mayor and his team of cargo holders had acted “in their capacities as authorities” and that it was as such that they were “accompanied by 400 neighbours”; that the use of the megaphone “proved the intention of making a dialogue” but “as they were unable to initiate (*entablar*) a dialogue” they “proceeded to organise said neighbours to tear up the poles”. Consequently, “analysed in its totality (*conjunto*)”, the accusation lacked merit. And, again, the claimants and their lawyer, assisted by the Totonicapán branch of the public prosecutor, appealed the verdict.

In the appeal, the K'iche' lawyer—who presents himself as a specialist in indigenous law on his business card—argues that the verdict “violates the principle of authority (*imperatividad*) because the contested authority deviates from the form of Guatemalan penal law”. The contradiction is that “the authority contested by the appeal ruled without knowledge about the customary law (*los usos y costumbres*) of said community, because customary indigenous law has as its principle not being codified and written” and here, as he refutes the judges' references to the community's *acta* 303-2006 that acknowledges the election of the communal mayor in question, he cites a work of Rodolfo Stavenhagen on indigenous

law whereby this scholar explains that oral proceedings are a central characteristic.<sup>24</sup> The lawyer goes on to dedicate six pages to a presentation of the system of communal authorities in Totoncapán, maintaining that its principal norms are

“the respect for life, property and human dignity, the spoken word and oral agreements; for instance, the solution that is arrived at is not registered in written form and neither is formalisation by a lawyer required (*ni se exigen auténticas de un profesional de derecho*) ... the authorities transmit the orders (*consignas*) to the elected persons ... we consider that the orders form part of a great Oral Code of K'iche' Mayan Law of Totoncapán ... which is why it is vital, when considering customary indigenous law, one must know this law beforehand ... which is not happening in the present case ... which also fundamentally disregards the [Mayan] spirituality or world view (*cosmovisión*)... “.

This is a lawyer born and bred in Totoncapán arguing, in effect, that most of the changes that have been taking place in the communal mayoralities in most of the cantons over the last 40 years or more are un-indigenous because they involve the art of writing.<sup>25</sup> Having lived in Totoncapán for prolonged periods, I know what most educated Mayan locals know about this lawyer's standing as an expert in local culture—i.e., he is not taken seriously. However, even though people generally realise that many things have changed since the fall of the principals in 1987, among Mayas too there persist differing opinions about what the new generation of reformist communal mayors are doing and how to tackle the message of human rights. In these waters, also stirred by social instability in weak cantons like Poxlajuj, the rhetoric of such lawyers does find resonance—and strong resonance among middle class Ladinos who staff the branches of the prosecutor in the Western Highlands.

24 My point here is, of course, not to challenge Stavenhagen or the generally valid assumption that most indigenous law is oral; it is to make the reader aware of how literally the work of scholars is often read, and probably particularly so among positivism-trained Latin American lawyers.

25 The oldest existing community book in Totoncapán may be one from the strong community of Nimasac which contains the *actas* from the year of 1922; most cantons probably began writing their *actas* during the 1950s. One could also mention the numerous written title deeds, some written in K'iche' and others in Spanish, the oldest of which dates from the 1550s (*El Título de Totoncapán*).



However, the judges that have served in Totonicapán's tribunals over the last ten years—among them a prominent local K'iche'—have been more open to the processes of change and, luckily, their colleagues in the Appellate Court in Quetzaltenango are also willing to see communal authorities in action where the prosecutors see mobs.

Before proceeding with how these conflicting views were met in the Appellate and the Supreme Courts, it must be mentioned that the appeal also contained a claim that the judge's use of the Penal Code was flawed because the verdict—in the case of the piece of land, C-51-2008—did not express the “factual reasons” for determining that the action in question really was an expression of the legal customs of the community. Moreover, and in a separate appeal of constitutional review, an *amparo*, the claimant asserted that the Guatemalan state had violated his constitutionally guaranteed right to water by not taking action against “a group of neighbours” who “forcibly cut his water”.

The first appeal was rejected by the Appellate Court in the regional capital of Quetzaltenango on 15 April 2008; in fact, it notes that “the action which was supposedly committed was carried out with due regard to a decision flowing from the community of Canton Poxlajuj obeying written agreements signed by the [inhabitants of the] same community”; moreover it notes that this had been done “invoking (*al amparo de*) Art 66 of the Penal Code of the Republic of Guatemala and Art 8 of Convention 169”.

In his renewed appeal, the K'iche lawyer wrote that he was unsure whether the Court “is offending or making fun of indigenous peoples” when the contested authority and that of the First Instance Court invoked Convention 169 “[for] the values of customary, indigenous law consist in public shaming, damage repair, community service, and not actions that are attempts against the life, health and freedoms of communitarians”. But, on 13 July 2009, the constitutional review section (*Cámara de Amparo*) of the Supreme Court rejected the *amparo*, reasoning that the authorities of Poxlajuj had acted “in conformity with the powers that the Penal Code gives it” and hence the appeal for constitutional review of the sanction in question was inadmissible. However, six weeks later, on 21 October, the Constitutional section (*Cámara de Constitucionalidad*) of the same Supreme Court accepted the appeal with regard to a flawed legal process. Although it admitted that the indigenous community in question was free to impose sanctions and even cut an individual's water supply when there were communal taps nearby—and here the court refers directly to C169, Articles 8 and 9—it determined

that the “factual reasons” for arriving at this conclusion had not been adequately spelt out by the first instance court.<sup>26</sup>

The case was thus sent back to the First Instance Court in Totonicapán in May 2011, and this time, in April and August 2012, the accused former communal mayor was sentenced for “coercion” in the First Instance and Appellate Courts. Now, however, with the support of the free legal aid agency (IDPP), the former communal mayor of Poxlajuj asked for annulment and, on 6 November 2012, the Penal Section of the Supreme Court (*Cámara Penal*) repealed the verdict. Invoking Convention 169 and Article 66 of the Constitution, the Supreme Court maintained that “insofar as [Indigenous Law] is a pillar of coexistence [in the community], it is incorrect to subject it to the juridical instruments (*institutos jurídicos*) of the hegemonic systems born out of distinct social realities”. The now annulled ruling had been “done with total incomprehension of the dynamics of Indigenous Law and its own forms of conflict resolution”.<sup>27</sup>

## Conclusions

Through the above discussion of recent changes in how the Mayan communities of the Western Highlands govern themselves, we have seen how C169 is used to back up a tradition of autonomy at the margins of the state at the same time as the discourse about human rights and development of which it is a part urges canton governments to accommodate modern notions of universal citizenship, gender equality and fair trial. Democratic elections are replacing age-based hierarchies, women and youth are participating ever more in politics and, in a few cases, a sort of revived elders’ council now functions as an appellate court supervising the judicial activities of the communal mayor.

As the example of the seminar series clearly shows, it is a little misleading to give all the credit to C169 for these changes for, in practice, the treaty is embedded in a larger package of democratisation at all levels of society. From this perspective, the seminars embodied an emerging sphere of indigenous-oriented in-

26 The verdict (Supreme Court file number *amparo* 451-2008) reads: “The contested authority and the First Instance Judge ... should express the concrete and objective circumstances that makes it evident that the imputed conduct of the accused was the product of applying the Mayan juridical system to which Poxlajuj belongs”.

27 Supreme Court file number *casación* 01004-2012-01524.

ternationally-sponsored action within a broader process of human rights-based globalisation. The conclusion here is that C169 has strongly affected the overall democratising processes through which Guatemalan society has passed since the war ended insofar as influential social and political actors—the state, embassies and aid agencies and not least Guatemala's own NGOs—routinely refer to it and merge it with the other elements of the Peace Process.

Taking a closer look at the *modus operandi* of the public prosecutor and the way typical intra-Mayan conflicts are handled by Guatemala's judicial system has also enabled us to see how the surrounding society is biased in its readings of the Mayan community whereby it confuses difference with inferiority when oral proceedings are imagined as a thing of the past. The discussion of conflicting images of communitarian conflict resolution practices and how they served to polarise and aggrandise a local conflict is also a warning against the essentialising proclivities of human rights. The focus on identity-based group rights tends to over-define the boundaries between the indigenous and non-indigenous and "culturalise" social differences.

This last point brings us to another weak point of the Convention. Mayan society is not only "hybrid" or "transitional" as much as it is "marginal" to the nation-state in question; it is also highly complex in itself. This is not a small and homogeneous group outside the bounds of industrialised agricultural societies. A situation of 48 small republics in one municipality and approximately 20 different but closely related language groups whose speakers make up a majority in more than half of the country's municipalities speaks as much of a "distinct nation" within one nation-state as of an indigenous people. Although C169 has had more success in Latin America than on any other continent, its text is not designed for catching the complex political realities of great colonised traditions such as those of the Mayas, Aztecs and Incas. The institutions that are to be respected and developed by the ratifying states do not presently exist on levels of regional importance that would correspond to the demographic weight and geographic distribution of the population in question. One might argue that Guatemala has an obligation to establish a Mayan parliament as a representative, consultative instance; however, the experiences of stimulating cooperation between the indigenous mayoralties so far indicate that this is a long-term project that extends far beyond the horizons of Convention 169 and, indeed, contemporary Guatemalan party politics.<sup>28</sup>

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28 There is an interesting debate about a possible Maya-Ladino federation in the Mayan movement, see e.g. Demetrio Cojtí, "Unidad del Estado mestizo y regiones autónomas mayas" in *Guate-*

I began this article by asking how C169 had changed life at the grassroots in Guatemala's Mayan indigenous society. Looking back at the many discussions I have enjoyed in Tonicapán since the late 90s, I think I found the defining storyline in the meeting room of the communal mayorality of Canton Chuculjuyup in October 2000, when I participated in one of the meetings of the recently-appointed Rules Committee. I had been tipped about this activity from a young Mayan development worker (an economist by training) from Paxtocá canton because he knew I was interested in the topic and because he had participated in a similar committee in his home canton. When I asked the members of the Rules Committee why they wanted to draw up a constitution-like document the answer was:

"We want to give form to the experience of life (*plasmar la vivencia*) here in Chuculjuyup ... we will put the orders into writing, do away with some obsolete things and adapt to present circumstances. We want to define the norms of living together in this place because our rules are more in line with reality than the Constitution of the Republic".

I think this explanation neatly sums up the challenges ahead for a Guatemalan Mayan community—a challenge, in fact, quite comparable to what faces us all as we move into our own time in a constantly changing world; one has to adapt and one has to govern this process oneself.

In this existential struggle, C169 gives an indigenous community the power to do this although it also demands that it must be done in line with the ideas that underpin the nation-state as the natural container for political life in contemporary society. Throughout the article, I have insisted that C169 is best seen as part of a wider discourse on how a modern society is to be constructed in line with the tenets of human rights. At the end of the day, the Convention is as much a homogenising factor as a civilising one in the construction of a world of nation-states. ○

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*mala: Oprimida, pobre o princesa embrujada?* (Guatemala City: Friedrich Ebert Stiftung, 1997); Edgar Esquit Choy, "Relaciones interétnicas en Guatemala: de la dominación a la democracia multicultural" in Claudia Dary (ed.), *La construcción de la nación y la representación ciudadana en México, Guatemala, Perú, Ecuador y Bolivia* (Guatemala City: FLACSO, 1998); Waq' Q'anil Demetrio Cojtí, Ixtz'ulu' Elsa Son Chonay and Raxche' Rodríguez Guaján, *Nuevas perspectivas para la construcción del Estado multinacional* (Guatemala City: Cholsamaj, 2007).

OTHER  
INTERGOVERNMENTAL  
ACTIVITY

## The Counter-Hegemonic Origins and Potential of Human Rights: the Rights of Indigenous Peoples and the World Bank as a Case Study

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*Camilo Pérez-Bustillo*

Is the World Bank serious about human rights, and what would it take for the Bank to be taken seriously in this regard? This chapter seeks to explore implications of the extent to which the World Bank has recognized the rights of indigenous peoples, and the relationship between its still incomplete recognition of these rights and continuing limitations on the overall incorporation of international human rights norms into its policies and practices. Despite some changes in the Bank's rhetoric as to human rights issues, in practice it continues to resist the full incorporation of human rights standards into its overall activities, and has recently retreated further from this at its October 2014 meeting<sup>1</sup> through the proposed dilution of its "safeguard" policies<sup>2</sup>. The continuing deficit in the World Bank's approach to human rights in general is reflected and intensified in contexts related to the rights of indigenous peoples.

According to Human Rights Watch "(t)he draft policy includes a highly controversial provision which would allow a government to "opt-out" of applying specific protections for indigenous peoples if it believes requiring the protections would raise ethnic conflict or contravene constitutional law, essentially rendering protec-

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1 See Human Rights Watch, 10 October 2014: "World Bank Group: Proposed Policy a Setback for Rights Development Cannot Succeed if it Harms Communities". <http://www.hrw.org/news/2014/10/10/world-bank-group-proposed-policy-setback-rights>, see also "World Bank: Ducking Human Rights Issues" (HRW July 2013) <http://www.hrw.org/news/2013/07/22/world-bank-ducking-human-rights-issues>

2 See [http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/qa\\_safeguards\\_review\\_-\\_august\\_2014\\_-\\_140822.pdf](http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/qa_safeguards_review_-_august_2014_-_140822.pdf)

tions for indigenous peoples optional...Indigenous peoples' recommendations to strengthen World Bank standards and bring them into line with the UN Declaration on the Rights of Indigenous Peoples have fallen on deaf ears," said Joji Carino, Forest Peoples Programme director. "World Bank pledges on 'no-dilution' of existing policies are being broken with this proposed opt-out, despite advances made in other substantive areas of the new proposals."<sup>3</sup>

## Indigenous rights issues as a representative case

This chapter argues that persistent deficiencies in the Bank's approach to issues of indigenous rights are intertwined with and reflect underlying structural issues related to the Bank's failure to fully comply with human rights standards overall, given their ultimate conflict with its institutional mission as a strategic component in the hegemony of the current global system ("globalization"), and with its corresponding neoliberal ideological framework. The evolution, over the last 30 years, in international recognition of the rights of indigenous peoples since the establishment of the UN's Working Group on Indigenous Populations in 1982, in spaces ranging from the UN and the World Bank to regional organizations such as the Organization of American States (OAS), and in Latin American constitutions such as those of Nicaragua (1987), Colombia (1991), Venezuela (1999), Ecuador (2008) and Bolivia (2009), is a key case study of how counter-hegemonic dimensions of human rights can become hegemonic and yet still be resisted and only selectively complied with at the core of the world system in settings such as the World Bank.

