

Human Development Report Office

OCCASIONAL PAPER

Background paper for HDR 2004

Indigenous Peoples in Comparative Perspective – Problems and Policies

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2004/14



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Who and Where

One of the more widely debated topics involving indigenous peoples and state policies is the ambiguity surrounding the term “indigenous”. There is no internationally agreed upon definition of indigenous peoples. Different states adopt –if at all– definitions in terms of their particular contexts and circumstances. The term indigenous is frequently used interchangeably with others, such as “aboriginal”, “native”, “original”, “first nations” or else “tribal” or other similar concepts. In some countries no formal designation exists even though there might be general agreement that such populations do in fact inhabit certain areas of the country. In others, the existence of indigenous groups is denied altogether and therefore their definition becomes even more problematic. Yet the absence of an international definition does not prevent constructive action in the protection of the rights of indigenous peoples and the promotion of their development. Whereas at the national level, formal definitions have become more common in recent years, the criteria of membership in an indigenous group, nation or community are not always clearly established.

While indigenous peoples the world over share many commonalities, there are also great differences among them. In North America, for example, Native Americans were considered as sovereign and distinct by the governments of the United States and Canada well into the nineteenth century. Relations between these peoples and the state were based on treaty arrangements which, as time went by, were abrogated unilaterally by the states concerned; a similar process occurred in Chile. In New Zealand, on the other hand, the Treaty of Waitangi sets the frame of the relations between the Maori and the State. In all these countries, the situation of indigenous peoples today results in many ways from such agreements and their consequences.

According to recent estimates, the indigenous populations number around 300 million, most of them in South Asia. In Latin America the number of Indians is estimated at around 40 million people, which means roughly 10% of the region’s total population, and they are concentrated mainly in the Andean area, Mexico and Central America, comprising about 400 different groups who are in turn divided into many thousands of local communities.

Of special interest is the situation in Africa, where states usually do not recognize indigenous peoples among their populations because of their fear of resurgent “tribalism” and because most Africans consider themselves to be “indigenous” to the continent. The African Commission on Human and Peoples’ Rights now includes an expert working group on the rights of indigenous or ethnic communities. At its 2003 session the working group presented a report that “calls for a recognition of the unique character of indigenous people and develop policies and practices in consultation with the people concerned and with due regard to [their] identity.”

The countries of Asia also present different approaches. Some scholars consider the various “tribal” categories used in some states as equivalent to the concept of indigenous peoples but others disagree. The Adivasis in India might usually be considered as indigenous peoples, but they are not officially recognized as such. Similarly the Ainu of Japan have only recently been recognized as a minority or an indigenous people by government authorities. No such definitional problems arise concerning indigenous peoples in Australia, New Zealand, Malaysia and Philippines, nor in Russia where a long-standing legal tradition provides clear guidelines regarding definition of groups and membership criteria. In northern Europe the Sami are also recognized as indigenous.

A United Nations report provides a widely used definition,¹ to which Convention 169 on Indigenous and Tribal Populations of the International Labor Organization adds: "*Self-identification as indigenous or tribal shall be regarded as a fundamental criterion.*"²

The Draft Declaration on the Rights of Indigenous Peoples, being considered by the UN Commission on Human Rights, states the right to membership in an indigenous community.³ The UN Working Group on Indigenous Populations proposes four principles to be taken into account in any possible definition of indigenous peoples: (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) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.⁴

The lack of adequate legal provisions has led to human rights violations of indigenous peoples in many parts of the world. Ambiguities in their legal situation are of particular concern to indigenous peoples in several Latin American countries, such as Argentina, Chile and Mexico. The Amazigh (also known as Touareg, Kabyles and Berbers) of North Africa demand legal recognition and the respect of their cultural and social rights as an indigenous people. In the Philippines, the provisions of the *Indigenous Peoples' Rights Act* are sometimes overridden by other legislation, creating tensions and judicial controversy. Within the framework of a constitutional review in Kenya, the Ogiek, a hunter-gatherer people, claim recognition as a distinct indigenous minority. The Maasai pastoralists are considered to be an indigenous minority in several east African countries, and their legal recognition varies in the different states. In Malaysia, special legislation applies to the Orang Asli as an aboriginal people. The UN Committee on the Elimination of Racial Discrimination has expressed its concern for the legal status of the indigenous peoples of Cambodia, particularly as regards their rights, culture and traditional lands.⁵

Background

Ever since the Europeans first came to the shores of the American continent to conquer and settle, indigenous peoples have suffered discrimination, exploitation and racism. During three hundred years of colonial domination, the indigenous societies of Latin America were subjected to the worst forms of oppression and exploitation. Much of the colonial wealth of Europe was based on the use Indian workers in the mines and in the fields, which next to African slavery provided an inexhaustible supply of servile labor. Indigenous cultures were

destroyed or subordinated to the dominant Hispanic Catholic mold. In some parts of the continent, widespread genocide of indigenous societies took place. The indigenous population, which was decimated as a result of military conquest, ecological destruction, forced labor and the introduction of lethal diseases brought by the colonists, decreased drastically as a result of the invasion. After political independence in the 19th century, Indians were formally granted citizenship in most of the new states, though in many parts they remained less than equal to the population of European or mixed ancestry.

Expanding agrarian capitalism destroyed numerous surviving indigenous communities. As in the United States, in Argentina and Chile the still existing sovereign Indian nations were subdued by the national state. Despite holding legal citizenship rights, they were in fact excluded from equal participation in the economic, social and political system. Special legislation often placed indigenous populations at a disadvantage in relation to the rest of society, even when some laws were of a protective and tutelary nature, and in some countries Indians were still treated as minors and legally incompetent until very recently. It was not until the last decades of the twentieth century that most Latin American countries carried out a spate of constitutional reforms regarding native languages and cultures, the recognition of indigenous communities and their territories as specific forms of social organization, as well as the aims of public policies aimed at indigenous populations.

The land issue

For most indigenous peoples survival is the major challenge in a world that has systematically denied them the right to existence as such. Historically linked to the land as the source of their main livelihood, the indigenous have long struggled to gain and keep access to this precious resource which is at the same time the essential element of their identity as distinct cultures and societies. Land rights are the major issue faced by native peoples around the world and they are at the center of numerous conflicts involving indigenous communities, particularly as a result of globalization. The impact of new economic processes can be dramatic, as seen in agricultural modernization, for example. The widespread introduction of commercial crops for export, based on the intensive use of modern inputs (mechanization, improved grains, fertilizers, insecticides, and more recently, genetically modified seeds) tends to displace traditional subsistence farming, on which most indigenous communities depend for their survival. Increasing production costs and the need for economies of scale favor the consolidation of larger productive units and integrated agribusiness, putting traditional farms at a disadvantage in highly competitive markets. Agricultural development policies, instead of helping small subsistence farmers overcome their handicaps, have in fact pushed the poorer peasants out of business and favored the concentration of larger agro-industrial enterprises, and they have forced the peasants to become increasingly dependent on, and therefore vulnerable to, the globalized agricultural economy. Current negotiations concerning agriculture within the framework of the World Trade Organization do not bode well for the continued existence of indigenous farming.

From time immemorial indigenous peoples maintain a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as identifiable territorial communities. The right to own, occupy and use land collectively is inherent in the self-conception of indigenous peoples and generally this right is vested in the local community, the tribe, the indigenous nation or group. For productive purposes it

may be divided into plots and used individually or on a family basis, yet much of it is regularly restricted for community use only (forests, pastures, fisheries etc.), and the social and moral ownership belongs to the community. While such rights are protected by legislation in some countries, powerful economic interests often succeed in turning communal possession into private property. From southern Chile to the Amazon basin to Canada's northern forests; from the tropical jungles of southeast Asia to the bush of southern Africa, there is no longer any territory which is not coveted by some international corporation, either for its mineral wealth, its oil deposits, its pastures, tropical or hard-wood forests, its medicinal plants or its suitability for commercial plantations, its hydraulic resources or its tourist potential. Indigenous peoples are the most recent victims of globalized development, and if these tendencies continue unabated, their chances of survival are becoming weaker, their very existence as distinct societies and cultures is seriously endangered.

Closely linked to the land problem is the territorial issue. Indigenous peoples have been historically rooted in specific locations, their original homelands, which in some cases constitute well defined geographical areas. Indigenous peoples organizations now demand the recognition and demarcation of these territories as a necessary step to ensure their social, economic and cultural survival. The territory of the San Blas Kuna is constitutionally protected in Panama; so is that of the Yanomami in northern Brazil. The Mapuche of southern Chile and the Miskitos of Nicaragua, among many others, have been in the forefront of these struggles in their countries. The Colombian constitution of 1991 recognizes the traditional homelands of a number of indigenous groups and assures them of legal protection. Philippine legislation recognizes indigenous ancestral domains. In some Canadian provinces aboriginal title to territory is legally recognized.

Convention 169 of the International Labor Organization, adopted in 1989, calls upon States to respect indigenous lands and territories, and proclaims the right of indigenous peoples to control their natural resources. This is a most important right, because many of the current conflicts over land and territory relate to the possession, control, exploitation and use of natural resources. In a number of countries it is the State which keeps for itself the right to control such resources, and in numerous instances multinational corporations are asserting their own economic interests over them, unleashing complicated conflicts over ownership and use-rights with indigenous communities. In Chile, for example, one law recognizes the rights of indigenous communities to their lands, but other laws allow any private party to claim possession of subsoil and water resources on them. Under these circumstances, indigenous communities are hard put to defend their ancestral claims.

Indigenous peoples in Southeast Asia face the loss of control over land and resources due to the non-recognition of customary land rights. In most southeast Asian states there are no legal rules granting indigenous peoples the right to their land and many indigenous peoples are threatened by logging, mining and other exploitative activities or due to infrastructure programs (dams, roads) pursued by national governments. In Resolution 55/95 on Cambodia, the UN General Assembly notes that illicit logging 'has seriously threatened full enjoyment of economic, social and cultural rights by many Cambodians, including indigenous people'.⁶ A major recent development in this country is the 2001 land law, which states that ownership of land *'is granted by the State to the*

indigenous communities as collective ownership. This collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners’.

