

The UN Draft Declaration on the Rights of Indigenous Peoples and the Position of the United Kingdom

I Introduction

In 2002, Foreign and Commonwealth Office (FCO) staff, members of indigenous peoples' organizations and UK-based NGOs and institutes met to discuss the position of the United Kingdom in relation to the UN draft Declaration on the Rights of Indigenous Peoples. It was agreed that the exchange of views was important, that further dialogue would take place and that additional comments would be submitted in writing at a later date.

In its invitation to this meeting, the FCO stated:

The UK has a clear position on the idea of collective human rights: with the exception of the right of self-determination (ICCPR Article 1.1) we do not accept the concept of collective human rights. In a legal framework, human rights are calls upon states to treat individuals in accordance with international standards. As a result, the UK is unwilling to accept use of the term *rights of indigenous peoples* in a human rights context.

We are aware that many of you disagree with our position. We are keen to hear your arguments in favour of (or indeed against) collective rights. In particular we are interested in your views on the following issues:

- which collective legal human rights, if any, do you wish to see established for indigenous groups?
- how would the groups to which these human rights would be ascribed be defined?
- how would these new collective human rights sit with the existing individual human rights of members of those groups and of others outside those groups?
- Lack of definition of what constitutes an indigenous people. Self-definition means the scope of application of the Draft UN Declaration is uncertain and groups and individuals may seek to gain indigenous status to benefit from its provisions.

This document responds to these points, as well as issues raised during the meeting (as recorded in the minutes) and some of the statements of the UK delegation at the 8th Session of the Working Group to elaborate the draft Declaration on the Rights of Indigenous Peoples (WGDD8), held in Geneva, December 2002.

II Collective Rights

The position of the FCO is basically that, with the exception of the right to self-determination, collective human rights are not recognized in international law, at least in the six core human rights instruments, nor should they be as these rights undermine the human rights regime and threaten individual rights. The FCO states that for this reason, it cannot accept, presumably among others, the use of the term 'indigenous peoples' in a human rights context. We believe that this position as a matter of fact, law and principle is incorrect for the following reasons:

- first, it is incorrect to state that collective rights are not recognized in international law: they are, including under at least one of the core instruments and in norms of customary international law;
- second, the jurisprudence of intergovernmental human rights bodies overseeing universal and regional human rights instruments routinely uses the term indigenous peoples;
- third, notwithstanding the objections of a minority of states, state practice indicates that there is international consensus on collective rights in the case of indigenous peoples, in particular as evidenced by domestic laws, policy and practice;
- Finally, restricting an analysis of human rights to the six 'core' instruments dismisses a large body of binding and persuasive sources of law that are very relevant to the issue of collective rights and the present state and emerging nature of human rights law. In particular, it ignores the two and presently only binding instruments exclusively focused on indigenous peoples' rights – ILO Convention Nos. 107 and 169 – which clearly demonstrate that the international community has recognized the applicability, relevance and importance of collective rights in the case of indigenous peoples. ILO 169 was adopted by a vote of 328 in favour, 1 against and 40 abstentions. The UK accepted collective rights in ILO 169 and earlier in ILO 107.

A Collective Rights Do Exist in International Law

While international law has traditionally focused on the individual, a number of rights may be identified that are vested in collectivities. Nowhere is this more apparent than in the field of indigenous peoples' rights. As stated by the Inter-American Commission on Human Rights (IACHR), “[p]erhaps most fundamentally, the Commission and other international authorities have recognized the collective aspect of indigenous rights, in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people.”¹

1 Examples in International Instruments

In addition to common article 1 of the Covenants, the Genocide Convention, the right to development and others, the following instruments explicitly include collective rights:

a *Convention on the Elimination of All Forms of Racial Discrimination*

Articles 2(a) and 4(a) use the language, states undertake not to engage in any act, etc., “of racial discrimination against persons, **groups of persons** or institutions” and shall punish incitement to racial discrimination “against any race or **groups of persons.**” Article 1 states that the Convention applies to ‘groups’. Thornberry states that “[t]he Convention is group-orientated to the extent that ‘advancement’, ‘development’ and ‘protection’ relate to groups as well as individuals, opening up significant possibilities for addressing the collective rights of indigenous groups within the parameters of the Convention rights.”² This is consistent with the practice of the UN Committee on the Elimination of Racial Discrimination:

¹ IACHR, The Human Rights Situation of Indigenous People in the Americas, OEA/Ser.L/V/II/108, Doc. 62 (2000), at 125.

² P. Thornberry, *Indigenous Peoples and Human Rights*. Manchester: Manchester University Press (2002), at 208.

14. The Committee notes that the cultural and linguistic rights of the Basarwa/San are not fully respected, especially in educational curricula and in terms of access to the media. The Committee recommends the State party to fully recognize and respect the culture, history, languages and way of life of its various ethnic groups as an enrichment of the State's cultural identity, and adopt measures to protect and support minority languages, in particular within education.³

335. The situation of the country's indigenous people, the Veddas, and the creation of a national park on their ancestral forestland is of concern. In this context attention is drawn to the Committee's general recommendation XXIII calling upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.⁴

400. The Committee notes with concern that treaties signed by the Government and Indian tribes, described as "domestic dependent nations" under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government. It further expresses concern with regard to information on plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples.⁵

See, also, the Committee's General Recommendations XXIII and XXIV.

b International Labour Organization Convention Nos. 107 (1957) and 169 (1989)⁶

Both of these instruments, which focus exclusively on indigenous and tribal peoples, are replete with collective rights. ILO 169 consistently uses the term indigenous 'peoples' thereby designating that the rights are collective in nature and vested in the indigenous people(s) in question. It also, as does ILO 107, which employs the collective term 'populations, distinguishes between peoples and individuals to specify the rights holders in different contexts. For the sake of emphasis, ILO 169 also uses the terms 'collective' or 'collective aspects' or 'collective rights'. For example: article 13(1) requires that states recognize and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially "the collective aspects of this relationship." ILO 107, for instance, provides in article 11 that "[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized."

³ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana.* 23/08/2002.

⁴ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka.* 14/09/2001.

⁵ *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America.* 14/08/2001.

⁶ As of October 2002, the following 17 states have ratified ILO 169: Mexico, Norway, Brazil, Costa Rica, Colombia, Denmark, Ecuador, Fiji, Guatemala, The Netherlands, Dominica, Peru, Bolivia, Honduras, Venezuela, Argentina and Paraguay. The following states have submitted it to their national legislatures for ratification or are discussing ratification: Chile, The Philippines, Sweden, Finland, El Salvador, the Russian Federation, Panama, and Sri Lanka. Germany has adopted ILO 169 as the basis for its overseas development aid and the Asian Development Bank and the UNDP have incorporated some of its substance into their policies on indigenous peoples. See, for instance, Asian Development Bank, *The Bank's Policy on Indigenous Peoples, April 1998.*

c *The African Charter of Human and Peoples' Rights (1986)*

As the title suggests, this instrument, present binding on 53 African states, recognizes and guarantees a range of collective rights. The Working Group on Indigenous Peoples/Communities of the African Commission on Human and Peoples' Rights, established in 2000, has also affirmed that indigenous peoples' rights are collective rights:

The indigenous rights are clearly collective rights, even though they also recognize the foundation of individual human rights. Collective rights to land and natural resources is one of the most crucial demands of indigenous peoples – globally as well as in Africa – as they are so closely related to the capability of those groups to survive as peoples and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop on their own terms their mode of production and way of life and to exercise their own culture.⁷

d *UNESCO Declaration on Race and Race Prejudice (1978)*

This Declaration states:

Art. 1(2). All individuals and **groups** have the right to be different, to consider themselves as different and to be regarded as such....

Art. 6(1). The State has prime responsibility for ensuring human rights and fundamental freedoms on an entirely equal footing in dignity and rights for all individuals and all **groups**.

Art 9(2). Special measures must be taken to ensure equality in dignity and rights for individuals and **groups** wherever necessary, while ensuring that they are not such as to appear racially discriminatory. In this respect, particular attention should be paid to **racial or ethnic groups** which are socially or economically disadvantaged

e *Caribbean Community – Caribbean Charter of Civil Society (1997)*

Article XI of the CARICOM Charter of Civil Society provides that “[t]he States recognise the contribution of the indigenous peoples to the development process and undertake to continue to protect their historical rights and respect the culture and way of life of these peoples.” The Charter was adopted unanimously by the Heads of State of CARICOM and has the status of a regional, intergovernmental human rights declaration.

2 Jurisprudence

See, also, Section III below.

a *CERD*

Under the Convention, state parties are obligated to recognize, respect and guarantee the right “to own property alone as well as in association with others” and the right to inherit property without discrimination.⁸ These and other provisions of CERD are declaratory of

⁷ *Conceptual Framework Paper (2nd draft) by the Working Group on the Rights of Indigenous Peoples/Communities in Africa of the African Commission on Human and Peoples' Rights*, 20 December 2002, at 9.

⁸ CERD has been ratified by 165 States as of December 2002.

customary international law.⁹ In its 1997 *General Recommendation on Indigenous Peoples*, the UN Committee on the Elimination of Racial Discrimination contextualized these rights to indigenous peoples. In particular, the Committee called upon 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.”¹⁰ Note the similarity between this statement and articles 26 and 27 of the Draft Declaration.

The Committee also recommended that states parties:

- 4.(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) 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;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.¹¹

While this General Recommendation is technically non-binding, it is nonetheless “a significant elaboration of norms” and corresponding state obligations under the Convention.¹² Note also the similarity between 4(d) and articles 19, 20 and 30 of the UN Draft Declaration.

b Inter-American System

In the 1985 *Yanomami Case*, the IACHR recognized the collective rights of the Yanomami people in Brazil to the delimitation and demarcation of their territory and recommended that the Brazilian government take steps to demarcate those lands together with measures of a collective nature relating to the education, health and social integration of the Yanomami people.¹³

⁹ T. Meron, *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press (1989), 21.

¹⁰ *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee’s 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.

¹¹ *Id.*, at para. 4.

¹² Thornberry, *supra* note 2, at 217-18.

¹³ *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), 33. See, IACHR’s discussion of this case in *The Human Rights Situation of Indigenous People in the Americas*, *supra* note 1.

In its *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, the IACHR again addressed collective rights finding that with regard to the “ethnic groups of the Atlantic zone of Nicaragua:”

special legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands. Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous. ... In the opinion of the IACHR, the need to preserve and guarantee the observance of these principles in practice entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state ... that it is designed in the context of broad consultation and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives.¹⁴

In its *Third Report on the Situation of Human Rights in The Republic of Guatemala*, the IACHR found Guatemala responsible for acts and omissions detrimental to indigenous peoples’ “ethnic identity and against development of their traditions, their language, their economies, and their culture.”¹⁵ It characterized these as “human rights also essential to the right to life of peoples.”¹⁶ This is stated as a right of peoples, as opposed to individuals, and therefore a collective right.

