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DRAFT PAPER ON:

Indigenous Peoples Rights and the Environment: issues and the future

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Indigenous Peoples Rights and the Environment: issues and the future

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1. Introduction

We live in an era of unprecedented crisis for the survival of the human species – a crisis caused by mankind’s use of the planet. Oceans, freshwater systems, forests, deserts, frozen landscapes are all subject to over-exploitation and pollution. The IUCN Red List assesses 16,928 species as threatened with extinction.¹ Scientific evidence points to an extremely dangerous situation with species disappearing at 50-100 times the natural rate and this is likely to increase dramatically.² The loss of biological diversity is altering irrevocably the kind of life on the earth as well as the conditions for life itself. Biological diversity is not merely the numbers of plants and animals, but “*the variability among living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part; this includes the diversity within species, between species, and of ecosystems.*”³ The Millennium Ecosystem Assessment concludes that 60 per cent of the world’s ecosystem services are being degraded or used unsustainably.⁴ This has serious implications for present and future generations of humans, all of whom depend on the natural world in order to survive.

While damage to the environment ultimately affects all of mankind, it has a particularly devastating impact on indigenous peoples whose cultures are closely interwoven with the natural environment. Loss of or damage to ancestral lands threatens the physical, cultural and spiritual survival of indigenous peoples – not only as individuals but also as peoples with a collective identity. As traditional indigenous management systems are replaced, indigenous peoples generally bear a disproportionate burden of the costs of management for economic development.

*"Much damage has been done to the indigenous peoples through economic development projects ... The isolated, marginal areas often occupied by indigenous peoples constitute the last great and, until recently, unexploited reserves of natural resources. Neither State planners nor multinational corporations nor international development agencies have hesitated to 'incorporate' these areas into the national and international economy. In the process, indigenous peoples have suffered genocide and ethnocide." Professor Rodolpho Stavenhagen E/CN.4/1989/22, annex III C, para. 3.*⁵

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¹ See www.iucnredlist.org/documents/2008RL_stats_table_1_v1223294385.pdf.

² Secretariat of the Convention on Biological Diversity, *Sustaining Life on Earth. How the Convention on Biological Diversity Promotes Nature and Human Well-being* (Montreal: 2000), p. 5.

³ Convention on Biological Diversity, Article 2.

⁴ Millennium Ecosystem Assessment (MA), *Ecosystems and Human Well-being: Synthesis* (Washington, DC: Island Press, 2005), p. 1.

⁵ Quoted in *Human Rights and the Environment; Final Report*, Fatma Ksentini, Special Rapporteur, UN Doc E/CN.4/Sub.2.1994/9 at para 79

Mankind's continuing abuse of the planet has led to a relatively new and growing threat - anthropogenic climate change which is altering forever weather patterns, the migration and existence of fauna and the basic ecology of the planet. The economic costs of extreme weather are already high at approximately US\$60 billion annually (0.2% of global GDP) and estimated to rise to 0.5% - 1% of global GDP by the middle of the century.⁶ The human cost is immeasurable. As Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference asked at the 2005 Conference of Parties of the United Nations Framework Convention on Climate Change:

"How would you respond if an international assessment prepared by more than 300 scientists from 15 countries concluded that your age-old culture and economy was doomed and you were to become a footnote to globalisation?"⁷

The Inuit cannot live as Inuit without the frozen Arctic. At the other extreme, in the tropics, indigenous peoples are also suffering the effects of climate change. The WaiWai, until recently a semi-nomadic Amerindian people, were forced to relocate their entire village after unprecedented flooding in the remote Amazonian forests of Guyana. The WaiWai now say that they are finding it increasingly difficult to predict the weather and the behaviour of the rivers upon which they depend for fish and safe travel.⁸ Their situation is not unique. Indigenous peoples are likely to be the ones to suffer most from environmental damage, even though they generally bear the least responsibility for the current crisis.

2. Who are indigenous peoples?

While it is convenient to talk about indigenous peoples, a preliminary issue is to find some consensus on who are indigenous peoples i.e. who are the beneficiaries of the international laws and policies aimed at protecting indigenous peoples.⁹ The ordinary meaning of indigenous is of little help since it simply means, "born or produced naturally in a land."¹⁰ When coupled with the word "peoples" indigenous takes on a more specialised meaning. Being born in a country may make a person indigenous to that country as opposed to being naturalised or an alien/foreigner within that country. But birth alone does not automatically mean that the person is a member of an indigenous people. Some other criteria are necessary to identify the groups who are to be recognised as indigenous people. In practice it has proved to be very difficult to agree on such criteria. Even the recent United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) does not define "indigenous peoples" because States were unable to agree on a definition. Some States, particularly in Asia and Africa, even question whether the term has any relevance to them.

⁶ Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge 2007, p 149

⁷ Quoted in Osofsky, *The Inuit Petition as a bridge*, 31Am. Indian L. Rev. 675 2006-2007

⁸ Personal communication to the author

⁹ For a good summary of the issues see Benedict Kingsbury, "*Indigenous Peoples*" in *international law: a constructivist approach to the Asian controversy* American Journal of International Law [Vol 92:214 1998]

¹⁰ The Shorter Oxford English Dictionary

A widely used non-legally binding definition of indigenous peoples was formulated by Martinez Cobo, the Special Rapporteur of the UN Sub-Commission on Human Rights as follows:

“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.”

