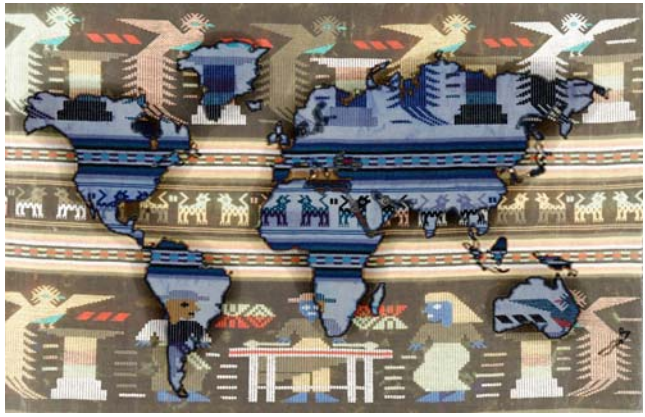
INTERNATIONAL INDIGENOUS RIGHTS



Evolution, Progress & Regress

Yogeswaran Subramaniam

INTERNATIONAL INDIGENOUS RIGHTS

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2007
CENTER FOR ORANG ASLI CONCERNS
PARTNERS OF COMMUNITY ORGANIZATIONS TRUST
SUBANG JAYA • MALAYSIA

INTERNATIONAL INDIGENOUS RIGHTS
Evolution, Progress & Regress

Published by
CENTER FOR ORANG ASLI CONCERNS
P.O. Box 3052
47590 Subang Jaya, Malaysia
Email: coac@streamyx.com
Website: www.coac.org.my

PARTNERS OF COMMUNITY ORGANIZATIONS TRUST
(PACOS)
P.O. Box 511
89057 Penampang, Sabah, Malaysia
Email: pacos@tm.net.my
Website: www.sabah.net.my/pacos

Printed by
Vinlin Press Sdn. Bhd.
Kuala Lumpur, Malaysia

Cover design
Wendy Tan

Layout
Colin/COAC

Photography
Colin Nicholas

ISBN 978-983-43248-2-7

ACKNOWLEDGEMENTS

I wish to thank Associate Professor Dr Ramy Bulan of the Faculty of Law, University of Malaya, for her feedback when the initial draft of this manuscript was but a piece of coursework submitted in pursuit of the Masters in Law degree. Special thanks to her for provoking my interest in indigenous minority affairs.

The assistance of Associate Professor Puan Siti Zaharah Jamaluddin of the Faculty of Law, University of Malaya and my dear friend, Puteri Razalinawati, is greatly appreciated.

No words can express my gratitude to my beloved wife, Fong Mei, who in addition to providing me the much-needed support and encouragement in my efforts, also proof-read the draft text.

I would like also to express my gratitude to the Center for Orang Asli Concerns (COAC) for seeing the value of the manuscript. And to the Partners of Community Organizations Trust (PACOS) for agreeing to use their publications grant to finance the printing of this booklet.

Lastly, the opinions expressed herein are nevertheless mine and I remain solely responsible for them.

Yogeswaran Subramaniam
July 2007

Acknowledgement is also due to the Government of Denmark for financing this booklet through its support to PACOS Trust via the good offices of theCopenhagen-based International Work Group on Indigenous Affairs (IWGIA).

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GLOSSARY OF TERMS USED

CBD	The Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
Convention 107	ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries
Convention 169	ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries
the Declaration	UN Declaration on the Rights of Indigenous Peoples
ECOSOC	UN Economic and Social Council
FAO	UN Food and Agricultural Organization
ICCPR	International Covenant on Civil and Political Rights
ICEFRD	International Convention on the Elimination of All Forms Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ibid	*Ibidem* - In the same place.
Id	*Idem* - The same.
ILO	International Labour Organization
IACHR	Inter-American Commission for Human Rights

loc. cit.	*Loco citato* - In the place cited
op. cit.	*Opere citato* - In the work (cited) just quoted
Proposed OAS Declaration	Proposed American Declaration on the Rights of Indigenous Peoples in 1997
PFII	Permanent Forum on Indigenous Issues
Rio Declaration	A declaration on Environment and Development adopted at UN Conference on Environment and Development in Rio de Janeiro in 1992
Statement of Principles on Forests	Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All types of Forests adopted at UN Conference on Environment and Development in Rio de Janeiro in 1992
the Sub-Commission	Sub-Commission on Prevention of Discrimination and Protection of Minorities
supra	above
terra nullius	Vacant lands
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UN Charter	Charter of the United Nations
WGIP	UN Working Group on Indigenous Populations

INTRODUCTION

1

Centuries of colonization, the lack of recourse at international level and repressive state policies and laws have until relatively recently left indigenous peoples defeated, deprived of their traditional environments and politically, economically, culturally and religiously dispossessed.[1]

The late nineteenth century saw a time where colonialism was at its peak and settler societies like the United States of America expanded their reach to territories they could dominate at the expense of indigenous peoples. This voracious expansion that contributed to the industrial revolution and economic growth to many a society during the time somehow excluded most indigenous communities from the grand plan leaving them well on the way to extinction.[2]

Maltreatment, enslavement, suicide, punishment for resistance, malnutrition and introduction of diseases resulting from contact with Europeans took a large toll on indigenous peoples.[3] At this point of time, the best proposition that indigenous peoples could

look forward to for their own individual survival was the horrendous prospect of losing their culture by being integrated into the dominant society. This has been achieved by state policies (framed by the dominant society) tantamount to the use of force[4] or the signing of treaties that could easily be construed as using sleight of hand.[5]

Despite this turbulent history, it must be said that there have been significant developments at international level especially over the past 25 years in terms of the recognition of the need to protect indigenous peoples and their rights. Having rights in the international arena would mean international legal recourse to safeguard their fundamental rights as distinct societies.

Consequently, the survival of indigenous peoples is corollary to the recognition and consequent effective enforcement of these rights at international level in a world where most indigenous peoples lack political and economic power. These relatively recent developments accordingly merit an evaluation of the extent to which international law has contributed to the survival of indigenous peoples.

This publication will initially briefly look at some basic principles of international law and who are indigenous peoples before outlining the fundamental rights of indigenous peoples that will form the reference point for discussion in this publication. The publication will then concisely examine the western view of the rights of indigenous peoples, its regression during the 19th century and its nexus to corresponding developments in international law followed by the period in the 20th century where the assimilation of indigenous peoples into dominant societies was regarded as an acceptable policy internationally. Finally, the emergence of indigenous peoples' rights in international law from the 1970s and the ability of contemporary international law to secure the survival of indigenous people will be studied.

In order to evaluate the contribution of international law to the survival of indigenous peoples, these developments in international law will be matched against the fundamental rights of indigenous peoples as outlined in the following section.

SETTING THE STAGE

2

Before critically examining the contribution of international law to the survival of indigenous peoples, it would be useful to delineate the scope of discussion by defining international law and its basic principles in context, providing a working definition of indigenous peoples and outlining the minimum standard of rights of indigenous peoples in international law. These terms have no doubt been and still are the subject of contention but it is submitted that the selected meanings for each respective term best suit the discussion for the purposes of this publication.