In 1997, the Inter-American Commission on Human Rights 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.’¹⁷

The IACHR reiterated this conclusion in its *Second Report on the Human Rights Situation in Peru*, stating that “[l]and, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity.”¹⁸

The Inter-American Court on Human Rights in the *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* Case confirmed that indigenous peoples’ collective property rights arise from traditional occupation and use and indigenous forms of tenure, not from grants, recognition or registration by the state. In its judgment, issued in September 2001, the Court observed that

¹⁴ *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*. OEA/Ser.L/V/II.62, doc.26.(1984), at 81, para. 15.

¹⁵ *Third Report on the Situation of Human Rights in The Republic of Guatemala* OEA/Ser.L/V/II. 67, doc. 9 (1986), at 114.

¹⁶ *Id.*

¹⁷ *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.

¹⁸ *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., (2000), at Ch. X, para. 16. See, also, in accord, *Third Report on the Human Rights Situation of Human Rights in Paraguay*. OEA/Ser.L/V/II.110 Doc.52 (2001), Ch. IX, para. 47.

Among indigenous communities, there is a communal tradition as demonstrated by their communal form of collective ownership of their lands, in the sense that ownership is not centered in the individual but rather in the group and in the community. By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.¹⁹

Finding that “[t]he customary law of indigenous peoples should especially be taken into account because of the effects that flow from it” the Court stated that “[a]s a product of custom, possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership.”²⁰ It then held and ordered, among others, that “the State must adopt measures of a legislative, administrative, and whatever other character necessary to create 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.”²¹ For most indigenous peoples, ‘customary law, values, usage and customs’ vest ownership of lands, territory and resources in the collective with individuals, families, clans, etc., holding subsidiary rights.

Most recently, in the *Mary and Carrie Dann Case*, citing international jurisprudence, the IACHR stated that “general international legal principles²² applicable in the context of indigenous human rights ... include:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.”²³

¹⁹ *Judgment of the Inter-American Court of Human Rights in the case of The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* Issued 31 August 2001, Inter-Am. Court on Human Rights, Series C No. 79 (2001), at para. 149.

²⁰ *Id.*, at para. 151.

²¹ *Id.*, at para. 164.

²² General principles of international law refer to “rules of customary law, to general principles of law as in Article 38(1)(c) [of the Statute of the International Court of Justice], or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies.” *Principles of Public International Law*, *supra* note 49, at 19.

²³ Inter-American Commission of Human Rights, *Report N° 75/02*, Case N° 11.140, *Mary and Carrie Dann (United States)*, Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at para. 130. (footnotes omitted) (hereafter ‘Dann Case’).

In this case, it interpreted the American Declaration on the Rights and Duties of Man (1948) to require “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources”²⁴

c The African Commission on Human and Peoples’ Rights

The African Charter on Human and Peoples Rights (1981)²⁵ guarantees a range of collective rights including the right of peoples to freely dispose of their natural wealth and resources.²⁶ Whether this provision applied to the constituent peoples of a state or only to its entire population has been debated for many years.²⁷ However, in May 2002, the African Commission on Human and Peoples’ Rights unambiguously applied the right to the Ogoni people, one of the constituent peoples of Nigeria:²⁸

Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.²⁹

The Commission noted in general that

“At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. ... And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.”³⁰

It also found a violation of article 24 of the African Charter, which guarantees the right of *peoples’* to a healthy environment³¹ and violations of the right to housing and protection against forced eviction – a “right enjoyed by the Ogonis as a collective right”³² – the right to health and the right to food - “[w]ithout touching on the duty to improve food production

²⁴ *Id.*, at para. 131.

²⁵ To date, 53 African states have ratified the Charter.

²⁶ Article 21 of the African Charter states in pertinent part that: “1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.”

²⁷ See, among others, R. N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 *Am. J. Int’l L.* 80-101 (1988) and; P. Nobel, ‘The Concept of `Peoples’ in the African (Banjul) Charter on Human and Peoples’ Rights.’ In, P. Nobel (ed.), *Refugees and Development in Africa*, 9-18, Uppsala: Scandinavian Institute of African Studies (1987).

²⁸ The Ogoni self-identify as indigenous and have played an active role in UN fora relating to indigenous peoples.

²⁹ African Commission on Human and Peoples’ Rights, *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, at para. 58 (hereafter ‘Ogoni Case’).

³⁰ *Id.*, at para. 45 (footnotes omitted).

³¹ *Id.*, at para. 52.

³² *Id.*, at 62-3.

and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent *peoples'* efforts to feed themselves."³³

d European Commission of Human Rights

In *G and E v. Norway*, a case involving indigenous peoples (Saami), the European Commission, while rejecting the complaint as inadmissible, recognized that under article 8 of the European Convention – respect for private life, family life or home – “a minority **group** ... [is] in principle, entitled to claim the right to respect for the particular lifestyle it may lead.”³⁴

B Use of the Term Indigenous Peoples is Routine

As can be seen from the preceding, human rights bodies routinely employ the term indigenous peoples. Further examples are provided here. Of particular note is the decision, by consensus, of the 35 member states of the OAS, participating in the 2001 session of the Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples, to use the term ‘indigenous peoples’ throughout the Declaration.³⁵

1 Human Rights Committee

“With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.”³⁶

2 Committee on Economic, Social and Cultural Rights

In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples, the Committee deems it useful to identify elements that would help to define indigenous peoples’ right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from

³³ *Id.*, at 65.

³⁴ *G and E v. Norway*, Applications Nos. 9278/81 and 9415/81 (1984) 35 *Eur. Comm. H.R. Decisions & Reports* 30, at 35.

³⁵ Report of the Chair, Special Meeting of Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, held April 2-6, 2001. OEA/Ser.K/XVI GT/DADIN/doc.23/01 rev. 1, 26 July 2001, p. 7 and 36.