Development and Indigenous Peoples

Indigenous peoples live mainly in rural environments. Wherever they have been able to maintain their community lifestyles and their traditional cultures, it is because the areas in which they live have been spared major upheavals resulting from rapid economic and ecological transformations. But this situation has changed extensively over the last few decades, as national governments, large corporations and multilateral financing agencies turn their attention to so-called undeveloped regions in order to extract natural resources, establish plantations and industrial plants, develop tourist activities, ports, communication hubs or urban centers, build transportation networks, multipurpose dams, military bases or toxic waste dumps. Wherever such developments occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. Large-scale development projects will inevitably affect the conditions of living of indigenous peoples. Sometimes the impact will be beneficial, very often it is devastating, but it is never negligible.

Traditionally few governments have taken the rights and interests of indigenous peoples into account when making plans for major development projects. As the projects mature, which may take several years depending on their characteristics, the concerns of indigenous peoples, who are seldom consulted on the matter, take a back seat to an overriding “national interest”, or to market-driven business objectives aiming at developing new economic activities, maximizing productivity and profits. For a long time, multilateral financing agencies involved in the planning and execution of such projects appeared to go along with this approach. Hence, the social and environmental concerns expressed by many people, including indigenous communities, have not been given the necessary attention.

In recent years, this situation is changing, as multilateral agencies, national governments and private companies take up a new interest in indigenous concerns. At the international level, ILO’s Indigenous and Tribal Peoples Convention 169 stipulates that:

1. “The peoples concerned shall 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 lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly...”

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”
(Art. 7)

Numerous international conferences have reaffirmed such rights in one formulation or the other, notably the Rio Earth Summit (1992) and the Johannesburg World Summit on Sustainable Development (2002). The World Bank is in the process of adopting a new operational policy that establishes the need to involve indigenous peoples in development projects that may affect them, and the Inter-American Development Bank has laid down similar guidelines for its own activities. Several states have likewise adopted legislation in the same sense.

None have been more concerned with these important issues than indigenous peoples themselves. One recent study reports on “the disproportionate impacts that indigenous peoples suffer from development programmes, so long as their human rights are not fully recognized, and so long as they continue to be marginalized in decision-making affecting their lives.”⁷ Further, indigenous peoples argue that “as the pressures on the Earth’s resources intensify, indigenous peoples bear disproportionate costs of resource-intensive and resource-extractive industries and activities such as mining, oil and gas development, large dams and other infrastructure projects, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects.”⁸ On the specific issue of large dam construction the World Commission on Dams finds that:

*“Large dams have had serious impacts on the lives, livelihoods, cultures and spiritual existence of indigenous and tribal peoples. Due to neglect and lack of capacity to secure justice because of structural inequities, cultural dissonance, discrimination and economic and political marginalisation, indigenous and tribal peoples have suffered disproportionately from the negative impacts of large dams, while often being excluded from sharing in the benefits.”*⁹

To the extent that many of these projects are located on the ancestral territories of indigenous peoples, it is not surprising that they should raise the issue of the rights to land, to prior consent concerning its use, to participation in the decision-making process regarding the implementation of such projects, and beyond this, the right to share in the potential benefits. At the twentieth session of the Working Group on Indigenous Populations (WGIP) “...virtually every indigenous participant stated that their right to self-determination is a pre-condition for the realization of all other human rights, and must be considered as the bedrock that ensures their self-governance, whereby they can participate in decision-making processes in policies that directly affect them. They therefore reiterated the intrinsic link of the right to self-determination to various other indigenous human rights issues such as the right to land and natural resources, the preservation of cultural identity, and the rights to language and education.”¹⁰

The right to free, informed and prior consent by indigenous peoples continues to be of crucial concern, inasmuch as too many major decisions concerning large-scale

development projects in indigenous territories do not comply with this stipulation, clearly set out in para. 6 of ILO's convention 169, which provides that governments shall

“(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

“(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them...”

Likewise, Article 30 of the UN Draft Declaration on the rights of indigenous peoples also provides that states shall obtain free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.¹¹ The Proposed American Declaration on the Rights of Indigenous Peoples (Article 21[2]) contains a similar provision. For indigenous peoples the principle of free, prior and informed consent is an issue of primary importance. In some states legislation has progressed in this direction. The Aboriginal Land Rights (Northern Territory) Act 1976 (amended in 1987) of Australia not only recognizes the right of Aborigines to own the land, but also provides in effect the right to veto over mining for a 5-year period. Furthermore, a mining grant or a road construction may not be undertaken unless the traditional owners of the land understand the nature and purpose of the proposed mining or road construction proposals as a group and consent to them.¹²

The Indigenous Peoples Rights Act 1997 of the Philippines recognizes the indigenous right to ancestral domain and the land title to traditional lands. Philippine law also requires a developer or company to obtain free, prior and informed consent of indigenous peoples for certain activities, such as (a) exploration, development and use of natural resources; (b) research-bioprospecting; (c) displacement and relocation; (d) archaeological explorations; (e) community-based forest management; and (f) entry of the military. However, indigenous organizations complain that these provisions are not being complied with as they should.¹³

Regarding the exploitation of natural resources in traditional territories of indigenous peoples, the Constitutional Court of Colombia argues that “..indigenous peoples are subjects of fundamental rights. If the State does not guarantee their right to subsistence (survival), these communities will not be able to materialize their right to cultural, social and economic integrity which is stated in the Constitution”.¹⁴ Article 2 of the Constitution of Mexico (amended in 2001) recognizes the land rights of indigenous communities but subjects them to the rights of “third parties”, a legal limitation which indigenous organizations and legal scholars consider rather as a step backwards in the recognition of their collective rights.

In various UN and other forums, indigenous organizations have signaled their concern about negative impacts of major development projects on their environments,

livelihoods, lifestyles and survival. Complaints about loss of land and the lack of control over their natural resources have become widespread. Often these projects entail involuntary displacements and resettlement of indigenous communities that happen to lie in the way of a dam, an airport, a game reserve, a tourist resort, a mining operation, a pipeline or a major highway etc. As a result, violations of civil and political, economic, social and cultural rights occur with increasing frequency, prompting indigenous peoples to launch major protest or resistance campaigns in order to bring public attention to their plight, besides engaging the judicial system or appealing for administrative redress, as well as lobbying the political system. Cases in point:

- The High Court of Australia delivered a devastating decision in 2002, which denied native title rights over any mineral or petroleum resources in the Miriwung-Gajerrong native title claim first lodged in 1994.¹⁵
- A number of Pehuenche Mapuche families of Chile have been evicted from the construction site of the Ralco hydro-electric installation which will flood their riverine communities.¹⁶
- The Sardar Sarovar dam on the Narmada river in India is expected to displace over 320,000 people –among them numerous Adivasi farmers—in what one author has labeled “India’s greatest planned human and environmental disaster”.¹⁷
- The **San Roque** Multipurpose Project in the Philippine Cordillera region is expected to affect several thousand indigenous households, who have protested against the project, but to little avail.¹⁸
- An indigenous community in Kenya reported to the UNWGIP that “today, this destruction of our cultures and land continues, due to so-called development projects such as mining, logging, oil exploration, privatization of our territories, and tourism.”¹⁹
- It was reported that in Ecuador oil activities are being undertaken which result in the break-up of the traditional, cultural and political structures of indigenous communities while facilitating the integration or assimilation of the oil economy in the country.²⁰
- In Japan, the building of a hydroelectric power dam in Nibutani, land sacred to the Ainu people, caused the destruction of traditional agriculture and the submergence of their sacred ceremonial sites. It further disrupted the links between the elders and the young as poverty forced families to sell their lands to the Government, which created divisions in the community.²¹
- The Bakun Dam in Malaysia is reported to cause the forced displacement of 5,000– 8,000 indigenous persons from 15 communities by clear-cutting 80,000 hectares of rainforests.²²
- Thousands of families of the Santhal Adivasi people in the Jharkhand province of India have reportedly been displaced as a result of the extraction of the minerals without proper compensation or economic security.²³
- In Thailand, several highland communities including the Karen people have reportedly been moved out of national parks against their will,²⁴ whereas tourist development in Hawaii resulted in the displacement of indigenous people and their increasing poverty.²⁵ Asian indigenous representatives

expressed to the Working Group on Indigenous Populations that "...conflict and development interventions had resulted in large-scale displacements, internal and external, and serious consequences for [indigenous] children and youth resulted from the implementation of inappropriate and non-consultative development projects."²⁶

African indigenous peoples are not the exception when it comes to displacement from their traditionally owned lands. The creation of national parks or game reserves has forced people off their land. The Boran of Kenya, for instance, testified that four reserves created in Isiolo had been annexed affecting important grazing and watering points previously used by pastoralists. Moreover, the Keiyo indigenous people in Kenya also reported that they have been forcibly evicted from their land without compensation, because of mining activity there.²⁷ Despite judicial appeal to the country's High Court (which was dismissed on technical grounds) and international concern, the Basarwa (Bushmen) in Botswana had their water supply cut off and have no choice but to leave their traditional hunting grounds for resettlement villages, to make way for government-sponsored development activities in the Central Kalahari Game Reserve.²⁸

Evictions or involuntary displacements are so common a feature of major development projects, that the UN Committee on Economic, Social and Cultural Rights comments that forced evictions are *prima facie* incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights.²⁹ Conflicts over development projects on the lands of indigenous peoples lead to further violations of human rights. For instance, forced evictions from their traditional lands may lead to breaches of civil and political rights such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home, and the right to the peaceful enjoyment of possessions. Protesters are often arrested and harassed by the police or private company guards.³⁰

For example, people in Penan (Malaysia) have reportedly been arrested because they were blockading roads trying to stop loggers destroying their traditional forests.³¹ Philippine indigenous peoples have allegedly been physically abused and detained by mining companies and the police in the process of peaceful picketing against mining activities on their traditional lands.³² Sometimes, the strict enforcement of environmental conservation laws prevents indigenous farmers, hunters, fishermen or gatherers from using their traditional land or resources, thus turning them into offenders who may be jailed for attempting to subsist.³³ According to a recent report, oil workers in the Upper Pakiria River region of southeastern Peru forced the Kugapakori to move deep into the Amazon and threatened to arrest and decimate the community with diseases if they refused to leave their home.³⁴ The Cucapá people in northern **Mexico** have been restrained by the authorities from practising their subsistence fishing because of environmental concerns, and the National Commission of Human Rights found that their human rights were being violated and recommended that the Cucapá become participants in the planning and execution of programs for their own social development, including the fishing of protected species for their subsistence.³⁵

Major development projects often entail serious health hazards for indigenous peoples. Environmental degradation, toxic chemical and mineral wastes, the destruction of self-sustaining eco-systems, the application of chemical fertilizers and pesticides are but some of the factors that seriously threaten the health of indigenous peoples in so-called “development zones”. When relatively isolated indigenous communities enter into contact with the expanding national society and monetary economy –as has happened dramatically in the Amazon basin and other inter-tropical areas in recent decades—indigenous peoples also risk contracting contagious diseases, such as smallpox, aids and venereal diseases, as well as psychological troubles.³⁶

Indigenous peoples also argue that “environmental degradation and pollution [are] an integral facet of the health and well-being of indigenous peoples,” citing, for instance, toxic contamination by persistent organic pollutants (POPs) and other industrially produced toxins.³⁷ The Batwa of Rwanda report that deforestation leads to loss of traditional medicinal plants and to increased mortality,³⁸ a complaint also voiced in Canada, Chile, Mexico and Philippines.³⁹ The construction of a dam in the Cuene region in Namibia will reportedly flood the palm nuts and other trees on which the goats, that provide are a vital food source for the riverine Epupa community, feed.⁴⁰ Because of the pollution of their traditional lands, the peoples of the north in Russia report that they have now become “ecological refugees”, whereas mining activities in Peru reportedly cause the pollution of fresh water used by indigenous peoples for food production.⁴¹ Philippine indigenous representatives reported similar environmental, economic and social effects of mining activities in various parts of the country, which they aptly label “development aggression.”