International law or the law of the nations is the system of law regulating the interrelationship of sovereign states and their rights and duties with regard to the other.[6] The concept of consent finds frequent application in contemporary international law: obligations arising from agreements and from customary rules depend on consent; the jurisdiction of international tribunals require consent; membership in international organizations is not compulsory; powers of organs of international organizations to make and enforce

decisions depend on the consent of member states.[7] Further, there are two other related doctrines of international law that will emerge throughout this publication namely the doctrine of sovereignty (whereby states exercise supreme political authority within their territories and in relation to their citizens) and territorial integrity (the preservation of territorial integrity of a state arising in the course of their relations with other states and movements of identifiable groups for national independence).[8]

The terminology used to describe indigenous peoples in the past has included "aborigines", "natives", "Indians", "minorities" and the "Fourth World".[9] This publication will use the term "indigenous peoples" unless the context requires otherwise. In terms of defining indigenous peoples, there has been debate among all quarters to say the least.[10] It is submitted that the approach of the former Chairperson-Rapporteur of the United Nations Working Group on Indigenous Peoples, Erica-Irene Daes be adopted in this respect. She was of the considered opinion that the concept of "indigenous" is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world.[11] Instead, she offered a collection of factors she considered relevant to the understanding of the term "indigenous":

(a) priority in time, with respect to the occupation and use of a specific territory;

(b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;

(c) self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and

(d) experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[12]

As for the rights of indigenous peoples, six of the seven fundamental rights of indigenous peoples for the purposes of this publication are extracted from the principles and rights as elucidated by Professor Dalee Sambo[13] (hereinafter "Fundamental rights of indigenous peoples" when collectively referred to). Her elucidation is by no means novel but does sum up the basic rights of indigenous peoples and common themes described in the plethora of other literature in a succinct manner.

They are firstly, the recognition of the collective or communal nature of indigenous societies and their corresponding rights that are collective in nature as opposed to many non-state international rights (e.g. human rights) that are individual in nature. Secondly, there must be the right of self-determination by virtue of which indigenous peoples may freely determine their political status and institutions and freely pursue their economic, social and cultural development.[14]

Thirdly, states should be obligated to obtain the free and informed consent of indigenous peoples with regard to policies and decisions which affect these peoples. Fourthly, indigenous peoples should have the right to determine their own priorities in terms of economic, cultural, spiritual and political development. Fifthly, such development should be sustainable (not short term) and equitable (fair to all).

Sixthly, indigenous peoples shall have the right to protection of the integrity of indigenous values, practices, institutions and environment. Finally, there is the obvious right to be treated equally without negative discrimination.

It is submitted that the above Fundamental rights of indigenous peoples are not meant to be all-encompassing but covers the basic rights necessary to ensure the survival of indigenous peoples. Additionally, these rights also provide the necessary focus and benchmark for matters discussed in this publication. However, it must be noted that they are current in that they are a culmination of historical and other factors that have influenced and moulded the wants and needs of indigenous peoples.

EVOLUTION OF INTERNATIONAL INDIGENOUS RIGHTS

3

European Exploration and the Naturalist View

European exploration to the Americas in the late 15th and early to mid 16th century naturally raised issues as to the legal relationship between them and the indigenous peoples they came across. Within the frame of thinking traditionally linked to the rise of modern international law, Europeans theorists began questioning the legality and morality of the claims to the "New World" and the ensuing brutalities.[15]

Two Dominican clerics who stood out during this period were Bartoleme De las Casas and Francisco Vitoria.[16] De las Casas criticised the Spanish *encomienda* system which granted Spanish conquerors and colonists land and the right to labour of the Indians living on them.[17] Vitoria held that Indians possessed certain original powers which the Europeans were bound to respect.[18] He rejected the view that papal donation to the monarchs provided a legitimate basis for Spanish rule and clearly found that the Indians had polities and a "kind of religion of their own".[19] He further maintained that

the discovery of the Indians' lands alone could not confer title on the Spanish any more than if it had been the Indians who discovered Spain.[20]

Despite his liberal thought, he had a Eurocentric bias when saying that the Indians were unfit to rule as they failed to conform to European forms of civilisation with which Vitoria was all too familiar.[21] He further advocated the theory of just war by justifying Spanish actions in that Indians were bound to allow foreigners to travel to their lands, trade among them and proselytise in favour of Christianity in accordance with *jus gentium* (law of the nations).[22]

It would therefore follow that Indians who were indigenous peoples not only had rights but also duties within this early naturalist frame. A century later, Grotius, widely known as one of the "fathers" of international law rejected title by discovery and affirmed the abilities of all peoples including "strangers to the true religion" (in this case, Christianity) to enter treaty relationships but endorsed the concept of just war albeit for more secular reasons like, defence, recovery of property and punishment.[23]

During this period, laws were passed for the humane treatment of indigenous peoples[24] and treaties were signed with them.[25] Nevertheless, the theory of just war provided justification for the exertion of control of indigenous peoples.[26]

The emergence of a consensus as to the concept of nation-states evidenced in the Treaty of Westphalia of 1648 that ended the Thirty Years' War in Europe brought about a Eurocentric view of what constitutes a state or a nation for the purposes of international law.

The concept of the nation-state in the post-Westphalian era is grounded upon models of political and social organization whose dominant defining characteristics are exclusivity of territorial domain and hierarchical, centralized authority while indigenous peoples prior to European contact were organized by tribal and kinship ties, have had decentralised political structures and enjoyed shared or overlapping spheres of territorial control.[27] Therein lay a problem because indigenous peoples could not enjoy the rights

and duties under the law of the nations unless they qualified as nation-states in European eyes.[28]

Emmerich Vattel, a reknown Swiss diplomat who expressed the idea of a body of law concerned exclusively with states in his treatise *The Law of Nations, or the Principles of Natural Law (1758)* defined states widely to include "all political bodies, societies of men who have united together and combined their forces in order to promote their mutual welfare and security" and believed that at least some non-European aboriginal peoples would qualify as states or nations with rights as such.[29] However, Vattel himself drew unfair distinctions between Empires of Peru and Mexico that he regarded as civilized and the North American tribes whom he faulted as being nomadic and accordingly uncivilized.[30]

A clear and oft-cited example of ambiguity and the inconsistency in the recognition of indigenous peoples as nation-states is what has now come to be known as the Marshall Trilogy, three decisions of the Unites States Supreme Court decided by Chief Justice Marshall in the early 19th century. In *Johnson v M'Intosh*[31] a case involving competing interests in land, i.e., between a title granted by the United States Government and a title purchased from an Indian tribe, Marshall viewed tribal societies as not qualifying as nations or states and therefore without rights to ancestral lands. Marshall took a different path in *Cherokee Nation v Georgia*[32] in which he held that Indian tribes (this case involved the Cherokee tribe) were not "foreign states" under Article III of the United States Constitution but clearly spelt out that Indian tribes were analogous to domestic dependent nations with a relationship with the United States that resembled that of a ward to his guardian.

Finally, in *Worcester v Georgia*,[33] another case involving the Cherokee, Marshall held that Indian tribes were "nations" who had natural rights over their lands which they could not lose by discovery alone. However, voluntary cession and actual conquest, applicable to all other nations, would gauge whether the Indians had divested their rights.

Marshall's liberal assessment in *Worcester* of the status of Indian tribes has been said to be influenced by the fact that the Cherokee tribe had adopted the European form of governance and education.[34] This epitomizes the Eurocentric perspective of indigenous peoples and the law of the nations prevalent at the time. Despite realising the immorality of their actions and acknowledging the existence of some form of civilization and nationhood amongst indigenous peoples, Western natural law jurists simply did not take that additional step towards protecting the Fundamental rights of indigenous peoples perhaps due to religious dogma and opposition particularly from European colonists. Indigenous peoples were therefore:

"*sovereign enough to enter into treaties with the purpose of ceding title to their territory, but not sovereign enough to function as independent political entities or to protect the remnants of their sovereignty.*"[35]

Notwithstanding, this period of time clearly showed the willingness of western natural law to recognize the basic rights of indigenous peoples as nation-states.