Indigenous rights issues are an especially apt case study given that it is the struggle for their recognition during the 16<sup>th</sup> century, in the wake of the Spanish Conquest of the Americas, that lies at the origin of international law and human rights in the activism and scholarship of Bartolomé de las Casas and the Salamanca School, as key forerunners of Grotius and, eventually, of Kant. Tendencies and limitations characterizing the recognition of indigenous rights by the World Bank are similarly symptomatic of broader issues as to the nature of the contemporary world system, given the centrality of the Bank to the most powerful dimen-

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3 Human Rights Watch Ibid.

sions of this system, and the continued marginality of indigenous peoples as among its most excluded sectors.

My approach to these issues draws upon several inter-related dimensions which include: 1) a comparison between the characteristics of the Bank's current Indigenous Peoples' Policy (Operational Policy – OP - 4.10 and Bank Procedure – BP - 4.10 - hereinafter OP/BP 4.10, adopted by the Bank's Board of Executive Directors in May 2005 and effective since July of that year, as successor to Operational Directive – OD - 4.20, which was the applicable policy for indigenous peoples between 1991 and 2005; OD 4.20 in turn was preceded by Operational Manual Statement - OMS 2.34 and related policies, first developed in 1981), and key contemporary sources of indigenous rights standards such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, adopted by the UN General Assembly in September 2007), ILO Convention 169 on the Rights of Indigenous and Tribal Peoples (adopted in 1989 and in force since 1991), the jurisprudence of the Inter-American Court of Human Rights and constitutional courts in countries such as Colombia and Australia, national constitutional frameworks and laws (from the Americas to the Philippines), the findings and recommendations of specialized mechanisms within the UN, and the policies of other multilateral organizations, among other potential sources; 2) contributions grounded in the demands and concerns of indigenous rights movements and defenders, academic experts, etc., including the Tilburg Guiding Principles on the World Bank, IMF, and Human Rights (2002)<sup>4</sup>; and 3) an analysis of the historical context within which indigenous rights issues have emerged.

The Bank's approach to international standards on indigenous rights is explicitly, self-admittedly selective. As its own Learning Review issued in August 2011<sup>5</sup> regarding the implementation of its Indigenous Peoples' Policy since July 2005 indicates, its new approach "strengthens requirements" in three policy contexts (projects related to extractive industries, "physical relocation" of indigenous peoples due to project impact, and "commercial development of Indigenous Peoples' cultural resources and knowledge"), but at least four key dimensions (as to

4 See: <http://www1.umn.edu/humanrts/instree/Tilburgprinciples.html>, and the book *World Bank, IMF and Human Rights*, Willem van Genugten, Paul Hunt and Susan Mathews, (eds), Nijmegen: Wolf Legal Publishers, 2003, and my chapter in that book: "Towards International Poverty Law: The World Bank, Human Rights, and Indigenous Peoples in Latin America"

5 [http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous\\_peoples\\_review\\_august\\_2011.pdf](http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf)



self-identification as principal criterion for determining indigenous status, requiring free prior informed consent for projects which affect them, the full recognition of customary land rights, and the prohibition of physical relocation) of its new approach “did not fully meet the expectations of some external stakeholders” (emphases added, *id.*). An initial concern here is the lack of transparency as to the language employed by the Bank in such contexts: for example, where it refers to “physical relocation”, human rights norms and their defenders would insist instead on the concept of “forced displacement”. The transition from the latter to the former eliminates both the agency of those whose rights are violated and that of the perpetrators responsible (the Bank and its borrowers). I will explore a representative sample of such issues in greater detail below.

My approach here includes an insistence upon a critical understanding of legal definitions of rights in positive law in any specific historical period as minimums, not maximums (“floors” and not “ceilings”), and thus as points of departure, not destinations in themselves. From this perspective, the Bank must shape its policies in compliance with the highest standards reflected in applicable law and related contexts (e.g. UNDRIP; ILO Convention 169; international, regional, and national jurisprudence and laws; policies of other multilateral organizations, etc.) as relevant “minimums”. However, it also has an equitable duty, analogous to those imposed in a fiduciary context, to go beyond such “minimums” (towards higher standards of compliance), given the inequality in power between the Bank and indigenous peoples (and generally between it and member states primarily responsible in the first instance for compliance with international, regional, and national standards). This “higher duty” reflects Luigi Ferrajoli’s (1999)<sup>6</sup> argument that the imperative to protect human rights most strictly applies as a “law of the weakest” wherever the correlation of power reflected in, or which underlies, a relationship between social actors, is unequal.

The Bank’s selective approach to compliance with international standards on indigenous rights issues should thus be approached from a broader perspective that highlights the Bank’s equally inconsistent approach to the implications of a fully incorporated human rights approach throughout its operations. In both contexts (indigenous rights and human rights overall), the Bank combines a general-

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6 <http://nancyarellano.files.wordpress.com/2014/03/derechos-y-garantias-la-ley-del-mas-debil-ferrajoli.pdf>

ized, rhetorical embrace of human rights discourse with actual policies and practices that, upon detailed examination, in fact fall well short of, and undermine, what full good faith compliance would demand. These gaps in turn reflect a deeper conflict in contemporary international law and human rights between hegemonic and counter-hegemonic approaches to such issues.

The hegemonic or counter-hegemonic character of such approaches has reference both to their respective locations in the configuration of the domains of overall discourses on international law and human rights (e.g. as to which discourses have greater institutional weight and diffusion within the prevailing global order, and the spaces where these discourses are produced and reproduced, such as think tanks, NGOs, research institutes, universities, publishers, journals, funders, etc.), and to the extent to which such discourses are in practice aligned with, or challenge, the premises and effects of existing forms, structures and processes of domination, exploitation and discrimination (neoliberal capitalist globalization, militarism, ecocide, neo-colonialism, racism, ethnocentrism, xenophobia, sexism and patriarchy, etc.).

This includes implicit and explicit tensions between these two contending paradigms given the emphases accorded by hegemonic approaches to 1) nation-states as the most privileged subjects of rights, rather than peoples, communities or persons; 2) individual rights related to the defense of interests related to private property and the market, rather than collective rights; 3) their civil and political rather than their economic, social, cultural and environmental dimensions; 4) the formalist, positivist and proceduralist dimension of rights rather than their substantive compliance, in actual practice, in terms of their indivisibility, inter-dependence and integrality; and 5) in epistemological terms, Eurocentrist and Occidentalist configurations of rights, law and justice and of their history and theory, rather than their authentic, inter-cultural, "trans-modern" (Dussel 2013)<sup>7</sup> universality and plurality in the context of the "epistemologies of the South" (Sousa Santos 2014).<sup>8</sup>

This differentiation between hegemonic and counter-hegemonic configurations of international law and human rights helps explain how it is possible for the World Bank simultaneously both to ritualistically affirm its adherence to such dis-

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7 <https://www.dukeupress.edu/Ethics-of-Liberation/>, *The Ethics of Liberation in the Age of Globalization and Exclusion* (Duke University Press, 2013).

8 *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers, 2014).

courses and to regularly violate multiple concrete human rights standards in practice. This apparent incoherence undermines the Bank's institutional legitimacy in the medium and long-term, but serves its short-range interests by reducing the high potential budgetary and political costs which taking human rights seriously as part of its day-to-day operations might imply. Its current, apparently more passive but ultimately cynical, approach is also functional since it in effect transfers the costs of compliance to its member states, which are more likely to be directly vulnerable to the pressures of human rights litigation, advocacy and activism, to which the Bank is largely immune. This approach also makes it possible for the Bank to end up having things both ways, by avoiding and transferring the costs of its non-compliance on the one hand, and at the same time maximizing its own leverage as a unique source of marketable anti-poverty and social policy expertise to assist states in remedying the attributable effects of its own actions and omissions.

The Bank's approach to human rights is also functional in terms of taming, "colonizing" or appropriating human rights discourse, by putting this discourse at the service of its own institutional and systemic interests, while also seeking to marginalize its potentially more disruptive, counter-hegemonic interpretations. The Bank's gradual opening up, over the last decade, to human rights discourse within its own institutional framework (initially as an outgrowth of its emphasis in the 1990's on issues of democratic governance and "rule of law") must also be understood as part of a broader, more complex process of convergence between hegemonic paradigms of development and those related to human rights as reflected in the UN's Millennium Summit and Millennium Development Goals, and in contexts such as the evolution of UNDP's Human Development paradigm and Index. These examples in turn reflect the ascendancy of human rights on a global scale since the 1970's as a kind of universal "emancipatory script" (Sousa Santos 2002)<sup>9</sup> which has redefined, displaced and diluted the left-right ideological polarities that were characteristic during the Cold War. As a result, contemporary institutional orders, ideologies and policies related to capitalist markets, free trade, development, democracy, rule of law, participation, governance and, finally, "human rights" (in their constricted, hegemonic version) have become intertwined as inter-related dimensions of a dominant paradigm of systemic "common sense"

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9 "Human Rights As an Emancipatory Script? Cultural and Political Conditions" by Boaventura de Sousa Santos <http://www.boaventuradesousasantos.pt/media/Chapter%201%284%29.pdf>

within the Bank and beyond, which can also be useful as a way of delegitimizing and deterring more radical alternatives.

## Historical Dimensions

The differentiation between hegemonic and counter-hegemonic approaches to international law and human rights in general and in the specific context of indigenous rights also has an important historical dimension. My approach here assumes that contemporary human rights norms are the historical product of the struggles of social movements and their impact on evolving patterns of reflection and discourse, which include those against feudalism, colonialism, imperialism, slavery, racism and national oppression, the exploitation of workers, and the domination of women. The largely unwritten history of the “making” of international human rights (Thompson 1963)<sup>10</sup> is the history of the ebbs and flows in a non-linear trajectory of the extent of recognition of the rights of those most marginalized and excluded in each historical period. This approach also involves a distinct rupture with epistemological assumptions of a positivist, functionalist and determinist character that are still prevalent in many circles.

All of this includes a recognition of how initially hesitant advances at one moment can be completed at a much higher level of complexity later, as a result of the pressure of vigorous social movements. A key example is the adoption of the Declaration of the Rights of Man and Citizen in 1789 in the context of the early stages of the French Revolution, which despite its classical liberal rhetoric of “liberty, equality, fraternity”, denied all three of these dimensions of human freedom to millions of African slaves within the French colonial empire, to women, and to males who were not property owners. The Declaration’s failure to address the issue of slavery was not remedied until the rebellion of slaves in Haiti, led by Toussaint L’ouverture in 1791, compelled the French National Assembly to finally abolish it in 1794 (James 1963; Blackburn 1988)<sup>11</sup>; and despite such initial advances in France and then in the United Kingdom (and only much later in the United States and Brazil) the first enforceable international convention against

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10 The Making of the English Working Class by E.P Thompson (Vintage 1963).

11 CLR James, *Black Jacobins* (Vintage 1963); Robin Blackburn *The Overthrow of Colonial Slavery: 1776-1848* (Verso 2011).

slavery and the slave trade was not adopted until 1926. Similarly the Nazi genocide was completely “legal” (in terms of relevant legal frameworks in place within Hitler’s Germany) during the period it was carried out, and the first international convention against genocide was not adopted until 1948.

Debates in the international community as to the rights of indigenous peoples thus highlight the extent to which the world system and hegemonic versions of international law and human rights discourses and practices are characterized by inequalities of rights. This is particularly so given the fact that the history of efforts to secure international recognition of the rights of indigenous peoples is completely intertwined with the origins of international law (and what we have now come to understand as “human rights”) as such. The adoption in 2007 of the UN Declaration on the subject is in this sense simply the latest stage in a continuing and still incomplete process of recognition of such rights, which in fact have an existence prior to that of the so-called “international community” itself, and prior to that of its constituent states. These efforts began with early scholars such as Bartolomé de las Casas, Francisco de Vitoria, Francisco Suárez, and Hugo Grotius in the 16<sup>th</sup> and 17<sup>th</sup> centuries, who laid the foundations of what has come to be known as the “Salamanca School”, which developed the first systematic approach to what we currently define as “international law” and thereby engendered its most precocious step-child, “international human rights” (Dussel id.). Their still widely unacknowledged origins are in Las Casas’ arduous efforts to explore, document and ultimately critique the theological, legal and ethical bases for the Spanish conquest of the New World (Gutiérrez 1995)<sup>12</sup>.

Las Casas’ work drew in large part upon the widespread resistance of indigenous peoples to these processes, and insisted upon the legality and legitimacy of their assertions of self-defense, sovereignty and, finally, armed rebellion (id.). The echoes of their defiance continue to resonate today. The new UN Declaration would not exist if there had not been a notable resurgence in demands for the recognition of the rights of indigenous peoples as a result of widespread controversy regarding the implications of the observance of 500 years of the inception of the European conquest of the Americas in 1992, the awarding of that year’s Nobel Peace Prize to Guatemalan human rights activist Rigoberta Menchú, Mexico’s Zapatista rebellion in 1994, and analogous movements in countries such as

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12 Las Casas: In Search of the Poor of Jesus Christ by Gustavo Gutierrez (Orbis Books, 1993).

Ecuador and Bolivia (culminating in the election in 2005 of its first indigenous President, Evo Morales). The significance and limits of the new UN Declaration can only be fully understood in this context.

