



State Responsibility in Protecting Indigenous Peoples Under International Law

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Law, Justice, Rights, State Responsibility and Society

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ABSTRACT *In all parts of the world, there is growing recognition of the importance of protecting indigenous peoples' rights, as an integral element of the promotion of human rights, democracy, good governance, sustainable development and environmental protection. The international system's contemporary treatment of indigenous peoples is the result of activity over the last few decades. This activity has involved, and been substantially driven by indigenous peoples themselves. Indigenous peoples have ceased to be mere objects of the discussion of their rights and have become real participants in an extensive multilateral dialogue that also has engaged states, NGOs, and independent experts. The new and emergent international law of indigenous peoples, which includes ILO Convention No. 169 and customary law, is a dramatic manifestation of the mobilization of social forces through the human rights frame of the contemporary international system. Indigenous peoples themselves have been at the helm of a movement that has challenged state-centered structures and precepts which have continued within international law and global organization. This movement, although fraught with tension, has resulted in a heightened international concern over indigenous peoples and a constellation of internationally accepted norms generally in line with indigenous peoples' own demands and aspirations.*

Introduction

Indigenous peoples are generally considered those who inhabited a country or a geographic region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means. The Bushmen of Botswana, the Ainu of Japan, the Pygmies of Central Africa, the Intuits of the Arctic, the Yanomami of Brazil, the Maori of New Zealand and the Tribal of India may be as different as day and night in their cultures, customs and traditions. But they are some of the 300 million "indigenous" individuals worldwide, face a common threat being civilized to extinction. But all "indigenous peoples" belonging to 5000 or so groups scattered in more than 70 countries are descendants of the original inhabitants of their lands. The contribution of these "peoples" to modern civilization is pervasive. They were the original cultivators of such staple foods as peppers, potatoes, peas, sugarcane, garlic and tomatoes. They were the first to develop and use most of the world's plant based pharmaceuticals, from aspirin to quinine, and have given the English language such words as Canoe, Barbecue and Squash. Despite their great influence on the food we eat, the languages we speak, and the science and medicines we use to better our lives, "indigenous peoples" have often, at best, been forgotten and, at worst, been driven from their lands, robbed of their cultures, excluded from political decision making, brutally socialized and economically exploited.

Indigenous, who are estimated to number more than 250 million persons (approximately 4% of the world's population) include about 5000 distinct groups, living in roughly 70 nations. They generally participate only minimally in the growing global economy, often by their own choice. They typically resist development within their territories, perceiving it as a threat to their survival as a people. This resistance often puts them in direct conflict with the government of the states in which they live, governments that, generally, are intensely committed to fostering that devel-

opment. Despite their opposition to the developmental policies of the government, tribal people generally do not aim to establish their own separate nation state (particularly because these tribal groups are often very small). Rather, they wish to acquire local control sufficient to protect their own land and culture, as well as a voice in the decision making of the states in which they find themselves. Although these people are often in the minority, they are distinguishable from other minorities, such as the Latino population in the United States, in that their primary concern is generally the protection of their culture through preservation of their land base.

Indigenous peoples have generally "been organized primarily by tribal or kinship ties, had decentralized political structures often linked in confederations, and have enjoyed shared or overlapping spheres of territorial control". By contrast, the currently dominant form of government, the nation state, developed after the Treaty of Westphalia (1648). It was based upon "a model of exclusivity of territorial domain and hierarchical centralized authority". Since indigenous peoples did not fit this pattern, they were historically not recognized by International Law, creating another source of vulnerability.

Definition of Indigenous Peoples

There is no one universally accepted definition of an indigenous person. Some of the inquiries made by western science to distinguish indigenous populations include whether the community in question occupies ancestral lands or if they share common ancestry with the original occupants, and defining what the culture in general is like regarding religion, tribal system, life style, livelihood, language, residence in certain parts of a particular country or in certain regions of the world.

The first definition is found in an International Law Instruments, the Convention Concerning Indigenous and Tribal Peoples in Independent countries (Convention No. 169 of 1989) of ILO. Article 1 (1) (b) of the revised convention No

169 defines "indigenous as follows:

"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".

According to this definition indigenous peoples need not be a special category of tribal peoples and need not be confined to a particular part of the world. They may be peoples who have been affected during the establishment of the present state boundaries and who retain some of their economic, cultural and political institutions.

The second definition is a working definition which has been accepted as an operational definition in the elaboration of an instrument that is international in character.

"Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcome them and by conquest, settlement or other means, reduced them to a non-dominant or colonial condition, who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under the state structure which incorporates mainly the national, social and cultural which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant".

Thus according to the working definition "indigenous" are those original inhabitant of a territory who for the historical reasons reduced to non-dominant or isolated or marginal population and who are socially and culturally distinct from other segments of the predominant population.