Historical continuity may consist of one or more of the following factors:

- (1) Occupation of ancestral lands, or at least of part of them;*
- (2) Common ancestry with the original occupants of these lands;*
- (3) Culture in general, or in specific manifestations,*
- (4) Language;*
- (5) Residence in certain parts of the country, or in certain regions of the world;*
- (6) Other relevant factors.”¹¹*

This definition is useful but could exclude indigenous peoples who have been dispossessed of their ancestral lands. It is also questionable whether non-dominance is a useful criterion from a legal perspective, since equality before the law is a fundamental principle of human rights and one that applies to indigenous peoples. Indigenous peoples do not stop being indigenous peoples once they achieve equality.¹² A more relevant criterion would possibly be the particular vulnerability of indigenous peoples and indigenous cultures in the face of individualistic capitalist societies.

The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) covers:

I(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) 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 colonisation 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.

¹¹ E/CN.4/Sub.2/1986/7/Add.4 paras 378-80

¹² An interesting case is Guyana where since Independence in 1966, there have been Amerindian MPs from all parties; currently three Ministers (the Minister of Foreign Affairs, the Minister of Amerindian Affairs and the junior Minister of Education) are all Amerindian women.

2. *Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.*

While this is not a definition as such but a statement of coverage¹³ it is still a useful starting point for identifying indigenous peoples. A recent example is the case of the *Saramaka People v. Suriname*¹⁴ in which the Inter-American Court of Justice held that the Saramaka people, one of six distinct Maroon peoples in Suriname, were not an indigenous people but a tribal people.¹⁵ However the principle that self-identification as indigenous is a fundamental criterion is circular, subjective and leaves it open to any group to claim that it is an indigenous people.¹⁶ As Ivor Jennings said in relation to self-determination,

*“On the surface it seem[s] reasonable: let the people decide. It [is] in fact ridiculous because the people cannot decide until somebody decides who are the people.”*¹⁷

Another difficulty with both ILO 169 and the Martinez Cobo definition is the idea of pre-invasion, pre-conquest and pre-colonisation peoples. If these are interpreted to mean only peoples inhabiting an area before European invasion, conquest or colonisation, this interpretation would exclude many groups who regard themselves as indigenous peoples in Asia. It could also make it difficult for African indigenous peoples to distinguish themselves from other African peoples. If it means any peoples subject to invasion, conquest or colonisation, it could be too inclusive. Furthermore, under ILO 169, descendants of populations in a former colonial country at the time of independence could include settler populations and descendants of slaves (such as the Saramaka people) and descendants of indentured workers.

Although “indigenous peoples” is used in international treaties¹⁸ a legal definition remains elusive. International lawyers have even questioned the usefulness of the term. According to Ian Brownlie,

*“The heavy reliance on the still relatively controversial category of ‘indigenous peoples’ is difficult to understand and frankly it smacks of nominalism and a kind of snobbery.”*¹⁹

This is an unpopular but valid perspective since law should be as precise as possible in order to identify who has what rights and duties. In reality,

¹³ Xantaki, *Indigenous Rights and United Nations Standards*, Cambridge Studies in International and Comparative Law, p70-71

¹⁴ Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007)

¹⁵ Contrast this with the Garifuna, the descendants of African slaves and Caribs who are recognised as indigenous peoples.

¹⁶ See for example the Boer claim to be indigenous to South Africa:

http://www.facebook.com/note.php?note_id=94628178959

¹⁷ I Jennings, *The approach to Self-government* p56

¹⁸ For example *The Convention on Biological Diversity*

¹⁹ Ian Brownlie, *Treaties and Indigenous Peoples*, Clarendon Press, Oxford, 1994 p63

“The drafting of treaties is notoriously sloppy – usually for very good reason. To get agreement, politic uncertainty is called for.”²⁰

A universal definition of indigenous peoples risks being either too exclusive or too inclusive. Criteria which may be useful in one State might be inapplicable in another. The term “indigenous peoples” has received widespread political acceptance and remains a critical concept for peoples whose cultures, languages, spiritual beliefs, values and historical experience are different to those of the mainstream populations in the States which they inhabit. It may be that for the foreseeable future “indigenous peoples” should remain undefined in international law and left up to the citizens of each State to agree on its use in national law consistent with the country’s history, politics and social organisation.

3. International law and policy

The rights of indigenous peoples have been specifically addressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and in ILO 169.²¹ The UNDRIP protects indigenous peoples against discrimination,²² and recognises their rights to internal self-determination,²³ culture,²⁴ land,²⁵ spirituality/religion,²⁶ health.²⁷ The UNDRIP also acknowledges the collective nature of indigenous rights. The UNDRIP was passed by an overwhelming majority with eleven abstentions.²⁸ Significantly Australia, Canada, New Zealand and the United States, all of whom have major indigenous populations, voted against the UNDRIP. Although the UNDRIP is not legally binding, some of its provisions may reflect customary international law. In any case, it is an important step towards setting standards for recognising and protecting the rights of indigenous peoples.