Contemporary debates in the international community tend to reflect the imperatives of “state logic” and “market logic” (Falk 2000), which continue to be dominant in such contexts. These logics are centered around the defense of the interests of existing nation-states as the most privileged subjects of international law, understood as the framework for governing relations among states, as distinct for example from an international system structured around the “rights of peoples” (Basso 1976; see also the African Charter on Human and Peoples’ Rights, adopted in Banjul in 1981, which is the basis of the African regional human rights system)<sup>13</sup>. According to Falk, however, this dominant statist logic is in turn subordinated to the imperatives of transnational capital, as reflected for example in neoliberal economic policies imposed through the IMF, the WTO, the World Bank, and free trade agreements.

### **Illustrative Policies Adopted by Other Multilateral Organizations**

A key additional objective of this chapter is to assess the World Bank’s policies and practices regarding indigenous rights issues with the UN Declaration on Indigenous Rights’ interpretation of the “right to development” in the indigenous context, and with alternative paradigms grounded in indigenous traditions and the demands and accomplishments of social movements which have promoted the redefinition and recognition of their rights. Our emphasis here is on cases which illustrate the complex, interactive relationship between rights recognized in the Declaration and related legal and policy developments, which together constitute the relevant landscape for assessing its potential implications and impact. Key examples include the policies and practices of other multilateral organizations besides the World Bank (including to varying extents the United Nations Development Program - UNDP, European Union - EU, Inter-American Court of Human Rights – IACHR - of the OAS, and the Inter-American Development Bank - IADB), and states (including new constitutional norms, implementing legislation and ju-

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<sup>13</sup> <http://www.iisg.nl/archives/en/files/i/ARCH03010.php>

risprudence in or regarding countries such as Nicaragua, Paraguay, Surinam, Colombia, Venezuela, Ecuador and Bolivia; and notable regressive trends in cases such as Mexico, Peru and Chile), which are beginning to transform what is understood by "development" - and thus "development law" - and their implications for the conceptualization of human rights, from a non-Western, non-Eurocentric perspective in the context of indigenous peoples, particularly in Latin America.

This includes the emphasis in constitutions recently adopted in Bolivia (in effect as of January 2009) and Ecuador (2008) on alternative indigenous concepts of development such as "*sumak kawsay*" (in the variant of the prehispanic language of Quechua spoken in Ecuador), and "*suma qamaña*" (in the variant of the prehispanic language of Aymara spoken in Bolivia), which have been translated into Spanish as "*vivir bien*" and into English as "living well" or "collective well-being". These concepts are deployed as bases for the "refoundation" of these states and for the intended accompanying "decolonization" of their constitutions and legal systems as a whole. They have been drawn from indigenous movements in these countries as part of their recovery of basic principles embedded in the civilizations prevailing in the Andean region prior to Hispanic colonial conquest in the 16<sup>th</sup> century, and provide the overall normative framework for the approach taken in these constitutions to issues of state legitimacy, social policy and social development, human rights, as well as to indigenous rights in particular. The indigenous social movements of Bolivia and Ecuador are among those which are most influential in Latin America as a whole, and thus the impact of their success in obtaining constitutional recognition of their normative approach to indigenous policy issues is also likely to have widespread effects beyond these two countries, as evidenced below in their incorporation into UNDP's processes of consultation and policy development and in the discourse of organizations such as the influential Society for International Development (SID).

In the Bolivian context (the most far-reaching thus far), this involves a commitment in the Constitution's Preamble to building a new kind of state based upon "respect and equality for all" and principles of "sovereignty, dignity, complementarity, solidarity, harmony and equity in the distribution of social wealth". Both constitutions, along with those of Venezuela and Colombia, are also notable for the extent to which they explicitly incorporate detailed aspects of international human rights law, including indigenous rights, and provide for their justiciability in national courts (unlike states such as Mexico). In most cases, these references re-

flect the highest levels of protection or recognition existing in relevant international or regional instruments, in some disturbing cases fall short of these (for example providing only for rights of prior consultation but not of "free prior informed consent" for indigenous peoples on legislative or administrative decisions that might affect them, as required by Art. 19 of the Declaration), and in others go beyond the limits of current international minimums. With respect to this example, then, the relative weakness of the Bolivian and Ecuadorian constitutional provisions on rights of consultation must be strengthened by adding and applying the right to prior consent recognized in Art. 19 of the Declaration, as part of these states' obligation to harmonize their approach with that of the strongest levels of protection applicable pursuant to international customary law.

On the other hand, in Ecuador for example, the new constitution includes recognition (Art. 71 of the Constitution) of the justiciable rights of the planet itself as a living organism ("Pacha Mama", similar to the concept of "Gaia" prevalent among the proponents of "deep ecology") with legal standing as a subject of rights, and although this is not explicitly echoed in the Bolivian Constitution, the Bolivian state has organized an unprecedented international summit held there in April 2010 focused on promoting recognition by all peoples throughout the world of the Ecuadorian approach as a response to the failures of the Copenhagen summit (COP 15) in December 2009, and as a way to promote a more unified stance among countries of the Global South leading up to COP 16 in Mexico in December 2010 and Rio+20 in June 2012.

The Declaration adopted by the Cochabamba People's Summit included specific calls for the creation of two new independent tribunals: one focused on issues of Climate Justice and Environmental Justice, intended to provide a forum for the states of the peoples of the Global South to judge the conduct of the states of the Global North (similar in certain respects to the Latin American Water Tribunal), and another which is the first International Tribunal of Conscience focused on issues involving the rights and dignity of migrants, refugees and the displaced. Both of these tribunals are likely forums for challenging the continuing limitations of the World Bank's approach to indigenous rights issues, in addition to the long-standing Permanent People's Tribunal founded in 1979. The combined effect of the Ecuadorian constitutional provisions and of Bolivian state policy is thus to highlight the direct connection between the overall approach to indigenous rights and human rights in these contexts and issues of environmental policy and climate change from the perspective of alternative development paradigms, in a



way that builds upon and strengthens the level of recognition of such issues in the Declaration.

All of this also includes an increasing emphasis among scholars such as Catherine Walsh, Richard Falk, Boaventura de Sousa Santos, Enrique Dussel and Raúl Zibechi on how evolving human rights norms and related transformations in law and policy in such contexts result from often contradictory responses to the impact of the changing demands of social movements. At the same time, apparent advances in the formal recognition of certain rights of indigenous peoples in some of these settings (Nicaragua, Colombia, Mexico, Ecuador, Venezuela) have also been undermined or frustrated due to the effects of the imposition of the purported imperatives of neoliberal globalization, "free trade", and/or "national security" (through the subordination of broader objectives of authentic democratization and the promotion of social justice to militarization). These are also the principal structural factors which explain recent retreats from international and regional trends in favor of expanded recognition of indigenous rights in settings such as Peru and Chile. Serious interpretations of the Declaration, its potential and limitations must navigate such complexities.

The insistence in the recently adopted constitutional frameworks in Bolivia and Ecuador on the need for alternative development paradigms rooted directly in indigenous traditions and the ethics and practices of contemporary indigenous social movements is convergent with the emphasis in UNDRIP (e.g. Art. 23) on the right of indigenous peoples to determine and define their own priorities and strategies for development, and the importance accorded in the European Council's Resolution of 30 November 1998 ("Indigenous peoples within the framework of the development cooperation of the Community and the Member States";<sup>14</sup> to respect for the concept of "self-development" by indigenous peoples, which the Resolution defines as the "shaping of their own social, economic, and cultural development and their own cultural identities"(para. 2), and which includes respect for their "right to choose their own development paths", the "right to object to projects, in particular in their own traditional areas", and to compensation "where projects negatively affect" their livelihoods (para. 5). The European Commission's May 1998 Working Document regarding "support for indigenous peoples in the development cooperation of the Community and the Member

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14 See links to this and document cited below at website regarding EU Policy on Indigenous Peoples: [http://ec.europa.eu/external\\_relations/human\\_rights/ip/index\\_en.htm](http://ec.europa.eu/external_relations/human_rights/ip/index_en.htm)

States”, which helped lay the basis for the November 1998 Resolution, specifically refers to the draft version of UNDRIP as one of the bases for its approach.

The IADB’s policy for indigenous peoples meanwhile specifically emphasizes the need to “promote the institutionalization of the information, timely diffusion, consultation, good faith negotiation and participation mechanisms and processes” necessary to fulfill “commitments made both nationally and internationally regarding consultation with and participation of indigenous peoples in the issues, activities and decisions that affect them”, and that such “mechanisms and processes must take into account the general principle of the free prior and informed consent of indigenous peoples as a way to exercise their rights” and to “decide their own priorities for the process of development...and to exercise control, to the extent possible, over their own economic, social, and cultural development”, in language anticipating the essence of Art. 19 of UNDRIP.

Similarly the IADB’s 2006 Strategy for Indigenous Development adopts the paradigm of “development with identity”, which it defines in terms of principles such as “equity, interconnectedness, reciprocity, and solidarity”, and with reference to a “vision of sufficient well-being”, which are present in either or both of the approaches developed in terms of the alternative Andean indigenous paradigms of “living well” or “collective well-being” in the Bolivian and Ecuadorian constitutions, and which at minimum are convergent with such approaches (para. 2.6, p. 4).

Meanwhile the UNDP explicitly recognizes the right to “free prior informed consent” of indigenous peoples in the context of development processes and ties it directly to the UNDP’s understanding of their “right to development” (para. 27 and 28, p.7 of “UNDP and Indigenous Peoples: A Policy of Engagement”, 2001 ), and rights to self-determination and autonomy, while carefully anchoring its overall approach within the framework of overall trends as to the recognition of indigenous rights within the UN system. The UNDP has recently (January 2010) convened its own consultation with indigenous policy experts, including several designated by the UN’s Permanent Forum on Indigenous Issues (PFII), which it attributes in part to the “fresh impetus” for “UNDP engagement with indigenous peoples” resulting from the adoption of UNDRIP.<sup>15</sup> This consultation was also

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15 See UNDP website: [http://www.undp.org/partners/civil\\_society/empowering\\_indigenous\\_peoples.shtml](http://www.undp.org/partners/civil_society/empowering_indigenous_peoples.shtml)

motivated by the 20th anniversary of UNDP and its Human Development Reports and by UNDP's leadership in the overall Millennium Development Goals (MDG) process. Here, too, it would be important for the UNDP to specifically highlight and reference UNDRIP standards within its current policy frameworks and in its upcoming global, regional and national reports, in addition to the mention made of the need for a monitoring tool to track the impact of the Declaration in the focus group discussion report cited above (p. 6). The report specifically notes the emergence and broader relevance of alternative paradigms such as those summarized above in the context of Bolivia and Ecuador:

“Indigenous peoples from different parts of the world have been promoting a different concept of development that is multidimensional, holistic, cyclical, regenerative, and sustainable. A good example is the indigenous concept of “Bien Vivir” (“Live Well”) in Latin America, which should be noted in the HDR through a text box in the report. This is something that is being used more and more by governments (e.g., the Governments of Bolivia and Nicaragua), and may significantly contribute to the concept of human development for all, not only indigenous peoples.” (report, p. 2).

Furthermore, UNDP repeatedly notes the relevance of indigenous peoples' issues in the context of its work in the Philippines, in addition to its efforts in the Latin American context. UNDP was also instrumental in the process leading to the drafting of the UN Development Group's (UNDG) Guidelines on Indigenous Peoples' Issues<sup>16</sup> issued in February 2008, which are directed at shaping the approach of UN country teams throughout the world, emphasizing the centrality of UNDRIP and underlining the importance of implementation of Arts. 41 and 42 by UN system staff (Box 1, p. 8). Box 2 of the Guidelines text describes the desired characteristics of “free prior informed consent” (FPIC).

The UNDG Guidelines emphasize the connection between indigenous peoples' right to development, rights to FPIC, and rights to self-determination and autonomy (p.8 of Guidelines) and suggest the following framework for interpreting and implementing the right to development in the context of indigenous peoples:

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16 [http://www.undp.org/partners/civil\\_society/indigenous/docs/UNDG\\_guidelines\\_on\\_Indigenous\\_Peoples\\_Issues\\_2008.pdf](http://www.undp.org/partners/civil_society/indigenous/docs/UNDG_guidelines_on_Indigenous_Peoples_Issues_2008.pdf)

“Indigenous peoples and the right to development: Indigenous peoples have the right to define and decide on their own development priorities. This means they have the right to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development that may affect them. This principle is re-affirmed as one of the objectives of the Second International Decade on the World’s Indigenous People. The principle requires that UN programmes and projects also take measures to involve indigenous peoples in all stages of the development process. Indigenous peoples’ lands have been disproportionately affected by development activities because they often contain valuable natural resources including timber, minerals, biodiversity resources, water and oil among others... Land and resource issues are often at the heart of the tensions between indigenous communities and States and are often the source of human rights violations... Some of the issues that confront many indigenous communities worldwide are ownership rights, the right to adequate housing ... and protection from forced evictions.. natural resource management questions, management and use of protected areas and/or nature reserves, benefit-sharing, protection from environmental impacts and guarantees for sacred or cultural sites. These issues may be resolved through dialogue and negotiation where national laws are in line with the individual and collective human rights of indigenous peoples.

The development goals of indigenous peoples are closely linked to their ability to exercise decision-making in their communities (including the participation of women in this decision-making), maintain rights over their lands and resources, protect the rights of groups within indigenous communities, such as women and children and live according to their cultures and traditions. Cooperation between the United Nations and indigenous peoples in development requires respect for these socio-cultural and economic factors. The seventh Conference of the Parties of the Convention on Biological Diversity, adopted the Akwé: Kon guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.<sup>44</sup> It is expected that the impact assessment (embodied in the guidelines) will help prevent the potential adverse impacts of proposed developments on the livelihoods of indigenous and local communities concerned” (UNDG Guidelines, p. 14).