³⁶ 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, at para. 7.

their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.³⁷

Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not 'be deprived of its means of subsistence', States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.³⁸

... that the issue of land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands."³⁹

In relation to article 13(2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all....⁴⁰

3 CERD

16. The Committee expresses concern about the difficulties which may be encountered by Aboriginal peoples before courts in the establishment of Aboriginal title over land. The Committee notes in that connection that to date, no Aboriginal group has proven Aboriginal title, and recommends that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before courts.⁴¹

13. The Committee notes with concern the shortcomings of the State party in its activities on behalf of indigenous peoples, as reported by the Office of the Ombudsman, in particular the failure on the part of the authorities to maintain communication with the indigenous population and the absence of specific government plans for them. In this context, the Committee wishes to refer to its general recommendation XXIII, in which it calls 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

³⁷ General Comment 14, The right to the highest attainable standard of health : 11/08/2000. UN Doc. E/C.12/2000/4, 11 August 2000. In., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*. UN Doc. HRI/GEN/1/Rev.5, 26 April 2001, pps. 90-109, at para. 27 (endnotes omitted). (hereafter 'General Comments/Recommendations Compilation').

³⁸ *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11, 26 November 2002, at para. 7.

³⁹ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Panama. 24/09/2001. UN Doc. E/C.12/1/Add.64, at para. 12.

⁴⁰ General Comment No. 13, The Right to Education (art. 13) (1999). In., *General Comments/Recommendations Compilation*, pps. 74-89, at para. 50 (endnotes omitted).

⁴¹ *Concluding observations of the Committee on the Elimination of Racial Discrimination : Canada*. 23/08/2002.

directly relating to their rights and interests are taken without their informed consent.⁴²

10. The Committee also notes with concern that, although progress has been made regarding consultation with indigenous peoples so that they may participate in decisions which affect them with a view to securing their agreement, there are still situations in which consultation and participation do not occur. The Committee recommends that the State party find ways and means to facilitate such participation.⁴³

4 Committee on the Rights of the Child

77. The Committee is deeply concerned about the poor situation of Batwa children and the lack of respect for almost all of their rights, including the rights to health care, to education, to survival and development, to a culture and to be protected from discrimination.

78. The Committee urges the State party urgently to gather additional information on the Batwa people, to strengthen the representation of Batwa in national policy-making and to elaborate a plan of action to protect the rights of Batwa children, including those rights related to minority populations and indigenous peoples.⁴⁴

5 IACHR

The actions of the lumber and oil companies in these areas, without consulting or obtaining the consent of the communities affected, in many cases lead to environmental degradation and endanger the survival of these peoples.⁴⁵

While the legislation currently in force in Paraguay offers a favorable legal framework for the indigenous peoples, it is not sufficient for the due protection of their rights if not accompanied by state policies and actions that ensure the enforcement and implementation of the norms to which the State has sovereignly bound itself.⁴⁶ Corresponding recommendation: “Enforce and implement, without further delay, the provisions of the Paraguayan Constitution concerning respect for and restoration of the community property rights of the indigenous peoples, and regarding the granting of lands, at no cost, of sufficient extent and quality to conserve and develop their ways of life.”⁴⁷

⁴² *Concluding observations of the Committee on the Elimination of Racial Discrimination : Costa Rica. 20/03/2002.*

⁴³ *Concluding observations of the Committee on the Elimination of Racial Discrimination : Argentina. 27/04/2001.*

⁴⁴ *Concluding observations of the Committee on the Rights of the Child : Burundi 1998.*

⁴⁵ *Second Report on the Human Rights Situation in Peru, supra note 18, Ch. X, at para. 26.*

⁴⁶ *Third Report on the Human Rights Situation in Paraguay, supra note 18, at para. 28.*

⁴⁷ *Id.*, at paras. 50 (1)(2) and (4).

6 Others

a Council of Europe

The Political Declaration adopted by Ministers of the Council of Europe's member states at the concluding session of the European Conference against Racism uses 'indigenous peoples'⁴⁸ as do the Conference's General Conclusions.⁴⁹

b UNESCO Declaration on Cultural Diversity

Article 4 of the Declaration states that "[t]he defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."

c Final Declaration World Summit on Sustainable Development (2002)

"We reaffirm the vital role of indigenous peoples in sustainable development." (para. 22)

C State Practice and Collective Rights for Indigenous Peoples

The IACHR has correctly acknowledged the existence of general principles of international law concerning indigenous peoples' collective rights to lands, territories and resources.⁵⁰ More generally, state practice, especially as evidenced by domestic legal provisions, demonstrates consensus on collective rights for indigenous peoples. While the content of these domestic guarantees is of interest – particularly in relation to norms that may be applicable generally in international law - the point made here is only that the vast majority of states addressing indigenous peoples' rights have done so on the basis of recognition of collective rights. This consensus is further demonstrated by regional intergovernmental declarations and statements and ratification of the two ILO conventions.

1 The Americas

With the exception of states in which there are no indigenous peoples, every state of the Americas and the Caribbean has enacted laws that recognize and guarantee the collective rights of indigenous peoples and in many cases, some of those rights are entrenched in their Constitutions.⁵¹ The acceptance of the term 'indigenous peoples' in the context of the Proposed American Declaration on the Rights of Indigenous Peoples – accepting that the vast majority of rights recognized in the proposed Declaration are vested in indigenous collectivities – was preceded by extensive use of the term 'peoples' in the Final Declarations

⁴⁸ EUROCONF (2000) 1 Final, 13 October 2000, p. 4.

⁴⁹ EUROCONF (2000) 7 Final, 16 October 2000, p. 4

⁵⁰ Dann Case, at para. 130. (footnotes omitted).