The Rise Of Positivism and the Regression of Indigenous Rights

Soon after the Marshall Trilogy, international law turned for the worse as far as the recognition of indigenous peoples as political bodies were concerned mostly due to the forces of colonization. The law of the nations would become a legitimizing force for colonization rather than a liberating one for indigenous peoples.[36] The second part of the 19th century saw the domestication of the status of indigenous peoples as colonizing states sought to remove all the issues relating to indigenous peoples from the international and place them in the domestic sphere.[37]

The four main premises of the law of nations upon which this legitimizing force was based were essentially positivist and form many of the basic principles of contemporary international law.[38] According to Anaya, they were that:

(a) international law was only concerned with rights and duties of states;

(b) international law upholds the exclusive sovereignty of states, which are presumed to be equal and independent thus guarding its sovereignty from outside interference;

(c) international law is law between and not above states, finding its theoretical basis of consent; and

(d) the culmination of earlier tendencies to conceptualise the state in narrow and largely Eurocentric terms so much so that it excluded indigenous peoples.[39]

The effect of these premises meant that indigenous peoples could not participate in the shaping of international law and states could create or customise doctrines to prefect claims over indigenous territories and laws over indigenous peoples domestically without any effective form of check and balance.[40] For example, indigenous lands prior to any foreign presence have been considered legally unoccupied or *terra nullius* (vacant lands) whereby discovery was used to uphold any colonial claims to indigenous lands and to bypass any claims for possession by indigenous peoples.[41] Oppenheim's early 20th century principle of recognition of "civilized states" before a state became an international person[42] was self-serving to the Europeans as it was in the best interests of the existing "Family of Nations" not to recognize indigenous peoples as states with corresponding rights in international law when pursuing colonial domination.

A good illustration of how the international community regarded the rights of indigenous peoples in terms of sovereignty is the 1922-1924 dispute involving the Iroquois Confederacy and Canada at the then prevailing international organization for settlement of state disputes, the League of Nations.[43] The Iroquois Confederacy, a federal union of six aboriginal nations pursued recognition of their political autonomy and resolution in respect of

their continuing dispute with the Canadian government from the League of Nations.[44] They requested that the League of Nations accept them as members and prevent the Canadian government from encroaching on their independence.[45] They argued that the six nations had been a long self-governing state and had been recognized through formal treaties in the past and diplomatic relations with the Dutch, French, American and British from 1613 and even cited Vattel[46] in support thereof.[47] The League of Nations determined that the Iroquois did not qualify for membership in the League because the sovereign status of Canada (itself a contentious issue at the time) precluded similar recognition for indigenous peoples within its borders.[48]

While not recognizing nations of indigenous peoples as states, many colonizing states adopted trusteeship notions towards indigenous peoples which on the one hand represented humanistic thought towards indigenous peoples but on the other hand viewed indigenous peoples and their cultures as inferior thus requiring "civilization".[49]

The trusteeship doctrine wherein states acted in what they thought would be in the best interests of indigenous peoples was observed by amongst others Great Britain, the United States of America and Canada during the mid-nineteenth to early-twentieth century.[50] It must be noted that pursuant to these civilising missions, government and Christian church agents proceeded to systematically break down indigenous forms of political and social organization, cultural practices and suppress cultural practices.[51] Evidence to support this can be found in the fact that indigenous populations in a number of countries were at their lowest in the late 19th century.[52] The trusteeship doctrine can also be seen as assimilationist in nature thus contributing to the destruction of the way of life of indigenous peoples.

This period can therefore be considered as one of the darkest periods for international law as it was used to increase colonial domination in the world at the expense of the attenuation if not destruction of indigenous peoples.

4 EARLY INVOLVEMENT OF INTERNATIONAL ORGANIZATIONS

This section will evaluate the early role of two international organizations, the International Labour Organization ("ILO") and the United Nations ("UN") in the protection of the Fundamental rights of indigenous peoples by looking at a few important conventions adopted by these organizations before 1982, the year in which the UN finally established the UN Working Group on Indigenous Populations to directly address the problems of indigenous peoples ("WGIP").[53]

The International Labour Organization

The ILO began working in the area of indigenous peoples as early as 1921 with what was known as "native workers" and after the establishment of the UN system following the Second World War acted as the lead agency in the Andean Indian programme, a vast multidisciplinary development program for the Andean countries in Latin America.[54] In the years that followed between the early 1950s to the 1970s it was joined by the UN and other UN Agencies

(e.g. the UN Food and Agricultural Organization, the UN Educational, Scientific and Cultural Organisation ("UNESCO") etc.) in its efforts.

Given that the ILO is an international organization that is generally known as one that deals with labour, its involvement with the subject of indigenous peoples was questioned at every stage internationally but has been subsequently sanctioned. The ILO was considered the most appropriate for dealing with rights of indigenous peoples at the time mainly because pure "labour" as in "wage-earning employment" is an incomplete description of ILO's mandate as it also has to do with the conditions under which humanity pursues its struggle for survival and economic security.[55]

Issues relating to indigenous peoples like the equality of treatment, basic protection against arbitrary administrative procedures, protection of their land base as a fundamental economic resource, vocational and literacy training and social security concerns are all related to ILO's core concerns.

In 1957, Convention 107[56] ("Convention 107") that remained unique in international law as the only comprehensive international statement on the rights of indigenous populations for 32 years until 1989 was adopted. Convention 107 covers basic policy and administration, protects customary laws, contains vital protections for the land rights of these peoples and guarantees equal or preferential treatment in labour, social security, health, vocational training and general education.[57] The positive side of Convention 107 is that states that ratify it are required to submit annual reports on their law and practice, which are then examined by a Committee of Experts on the Application of Conventions and Recommendations who may recommend that the states respond to questions raised at the ILO annual conference.[58] In some cases, Convention 107 has been a major factor in the correction of the situation and in others it has worked to focus international attention on the continued survival and well-being of indigenous peoples.[59]

However, Convention 107 has some fundamental flaws in that it refers to indigenous peoples as "less advanced"[60] and

promotes eventual integration as the way to resolve the "problems" caused to states by their continued existence[61]. It has been criticized as being of an assimilationist orientation.[62] There are however limited safeguards in Convention 107. Article 11, for example, orders governments to recognize members of indigenous tribes as holding both individual and collective rights of ownership over their traditionally occupied lands. Article 12 warns assimilating governments against removing tribes from their habitual territories without their consent, although it undermines this protective sentiment with exceptions that allow a state to remove a tribe from its territory in the interest of national economic development. Yet, Convention 107 has only been ratified by 27 countries.[63]

A simple evaluation by matching the provisions of Convention 107 against the Fundamental rights of indigenous peoples[64] shows that Convention 107 contributes more to the destruction of indigenous peoples than its survival despite protecting some basic rights. Amongst others, its integrationist approach, failure to recognize the right of self-determination (whether in broad or narrow sense) and collective rights as "peoples" and qualification in terms of the right to be consulted and the requirement of consent in matters that affect the rights of indigenous peoples all lend credence to this conclusion. Nevertheless, Convention 107 can be regarded as a large step up from the stand of the international community who had until then ran roughshod over the basic rights of indigenous peoples.

The United Nations and Early International Human Rights Instruments

Following the end of World War Two, governments of the free world established the United Nations pursuant to the Charter of the United Nations[65] ("UN Charter") in 1945. Amongst its principles was to develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples[66] and to encourage respect for human rights for all without distinction as to race, sex, language or religion.[67] The

preamble to the Universal Declaration of Human Rights[68] ("UDHR"), the statement of guiding principles on international standards for human rights without mentioning self-determination at all, expresses the need for member states to secure the fundamental human rights of the peoples of territories under their jurisdiction.

Thus, the UN Charter and UDHR set the foundation for UN member states to recognize the rights not merely of minorities but of indigenous peoples.[69] Neither document, however, expressly focuses on the significance of the environment in indigenous peoples' cultural traditions or makes the self-determination of such peoples its primary goal.[70]

Almost 20 years later and after long debate, the UN General Assembly finally adopted three treaties addressing human rights; namely the International Convention on the Elimination of All Forms Racial Discrimination (1965)[71] ("ICEFRD"), International Covenant on Civil and Political Rights (1966)[72] ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights (1966) ("ICESCR").[73] These treaties essentially gave legal effect to the rights set forth under the UDHR.