## **Conclusion: Implications of Current World Bank Policies for Indigenous Peoples**

The impact of the Bank's activities on indigenous peoples has historically been a key component of overall concerns as to the social and environmental consequences of its policies and practices. According to Fox and Brown's overview (1998), 23 of the 36 NGO campaigns protesting at Bank projects which they consider to have had significant impact on Bank policies have involved issues of indigenous rights; most recently, the Bank's study: "Implementation of the World Bank's Indigenous Peoples' Policy, a Learning Review" assessing projects implemented in fiscal years 2006, 2007 and 2008, the first three years that the revised Indigenous Peoples' Policy was in effect, and released in August 2011 (id.), found that between July 2005 and July 2008, approximately 12 percent (total number 132) of all projects approved by the WB over this period triggered application of OP 4.10, with 41% (55 of 132) of these in Latin American and the Caribbean region and, in general, 19% of the 510 projects triggering application of WB's indigenous peoples' policies between FY 93 and FY 08 were based in this region. This makes the Latin American experiences referred to above all the more relevant to a full assessment of the context within which the Bank's Indigenous Peoples' Policy is applied.

The shift from OD 4.20 to OP/BP 4.10 in July 2005 has meanwhile expanded the potential range of application of the Bank's Indigenous Peoples Policy from situations characterized by "potential adverse impacts" on indigenous peoples to contexts which more broadly include their "presence" (it is not clear how this wider reference is quantified) or involve an area (territory, land, resource?) to which they have a "collective attachment". At the same time, the concept of "informed participation" included in OD 4.20 has been replaced in OP/BP 4.10 by that of "informed consultation", which is arguably a more precise formulation, in theory. In practice, however, the ground potentially gained by narrowing "participation" down to its constituent dimension of "consultation" has been lost by failing to give it the concrete anchoring of "consent" (as required for example by Article 19 of UNDRIP, and as affirmed in the UNDP context cited in the preceding section).

Here, as regarding the Bank's approach to the potentially prescriptive character of human rights standards in general, no concrete reference is made any-

where in the text of OP/BP 4.10 to any specific text or norm of international human rights law regarding the rights of indigenous peoples. The failure to refer to UNDRIP could be explained by the fact that the new policy was adopted in 2005 prior to the Declaration's own adoption in 2007; however, ILO Convention 169 (in force since 1991) is also absent, so there must be another rationale at play here. That which is most probable is worst from the standpoint of any meaningful conception of "rule of law": the idea in effect that the Bank is free to pick and choose among the legal standards available as to which is most advantageous or desirable from its perspective (and not for example from that of the rights-bearers whose entitlements gave rise to the norm or instrument at issue). Such arbitrariness (and the institutional bias and ultimately "ego" which it embodies) is at the most distant extreme possible from the "generality" and "disinterestedness" characteristic of law (as differentiated from "whim") as addressed in the Hart-Fuller debate (1958, 1961, 1964, 1965).<sup>17</sup> ○

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17 Lon Fuller (1964), *The Morality of Law* (New Haven and London, Yale University Press), Lon Fuller (1957-8), 'Positivism and Fidelity to Law - A Reply to Professor Hart' 71 *Harvard Law Review* 630; H.L.A. Hart (1957-8), 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* 593, H.L.A. Hart (1961), *The Concept of Law* (Oxford: Clarendon Press, second edition 1994) H.L.A. Hart (1963), *Law, Liberty and Morality* (Oxford University Press), H.L.A. Hart (1965), 'Lon L. Fuller: *The Morality of Law*' 78 *Harvard Law Review* 1281-96.



## The Stars in Rio<sup>1</sup>

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Hans Jakob Helms

### 1992 Rio de Janeiro, Brazil

**A**s Fidel Castro stepped out through the glass doors of the hotel, I suddenly thought of the one-armed shoeshine boy.

The morning light shimmered over Copacabana as the humidity was already forcing the sweat from beneath my clothes. All around, people stopped and applauded as he strode majestically towards the waiting limousine, followed by two Cuban bodyguards with their bulging weapons.

I joined in the clapping, staring out over the palms lining the pavement restaurant where a pair of curly-headed boys were peering through the fronds.

The limousine disappeared from view, speeding along the boulevard and on to the blocked off route to the congress centre.

I clambered into the delegation bus where the friendly air conditioning made life more bearable. As I waited, my eyes wandered over the azure bay with its sun-baked beaches and the luxuriant mountain slopes framing the scene as people frolicked in the water.

An idyllic scene, until the air was ripped apart by a low-flying helicopter with uniformed bodies and automatic weapons jutting through the open doors. It hovered, unmoving, outside the hotel before veering off to one side and continuing to the tip of the promontory.

Meanwhile, the other delegates had started to arrive, finding their places on the coach. Parliamentarians followed by civil servants, union reps and NGOs. With the Minister for the Environment as our leader, we filled an entire floor of

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<sup>1</sup> This text is translated from Danish and was first published in the book *Dansen i Geneve: Fortællinger fra Verden* (The Geneva Dance) by Hans Jakob Helms, RIES: 2004



the hotel. Just like Castro and his people. The rest of the hotel was packed with smaller delegations, as were all the other hotels in the town.

The UN Conference on Environment and Development was reaching its peak, when heads of government from around the globe would gather and adopt the world's new agenda for a better future for the poor and Mother Nature.

It was big. So big that the Brazilian authorities left nothing to chance. All the roads from the town to the congress centre were closed to the general populace, the air was buzzing with helicopters and the streets overflowed with tanks and police vehicles.

As the coach rounded the point and turned in along the fenced-off boulevard along Ipanema, I followed the rolling ocean waves, foaming against the shore. If I closed my eyes and suppressed the sound of the others' voices, I could hear the sea in just the same way as last time. A hissing scream against my eardrums.

## 1984

After the third cognac, I was almost unconscious in my seat on the plane. In any case, the last thing I remembered was a white light spreading itself over my eyes to the sound of the director's voice, as he rambled on about the beautiful country where the Europeans had, unfortunately, bred with their slaves so that they all turned into light-brown pickpockets and dancing carnival titts.

I didn't come to until the plane hit the runway. He shook my arm, full of excitement, shouting "Rio" while waving towards the window. He dropped his hand luggage, trying to manoeuvre it out of the overhead locker. It hit me on the neck. That woke me up.

Opposite, the figure of Jesus on the mountaintop spread its arms out between the heaven and earth.

The director had used his very limited Portuguese to bargain a fixed price with the taxi driver. He now leaned back full of self-satisfaction in the front seat and explained to me just how dangerous the town was, while we pressed our noses against the car windows. He knew someone who felt like sunbathing on Copacabana. For safety's sake, he had rolled his trousers round his wallet and used them as a pillow under his neck as he lay in the sun. This was fine until someone pinched his big toe. As he sat up to see who it was, his trousers simply disappeared.

We nodded, seriously, as we rolled in through the town's grey industrial area, just as boring as all the others of its kind. He continued babbling on all the way to the hotel, which lay in the centre of town, two streets from the beach.

However, that didn't prevent it from displaying three gold stars by the side of its name over the door. A couple of chairs and some large potted orange trees flanked the entrance. Opposite was a small, triangular square squeezed in between the ends of two narrow streets where people sat at an open-fronted café with their green drinks and open newspapers.

We lugged our baggage into the hotel while he paid the taxi. Others had beaten us to it so we had to wait. He opened his case impatiently and heaved out a pair of swimming trunks and a towel. He tossed his jacket in our direction and asked us to check in for him as he disappeared at full speed in the direction of the beach.

After we had changed our clothes, we drank a cup of coffee at the café opposite. I looked down at my bare legs in my shorts. They were as white as a snow-covered field. My arms, in my short-sleeved shirt, were not much better. I dreaded to think what my head looked like.

The boy appeared from nowhere. He just stood there suddenly, observing the square, his head on one side. He wore a grubby yellow t-shirt with no sleeves and a pair of far-too-short trousers hanging down over his skinny, brown legs. He was barefoot. In his right hand, he held a little footstool. His left arm was missing. It ended at the elbow in a scarlet, badly-healed scar. Tucked under the stump was a shoeshine box, pressed against his body. He couldn't have been a day over seven.

He started systematically at the other end of the square. No luck. So he stopped in front of us and, with his light-brown head with its flattened nose on one side, asked "Americanos?"

We shook our heads.

"English?" he said, undaunted.

We shook our heads again.

He shrugged his shoulders, looked directly at me and asked: "Shoe shine?"

I observed his skinny body, the amputated arm and the bare legs.

I nodded.

He then tipped his head back, shook it towards the sky and laughed out loud, pointing at my feet.

I had forgotten that I had changed into my sandals.

We found our director down on the beach together with a nougat-brown younger lady in a flowered summer dress. She was watching over two small half-

naked boys digging in the sand while their tattered trainers dried in the sun. He introduced her to us, delighted, and explained that she and her children had just protected him from the dangers of the beach. They had looked after his clothes while he was in the water. Now he wanted to go back in again. We decided to split up so that one of us could keep this friendly lady company.

The sun was low in the sky by now, melting copper across the surface of the water as waves of heat enveloped our bodies. We dived in and disappeared into Copacabana's wet embrace.

After a while he ran in again and our colleague came out as the sun disappeared into the horizon.

When the colleague and I came back he was just fastening his shoes. He was already in his long trousers and shirt. The friendly lady had gone home with the children. She had warned us against the darkness. We should leave the beach now.

As he told us this he began to pat first his rear pockets and then his side pockets. His hands searched every fold and bulge in his trousers as his face became darker and darker. He tapped his breast pocket, bent down and started to search the sand where his clothes had been.

By then we were fully dressed and stood waiting, our wet towels in our hands. He started swearing under his breath.

Finally, he stood up, looked across the bay and slapped his back pockets one last time. He turned to us, shrugged his shoulders and said. "It was there when I put my trousers on," as he kicked the sand. "I helped the little one with his laces when they were leaving. The older one was playing behind me."

He didn't say any more but span round and marched off the beach with stiff strides. We hid our faces in our towels and followed him.

When we had changed again we invited him to dinner. He said he was tired and we had to almost drag him into town. We found a side street where the shops ran out and were replaced by small bars with tables on the pavement and dining families with small children swarming around them. Outside one of them sat a grey-bearded, leathery, old man playing his Spanish guitar. I recognised the tune. Corcovado. Silent nights, silent stars.

We ate fish. The Director thought that it was probably polluted by the sewage of millions of people pouring into the wretched bay. I hummed along to the music from the street and listened to the sound of the playing children.

The heat of the night was friendly and smelt of sea and kitchen combined. It was as if it all melted together and became one with the song of the guitar. The fish tasted wonderful.

When we got back, the boy was squatting outside the hotel with his box squeezed under his stump.

I sat down in the chair and pointed to my black evening shoes.

"Shoe shine," I said.

He came running.

## 1992

The bus left the town and wound its way into the country along the mountainside, where small, miserable huts were huddled together in endless rows. Everything was bare and brown and dry. It must once have been just as green as the other mountains. Now the only variation was in the colour of the washing hanging from the windows. No power cables, no visible roads or streets. Only this confusion of brown buildings and dusty earth.

After a while the mountain was replaced by a flat landscape of waving fields of maize. A couple of barefoot peasants in straw hats stood staring at the cars passing by.

Behind the fields, the congress centre hove into view. In honour of the occasion it had been extended with an enormous wooden hall where all the delegations had been allocated their own little base; the remaining space was filled with restaurants and bars.

The hall in the actual centre was reserved for the speeches. One after another, the government leaders talked about the state of the world. The less well-known speakers had already been at it for the last two days but now the stars had started to arrive and the space for each delegation was limited.

In the foyer, I turned right through the doors to the extension and found the delegation's base, which was one room for the delegation and one for the Minister. The door to the Minister's room was closed but we could hear the sound of raised voices. In the front room, a couple of parliamentarians were squabbling about the only available telephone. The NGOs had gone out to see their friends. I found a chair and sat down in the corner.

The slim, blonde delegation leader was red in the face from a combination of sun and stress when he emerged from the Minister's room. He had one of the

new mobile phones in his hand and most people were concentrating on that. He cleared his throat and gathered them round the table. He then went through the day's programme and the most important outstanding issues.

The USA had caused new problems for the climate convention. The Minister would concentrate on them. The delegation leader would take care of setting up the new green fund. This could drag on until late but he was hopeful. Since the American President had finally decided to come, things looked a bit more optimistic. So now a solution had to be found.

When the others had finished asking the day's questions, I raised my hand. He gave me a friendly nod and I asked him if there were any spare places in the hall for Fidel Castro's speech.

The room went strangely quiet. The delegation leader moved round a piece of paper on the table and said: "We do not take part in Cuba's propaganda. The Minister doesn't want anybody in there." He dissolved the meeting.

I was outside the hall when Fidel Castro arrived. The same thing happened as in front of the hotel. Everyone around stopped to clap. I looked over my shoulder and couldn't see anyone from the delegation. So I joined in the applause.

My colleague from Malta, who had just as little to do as I had, came and invited me for a beer. So he could tell me all about the bird killers on the crusaders' island while we watched Fidel on the big screen.

We later tried battling our way through one of the endless queues at the bar to get some lunch. We finally managed to get hold of something that looked like chicken drumsticks with fried potatoes and shredded lettuce leaves. Once we had finished we went back to our bases.

I was nearly knocked over by the Minister. He emerged, doubled up and snorting, through the door with the Ministerial Secretary and the Ministerial Head of Department breathlessly at his heels.

"Out the way!" he roared and continued out to the foyer.

The door to the Minister's room stood open. A fork decorated the threshold and I caught a glimpse of a carafe on its side on the table.

I went closer and looked inside. A stripe of yellow cheese sauce oozed down one wall. Beneath lay an upside-down paper plate with wedges of pizza sticking out the sides. In one corner a pile of ham and a knife came into view.

Our delegation office assistant scurried in with a plastic bag. "He said how dare we offer him such a load of cat food," she said. "Then he threw it and left."

One of the Members of Parliament came and looked. "What the Hell," he said. "The man's just lost a referendum and they will drag the demands of the climate convention down so he can't keep his promises to the wind turbine manufacturers. It's bound to go pear-shaped in this heat."

And off he went.

The assistant started to clear things away. I went over to the Maltese delegate.

We left the air-conditioned life of the congress building and let our sweat flow in the Brazilian heat as the bus trundled us back to town.

