CHAPTER VI

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HUMAN RIGHTS

By Dalee Sambo Dorough

Early conceptions of natural rights, and later human rights, in some ways share certain parallels or philosophical strains with the general practices, customs and values of indigenous societies: the social contract, the common good, the general will, equality and so forth. There are a number of notable distinctions or additional elements, however. For example, indigenous concepts are not confined to human beings but include all living things, underscoring an essential, unique element of the relationship of indigenous peoples to nature and their natural world that has permeated indigenous identity and is at the core of their world views and perspectives. The collective rather than individualistic nature of indigenous societies is another important attribute that has surfaced repeatedly in all international and regional human rights standard setting discussions. The narrow view of rights attaching only to individuals is regarded as wholly insufficient for the distinct cultural context of indigenous peoples. The collective dimension of indigenous societies cannot therefore be underestimated in the development and implementation of human rights standards concerning indigenous peoples.

Other notable distinctions include the values of honour, respect for one another, deference to Elders, family and kinship and related roles, sharing, cooperation, humour, knowledge of language, customs and traditions, compassion, humility, avoidance of conflict, spirituality,[1] peace and harmony. These and other values are common to many, if not all, indigenous communities.[2] The concept of *having responsibilities to the collective* rather than simply enjoying rights is a widely found component of indigenous cultures. The link between knowledge of language, customs and traditions and indigenous peoples' relationship to their natural world is directly related to inter-generational responsibilities and rights. The practice of consensus decision-making and consultation is also a common practice within indigenous communities.

The values, customs and practices of indigenous societies are in fact "norms" that have guided indigenous societies toward harmonious relations. Through expressions at various international fora, indigenous peoples have translated their worldviews into a human rights discourse, through the borrowing of terminology as well as the expansion of human rights ideals.

This expansion of human rights concepts has taken hold within the United Nations, the International Labour Organization, the Organization of American States and elsewhere. What has evolved is a set of standards that are more consistent with the values, practices and institutions of indigenous peoples. Indeed, Richard Falk notes that:

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[1] Inupiaqatigiigniq, the Inupiat of the north and northwest coast of Alaska have interpreted a number of concepts crucial to collective relations within Inuit communities: Qiksiksrautiqagniq (respect) for Elders, others and nature; Ilagiigniq (family kinship and roles); Signatainniq (sharing); Inupiuraallaniq (knowledge of language); Paammaagiinniq (cooperation); Piqpakkutiqagniq (love and respect for one another); Quvianguniq (humor); Anuniagniq (hunting traditions); Naglikkutiqagniq (compassion); Qinuinniq (humility); Paaqtaktautainniq (avoidance of conflict); and Ukpiqqutiqagniq (spirituality).

[2] A table referencing Maori values similar to those of the Inupiat values discussed above was presented by Garth Harmsworth from Landcare Research (New Zealand) at the Seventh Joint Conference: "Preservation of Ancient Cultures and the Globalization Scenario", organised 22–24 November 2002 by Te Whare Wananga o Waikato, (School of Maori and Pacific Development, University of Waikato, Hamilton, New Zealand) & International Centre for Cultural Studies (ICCS), India. See Harmsworth (2002).

> *This recent authentic expression of indigenous peoples' conception of their rights contrasted with that of earlier mainstream human rights instruments claiming universalism... Such comparisons confirm the contention that participatory rights are integral to a legitimate political order, as well as to a reliable clarification of grievance, demand, and aspiration. This alternative conception has been developed by indigenous peoples in an elaborate process of normative reconstruction that has involved sustained and often difficult dialogue among the multitude of representatives of Indigenous traditional peoples.*[3]

Despite efforts over the last forty years to improve conditions and to increase recognition of indigenous rights through law and policy, litigation, national dialogue and enhanced leadership opportunities, full accommodation of indigenous rights remains elusive. Domestically, remnants of colonialism applied with nuance and subtlety have become difficult to specify or identify. But ever since Cayuga Chief Deskaheh and Maori religious leader W.T. Ratana[4] tried to gain the attention of the League of Nations in the early 1920s, indigenous peoples have increasingly felt compelled to speak out internationally about the abuses being perpetrated by one people against another and the need to check the limits of power and abuses of others. Largely due to indigenous peoples organising themselves nationally and internationally, we are seeing an important synergy develop between domestic arenas and international human rights standard setting. These actions may ultimately ensure indigenous peoples their rightful place within the international community and create new tools with which to reconstruct political and legal relationships with nation-states and others. In this regard, the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly in 2007 was a very significant event and the Declaration will inevitably be instrumental in shaping indigenous peoples' relationships with both the international community as well as states.

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A human rights-based approach

Indigenous advocates believe the use of a human rights-based approach to advancing their rights, interests and concerns, and for resolving indigenous/state conflicts, is critical to the future of indigenous peoples. As the Special

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3 Falk (2000), 151-152.

4 See the Introduction to this volume. Although the Iroquois Confederacy engaged in international relations with Great Britain, France and other Indigenous nations, it was not until the creation of the League of Nations that they attempted to gain access to a formal international organization to resolve a conflict. See, generally, Akwesasne Mohawk Counselor Organization, Deskaheh: Iroquois Statesman and Patriot (1984); and also D. Sanders (1992), 485. Regarding W.T. Ratana see http://www.socialjustice.org.nz/?sid=32&id=99&print=articles, wherein his efforts to have the Treaty of Waitangi upheld are discussed, and reference is made to his trip to Europe.

Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, has noted, a human rights-based approach

> *…should take into account basic principles such as the indivisibility and universality of human rights; non-discrimination, especially in the case of vulnerable or marginalized groups; participation and empowerment; and accountability.*[5]

Right to self-determination

[indigenous peoples have consistently regarded the right to self-determination as a prerequisite to the protection and promotion, as well as the exercise and enjoyment, of all other human rights]

In the context of indigenous peoples, and consistent with the inter-related, interdependent and indivisible nature of human rights, a human rights based approach requires recognition of the fundamental right to self-determination. The fundamental nature of the right to self-determination is evidenced by the fact that it appears in the United Nations Charter,[6] the International Covenants,[7] the Declaration Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,[8] and the United Nations Declaration on the Rights of Indigenous Peoples.[9] The right to self-determination has been acknowledged as essential to the exercise of all other human rights and referred to as the pre-condition for the exercise of all other rights:

> *Human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and a prerequisite for the enjoyment of all the other rights and freedoms.*[10]

Likewise, indigenous peoples have consistently regarded the right to self-determination as a prerequisite to the protection and promotion, as well as the exercise and enjoyment, of all other human rights. Furthermore, they have consistently emphasized the principle of non-discrimination, despite repeated state efforts to qualify or limit the right of self-determination in relation to indigenous peoples. And they have articulated self-determination as an inherent right, not a right that is "given" or "created" by others but pre-existing.

Under international law, self-determination is considered to be jus cogens or a peremptory norm. Similarly, the prohibition of racial discrimination is a peremptory

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[5] Stavenhagen (2007), para. 14.

[6] Charter of the United Nations, Article 1, para. 2.

[7] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, common Article 1.

[8] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. UN Doc. General Assembly Resolution 2625 (XXV), 1970.

[9] The UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007 (A/RES/61/295).

[10] Gros Espiell (1980), 10, para. 59.

norm of international law. It is therefore disconcerting that not only one but a range of state proposals were being made in relation to the language concerning self-determination of indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples.[11]

Self-determination is also an integral part of democracy. The right to self-determination has been described as "the oldest aspect of the democratic entitlement". As international law Professor Thomas Franck explains:

> *Self-determination is the oldest aspect of the democratic entitlement... Self-determination postulates the right of a people in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.*[12]

Fortunately, indigenous peoples' views prevailed on this matter at the United Nations. The provisions of the UN Declaration, when read in context, ensure consistency with international law and the obligations of UN Member States to promote and protect human rights for all, including indigenous peoples.

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

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

Similarly, indigenous peoples recognize the interrelatedness and interdependence of all human rights.[13] They do so in large part because of their worldview of the holistic nature of their relations and inter-relationships with all other beings and all living things. From their earliest interventions at the UN Working Group on Indigenous Populations (WGIP), indigenous peoples have seen the text of the UN Declaration on the Rights of Indigenous Peoples as a whole and have affirmed the view that human rights are interrelated, interdependent and indivisible.[14]

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[11] The Declaration on the Rights of Indigenous Peoples was adopted by 143 votes in favor, 4 against and 11 abstentions (A/RES/61/295).

[12] Franck (1992), 52.

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

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

The World Conference on Human Rights, through the Vienna Declaration and Programme of Action,[15] affirmed that:

> *All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

There are a growing number of international instruments that make specific reference to this important aspect of human rights.[16] In addition, this interpretation of human rights has been embraced by numerous scholars[17] and advocates.

The point of such an understanding and associated pronouncements is the need to recognize the dynamic interplay between cultural diversity and universal norms, principles or ideals. Furthermore, such language helps to motivate respect for certain minimum standards and to promote the actual enjoyment of basic human rights, which may be taken for granted. There is no question that each state will (and must) take into consideration its "national and regional particularities and various historical, cultural and religious backgrounds."[18] However, they must do so in a fashion that is consistent with universally applicable minimum human rights standards.

These and other fundamental principles of the human rights framework cannot be overstated, especially from an indigenous perspective. It is quite elementary but important to reiterate that it is undesirable and inconsistent with the human rights framework to establish a "hierarchy" of rights[19] or to invite discussion over rights that may be derogable and those that may not. Consistent with the indivisibility of human rights and their interdependence, state governments have both specific and general duties to promote human rights and are not in a position to determine which rights they may or may not limit.[20]

The universality of human rights, and understanding the cultural context

The Charter of the United Nations can be considered the starting point for the internationalization of human rights. In particular, Article 1(3) establishes a central purpose of the United Nations as one of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Although there was a tension between the West and primarily Asian countries as to the value systems embedded in the early human rights instruments,[21] the objective was to ensure that all peoples,

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

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

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

[18] See Preamble to the Declaration on the Rights of Indigenous Peoples.

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

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

[21] Henkin et al. (1999), 16: "The Western origin of rights was a source of some political resentment after the end of colonialism and became a political issue towards the end of the Twentieth Century, leading, for example, to the invocation of 'cultural relativism.' 'Asian values,' in particular, were invoked to challenge the universality of rights."

worldwide, enjoyed fundamental human rights. The purpose was not to replace national constitutions or internal laws[22] but rather to establish minimum standards at the international level to be guaranteed by every state to its peoples. Furthermore, there was no intention to create homogeneity.[23]

The concept of cultural context[24] is significant in order to reinforce the positive purposes of international human rights instruments. Dependent upon regional or cultural particularities and conditions, the manifestation of every right will require different weighting. This is also true in the context of the exercise of collective or group rights and those of an individual nature.