ILO 169 was developed partly with a view to removing the assimilationist orientation of earlier ILO standards²⁹ and has been ratified by twenty States.³⁰ It recognises and protects indigenous rights to culture,³¹ including traditional activities such as hunting, fishing, trapping and gathering.³² Article 14 of ILO 169 requires States to recognise the rights of ownership and possession which indigenous and tribal peoples have over the lands which they have traditionally occupied. States are also required to provide adequate

²⁰ Bennion, *Bennion on Statutory Interpretation*, Butterworths, 2008, p684

²¹ ILO Convention No. 107 of 1957 also covers indigenous peoples but its emphasis on assimilation is contrary to current thinking on preserving indigenous identity and culture.

²² Article 2

²³ Articles 3, 4 and 46

²⁴ Articles 5, 8, 11, 12, 13, 15, 16, 31

²⁵ Articles 8, 10, 20, 26, 27, 28, 29, 30, 32,

²⁶ Articles 12, 25

²⁷ Article 24

²⁸ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine.

²⁹ Most notably ILO 107 Indigenous and Tribal Populations Convention 1957

³⁰ <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>

³¹ Articles 2, 5, 7, 13,

³² Article 23

procedures within national legal systems to resolve land claims. Article 15 safeguards the rights of indigenous and tribal peoples to the natural resources on their lands including the right to participate in management and conservation of those resources. The right to participate is a long way from the right to decide and does not prevent States from selecting management and conservation schemes which do not maintain the ecological integrity of indigenous lands.

ILO169 imposes obligations only on those States which are parties to the treaty. Although it cannot yet be regarded as customary international law it has been relied on in international and national cases since some of its provisions reflect international law and therefore it helps to clarify State obligations.³³ Chief Justice Conteh of Belize considered that,

*“Article 14 of this instrument contains provisions concerning indigenous peoples right to land that resonate with the general principles of international law regarding indigenous peoples.”*³⁴

ILO 169 is not enforceable by indigenous peoples and its impact is limited. Indigenous peoples have therefore used general international law to address the threats from environmental damage, to gain control of their territories and to protect their survival as indigenous peoples. Two approaches are considered below. The first approach is to use protection of the environment to meet human rights standards. The rationale is that mankind depends on the natural world in order to survive. Therefore protecting the environment is essential in order to protect fundamental human rights such as rights to life, food, water, health, property and culture. The goal is to ensure respect for human rights through the mechanism of environmental law. The second approach is a mirror image of the first. Here the goal is to protect the environment through the use of human rights law. Where environmental damage undermines the ability of an individual or community to exercise fundamental rights (e.g. life, food, property), litigation to protect those rights will also have the effect of protecting the environment. Both of these approaches have been used by indigenous peoples but their effectiveness is questionable.

4. The right to a healthy environment

The link between human rights and the environment has been explicitly recognised at the international level in the 1972 Stockholm Declaration.³⁵ Part (a) of the Preamble of the 1982 World Charter for Nature also acknowledges that mankind’s existence depends on

³³ See *Application of ILO 169 by domestic and international courts in Latin America, A casebook*, ILO 2009

³⁴ *Cal v Attorney General of Belize and the Minister of Natural Resources and Environment*, Supreme Court of Belize 2007

³⁵ Principle 1 states that, “Mankind is a part of nature and depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients.”

the natural world.³⁶ Neither the Stockholm Declaration nor the World Charter for Nature is legally binding but they are important statements of policy to guide the actions of States and to support indigenous peoples in seeking to influence government actions at the national level.

Protecting the environment is essential in order to protect fundamental human rights such as rights to life, food, water, health, property and culture which depend on the continuation of ecological integrity. With a legal right to a healthy environment, international environmental law can be used as a mechanism for ensuring respect for human rights. This has been addressed in regional instruments. Article 24 of the African Charter on Human and Peoples Rights³⁷ (“African Charter”) provides that

“All peoples shall have the right to a general satisfactory environment favourable to their development.”

Article 11(1) of the Protocol of San Salvador³⁸ to the American Convention on Human Rights³⁹ (“American Convention”) states that

“Everyone shall have the right to live in a healthy environment...”

A human right to a healthy environment or to a general satisfactory environment favourable for the development of peoples is an important advance but is still somewhat vague. In *SERAC v Nigeria*,⁴⁰ the African Commission interpreted the right to a satisfactory environment as requiring the State to

“take reasonable and other measures to prevent pollution and environmental degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”⁴¹

The Commission further stated that governments must desist from threatening the environment of their citizens.

However environmental management to achieve a healthy or satisfactory environment raises complex technical and scientific problems. In order to give meaning to the right it is necessary to have standards for environmental quality (water, air, pollution, level of biodiversity etc.) against which the State’s actions can be measured. These standards could be set internationally in some cases but ideally should be tailored to the national situation. Within each State there will be differing views as to what level of exploitation of natural resources is allowed before the right is violated. Indigenous peoples who

³⁶ This is further elaborated in Principle 6, “In the decision-making process it shall be recognised that man’s needs can only be met by ensuring the proper functioning of natural systems and by respecting the principles set forth in the present Charter.”