## 1984

The boy rested on his bare knees in front of the chair and let the box glide from the stump of his arm to the pavement. He pushed the footstool in under my right shoe and took the lid off the box. It revealed a couple of stained cloths, two brushes and three small tins of shoe polish. He fished out the black polish and held it between his knees while he removed the lid, took the small brush, dipped it in the polish and efficiently applied it to the shoe while he tunelessly hummed a samba melody.

I sat looking at his greasy hair, which was filled with glistening grains of sand. There were still customers in the café opposite and light from the windows around us. Otherwise, the sky was dark but for a pale moon and myriads of stars twinkling in foreign constellations as the scent of oranges filled the warm night air.

He took a break and looked up at me. "Want drink?" he asked and pointed towards the café. I nodded and handed him a note.

He leapt up and sprinted over to the café. After a while he came smiling back with a small glass of the green drink, a slice of lime on the top. It tasted strong and sweet.

"Caipirinha," he said, and knelt down again with his brush. He didn't bring any change back.

I asked his name.

"Fidel," he said proudly. "Like Castro." He laughed and raised his little clenched hand.

"Good for poor people," he added, and looked at me seriously.

I looked away from his dark eyes and serious face with the dust glued to his cheeks.

He returned to his work, now using the big brush. After that, the cloth, until the shoe finally shone as brightly as the starry night.

He held the cloth in his mouth as he shifted the footstool over to the other shoe.

"You name?" he asked.

I told him and he responded immediately with another question. "Germany?"

I shook my head and told him where I was from. He had never heard of the country. But Europe was fine, he said. "Rich people."

His tiny stump danced aimlessly in the dark while he worked the brush backwards and forwards over the shoe in rhythmic strokes. I pointed at his arm and asked. He hit it with his sound arm and said: "Stupid arm. No good."

A distant look came into his eyes and the humming smile disappeared from his face. He straightened up and looked at the shoe. He gave it an extra rub with the cloth and nodded in satisfaction.

He named his price. It was about the same as a beer.

I fished out twice as much. He grabbed the money in one swift movement and concealed it under the hem of his trousers, sending a frightened glance over his shoulder. With a look of relief, he smiled at me as he packed his things together.

"No boss," he said and nodded behind him. "Checking other boys now."

He wiped his nose with the back of his hand and dried it on his trousers as he pressed the shoebox back under his stump and rose to his feet. I examined my shoes and praised his work. He smiled back, glad, patted himself and said: "Now food," laying his hand on his belly. "Stomach happy."

He then bent down, gathered up his things and looked at me a minute, as if he was considering something. He stepped closer, nodded towards his stump and whispered: "Big boys, big knives," grabbed the empty glass with the tips of his fingers and disappeared.

## 1992

We sat in bathing trunks and t-shirts in the hotel's pavement restaurant. The water from Copacabana's rolling waves was still steaming from our hair and our small green drinks shimmered in the sun. Hotel guests came and went. The jeweller from the shop next door stood in the entrance, smoking and staring into space. No-one seemed to be busy in this town.

A couple of small, scruffy boys carrying shoeshine boxes started towards us but veered off when they saw our sandals. I looked behind them and caught sight of the tall boy with the long, baggy shorts and a Hard Rock Café sweater standing behind the palms. One of his eyes seemed dead while the other followed them attentively. I pointed him out to my Maltese friend. This caused him to disappear behind the palm.

“So they haven’t got all of them anyway,” my friend remarked.

I asked what he meant.

“The street boys,” he said. “I heard that they had either shot them or locked them up. Because of the meeting. They wanted to rid the town of them so that people felt safe.”

I shook my head in disbelief. Then I told him about the one-armed boy.

He asked what had happened to him. I shrugged my shoulders and gestured towards the town.

“You,” he said. “I’ve heard about a guy from Switzerland who was in Colombia at a medicinal congress. He felt sorry for one of these boys. So he placed him in some school or other and paid for his education and everything.”

I looked out over the water.

“Last year,” he added, “the boy came to Switzerland.”

He took a swig of his caipirinha and leaned back in his chair. “As a doctor,” he said and pushed his sunglasses up to his forehead.

“Who believes that?” I said and scooped up a handful of peanuts.

“It was in a radio contest,” he said, “about good real-life stories. They checked it.”

Behind him an elderly lady in a long yellow dress and high-heeled sandals paused outside the jewellers. She had a small white dog on a lead. Its collar glittered.

“One swallow doth not a summer make,” I said.

He looked at me.

“But one is still more than none,” he replied.

“And what do we do,” I said, “about the other millions?”

He shrugged his shoulders and pointed in the direction of the fenced-off route to the global summit.

“The United Nations,” he said. “Isn’t that what we’re here for?”

The helicopter roared over the roof of the hotel. Its rotors made the palm fronds wave towards the sky. The boys were gone. The woman and her dog had disappeared into the shop.



A guy from the Portuguese delegation came out of the hotel. He came to our table and said that he and a couple of friends had hired a yacht for the rest of the day. With captain.

“Old connections,” he smiled, colonially. They were going to sail across the bay to a tourist spot on the other side. Did we want to come with them?

We were changed and ready before he had got hold of a taxi.

## 1984

In the morning, the director was his old self again.

“Una cerveja grande,” he had shouted when we came out in our short-sleeved shirts and shorts, bathing gear rolled up in our hands. He had headed directly to the café opposite. There, we had sat in the morning sun drinking our beer before our planned trip to Inpanema’s beach. He had warned us. The ocean was next on our list. Not a pathetic wind-still bay. Real waves. Undertow of global dimensions. Real sea. Just the thing for the white man.

The shoeshine boy had poked his head round the street corner. He contented himself with a wave having checked out our sandals. I waved back. The others shook their heads.

Ipanema beach was wide and white and filled with suntanned bodies who played, dozed and swam. The director bought a green shirt, with “RIO FOR LOVERS” printed in yellow on the front, from one of the many stalls lining the street.

“Teenage daughter,” he confided, as the salesman put it in a plastic bag. “It’s just her.” We turned out towards the beach and wandered off along the rolling waves.

We didn’t walk very far. Even with sunglasses on, we looked like white clowns in a circus of mulattos. A backward glance revealed that the couples who looked as if they were sleeping had turned their heads, their sunglasses perched on their noses, with a look of disbelief as we walked past.

When we took our shirts off the playing youngsters stood in small groups, giggling shamelessly as we passed.

We found a space right down by the water’s edge. With our backs turned to the audience on the beach, we took off our shorts and sandals and got ready to go in the water.

The colleague remained seated, complete with shirt, shorts, socks and sandals, and proclaimed himself the guard of our possessions. He gathered them in a heap in front of his feet and started to make a neck-rest with his hands.

The water was green, filled with swirling sand and a strong taste of salt. It rolled towards the coast in elongated swells of foaming waves.

I dived under them and felt the water engulf me as the current pulled at my body and dragged me into the pull of the waves. I opened my eyes and twisted my body happily in the roar of the ocean's heart. I raised myself playfully and let my body surf the white rollers towards the beach while my hands grabbed the water, beating it until it left me on the white sea floor between rolling shells and pebbles.

I could feel the undertow massage a cool languor in my skin. Round about, I could see heads bobbing in and out of the water and hear the cries of the wind-surfers against the sky. We all seemed very small.

Every now and then, I saw the Director surfacing close to me as he tried to float on his back at the water's edge. Our colleague dozed in the sun on the beach. I dived again and swam out to sea with long, slow strokes.

I never even saw the wave forming. As I raised myself up from my swim it was already falling over me like a gigantic foaming wall. I tried to turn away as it broke. I only half-succeeded. Water poured over me, my feet were swept from under me and my body was thrown down with a force that made all resistance useless. I tumbled round, blinded, and tried to protect myself with my hands as it hammered my body down to the seabed. A burning pain spread across my knee while I desperately tried to lift my head above the water. It pressed my lungs and my eyes stung with salt. My hands grasped for something solid but my body rolled helplessly round in the sand, completely out of control. I wanted to shout but the green walls of the sea closed about me, and there was no room for any other sound than the scream of the sea against my eardrums.

I felt light disappear and my eyes turn white as my chest squeezed about my lungs. Then I sank down into a world of dark green and the light went out behind my eyes.

The wave released me in the last short space before the beach. I lay with my hands burrowed in the sand and gasped for air, until the sea flowed in my throat and I had to cough, gulping, with tears spurting from my eyes.

As I vomited, feeling returned to my body. I raised myself on my torn knees and sat at the water's edge, heaving for air as I dried my eyes and gradually regained my sight.

I looked for the Director.

He was lying a bit further along in the shallow water, resting on his big stomach with his head facing the sea, digging desperately in the sand in front of him with his hands. The wave was gone and the returning current sucked all loose material back into the ocean. But we were far enough inland to be left in peace.

Once I could breathe normally, I looked up at the colleague we had left on the beach. He stood there, bending over the pile containing our towels, shorts and shirts. The sand around him was heavy with water. As were his grey socks. He lifted our clothes, clumsily. Water dripped from the bundle. In the background I could hear the Director, swearing loudly. I dragged myself up, sat at the water's edge and inspected the damage to my knees. They looked as if someone had rubbed them with coarse sandpaper. It felt like it too. As I looked round I realised that many of the suntanned men were on their way from "our" area. They walked together shaking their heads at each other.

I went over to our colleague. The Director was still on his knees, fiddling about in the shallow water. The colleague still stood there with our dripping clothes in his hands. He looked almost sorrowfully at me behind his thick glasses.

"I didn't even see it," he said and nodded towards the water. "It went right up over my knees." He pointed at the wet sand at his feet.

We started to wring our shorts out as the Director came towards us. He walked as if he was feeling his way with his feet. His fists were clenched and his hair hung in wet slicks over his forehead. The white belly a damp dome facing the sun. He was bleeding from one elbow and had torn, red scratches along one shin. The thin legs below his knees seemed to point in different directions as he walked.

A couple of grinning, golden-brown youngsters ran behind him, pointing and shouting loudly. He turned and wanted to drive them off but his hand flapped in the wrong direction, which made their enjoyment even louder as he stared blankly, wiping his eye with the back of his hand.

When he reached us he looked at us with a strange, blank gaze in one eye while the other was directed towards the soaking wet clothes.

"Bloody Hell," he mumbled. "What a crazy world we've landed in." He reached out for his shirt, missed and swore again.

"My contact lens," he said and pointed at his eye. "The bloody wave took it. I can't see a thing without it."

The colleague shoved the wet shirt in his hand. He shook it a bit and threw it down in a fit of irritation. The sand clung to the soaking cotton. Wringing it out was no longer any use. He looked down at it and kicked out without reaching it.

"Let's get away from here," he said. "I need a beer."

We pulled the wet shorts up over our trunks. I put on my wet shirt and hoped the sun's drying rays would do their work, while he stood hopelessly with the sandy bundle in his hands.

"I'll have to wear something," he muttered to himself. "I can't walk down the bloody street with no clothes on."

The colleague nodded and handed him the plastic bag with his daughter's t-shirt while he scraped his sandal along the mound of sand, which was supposed to have been his pillow. Then he stood there, staring aimlessly, the tousled hair sticking up from his forehead and the wet beard clinging to his chubby cheeks.

"O FOR LO" it said in glaring yellow, stretched over the expanse of his stomach. The rest of the words were lost around the sides while the green shirt stretched round him like a spinnaker in stormy weather. It was too short to cover him and, below the bare skin, the wet, blue shorts dripped water into his sandals.

He shrugged his shoulders, giving up, and started to make his way towards the bars lining the promenade.

The colleague bent down and picked up the plastic bag. He took a step backwards and trod in the hole he had made in the sand. He gave a little gasp as he lost his balance and fell backwards on the beach with his arms and the bag waving in the sun and his glasses gliding down his nose.

As I helped him up, I decided not to look up again before we were well off the beach.

## 1992 (1984)

The yacht's engine chugged towards the evening twilight and the vibrations reverberated through the foredeck beneath my back. The captain's model girlfriend had left her sunbed where she had been hard at work all day, ensuring that an even tan spread itself over all the uncovered parts of her young body. Now she sat inside, next to him, while he rested one hand on the rudder and the other on her.

Earlier in the day I had been in the wheelhouse to find out just what it was that had made him so rich that he could sail his days away in his millionaire yacht.

He had looked me up and down and said that he was “the big boss” but that the World Congress was “bad for business”. And that was all. His pale eyes beneath the half-long, blonde hair had bored right through me. A pistol lay nestled next to his cigarettes, mobile phone and binoculars on the shelf beneath the instrument panel. I stayed outside for the rest of the trip.

Our Portuguese host had disappeared below deck with the model’s friend. The Maltese sat up by the bowsprit with his legs hanging over the side and a beer in his hand. Even I had a glass of champagne dangling between my fingers. I could hear the hiss of the water against the side of the boat and the sound of a dancing saxophone from the open window of the wheelhouse.

My body was full and tired from the hours in the sea and the lobsters from the restaurant. My arms ached from being pulled by the water-ski line attached to the zodiac’s foaming stern. It now lay silent and covered on the aft deck of the yacht. A couple of the captain’s friends sat there, fiddling with a hand mirror.

The darkness deepened, filling with stars twinkling like gold dust against the dark blue dome of the sky. I closed my eyes and, saw behind my lids the shoe-shine boy approaching from the corner, as he had done that evening when I sat in the café drowning our Ipanema outing in beer, while my knees still stung from the pain of the seabed.

He was wearing the same clothes as the previous evening as he walked towards me with the box bobbing under the stump of his arm. His face seemed black in the darkness. When he got close enough I could see that one of his eyes was half-closed and the skin surrounding it was swollen and blue. His top lip was also swollen with a line of blood in the middle.

He tried to smile as he pointed at my shoe, which still shone from the evening before. There were stripes in the dust on his cheek.

I nodded and he sank to his knees and put the stool in place.

I asked him what had happened.

He shrugged his shoulder and mumbled, “Boss angry,” as he spread polish on the shoe.

“Find me eating,” he said, and patted his trousers where he had hidden my money from last time.