Indigenous peoples have argued at length and legitimately that major development projects that do not take into account their fundamental interests entail violations of their basic human rights. At the UN Working Group on Indigenous Populations they maintain that “the indigenous approach to self-development [is] based on the principles of respect for and preservation of land, natural resources and all elements of the natural environment; consensus in decision-making; mutual respect for peoples’ values and ideology, including sovereignty over land, resources and the environment under natural law.” They also complain that full, meaningful and effective participation of indigenous peoples in development is generally not being considered. For instance, indigenous peoples from Chittagong Hill Tracts in Bangladesh said that “development strategies based on road construction, pacification programmes and socio-economic development programmes, and immigration, remained in the hands of the military and the participation of indigenous peoples in the development was excluded.” The Ogiek of Kenya and the Batwa of Rwanda, referring to the need to get their views across, spoke of difficulties of ensuring effective minority participation in a majority-based democratic system.

On the other hand, some governments make efforts to ensure the participation of indigenous peoples in development. For instance, Canada adopted a number of initiatives in this direction such as participation of indigenous peoples in environmental assessment and regulatory boards and in land claim settlement agreements. It further developed a regional partnering approach to increase the opportunities for indigenous peoples’ employment. New Zealand has launched a capacity building programme designed to assist

Whanau, Hapu, and Iwi Maori communities to identify needs and develop initiatives to achieve long-term economic development.⁴²

- In the eastern Amazon area of Brazil, the influx of settlers and loggers, attracted by multi-million dollar development projects, are threatening the survival of several indigenous peoples, among them the Awá. Elsewhere in the Amazon area, several indigenous peoples are asking for the demarcation of their traditional homelands according to existing legislation, and the return to lands from which they had been forcibly removed in previous years, among them the Kayabi of the Baixo Rio Teles Pires area and a group of Krahô Indians in Maranhão state.⁴³
- In British Columbia the Secwepemc first nation are struggling to protect their traditional land, which they use for multiple subsistence activities, from the planned expansion of a ski resort, on the basis of their Aboriginal Title recognized by the Supreme Court of Canada in 1997.⁴⁴
- In Botswana and Namibia the Bushmen, numbering around 80,000 have been the victims of discriminatory practices and their survival as a distinct people is endangered by official assimilationist policies. Of particular concern is the fact that many groups have been dispossessed of their traditional lands to make way for game reserves and national parks. One non-governmental organization states that “unless fundamental rights such as that to land ownership are recognized urgently, the situation of the Bushmen will deteriorate further.”⁴⁵
- The hunter-gatherer forest dwelling Ogiek of Kenya who number approximately 30 000 people countrywide have long suffered dispossession of their land. They have challenged in the courts the government’s continued intention to excise large parts of land for private development from areas traditionally occupied and held by the Ogiek.

- Malaysia has three main groups of indigenous peoples: the indigenous peoples of Sabah and Sarawak, who are covered by the 'special provisions' in the Constitution and the Orang Asli who are not covered by these provisions, but by specific legislation and administration. Although the 1954 *Aboriginal Peoples Act*, amended in 1967 and 1974, establishes certain rights for the Orang Asli, it mainly contains provisions restricting their rights to control their own lives. Orang Asli can live in specific lands and reserves, but cannot own them; authorities have the right to order an indigenous community to leave an area or stay away; they can revoke or vary any declaration of an aboriginal reserve with no compensation; they have no obligation for compensation for the loss of land, nor any obligation for relocation of the indigenous community or allocation of alternative land. Thus, Orang Asli have no security over their lands, but are reduced to be tenants at will. State authorities do not grant or sell land to the Orang Asli and there is little help for them to obtain individual title to the lands in which they live. Even when their lands are gazetted (officially announced), they have few rights and security. Development schemes and use of land for plantations and logging purposes often prevail over Orang Asli occupation of a certain land. Several land scale planned settlements schemes proclaimed in the 1960 *Land (Group Settlement Areas) Act* are implemented in Orang Asli areas. Their rights over their lands are lost in development schemes, highway and dam projects. Also, Orang Asli do not have any exclusive rights to the natural products growing in their areas. Moreover, matters concerning Orang Asli and their lands are decided without their participation.⁴⁶
- Despite the existence of national legislation concerning the rights of indigenous and tribal peoples, the implementation of these laws in Southeast Asia has been far from satisfactory. Indigenous representatives from the Philippines complain about the slow pace of implementation of the *Indigenous Peoples Rights Act*, adopted in 1997 arguing that the government has not yet allocated funds for its operationalisation. Also, it is argued that the Act fails to fully protect indigenous lands from mining and logging. According to section 56, '*property rights within the ancestral domain already existing and/or vested upon effectively of this act, shall be recognized and respected*'. Thus, leases for logging and mining shall continue to exist, even if an area is identified as an ancestral domain under the Act.⁴⁷
- Other legislation allows turning indigenous lands into national parks and reserves for the sake of eco-tourism. Once free to roam the forest and harvest some products to sell in the lowlands, the new legislation curtails this former freedom of indigenous people severely. Moreover, private interests and foreign investors have established their activities in indigenous regions. In 2001, indigenous representatives reported to the Working Group on Indigenous Populations that two of the country's biggest companies have refused to compensate victims of disasters caused by their mining activities. As indigenous representatives state it, despite many positive points of the Indigenous Peoples Rights Act, other legislation stops its effective implementation.⁴⁸
- Serious issues regarding the non-recognition of, and failure to respect, the rights of

indigenous and tribal peoples have been reported in Suriname. Indigenous and tribal peoples (Maroons), who together comprise around 75,000 persons or about 14% of the total population, occupy the forested areas of the “interior” and suffer various types of discrimination in the national society. The government’s report to the World Summit on Social Development recognizes these peoples as stakeholders in natural resources exploitation in their traditional lands but concedes that their participation in decision taking in those issues “needs to be improved.” Legally, the land they occupy is owned by the state, which can issue land property grants to private owners. Indigenous and tribal lands, territories and resources are not recognized in law. Various indigenous and Maroon communities have been affected by mining (gold and bauxite) and logging activities carried out by national and foreign companies, without their prior consent or participation. As a result, numerous villages have had to relocate against their will and their environment has been disturbed, disrupting their traditional subsistence economy, their health, their social organization and their culture. Despite petitions to the national government and the Inter-American system of protection of human rights (Commission and Court), the indigenous and Maroon communities have not received the protection they require.⁴⁹

The International Labor Organization handles representations made by indigenous peoples concerning alleged violations of Conventions 107 and 169. At a recent session, the ILO’s tripartite committee found that, in view of the importance of collective ownership of land for certain indigenous and tribal peoples, decisions involving legislative or administrative measures that may affect the land ownership must be taken in consultation with them. When communally owned indigenous lands are divided and assigned to individuals or third parties, this often weakens the exercise of their rights by the community or people, and they may end up losing most, if not all, of the land.⁵⁰ Consultation has also been dealt with within the context of a number of situations involving displacement for the purposes of development projects, particularly in a number of Latin American countries as well as in Asia. In each instance, one of the primary concerns of both the tripartite committee and the Committee of Experts of the ILO has been the apparent lack or inadequacy of consultations with the indigenous peoples affected by these projects, and lack of protection of displaced persons. The Committee expressed concern that the burden of such projects should not fall disproportionately on the tribal people inhabiting regions where these projects take place. Measures should be taken to ensure that they are provided with adequate protection.

Indigenous farmers and hunter-gatherers in forest environments are caught up in this maelstrom of change, and they often become uprooted and displaced, virtual “development refugees”, increasing the ranks of migrant laborers both within as well as across national boundaries. Millions of indigenous peasants have thus become itinerant agricultural laborers and migrants to large urban centers, sometimes also across international boundaries.

Indigenous communities and human rights organizations are working together to protect the lands to which they have a claim according to international and national legal standards. A landmark case in this direction is the decision of the Inter-American Court of

Human Rights against the State and in favor of the Awas Tingni indigenous community in Nicaragua, concerning an “*effective mechanism for official delimitation, demarcation and titling of the indigenous communities' properties, in accordance with the customary law, values, usage and customs of these communities.*”⁵¹

Similar judgments have been made by the courts in other states as well, so that indigenous land rights can, and indeed are, in some cases protected by favorable legal and court action. Still, these are exceptional cases, because generally indigenous communities do not have easy access to the judicial system and in a number of countries these remedies are not available to the indigenous at all. It therefore appears that in the future efforts must be made to improve access to the judicial system by indigenous communities and to reform the legal systems when indigenous peoples are denied access to legal recourse.

But even when laws are in principle available to the indigenous, these are not always implemented in their benefit. Numerous states report on recent legislative activity by which indigenous rights are seemingly protected, but indigenous organizations also report that their implementation leaves much to be desired. How to implement existing legislation effectively is as important for the rights of indigenous peoples as the adoption of such legislation itself. Moreover, not all legislation governing the ownership, use and access to land and other natural resources is favorable to the protection of indigenous rights. In some countries recent legislation undermines traditional communal or tribal holdings and opens the way to their dispossession by third parties or other private or corporate interests.