The ICEFRD obliges states that are party to condemn discrimination against persons based on race, colour, descent or national or ethnic origin.[74] It further urges states to "discourage anything that tends to discourage racial divisions"[75] and recognizes the right to own property in association with others.[76] Article 1 paragraph 4 of the ICEFRD allows for special measures to be taken for securing the adequate advancement of certain groups to ensure equal enjoyment or exercise of human rights provided that they "shall not be continued after the objectives for which they were taken have been achieved". An individual or group of individuals claiming to be a victim of a violation of any rights set forth in the ICEFRD may make communications to the Committee on the Elimination of Racial Discrimination ("CERD") who may make suggestions and recommendations to the state party and the petitioner subject to Article 14 of the ICEFRD.

Although not expressly providing for indigenous peoples, the provisions of the ICEFRD seem to be applicable to them albeit within the limited circumstances envisaged in the ICEFRD. The main goal of the ICEFRD seems to be the parity between individuals of all races rather than the protection of the Fundamental rights of indigenous peoples that are essential for their survival as distinct "peoples". More recently, the CERD has in General Recommendation XXIII stressed the importance of ensuring that "members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are to be taken without their informed consent". [77]

The ICCPR's primary focus is on the rights of all individuals to humane and equal treatment by the state under the laws or what is known as first generation rights.[78] Notwithstanding, there are provisions that seem[79] to cover the protection of indigenous peoples. They include States parties to ensure:

(1) the right to self-determination[80] (defined as the right to "freely determine their political status and freely pursue their economic, social and cultural development"[81]);

(2) the entitlement of equality and equal protection of the law without discrimination on grounds of amongst others, race;[82]

(3) the rights of individuals belonging to ethnic, religious or linguistic minorities not to be denied the right, in community with other members of their group, to enjoy their own culture, to practice their own religion or use their own language;[83]

(4) the rights to family and privacy [84] and protection of the family;[85] and

(5) the rights to freedom and thought. [86]

The First Optional Protocol to the ICCPR[87] ("the 1st Optional Protocol") allows individuals (not groups as may be the case with claims by indigenous peoples) to make applications to the Human Rights Committee in respect of any violation of the ICCPR who may make findings that are sent to the individual concerned and publish the same in its annual report.[88]

Notwithstanding this, the ICCPR has with regard to self-determination, been subsequently interpreted rather cautiously by the UN and the international community. Firstly, indigenous people have not been regarded as 'peoples' for the purposes of self-determination under article 1 of the ICCPR because the right has historically been equated with the decolonization process[89] and the absolute right to form an independent state. [90] The rejection of the notion that self-determination from the perspective of indigenous peoples deals more with the right to fair political representation and participation within a state[91] rather than a right to claim independence from a sovereign state may well explain the failed attempts by indigenous peoples to submit communications pursuant to article 1 of the ICCPR.[92]

The Human Rights Committee has however in the last 20 years or so considered complaints under article 27 in respect of the protection of culture although it was originally not intended to apply to indigenous peoples.[93] It has determined states could be in possible violation of article 27 where the regulation of an economic activity, usually a matter for the state is an essential element in the culture of an ethnic community.[94] Other situations where there have been held to be violations of article 27 include the granting of a lease for commercial timber activities on grounds that it could destroy the traditional life of the Lubicon Lake Group,[95] granting of a permit to quarry stone that interfered with the traditional reindeer husbandry of the Sami Tribe[96] and the prevention of a member of an indigenous minority from residing on a tribal reserve.[97]

In 1994, the Human Rights Committee concluded that there was an infringement of articles 17 paragraph 1 (the right to family

life) and 23 paragraph 1 (the right to protection of family life by the state) of the ICCPR in the proposed construction of a hotel.[98] It also commented that culture manifests itself in many forms including "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples" and there should be "effective measures to ensure the effective participation of members…in decisions that affect them"[99] indicating a recognition of the special relationship between indigenous peoples, their land, environment and culture and the need for protection of these rights.

The ICESCR deals with second generation rights including the right to pursue their economic, social and cultural development.[100] Rights associated with employment, food production, healthcare, education and participation in the scientific, artistic and intellectual community[101] are all related to the rights of indigenous peoples but do not provide the means through which traditional territories or natural resources may be preserved or protected for indigenous peoples' cultural use.[102] A further impediment to a realization of rights is the lack of a complaints procedure under the ICESCR.

This heading clearly demonstrates that the Fundamental rights of indigenous peoples were not at the forefront of the agenda when these declarations and treaties were drafted. The lack of focus on the special "collective rights" of indigenous peoples coupled with the individual nature of many of the rights in these instruments lends support to this position.

In spite of this, the recent trend in the Human Rights Committee's recognition of certain indigenous peoples rights especially in the case of the ICCPR and the ICESCR is a positive development in international law as far as the rights of indigenous persons are concerned. It must be noted that this development forms a part of the relative progress achieved over the past 25 years by indigenous peoples in the international fora as will be discussed in the next section.

5 THE EMERGENCE OF INTERNATIONAL INDIGENOUS RIGHTS

The progress made in international law in respect of the protection of the Fundamental rights of indigenous peoples to ensure their survival will be evaluated in this heading by a critical analysis of the recent developments commencing from the establishment of the WGIP until the adoption of the Draft Declaration on the Rights of Indigenous Peoples by the Human Rights Council in June 2006.

This section will review the developments in the rights of indigenous peoples from the perspective of standard-setting by the ILO and the UN and related developments internationally.

The ILO

Due to the growing perception that the integrationist approach of Convention 107 was outdated and no longer adequate to meet the needs of indigenous peoples, recommendations were made to the Governing Body of the ILO for its revision in 1986.[103]

Convention 169[104] ("Convention 169") adopted a new attitude in respecting the cultures and ways of life of indigenous and tribal

peoples and presuming the right to continued existence and development along the lines they themselves wish.[105]

In terms of the Fundamental rights of indigenous peoples, firstly there is no mention of the right to self-determination. In fact, article 1 paragraph 3 clarifies the meaning of the word "peoples" in the convention as not to have any implications as regards to the rights attached to the term under international law thus negating the possibility that the use of the term "peoples" would imply self-determination.

As for the right to free and informed consent, Convention 169 uses phrases like "consultation"[106] and "participation" and even allows for dispensation of consent after affording an opportunity for effective representation in respect of the right of indigenous peoples not to be removed from their land.[107]

Notwithstanding this, the rights to determine their own economic, social and cultural development are protected albeit without the right to determine political development.[108] In terms of collective rights, Convention 169 is not express but calls for states to take into account problems that face indigenous peoples as a group. Finally, the right to protection of the integrity of indigenous values, practices, institutions and environment,[109] the right to equitable development[110] and to equality[111] are covered by Convention 169.

Despite its drawbacks, Convention 169 is looked at as a modest step forward considering its adoption took place in a climate of severe conflict, struggle for understanding and offstage maneuvering.[112] It has consecrated the right to self-management (within the limits allowed by the state), recognized the right to continued existence and partially recognized the claim to be regarded as peoples.

Notwithstanding, the loose wording of Convention 169 and the lack of a complaints procedure requires action at national level by states that are party as opposed to directly enforceable obligations.