The United Nations Charter itself recognizes that regional organs and arrangements were anticipated by the United Nations[25] for the accommodation of regional differences. In fact, various regional arrangements have emerged and have been complementary to the international human rights framework. For example, the Organization of American States is a regional arrangement, with a corresponding Inter-American Court of Human Rights and institutions to "enforce" and monitor a variety of regional human rights instruments.[26]

[ultimately, the balancing of the universality of human rights and the accommodation of distinct cultural contexts are necessary to ensure and maintain the rich diversity of humankind]

Similar to these regional arrangements, the work of the United Nations in preparing the Declaration on the Rights of Indigenous Peoples reinforced the need for instruments and processes to accommodate cultural diversity. Indeed, this was the ultimate objective of the UN Declaration. Such an approach is a necessary element to ensure the effectiveness of universally recognized human rights. Furthermore, cultural diversity is preferable to cultural imperialism, which would be antithetical to the objective of respecting and promoting international human rights.[27]

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22 See also Mabo v. Queensland (1992), per Brennan J: "[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."

23 Falk (2000), 151-152: "[T]he interplay of different cultural and religious traditions suggests the importance of multi-civilizational dialogue involving the participation of various viewpoints, especially those with non-Western orientations. The world does not need a wholesale merging of different cultures and civilizations; rather, it simply needs to foster a new level of respect and reconciliation between and among its ever changing and ever diverse peoples and nations."

24 Steiner and Alston (1996), 374, which cites the American Anthropological Association's "Statement on Human Rights" (1947): "Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life."

25 Charter of the United Nations, Chapter VIII.

26 Hannum (1990), chapters 5, 10 and 12.

27 Henkin et al. (1999), 107, quoting Donnelly (1989): "Cultural relativity is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability. The doctrine of cultural relativism holds that at least some such variations cannot be legitimately criticised by outsiders. But if human rights are literally the rights everyone has simply as a human being, they would seem to be universal by definition. How should the competing claims of cultural relativism and universal human rights be reconciled? I defend an approach that maintains the fundamental universality of human rights while accommodating the historical and cultural particularity of human rights."

Indigenous peoples recognize that there is no room for cultural imperialism in the context of human rights. Rather, indigenous peoples are demanding that human rights be interpreted fairly, holistically, and consistent with the peremptory norms of international law. Ultimately, the balancing of the universality of human rights and the accommodation of distinct cultural contexts are necessary to ensure and maintain the rich diversity of humankind.

Human rights, democracy, and the rule of law

Like the interdependence of human rights, there are important relationships between human rights, democracy and the rule of law.[28] Increasingly, the international community has recognized the importance of this relationship.[29] For any government institutions to have a measure of integrity, they must ensure access, participation and representation. In this way, democracy is not merely about one person, one vote. In order to exercise the human right to self-determination without any threat to the territorial integrity or political unity of sovereign and independent states, governments must guarantee effective representation of all.[30] Without such effective participation and accommodation, and without recognizing the rights of distinct peoples within their borders, states cannot possibly claim to respect social justice and democracy. Hence, democracy and the rule of law are necessarily interrelated.

In 1991, the Conference on Security and Co-operation in Europe noted:

> *The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.* [31]

And, in 1992, United Nations Secretary-General B. Boutros-Ghali stated:

> *Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the [United Nations] Charter... This is not only a political matter.*[32]

More recently, the member States of the OAS adopted the Inter-American Democratic Charter in Lima, Peru, coincidentally on September 11, 2001, and affirmed, both in the preamble and operative paragraphs of the Charter,

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[28] Steiner and Alston (1996), 387, citing Pannikar (1982): "Human rights are tied to democracy. Individuals need to be protected when the structure which is above them (Society, the State or the Dictator – by whatever name) is not qualitatively superior to them, i.e., when it does not belong to a higher order. Human rights are a legal device for the protection of smaller numbers of people (the minority or the individual) faced with the power of greater numbers."

[29] Steiner and Alston (ibid.), 1314, quoting Steiner (1999), 202: "…the rule of law, so vital to the growth of liberalism and democratic government, is invoked to urge greater predictability in the application of laws bearing on foreign investment and on business generally… In turn, it is argued, heightened business investment and activity under such a legal regime will ultimately strengthen the rule of law with respect to civil and political rights as well. Foreign investment and the development of the local economy in a broad Western model thus will contribute importantly toward, if not make inevitable, the realization of democratic and human rights culture… The causal flows are argued to be reciprocal, as global business activity both inspires and responds to the growth of democratic rule and its associated rule of law."

[30] See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, (1970), General Assembly Resolution 2625 (XXV), 25 UN GAOR, Supp. (No. 28) 121, UN Doc A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970).

[31] OSCE Document of the Moscow Meeting on the Human Dimension, Emphasising Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, 3 October 1991, in 30 I.L.M. 1670, at 1672.

[32] B. Boutros-Ghali (1992), 22, para. 81.

the fundamental connection between human rights, democracy and the rule of law.[33] In particular, Articles 7, 9, and 11 read:

> *Article 7*
> *Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.*
>
> *Article 9*
> *The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of Indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.*
>
> *Article 11*
> *Democracy and social and economic development are interdependent and are mutually reinforcing.*

It is the underlying principles of democracy that are necessarily and intimately tied to the exercise of human rights by indigenous peoples as well as the equal application of the rule of law to indigenous individuals and groups.

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All of the key aspects of a human rights-based approach adopted by indigenous peoples require consideration: self-determination; the inter-related, interdependent and indivisible nature of human rights; universality; and human rights, democracy and the rule of law. Too often, they have been overlooked and denied within the indigenous context. Without a comprehensive understanding of these human rights principles, the full and effective exercise of indigenous human rights will not be achieved.