³⁷ Ian Brownlie, Guy Goodwin-Gill (eds.), *Basic documents on human rights*, OUP 2002, p728

³⁸ Ian Brownlie, Guy Goodwin-Gill (eds.), *Basic documents on human rights*, OUP 2002, p693

³⁹ Ian Brownlie, Guy Goodwin-Gill (eds.), *Basic documents on human rights*, OUP 2002, p671

⁴⁰ The full decision can be downloaded from <http://www.serac.org/>

⁴¹ Decision of the African Commission paragraph 52

depend on the land and natural resources to satisfy their immediate needs may demand a higher level of environmental protection than other sections of society who see those lands and resources as the basis for economic development. While this political debate should be resolved through democratic processes, the reality is that indigenous peoples are often marginalised and lack the knowledge and financial resources to use the available political and legal structures. In general it is the poor who bear the brunt of environmental degradation – often referred to as the “not in my backyard” syndrome. In the United States, for example, brownfield sites have often been located in or close to areas inhabited by low-income African-American families and away from more affluent neighbourhoods.⁴²

The right to a healthy environment extends beyond the mere physical well-being of individuals to their mental and spiritual health which is difficult to assess unless the damage is severe. The physical, mental and spiritual health of the community as a whole are also important issues for indigenous peoples and equally difficult to assess. The extinction of an animal species may be regarded as an acceptable price for development by some sections of a society but could have a catastrophic effect on the spiritual relationship which an indigenous community has with its territory – particularly where the animal has totemic significance.

While a right to a healthy environment in international law is useful, its impact is limited in practice. The scope and content are unclear and enforcement is difficult. Indigenous peoples could find themselves in a similar situation to the Ogoni people who suffered irreparable harm before there was any recourse at the international level. A right to a healthy environment is best addressed at the national level in the constitution of the State which should provide adequate remedies for violation of constitutional rights and legal measures such as injunctions to prevent harm.

5. Using substantive human rights to protect the environment

Indigenous peoples have sought to protect their environment and keep intact their lands and territories through legal action to enforce their substantive human rights. The right to life is the most fundamental of human rights and is guaranteed by a raft of human rights instruments. Article 3 of the 1948 Universal Declaration on Human Rights (UNDR) states that “*Everyone has the right to life...*” The American Declaration of the Rights and Duties of Man 1948 likewise provides that “*Every human being has the right to life...*”⁴³ Although these declarations are non-binding they were part of standard setting by the United Nations and the Organisation of American States. In addition to being protected under customary international law, the right to life is guaranteed by various treaties. The International Covenant and Political Rights 1966 states in Article 6 that

“Every human being has the inherent right to life. This right shall be protected by law. No person shall be arbitrarily deprived of his life.”

⁴² See Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples*, Earthscan 2008, page 19

⁴³ Article 2

The right to life is also protected in the three regional treaties covering Europe, the Americas and Africa. Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that

*“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.”*⁴⁴

The Charter of Fundamental Rights of the European Union likewise guarantees the right to life and prohibits the death penalty.⁴⁵ The American Convention on Human Rights Article 4 establishes the right to life from conception and the 1990 Protocol abolishes the death penalty. The African Charter provides that human beings are inviolable and every human being shall be entitled to respect for his life and the integrity of his person.⁴⁶ The right to life is also entrenched in constitutions around the world. Arguably the right to life has evolved into a peremptory norm and part of *jus cogens*.⁴⁷ Support for this view is found in the American system in the opinion of the Inter-American Commission on Human Rights (“Inter-American Commission”).⁴⁸

It is clear that damage to the environment can threaten human life – either in the case of a single individual or the entire community to which the individual belongs. This was graphically illustrated in *SERAC v Nigeria* where the African Commission found that the right to life had been violated and noted that,

*The pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community. They affected the life of the Ogoni society as a whole.”*⁴⁹

The UN Human Rights Committee has confirmed that the right to life should not be interpreted narrowly.⁵⁰ The right to life is more than just physical survival. The Indian Supreme Court has held that the right to life⁵¹ includes “*all that give meaning to a man’s life including his tradition, culture and heritage and protection of that heritage in its full measure.*”⁵² This is even more of an issue for indigenous peoples. Their right to life depends on their continuing relationship with the land – a relationship that has evolved over hundreds (sometimes thousands) of years. In the Summary of the Petition to the

⁴⁴ Protocol 6 as amended by Protocol 11 abolished the death penalty.

⁴⁵ Article 2

⁴⁶ Article 4

⁴⁷ Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford Monographs in International Law 2008

⁴⁸ *Victims of the Tugboat ‘13 de Marzo’* para 79

⁴⁹ Para 67

⁵⁰ General comment 6

⁵¹ Article 21 of the Indian Constitution provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

⁵² *Ramsharan Autyanuprasi v Union of India* 1989 Supp (1) SCC 251, 256: AIR 1989 SC 549

Inter-American Commission seeking relief from global warming caused by acts and omissions of the United States the Inuit stated:

*“Like many indigenous peoples, the Inuit are the product of the physical environment in which they live. The Inuit have fine-tuned tools, techniques and knowledge over thousands of years to adapt to the environment. They have developed an intimate relationship with their surroundings, using their understanding of the Arctic environment to develop a complex culture that has enabled them to thrive on scarce resources. The culture, economy and identity of the Inuit as an indigenous people depend upon the ice and snow.”*⁵³

However the Inter-American Commission declined to hear the petition. The link between land and life was also recognised in *Cal v The Attorney General of Belize and the Minister of Natural Resources and the Environment*, where Chief Justice Conteh held that without legal protection of the Maya rights to and interests in their customary land, the Maya enjoyment of their right to life would be seriously compromised and be in jeopardy.⁵⁴