UN's direct response

During the early 1970s, strong international lobbying on the part of indigenous peoples and supportive non-governmental organizations on the serious need to promote and protect the rights of indigenous peoples finally prompted the UN Economic and Social Council ("ECOSOC") to authorize the Sub-Commission on Prevention of Discrimination and Protection of Minorities ("the Sub-Commission") to make a study of the problem of discrimination against indigenous populations and to suggest measures for eliminating such discrimination.[113] Before the study was completed, the Sub-Commission was authorized to establish the WGIP to review the developments pertaining to the human rights of indigenous populations and to give attention to the evolution of the standards concerning the rights of such populations.[114]

At its first session in 1982, rules of procedure were adopted which allow interested persons to address the WGIP and permit the submission of information from any source hence opening the door for the participation of indigenous peoples in WGIP deliberations.[115] Another important factor that assisted indigenous participation was the creation of the Voluntary Fund for Indigenous Peoples by the UN General Assembly that funded such participation.[116] At its fourth session in 1985, the WGIP decided that it should aim to produce a draft declaration on indigenous rights for eventual adoption and proclamation at the UN General Assembly.[117] From 1988 the draft Universal Declaration on the Rights of Indigenous Peoples was drafted, debated, revised and redrafted until 1994 when the WGIP submitted the text of the Draft Declaration to its immediate parent body, the Sub-Commission.[118]

After a further 12 years, the Human Rights Council[119] finally adopted the UN Declaration on the Rights of Indigenous Peoples[120] ("the Declaration") and recommended that the UN General Assembly adopt the Declaration.[121] However, a severe blow was dealt to the progress of the Declaration recently when the UN

General Assembly Third Committee (Social, Humanitarian and Cultural) on 28 November 2006 voted to defer consideration and action on the UN Declaration on the Rights of Indigenous Peoples to allow time for further consultations until at least the end of the its current annual session.[122] It is strongly believed that more months of undefined government consultations will in no way improve the Declaration's chances of being adopted but can rather be seen as an attempt by governments such as Australia, New Zealand, the USA and Canada – who have stubbornly opposed the Declaration's text as adopted by the Human Rights Council – to butcher it or to block its final adoption all together.[123]

Despite the bleak outlook painted above, it must nevertheless be borne in mind that the Declaration has yet to be touched or amended in any way. Consequently, the provisions of the Declaration are still very much of relevance. In general, the Declaration seeks to protect the Fundamental rights of indigenous peoples by protecting firstly, the collective rights of indigenous peoples,[124] secondly, the right to self-determination,[125] thirdly, the obligation to obtain free and informed consent when making decisions that affect indigenous peoples,[126] fourthly, the right to determine their own priorities,[127] fifthly, the recognition of the right to sustainable and equitable development,[128] sixthly, the right to the protection of indigenous values, practices, institutions and environment[129] and seventhly, the right to equal treatment without discrimination.[130]

The Declaration, not a binding document even after adoption will bear testament to the international community's undeniable will to protect the rights of indigenous peoples.

The UN has also played its part in recognizing and promoting the rights of indigenous peoples when the General Assembly proclaimed 1993 as an International Year of the World's Indigenous People.[131] The theme of the international year was "A New Partnership" reinforcing international cooperation to find solutions for the problems of indigenous peoples in areas such as human rights, the environment, economic development and health.[132]

Based on the recommendations made at the Vienna Conference on Human Rights in 1993, the General Assembly proclaimed the International Decade of the World's Indigenous People commencing on 10 December 1994 and expressed amongst others, the importance of establishing a permanent forum for indigenous peoples and invited governments to ensure the planning and implementation of the decade on the basis of full consultation and collaboration with indigenous peoples.[133]

The objectives of the decade included the promotion and protection of the rights of indigenous peoples and their empowerment to make choices that would enable them to retain their cultural identity while participating in life with full respect for their cultural values, the adoption of the Declaration and national legislation to protect and promote the human rights of indigenous peoples, the establishment of a permanent forum on indigenous peoples at the UN and the promotion of education concerning the situation, languages, rights and aspirations of indigenous peoples.[134]

In 2000, ECOSOC established the Permanent Forum on Indigenous Issues ("PFII") with the mandate of the ECOSOC relating to the economic and social development, culture, the environment, education, health and human rights of indigenous peoples.[135]

In December 2004, the UN General Assembly adopted a second resolution for the 2nd International Decade of the World's Indigenous People which commenced on 1 January 2005[136] indicating on one hand the importance of attaining the objectives of the first decade and building on it but on the other implying the failure of the first decade to achieve its objectives.[137]

Other responses

In recent times, there have been an abundance of international instruments applicable to indigenous peoples but the focus will be on those instruments that have expressly taken into account the rights and interests of indigenous peoples and are directly relevant to their survival.

In June 1992, the UN Conference on Environment and Development[138] adopted a declaration on Environment and Development ("the Rio Declaration"),[139] a program of action for achieving sustainable development ("Agenda 21")[140] and a statement of principles on sustainable forestry ("Statement of Principles on Forests").[141]

The Rio Declaration recognizes indigenous peoples as distinct social partners in achieving sustainable development, emphasizing the unique value of indigenous cultures.[142] Agenda 21 contains a chapter on recognizing and strengthening the role of indigenous people and specifically provides for the participation of matters that affect them especially with regard to the protection of their lands.[143] Other chapters also refer to the distinct legal status and rights of indigenous peoples.[144]

The Statement of Principles on Forests recognizes and duly supports the identity, culture and the rights of indigenous people and their communities.[145] While the agreements adopted at Rio acknowledge the special status of indigenous peoples in relation to the environment and their right of participation in decision making, they do not create international law but are at least norms of environmental law.[146]

The Convention on Biological Diversity[147] provides for states party to respect, preserve, maintain and encourage indigenous communities embodying traditional lifestyles for the conservation and sustainable use of biological diversity and in respect thereof, to support any remedial action.[148]

The World Bank has from 1991 explicitly recognized the need to protect and respect the rights of indigenous peoples, advocating as a matter of policy amongst others, informed participation and that indigenous peoples should not suffer adverse effects from development projects financed by them.[149]

The only regional convention that will be discussed in this publication is the Proposed American Declaration on the Rights of Indigenous Peoples in 1997 ("the Proposed OAS Declaration")[150] as it is the only instrument that attempts to address the protection

of the Fundamental rights of indigenous peoples holistically rather than on a piecemeal basis.

The OAS[151] began drafting the Proposed OAS Declaration only in the 1990s but overtook the WGIP when the Inter-American Commission for Human Rights approved the Proposed OAS Declaration within 5 years of commencement.[152] However, it seems to have run out of steam as it still has not been passed by the OAS as at the time of the writing of this publication.

In terms of protecting the Fundamental rights of indigenous peoples, the Proposed OAS Declaration firstly, provides for "internal" self-government, formulation and application of indigenous law as opposed to full self-determination.[153] Secondly, the collective nature of rights of indigenous peoples is recognized.[154] Thirdly, the right of informed consent applies in respect of the right to environment,[155] land and resources[156] and development.[157] Fourthly, the right to determine its own priorities in terms of development is addressed.[158]

The protection of the right to integrity seems to be couched generally to address cultural[159] and spiritual[160] issues. However, there is no express statement as to sustainable and equitable development.

Although mentioning human rights and fundamental freedoms throughout the document, the Proposed OAS Declaration does not reaffirm the equality of treatment of indigenous peoples. However, it clearly recognizes that indigenous peoples are subjects of international law and are entitled to all protections afforded under the applicable human rights and international indigenous peoples instruments.[161]

Unlike other international documents, the Proposed OAS Declaration clarifies the peoples within its scope of application.[162]

6 IS MERE RECOGNITION ENOUGH?

There is no doubt that the growth of awareness and recognition of the rights of indigenous peoples over the last 25 years has been exponential if compared to other periods since European intervention in the 15th century.

The efforts of the indigenous peoples and the various non-governmental organizations both internationally and at state level have firmly placed the rights of indigenous peoples on the roadmap of international law for reasons already discussed above.