Relevant human rights instruments specifically concerning indigenous peoples

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

The United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly's adoption on September 13, 2007 of the United Nations Declaration on the Rights of Indigenous Peoples demonstrates the Organization's

[33] Inter-American Democratic Charter (2001).

capacity to accommodate the distinct status of indigenous peoples. The instrument now provides an important framework for the realization of indigenous peoples' human rights as well as a benchmark for state accountability in relation to their specific obligations.

> the United Nations Declaration is an extraordinary document, reflecting the important balance between individual and collective indigenous human rights as well as the legitimate interests and concerns of state governments

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

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

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

Australia endorses the UN Declaration on the Rights of Indigenous Peoples

On 3 April 2009, the Australian government officially endorsed the United Nations Declaration on the Rights of Indigenous Peoples, reversing the position of the previous government and fulfilling a key election promise. The Minister for Indigenous Affairs, Jenny Macklin delivered a statement in support of the document at Parliament House, saying that the move was a step forward in "re-setting" the relationship between Indigenous and non-Indigenous Australians. "The Declaration gives us new impetus to work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians," Ms Macklin said.

> Member of the UN Permanent Forum on Indigenous Issues and Australian of the Year, 2008 Professor Mick Dodson said the government should not be afraid of the contents of the Declaration, adding that Australians should embrace it as a framework for policy. Prof Dodson also said that supporting human rights was not a barrier to progress. "Human rights do not dispossess people. Human rights do not marginalize people. Human rights do not cause problems. Human rights do not cause poverty. Human rights do not cause life expectancy gaps," Prof Dodson said. "It is the denial of rights that is the largest contributor to these things".
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> *Source: Speeches made by both Ms Jenny Macklin and Mr Mick Dodson at Parliament House, Canberra, Australia 3 April 2009.*

OAS Proposed American Declaration on the Rights of Indigenous Peoples

On a regional basis, the Organization of American States (OAS) has a history of dealing with indigenous peoples' issues dating back to the first Inter-American Indian Congress, held in Patzcuaro (Mexico) in 1940.[34] Since that time, the Inter-American Indian Institute has become one of the specialized agencies of the OAS and has played a primarily advisory role to the OAS on matters concerning indigenous peoples, including the work of the Inter-American Commission on Human Rights.[35] The OAS is currently considering a proposed American Declaration on the Rights of Indigenous Peoples.[36] This development emerged in early 1989 and was almost certainly prompted by both the revision of ILO Convention No. 107 and the elaboration of the Declaration by the United Nations.[37]

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

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

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

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

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

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

[37] Anaya (1996), 54. See also Suagee (1997), 365.

The ILO Conventions

Dating back to 1921, the International Labour Organization (ILO) is one of the few intergovernmental organizations to have concerned itself with indigenous and tribal peoples and the issues facing them. In June 1957, the ILO adopted Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. This Convention[38] has been ratified by only 27 States and came into force in June 1959 (and remains in force for some). The 1957 instrument encourages the gradual assimilation of indigenous individuals into national societies and economies, thus legitimising the gradual extinction of indigenous peoples as such. Moreover, the Convention presupposes complete state control over the affairs of indigenous peoples. As one might guess, many indigenous peoples have strongly criticized the ILO and its early interest in the area of indigenous conditions for being "paternalistic" in its approach to "protecting these groups". The ILO itself has acknowledged this criticism.[39]

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

[setting aside the criticisms about Convention No. 169, it has proved useful to indigenous peoples in domestic policy development and litigation, as well as in formal human rights complaints to the Inter-American Commission on Human Rights]

However, the revised ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989,[40] substantiates and reinforces indigenous rights. This updated instrument, which remains open for state ratification, provides standards and protections relating to the environment, development and direct participation of indigenous peoples in matters affecting their rights, lives and territories.

Conventions Nos. 107 and 169 are the only legally binding international treaties that deal specifically with indigenous rights and, furthermore, include a recourse mechanism: the Committee of Experts on the Application of Conventions and Review of Recommendations. If the Committee is actively used, it is an effective method for overseeing government behaviour and actions toward indigenous peoples in those countries where the Convention has been ratified.[41] This aspect of ILO Convention No. 169 cannot be underestimated. Because of the efforts of trade unions and support groups such as Survival International and Amnesty International, even application of the outdated Convention No. 107 has saved lives.

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[38] 328 UNTS 247.

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

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

[41] ILO Convention No. 169 has been ratified by 20 countries (source: ILOLEX 30.11.08) Ed.

When read in context, there are many possibilities for interpreting the language in a positive fashion. Setting aside the criticisms about Convention No. 169,[42] it has proved useful to indigenous peoples in domestic policy development[43] and litigation,[44] as well as in formal human rights complaints to the Inter-American Commission on Human Rights.[45]

International Covenants

The Universal Declaration of Human Rights was utilized as a starting point for the codification of first and second generation rights, namely civil and political rights as contained in the International Covenant on Civil and Political Rights (ICCPR)[46] and economic, social and cultural rights as contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[47] It is interesting to note that some of those engaged in the process grappled with the fact that civil and political rights and economic, social and cultural rights were interdependent.[48]

Common to both the ICCPR and the ICESCR is the fact that they are binding upon State parties to the Covenants—creating international legal obligations that relate to the very principles and purposes of the United Nations

[42] See S. Venne (1989).