The Inter-American Court has recognised that the failure to respect land rights has a negative effect on life because it deprives the Community of

*“access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.”*⁵⁵

This is also linked to the right to food since without their traditional means of subsistence, indigenous peoples are at the mercy of the market or dependent on handouts from the State or NGOs. The Inter-American Court has therefore stressed the importance of indigenous peoples retaining their subsistence rights.⁵⁶ The right to food is guaranteed by several international instruments.⁵⁷ The United Nations Human Rights Committee has recognised that the right to adequate food requires States to adopt appropriate environmental policies.⁵⁸ The Africa Charter on Human and Peoples’ Rights does not contain a specific right to food but the Commission held that such a right is implicit in the right to life (article 4), the right to health (article 16) and Article 22 (cultural and social development). The right to food is *“inseparably linked to the dignity of human beings...”*⁵⁹

⁵³ http://www.earthjustice.org/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf

⁵⁴ Para 117

⁵⁵ Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005

⁵⁶ For example *Sawhoyama v Paraguay*, *Yakye Axa v Paraguay*,

⁵⁷ See for example Article 11 International Covenant on Economic, Social and Cultural Rights; Article 24 Rights of the Child Convention; Article 14 Convention of the Elimination of Discrimination against Women; Article 5 Convention on the Elimination of Racial Discrimination; Article 12 Protocol of San Salvador;

⁵⁸ General Comment 12, para 4

⁵⁹ *Serac v Nigeria*, African Commission decision paragraph 65

The right to health is likewise guaranteed by several international instruments⁶⁰ and has also been invoked to protect indigenous peoples.⁶¹ Article 16(1) of the Africa Charter of Human and Peoples' Rights states that

“Every individual shall have the right to enjoy the best attainable state of physical and mental health.”

The African Commission held that this right had been violated as a result of the damage to the environment of the Ogoni people.⁶² Violation of the right to health was also a factor in the decision of the American Commission to recommend demarcation of the Yanomami reserve.

The link between the physical environment and cultural survival is especially close for indigenous peoples who have sought to rely on the right to culture to ensure the continuation of their traditional way of life. The right to culture is fundamental to human existence. The preamble to the Stockholm Declaration notes that

“Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth.”

This principle has been given legal recognition in Article 15 of the International Covenant on Economic, Social and Cultural Rights which recognises the right of everyone to take part in cultural life. The right to culture is also recognised in the Protocol of San Salvador⁶³ which guarantees the right to take part in the cultural life of the community and in the African Charter which guarantees the right of all peoples to cultural development.⁶⁴ Article 27 of the International Covenant on Civil and Political Rights also establishes that

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture...”

The Human Rights Committee confirmed that in the exercise of the cultural rights under Article 27,

“...cultural manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right

⁶⁰ See for example: Article 12 International Covenant on Economic, Social and Cultural Rights; Article 24 Rights of the Child Convention; Article 14(2)(h) Convention on the Elimination of Discrimination against Women.

⁶¹ For example: *Yanomami v Brazil*; *Yakye Axa v Paraguay*

⁶² *SERAC v Nigeria para 64*

⁶³ Article 14

⁶⁴ Article 22

may include traditional activities such as fishing or hunting and the right to live in reserves protected by law.”⁶⁵

Damage to the underlying resource base of indigenous peoples and interference with their traditional economic and social activities therefore has an adverse effect on their culture within the meaning of Article 27. In the Lubicon Lake Band case⁶⁶ the Human Rights Committee confirmed that the grant of timber leases and other developments threatened the way of life and culture of the Lubicon Lake Band and were a violation of Article 27. The Committee emphasised that the rights under Article 27 were individual rights but acknowledged that the right can only be meaningful if exercised in community. In *Lovelace v Canada*, Sandra Lovelace lost her Indian status and therefore her right to live in the reserve as a result of her marriage to a non-Indian. The Human Rights Committee held that

“...the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists.”⁶⁷

In keeping with this approach, the Human Rights Committee gave priority to the traditional community activities over the rights of individuals. In the case of Ivan Kitok, a Sami, the Human Rights Committee held that his right to culture under Article 27 had not been violated because of the need to restrict the number of Sami who could practise reindeer husbandry in order to ensure that it was economically viable for the Sami communities:

“Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer herding is the primary source of income.”⁶⁸

This decision does not however address the underlying question of why there was room for only 2,500 Sami (out of a then population of 15,000 to 20,000 Sami) to carry out reindeer husbandry although it did note that many Sami had been assimilated into Swedish society.

The Inter-American Court of Human Rights has recognised that for indigenous peoples, land and culture cannot be separated :

The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main

⁶⁵ General Comment 23, para 7

⁶⁶ *Ominayak., Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984 U.N.Doc. CPR/C/38/D/167/1984 (1990)

⁶⁷ See *Lovelace v Canada*, Communication No. 24/1977 in which

⁶⁸ *Sweden*, Communication No. 197/1985

*means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.”*⁶⁹

One of the most important rights that indigenous peoples have relied on to safeguard their existence is the right to property since

*“Property of the land ensures that the members of the indigenous communities preserve their cultural heritage”.*⁷⁰

Article 21 of the American Convention on Human Rights guarantees the right to property:

*“Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society.”*⁷¹

Recognition of indigenous land rights can range from the relatively weak legal position of usufruct rights to the virtually unassailable position of a full and absolute collective title, constitutionally guaranteed against a taking by the State.⁷² Indigenous peoples have had mixed success in obtaining their property rights. Although the Inter-American Commission recommended that the Yanomami lands be demarcated, there was no finding of a violation of the right to property and no questioning of the Brazilian approach by which Indians are regarded as incompetent and needing to be placed under administrative guardianship. Title to the Yanomami lands remains with the State.