I stared at the evening air, emptied my caipirinha, summoned the waiter and ordered a new drink, together with a new sandwich.

He polished, tight-lipped, brushing the already-shining shoe. I asked where he lived. He looked at me, almost indulgently. Then he pointed to Copacabana. "Sometimes there," he said, and pointed further over to Ipanema, "Sometimes there."

"On the beach?" I said. He nodded, his cloth in his mouth, as he moved the stool to the other foot.

I asked him where his mother and father were. He shook his head again and polished so hard that his stump shook in the darkness.

Shortly afterwards, he was finished and he stuck out his hand. I fished a note from my wallet and gave it to him. When I went to get out another one he stopped me with his eyes and moved his head slightly. I looked over towards the corner. A half-grown boy was leaning against a wall with a cigarette in his mouth. He wore long khaki trousers and a black shirt and a camouflage cap pressed down over light-brown curly hair. He looked right at me, without blinking. Then he spat at the pavement and moved away slightly.

I took the sandwich, stood up and held it out to the boy. He looked at it, scared and hungry. I winked at him while I shouted, "Take it and eat it now!" in my most commanding voice, while I tried to look angry.

A smile spread itself over the beaten mouth and he grabbed the sandwich and swallowed it in big, excited bites.

I could see the cigarette on the corner glowing red.

When he had finished, he poked the box back under his stump, took the footstool and stood up. I looked at his sand-filled hair and his dusty face and felt my stomach stir.

His eyes were shiny in the dark.

I stretched, patted his hair and said goodnight.

He looked me in the eyes with a little smile lurking in the corners of his eyes and pointed to the hotel sign.

"You just have three stars," he said as his hand indicated the twinkling sea of stars over Copacabana.

"But I have millions."

He gave me a smile with his damaged mouth and ran towards the beach.

I opened my eyes and lay there for a bit, looking at the sea of light coming from the town, reflected in the surface of the water. The Maltese pointed to the base of the bay where a faint glow emerged.

"Boy's prison," he said. "That's where they've hidden them. But they'll probably throw them out again when the meeting is over. It costs money to keep them in."

As we turned in towards the marina, we emptied the champagne, gathered our bathing gear and got ready to go on land.

The Portuguese wanted to go on into town and invited us to his special Brazilian evening concept. I asked him what it was.

“First a couple of the small light greens and then a couple of the small light browns,” he grinned.

We went back to the hotel.

## 1992

The Minister stood at the lectern in front of the press photographers, smiling, with a pen in his hand. All the members of the delegation stood around watching, as he slowly put his pen to the document the UN chief placed in front of him.

He looked encouragingly at the photographers and, very slowly, signed his name as the bulbs flashed.

He then took the Danish members of the press to one side and talked enthusiastically about the results of the Rio summit and the positive effects the new agenda for the 21<sup>st</sup> century would have not just on the poor but also on the world's environment.

He was friendliness itself, praised the questions as he responded to them and quietly explained to the journalists the enormous efforts that the politicians had gone to in clearing up the mess that all the civil servants had made.

He looked out over the room, seeking more questions.

The parliamentary members of the delegation and the NGOs stood at the back and waited patiently for their chance to come to the microphone.

Meanwhile, a new minister came to the lectern.

I went over to the corner of the hall, which was being readied for the final “family photo”. More than 150 Heads of State were now in the building, waiting together with the Minister in the VIP section for the setting up of the joint photograph which would be the jewel in the crown of the UN summit.

I wondered who Castro was talking to in there.

Contrary to expectations, his speech had been short. But that hadn't prevented it from being insulting towards the Euro-American world, its post-colonial trade policy, its over-consumption and its plundering of the world's poor.

Most delegates had just put it down as worn-out rhetoric for times gone by. Entertaining, but past its sell-by date.

The Minister had said that it was a pity for Cuba that Castro continued to stand in the way of the future. The press had quoted this word for word.

Now we all circled round waiting for the final photo as the hall was ringed with a barrier and armed guards took their positions along the sides. I found my Maltese friend in the crowd and persuaded him to come and have a coffee.

He had bought a t-shirt to mark the event with a slogan about thinking globally and acting locally. It suited him beneath his jacket. Now he had to go home to face the endless battle with the hunters' associations about the future of the island's small birds and birds of prey.

However, before having to face all this,, he had decided to celebrate the last evening in town. There was a special area of Rio's nightlife he had not experienced. It was now or never, he winked.

In general, he thought that the final document was probably not the best in the world but, anyway, it did set a new and improved global agenda. That was worth celebrating.

He asked if I had been to see the alternative summit's camp. I hadn't. We decided to go there after the photo had been taken.

A rising murmur spread itself through the entire centre as the political stars started to make their way to the hall and, chatting together, took their places around the Brazilian President.

A sweating Head of Protocol darted round with a large piece of paper and tried to get everyone to take the right position. The politicians laughed at him but willingly stood where he put them as they continued to chat and wave to the photographers and the rest of us, standing on our toes behind the barrier.

Finally, the Head of Protocol had got the three rows in place.

At the front, stood the leaders of the largest and richest countries. They were all white, apart from the Brazilian President and the UN General Secretary.

The second row was dominated by South Americans and Asians.

The Africans stood at the back.

The Head of Protocol had just stepped back when one of his staff pulled his arm and whispered something in his ear. He paled in the light of the projector and looked helplessly at the VIP door.

The Brazilian President glanced at him, impatiently and several of the prominent guests started to lose their smiles.



Then applause rocked the hall and Fidel Castro came striding across the floor, head held high and waving at the spectators. They continued applauding all the way while he went to the front of the group, greeted the Brazilian President and squeezed himself right in the front row.

The Head of Protocol stepped towards him but was waved away by the President.

The room fell silent and the politicians stared out at us. The air vibrated for a moment in the stillness. Then the Brazilian President smiled, shook hands with the UN General Secretary and bowed slightly to the photographers.

The rest was drowned in the flash of the cameras.

As they left the podium, waving and chatting, the Maltese grabbed me by the arm and dragged me out. Behind the rows of motorcycle police and soldiers was the bus which took passengers to the alternative meeting every hour. We climbed in together with a lot of NGOs, who definitely didn't look like the civil servants that had otherwise filled the congress centre. Apart from the mobile phones.

The peasants were still standing along the road observing us as we passed through the fields on the way to town.

## 1984

As we checked out I looked down at my shoes, which hadn't been so shiny since I first bought them. I placed my plastic card on the desk and the smiling lady handed it back together with the bill carrying the hotel's name under the three stars. I signed the bill and asked them to look after our luggage while I went in to the breakfast buffet.

The others arrived shortly afterwards. The Director had found his spare glasses. The colleague was talking about precious stones. He had discovered a shop nearby and bought stones at incredible prices. We didn't bother to ask him how he knew they were genuine.

The Director had gone straight home and hadn't left the hotel again. On the other hand, he had "bought" a visitor. "A huge black woman," he whispered and rolled his eyes, "they really know how to do it."

I told him about the shoeshine boy.

"Give him an inch and he'll take a mile," said the Director, shaking his head. "We can't save all the world's poor anyway."

"Who can then?" I asked.

"They should never have mixed themselves with the slaves," he said. "It's their own fault."

He went and got a new helping of pancakes.

As we were waiting for the taxi, I saw the boy coming round the corner. He was still wearing the same clothes and the little box was tucked beneath his arm. His eye was completely closed by now and his lip was still swollen.

He walked towards us and saw our luggage. The lines in the dust on his face were gone but the sand still glittered like stars in the sun in his greasy hair.

The others looked away, demonstratively.

"Hi, Fidel," I said. "Time to go."

He looked at me with his open eye and leaned his head to one side.

"No more shoeshine?" he asked.

I shook my head and pulled a note from my pocket. He snapped it up in a lightning move and it disappeared in his pocket as he, as usual, looked over his shoulder.

The taxi rolled up in front of the door and we loaded our luggage. He dried his nose with the back of his hand and stepped closer. He took hold of my arm and dragged me down to his level.

"You rich man," he whispered. "Take Fidel with you."

I shook my head and patted his hair.

"Please," he said quietly, as his dark eyes became shiny in the light. "Give me good life. Like you."

I pulled myself free from his grasp, threw myself in the taxi and slammed the door as the driver started the engine.

He stood there on the pavement, head bowed. He had dropped the box and his little stump waved hopelessly in the air. Then he straightened up and spat after the car.

I saw the boy in the camouflage cap walk towards him from the street corner.

"Arrgh," said the Director, "you patted his head. Don't you know they're full of lice?"

I turned and looked at him.

"Just keep your fat mouth shut," I said, hearing my voice break.

"Alright," mumbled the colleague, "Alright."

Shortly afterwards I heard him telling the colleague just what you had to do to be fired from his department.

## 1992

The bus stopped by a long park between two broad boulevards.

There, between the trees and the bushes, were rows of stalls and tents where people in colourful outfits walked round between the plumes of smoke from the barbecues and the music coming from the transistor radios.

The park was fenced off with barbed wire, and military armoured vehicles were parked at every corner. Around them, soldiers were hanging around holding machine guns with cigarettes dangling from their mouths beneath their camouflage caps.

We paid to come in inside a large entrance tent, which doubled up as the information centre. There was also an information board covered with small yellow notes carrying contact information and requests to call.

The people behind the tables looked tired in the humid afternoon air. No air conditioning here. We got a stamp on our hands and were allowed in. The grass was worn and dusty and the atmosphere lazy, and relaxed now that everybody was starting to pack their exhibits together.

We walked slowly from stand to stand and studied the various messages. All the international NGO organisations were here, each fighting for their individual causes between the stalls of eco t-shirts, herbal medicines and Indian handicrafts. Everything borne along by weary activists with dusty clothes and sweaty hair.

As in the congress centre, there were restaurants and bars. But here they were simple sheds built round a couple of barbecues with rough wooden tables and folding chairs. A few places had cold boxes filled with chopped ice so you could get a beer. It smelt of charcoal and burnt meat, of sweat and flowers. In the middle of the park was a stage of rough wood, where a megaphone was tied to the corner post with a long string. A guy in work clothes was taking down the rear wall.

A slight distance away a lonely Indian sat playing his panpipes.

We sat ourselves down in the shade and had a beer while we read some of the innumerable folders that had been thrust into our hands on our way around the booths. Then we dropped them in one of the overflowing rubbish bins and moved on.

The Maltese stopped at an exhibition of birds of prey. His country's name topped the list of those who threatened the species. It stood there, in very large

letters on a wall poster. It demanded an end to all falcon trapping in Malta and urged a boycott of all the country's exports until they stopped.

My Maltese friend looked serious and shook his head.

"It's a bit much," he said. "We are the land of the Maltese falcon. You can't just wade in and change other people's culture."

"I thought that was the whole point of a world summit," I commented.

"That's something else," he said. "There we do it together."

We went on until we had been round nearly all the booths. At one of the last ones he bought an Indian rattle decorated with yellow and blue parrot feathers.

"As long as it's only the Indians, it's OK then," he said, pointing at the feathers. "These parrots are no better off than the falcons in Europe."

"The number the Indians trap doesn't threaten the entire parrot population," I said.

"It's not that simple any more," he replied. "They've got modern weapons now. And they need money."

Darkness was falling as we neared the exit. We came upon a large, grey tent just before the park ended. We looked in.

It turned out to be an exhibition from a Brazilian Child Protection Organization. . The accompanying texts were in Portuguese and beyond my abilities. But the pictures spoke their own language. The streets kids of Brazil. Sick and starving, skinny and lost. Among the photos were pictures of open wooden sheds over rows of seated children.

These were the organisation's schools where the children were gathered together, fed, washed and taught. Giro forms posted next to them indicated that you could adopt a child.

A row of young, serious Brazilians stood behind the children and stared intently at the camera. I could recognise some of them from those sitting at the table in the tent. They were in the throes of packing their things down in large crates and taking the pictures down from the wall. It was becoming more difficult to see in the evening light.

A girl with a crooked nose lit some candles on the tables. Their reflections flickered across the shiny surfaces of the photographs.

The Maltese dragged me over to a corner where there were a number of pictures I hadn't noticed before. They showed dead boys. They lay in dark alleyways and backyards, on the street and on the beach. They were poor photos. Obviously taken at night and in a hurry.

He explained that, at great personal risk, the members of the organisation had decided to document that the military police had murdered a lot of the street gang members before the meeting instead of interning them. The authorities had threatened to close the exhibition and the tent had been set alight on the first day. It was only because they were protected by the world summit that the place hadn't been stormed and removed from the beginning.

Displayed to one side was a large picture of a pit just outside the town. It had been taken using a telephoto lens and one could see a lorry and a couple of men in military uniforms standing by, guns in hand. Their faces glowed white under their caps.

A couple of others were digging, enlarging the hole.

I stepped closer in the darkening tent and looked at the open load of the lorry. The dead bodies lay twisted, slung one over the other. They were all older boys. Most of them were barefoot, in long trousers and short tops. Some had been shot in the head and others in the body. They lay frozen in still, unnatural positions.

A gust of wind caused one of the candles to flutter. It sent a ray of light to the dark, evening picture.

I stepped backwards and tried to take a deep breath. I felt the light disappear and my eyes turn white as my chest contracted and silence screamed in my ears.

I forced myself to look at the picture again.

On the floor of the lorry, between the dead, brown bodies at the bottom, I could glimpse an arm sticking out. An arm that stopped at the elbow in a red, badly-healed scar.

Outside, the stars spread their blanket over the Rio sky.

Fidel Castro had left the evening before and nobody clapped as we left the hotel.

The members of the delegation dragged their cases out to the waiting driver and clambered up into the bus. From the look of most of them, the Maltese was not the only one who thought that the result of the meeting deserved to be celebrated.

The Minister had gone on ahead in the limousine.

The morning sun blazed sharply in the blue sky and shone on the few remaining guests at the tables in front of the restaurant. Happy morning laughter came from the beach and a lone, small curly-haired boy stood behind the palm looking for morning shoes.

The air oozed the scent of heat and salt water. The jeweller took his morning smoke outside his store. On the other side were two parked police cars. The officers looked as if they were asleep in their seats.