[43] The following information was downloaded from the ILO website at http://www.ilo.org: "Prior to its submission to the Committee of Experts of the ILO, the Government of Norway sent its latest report on the implementation of Convention No. 169 to the Sami Parliament for its comments. These comments form an integral part of the report, under the terms of an agreement entered into between the Norwegian Government and the Sami Parliament. This co-operation is established as a permanent procedure to ensure the inclusion of the opinion of the Sami Parliament in the formal reporting procedure on Convention No. 169. The Sami Parliament has indicated its willingness to enter into an informal dialogue with the Committee of Experts, together with the Norwegian Government, to facilitate the implementation of the Convention. The Government has stated that it shares the wish to facilitate the implementation of the Convention in this way, believing that open co-operation between governments and representative indigenous bodies may contribute effectively to the international promotion of indigenous rights and cultures, and the Government therefore fully supports the suggestion of a supplementary dialogue."

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

[45] See the Petition lodged by Jaime Castillo Felipe, on his own Behalf and on Behalf of the Mayagna Indian Community of Awas Tingni Against Nicaragua, re-printed in 9 St. Thomas L. Rev. 164 (1996). This petition was prepared by S. James Anaya, Counsel of Record, and invokes various provisions of ILO Convention No. 169, as well as the United Nations draft Declaration on the Rights of Indigenous Peoples, the draft Inter-American Declaration on the Rights of Indigenous Peoples [discussed above], and the American Convention. See also the Petition by the Western Shoshone (1993); the Mayan Cultural Council of Belize (2000); and the complaint filed by S. J. Anaya and R. A. Williams, Jr., on behalf of the First Nation of Carrier Sekani of British Columbia, Canada (2000). See also Anaya (1998), 1.

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

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

[48] Steiner and Alston (1996), 17. The authors re-print the "Annotations on the Text of the Draft International Covenants on Human Rights," UN Doc. A/2929 (1955), which include: "[Between 1949 and 1951 the Commission on Human Rights worked on a single draft covenant dealing with both of the categories of rights. But in 1951 the General Assembly, under pressure from the Western-dominated Commission, agreed to draft two separate covenants]…to contain 'as many similar provisions as possible' and to be approved and opened for signature simultaneously, in order to emphasise the unity of purpose….Those who were in favor of drafting a single covenant maintained that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured…."

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

The rights enshrined in the Universal Declaration and the Covenants do attach to indigenous individuals and collectivities, who also strive for human dignity and enjoyment of their natural rights as human beings. Hence, the use by indigenous peoples of the treaty bodies responsible for overseeing state implementation of the rights embraced by the Covenants. Such actions have dramatically increased due to the efforts of indigenous peoples, the elaboration of an indigenous cultural context and reliance upon such expressions by treaty body members. Though indigenous peoples, nations and communities have remained distinct from existing state governments, such actions are even more critical because the creation of states is a historical, legal and political reality that indigenous peoples must deal with.

[there is increasing awareness and use of the treaty-based human rights bodies by indigenous peoples, as well as greater sensitivity toward indigenous peoples' rights and issues being shown by their respective members]

In regard to accommodating the human rights of indigenous peoples, we are seeing a noticeable difference in the more recent comments and concluding observations of the human rights treaty bodies. There is increasing awareness and use of the treaty-based human rights bodies by indigenous peoples, as well as greater sensitivity toward indigenous peoples' rights and issues being shown by their respective members.

These treaty bodies are providing for an indigenous cultural context in the interpretation of the existing international instruments, such as the Human Rights Committee under the ICCPR and the Committee on the Elimination of Racial Discrimination[49] (CERD) under the International Convention on the Elimination of All Forms of Racial Discrimination.[50] Though each of the treaty bodies have had the opportunity to review cases emerging from indigenous individuals, on behalf of their communities, the more recent work of the treaty bodies is evidence of a much more expansive and inclusive interpretation of human rights and their attachment to the distinct circumstances of indigenous peoples. Now, with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, it is highly likely that the treaty bodies, Special Rapporteurs and others will rely

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[49] For a description of the Committee's work in regard to indigenous peoples, see Anaya (1996), 100-101 and 162-166.

[50] The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by UN General Assembly on 21 December 1965, opened for signature on 7 March 1966, and entered into force on 4 January 1969. General Assembly Resolution 2106A (XX) UNTS, Vol. 660 (1966), 195; reprinted in ILM.1966 (5), 350.

upon the Declaration for purposes of context and interpretation of indigenous human rights standards.

There has been a blossoming of United Nations initiatives, ranging from the establishment of the UN Permanent Forum on Indigenous Issues to the appointment of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and of the Expert Mechanism on the Rights of Indigenous Peoples. This groundswell of positive progress has had a contagious effect upon other international and regional instruments as well as inter-governmental institutions, and bodies including the World Bank, the Asian Development Bank, the Inter-American Development Bank, the World Intellectual Property Organization, the Commission for Sustainable Development and numerous other fora.

Indigenous Peoples' human rights—on the ground

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

[despite all the positive international human rights standard-setting developments, indigenous peoples continue to face serious human rights abuses on a day-to-day basis]

Violence against indigenous women

According to a United States Department of Justice study on violence against women, more than one in three American Indian and Alaska Native women will be raped during her lifetime. A comparable figure for the United States as a whole is less than one in five. Furthermore, half of Native American women reported suffering physical injuries in addition to the rape, while the comparable figure for women in the United States as a whole is 30 per cent.