The third definition is contained in the World Bank's Operational Directive. The directive provides that the terms "indigenous peoples", "indigenous ethnic minorities", "tribal groups" and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups. Within their national constitutions, statutes and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.

Indigenous peoples are commonly among the poorest segments of the population. They engage in economic activities that range from shifting agriculture in or near forests to wage labour or even small-scale market oriented activities.

Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

(a) a close attachment to ancestral territories and to the natural resources in these areas,

(b) Self-identification and identification by others as members of a distinct cultural groups,

(c) An indigenous language, often different from the national language,

(d) Presence of customary social and political institutions, and

(e) Primarily subsistence oriented production.

According to this definition indigenous peoples are those social groups who have a social and cultural identity distinct from dominant society. For the identification of indigenous peoples, the definition also provides some criteria such as, ancestry, language, customary social institution etc.

The Draft Declaration on the Rights of Indigenous Peoples

Since 1982, leaders of various indigenous groups had been working toward an international instrument that would embody the rights and aspirations of native peoples, as well as provide recognition and afford protection of indigenous lands. In 1993, the working groups agreed upon and published a Draft Declaration on the Rights of Indigenous Peoples (Declaration). The Draft Declaration acknowledged the right to self-determination, the right to maintain and strengthen distinct political, economic, social and cultural characteristics, the right to belong to an indigenous community or nation, and full guarantees against genocide and other acts of violence.

In 1995, the Commission on Human Rights, under the Umbrella of the U N's Economic and Social Council, created an opened inter-sessional working group to elaborate and expand upon the Draft Declaration. The inter-sessional working group was open to indigenous peoples affiliated with an organization even if they did not have consultative status with the United Nations. Despite this apparently expansive and inclusive gesture, the full structure of the commission on Human Rights would be in effect, thus making the rules stricter than those of the working groups.

The first deliberations began with indigenous peoples attending the inter-sessional working groups to defend the work on the draft Declaration that had been ongoing for twelve years. At the Second meeting in October 1996, the indigenous delegates, walked out. As the meeting opened, the delegates raised their concerns that the final version of the Declaration would not reflect the full and equal participation of the various indigenous interest and that nation-states would retain the exclusive right to determine the final contents of the document. When the inter sessional working groups chairman, Jose Urrutia of Peru, confirmed these fears by making it clear that the indigenous delegates could only attend and speak at the meeting without being considered full and equal participants and that they could not initiate proposal for discussion, the delegates felt they should not sanction the proceeding with their presence. The chairman was essentially telling them they could agree to and approve the proposals and consensus making going into the Declaration as modified by the national governments, but they could disagree with a consensus of governments. This split coincided with Jockeying among some NGO's as individual and organizational interests took precedence over broader goals, further undermining the unity among the indigenous peoples that had marked the early process.

In late October and November of 1997, the inter sessional working group met for its third annual two week session with some harmony and satisfaction along with a unified sense of purpose restored to the indigenous delegates. After his re election at the outset of the gathering, chairman Urrutia consulted with indigenous representatives and governments, producing a compromise that divided the meeting into formal and informal sessions, with the indigenous delegates having rights to full participation in the informal session only after reaching a consensus in an informal session would any decision be passed to the formal sessions, which remained the domain of the national governments. This process gave the indigenous representatives a 'defacto veto over any formal decision making' providing great leverage over any proposed changes to the draft declaration, although still keeping the group in a weak position with regard to approval of the sessions final report which would be done in a formal plenary session. While this procedural change finally gives the indigenous groups some meaningful authority, the veto power it created did not have to be used as the governments did not agree on any changes to existing Articles of the Draft Declaration. In sum the indigenous representatives were pleased with their oblate, through a co-ordinated defense and expert counter arguments to keep the draft declaration unchanged for another year. Although some indigenous peoples consider the declaration not forceful enough most believe it to be significant step forward. The challenge to maintain the documents integrity will continue.

Other Current Issues

On Decemeter 10, 1994, the inauguration of the international decade of the world's indigenous people was held at the United Nations. The theme for the ten years commemoration was to be indigenous people; partnership in action. One goal of this ten year disservice is to further cultivate and promote the partnership sought between indigenous people and other in the international community another goal is to strengthen cooperation for the solutions of problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health. To achieve these goals, a voluntary fund, similar to the fund for the working group was established.

A major agenda items for the international decade is consideration of a permanent forum for indigenous people within the United Nations. For more than five years, the working group has contemplated a permanent forum. The idea was part of a resolutions coming out of the Human Rights conference in Vienna. In June of 1997, a Second workshop examining the issues surrounding a permanent forum convened in Santiago, Chile. A number of governments have shown support for the establishment of a permanent forum, and some have shown support for the establishment of a permanent forum, and some have said such a forum should have a broad mandate to extend beyond just a narrow Human Rights focus. Supporters suggest including issues of economic, social cultural, political civil and educational development as well as providing that indigenous NGOs have a role in all relevant U.N. activities. The suggestions include placing the form at a high level within the United Nations and putting it on equal states with the Economic and Social Council. A statement issued by indigenous people representation attending a 1996 meeting in preparation for a working group session stated that the permanent forum should not take the place of the working go up. Another proposal maintains the forum be a U.N. Commission on the States of Indigenous People.