Homelands and territories

While access to land for productive purposes (agriculture, forestry, herding, foraging) by individual members of indigenous communities is certainly of the greatest importance for indigenous people, there are other factors involved as well. Indigenous communities maintain historical and spiritual links with their homelands, geographical territories in which society and culture thrive and which therefore constitute the social space in which a culture can reproduce itself from generation to generation. Too often this necessary spiritual link between indigenous communities and their homelands is misunderstood by non-indigenous persons and is frequently ignored in existing land-related legislation.

Some scholars argue that the recognition of indigenous territorial rights is necessary for the full protection of the human rights and fundamental freedoms of indigenous peoples whereas others seem to fear that such recognition might undermine the unity and integrity of existing states. Nevertheless, in a number of countries such rights have indeed been legislated and experience suggest that national unity is not threatened by these developments.

After a decades-long struggle for legal redress concerning ancient land rights and aboriginal title, the Inuit people of northern Canada, who had linked land claims to territorial autonomy, negotiated a political agreement with the federal government, whereby they achieved the creation, in 1999, of the self-governing territory of Nunavut. Rather than

weaken national unity, this arrangement has strengthened the federal structure of Canada and met the claims and aspirations of the Inuit people.⁵²

In Panama seven indigenous peoples, the Ngöbe, Kuna, Emberá, Wounaan, Buglé, Naso and Bri Bri, who together represent 8.3% of the national population, are mostly concentrated in five legally constituted territorial units (*comarcas*) which make up almost 20% of the country's total land area. These *comarcas* are semi-autonomous regions governed by local councils and traditional governors (*caciques*).⁵³

How can and should existing states coexist with the notion of indigenous territories? Are these notions incompatible? To what extent is the idea of legally recognized indigenous homelands a necessary ingredient for the full enjoyment of the range of human rights by indigenous peoples? These are still open and debated questions, and answers will vary by region and country. While there are a number of practical experiences that illustrate the problems involved, more research is needed to address the particular issues, which are frequently controversial in public discourse. How can constructive arrangements be found between the legitimate concerns of states regarding territorial integrity and national unity, and the equally legitimate concerns of indigenous peoples regarding their collective survival qua peoples linked to the earth in myriad ways within an international system made up of sovereign states?

Civil wars and violence

In some countries, indigenous peoples have been the victims of civil conflicts, involving guerrilla warfare, paramilitary units, military repression and other forms direct and indirect violence which has led to assassinations, forced disappearances, compulsory relocation, refugee flows, detention without due process, destruction of villages and entire communities etc. The human rights situation of indigenous people in the framework of civil conflicts past or present has been extensively documented, but the actual protection of their human rights involves complex and difficult issues. The Maya and Miskito of Central America, the Hmong in southeast Asia, the East Timorese, the Emberá and Huaorani in South America, the Twa in east Africa have all, at one time or another, been hapless victims of civil or international violence and conflict. In some countries, "Truth Commissions" were set up to elucidate the facts, in others special efforts at post-conflict reconstruction and reconciliation are being undertaken.⁵⁴

- Numerous reports document the situation of the Emberá in Colombia who are victims of the civil war between the government of Colombia and the FARC (Fuerzas Armadas Rebeldes de Colombia). Their leaders and spokespersons have been threatened, persecuted, arrested and killed by paramilitary groups, guerrillas, or members of the police or armed forces (not to mention drug-traffic related violence).
- In northern Ecuador the Shuar have suffered fall-out from the violence in neighboring Colombia and the "war on drugs". A fact-finding mission organized by a group of non-governmental organizations in July 2001 reports increasing militarisation in the area, environmental destruction, kidnappings, disappearances and killings of individuals and a general deterioration of social,

economic and cultural conditions in the indigenous communities.⁵⁵

- After thirty years of civil war in Guatemala a peace accord was signed in 1996 in which the rights and culture of the indigenous Maya people were agreed upon. In September 2001 the United Nations Mission to Guatemala (MINUGUA) published a Verification Report, which concludes as follows:

“After more than seven years since the Global Agreement on Human Rights took effect and almost five since the signing of the Agreement on a Firm and Lasting Peace, the Mission feels that little progress has been made in one of the most important areas for the consolidation of a democratic State that is inclusive, participatory and non-discriminatory. The ethnic diversity of the Nation is not yet recognized and valued as one of the greatest riches and the indigenous peoples continue to be subject to strong racial, ethnic and cultural discrimination which deprives them of the enjoyment of their basic human rights.

“The excluding economic and social models, as well as the centralization of public investment have led to a situation in which broad sectors of the population living in rural areas are subjected to conditions of poverty and extreme poverty, especially the great majority of the country’s indigenous peoples. At the same time, the high concentration of indigenous population in regions where the armed confrontation was the most intense has made these peoples the victims of the worst consequences of the conflict which devastated Guatemala for more than 30 years.”⁵⁶

- In the wake of the genocide in Rwanda in the early nineties, members of the Batwa tribe, considered as the indigenous people of the country, have suffered from persecution and reprisals. Some are languishing in jail, accused of acts of genocide in Rwanda. The historic links between Batusti and Batwa made them vulnerable to attack by the Bahutu during the period of genocide. Between December 1993 and March 1994 at least 11 Batwa settlements were burned to the ground, the people attacked and some killed.⁵⁷
- In the Central Highlands between Viet Nam, Laos and Cambodia the indigenous Montagnard/Degar people have been involved in conflicts and become the victims of human rights abuses over a period of many years. Montagnard asylum seekers from Viet Nam have reportedly been expelled from Cambodia and may be at risk. The OHCHR/Cambodia and the UNHCR have monitored the situation closely and the latter is involved in negotiations with Cambodia and Viet Nam concerning Montagnard refugees. Around 600,000 highland refugees are reportedly scattered inside Laos and Thailand without any UN protection, facing arrests, detention and brutality. The 2001 U.N. *Report of the situation in human rights in Cambodia* states that persons from the Central Highlands were driven out from Viet Nam for fear of persecution, because most of them ‘had taken part in Viet Nam protesting the continuous confiscation of land by the Vietnamese Government since the end of the war in 1975’.⁵⁸

In a number of southeast Asian countries the resettlement of indigenous peoples and ethnic minorities in highland areas is the result of “sedentarisation” policies designed to further certain rural development objectives, without sufficient regard to the needs and aspirations of the communities thus affected. Regarding Viet Nam, CERD has expressed concern ‘about the alleged population transfer to territories inhabited by indigenous groups, disadvantaging them in the exercise of social, economic and cultural rights.’⁵⁹ Despite the government of Viet Nam’s repeated denial that there is any racial discrimination in this country, there continue to appear reports of the use of force, land confiscations, forced sterilizations, killings and other forms of persecution of indigenous people in the area.⁶⁰ Similarly, the identity of the indigenous peoples, their cultures and their traditional way of living in Cambodia are reportedly seriously at risk, due to violations of land and citizenship rights. Some of the human rights abuses in the region occur within the frame of internal armed conflict, where anti-terrorism legislation and the granting of emergency powers not only delay the peaceful negotiation of differences but tend rather to further human rights abuses.

In several North African countries (mainly Algeria and Morocco), the Amazigh (also referred to as Kabyles, Touareg, Berbers), who consider themselves as indigenous to these countries, have been asking for the official recognition of their language, culture and identity, as well as the full enjoyment of their civil and political rights. After a rebellion in 1990, which actually started in Niger, the Touareg of Mali entered into a peace treaty with the government in 1991, followed by another one in 1992, to allow them regional self-governance and internal democracy, enabling the government to grant autonomy to the northern areas of the country occupied by the Touareg.⁶¹

While in Africa there is no consensus on the use of the concept “indigenous”, the African Commission on Human Rights has argued for the protection of the human rights of specific sectors of the population, as for instance, in a decision that involves the protection of rights of black populations in Mauritania. The Commission found that

*“language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity....”*⁶²

In dealing with human rights issues raised by indigenous and human rights organizations, it should be noted that while it is individuals who suffer abuses, these violations generally occur because they are members of distinct indigenous communities, tribes or peoples, and that indigenous collectivities are often singled out as victims of abuses such as land loss, environmental destruction, forced displacement, imposed assimilation, ethnocide and so forth. The collective rights of indigenous peoples are thus

often placed at the center of the issues that come to the attention of international agencies such as the WGIP, the ILO, the CERD and the UN Human Rights Commission. These issues are being taken up increasingly by regional bodies as well, for instance the Inter-American Commission on Human Rights and the African Human Rights Commission. Thus emerges a pattern of collective discrimination of entire communities, tribes and peoples.

Indeed, numerous formally recognized legal rights of indigenous peoples are often not fully implemented in practice, either in the courts by way of final adjudication determined by the judiciary, or as a result of new legislative acts which in fact weaken or reduce previously legislated rights. Collective discrimination may occur in democratic states where the rule of law prevails. This concern has been expressed by indigenous participants at the WGIP.⁶³ In relation to this process in the case of Australia, the Committee on the Elimination of Racial Discrimination (CERD), recommended that "...close scrutiny continue to be given to any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be further reduced."⁶⁴

The vulnerability of land and other rights is also a problem besetting the "Small Peoples" in the Arctic regions of Asia, an issue that has been taken up by the Committee on the Elimination of Racial Discrimination (CERD). In these regions, indigenous children face discrimination and other severe problems. In 1999, the Committee on the rights of the child expressed its concern for the living conditions of indigenous peoples in the north and their access to health, educational and other social services. The Committee referred to the growing incidence of societal discrimination against children belonging to ethnic minorities, including indigenous peoples and asked the Russian federation to take all appropriate measures to improve the situation. Notwithstanding the extensive rights of Samis in the Scandinavian countries, Sami women and children still face discrimination, as indicated by the concern expressed by the Committee for the Elimination of Discrimination against Women (CEDAW).⁶⁵

Profiles

Philippines

About 140 indigenous ethno-linguistic groups, representing 15-20% of the total population of 80 million, are present in more than 50 of the country's 78 provinces. They have continuously lived as communities in communally bounded and defined territories, which they have occupied from time immemorial. The legal framework in which indigenous rights must be considered under the Constitution is the Indigenous Peoples Rights Act of 1997, which also established the National Commission on Indigenous Peoples.

For poor indigenous farming communities crucial land rights are addressed by filing legal claims to their own ancestral domains and titles. The process is cumbersome and indigenous representatives perceive that the business interests of private enterprises, which over the years have encroached upon their ancestral domains, are more protected

than their own rights based on land use and continuous occupation. High poverty rates and the lack of basic social services force many indigenous to migrate to poor urban areas where the situation of women and children is of particular concern.