⁵¹ For a compilation of these laws, see, IACHR, *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*. OEA/Ser.L/V/II.110 Doc. 22 (1 March 2001). See, also, S.J. Anaya & R. Williams, *The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System*. 14 Harv. Hum. Rts. J. 33 (2001).

of the Summit of the Americas adopted by the Heads of State in 1999 and 2001.⁵² Thirteen American states are party to ILO 169 and 5 are party to ILO 107. As noted above, the Caribbean Community has recognized indigenous peoples' collective rights in its 1997 Charter of Civil Society.

2 Europe

The Scandinavian states have recognized the collective nature of the rights of the Saami; two have ratified ILO 169 (Denmark and Norway) and two are in the advanced stages of doing so (Sweden and Finland). The *Greenland Home Rule Act* is a clear recognition of the collective rights of the Inuit peoples of Greenland. Russia's 1999 Federal Law '*On Guarantees of the Rights of Small Indigenous Peoples' Rights in the Russian Federation*' recognizes and protects collective rights as do laws pertaining to, among others, natural resources and the environment. The Arctic Council, an intergovernmental organization that also includes Canada and the United States, recognizes indigenous peoples' collective rights both in terms of their formal participation in the Council and in its various declarations and activities.⁵³ France has recognized the collective rights of indigenous and tribal peoples in its overseas departments and territories.⁵⁴ France also stated that it has no objection to collective rights and 'indigenous peoples' at WGDD8 in 2002. The Netherlands is a party to ILO 169, Germany has adopted it as the basis for its overseas development aid and Belgium and Portugal are party to ILO 107. At the EU level, the Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998) states, among others, that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas."

a United Kingdom

The UK/Great Britain has long recognized collective rights in its dealings with indigenous peoples and in its colonies. This is evident in Royal Proclamations, Acts of Parliament, numerous treaties with indigenous peoples, decisions, including recent ones, of the Law Lords and Judicial Committee of the Privy Council, colonial ordinances and general colonial policy. There are today also numerous areas throughout the UK recognized as common property.

3 Australasia and the Pacific

Australian and New Zealand statutes and common law recognize and guarantee the collective rights of Aboriginal peoples and Māori tribes. The Treaty of Waitangi, which clearly recognizes the collective rights of Māori tribes, has been held to be part of the constitution of Aotearoa-New Zealand.⁵⁵ Papua New Guinea's property and other laws are in large part predicated upon recognition of the various collective interests of its constituent

⁵² *Second Summit of the Americas on Sustainable Development*, especially, Santiago Plan of Action, Sections IV. 19 and 23.

⁵³ See, for instance, *The Nuuk Declaration on Environment and Development*, adopted at the Second Ministerial Conference on the Arctic Environment, 16 Sept. 1993

⁵⁴ Among others, see, *Decret no. 97-267 du Avril 1987 modifiant la code du domaine de l'Etat et relatif aux concessions domaniales et autres actes passés par l'Etat en Guyane en vue de l'exploitation ou de la création de ses immeubles domaniaux; Section III – Droits des communautés tirant traditionnellement leurs moyens de subsistance de la forêt.*

⁵⁵ Among others, *New Zealand Maori Council v A.G.* [1987] 1 NZLR 641.

peoples. The same can also be said for the Solomon Islands, Samoa, Tonga and Pacific territories held by the United States. Fiji is party to ILO 169 which has been implemented via constitutional and statutory provisions guaranteeing collective rights.

4 Asia

The *Indigenous Peoples' Rights Act* 1997 of the Philippines is based on the territorial and cultural self-determination of indigenous peoples. Indigenous peoples' collective rights are also guaranteed in the Philippines Constitution. India's Constitution guarantees various collective rights for the so-called scheduled tribes. Recent judicial decisions in Malaysia recognize indigenous peoples' collective rights to lands and resources⁵⁶ as does the Constitution of Sabah and Sarawak and the *Aboriginal Peoples Act* (Orang Asli). Rights of "aboriginal peoples" are also accounted for in Malaysia's Constitution. Indonesian laws pertaining to indigenous peoples are in part based upon recognition of *adat* or customary law and recognize collective land occupancy and use rights. Cambodia also has a specific law recognizing the collective rights of indigenous peoples.⁵⁷ Japan's *Ainu Culture Law* 1997 recognizes the Ainu as "an indigenous and small-numbered people" with certain collective rights. Taiwan has recognized the collective rights of indigenous peoples through a series of Executive Decrees. Bangladesh, India and Pakistan are party to ILO 107 and Sri Lanka is presently considering accession to ILO 169.

5 Africa

The situation in Africa is less clear cut. South Africa has clearly recognized collective rights as exemplified by the case of restitution of the communal lands of the Khomani San in 2002. Collective title was transferred to the San pursuant to an out-of-court settlement based upon an action filed under the *Restitution of Land Rights Act* 1994. Additionally, various sections of the 1996 South African Constitution recognize collective rights of San to language and culture (i.e., Section 6(5)). Kenya's *Group Representative Act* guarantees the rights of collectivities to their traditional lands and resources. Uganda's 1995 Constitution guarantees certain rights for minority 'groups', presumably including the Batwa indigenous people. Indigenous peoples' collective rights are also recognized in the Constitutions of Algeria, Cameroon and Ethiopia. The following African states are party to ILO 107: Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia. The Working Group on Indigenous Peoples/Communities of the African Commission on Human and Peoples' Rights has also affirmed that indigenous peoples' rights are collective rights.⁵⁸

6 Conclusion

While domestic laws and jurisprudence are not directly relevant to multilateral standard setting exercises, where these laws are illustrative of consistent state practice and international consensus they are very relevant to the current state of international law.