Amnesty International reports that between 2000 and 2003, Alaska Native people in Anchorage were 9.7 times more likely to experience sexual assault than others living in the city, and a medical professional responsible for post-mortem examinations of victims of rape and murder told Amnesty International in 2005 that of the 41 confirmed cases in Alaska since 1991, 32 involved Alaska Native women.

Following a history of discrimination against indigenous peoples by national judicial systems, indigenous peoples frequently distrust formal justice systems. "When an emergency call comes in, the sheriff will say 'but this is Indian land.' Tribal police will show up and say the reverse. Then, they just bicker and don't do the job. Many times, this is what occurs." Victims often do not report incidents of sexual violence to the police because they believe they will be met with indifference and inaction, or even blamed for the incident. As a result, this non-reporting creates a climate of impunity where sexual violence is seen as normal.

Source: Amnesty International (2007), 2-36.

In 2005, Mapuche leaders in Chile were jailed, threatened and had their homes burned down solely because they were working in defence of their land rights.[51] The Special Rapporteur, in his analysis of 15 different countries ranging from Myanmar to the Russian Federation to Australia, identified this unfortunate dynamic in the context of indigenous human rights violations:

> *In many countries, indigenous people are persecuted because of their work in defence of their human rights and fundamental freedoms, and are the victims of extrajudicial executions, arbitrary detention, torture, forced evictions and many forms of discrimination.*[52]

[there are a myriad of examples and testimony at the international level of the forced relocation of indigenous peoples and dispossession of their lands]

There are a myriad of examples and testimony at the international level of the forced relocation of indigenous peoples and dispossession of their lands. For a number of years now, the San (formerly known as Bushmen) living in their traditional hunting grounds in the Central Kalahari of Botswana have been struggling with forced relocation from their homelands, without any substantive address of their fundamental human rights.[53] For over two decades, the conflicts between indigenous peoples and gold miners, cattle ranchers and other outsiders have been raging throughout Brazil with little international notice or attention. Though legislation to demarcate lands has been adopted, the reality on the ground is dramatically different from the laws of the nation-state. For example, the Special Rapporteur has received Urgent Appeals from the Guarani-Kaiowa in the State of Mato Grosso do Sul, Brazil concerning eviction notices received despite the fact that their lands were demarcated as indigenous lands in 2004.[54]

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

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[51] Stavenhagen (2006), para. 20.
[52] Stavenhagen (2006), para. 6.
[53] Stavenhagen (2006), para. 77.
[54] Stavenhagen (2006), 8.

> *The principal human rights effects of these projects for indigenous peoples related to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.*[55]

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

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

Other development projects being imposed or forced upon indigenous communities include logging, mining, resort developments and highway construction, establishment of national parks and reserves as well as oil and gas exploration and exploitation. For example, in the Russian Far East, little or no consideration has been given to the indigenous peoples' demands to safeguard their hunting, fishing and gathering territories in the face of oil and gas development.[56] These cases arise as urgent measures primarily due to the fact that state governments have not even established the ways and means for indigenous peoples to bring claims to gain any recognition or affirmation of their distinct rights to own and control their lands, territories and resources.

More recently, leaders of the Ardoch Algonquin First Nation (Canada) have had legal action taken against them for their efforts to block uranium exploration and mining on lands that have been claimed by the Algonquins.[57] The lack of procedures to identify and affirm indigenous land rights is exacerbated by the imposition of major, adverse developments that favour others, such as multinational corporations, and "criminalize" indigenous peoples' protests. The rampant actions of large economic and corporate forces often appear to go unrestrained by governments, who are ultimately responsible for the prevention of violations and abuses of indigenous human rights by third parties.

Discrimination against indigenous peoples

Indigenous peoples frequently raise concerns about systemic discrimination and outright racism from the State and its authorities. This discrimination manifests itself in a number of ways such as frequent and unnecessary questioning by the police, condescending attitudes of teachers to students or rudeness from a receptionist in a government office. At their most extreme, these forms of discrimination lead to gross violations of human rights, such as murder, rape and other forms of violence or intimidation. These forms of discrimination are often either difficult to quantify and verify or are simply not documented by the authorities, or not disaggregated based on ethnicity.

[55] Stavenhagen (2003), 2.
[56] Stavenhagen (2003), para. 68.
[57] "Ontario Algonquins suspend uranium site occupation", Friday, October 19, 2007, CBCNews.ca.

There are however some indicators of discrimination, which are documented and disaggregated, such as disproportionately high incarceration rates. In 1991 indigenous peoples accounted for less than 2.0 per cent of the total population of Australia, yet 14 per cent of all adult prisoners were indigenous. By 2001, this number had risen to 19.9 per cent, while the indigenous population had risen to just 2.4 per cent of the total population. Indigenous Australians were thus 8 times more likely than non-indigenous Australians to be imprisoned in 1991. In 2001 the ratio was 9.6.[58] In Canada, indigenous offenders represented 16.6 per cent of the federal prison population, while comprising only 3.38 per cent of the Canadian general population, making indigenous Canadians 5 times more likely to be imprisoned, than their non-indigenous fellow Canadians.[59] In the United States, in the state of Alaska, Native Alaskans are incarcerated at a rate 3.2 times higher than that of white Alaskans, and Native Alaskan juveniles are 1.8 times as likely to be adjudicated delinquent as white juveniles.[60] In New Zealand, of 10,452 cases resulting in a custodial sentence in 2005, 5,293, or just over 50 per cent, were Maori. Sixty-one per cent of women sentenced to prison in New Zealand in 2005 were Maori.[61] Ten years earlier, Maori women were 49.3 per cent of sentenced inmates and Maori men were 45 per cent of sentenced inmates.[62] In 2006, the Maori were 14.6 per cent of the total population, making them 3.4 times more likely to be imprisoned, than non-indigenous New Zealanders.