Large scale economic activities such as logging, open-pit mining, multi-purpose dams, agribusiness plantations, and other development projects, are having long-term devastating effects on the livelihood of indigenous peoples and their environment. These activities are often carried out without their prior, free, informed consent as the law stipulates. Communities resist development projects that destroy their traditional economy, community structures and cultural values, a process described as “development aggression.” Indigenous resistance and protest is frequently countered by military force, involving numerous human rights abuses, such as arbitrary detention, persecution, killings of community representatives, coercion, torture, demolition of houses, destruction of property, rape, and forced recruitment by the armed forces, the police, or so-called paramilitaries.

Chile

The Mapuche in southern Chile, who make up more than half of the country’s indigenous population, have lost most of their ancestral territory as a result of the expansion of large agricultural enterprises and the privatization of their land undertaken aggressively by the military dictatorship (1973-1991) and continued to this day. The government’s program to buy land for the Mapuche, under Law 19.253 (adopted in 1993) has been slow and insufficient. Currently small individual Mapuche farms are scattered islets in a sea of large commercial estates. Militant Mapuche organizations insist that more attention be given to their needs and they have staged protests to draw attention to their longstanding and neglected claims. Government authorities have expressed their willingness to address legitimate demands, but they have also cracked down on Mapuche protesters, accusing them unjustly of engaging in violent terrorist acts. Numerous organizers are in jail and the local tensions have created a climate of political confrontation at the national level which does not help the cause of indigenous rights at the present time when a proposal to reform the constitution in order to recognize such rights is stalled in the national congress. The demand for social services for the Mapuche and other indigenous peoples has not been met, and the HDI of the Mapuche (particularly women) is systematically lower than the national average. While intercultural and bilingual education is part of government policy, its results to date have been minimal and indigenous organizations complain that their educational services are below par.

In arid northern Chile small indigenous Aymara and Atacameño communities are being denied the necessary water resources for survival, which large mining interests are able to appropriate according to the law. Their poverty index is high and many younger people move to the cities in search of jobs and income. The preservation of their cultural and linguistic identity is severely threatened.

Easter Island in the Pacific, inhabited by the Polynesian people of Rapa Nui, was incorporated into Chile in the nineteenth century. The remaining indigenous population of about 2000 people is being swamped by the increasing immigration of outsiders who have taken over most of their land. They are asking for more local autonomy and a direct relationship with the national government, rather than with a provincial one as is now the case.

Mexico

The Zapatista uprising in 1994 put the issue of indigenous rights squarely on the national agenda, but a peace accord, signed in 1996, remained on paper. In 2001 the new government passed a constitutional reform on indigenous issues that deviated from the agreements and further stalled the peace process. Subsequently, in 2003 a number of indigenous municipalities, which earlier had declared their autonomy, created parallel government structures to promote their own vision of development as set out in the peace agreements, whereas the government decided to set up a new National Commission for the Development of Indigenous Peoples and a National Institute of Indigenous Languages. At the local level conflicts over land and resources often turn into acts of violence, and indigenous persons frequently become the victims of a corrupt and biased judiciary system. Indicators of social wellbeing are much lower in the indigenous rural communities than in non-indigenous urban areas, leading to massive migrations of Indians to other parts of the country and across the border to the United States. If carried out as announced, the Puebla Panama Plan of the governments of Mexico and Central America may further affect the potential of indigenous communities to survive as distinct cultural entities in a globalized world. Indigenous organizations demand not only respect for their culture and languages, but also of their rights to self-determination and autonomy as well as full participation in the political and social process.

Guatemala

More than half of the national population consists of indigenous, mainly Maya, people who are now officially recognized in the Peace Agreement on the Identity and Rights of Indigenous Peoples, signed in 1995 after thirty years of brutal civil war. Access to land and resources is nevertheless still the main problem faced by indigenous communities, who also continue to be the victims of discrimination and marginalization. Indigenous identity, extreme poverty, poor access to educational and health services are all closely related. One of the areas in which discrimination against indigenous people is especially strong is the administration of justice system, which despite a major effort made by the government in recent years, is still cumbersome and inefficient. Social conflicts are often criminalized, creating dissatisfaction with the judiciary among the indigenous communities. Lynchings of suspected offenders have become commonplace in local communities where the reach of the law is absent. Local police forces are still in many places controlled by members of the paramilitary groups that committed brutal atrocities during the war, and despite the peace agreements and a supervisory mechanism set up by the United Nations, human rights violations are again on the increase.

Numerous social and human rights organizations, including a vibrant Maya movement, have been working actively over the years on an agenda aiming at the full respect and participation of indigenous peoples within the national society. Several indigenous ministers in the government are promoting public policies in the field of indigenous education and culture; Maya languages are spoken by half of the population, and bilingual intercultural education is an objective of the formal educational system.

Japan

The Ainu, the original indigenous inhabitants of the island of Hokkaido, were formally incorporated into the Japanese state in the nineteenth century. Official government policy was to integrate them into Japanese society and culture, a process that over the decades

led to the almost complete loss of Ainu ethnic identity. The Ainu soon became a minority on their own ancestral territory.

The first reaction to preserve their vanishing culture was undertaken about twenty or thirty years ago by Ainu activists concerned about the loss of their language, traditions and identity, who formed the Ainu Association of Hokkaido. They finally achieved a long-hoped for result: the passage of the Ainu Cultural Promotion Law of 1997. While recognizing its merits, Ainu activists state that the Law does not satisfy their aspirations, because it does not formally recognize their social and cultural rights as an indigenous people.

A landmark case for the Ainu was achieved in the Sapporo District Court, which decided in 1997 that the building of the Nibutani Dam on the Saru River illegally affected traditional sacred and burial sites of Ainu communities. Ainu people, particularly women, report incidents of discrimination against them in daily activities. Nowadays Ainu cultural activists undertake a series of activities at the community level to preserve knowledge of the Ainu language and their arts and traditions. They hope for more government support and understanding by the rest of society (as well as other Ainus), because they are aware that their survival as an indigenous people is at stake in this process.

Canada

Though they represent only a small fraction of the total population, Canada's First Nations claim that as the original inhabitants of the country they have been marginalized and discriminated against in the Canadian Federation. Having lost their former sovereignty, they have had to endure endless pressure on their territories, land and resources, a condition which has transformed most of them into wards of the state, depending on governmental subsidies and social services for their survival. Many First Nations have gone to the courts to defend their aboriginal treaty rights and their aboriginal land title claims, where sometimes they have indeed received favorable judicial decisions. They demand equal treatment with the other two "founding nations" of Canada and claim the right to self-determination. Some of them are involved in struggles to retain control over and access to some of the last natural resource domains on the continent (forests, lakes, streams, fisheries) that are being coveted by powerful economic interests. The insistence of the First Nations on their treaty rights is essential for their survival as culturally distinct peoples.⁶⁶

Education and culture

Indigenous peoples tend to maintain a cultural distinctiveness that distinguishes them clearly from other groups in society and from those sectors that are usually identified by the concept of "national culture". There are numerous features associated with this cultural distinctiveness, the main one being the use of their own language, which is not only a medium of communication, but also a crucial element in the structuring of thought processes and in providing meaning to the natural and social environment of any person. A language community is also an epistemic community, that is, it links people through their participation in a common medium and in shared understandings. Indigenous language communities

provide their members with the full range of cultural meanings attached to the use of a shared idiom. Most indigenous languages are very ancient and while they have undergone changes – just as any other language—they are transmitted from generation to generation and thereby help preserve the continuity of a language community and its culture.

Language rights are an essential element of the cultural rights that all persons enjoy under international human rights standards. The right to one's own language pertains not only to individuals but also to communities, nations and peoples. If a language community as such is denied the collective and public use of its language (for example, in schools, the media, the courts, the administration) then any individual's right to this language is severely curtailed. Therefore, language rights are nowadays proclaimed as human rights, which entail respect, protection and promotion by others and especially by public authorities. Numerous states have now adopted legislation concerning the protection of regional, minority or indigenous languages. For example, in New Zealand, the Education Act ensures funding for Maori pre-schools, primary schools, secondary schools and universities. The impetus for this came from Maori mothers insisting that Maori reclaim the education of their children from birth through to adulthood.

In historical perspective, however, state policies have not always recognized or protected the languages spoken by indigenous peoples or linguistic minorities. On the contrary, the intention of official linguistic, educational and cultural policies has often been the assimilation of such groups into the national mainstream, thus leading to language and cultural loss. It has only been in recent years that these processes have been seen as being in violation of the human rights of the members of such linguistic communities, and they have sometimes been considered as a form of ethnocide.⁶⁷

In some countries indigenous languages are recognized as national languages, at least in the regions in which they are widely used, and sometimes they have been accorded official status of some kind or another. In other cases, they may no longer be actually repressed but only tolerated as a private medium of communication but are not accorded any official status. In numerous indigenous linguistic communities around the world, it is common to find members of the older generation who maintain their language whereas youth and children are more prone to suffer language loss, particularly when assimilationist policies are carried out. Article 30 of the Convention on the Rights of the Child is clear: *“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”*

The denial of the right to practice one's own culture, religion or language may take many forms. Often when the social and institutional environment is unfavorable for the preservation and development of indigenous cultures and languages, this right is in fact denied even when there is no formal prohibition or restriction involved.

The use of the mother tongue in education and public communications is an important issue for indigenous communities. In contrast to the formerly widely extended and dominant idea of formal schooling as an instrument of assimilation and acculturation, through which indigenous children learn to speak the official national idiom and replace

their native tongue, current thinking on the subject tends more towards the opposite direction. Bilingual and intercultural schooling has become the object of educational policy for indigenous communities in many parts of the world. Specialists in education agree that early schooling in both the native mother tongue and the official language of the state is of great benefit to indigenous children, who may become proficient in the vehicular language of the wider society without losing their vernacular idiom.

Nevertheless, despite the best of intentions, the teaching of native tongues in schools has its difficulties. In the first place, many indigenous languages lack their own alphabets and do not have a written tradition. Secondly, the formal teaching of the vernacular tongue and of the vehicular or official idiom as a second language requires special training and pedagogical skills which indigenous teachers often lack. In Mexico, for example, as well as in other Latin American countries where official bilingual education in indigenous areas has a history of some decades, the output level of students in bilingual schools is still below that of the national average. Furthermore the preparation of textbooks and teaching materials in indigenous languages usually lags behind those in areas where the national or official language is taught exclusively. In many countries school administrations (either public or private) are not set up to handle indigenous bilingual education effectively. To that extent, the indigenous right to education in their own languages is not being adequately implemented and requires serious attention in the future.