As the bus turned on to the road, the helicopter with the bristling machine guns roared in over the promontory. It followed us until we turned into the industrial area and left the colours of the town behind us. Then it swung off in an arc over the bay and disappeared.

Above us, the figure of Jesus stood on his mountain top and spread his arms out between heaven and earth.

The Maltese came up the escalator towards the transit hall as I stood buying Brazilian rum and Cuban cigars. He had dark circles under his eyes and a crumpled jacket over a new blue t-shirt with a glittering carnival lady dancing over his chest.

He patted his crotch and, raising his hand, waved a V-sign in my direction.

"Where did you get to?" he asked. "The stars were dancing last night." He rolled his eyes.

I smiled at his pale face. "I gave up," I said. "I couldn't make up my mind."

He stopped and looked at me, curiously.

"What about?"

"Everything," I said. "I went home to bed."

He shook his head. "You do realise," he said, smiling, "that the only things you ever only really regret in life are those things you haven't done."

"Yes," I said. "Exactly."

"What do you mean?" he asked, and yawned.

"Forget it," I said and took him by the arm.

We walked to the terminal exit.

"You know," he said as we stood by his gate. "In Rio nobody sleeps at night. That's when you live."

"Some do," I said. "Some do."

Shortly afterwards we were both sitting in the sky.





## List of Authors

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**Nilo Cayuqueo**, (Mapuche), from the Los Toldos community in the southwest part of Argentina. Member of the Comisión Mapuche La Azotea and one of the Coordinators of the Network of the Original Native Peoples of the Buenos Aires province. Board member of the International Funders for Indigenous Peoples, IFIP, member of Indigenous World Association based and an advisor and nominator for the Goldman Environmental Prize. Has been active in Indigenous rights work for more than 40 years. He attended the Conference on Indigenous Peoples at the United Nations in Geneva 1977. After that and during the Military Dictator in Argentina he has leave the country because the threats. He went to live in Peru, Bolivia, France and United States. In 1981 he attended the "Conference of Indigenous Peoples and the Land" at the UN in Geneva. After that he participated in the Working Group on Indigenous Populations in the UN and together with other indigenous delegates helped to draft the ILO Convention 169. Nilo was one of the founders of the Indian Council of South America, CISA based in Peru and founding member of the South & Meso American Indian Rights Center (SAIIC) in Oakland, California and was the founder and director of the Abya Yala Fund, to support self-determined Indigenous community projects. Nilo is writing a book of the Movement of Indigenous Peoples of the Americas.

**Professor Dr. Erica-Irene Daes** is an academic, diplomat and UN expert best known for her almost 20 years as chairperson of the UN Working Group on Indigenous Populations (1984–2001) and expert member of the Sub-Commission on the Promotion and Protection of Human Rights (1976-2002), promoting the cause of the world's indigenous peoples. During this time, she authored many United Nations reports on Indigenous rights issues and was a driving force behind the UN Declaration on the Rights of Indigenous Peoples.

**Dr. Dalee Sambo Dorough** (Inuit-Alaska) is an Associate Professor of Political Science at the University of Alaska Anchorage and Expert Member of the UN Permanent Forum on Indigenous Issues. She is a former member of the Board of the UN Voluntary Fund for Indigenous Peoples. She teaches in the sub-field of International Relations as well as Alaska Native Studies. On behalf of the Inuit Circumpolar Council, she was an active participant in the standard setting for both the UN Declaration and the two-year revision process of ILO C107, which resulted in the adoption of C169. In addition to her international work, during her tenure at the ICC she was responsible for coordinating the Alaska Native Review Com-

mission, which is regarded as one of the most important, comprehensive reviews of the impact of the Alaska Native Claims Settlement Act of 1971.

**Dr. Roxanne Dunbar-Ortiz** is a historian specializing in European and United States' colonization of the Americas and Indigenous Peoples' anti-colonial resistance and is professor emeriti at California State University, where she developed the Native American Studies program. Involved with the International Indian Treaty Council from its founding in 1974, she served on the staff planning the 1977 "International NGO Conference on Discrimination against Indigenous Populations in the Americas" and the 1981 "International NGO Conference on Indigenous Peoples and the Land," both held in Geneva at the Palais des Nations. In the period between the two conferences she lobbied the UN Sub-Commission on Racism and the UN Commission on Human Rights to establish a Working Group on Indigenous Peoples, which met for the first time in 1982. She received the Diplôme of the International Law of Human Rights in 1983, at the International Institute of Human Rights, Strasbourg. She is author or editor of twelve books, the most recent being *An Indigenous Peoples' History of the United States*.

**Asbjørn Eide** is former Director of and presently Professor Emeritus at the Norwegian Centre for Human Rights at the University of Oslo. He has been Torgny Segerstedt Professor at the University of Gothenburg, Sweden, visiting professor at the University of Lund, and adjunct professor at the College of Law, American University in Washington. He is author and editor of several books and numerous articles on human rights, including on minority rights, indigenous peoples' rights, economic and social rights, including on the right to food and the right to health. He was an expert member and Chairman of the UN Sub-Commission on Promotion and Protection of Human Rights for 20 years, the first Chairman of the UN Working Group on Indigenous Populations, the Chairman of the UN Working Group on Minorities for ten years and has also been a member and President of the Council of Europe's Advisory Committee under the Framework Convention on National Minorities. He was also President of the FAO's Panel of Eminent Experts on Ethical Issues in Food and Agriculture for eight years.

**Stener Ekern** is Associate Professor at the Norwegian Centre for Human Rights, University of Oslo, and Doctor (Dr. Polit.) of Social Anthropology from the University of Oslo in 2006, based on fieldwork in Nicaragua (1984-5) and Guatemala

(2000-03). He has broad work experience from Norwegian development cooperation (NORAD, Caritas Norway, the Norwegian Programme for Indigenous Peoples) and the UN (El Salvador Truth Commission).

**Michelo Hanungule** is Professor of Law at the Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa; Honorary Khoi San Elder in South Africa and Honorary Chief in Zambia; Commissioner of the International Commission of Jurists (ICJ); Board Member of Minority Rights Group International (MRG); and Expert Member of the African Commission's Working Group on Extractive Industries.

**Hans Jakob Helms** holds a degree in Ethnography and Nordic Language and Literature from the University of Aarhus, Denmark. He has worked as a personal assistant in the European Parliament and for the President of the Inuit Circumpolar Conference. He was a director in the Greenland Home Rule government for many years in different positions, before returning to Denmark to become a political advisor for the Greenlandic members of the Danish Parliament and a novelist. He has since published "The Genevan Dance" (Dansen I Genève, from which the contributions in this book are taken) and the novel "If you Whistle at the Northern Lights" (both presently only in Danish and Greenlandic editions). He was an NGO participant in two of the first meetings of the WGIP and Rapporteur in the ILO C107 revision process.

**Dr. Wilton Littlechild** holds a Bachelor of Law, an honorary Doctor of Law and a Master's in Physical Education. A former Member of Parliament, he has participated in over 150 international conferences, UN expert seminars and other fora relevant to Indigenous Peoples' issues since 1977. He served as a Chairperson-Rapporteur of the first UN Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples (2003) and Co-Rapporteur of the 2nd Expert Seminar (2006). He also served as Chairperson Rapporteur for the first Expert Seminar on Private Industry, Human Rights and Indigenous Peoples. He was a member (North America) of the UN Permanent Forum on Indigenous Issues (2000-2007) as Rapporteur for six sessions. He currently is serving a second term on the UN Expert Mechanism on the Rights of Indigenous Peoples and was Chairperson of its 5th and 6th sessions.

**Ole Henrik Magga** is Professor of Sámi Linguistics at the Sami University College in Kautokeino. He was a delegate to the World Council of Indigenous Peoples (WCIP) when it was founded in 1975, first president of the Sami Parliament of Norway from 1989 to 1997, member of the World Commission on Culture and Development from 1992 to 1995 and the first chairman of the UN Permanent Forum on Indigenous Issues (2002-04).

**Dr. Felix Mukwiza Ndahinda** is an Assistant Professor and Master's Coordinator at Tilburg Law School's International Victimology Institute Tilburg (INTERVICT - Tilburg University - the Netherlands). He holds a PhD from the same institution (2009), an LLM from the Raoul Wallenberg Institute of Human Rights (Sweden, 2006) and a Bachelor's (LLB.) from the National University of Rwanda (2003). He previously worked for the Office of the Auditor General for State Finances in Rwanda (2004) and the International Criminal Tribunal for Rwanda in Arusha, Tanzania (2003, 2009). He has been a visiting lecturer at Rwandan universities and a consultant to the UN Human Rights Council on "Human rights and issues related to terrorist hostage-taking".

**Michael O'Flaherty** is Established Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway. Among previous positions he has been a member and latterly Vice-Chair of the UN Human Rights Committee (2004-2012) and Chief Commissioner of the Northern Ireland Human Rights Commission (2011-2013).

**Ruth Pearce** was appointed Head of Public Diplomacy and Information in the Australian Department of Foreign Affairs and Trade in January 2012. She has served as Australian Ambassador in Honiara (1992-95), Moscow (1999-2002), Manila (2002-05) and Warsaw (2008-12) with previous assignments in Bangladesh, Israel and the UN, Geneva. She has also held senior positions in the Department of Foreign Affairs and Trade and AusAID in Canberra, including Head of Americas and Europe Division, International Organisations and Legal Division and Corporate Management Division at the Department of Foreign Affairs and Trade and Head of the Corporate Governance and Review Division at AusAID.

**Camilo Pérez-Bustillo** is Visiting Professor affiliated to the Departments of Government and Criminal Justice at New Mexico State University (NMSU) in Las

Cruces since August 2013, while on leave from his position as a Research Professor of the Graduate Program in Human Rights and the Faculty of Law, Autonomous University of Mexico City (UACM) (in post since April 2006), and Coordinator of the Center on Migration and Human Rights based at UACM (since 2007). He is a Fellow of the Comparative Research Programme on Poverty (CROP), and has been a member of the Committee on the Rights of Indigenous Peoples of the International Law Association (ILA), of the international organizing committees of the World Social Forum on Migration (held in Quito, Ecuador Oct. 8-12 2010) and of the Global Alternative Forum of Peoples in Movement and its International Tribunal of Conscience.

**Isabelle Schulte-Tenckhoff** is a Professor of Anthropology, Graduate Institute of International and Development Studies, Geneva (Switzerland). Prior to joining the Graduate Institute in 2003, she held teaching and research positions in Canada, the US, and France. Her research favours a non-Eurocentric approach to the role of Indigenous peoples in the history of international law and international relations. Her publications include, *inter alia*, *La question des peuples autochtones* (Brussels/Paris 1997) and *Introduction au droit des peuples autochtones* (Brussels, forthcoming 2015) ; as well as the edited volume *Altérité et droit* (Brussels, 2002), and the co-authored volume *Le droit et les minorités: analyses et textes* (Brussels, 2<sup>nd</sup> ed. 2000).

**Anne Julie Semb** is Professor at the Department of Political Science, University of Oslo, Norway. Her research interests include conflicts between states and groups, state sovereignty, indigenous politics, and human rights and citizenship, including Sami citizenship.

**Elsa Stamatopoulou**, Director, Columbia University's Indigenous Peoples' Rights Program, Institute for the Study of Human Rights (ISHR), and Adjunct Professor, Columbia University, Center for the Study of Ethnicity and Race, and the Department of Anthropology. She has devoted some 21 years of her UN work to human rights and served in various positions at the UN offices in Vienna, Geneva and New York. In addition, from 2003 to 2010, she was the first Chief of the Secretariat of the UN Permanent Forum on Indigenous Issues. Her current involvement includes participating in boards of Indigenous organizations, in the In-

ternational Commission on the Chittagong Hill Tracts of Bangladesh and, in her native Greece, in the Center on Minority Studies and other NGOs.

**Rodolfo Stavenhagen**, Professor Emeritus of Sociology at *El Colegio de México*, was the first UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (2001-2008). He has also been Assistant-Director General for Social Sciences at UNESCO and is vice-president of the Inter-American Institute of Human Rights. His research interests include social development, agrarian problems, ethnic conflicts, indigenous peoples and human rights. He lectures widely and his written contributions have appeared in Spanish, English, French and other languages.

**Lee Swepston** is Visiting Professor with the Raoul Wallenberg Institute at the University of Lund (Sweden), and a consultant on human rights and international labour law. He attended the Law School of Columbia University (New York) and was an official with the International Labour Organization (ILO) for 34 years. His posts included Chief of the Equality and Employment Branch, Director of the Department of Fundamental Principles and Rights at Work and Senior Advisor on Human Rights. He has written numerous books and articles on various aspects of human rights and international labour law, child labour, freedom of association, discrimination, HIV and AIDS, migrant workers and indigenous and tribal peoples. He was the staff member responsible for the adoption of Convention No. 169 and for its supervision for some years.

**Pei-Lun Tsai** is a doctoral candidate at the University of Nottingham's School of Law. She holds an LLM in International Legal Studies from New York University School of Law, and an LLB and a BA in Diplomacy from National Chengchi University, Taiwan. She is currently serving as Associate Editor of the Chinese (Taiwan) Yearbook of International Law and Affairs.

**Zhou Yong**, Associate Professor of Law, Institute of Nationality Studies, Chinese Academy of Social Sciences, and Researcher and Program Director, Norwegian Center for Human Rights.