In addition to considering and taking measures to address the rights of indigenous peoples, international organizations whether or not under the auspices of the UN have supported numerous projects in the education and cultural fields relating to indigenous peoples[163] and devoted part of its sessions to the health of indigenous peoples.[164] High level international conferences have also made recommendations relating to indigenous peoples.[165]

More recently, an international tribunal namely the Inter-American Court of Human Rights has for the first time recognized

the territorial rights of indigenous peoples.[166]

Notwithstanding all these positive developments, there are several undeniable facts concerning the rights of indigenous peoples at international law. Firstly, the only treaty in force that addresses the Fundamental rights of indigenous peoples in totality is Convention 169 which is not in itself without weaknesses.[167] Further it has only been ratified by 17 countries.[168]

Secondly, there has been no actual consensus on the definition of self-determination for the purposes of indigenous peoples at international law. The Declaration seems to clarify the position by stating that by virtue of self-determination, indigenous peoples can freely determine their political status[169] and have a right to autonomy in matters relating to their internal affairs[170] but it is not yet in force and not been the subject of judicial interpretation. Given the range of models of autonomy for self-governance or self-determination and the different practices in states[171] future dispute seems inevitable.

Thirdly, there still remains no real agreement on what constitutes indigenous peoples[172] and the approach towards this issue. In general, it has been dealt with by way of self-identification and fulfilling specified criteria[173] but fails to provide a mechanism for dispute resolution.

The Declaration and Proposed OAS Declaration are non-binding even after adoption by the respective General Assemblies. They will however create international norms and put international political pressure on states to at least make a genuine attempt at compliance. The process of agreeing on a binding agreement at international level will undoubtedly be slow given the multilateral environment in which indigenous issues are debated by states.[174]

Taking the example of international human rights law, the ICCPR and ICESCR were only ratified 18 years after the UDHR. Notwithstanding the inevitable delay, the two declarations provide a good start towards actual protection of the Fundamental rights of indigenous peoples. In the meantime, the only recourse for indigenous peoples is limited to the various international human

rights instruments that unfortunately do not encompass their specific collective concerns.

It can therefore be said that the clear recognition of the rights of indigenous peoples in international law over the past 25 years, although laudable, is but merely the first step towards adequate protection of indigenous peoples.

CONCLUSION 7

Despite the substantial progress made, there are a number of major challenges to international law that must be dealt with in order for there to be effective protection of the rights of indigenous peoples. State participation and receptiveness to the rights of indigenous peoples is far from satisfactory mostly due to conflicting political and economic objectives and the fear of the loss of sovereignty especially when it comes to the right to self-determination.

Consequently, more effort is required on the part of indigenous peoples, in concert with the international community before state governments fully recognize and respect the status and rights of indigenous peoples at domestic level and implement the new norms that now seem to be developing into an integral part of international law.[175] The lack of adequate resources also severely impedes effective representation and the improvement of the work at international level.[176]

These challenges and more have been set out in the objectives of the International Decade of the World's Indigenous Peoples

during its 2nd decade,[177] the achievement of which is essential. Only time and the tireless efforts of both indigenous peoples and the international community will tell if these challenges can be overcome.

In conclusion, international law has both played the role of villain and hero in the survival of indigenous peoples ranging from being an instrument to aid, if not facilitate, colonization and the suppression of indigenous peoples in the 19th and early 20th century to an arena at which indigenous peoples rally and battle for recognition of their rights today.

The role of international law in the progress of the protection of indigenous peoples has not always been merely slow and with obstacles. Worse still, the late 19th century saw a time in history where concepts of international law like sovereignty and consent legitimized domestic maltreatment of indigenous peoples and their forced assimilation into the dominant society leaving them on the brink of extinction.

Having said this, the current state of affairs of international law nevertheless shows substantial progress in the protection of the Fundamental rights of indigenous peoples. Encouraging as it may be, steps forward are painfully slow and far from satisfactory at this stage as demonstrated by the recent Declaration debacle.

There is still a lot to be done if international law can be said to be a truly effective instrument to ensure the survival of indigenous peoples. The silver lining to this cloud however remains clear. For the first time in the history of indigenous subjugation, international law is headed in the right direction.

Endnotes

8

1. Wiessner, S, "Rights and Status of International Peoples: A Global Comparative and International Legal Analysis" (1999) 12 *Harvard Human Rights Journal* 57-128, at 58-59.
2. For example, the Maori population in New Zealand dropped from 125,000 to 135,000 prior to colonization to 42,650 by 1886 (*Id* at 70).
3. Sambo, D, "Indigenous Peoples and International Standard-Setting Process: Are State Governments Listening?", (1993) 3 *Transnational Law and Contemporary Problems* 13-47, at 14.
4. See for example, the forced removal of five American Indian tribes from their lands in the east of the United States of America to the west of the Mississippi river pursuant to the United States Indian Removal Acts that resulted in countless deaths, trauma and misery so much so the migration trail became aptly known as the "the Trail of Tears". A detailed account of these events is contained in Foreman, G, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians*, (Oklahoma: University of Oklahoma Press, 1973).
5. For example, the Treaty of Waitangi between the British Crown and the Confederated and Independent Chiefs of New Zealand in 1840 contains clear disparities between the Maori and English text (see Made in New Zealand: The Treaty of Waitangi, accessed 5 October 2006 <http://www.treatyofwaitangi.govt.nz/treaty/>).
6. Martin, E, *A Dictionary of Law*, 5th ed., (Oxford: Oxford University Press, 2002), at 260. Certain international organizations (such as the United Nations), companies and individuals (e.g. in the sphere of human rights) may have rights or duties at international law (*Ibid*). Generally, however, the sovereign state is of primary importance as the "subject" of international law.
7. Pritchard, S (ed.), *Indigenous Peoples, the United Nations and Human Rights*, (Anandale, Australia: Zed Books, 1998), at 7-8.
8. *Id* at 8-10.
9. Corntassel, J and Primeau, T, "Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-

Determination"", (1995) 17 *Human Rights Quarterly* 343-365, at 346.

10. For further reading see for example, Corntassel and Primeau, *Id* at 345-348 and Kingsbury, B, ""Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy", 92 *American Journal of International Law* 414-457.
11. Working Group on Indigenous Peoples, "Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene A. Daes on the Concept of "indigenous people"", UN ESCOR, 14th session, UN Doc E/CN.4/sub 2/AC.4/1996/2 (1996), at 5.
12. Wiessner, *op.cit.*, 114.
13. Sambo, *op. cit*., 21-32.
14. There have been years of dispute at international level as to the right to self-determination for indigenous peoples due to the competing principle of international law requiring territorial integrity of states to be respected.
15. Anaya, J, *Indigenous Peoples in International Law*, (Oxford: Oxford University Press, 2004), at 16.
16. *Ibid*.
17. *Ibid*.
18. *Ibid*.
19. *Ibid*.
20. *Id* at 18.
21. *Ibid*.
22. *Ibid*.
23. Anaya, J, *op.cit*., 19.
24. But the laws were met with considerable resistance by the Spanish colonists in the Americas. Further reading on the subject can be found in Hanke, L, *The Spanish Struggle for Justice in the Conquest of America*, (Philadelphia: University of Pennsylvania Press, 1949).
25. For example, the early treaties signed with Native Americans (see Cohen, F, *Handbook of Federal Indian Law* (Washington: United States Government Printing Office, 1945) accessed 5 October 2006 <http://thorpe.ou.edu/cohen.html>, at 46).
26. Anaya, J, *loc.cit.*
27. Anaya, J. *op.cit*., 22.
28. *Ibid*.
29. *Ibid*.