Even more problematic is the idea of multicultural or intercultural education, because this involves not only local schools but also the regional and national school systems and the educational philosophy of any country where there are indigenous peoples. The notion of multicultural and intercultural education leads to a complete revision of educational contents and methods in countries where it is applied. It basically means that the cultural diversity of the country be reflected in the curriculum and the preservation and promotion of cultural diversity become an objective compatible with democratic governance and the enjoyment of human rights by all. In some cases this approach will require the revision of traditional ideas held by majority or dominant cultural groups about national culture and identity. Indigenous peoples' organizations often need to remind the world that their own cultural specificities are also contributions to a universal culture and not mere relics of a disappearing past. The rights of indigenous peoples to culture and education (the whole gamut of cultural rights, in fact) include the right to the enjoyment and protection of their own cultures in a wider, multicultural world.

Multiculturalism

The preservation of indigenous cultures (including tangible and intangible elements, arts and artifacts, traditions, knowledge systems, intellectual property rights, ecosystem management, spirituality and so on) is an essential component of a comprehensive indigenous human rights package, but in fact the preservation of indigenous cultures is not a natural process at all. The contrary is more likely, because as has been well documented in the specialized literature on the topic, public policies have frequently been designed to eliminate and transform indigenous cultures because their existence has often been considered as detrimental to the idea of national integration and development. Many countries adopted specific policies to “assimilate” indigenous peoples into the wider

“national” culture within the framework of cultural and social modernization. While such ideas no longer command the support they used to have, and whereas more and more States adopt positions favorable to multiculturalism, there are still numerous cases in which the cultures of indigenous peoples are under strong outside pressures to change, when they are not actually on the verge of extinction.

The idea of multiculturalism does not imply the artificial preservation of indigenous (or tribal) cultures in some sort of museum, but only the right of every human community to live by the standards and visions of its own culture. Certainly cultures change over time, but whether there will ever be one universal culture or any number of interrelated local, regional, ethnic, and national cultures, only time will tell. In human rights terms, it is clear that cultural rights pertain to every individual, yet these rights can only be fully enjoyed by all persons in community with other members of the group. Thus indigenous peoples require guarantees that their cultures will receive the respect and consideration that other groups in society also enjoy, and that they will have the freedom to develop their cultural creativity in communion with other members of their group. At the international level, these issues have been taken up by UNESCO and by WIPO with regard to the cultural heritage and intellectual property of indigenous peoples.

The cultural rights of indigenous peoples are also addressed in a number of national legislations, though not always with the clear intent to promote and enhance them. For example, in the Philippines, the Constitution includes several provisions concerning the rights of the ‘cultural communities’, and Article IV states that *‘the State shall recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions’*. Most Latin American constitutions now have provisions affirming the right of indigenous communities to preserve their own cultures and stating the obligation of governments to protect them. But here, as elsewhere, the devil is in the details. Implementing legislation and practice usually lags well behind the principles set out in the constitutional texts.

Since the nineteen eighties a number of Latin American states have reformed their political constitutions, many of them recognizing for the first time indigenous peoples as deserving of special attention by the state and as holders of specific rights relating to land, language, culture, social organization and other features. Some texts are more specific on indigenous rights whereas others refer only to the protection and preservation of culture. The right of peoples to self-determination and autonomy is dealt with in only a few of these documents. Implementing legislation has been slow in coming and indigenous organizations tend to point out that in many instances the constitutional texts are not actually being complied with by the authorities.

It was pointed out above that indigenous cultures are closely linked to the concept of land rights and the occupation and possession of territorial homelands. A question frequently asked of indigenous peoples is whether their cultural identities can survive in a de-territorialized environment, that is, in dispersed settlements and urban centers where indigenous migrants live interspersed with non-indigenous populations. The answer to this

question depends on particular circumstances and is contingent on the specific definition of indigenous identity in each case. It may be argued that to the extent that cultural rights are universal, they are not subject to any kind of territorial restriction. The right of any individual or group of individuals to preserve, practice and develop their own culture is not dependent upon territoriality but rather related to self-identification. Indigenous identities have indeed been diluted in the process of urbanization, but under certain circumstances the urban environment is favorable to the emergence of new kinds of indigenous cultural identities. The majority of Mapuche Indians live in Chile's capital, Santiago, where they have organized strong militant political, social and cultural associations based on their ethnic identity. Some Mexican indigenous migrant groups have formed ethnic associations that actually straddle the US-Mexican border in urban environments, turning into a new type of "transnational community". In the Philippines about half the population of Baguio City, the major urban center of the Cordillera, consists of immigrants from outlying indigenous villages, just as Quetzaltenango in Guatemala has a strong Kiché (Maya) identity. In other metropolitan centers ethnic neighborhoods are able to maintain indigenous identities over several generations.

How the linguistic, educational and cultural rights of indigenous peoples are being protected or not under varying circumstances is an empirical question that needs more comparative research. UNESCO has recommended that states take special measures to ensure the protection and promotion of indigenous cultures. The African Commission on Human and Peoples' Rights has set out guidelines that require states to take specific measures aimed at the promotion of cultural identity and the *"awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the populations"*.⁶⁸

A major issue facing indigenous peoples is the protection of their cultural heritage, including traditional knowledge, skills and techniques of all kinds. Frequently the topic is dealt with under the label of "intellectual property" but this concept has commercial connotations that are unrelated to the way indigenous peoples conceive of their culture. One study on the subject concludes that the distinction between cultural and intellectual property is, from indigenous peoples' viewpoint, an artificial one and not very useful. Industrialized societies tend to distinguish between art and science, or between creative inspiration and logical analysis. Indigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world. Since the ultimate source of knowledge and creativity is the land itself, all of the art and science of a specific people are manifestations of the same underlying relationships, and can be considered as manifestations of the people as a whole.

Cultural heritage "is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of

the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.”⁶⁹

In 2000 the UN organized an international seminar on the protection of the cultural heritage of indigenous peoples which adopted a set of principles and guidelines, among others the following:

“1. The effective protection of the heritage of the indigenous peoples of the world benefits all humanity. Its diversity is essential to the adaptability, sustainability and creativity of the human species as a whole.

2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organization.

3. Indigenous peoples should be the source, the guardians and the interpreters of their heritage, whether created in the past, or developed by them in the future.

4. Recognizing, respecting and valuing their customs, rules and practices for the transmission of their heritage to future generations is essential to indigenous peoples, their identity and dignity.

5. Indigenous peoples' ownership and custody of their heritage should be collective, permanent and inalienable, or as prescribed by the customs, rules and practices of each people.”⁷⁰

- “A song, for example, is not a "commodity", a "good," or a form of "property," but one of the manifestations of an ancient and continuing relationship between the people and their territory.. [and therefore] it is inconceivable that a song, or any other element of the people’s collective identity, could be alienated permanently or completely.”⁷¹
- The Cultural Heritage Act No. 3501 (1979) of Ecuador is applicable to all that indigenous peoples themselves regard as "recurrent and valid means of expression and identification of their culture".
- In Sweden the Sameting, an elected governmental authority of Sami people established in 1992, decides how to allocate national funding for the promotion of Sami culture and the Sami language. Sami cultural heritage is included in the curricula of all Swedish schools, and Sami communities are free to establish their own schools. All abandoned sacred and ceremonial sites are protected by Swedish law; however, Swedish law does not distinguish between the intellectual property rights of Sami and other citizens.

Convention on Biological Diversity

The wealth of knowledge that indigenous communities possess concerning the environment, the plants and animals of their traditional habitat and the multiple uses that such knowledge can be put to is one of the principal assets of indigenous cultures. During colonial times and up to fairly recently such knowledge was widely used and shared, particularly in connection with traditional herbal medicine, nutrition, colors used for weaving textiles and making handicrafts, hunting, fishing and gardening etc. As a result of the dissemination of the technological and scientific achievements of the post-industrial society, however, much of this knowledge was neglected and discarded, when not actually rejected and its use forbidden by authorities of all stripes who wanted to “modernize” their countries. For example, herbal specialists were in some parts forbidden to practice their skills openly, or access to certain locations necessary for such practice was refused to members of indigenous communities on legalistic grounds.

Indigenous people are demanding respect for their traditional knowledge and the freedom to use the products of their environment according to custom. Moreover, some indigenous communities have been able to merchandise such products and thereby increase their incomes. More recently, multinational corporations have discovered the commercial potential inherent in much of this traditional wealth, and the world race is on to patent, privatize and appropriate what has been part of the cultural heritage of indigenous peoples from time immemorial. Once again, the indigenous are being dispossessed of their legitimate collective property, only this time within the framework of multilateral commercial and financial agreements arranged by corporations, universities and governments. This dramatic reversal of fortunes is deeply hurting indigenous peoples the world over, and only through concerted international action will they be able to save what little is left of their cultural heritage.

One such favorable development is the Convention on Biological Diversity (1992), which has so far been ratified by 134 states. The Convention provides that states shall:

"... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices" and "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

Nevertheless, there is still a long way to go from the text of this Convention to its actual implementation by states at the national level.

Social organization, local government, customary law

Cultural identities are sustained not only by a discrete list of “elements” that every member of a cultural group “carries along” as he/she goes through life. In fact, these

elements may vary from individual to individual and they may, and frequently do, change over time. So it is not the contents of a culture which defines any group's identity. It is rather in the field of social organization that identities are wrought and sustained. To the extent that a system of social relations defines the identity of each individual member and his/her link to the group as a whole, the social institutions and relationships characteristic of a given community are the necessary frame of reference for any culture to thrive. Indigenous communities know this well, because when they claim the right to maintain their social organization in the face of the pressures of the wider society, they are actually appealing for the preservation of their culture.

Too often the larger society has taken the stance that indigenous social institutions are contrary to the national interest or, worse, are morally reprehensible. This position was taken for a long time by the dominant institutions in colonial empires. The question is frequently debated whether adherence to indigenous communal institutions may lead under certain circumstances to the violation of individual human rights (for example, the rights of women and girls).