The United Nations recommends that its specialized agencies and organizations designate focal points for coordination with the center for Human Rights concerning activities relation to the International Decade. For example, the United Nations Educations, Scientific and Cultural Organizations (UNESCO) established in 1993 a focal point unit to work on indigenous issues within its cultural wing. Priorities for the work included obtaining money for activities and projects originating with the indigenous people involved, with special emphasis given to projects directed at enhancing the capabilities of indigenous peoples. Such efforts are centered on training and creating human resources in areas related to mother tongue or native language education, cultural heritage awareness, including the promotion of native crafts, examining and furthering traditional skills for use in protecting and responsibility developing natural resources, and encouraging regular means of dialogue with member states. This UNESCO policy has long range goals based on continuing and expanding consultation with indigenous people.

For many years the United Nations represented a means to attain justice for indigenous people. This is however, providing to be an illusion a representation only and not a reality. The present challenge is to define an indigenous model for resolving conflicts, setting standards of justice, and furthering international dialogue a model that would transform the United Nations into an institution that truly responds to the problems of the world. Native peoples have an opportunity to provide leadership in breaking down the monopoly of the controlling nations and to push the United Nations towards truly becoming a forum for all people of the world a forum with an identity transcending the boundaries by lines drawn on maps.

International Standards

The Indigenous and Tribal Peoples Convention 1989 (No.169) has been ratified by 20 countries. It covers a wide range of issues, including land rights, access to natural resources health, education, vocational training conditions of employment and contacts across borders. The core concepts are consultation participation and self management. These places a responsibility on governments to consult indigenous and tribal people and ensure that they fully participate at all levels of decisions making processes that concern them.

The Convention includes a number of provisions which lay down responsibility for the government as well as right for indigenous peoples and individuals. Governments have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these people and to guarantee respect for their integrity.

Indigenous peoples have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the land they occupy or otherwise use. They also have the right to exercise control, to the extent possible over their own economic social and cultural development, in additions they have the right to participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.

With the adoption of the United Nations Declaration on the Rights of Indigenous People by the General Assembly in 2007, the UN as a whole has taken a major step for-

ward in the promotion and protection of indigenous and tribal people's rights throughout the world. The non binding declaration outlines the individual and collective rights of indigenous peoples, and goes substantially beyond the formulations of the more moderate ILO convention 169. But the provisions of the declaration and convention No.169 are compatible and mutually reinforcing. The declaration provides for a specific role of UN agencies to support the realizations of its provisions. In particular the ILO has an important role to play in this contact.

While the ILO Convention does not mention the term self determination the more recent UN General Assembly Declaration is very clear; its Article 3 states that 'indigenous people have the right to self determination. They freely determine their political status and freely pursue their economic social and cultural development' it adds however, that the declaration may not be interpreted as implying that anyone can engage in any activity contrary to the Charter of the United Nations. It explicitly does not authorize or encourage any action which would dismember or harm the territorial integrity or political unity of sovereign and independent states.

The International Labour Organization Conventions

In 1957 the International Labour Organization (ILO) adopted the Indigenous and Tribal Population's Convention No 107, which recognized both the collective and individual land rights of indigenous peoples and their right to compensation for confiscation of their lands by governmental agencies. Ratified by only a few states, this contention did not prove effective even amongst the countries ratifying it.

In 1989, Convention No 169 was adopted by the ILO over strong protests from indigenous groups. Contained in the Convention are tenets "promoting the full realization of the social, economic and cultural rights of these peoples with regard for their social and cultural identity, their customs and traditions and their institutions". Convention No 169 promised "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned". However, the convention provided no mechanism which provided for the safeguarding of rights under existing international or domestic law, or for enforcing these measures. The Convention also promised "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which faced them both as groups and as individuals".

Ultimately, the benefits of ILO conventions 107 and 169 were to provide an opportunity to identify and address the right sought by indigenous peoples. Although both conventions failed to provide indigenous peoples any concrete and identifiable rights or mechanisms to enforce those rights, they laid the ground work for further discussions.

Indigenous Peoples in International Law

Indigenous peoples in International Law are a theoretical and practical analysis of the historical, contemporary and emerging international laws that affect indigenous peoples.