The overrepresentation of indigenous peoples in correctional institutions can be linked to discrimination in earlier stages of the justice process. For example, indigenous peoples are disadvantaged when their rights are adjudicated in non-indigenous languages. The Special Rapporteur has reported that, for example, this "is often the case in some Asian countries, where legal texts and proceedings are written and carried out in English or a national language not understood by an indigenous community."[63] He has also found that interpreters and public defenders for indigenous people may not be available, and if they are, may not be adequately trained in indigenous culture. Moreover, court officials may be biased against indigenous people in their district." [64]

Little systematic data on incarceration rates of indigenous peoples is available for most countries. However there is information available on the detention and imprisonment of indigenous peoples, and although this information is not compiled by means of census data collection, a review of some reports submitted to the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples paints "a disturbing picture of the situation of indigenous people in detention, which in many cases violates international principles for the treatment of prisoners." [65]

Indigenous peoples are all too often held in overcrowded prisons, in substandard conditions and with inadequate access to basic health and other services, and far from their communities, which makes it difficult for them to maintain contact with their families. Restrictions on religious rights have also been reported.[66] In Canada, the Special Rapporteur has reported that, not only are indigenous women held in disproportionately high numbers in federal prisons, they are also singled out for segregation more often

[58] Wijeskere (2001), 6.
[59] Welsh (2008), 492.
[60] Stavenhagen (2004), para. 29.
[61] New Zealand Ministry of Justice (2006).
[62] New Zealand Ministry of Justice (1996)
[63] Stavenhagen (2004), para. 37.
[64] Stavenhagen (2004), para. 37.
[65] Stavenhagen (2006a), para. 22.
[66] Stavenhagen (2006a), para. 22.

than other inmates and suffer higher rates of inmate abuse.[67] In Mexico, reports indicate that indigenous women tend to be abused and harassed while in detention, and may become involved in drug and prostitution schemes operating in prisons.[68]

Indigenous peoples have frequently faced detention due to the criminalization of social protest activities. According to the Special Rapporteur, "[o]ne of the most serious shortcomings in human rights protection in recent years is the trend towards the use of legislation 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."[69] The Special Rapporteur has reported, for example, receiving "many reports from countries such as India, Indonesia, the Lao People's Democratic Republic, Malaysia and Thailand, of arbitrary arrest or fake criminal charges made against members of indigenous and tribal peoples, as well as other forms of threats and intimidations, as a result of their mobilization to defend their rights against State authorities. In Mexico, the Special Rapporteur received complaints about indigenous community activities being prosecuted on "fabricated" charges for their participation in social mobilization over rights issues.[70]

Cases of ill-treatment and torture during detention, as well as extrajudicial killings have also been widely reported. In relation to his 2006 visit to Kenya, the Special Rapporteur received numerous reports of arbitrary detention, police harassment, and incidents of torture and rape suffered by local residents as a result of the punitive application of security measures. Reportedly, many police abuses took place in relation to social protests associated with land rights claims, with vocal community members being ill-treated and arrested.[71] The Special Rapporteur has voiced concerns regarding abuse of indigenous individuals in detention in a number of instances, including in cases reported from Bangladesh and Botswana.[72]

Sources: See Footnotes

Testimony of abuses by State-controlled military or paramilitary forces has also been repeatedly given. In Myanmar, according to information received by the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, members of the village of Tagu Seik, near Einme, were tortured and their community ransacked on the basis of purported communications with another armed opposition group.[73] In the Philippines, a similar military attack upon indigenous peoples took place. This was again on the basis that the indigenous individuals were allegedly members of a "splinter group of communist terrorists".[74]

Needless to say, these and numerous other gross human rights violations and abuses are perpetrated against indigenous peoples—as collectivities or as individual men and women—on the basis of their identity and marginalization, and, in the case of indigenous women, on the basis of their sex. Unfortunately, such discriminatory actions have been constant, from the time of first contact with outsiders to the present. Little has changed, despite the groundswell of developments in the area of human rights standards specifically addressing indigenous peoples' human rights.

[67] Stavenhagen (2005), para. 56.
[68] Stavenhagen (2004), para. 26.
[69] Stavenhagen (2006a), para. 19.
[70] Stavenhagen (2004), para. 49.
[71] Stavenhagen (2007a), para. 60.
[72] See for example,Anaya (2008), para. 70 and Stavenhagen (2007a), para. 53
[73] Stavenhagen (2003), para. 60.
[74] Stavenhagen (2003), para. 66.

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

Apologies for Past Wrongs

In February 2008, the newly elected Government of Australia, at its first sitting of Parliament House apologized for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. In a statement, the Prime Minister, Kevin Rudd apologized "for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians…For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry. To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry. And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry. We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation. For the future we take heart; resolving that this new page in the history of our great continent can now be written. We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians. A future where this Parliament resolves that the injustices of the past must never, never happen again".

On the 11 June 2008, Prime Minister Stephen Harper made the apology in Parliament House, Ottawa, to the indigenous peoples of Canada for forcing aboriginal children to attend state-funded Christian boarding schools aimed at assimilating them. Mr Harper said aboriginal Canadians had been waiting "a very long time" for an apology. "I stand before you today to offer an apology to former students of Indian residential schools. The treatment of children in Indian residential schools is a sad chapter in our history". He said the system had been based on the assumption that "aboriginal cultures and spiritual beliefs were inferior and unequal". He went on: "We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. The government of Canada sincerely apologizes and asks the forgiveness of the aboriginal peoples of this country for failing them so profoundly. We are sorry".