In contrast in *The Mayagna (Sumo) Awas Tigni Community v Nicaragua*, the Inter-American Court found that there had been a violation of Article 21 and ordered Nicaragua to demarcate and title the community's land in accordance with their customary laws, values, customs and mores.⁷³

The Inter-American Court held in the case of the *Indigenous Community Sawhoyamaya v Paraguay* that the protection of property under Article 21 included,

“the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as incorporeal elements deriving therefrom...”

In the *Saramaka* case, the special relationship which the Saramaka people had with their ancestral territories as well as their communal concept of ownership prompted the the

⁶⁹ *Sawhoyamaya Indigenous Community v Paraguay*, Judgement of March 29, 2006, Para 118; see also *Yakye Axa v Paraguay*

⁷⁰ *Yakye Axa v Paraguay* para 146

⁷¹ See also Article 14 of the African Charter which guarantees the right to property although the right may be encroached in the public interest; and Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷² E.g. Amerindian title in Guyana

⁷³ Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) para 173

Inter-American Court to apply its jurisprudence on indigenous peoples to the Saramaka. The Saramaka claimed the right to

“own everything, from the very top of the trees to the very deepest place that you could go underground.”⁷⁴

The Inter-American Court confirmed that

“...members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally occupied and used.”⁷⁵

The Inter-American Court held that Suriname should demarcate the territory and grant collective title but that the natural resources protected under Article 21 were only those which were traditionally used and necessary for the continuation of their way of life. The court also held that Suriname could restrict the Saramaka rights to these natural resources in their territory provided the restrictions were established by law, necessary, proportional, and with the aim of achieving a legitimate objective in a democratic society. Logging and mining could be authorised by the State subject only to effective participation (but not consent) by the Saramaka, benefit sharing and a social and environmental impact assessment. The situation of the Saramaka people therefore remains somewhat precarious since they do not have control of their lands, but weaker procedural rights.

6. Special considerations for IPs

In its preamble the UNDRIP recognises that indigenous peoples are equal to other peoples but they are different. It follows that in order to make equality meaningful that difference must be accommodated. The Inter-American Commission considered,

“That for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states;”⁷⁶

Indigenous peoples are vulnerable to the imposition of other values and cultures and without special protection could be placed in a position of assimilation by stealth. As Chief Justice Conteh, pointed out, the failure of the Government of Belize to recognise and validate the customary land tenure system of the Maya people amounted to discrimination.

“...by failing to accommodate this difference by, for example, treating individualized leases as an adequate substitute for a Maya farmer’s customary interest in his village lands....and by treating lands used collectively by Conejo and Santa Cruz villages as

⁷⁴ Para 119

⁷⁵ Para 121

⁷⁶ Resolution No.12/85 para 8

*vacant national lands, government officials, as agents of the defendants, are acting discriminatorily against the claimants.*⁷⁷

Many indigenous peoples feel that their spiritual relationship with their lands is at the heart of their identity as indigenous peoples. But neither the Martinez Cobo formulation nor the ILO 169 wording includes the spiritual relationship with the land in the definition of indigenous peoples, although ILO 169 does refer to spiritual values and wellbeing in its provisions.⁷⁸ The spiritual relationship has been given judicial recognition at the international level by the Inter-American Court which held that:

*“...the close ties of indigenous peoples with the land must be recognised and understood as the fundamental basis of their cultures, **their spiritual life**, and their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and **spiritual element** which they must fully enjoy, even to preserve their cultural legacy and transmit to future generations.”*⁷⁹ (emphasis added).

While indigenous peoples are not the only people to have a spiritual relationship with the land, this is such a fundamental part of being indigenous that it should be recognised and protected by the States in which indigenous peoples live.⁸⁰

Another key issue for indigenous peoples is the recognition of their collective rights to identity and to land and natural resources. Although there is resistance from some States to the concept of collective rights except in relation to self-determination, such resistance is ideologically opposed to reality.⁸¹ The Inter-American Court has recognised that

*“Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community.”*⁸²

In order to accommodate indigenous peoples in a meaningful way, States must recognise collective ownership in their national laws.⁸³

⁷⁷ *Cal v Attorney General of Belize and the Minister of Natural Resources and Environment*, Supreme Court of Belize 2007, para 114

⁷⁸ See Articles 5, 7 and 13

⁷⁹ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) para 149

⁸⁰ Guyana gives statutory recognition to the spiritual relationship which Amerindians have with the land in the mechanism for settling land claims.

⁸¹ See *British Columbia, Canada, Oregon Jack Creek Indian Band v. Canadian National Railway* 34 B.C.L.R. (2d) 344. In relation to aboriginal rights, the Court stated that “It is a mistake... to ignore the historical fact that the rights are communal, and that they are possessed today by the descendants of the persons who originally held them. They are not personal rights in the sense that they exist independently of the community, but are personal in the sense that a violation of the communal rights affects the individual member’s enjoyment of those rights.”