30. Anaya, *op.cit.*, 23.
31. 21 U.S (8 Wheat.) 543 (1823).
32. 30 U.S. (5 Pet.) 1 (1831).
33. 31 U.S. (6 Pet.) 515 (1832).
34. Anaya, J, *op.cit.*, 25.
35. Manus, P, "Sovereignty, Self-Determination and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law", (2005) 23 *Wisconsin International Law Journal* 553-642, at 561.
36. Anaya, *op.cit.*, 26.
37. Mc Rae, H *et al*., *Indigenous Legal Issues: Commentary and Materials*, 3rd ed., (Sydney: Lawbook Co, 2003).
38. Discussed *supra* at 3-4.
39. Anaya, *loc.cit.*
40. *Ibid*.
41. For further reading, please refer to Roxburgh, R, ed., *Oppenheim's International Law: A Treatise* (London: Longmans, Green & Co., 1920-1921), Reprinted 2006 by The Lawbook Exchange, Ltd.
42. *Ibid*.
43. Nichols, R, "Realising the Social Contract: The Case of Colonialism and Indigenous Peoples", (2005), 4 *Contemporary Political Theory* 42-62.
44. *Id* at 42.
45. *Id* at 43.
46. *Supra* at 10-11.
47. Nichols, *loc.cit.* Treaties entered into between states and indigenous peoples during colonial times were often reneged and dismissed as having no legal or political significance. For examples involving the United States of America, Canada and New Zealand, see Weissner, *op.cit.*, 60-71.
48. *Id* at 43-44.
49. Anaya, *op.cit.*, 31.
50. *Ibid*.
51. Anaya, *op.cit.*, 34.
52. In New Zealand, 1886 was when the Maori population was at its lowest (see note 2 *supra*). The total population of American Indians in the United States of America dropped to its lowest in 1890 (Wiessner, *op.cit.*, 65).
53. ESC Res 34, UN ESCOR, UN Doc E/1982/59 (1982).

54. Swepston, L, "A New Step in International Law on Indigenous and Tribal peoples: ILO Convention No. 169 of 1989" (1990) 15 *Oklahoma City University Law Review* 677-714, at 679.
55. *Id* at 680-682.
56. *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted 26 June 1957, ILO C 107, (entered into force 2 Jun 1959).
57. The full text of Convention 107 is available at http:www.ilo.org/ilolex/cgi-lex/convde.p/?C107, accessed on 10 October 2006.
58. *International Labour Organisation Constitution*, article 22, accessed 25 November 2006 <http:www.ilo.org/ilolex/English/constq.htm>.
59. For examples, see Swepston, *op.cit.*, 683.
60. Convention 107, article 1(1)(a).
61. *Id* at article 2(1).
62. Sambo, *op.cit.*, 19.
63. International Labour Organisation, *ILOLEX Database of International Standards*, accessed on 25 October 2006 <http://www.ilo.org/ilolex/english/convdisp1.htm>.
64. *Supra* at 5.
65. Adopted 26 June 1945, 892 UNTS 119 (entered into force 24 Oct. 1945).
66. UN Charter article 1(2) and article 55.
67. UN Charter article 1 para 3, article 13 para 1(b), article 55 para c, article 62 para 2 and article 76 para c.
68. UN GAOR 217A(III) (1948).
69. Manus, *op.cit.*, 573.
70. *Ibid*.
71. Adopted 21 Dec. 1965, 660 UNTS 195 (entered into force 4 Jan. 1969).
72. Adopted 16 Dec. 1966, 999 UNTS 171 (entered into force 23 Mar. 1976).
73. Adopted 16 Dec. 1966, 993 UNTS 3 (entered into force 3 Jan. 1976).
74. ICEFRD article 2 para 1 read together with article 1 para 1.
75. *Id* at article 2 para 1(e).
76. *Id* at article 5 para (d)(v).
77. UN CERD, *General Recommendation XXIII Concerning Indigenous Peoples*, 51st Session, 1236th meeting, UN DOC A/52/18 annex V (1997).

78. E.g. Rights associated with the right to life, rights against slavery, arrest, detention, punishment and due process, conscience and religion, freedom of religion etc.
79. There have been a number issues and pronouncements as to whether these provisions do indeed cover indigenous peoples. The more pertinent decisions relating thereto shall be discussed in the next heading, *infra* at 23.
80. ICCPR article 1 para 1.
81. *Ibid*.
82. ICCPR article 26.
83. *Id* at article 27.
84. *Id* at article 17.
85. *Id* at article 23.
86. *Id* at article 18.
87. Adopted 16 Dec. 1966, 999 UNTS 171 (entered into force on 23 Mar. 1976)
88. See the 1st Optional Protocol articles 5 and 6.
89. A process whereby the colonies sought and obtained independence from their colonial masters mostly from the 1940s to the late 1970s.
90. See Barsh, R, "Indigenous Peoples in the 1990s: From Object to Subject of International Law", (1994) 7 *Harvard Human Rights Journal* 33-86, at 35-39 and Triggs, G, "Australia's Indigenous Peoples and International Law: Validity of the Native Title Act 1998 (Cth), 1999 23 *Melbourne University Law Review* 372-415, at 384.
91. Barsh, *op.cit.*, 39-40.
92. For examples, see Triggs, *loc.cit.*
93. Pritchard (ed.), *op.cit.*, 40.
94. *Ivan Kitok* v *Sweden*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No.197/1985, UN Doc CCPR/C/33/D/197/1985 (1988).
95. *Ominayak* v *Canada*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No. 167/1984, UN Doc A/45/40 vol. 2 (1990).
96. *Lansman* v *Finland*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No. 511/1992, UN Doc CCPR/C/52/0/511/1992 (1993).
97. *Lovelace* v *Canada*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No. 24/1977, UN Doc A/36/40 Annex 18 (1977).

98. Adopting a wide view of "family" and taking into account past cultural traditions, the Human Rights Committee determined that the construction of the hotel on ancestral lands would have destroyed their traditional burial grounds and interfered with the traditional owners rights to family (see *Hopu* v *France*, United Nations Human Rights Committee, *Report of the Human Rights Committee*, Communication No. 549/1993, UN Doc CCPR/C.60/D/549/1993/ Rev. 1(1997).
99. United Nations Human Rights Committee, *General Comment No 23 on Article 27*, 50th session, UN DOC CCPR/C.21/Rev.1/Add. 5 (1994).
100. The ICESCR reconfirms the right to "self-determination" in article 1 but the interpretation of the term has hardly been of assistance to indigenous peoples (see *supra* at 22).
101. ICESCR, articles 6-15.
102. Manus, *op.cit.*, 580.
103. Swepston, *op.cit.*, 687-689.
104. *Convention concerning Indigenous and Tribal peoples in Independent Countries*, adopted 27 Jun.1989, ILO C 169, (entered into force 5 Sep. 1991).
105. See for example Convention 169, article 7. This approach clearly moves away from the protection afforded by Convention 107 which was temporary in nature pending eventual integration.
106. Consultations carried out in the application of the Convention shall be undertaken, in good faith and in a form appropriate in the circumstances, with the objective of achieving agreement or consent to the proposed measure (Convention 169, article 6 para 2).
107. *Id* at article 16 para 2.
108. *Id* at article 7 para 1.
109. *Id* at article 5(b).
110. *Id* at article 23.
111. *Id* at article 2(a).
112. Swepston, *op.cit.*, 713.
113. ESC Res 1589(L), UN ESCOR UN Doc E/5032 (1971).
114. See *supra* at note 53.
115. For this and further methods of work that improved participation of indigenous peoples, see Pritchard (ed.), *op.cit.*, 42.
116. GA Res 40/131, UN GAOR, 40th session, 116th plenary meeting, UN DOC A/RES/40/131 (1985).