⁵⁶ *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*, (1997) 1 MLJ 418 *affirmed*, Court of Appeal, *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* (1998) 2 MLJ 158; *Nor Anak Nyawai et al* (2001) 2 CLJ 769; and, *Sagong bin Tasi & 6 Ors v. Kerajaan Negeri Selangor & 3 Ors* [2002] 2 AMR 2028.

⁵⁷ Article 26 of the 2001 Land Law 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".

⁵⁸ *Conceptual Framework Paper (2nd draft) by the Working Group on the Rights of Indigenous Peoples/Communities in Africa of the African Commission on Human and Peoples' Rights*, 20 December 2002, at 9.

Taken together with state practice at the international level, as evidenced by regional and global intergovernmental declarations and statements before intergovernmental bodies, as concluded by the IACHR, norms and principles of general international law have crystallized and are emerging that recognize and guarantee various collective rights for indigenous peoples. Irrespective of the precise content of these norms, they all clearly recognize that indigenous peoples' rights are collective rights.

D Tension Between Individual and Collective Rights

The FCO has stated its opposition to collective rights on the grounds that such rights will undermine the existing human rights regime and threaten individual rights. While we acknowledge that collectivities may seek to justify rights violations in the name of the collective – a practice readily observable today, particularly on economic grounds, in both democratic and undemocratic societies alike – this position is an oversimplification of the issue, misunderstands the interdependent relationship between collective and individual rights, and does not properly account for the position of an eventual UN declaration on the rights of indigenous peoples within international law.

1 Tensions between Individual and Collective Rights

Opponents to collective rights assert, among others, that individual rights will be eroded and threatened by the exercise of collective rights. While there is some degree of inherent tension between the rights of individuals and those of collectivities, these tensions are by no means restricted to the individual and collective rights of indigenous persons and peoples. Indeed, in all societies and legal systems, to varying degrees, the interests and rights of individuals and the collective (i.e., society) are measured against each other and balanced with those of other individuals. The power of eminent domain, for instance, is often wielded by states in the name of society even though the rights of individuals may be and often are compromised. Public ownership of sub-surface or other natural resources is also exercised in the name of the common good and in many cases exploitation thereof comes at the expense of rights of individuals and groups within the larger population.

The same is also true of rights recognized in international human rights law. Individual rights of freedom of speech, assembly and association, for example, are restricted by various interests vested in society in general and balanced with those of other individuals.⁵⁹ Rights of persons belonging minorities protected under article 27 of the ICCPR may be restricted if the limitation is “shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.”⁶⁰

There is an enormous body of domestic jurisprudence that deals with the balance between collective and individual rights, especially in connection with the rights of indigenous peoples and minorities. International human rights bodies have also developed jurisprudence on these issues. This jurisprudence addresses special measures required to protect and advance disadvantaged individuals and peoples, measures to guarantee de facto equality through recognition of difference and different circumstances, and a range of precautionary measures aimed at avoiding or at least minimizing conflict in particular cases

⁵⁹ See, for instance, *Universal Declaration of Human Rights*, article 29.

⁶⁰ *Kitok vs. Sweden*, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40). UN Doc. A/43/40 (1988), at 230, para. 9.8. See, also, *Lovelace vs. Canada* (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) at 166, UN Doc. A/36/40 (1981).

and circumstances. There is no reason why the UN Draft Declaration should not be viewed in this context and the collective rights recognized therein be understood and treated accordingly.

2 The Draft Declaration's Position in International Law

When the Draft Declaration is eventually adopted by the UN General Assembly it will be a non-binding statement of aspiration. On its face it will neither stand above nor negate existing sources of international law that guarantee the rights of individuals. These rights will remain inherent, inalienable and enforceable. States that have contractual and general international legal obligations concerning individual rights may not validly invoke a declaration to justify violation of international human rights standards applicable to individuals nor may indigenous peoples. This is equally true – by way of analogy to federal states - for indigenous peoples recognized as self-determining, autonomous and self-governing entities. Indigenous and non-indigenous individuals maintain the same rights of recourse to domestic and international tribunals to assert their rights.

Even if the declaration is in the future determined to reflect norms of international customary law, these norms will have to be interpreted and applied within the larger framework of international human rights law protecting the rights of individuals. Moreover, the draft Declaration in its present form states that “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” (art. 33) and “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations” (art. 45). Application of these two articles, which have clear implications for interpreting the remainder of the declaration, as well as standard canons of interpretative method in international law that apply to the declaration *in toto*, do not lead to the conclusion that the collective rights recognized therein will undermine individual rights. Finally, no state party to ILO 169 has even suggested that implementation of and respect for the rights recognized therein undermines individual rights in principle or practice.

III Indigenous Peoples and the Right to Self-Determination

A Human Rights Instruments

A leading commentator on the right to self-determination states that “Article 1 common to the Covenants addresses itself directly to peoples” and “[p]eoples are thus the holders of international rights to which correspond obligations incumbent upon Contracting States ...”⁶¹ These rights are not restricted to peoples in classic colonial situations only, but are vested in ‘all’ peoples.⁶² Consistent with this, the UN Human Rights Committee (HRC), the

⁶¹ A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*. Cambridge: Cambridge University Press (1995), at 144.