Local community organization is often upheld by adherence to a generally accepted system of customs and *mores* or customary law, which in numerous countries is not accorded any formal legal recognition and may in fact be considered as competing with the formal state legal system. Do community members who accept the norms of unwritten customary law stand in violation of a country's legal system? Does the application of customary law violate nation-wide legal norms? Yet what about situations in which the application of positive law entails a violation of community norms and customs? Might that not constitute a violation of human rights as well?

These issues are dealt with in different ways by individual states (and by different scholars) and the various solutions run from some form of accepted legal pluralism to the absolute rejection by the official legal system of any kind of indigenous customary law, with a number of possibilities in between. Under what circumstances might the application of indigenous legal systems (customary law) threaten internationally accepted standards of individual human rights? And conversely, under what circumstances could the limitation or elimination of indigenous customary law violate the human rights of members of indigenous communities? These are complex issues about which there is much debate and little agreement, which need to be addressed objectively and without bias.

Since time immemorial, local communities have evolved some form of local government within the structure of a wider polity into which they have been integrated as a result of historical events. Indigenous communities are no exception. Throughout history, local communities have struggled to defend their autonomy against outside encroachment, sometimes successfully, sometimes not. To the extent that indigenous people were incorporated into state structures not of their own choosing during times of colonization or the expansion of the modern nation state, their local forms of government were modified or adapted to suit the interests and needs of the state, creating tensions that have often led to conflict and violence.

Indigenous organizations seek to preserve or regain the right to local (and sometimes regional) self-government; they consider this right as part of the fundamental freedoms which international law accords to all peoples. Through negotiations and treaties, constitutional reform or special legislation, indigenous peoples have been able in numerous instances to establish agreements with states regarding this right to self-government. In other cases, however, this has not been possible, and national- or regional-level government units still take it upon themselves to administer the affairs of indigenous communities. Indigenous affairs ministries, departments or bureaus often have specific mandates to that effect and local indigenous governments need to deal with these institutions rather than with those of the national political or administrative system in general. Indigenous organizations may consider this to be a form of discrimination, whereas governments argue that such arrangements are designed for the protection of indigenous people themselves, in keeping with their best interests (as defined by the state).

Recognizing these issues, the Draft Declaration on the Rights of Indigenous Peoples states in article 33: *“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.”*

Poverty, levels of living, sustainable development

As already noted, indigenous people are very often found among the poorest strata in society, their levels of living are considered to be sub-standard in many respects. Studies have shown high levels of infant mortality, lower than average nutritional levels, lack of public services, difficulty of access to social welfare institutions, lower than average delivery of the services provided by such institutions, inadequate housing and shelter and other indicators associated in general with the idea of human development.

Many states have recognized these problems and promote special policies and measures designed to improve the levels of living of indigenous people. In other areas public policies are not oriented in this direction and the needs of indigenous populations have been neglected. Numerous statements made by indigenous representatives to the WGIP over the years, and other information gathered by independent research bodies, confirm this tendency. For instance, the Committee on Indigenous Health of the Indigenous Peoples’ Caucus expressed its concern at the nineteenth session of the WGIP that the gap between the health of indigenous peoples and the rest of society is widening, despite all efforts by national governments and international agencies.⁷²

The development of Latin America has been highly unequal, and the benefits of economic growth are concentrated at the upper end of the social and economic scale. While poverty and extreme poverty are widespread all over rural and urban Latin America, the indigenous peoples are mainly concentrated at the lower levels. The World Bank reported in the nineties that the living conditions of the indigenous people were abysmal, and that their poverty was persistent and severe, especially when compared to those of the non-indigenous population.⁷³

What has been done and what can be done? For many decades national governments, multilateral funding agencies, non-governmental organizations and private businesses have

designed and implemented development projects at the local and regional levels in order to promote the economic and social development of indigenous communities. Whilst ILO's Convention 169 states in article 7.1: "*The peoples concerned shall 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 lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development,*" unfortunately, due to multiple reasons, this does not always occur. In September 2003 a Korean farmer killed himself in front of the posh convention center in Cancun, Mexico, where the World Trade Organization was deciding the fate of hundreds of millions of poor peasants -among them most of the world's indigenous peoples-. The unrestricted tearing down of tariffs on agricultural and food products demanded by the leaders of the most powerful economies, together with continued high subsidies that rich countries pay their own farmers, has sentenced these millions of poverty-stricken farmers in the poor countries to a slow death. Unless the principles of Convention 169 are adhered to and implemented, the condition of poor indigenous farmers the world over will only deteriorate further.

Recent experience has shown that economic growth must go hand in hand with social concerns if the results are to be effective and make a difference in the lives of individuals and communities. A new approach seems to be taking hold in international discourse: *human-rights centered sustainable development*, meaning that unless development can be shown to improve the livelihoods of people within the framework of the respect for human rights, it will not produce the desired results. This approach may be of particular importance for indigenous peoples whose human rights have frequently been neglected when not actually impaired by traditional economic development approaches.

There is much international debate on these issues, and it is useful to place the human rights concerns of indigenous people into this frame of reference. Particularly relevant to this topic are the reports of the recent sessions of the WGIP (2001-2003), devoted to the right to development and to globalization and their implications for indigenous people. A review of the numerous statements made by government delegates and representatives of indigenous peoples and NGO's at these sessions points to the serious concerns expressed about human rights issues in the process of development.⁷⁴

Political representation, autonomy, self-determination

Indigenous self-organization has made considerable progress over the years. From the local level to the regional, national and international levels indigenous peoples' associations have become social and political actors in their own right, as witnessed by their continuing participation in the yearly sessions of the WGIP. They speak with many voices but on the fundamental issues of their human rights, their objectives and their aspirations they are usually in remarkable agreement. In some countries they are now recognized as legitimate partners and interlocutors of governments and other social sectors on the national scene. In other countries the going has been more difficult, their organizations may not be officially recognized and their human right to free association may not be completely respected. To the extent that the rights of indigenous peoples themselves are sometimes neglected and ignored within existing power structures, their

organizations and other human rights advocacy associations that take up their cause may also become victims of abuses and be denied adequate protection under the law. Numerous communications to this effect have been addressed over the years to the UN Office of the High Commissioner on Human Rights (UNHCHR), the ILO Committee of Experts and, among others, the Inter-American Commission of Human Rights.

Beyond respect for their human rights, indigenous organizations also claim the right to political representation qua indigenous peoples at the national level, an issue which may or may not be compatible with existing political structures. More insistent has been the demand for some kind of autonomy, and in a number of countries this has been achieved whereas in others it is not contemplated in current legal arrangements. A case in point is the Constitution of the **Philippines** which recognizes the right of Muslim and Cordillera peoples to self-determination in the form of autonomy, but the latter are still awaiting the creation of their autonomous region.⁷⁵

One of the more controversial topics surrounding the human rights and fundamental freedoms of indigenous peoples concerns the much debated right of peoples to self-determination. In their statements to international forums indigenous representatives demand the recognition of their right to self-determination as peoples. Equally insistently, some states argue that such a right should not extend to the indigenous. The concept of self-determination is closely linked to the use of the term “peoples”. There does not appear to be a clear and unequivocal definition of this term in any of the multiple international legal instruments that have been adopted over the last half century nor, for that matter, in national legislation. Without a clear definition that may command a broad consensus, it is not obvious what the debate is really all about. In political science and legal literature the term is usually linked to all the citizens of an existing state, whereas in more sociological texts the notion of a “people” refers to certain commonalities, shared identities and identifications.

The principle of the right of peoples to self-determination has been present in international debates for almost a century, and the current claims to this right by indigenous organizations is only the latest instance of its use in the expanding debate about human rights. Whereas some national constitutions do indeed refer to the right of self-determination of indigenous peoples (eg. Mexico’s reformed constitution of 2001), other legislations avoid it, and the controversy relates to the meaning given to the term in both international and national law. Chile’s Congress, for example, has voted against several initiatives that would constitutionally recognize the country’s indigenous peoples as such. Africa provides another example of conceptual difficulties. In 1981 the Organization of African Unity approved the African Charter on Human and Peoples’ Rights, and yet nowhere is the term “peoples” defined. Specialists continue to debate whether the term should apply only to all citizens of a given State or whether it has other applications as well (such as indigenous peoples). It is this debate which is holding up the adoption of the Declaration on the Rights of Indigenous Peoples in the United Nations.

NOTES

- ¹ “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.” (EC/N.4/Sub.2/1986/7/Add.4, pa. 379)
- ² Convention 169 of the ILO applies to: “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.”
- ³ “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.” (Art. 9) and “Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions.” (Art. 32)
- ⁴ UN Doc. E/CN.4/Sub.2/AC.4/1996/2. A similar approach is followed by the Indigenous Peoples of Africa Coordinating Committee (IPACC). See IPACC, *Annual Report (November 1998 to October 1999)* Appendix, 22
- ⁵ CERD/C/304/Add. 54.
- ⁶ See A/RES/55/95 of 28 February 2001
- ⁷ Jocelyn Carino, Overview paper presented to the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, OHCHR, United Nations, 2001, p. 4.
- ⁸ CSD Indigenous Peoples’ Caucus, “Dialogue Paper by Indigenous Peoples,” in Indigenous Affairs 4/01, IWGIA, p.14.
- ⁹ World Commission on Dams (2000). Dams and Development. A New Framework for Decision-Making. The Report of the World Commission on Dams. (See chapter 4, “People and Large Dams-Social Performance”, particularly the section on Indigenous Peoples). Available on www.dams.org .
- ¹⁰ Report of the 20th session of the WGIP, E/CN.4/Sub.2/2002/24, Para. 26.
- ¹¹ See Article 20 of the draft United Nations Declaration on the Rights of Indigenous Peoples.
- ¹² Paul Kaufmann, *Wik, Mining and Aborigines*, pp. 15-16, Allen and Unwin.
- ¹³ Jocelyn Carino, pp.11 -12.
- ¹⁴ Decision T-652-98 brought by the Embera Katio people with regard to the Urrea dam projects.
- ¹⁵ “No Native Title Over Minerals Or Petroleum,” www.smh.com.au/articles/2002/08/08/1028157983122.html.
- ¹⁶ The author visited the site in July 2003.
- ¹⁷ Cf. Rodolfo Stavenhagen, Second Annual Report to the Human Rights Commission of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People, E/CN.4/2003/90, para. 44-52
- ¹⁸ Report presented to the author by Ápit Takó, Alliance of Peasants in the Cordillera Homeland and Tebtebba, the Indigenous Peoples’ International Centre for Policy Research and Education, October 2002.
- ¹⁹ Statement of Loodoariak Community Land and Development Programme in Kenya to the 19th session of the WGIP.
- ²⁰ Report of the Workshop on “Indigenous Peoples, Private Sector Natural Resources, Energy and Mining Companies and Human Rights,” E/CN.4/Sub.2/AC.4/2002/3, Para. 104, p. 23.
- ²¹ Report presented to the author during his visit to the site in November 2002.
- ²² CSD Indigenous Peoples’ Caucus, “Dialogue Paper by Indigenous Peoples,” in Indigenous Affairs 4/01, IWGIA, pp.15 – 16.