⁸² *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) para 148

7. Challenges for indigenous peoples

As can be seen from the above discussion, the UNDRIP, ILO 169, and general international law provide some protection for indigenous peoples but indigenous peoples still remain at a disadvantage. There is no mechanism to enforce UNDRIP or ILO169 although these obligations may influence an international or national court. The African Commission considered that there were four level of duties for a State in relation to human rights These are the duty to respect the right (i.e. refrain from interference), the duty to protect (i.e. to take measures to protect beneficiaries of the protected rights against political, economic and social interferences), the duty to promote the enjoyment of human rights (e.g. through awareness raising) and fulfilment by moving the machinery of State towards actual realisation of the rights.⁸⁴

Taking a similar approach the Inter-American Court held in *Velasquez-Rodriguez v Honduras*, that

*“The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention.”*⁸⁵

If the State carries out its duties, indigenous peoples have some security for their future. If the State breaches its duties however, litigation may be necessary in order to force a State to meet its legal obligations but there is no guarantee that the national legal system will provide an adequate remedy. Litigation can be slow and in *Yakye Axa v Paraguay* the Inter-American Court held that Paraguay had violated the right to a fair trial partly as a result of delay. International cases take a long time. The Saramaka petition was filed with the Inter-American Commission on 27th October 2000 and judgement given by the Inter-American Court in November 2008. The Mayagna petition took nearly six years before judgment was given. To this must be added the time to exhaust domestic remedies. And during those years, the situation of the indigenous peoples could deteriorate significantly. As Chief Bernard Ominayak pointed out to the Human Rights Committee:

“The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band’s traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence

⁸³See for example the *Amerindian Act 2006* of Guyana which provides for collective title to land and recognises the collective identity of Amerindian communities

⁸⁴ *SERAC v Nigeria*

⁸⁵ http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf, at para 176

is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life."⁸⁶

Indigenous peoples are often at a disadvantage since the court system is generally alien to them. Litigation is by definition adversarial with a winner and a loser. This is quite different to the way many indigenous peoples approach dispute settlement. Litigation is also uncertain and may be affected by the quality of legal representation that indigenous peoples have access to. Even when the community wins a case, enforcement can be a problem. In March 2008, more than six years after their court victory, the Mayagna (Sumo) Awas Tingni Community were still without title to their lands and the uncontrolled plundering of their natural resources had created ecological destruction, economic loss and a climate of social instability.⁸⁷

A further issue for indigenous peoples is that the rights guaranteed by international law are held against States but the damage may be caused by non-state actors such as private corporations, NGOs and multi-lateral institutions. Although free prior informed consent is a recognised international standard, the World Bank uses "free prior and informed consultation"⁸⁸ in projects that may affect indigenous peoples. This is meaningless and gives indigenous peoples virtually no control over what happens to them and their lands.

International responses to address environmental problems may also exacerbate the plight of indigenous peoples. Many protected areas set up to conserve biodiversity have followed the model of Yellowstone National Park. Protected areas have been set up over traditional indigenous lands by governments who then exclude the indigenous peoples ignoring the fact that these are the very people who have maintained the ecological integrity of the area for centuries.

State actions to address climate change may also have the unintended effect of harming indigenous peoples through lack of understanding of indigenous culture or failure to accommodate indigenous ways of life. Schemes such as REDD (Reducing emission from deforestation and degradation) depend on clear land tenure arrangements. But there is a risk that States could seek to retain ownership of traditional lands in order to obtain revenue from those forests. Even where there is clear indigenous land ownership governments may insist that REDD revenues are paid to them rather than to the indigenous landowners thereby further undermining indigenous survival. For example Guyana's Low Carbon Development Strategy⁸⁹ which sets out the government's proposals for a REDD plus scheme (avoided deforestation) proposes that REDD revenue in respect of Amerindian forests should be paid to the Government which will then use it for projects in Amerindian villages. This is despite the fact that the Amerindian communities are the absolute owners of those forests under a collective title.

⁸⁶ Communication No. 167/1984

⁸⁷ Observations on the 3rd Periodic Report by Nicaragua on its Compliance with the International Covenant on Civil and Political Rights, University of Arizona Indigenous Peoples Law and Policy Programme.

⁸⁸ See World Bank OP4.10

⁸⁹ To view Guyana's Low Carbon Development Strategy: Transforming Guyana's economy while combating climate change, visit <http://www.lcds.gov.gy/images/stories/Documents/LCDS.pdf>

The Permanent Forum on Indigenous Issues has stressed that:

*“As stewards of the world’s biodiversity and cultural diversity, indigenous peoples’ traditional livelihoods and ecological knowledge can significantly contribute to designing and implementing appropriate and sustainable mitigation and adaptation measures. Indigenous peoples can also assist in crafting the path towards developing low-carbon release and sustainable communities.”*⁹⁰

But there is no guarantee that REDD schemes will properly incorporate and build on traditional knowledge or provide for adequate participation by indigenous peoples.

