

The Convention on Biological Diversity, State Sovereignty and Indigenous Peoples' Rights

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It is often stated that attention to and action on indigenous peoples' rights in connection with the Convention on Biological Diversity (CBD) is barred by state sovereignty. This assertion is incorrect. The CBD's Conference of Parties (COP), its subsidiary bodies and the states-parties must reflect a legally correct understanding of sovereignty. In light of contemporary international law, state sovereignty does not and cannot preclude attention to and respect for indigenous peoples' rights. On the contrary, as one scholar puts it, the principle of sovereignty over natural resources in international law *"includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations."*¹ As all states-parties to the CBD have ratified one or more human rights treaties and are bound by customary international law they are legally obliged to recognise indigenous peoples' rights, including rights to land and resources. This legal briefing explains why.

Sovereignty is not absolute

Sovereignty is a principle of international law that in essence provides that a state may - subject to any limitations prescribed by international law - freely determine and apply laws and policies governing the people and territory under its jurisdiction. This general principle is repeated in a modified form in Article 3 of the CBD:

*"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies."*²

Human rights law and international environmental law limit state sovereignty. **Therefore, state sovereignty does not amount to absolute political or legal freedom. Sovereignty is limited by the Charter of the United Nations and by other principles of international law, such as human rights treaties.**

The UN Charter

Article 2(7) of the Charter of the United Nations (the UN Charter) prohibits interference in states' internal political affairs. However, it is accepted legal practice within the UN that this provision does not apply to human rights, which are deemed of international concern and are therefore not solely within the internal sovereign sphere of states. For instance Judge Weeramantry of the International Court of Justice stated:

*"The concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. There is not even the semblance of a suggestion in contemporary international law that such obligations amount to a derogation of sovereignty."*³

The UN Charter and its relation to the CBD

The CBD was adopted under the auspices of the UN, and has been ratified by member-states of the UN. Article 103 of the UN Charter states unequivocally:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international instrument, their obligations under the present Charter shall prevail."

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¹ N. Schrijver, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES. Cambridge: Cambridge University Press (1997).

² The fourth preambular paragraph of the CBD is also relevant: "Reaffirming that States have sovereign rights over their own biological resources."

³ Judge Weeramantry of the International Court of Justice, *Bosnia and Herzegovina v. Yugoslavia*, 11 July 1996.

Article 1(3) of the UN Charter defines one of the primary purposes and principles of the UN to be “*promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.*” Articles 55 and 56 of the Charter require the UN and its members to promote “*universal respect for, and observance of human rights and fundamental freedoms for all . . .*”

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights to elaborate upon and specify the Charter’s human rights provisions and obligations. The Universal Declaration of Human Rights is today widely considered to express general principles of international law and norms of customary law binding upon states.⁴ **The CBD must be read consistently with the superior authority of the UN Charter and the Universal Declaration of Human Rights as an authoritative interpretation of the UN Charter.**⁵

Human rights treaties

The Universal Declaration on Human Rights was further developed into two legally binding Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the exercise of their sovereign will, the vast majority of states-parties to the CBD have voluntarily committed themselves to abide by human rights standards through ratification of these international human rights conventions. In doing so, they have accepted international obligations to promote, respect, protect and fulfill human rights. **These obligations are not suspended in connection with CBD; Article 22 of the CBD explicitly states this. Moreover, as a matter of basic international law, states may not invoke their sovereignty or domestic law to justify non-compliance with treaty- or custom-based obligations.**

Indigenous peoples’ rights

Apart from the two covenants mentioned above, other global human rights instruments, such as the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child recognize and protect indigenous peoples’ rights, including territorial and cultural rights. Recent decisions of international human rights tribunals have further elaborated and confirmed these rights. See box 1. **The CBD’s Conference of Parties must respect indigenous peoples’ rights, as must the vast majority of its states-parties when giving effect to the Convention at the domestic level.**

The CBD and indigenous peoples’ rights

Implementation of many of the CBD’s provisions may impinge upon indigenous peoples’ relationship with their lands and resources. While Articles 8 and 10 of the CBD are especially relevant to indigenous peoples, most of the CBD’s articles require scrutiny. This is especially the case for those dealing with identification, establishment and management of protected areas. Protected areas must not be established without:

- prior resolution of these rights, in a manner consistent with international human rights law;
- indigenous peoples’ free, prior and informed consent. (See also *Legal briefing 2: Protected areas and land rights*.)