**Sharon H. Venne** (Notokwew Muskwa Maniokan) is an Indigenous Treaty person (Cree) and a member of the Blood Tribe within Treaty 7 by marriage, with one

son. She worked at the United Nations prior to the establishment of the Working Group on Indigenous Peoples in 1982. The background research to the many of the clauses of the Declaration on the Rights of Indigenous Peoples is included in her book: *Our Elders Understand Our Rights: Evolving international law regarding Indigenous Peoples*. In addition, Sharon has written numerous articles and edited materials relating to the rights of Indigenous Peoples and lectured on their rights in Australia, New Zealand, Norway, Sweden, France, Italy, Hawaii, the United States and Canada. In addition to her work on the Declaration, she worked to secure a UN Study on Treaties. From the first introduction of the resolution in 1983 until the report was finalized in 1999, Sharon worked to ensure that the report reflected Indigenous laws and norms. Sharon has written numerous articles on the Treaty Rights of Indigenous Peoples. All her work, internationally and domestically, relates to the promotion of the rights of Indigenous Peoples, particularly rights related to lands, resources and treaties. Some of her work on the laws of the Cree Peoples in relation to treaty-making were published in *Aboriginal and Treaty Rights in Canada* (Michael Asch ed.) and *Natives and Settlers – Now & Then* (Paul DePasquale ed.). Sharon has recently published materials on the history of Indigenous Peoples at the United Nations since 1977 and an article on the problem of NGOs and their interference in Indigenous Peoples' exercise of the right to self-determination within international law.

**Petter Wille** is currently Ambassador and Special Envoy for Human Rights in the Ministry of Foreign Affairs of Norway. He was Ambassador and Permanent Representative of Norway to the Council of Europe from 2008 to 2013. He has also been Counselor at the Permanent Mission of Norway to the UN in Geneva, Deputy Director General in the UN department and Head of Division in the Legal Department of the Ministry of Foreign Affairs. He represented Norway during the negotiation of the draft Declaration on the Rights of Indigenous Peoples and chaired the working group that prepared the mandate for the Permanent Forum on Indigenous Issues. He also participated in the drafting of ILO Convention 169. He has a law degree from the University of Oslo.

## Bibliography of materials on the work of the ILO and the United Nations

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**T**here has been a great deal of writing on the subject of indigenous peoples, both by the ILO and UN themselves, and by others working on the issues. It will be impossible to compile a complete bibliography because of the sheer volume of writing. Therefore the following bibliography lists major works by the two institutions concerned, as well as works that authors of in this volume have submitted to the editors.

### **I. Institutional works**

#### **A. Brief Bibliography of the International Labour Organization's Work on Indigenous and Tribal Peoples**

The International Labour Organization (ILO) was created in 1919 at the same time as the League of Nations, and survived the Second World War to become the first of the UN specialized agencies. The ILO has been working on various aspects of the living and working conditions of indigenous and tribal peoples since around 1921. For most of the first period, before World War II, the main work was on the living and working conditions of "native peoples" performing forced labor in colonial situations. This led to the adoption of a series of instruments known collectively as the "Native Labour Code", which included the Forced Labour Convention, 1930 (No. 29). Shortly before World War II, the ILO began to work on the situation of indigenous and tribal populations inside independent countries, in the way that this term is now understood, at the request of the ILO's American and Asian member states. This work was suspended during the war, and began again only in the late 1940s.



Much of the ILO's work until 1989 centred on the adoption of the only two international conventions adopted on this subject. The first was the Indigenous and Tribal Populations Convention, 1957 (No. 107), and the second was the Indigenous and Tribal Peoples Convention, 1989 (No. 169). The ILO has also carried out supervision of the application of Conventions, information gathering, technical cooperation and various promotional activities. The following bibliography will cover works published by the ILO.

### **1. Adoption of ILO standards**

The ILO adopts standards in a way that is peculiar to itself. The basic process is that the ILO Governing Body places a standard-setting subject on the agenda of the International Labour Conference. This selection may be preceded by a meeting of experts to advise the Governing Body on whether this is appropriate.

The International Labour Conference discusses each new standard in two successive years. At the first session it adopts conclusions and, on the second occasion, it adopts the definitive standards. Because the ILO is a tripartite organization, governments and representatives of the employers' and workers' organizations in member states all take part in the discussion and – unlike in any other organization – the non-governmental members of delegations have the right to speak, to participate fully and to vote. Other non-governmental organizations – in this case including those of indigenous and tribal peoples – have a more limited right of participation than do employers' and workers' organizations, but can still take part in an advisory role.

Once a subject is included on the agenda, the International Labour Office prepares a "law and practice report" on the situation related to the subject, including a questionnaire regarding what should go into a new standard. This report is sent to all member states, which are required to consult employers' and workers' organizations in their countries when formulating their reply. These organizations may reply either directly to the ILO or through their governments. On the basis of the replies to the questionnaire, the Office prepares a summary report and proposed conclusions for a first Conference discussion. After the first discussion, a further report prepared by the Office circulates a summary of the discussion, and a preliminary draft of the new standards based on the first discussion. Govern-

ments and employers' and workers' organizations once again provide their comments, which are taken into account in the preparation of a second proposed draft instrument. This draft is the basis for discussions in the second session of the Conference, which then adopts the new standards.

The preparatory materials for each new standard therefore include two reports that are submitted to the first discussion, and two reports that are submitted to the second session. At the Conference, the report of the responsible committee and the discussion of the committee's report by the plenary of the Conference should also be taken into account. The committee's reports and the account of the discussion in the plenary are to be found in the Proceedings of the International Labour Conference.

The preparatory materials are all available on the ILO website. To find them, go to the ILO website [www.ilo.org](http://www.ilo.org), and look under Labour Standards, then Information Resources and Publications. Within this category you will see:

- *International Labour Conference documents*
  - *Preparatory reports for the adoption of conventions and recommendations*
  - *Record of proceedings since 1919*
- a. Preparatory materials for Convention No. 107
- *Protection and integration of indigenous and other tribal and semi-tribal populations in independent countries*, International Labour Conference (40<sup>th</sup> Session, 1957 (Geneva, Switzerland) Report VI (1), 1956).
  - *Protection and integration of indigenous and other tribal and semi-tribal populations in independent countries*, International Labour Conference (40<sup>th</sup> Session, 1957 (Geneva, Switzerland) Report VI (2), 1957.
  - *Report of the Committee on Indigenous Populations*, Record of Proceedings, International Labour Conference, 39<sup>th</sup> Session, 1956, Appendix XI, pp. 736 et seq.
  - *Report of the Committee on Indigenous Populations: Submission and Discussion*, Record of Proceedings, International Labour Conference, 39<sup>th</sup> Session, 1956, pp. 530 et seq.

- *Report of the Committee on Indigenous Populations*, Record of Proceedings, International Labour Conference, 40<sup>th</sup> Session, 1957, Appendix IX, pp. 722 et seq.
  - *Report of the Committee on Indigenous Populations: Submission and Discussion*, Record of Proceedings, International Labour Conference, 40<sup>th</sup> Session, 1957, pp. 400 et seq.
- b. Preparatory materials for Convention No. 169
- *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference, 75<sup>th</sup> Session, 1988, Reports VI (1) and VI (2), 1987. (Report VI (1) includes report of the Meeting of Experts, 1986.)
  - *Report of the Committee on Convention No. 107*, Provisional Record 32, *Proceedings of the International Labour Conference, 75<sup>th</sup> Session, 1988*.
  - *Report of the Committee on Convention No. 107: Submission and Discussion*, Provisional Record 36, *Proceedings of the International Labour Conference, 75<sup>th</sup> Session, 1988*.
  - *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference, 76<sup>th</sup> Session, 1989, Reports IV (1), (2A) and 2(B).
  - *Report of the Committee on Convention No. 107*, Provisional Record 25, *Proceedings of the International Labour Conference, 76<sup>th</sup> Session, 1989*.
  - *Report of the Committee on Convention No. 107: Submission, Discussion and Adoption*, Provisional Record 31, *Proceedings of the International Labour Conference, 76<sup>th</sup> Session, 1989*.

## 2. Other ILO Publications on Indigenous and Tribal Peoples

- a. Before the adoption of Convention No. 107:
- ILO: *Indigenous peoples: Living and working conditions of aboriginal populations in independent countries* (Geneva, ILO, 1953).

## b. Recent publications

There is a large collection of more recent publications that can be found on the ILO website under Indigenous and Tribal Peoples. As of July 2012, this material was available at the following address: <http://www.ilo.org/global/standards/information-resources-and-publications/lang--en/index.htm> Some of the most important include:

- *Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions - A compilation of ILO Supervisory Bodies' Comments 2009-2010, 2010.*
- *Application of Convention No. 169 by domestic and international courts in Latin America - A casebook, 2009.*
- *Indigenous & Tribal People's Rights in Practice - A Guide to ILO Convention No. 169, 2009.*
- *Including indigenous peoples in poverty reduction strategies, 2008.*
- *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169 - Key Principles in Implementing ILO Convention No. 169, Case Study 7, 2009.*

## B. Brief Bibliography of United Nations Work on Indigenous Peoples

There is a great deal of United Nations documentation around this issue, and it is not possible to produce a comprehensive listing here. The principal source for United Nations documentation is the web site of the United Nations Permanent Forum on Indigenous Issues, at: <http://undesadspd.org/IndigenousPeoples.aspx>.

This website contains the following sections, all of which contain documentation and information:

- Capacity Development
- Declaration on the Rights of Indigenous Peoples
- Inter-Agency Support Group
- International Day
- Library & Documents
- Meetings and Workshops

- Newsletter
- Post-2015 Agenda
- Recommendations Database
- Reports by Members of the Permanent Forum
- Second Decade
- Thematic Issues
- Trust Fund
- UNPFII Sessions

## 1. Selected Resolutions

### a. General Assembly Resolutions

- A/RES/61/295 United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007)
- A/RES/68/149 Rights of Indigenous Peoples (February 2014)
- A/RES/66/296 Organization of the High-level Plenary Meeting of the General Assembly, to be known as the World Conference on Indigenous Peoples. (Oct 2012)
- A/RES/60/142 Programme of Action for the Second International Decade of the World's Indigenous People (February 2006)
- A/RES/59/174 Second International Decade of the World's Indigenous People (February 2005)
- A/RES/58/158 International Decade of the World's Indigenous People (March 2004)
- A/RES/54/150 International Decade of the World's Indigenous People
- A/RES/53/130 UN Voluntary Fund for Indigenous Populations
- A/RES/50/157 Programme of activities for the International Decade of the World's Indigenous People
- A/RES/50/156 United Nations Voluntary Fund for Indigenous Populations
- A/RES/47/75 International Year for the World's Indigenous People, 1993
- A/RES/46/128 International Year for the World's Indigenous People

b. ECOSOC Resolution

- E/2000/22 Establishment of a Permanent Forum on Indigenous Issues (pp. 50-52)

c. Human Rights Council Resolutions

- UN Special Rapporteur on the Rights of Indigenous Peoples, Commission on Human Rights resolution 2001/57, followed by Human Rights Council Resolution 6/12, available at <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>
- Expert Mechanism on the Rights of Indigenous Peoples, UN Human Rights Council Resolution 6/36, available at <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>

**2. Selected publications and studies (available on UNPFII site)**

- Study of the Problem of Discrimination Against Indigenous Populations. Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo
- State of the World's Indigenous Peoples (New York: United Nations, 2009), available in print and electronic at <http://www.un.org/esa/socdev/unpfii/en/sowip.html>
- Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians
- UNDG Guidelines on Indigenous Peoples' Issues
- Indigenous Women and the United Nations System

**3. Special Rapporteur on the Rights of Indigenous Peoples**

(available on the UNPFII web site, and on the web site of the Office of the High Commissioner for Human Rights at [www.ohchr.org](http://www.ohchr.org))

- Annual Reports
- Special and Thematic Reports
- Country Reports

## II Brief Bibliography of Other Relevant Publications on Indigenous Peoples communicated by Contributing Authors of this Volume

### a. International Law Association

- Rights of Indigenous Peoples, Resolution No. 5/2012, 75<sup>th</sup> Biennial meeting of the International Law Association, Sofia, adopted August 30, 2012, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (last visited November 24, 2014)
- ILA Committee on the rights of indigenous Peoples, Final Report, Sofia 2012, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>
- ILA Committee on the Rights of Indigenous Peoples, The Hague Interim Report 2010, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>

### b. Relevant books on the rights of Indigenous peoples

- IWGIA, *The Indigenous World*.
- S. J. Anaya, *Indigenous Peoples in International Law* (2d ed.), 2004.
- *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, Claire Charters and Rodolfo Stavenhagen, eds., (Copenhagen: IWGIA, 2009).
- *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Steven Allen and Alexandra Xanthaki, eds. (Oxford: Hart Publishing, 2011).
- Dunbar Ortiz, Roxanne, *An Indigenous Peoples' History of the United States*. Boston: Beacon Press, 2014.
- Dunbar Ortiz, Roxanne, *The Great Sioux Nation: Oral History of the 1868 Sioux-U.S. Treaty*. (First published 1977) University of Nebraska Press, 2013.
- Dunbar Ortiz, Roxanne, *Roots of Resistance: A History of Land Tenure in New Mexico*. (First published, 1980) University of Oklahoma Press, 2007.
- Dunbar Ortiz, Roxanne, *Indians of the Americas: Human Rights and Self-Determination*. London: Zed Books, 1984.

## INDIGENOUS PEOPLES' RIGHTS IN INTERNATIONAL LAW: EMERGENCE AND APPLICATION

This diverse collection of essays and articles emerged from a workshop held in Oslo in March 2012, hosted by the Norwegian Center for Human Rights and the University of Oslo. The purpose of the workshop was to gather memories of how the international community had decided to examine the situation of Indigenous peoples, to explore, explain and celebrate their pioneering work within the United Nations and the International Labour Organization. The participants also examined the impact of that work and were further asked to identify desirable future developments.

The workshop and now this volume have brought together unique historical and political perspectives of the same events from a variety of different viewpoints. Participants were drawn from Indigenous communities, from the United Nations and the ILO, from national governments and from NGOs, all of whom had been involved in these discussions over the years – some since the very beginning.

Among the participants in the workshop was Asbjørn Eide, the founding Chairperson of the UN Working Group on Indigenous Populations (WGIP), and this book is dedicated to him on the occasion of his 80th birthday.

Cover design by Holly Nordlum, Iñupiaq Artist

RESOURCE CENTRE FOR THE RIGHTS OF INDIGENOUS PEOPLES



INTERNATIONAL  
WORK GROUP FOR  
INDIGENOUS AFFAIRS