⁶² Among others, *The Right of Self-Determination in International Law: Its Development and Future*. In, P. Alston (ed.), *Peoples' Rights*. Oxford: OUP (2001), pps. 7-68. Crawford states that

Just as a matter of ordinary treaty interpretation, one cannot interpret Article 1 as limited to the colonial case. Article 1 does not say that some peoples have the right to self-determination. Nor can the term ‘peoples’ be limited to colonial peoples. Article [1, paragraph] 3 deals expressly, and non-exclusively, with colonial territories. When a text says that ‘all peoples’ have a right – the term

body charged with monitoring state compliance with the ICCPR, has applied article 1 to indigenous peoples.⁶³ In its Concluding observations on Canada's fourth periodic report, the HRC stated that

With reference to the conclusion by the [Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.⁶⁴

The HRC reached similar conclusions – that the state implement and respect the right of indigenous peoples to self-determination, particularly in connection with their traditional lands and resources – in its Concluding observations on the reports of Mexico and Norway issued in 1999 and Australia in 2000.⁶⁵ In its complaints-based jurisprudence, the HRC has also related the right to self-determination to the right of indigenous people to enjoy their culture under Article 27 of the ICCPR.⁶⁶

The Committee on Economic, Social and Cultural Rights has also referred to the rights of indigenous peoples in connection with article 1. In 2002, the Committee stated: “[t]aking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.”⁶⁷

‘peoples’ having a general connotation – and then in another paragraph of the same article, it says that the term ‘peoples’ includes peoples of colonial territories, it is perfectly clear that the term is being used in its general sense.

Id., at 27. See, also, Human Rights Committee, *The right to self-determination of peoples (Art. 1)* : 13/04/84. CCPR General comment 12, 1984, at para. 6 - Article 1(3) “imposes specific obligations on States parties, not only in relation to their **own peoples** but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination” (emphasis added) – and, in accord, Committee on the Elimination of Racial Discrimination, *General Recommendation XXI on the right to self-determination*, 1996, at para. 5 – “the rights of all peoples within a State.”

⁶³ For an extensive discussion on this issue by a member of the Human Rights Committee, see, M. Scheinin, *The Right to Self-Determination under the Covenant on Civil and Political Rights*. In, P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination*. Turku: Institute for Human Rights, Abo Akademi University, (2000), pps. 179-202.

⁶⁴ *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).

⁶⁵ *Concluding observations of the Human Rights Committee: Mexico*. UN Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding observations of the Human Rights Committee: Norway*. UN Doc. CCPR/C/79/Add.112 (1999), paras. 10 and 17; and *Concluding observations of the Human Rights Committee: Australia*. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments), para. 9.

⁶⁶ *Apirana Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2. See, also M. Scheinin, *supra* note 63.

⁶⁷ *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11, 26 November 2002, at para. 7.

The IACHR has also included the right to (non-secessionist) self-determination in its Proposed American Declaration on the Rights of Indigenous Peoples (art. XV(1)):

Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy and self-government with regard to *inter alia* culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, the environment and entry by non-members; and to determine ways and means for financing these autonomous functions.⁶⁸

While the Proposed Declaration has yet to be approved, the IACHR has stated that it “should be understood to provide guiding principles for inter-American progress in the area of indigenous rights;”⁶⁹ and that “the basic principles reflected in many of the provisions of the Declaration [on the Rights of Indigenous Peoples], including aspects of Article XVIII [on territorial rights], reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration [on the Rights and Duties of Man] in the context of indigenous peoples.”⁷⁰

As noted above, in May 2002, the African Commission on Human and Peoples’ Rights found that Nigeria had violated the rights of the Ogoni people to freely dispose of their natural wealth and to be secure in their means of subsistence, an integral part of the right to self-determination.⁷¹

B Self-Determination and the Draft Declaration

The right to self-determination is the foundation of and framework for most of the other rights expressed in the draft Declaration. While a growing number of states have accepted its inclusion, it remains a contentious issue. All states agree that the right must be exercised without compromising territorial integrity and, with very few exceptions, indigenous peoples agree. There is also general agreement that there is no unilateral right of secession associated with self-determination. How then is this right to be interpreted and exercised?

The right to self-determination in the draft Declaration is clearly intended to be exercised within existing states and requires that indigenous peoples exercise their right to self-determination through the state’s political and legal systems unless these systems are “so exclusive and non-democratic that [they] can no longer can be said to be representing the whole people.”⁷² States have a corresponding duty to adopt legal, administrative and

⁶⁸ *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the IACHR in 1997.

⁶⁹ *Third Report on the Human Rights Situation in Colombia*. OEA/Ser.L/V/II.102 Doc. 9 rev. 1 (26 February 1999), Ch. X, at para. 9.

⁷⁰ Dann Case, at para. 129.

⁷¹ Ogoni Case, at para. 58.

⁷² *Explanatory note concerning the draft declaration on the rights of indigenous peoples*, by Erica-Irene Daes, Chairperson of the Working Group on Indigenous Populations. UN Doc. E/CN.4/Sub.2/1993/26/Add.1, at 5. This is in accord with the 1970 Declaration on Friendly Relations which states that, “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

constitutional reforms that recognize the rights of indigenous peoples to, among others, autonomy, self-government, territory, cultural integrity and participation based upon consent. Secession is only possible as an exceptional measure should the state fail to accommodate these rights **and** be so abusive and unrepresentative “that the situation is tantamount to classic colonialism....”⁷³

In principle, implementation of the right could, for example, be similar to ‘devolution’ as experienced in the UK. It is essentially a redistribution of defined jurisdictional powers within the existing structure of the state and concomitant guarantees of participation in extra-territorial activities.

IV Self-Definition is Accepted

Article 8 of the draft Declaration reads: “Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.”