Subject to indigenous consent, indigenous ownership and management of protected areas, or in some cases co-ownership and co-management of these areas, must be considered as a viable and appropriate method of implementing the CBD and as a means of resolving disputes should they arise.

BOX 1: Indigenous peoples’ rights in international human rights Conventions

Under the Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁶ states-parties are obligated to recognize, respect and protect the right

⁴ The International Court of Justice recognized the obligatory force of the Charter and Declaration in, among others, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), *ICJ Rep.* 3, 42, 1980.

⁵ The International Court of Justice has confirmed that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation,” including the Charter of the United Nations and subsequently developed customary international law. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *ICJ Rep.* 16 (1971), at 31. Additionally, Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* provides that treaty interpretation shall take into account “any relevant rules of international law applicable in the relations between the parties.”

⁶ CERD has been ratified by 160 States as of January 2000.

*"to own property alone as well as in association with others." In its 1997 General Recommendation XXIII, the UN Committee on the Elimination of Racial Discrimination elaborated upon this calling on states-parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories."*⁷

The UN Human Rights Committee, the body charged with oversight of the International Covenant on Civil and Political Rights (ICCPR),⁸ has reached similar conclusions, as has the Inter-American Commission on Human Rights. Under Articles 1 and 27 of the ICCPR, indigenous peoples' rights to freely dispose of their natural wealth and to be secure in their means of subsistence, including territorial and cultural rights, must be recognized and safeguarded.⁹ Article 30 of the Convention on the Rights of the Child contains the same guarantees as Article 27 of the ICCPR and must be read accordingly.¹⁰

According to the Human Rights Committee and the Inter-American Commission on Human Rights, indigenous peoples' property rights derive from their own forms of land tenure and traditional occupation and use and exist absent formal recognition by the state.¹¹ The Inter-American Court on Human Rights recently affirmed this conclusion in a binding decision.¹² Directly addressing land and resource rights, the Court stated that *"For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group.'"*¹³

Indigenous peoples' rights to participate in and consent to activities that affect them are well established in international human rights law. The 1997 General Recommendation issued by the Committee on the Elimination of Racial Discrimination, for instance, called upon states-parties to *"ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."* The HRC has found that respect for Article 27 of the ICCPR includes *"measures to ensure the effective participation of members of minority communities in decisions which affect them...."*¹⁴ The IACHR has found violation of Indigenous property rights attributable to state-authorized activities on Indigenous land conducted without Indigenous consent.¹⁵

⁷ *General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997.* UN Doc. CERD/C/51/Misc.13/Rev.4.

⁸ The ICCPR has been ratified by 115 States as of January 2000.

⁹ *Concluding observations of the Human Rights Committee: Canada.* 07/04/99, at para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999). See, also, *General Comment No. 23 (50) (art. 27)*, adopted by the Human Rights Committee at its 1314th meeting (fiftieth session). UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).

¹⁰ The Convention on the Rights of the Child has been ratified by 191 States as of January 2000.

¹¹ Case 11.577 (Awastingni Indigenous Community - Nicaragua), *Annual report of the IACHR*. OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), April 16, 1999, 1067, para. 108; and, *Concluding observations of the Human Rights Committee: Australia.* 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments), paras. 10 and 11.

¹² *Mayagna (Sumo) Awastingni Community Case*, Judgment of 31 September 2001.

¹³ *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.

¹⁴ *General Comment No. 23 (50) (art. 27)*, adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), at 3. See, also, *Jouni Lansman et al. vs. Finland (Communication No. 671/1995)*, CCPR/C/58/D/671/1995, 15.

¹⁵ Inter-American Commission on Human Rights, *Report No. 27/98 (Nicaragua)*, para. 142.