117. UN Doc E/CN/4/Sub 2/1985/2, Ann 2 (1985).
118. UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994).
119. The body that replaced the Commission on Human Rights in Geneva on 15 March 2006 (GA Res 60/251, UN GAOR, 60th session, 72nd plenary meeting, UN DOC A/RES/60/251 (2006)).
120. Human Rights Council, *Report to the General Assembly on the first Session of the Human Rights Council*, UN Doc A/HRC/1/l.10 (2006), accessed 12 September 2006 <http://www.iwgia.org/graphics/Synkron-Library/Documents/ Notice/InternationalProcesses/HR%20Council/HRCouncil1streport2006.pdf>.
121. International Working Group for World Indigenous Affairs, "Human Rights Council Adopts the UN Declaration on the Rights of Indigenous Peoples", accessed 12 September 2006, <http://www.iwgia.org/graphics/Synkron-Library/Documents/ Notice/International/DDadopted.htm>.
122. United Nations General Assembly Third Committee (Social, Humanitarian, and Cultural) Press Release, GA/SHC/3878, UN GA Third Comm. (SHC), 61st session, 53rd mtg, UN DOC GA/SHC/378 (2006).
123. International Working Group for World Indigenous Affairs, "Declaration: UN General Assembly fails to bring hope to indigenous peoples", November 2006, accessed 31 January 2007 <http://www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/IWGIAstatementDD.htm >.
124. Articles 1,7 and 8.
125. Articles 3 and 4.
126. Articles 10, 19, 29 and 32.
127. Articles 23 and 32.
128. See preamble.
129. Article 7 and article 8 para 2(a) where states are obliged to provide effective mechanisms to prevent the deprivation of such rights.
130. Articles 1 and 2.
131. GA Res 45/164, UN GAOR, 45th session, 69th plenary meeting, UN DOC A/RES/45/164 (1993). The insistence at the Commission on Human Rights level on the removal of the letter "s" from "Peoples" in the title by certain states especially by Canada and Brazil for fear that it may imply the right to self-determination must be noted.
132. Marantz, D, "Issues Affecting the Rights of Indigenous Peoples in International Fora", *People or Peoples: Equality, Autonomy and*

Self-Determination: The Issues at Stake at the International Decade of the World's Indigenous People (Montreal: International Centre for Human Rights and Democratic Development, 2004), 9-77, at 31-32.

133. GA Res 48/163, UN GAOR, 48th session, 86th plenary meeting, UN DOC A/RES/48/163 (1993).
134. *Programme of activities for the International Decade of the World's Indigenous Peoples*, GA Res 50/157, UN GAOR, 50th session, Agenda Item 111, UN Doc A/RES/50/157 (1996).
135. This includes the giving of advice and the making of recommendations on indigenous issues to the UN system (see United Nations Permanent Forum on Indigenous Issues, *About Us*, accessed 16 October 2006 <http://www.un.org/esa/socdev/unpfii/en/about_us.html>)
136. *Second International Decade of the World's Indigenous Peoples*, GA Res 59/174, UNGAOR, 59th session, Agenda Item 102, UN DOC A/Res/59/174 (2005).
137. For a review of the successes and failures of the decade, please see International Working Group for World Indigenous Affairs, "The UN Decade: Expectations and Realities", (2004), *Indigenous Affairs* 3/04, at 9-10.
138. in Rio de Janeiro.
139. *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, Annex 1, UN Doc A/CONF.151/26/Rev.1(Vol.1) (1993).
140. *Agenda 21*, UN Conference on Environment and Development, Annex 2, UN Doc A/CONF.151/26/Rev.1(Vol.1)(1993).
141. *Non-Legally Binding Authoritative Statement of principles for a Global Consensus on the Management, Conservation and Sustainable Development of All types of Forests*, UN Conference on Environment and Development, Annex 3, UN Doc A/CONF.151/26/Rev.1(Vol.1) (1993).
142. Principle 22.
143. Chapter 26.
144. For example, chapter 15 on biodiversity calls on governments in cooperation with indigenous peoples to respect, record, protect and promote indigenous communities embodying traditional lifestyles for the conservation of biological diversity. Other issues recognized in Agenda 21 include the value of their traditional fisheries (chapter 17, paragraph 17.71), the importance of incorporating traditional

knowledge into national management systems (chapter 17, paragraph 17.75(b)) and the need to consider indigenous peoples' right to subsistence in negotiating future international agreements on marine resources (chapter 17, paragraph 17.83).

145. Principle 5(a).
146. Triggs, *op.cit.*, 391.
147. *Convention on Biological Diversity*, adopted 5 June 1992, ATS No. 32, 31 ILM 818 (entered into force 29 December 1993).
148. Id at articles 8 and 10.
149. World Bank, *World Bank Operational Manual Operational Policies OP4.10*, (2005) and World Bank, *World Bank Operational Manual Bank Procedures BP4.10* (2005), accessed 17 October 2006 <http://www.wbln0018.worldbank.org/Institutional/Manual/Opmanual.nsf> that replaced World Bank Operational Directive 4.20, *Indigenous Peoples*, September 1991 with effect from 1 July 2005 in respect of projects reviewed on or after 1 July 2005.
150. *Proposed American Declaration on the Rights of Indigenous Peoples*, Inter-American Commission for Human Rights, 1333rd session, OAS Doc OEA/Ser/L/VII.95 (1997).
151. Organization of American States.
152. *Proposed American Declaration on the Rights of Indigenous Peoples*, *loc.cit*.
153. *Id* at articles XIV and XV.
154. See *id* at article II.
155. *Id* at article XIII para 7.
156. *Id* at article XVIII para 6.
157. *Id* at article XXI para 2.
158. *Id* at article XXI para 1.
159. *Id* at article VII.
160. *Id* at article X para 4.
161. *Id* at preamble 7.
162. *Id* at article 1.
163. UNESCO and the World Health Organisation ("WHO").
164. WHO and the Pan American Health Organization. For note 163 *supra* and this note, please see Centre for Human Rights, *Human Rights: The Rights of Indigenous People Fact Sheet No. 9, Rev. 1*, (Geneva: Centre for Human Rights, 1998), at 20.
165. See for example the International Conference on Populations and

Development (Cairo, 1994), World Summit for Social Development (Copenhagen, 1995) and World Conference on Women (*Human Rights: The Rights of Indigenous People Fact Sheet No. 9, Rev. 1*, *op.cit.*, 21.)

166. *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).
167. *Supra* at 20. Convention 107 still applies to nations that have not ratified Convention 169 but is clearly inadequate to address the needs of indigenous peoples as argued *supra* at 13-14.
168. International Labour Organisation, *ILOLEX Database of International Standards*, accessed 25 October 2006 <http://www.ilo.org/ilolex/english/convdisp1.htm>.
169. Article 3.
170. Article 4.
171. McRae *et al*., *op.cit.* 163.
172. See Kingsbury, *loc.cit* and Corntassel and Primeau, *loc.cit.*
173. For example Convention 169, article 1. In respect of criteria, article 1 paragraph 1(b) talks of inhabitation "at the time of conquest or colonisation or the establishment of present state boundaries" and retaining "some or all of their own social, economic, cultural and political institutions".
174. Marantz, *op.cit.*, 14-15.
175. Sambo, *op.cit.*, 46.
176. *Id* at 45.
177. *Supra* at 23.

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INTERNATIONAL INDIGENOUS RIGHTS

Evolution, Progress & Regress

International Indigenous Rights: Evolution, Progress & Regress concisely traces and evaluates the development of the rights of indigenous peoples internationally – from the time of European colonization in the late 15th century until the approval of the United Nations Draft Declaration on the Rights of Indigenous Peoples by the Human Rights Council in 2006.

Written for both interested laymen and specialists, the book outlines the scope of international indigenous rights necessary for the survival of indigenous peoples and uses these as a benchmark to evaluate the development of international indigenous rights over the last five centuries.

The analysis highlights the dark period of colonial expansion in which western concepts were used to dispossess, marginalize, assimilate and maltreat indigenous peoples – instead of protecting their way of life. It also appraises the later involvement of international organizations such as the International Labour Organization and the United Nations in protecting indigenous rights.

International Indigenous Rights: Evolution, Progress & Regress argues that while indigenous rights continue to be violated and indigenous peoples themselves still face substantial challenges, international law, somewhat reassuringly, is headed in the right direction.

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