8. Considerations for the future

It is no longer possible for indigenous peoples to protect themselves by obtaining full recognition and protection of their human rights, not even if their rights to self-determination⁹¹ are recognised and they acquire the right to freely determine their political status and freely pursue their economic, social and cultural development. Environmental damage has global dimensions. Much of this damage is attributable to the focus on development based on economic growth. Economists have tended to treat the natural world (forests, fisheries, water, etc) as part of the macro-economy and to ignore the fact that

*“The economy is a sub-system of the larger ecosystem, and the latter is finite, non-growing and materially closed.”*⁹²

Manmade capital is counted as an adequate substitute for natural capital. Land and natural resources are treated as commodities to be bought and sold. The failure of the market to take into account environmental damage in the price of goods - treating such damage as an externality - has led to the current environmental crisis. As Nick Stern pointed out,

*“Climate change is the greatest market failure the world has ever seen, and it interacts with other market imperfections.”*⁹³

In contrast many indigenous peoples are not driven by the economic development paradigm. The Haida have gone to court in Canada in order to stop the logging of old growth forests on lands which they have been claiming over a hundred years. They argue that forests take generations to mature and old-growth forests can never be replaced.⁹⁴ They attach a value to the forests over and above the market price of the timber. The need

⁹⁰ UN Doc E/C.19/2008/L.2 at para

⁹¹ See Article 3 ILO 169, Article 1 International Covenant on Civil and Political Rights, Article 1 International Covenant on Economic, Social and Cultural Rights

⁹² Herman E Daly, *Ecological Economics and Sustainable Development*, Edward Elgar Publishing 2007

⁹³ Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge 2007, p xviii

⁹⁴ *Haida Nation v. British Columbia (Minister of Forests)*[2004] 3 S.C.R.511

for balance and for sustainable development is recognised in international law,

“The need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”⁹⁵

Many indigenous peoples consider themselves to be stewards of the world’s biodiversity. According to an expert witness in *Yakye Axa v Paraguay*,

“...[the Chaco] manner of thought can be summarized in the axiom “living with nature,” contrary to the one that prevails in our culture, in which the economic good is partly identified with control over nature, summarized in the expression “live off nature”.

As recognised by Agenda 21, indigenous peoples have developed

“a holistic traditional scientific knowledge of their lands, natural resources and the environment.....”⁹⁶

This holistic view was succinctly expressed in the speech attributed to Chief Seattle in the nineteenth century,

“This we know: the earth does not belong to man: man belongs to the earth...All things are connected like the blood which unites one family...Whatever befalls the earth, befalls the sons of the earth. Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself.”⁹⁷

In its preamble the UNDRIP recognises that

“.....respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment...”

There is a plethora of statements, policies, decisions, declarations and treaties dealing with the environment and with human rights. A declaration on human rights and the environment which merely repeats the provisions of existing declarations, resolutions and other instruments of international policy would be of little value. Respect for indigenous knowledge suggests that indigenous ways of looking at the world should be considered as an integral part of the conceptual framework for a declaration and not as a separate consideration applying only to indigenous peoples. It may be that a new declaration on human rights and the environment should be based, at least in part, on indigenous ways of interacting with the non-human world and that there are lessons which the rest of the world can learn and can incorporate into international and national law.

⁹⁵ Case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia), *I. C. J. Reports 1997*, p. 7 per Justice Weeramantry

⁹⁶ Chapter 26

⁹⁷ Quoted in Edith Brown-Weiss, *In Fairness to Future Generations* (Tokyo: United Nations University: reprint 2006). There is much dispute over the authenticity of the words attributed to Chief Seattle. See J. L. Clark, “Thus Spoke Chief Seattle: The Story of an Undocumented Speech,” *Prologue: Journal of the National Archives*, vol. 18, no. 1 (spring 1985).

The guiding principles and concepts of Inuit Qaujimajatuqangit (traditional Inuit values, knowledge, behavior, perceptions and expectations) are recognised in legislation⁹⁸ in Canada and include the following principles: a person with the power to make decisions must exercise that power to serve the people to whom he or she is responsible; people are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill; hunters should hunt only what is necessary for their needs and not waste the wildlife they hunt; even though wild animals are harvested for food and other purposes, malice towards them is prohibited; hunters should avoid causing wild animals unnecessary suffering when harvesting them; wildlife and habitat are not possessions and so hunters should avoid disputes over the wildlife they harvest or the areas in which they harvest them; and all wildlife should be treated respectfully. These traditions would resonate with modern environmentalists and proponents of good governance.

Many indigenous concepts are finding their way into international law. Recognition of the intrinsic value of nature is found in the preamble to the Convention of Biological Diversity in which the States parties pronounce themselves to be “Conscious of the intrinsic value of biological diversity...”

The Native American proverb that, “*we do not inherit the planet from our ancestors but borrow it from our children*” is given modern form in the concept of inter-generational equity.⁹⁹ The International Court of Justice has stated in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons¹⁰⁰:

“The Court also recognises that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”

The creation of the modern state, the development of international law and the pursuit of economic development has left many indigenous peoples dispossessed of their traditional lands, politically marginalised, culturally threatened and particularly vulnerable to the effects of environmental damage. International law and policy, even where they may make special provision for indigenous peoples, often leave indigenous peoples in a defensive position, having to assert their rights against States. It may be that a new declaration on human rights and the environment should be based, at least in part, on indigenous ways of interacting with the non-human world and that there are lessons which the rest of the world can learn and can incorporate into international and national law.

⁹⁸ Conservation of Wildlife Act S.Nu. 2003, C26

⁹⁹ See also the *Minors Oposa* case from the Philippines

¹⁰⁰ I.C.J. Reports 1996 page 226