Sources: Apology to Australia's Indigenous Peoples House of Representatives Parliament House, Canberra (13 February 2008); BBC News Canada apology for native schools (11 June 2008).

[little has changed, despite the groundswell of developments in the area of human rights standards specifically addressing indigenous peoples' human rights]

Restoration of Ainu rights step nearer

A Diet resolution last week recognizing the Ainu as indigenous to Hokkaido and neighbouring parts of northern Japan has created hope that progress will be made in restoring the rights of the Ainu people.

In response to the resolution, which was approved unanimously in both chambers of the legislature Friday, the government drew up out a policy the same to give official recognition of the indigenous status of the Ainu for the first time.

A slew of problems still need to be addressed from this point on, including how to deal with such issues as the land and natural resources the Ainu were deprived of in the process of Japan's modernization.

Tadashi Kato, chairman of the Hokkaido Utari Association, was visibly overwhelmed with emotion at a press conference in the Diet Building following the adoption of the resolution.

The Hakkaido Utari Association – Utari signifies brethren in Ainu – was formerly known as the Ainu Association of Hokkaido. This body has working since the end of World War II to enhance the social status of the Ainu, many of whom live in Hokkaido.

"Mr. (Nobutaka) Machimura, the chief cabinet secretary, has made of clear that the government has recognized us as an indigenous people," Kato said.

"After a lapse of 140 years (since the Meiji Restoration), we can finally see some light. I can hardly find the words to fully express our gratitude."

by Mariko Sakai and Shozo Nakayama, Daily Yomiuri, June 11, 2008

Possible indicators of exercise and enjoyment of human rights

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

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

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

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

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

[do indigenous peoples exercise their human right to development, including social development, economic development, cultural development and spiritual development?]

There is also an inter-relationship (meaning you cannot attain one without the other) between development, security and human rights. And, in this context, "security" is not confined solely to military security. Rather, in an indigenous context; do indigenous peoples enjoy environmental security? Do indigenous peoples enjoy security in relation to their hunting, fishing and other gathering rights? If self-determination had been effectively attained, it would embrace such indigenous priorities and such questions would not have to be asked.

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

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

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

Democracy, the rule of law and human rights are inter-related and important dimensions of self-determination. Democracy in this context does not mean majority rule. Rather, it suggests a review of democratic principles and whether they are in operation within indigenous communities and in their relations with others.

These are only preliminary suggestions for possible indicators with which to analyse the extent to which indigenous human rights are respected, recognized,

exercised and enjoyed. Most indigenous communities already have a clear sense of the impact of human rights abuses. Yet such indicators may be useful in specifying and linking human rights violations to specific existing and emerging standards in international human rights law.[75]

Concluding Remarks

This short chapter has only hinted at the severity and range of issues that require greater attention. Given the reality and condition of indigenous human rights and this brief cataloguing of abuses, it may be necessary for the United Nations to bolster the role and mandate of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people in order to specifically monitor state action or inaction. The newly established Expert Mechanism on the Rights of Indigenous Peoples by the Human Rights Council may also help the United Nations to substantively respond to the urgent human rights conditions being suffered by indigenous peoples worldwide. Let us hope that the existing treaty bodies enhance and influence indigenous/state dialogue and state actions through their interpretation of the Declaration and corresponding review and receipt of state reports as well as consideration of human rights complaints. For example, the CERD and its potential for more active use of their early warning and urgent action procedures in the context of indigenous peoples may be critical. Yet at the same time, state governments, as the pivotal source of aggression toward indigenous peoples, must be compelled to respect and recognize the human rights of indigenous peoples. All such actions and more are necessary intermediate steps to be taken before the political milieu can become favourable to transforming the UN Declaration into a legally-binding covenant with a corresponding treaty body.

In the meantime, indigenous peoples will continue to be proactive in the defence of their human rights. Further steps must be taken in the area of human rights education and learning. The success of self-determination largely depends on the extent to which human rights concepts are understood by indigenous peoples within their home communities. Dialogue and training are critical to strengthening political organizations as well as developing political, economic, social and legal strategies with which to promote and protect indigenous human rights.

[indigenous peoples will continue to be proactive in the defence of their human rights]

Are human rights concepts and the content of the collective and individual human rights known and understood by those who assert self-determination? Are human rights concepts integrated in the community? Through human rights education and learning, political leaders as well as community members can explore the real meaning or effect of exercising and enjoying human rights at the

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

grass roots level. In this context, it may be helpful for communities to translate the United Nations Declaration as well as other key international human rights instruments into their respective indigenous languages in order to prompt dialogue and community organising. It may also be useful for the United Nations to catalogue the various human rights training programmes, both public and private, and especially those operated or controlled by indigenous peoples.

[the urgent and dire condition of indigenous peoples' human rights worldwide requires serious political will and resources]

Again, despite positive international developments, it is clear that the state of the world's indigenous peoples in relation to their human rights is very tenuous. Most indigenous communities are in extremely delicate situations; many have already been destroyed or weakened, their security and integrity compromised. The urgent and dire condition of indigenous peoples' human rights worldwide requires serious political will and resources. The Member States of the United Nations must therefore play a more substantive, proactive and central role in the campaign to respect and recognize indigenous peoples' human rights. They must take their obligations seriously, both at the international and domestic levels. The United Nations and others must call States to action. Inaction is not an option.

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