- ²³ Statement of the representative of the Santhal Advasi People to the 19th session of the WGIP.
- ²⁴ Chumpol Maniratanavongsiri, “The Karen Response to Thai Conservation Policies,” in CSD Indigenous Peoples’ Caucus, “Dialogue Paper by Indigenous Peoples,” in Indigenous Affairs 4/01, IWGIA, p.60.
- ²⁵ Report of the 19th session of the WGIP, Para. 60 – 61.
- ²⁶ Report of the 18th session of the Working Group on Indigenous Populations (E/CN.4/Sub.2/2000/24), Para.
- ²⁷ Statement of the Keiyo Indigenous Peoples of Kenya to the 19th session of the WGIP.
- ²⁸ Press Release III of the negotiating team, the mandated representatives of the residents of the Central Kalahari Game Reserve (CKGR), April 2002. See also Note No. 01/02/Gen/E/15 II (38) G2 of the Permanent Mission of Botswana in Geneva. The author visited one such village on a personal inspection tour.
- ²⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 7, The right to adequate housing (art. 11(1) of the Covenant): forced evictions.
- ³⁰ Indigenous communications to the WGIP and the Special Rapporteur on the Rights of Indigenous People; personal accounts provided to the author in Chile, Mexico, Philippines, Canada and elsewhere.
- ³¹ Statement by Tana Uma Amee to the 19th session of the WGIP.
- ³² Report of the Workshop on “Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights,” E/CN.4/Sub.2/AC.4/2002/3, Para. 60, p.15. Similar incidents were reported directly to the author during a visit to the Philippines in December 2002. (E/CN.4/2003/XX/Add.3).
- ³³ Cf. Robert K. Hitchcock, «Decentralization, Natural Resource Management and Community-Based Conservation Institutions in Southern Africa » p. 39, Indigenous Affairs 4/01, IWGIA; also, personal accounts provided to the author in *inter alia* Botswana, Canada, Chile, Mexico and Philippines.
- ³⁴ Cultural Survival Indigenous News, Headlines and Spotlights, 9 August 2002.
- ³⁵ Comisión Nacional de los Derechos Humanos, Recomendación núm. 08/2002, 30 de abril de 2002.
- ³⁶ For reports on Australian aborigines see The second annual report of the Aboriginal and Torres Strait Islander Social Justice Commissioner of Australia, 1994, p.106. On the relation between uranium mining and the health of local Adivasi children in Jharkhand, India, see “The Miner’s canary: Indigenous Peoples and Sustainable development in the Commonwealth,” Commonwealth Policy Studies Unit, p.32.
- ³⁷ Report of the 18th session of the Working Group on Indigenous Populations (E/CN.4/Sub.2/2000/24), para. 29-30.
- ³⁸ *Ibid.*, para 31.
- ³⁹ Personal communications during *in loco* fact finding missions
- ⁴⁰ The Proposed Construction of a Hydropower Scheme on the Lower Cuene River, Indigenous Affairs 2/98, IWGIA, p. 6. It is estimated that “*the inundation of the Cuene basin at Epupa would destroy the riverine forests. It would result in loss of an annual crop of hundreds of tons of the palm nuts and would in addition bring an end to gardening in the fertile soils along the riverbank.*”
- ⁴¹ Report of the 18th session of the Working Group on Indigenous Populations (E/CN.4/Sub.2/2000/24), para. 31, and Report of the 19th. Session of the WGIP (E/CN.4/Sub.2/2001/17), para. 87 and 106.
- ⁴² Report of the 19th. Session of the WGIP (E/CN.4/Sub.2/2001/17), para. 39.
- ⁴³ See the website of Conselho Indigenista Missionário: www.cimi.org.br
- ⁴⁴ Information presented to the author directly during fact-finding mission in Canada, March 2003.
- ⁴⁵ Statement by Survival International to the World Conference Against Racism, August 2001
- ⁴⁶ Orang Asli are called all the indigenous groups of peninsular Malaysia. For more information, see Minority Rights Group, *Forests and Indigenous Peoples of Asia*, London: MRG, 1999
- ⁴⁷ Dario Novellino, ‘The Ominous Switch: From Indigenous Forest Management to Conservation- The case of the Batak on Palawan island, the Philippines’, Marcus Colchester and Christian Erni (eds), *Indigenous peoples and Protected Areas in South and Southeast Asia*, IWGIA Document No. 97, Copenhagen 1999, 250-297.
- ⁴⁸ Human Rights Watch, Asia, *The Philippines, Human Rights and Forest Management in the 1990s*, April 1996; also, Survival of Tribal Peoples, *Mountains of gold, the mining threat to tribal peoples in the Philippines*, Survival 1996; also see Victoria Tauli-Corpuz, ‘The resistance of the indigenous peoples in Asia against racism and Racial Discrimination’, (2001) 1 *Indigenous Affairs*, 43-53.
- ⁴⁹ Forest Peoples Programme, Failure of the Republic of Suriname to Recognize, Guarantee and Respect the Rights of Indigenous and Tribal Peoples to Lands, Territories and Resources, to Cultural Integrity and to be

Free from Racial Discrimination. Formal Communication made Pursuant to Commission on Human Rights Resolution 2001/57.

⁵⁰ Report adopted by the Governing Body at its 271st Session (March 1999), regarding the representation made by the General Confederation of Workers of Peru, alleging non-observance of Convention No. 169 by Peru. See also Report adopted by the Governing Body at its 271st Session (March 1999), regarding the representation made by the Bolivian Central of Workers, alleging non-observance of Convention No.169 by Bolivia.

⁵¹ Inter-American Court of Human Rights, August 2001 (Judgment Summary and Order of the Inter-American Court of Human Rights. Issued 31 August 2001. In the case of The Mayagna (Sumo) Indigenous Community of Awas Tingni vs. the Republic of Nicaragua)

⁵² Website www.nunavut.com

⁵³ Congresos y organizaciones indígenas de Panamá, *Informe de la Situación de los Derechos Humanos de los Pueblos Indígenas de Panamá*, Panama, June 6, 2001 (Report presented to the Inter-American Commission of Human Rights).

⁵⁴ In Guatemala the peace accords of 1996 established a truth commission which documented massive atrocities committed by the military against the indigenous Maya during thirty years of civil war, while the government of Chile set up a “Commission on Historical Truth” in 2001, chaired by a former president of the republic, to study the situation of the country’s indigenous people. (It is to present its report in October 2003)

⁵⁵ Communication “Taruka Report”, presented to the author by a delegation of Ecuadorean Indians.

⁵⁶ United Nations Verification Misión in Guatemala. Verification Report. THE INDIGENOUS PEOPLES OF GUATEMALA: OVERCOMING DISCRIMINATION IN THE FRAMEWORK OF THE PEACE AGREEMENTS, September 2001.

⁵⁷ Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People, First Annual Report to the Commission on Human Rights, E/CN.4/2002/97

⁵⁸ See <http://www.hrw.org/press/2001/05/cambodia-0521.htm>; Statement by Dr. Vuag Pobzeb of the Lao Human Rights Council, presented in the 2001 UN working group on indigenous populations. Cf. *Situation of Human Rights in Cambodia, Report of the Secretary-General*, A/56/209, (26 July 2001), para. 73.

⁵⁹ CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Viet Nam*. 15/08/2001.CERD/C/59/Misc.21/Rev.3, para. 14.

⁶⁰ CERD/C/SR.1481, para. 4. See reports of the Montagnard Foundation presented to the UN; also see International Commission of Jurists, *Report by the Western Australian Branch of the International Commission of Jurists concerning sterilisations of Ethnic Montagnards in the Central Highlands of Vietnam: October 2000*

⁶¹ E/CN.4/2002/97

⁶² Ibid.

⁶³ Report of the 18th session of the WGIP, E/CN.4/Sub.2/2000/24, Para. 165.

⁶⁴ Concluding Observations by the CERD: Australia. 19 April 2000. CERD/C/304/Add.101. (Concluding Observations/Comments).

⁶⁵ CERD/C/SR.1246 of 5 March 1998; CRC/C/15/Add.110, of 10 November 1999, para. 65; A/56/38,paras.319-360 of 31 July 2001, para. 356. Also Russian NGO intervention at the meeting of the WGIP in July 2001.

⁶⁶ The brief profiles of Philippines, Chile, Guatemala, Mexico, Japan and Canada are based on the author’s observations during fact-finding missions to these countries in 2002-2003.

⁶⁷ Ethnocide is a process of cultural change and destruction as a result of specific policies that undermine a cultural community’s ability for self-preservation

⁶⁸ African Commission, General Guidelines Regarding the Form and Contents of Reports to be Submitted by State Members regarding the Meaning, Scope and Weight of the ‘Rights of Peoples’ Recognised by Articles 17(2), 19 to 20 of the Charter. 1990: 417-8.

⁶⁹ Erica-Irene Daes, “Study on the protection of the cultural and intellectual property of indigenous peoples”, E/CN.4/Sub.2/1993/28

⁷⁰ E/CN.4/Sub.2/2000/26

⁷¹ Ibid. See also E/CN.4/Sub.2/1995/26

⁷² Statement of the Committee on Indigenous Health (COIH) to the WGIP, July 2001

⁷³ George Psacharopoulos and Harry Anthony Patrinos (Eds.). 1994. *Indigenous People and Poverty in Latin America. An Empirical Analysis*. Washington, D.C., The World Bank, p. 206-207.

⁷⁴ Cf. E/CN.4/Sub.2/2001/17 and E/CN.4/Sub.2/2003/22

⁷⁵ David A. Daoas, 'The rights of the cultural communities in the Philippines', "...*Vines that won't Bind...*", *Proceedings of a Conference held in Chiang Mai, Thailand, 1995*, IWGIA Document 80, 97-107, 102-103.