James Anaya, analysis Indigenous peoples into three parts. The first part outlines the development of international law and its treatment of indigenous people overtime, and identifies the recent emergence of new norms within the law's burgeoning human rights program. The second part

describes the structure and content of contemporary international norms concerning indigenous people and emphasizes the principle of self determination and its link to emerging norms. In the final part, he stresses that states and the international community have a duty to implement norms concerning indigenous people, and evaluates existing mechanism through which implementation may be secured or promoted.

He begins by tracking the historical position of indigenous people within international law and finds that the conception of their rights has changed numerous times. In the beginning, indigenous people were considered to have an autonomous existence, as well as a right to land, however, war against them was considered just. Subsequently, western society toyed with, but ultimately rejected, the idea of viewing indigenous groups as political bodies with rights under international law. A positivist view later emerged, ensuring that international law would become a legitimizing force for colonization. Finally, a trusteeship doctrine developed which further justified colonial patterns and facilitated the control of indigenous people and their lands. The he turns to current developments within the modern era of human rights. He then asserts that although statist conceptions are followed, they are made to contend through the United Nations and other international organizations with humanistic precepts and to be concerned with individuals. He also briefly describes the contemporary indigenous rights movement and the active role of indigenous communities in this movement.

The second part attempts to define the structure and care elements of the contemporary body of international norms that concern indigenous people. He begins by describing the principle of self-determination, and the contemporary international practices which are based on this principle. He gives an overview of international norms concerning indigenous people, looking specifically at the following categories; non discrimination, cultural integrity, lands and resources, social welfare and development, and self government.

The final section describes the implementation and effectiveness of the international norms described in the prior sections that impose, on both states and the international community, the duty to secure enjoyment of human rights and provide remedies where the rights are violated. He describes the use of negotiated agreements and state institutional mechanisms, such as executive action, legislative acts and judicial procedures, which indigenous communities may use to implement international treaties or customary laws and secure their rights. He also comments on which instruments may be most effective to achieve the goals of indigenous communities.

He analyzes the role of international procedures in implementing international norms, and the monitoring procedures that have proven to be most adaptable to the demands of indigenous people. He provides an overview of the non-treaty monitoring procedures exercised by the U.N. working group on Indigenous populations and the U.N. Commission on Human Rights, and explains why they have generally been helpful in securing the rights of indigenous people. He also discusses structured treaty based procedures, such as the ILO Convention No.169 on Indigenous and Tribal peoples and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These treaties require periodic government reports on the implementation of ratified conventions, which are then

published in its annual report, along with observations on noteworthy aspects and shortcomings.

While Indigenous peoples in International Law sometimes reads like a survey of different legal mechanisms within the arena of International Law, it highlights which mechanisms have been and have the potential to be most useful in protecting indigenous rights.

State Institutional Mechanisms

International Law, including applicable conventional or customary norms concerning indigenous peoples, theoretically binds the state as a corporate whole. That is, on the international plane, a state is judged as a unitary actor, notwithstanding a division of powers that may exist among branches of a state's government or as a result of confederation. Yet in meeting or failing to meet its international obligations, the state acts or fails to act through its functional institutions, not withstanding whether the state's system is characterized as monist or dualist. In the *Awasi Tingni Case*, Nicaragua incurred international responsibility because of the particular acts and omissions of legislative, executive, and judicial agencies that, in the aggregate, resulted in a failure to protect indigenous land rights. The Inter American Court of Human rights in that case found responsibility by virtue of an inadequate legislative and administrative framework to address land titling petitions by indigenous communities, executive actions permitting logging on indigenous communities, executive actions permitting logging on indigenous lands, and judicial procedures that were flawed in their treatment of indigenous complaints against the logging. In virtually all modern states, discrete branches of government function within separate yet interrelated spheres of competency.

The Creation of the Permanent Forum on Indigenous Issues

The 1993 world conference on Human Rights and after a period of evaluation, the U.N. Economic and Social Council established as one of its subsidiary bodies the permanent forum on indigenous issues, which met for the first time in 2002. The initiative for a permanent U.N. institution for indigenous peoples was premised on the wide spread sentiment that existing international institutions and procedures were inadequate to address fully the concerns of indigenous peoples. The relatively weak informal procedures developing in the U.N. Working group on Indigenous populations were the only existing procedures that functioned on people's representatives and NGOs repeatedly have called attention to particular instances of government abuse or neglect.

Conclusion

Indigenous peoples in particular have been victims of widespread patterns of officially sanctioned oppressive action or neglect, which has led the international community at large to establish indigenous peoples as special subjects of concern. Indigenous peoples as remain vulnerable even in states that have taken concrete steps toward compliance with contemporary international standards concerning their rights. The international system does not today replace mechanisms needed at the state level to secure indigenous peoples rights. But a level of international competency to promote the implementation of norms upholding indigenous rights and to scrutinize state behavior in this regard is important, and justified, in so far as it may help blunt the countervailing political and economic forces that capture or influence decision making at the more local levels.

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