In General Recommendation XXIII, CERD emphasized that: “[i]n the practice of the Committee on the Elimination of Racial Discrimination ... the situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.”⁷⁴

In General Recommendation VIII, CERD made the important statement that membership in a group “shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.”⁷⁵ Logically, if individual members of a group may self-identify, they may also collectively self-identify as a group, nation or people, indigenous or otherwise. The Committee confirms that this is the case:

C. Concerns and recommendations: 18. The Committee reiterates its previous concern regarding the delay in resolving the claims of the Inughuit with respect to the Thule Air Base. The Committee notes with serious concern claims of denials by Denmark of the identity and continued existence of the Inughuit as a separate ethnic or tribal entity, and recalls its general recommendation XXIII on indigenous peoples general recommendation VIII on the application of article 1 (self-identification) and general recommendation XXIV concerning article 1 (international standard).⁷⁶

See, also, ILO 169, which provides that self-identification as indigenous or tribal shall be a fundamental criterion in determining to whom the Convention applies.

In October 2000, the African Commission on Human and Peoples’ Rights established a working group on the rights of indigenous peoples and communities in Africa with a

⁷³ *Id.*

⁷⁴ *General Recommendation XXIII on Indigenous Peoples 1997*, at para. 1.

⁷⁵ General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the Convention (1990).

⁷⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination : Denmark. 21/05/2002.

mandate to study indigenous peoples' rights in relation to the African Charter of Human and Peoples' Rights. The working group takes the view that there are indigenous people in Africa, based on the principle of self-identification, among others, as expressed in Convention 169.⁷⁷

Finally, the Commission on Human Rights Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People states

As regards individual membership, indigenous communities usually apply their own criteria, and whereas some States do regulate individual membership, it has become increasingly accepted that the right to decide who is or is not an indigenous person belongs to the indigenous people alone. Nevertheless, it must be recognized that membership in indigenous communities implies not only rights and obligations of the individual vis-à-vis his or her group, but may also have legal implications with regard to the State. In the design and application of policies regarding indigenous peoples, States must respect the right of self-definition and self-identification of indigenous people.⁷⁸

In this context, see, also, Draft Declaration, articles 9, 32 and 34.

V Consent

In contemporary international law, indigenous peoples' have the right to participate in decision making and to give or withhold their consent to activities directly affecting their rights. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation, free, prior and informed consent.

A CERD

Observing that indigenous peoples have and continue to suffer from discrimination, and "in particular that they have lost their land and resources to colonists, commercial companies and State enterprises,"⁷⁹ the Committee on the Elimination of Racial Discrimination 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."⁸⁰ The Committee later recognized indigenous peoples' right to "effective participation . . . in decisions affecting their land rights, *as required under article 5(c) of the Convention and General*

⁷⁷ *Conceptual Framework Paper (2nd draft) by the Working Group on the Rights of Indigenous Peoples/Communities in Africa of the African Commission on Human and Peoples' Rights*, 20 December 2002, 6-7.

⁷⁸ *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 100.

⁷⁹ *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, at para. 3.

⁸⁰ *Id.*, at para. 4(d).

Recommendation XXIII of the Committee, which stresses the importance of ensuring the ‘informed consent’ of indigenous peoples” (emphasis added).⁸¹

B Inter-American System

The IACHR has found that Inter-American human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”⁸² In the same vein, the Commission emphasized that

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.⁸³

Similarly, finding that Nicaragua had violated the right to property, judicial protection and due process of law by granting logging concessions on indigenous lands without taking steps to title and demarcate those lands, the IACHR held that

The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.⁸⁴

Additionally, the IACHR stated that “general international legal principles applicable in the context of indigenous human rights” include the right to

where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.⁸⁵

C CESCR

In 2001, the UN Committee on Economic, Social and Cultural Rights noted “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without

⁸¹ *Concluding Observations by the Committee on the Elimination of Racial Discrimination : Australia. 24/03/2000. CERD/C/56/Misc.42/rev.3, at para. 9. See, also, among others, Concluding observations of the Committee on the Elimination of Racial Discrimination : Costa Rica. 20/03/2002 and; Concluding observations of the Committee on the Elimination of Racial Discrimination : United States of America. 14/08/2001.*

⁸² Dann Case, at para. 131.

⁸³ *Id.*, at para. 140.

⁸⁴ Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua), at para. 142, *cited in*, The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000, *Inter-Am. Ct. H.R. (Ser. C) No. 66* (2000). See, also, Case 11.577 (Awes Tingni 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.*

⁸⁵ Dann Case, at para. 130. (footnotes omitted).

their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem.”⁸⁶ It then recommended that the state “ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned”⁸⁷

D ILO 169

While not requiring consent, ILO 169 requires that consultation be undertaken “in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent.” Respect for indigenous peoples’ right to give their free and informed consent is still required if a state party has ratified one of the instruments noted above because, pursuant to article 35, application of ILO 169 “shall not adversely affect the rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties or national laws, awards, customs or agreements.”

VI Special Measures

The FCO stated that the Draft Declaration accords indigenous peoples protections and rights over and above those enjoyed by non-indigenous persons and peoples and therefore, unduly discriminates in favour of indigenous persons and peoples. For this reason, various draft articles were deemed unacceptable. In this context, international law, and the domestic laws of most countries, recognizes that: 1) persons or groups that are especially vulnerable, may require ‘special’ protections, guarantees, measures, etc., in order to account for and address their vulnerability; 2) that these ‘special’ measures etc., may be required for persons and peoples to enjoy equal protection of the law and full enjoyment of all human rights⁸⁸ and; 3) that equal protection of the law does not require that all persons be treated exactly the same, but, rather, that they may be treated differently to account for their different characteristics, situations and needs.⁸⁹ If the preceding were not the case it is difficult to see how international human rights law could countenance separate rights regimes for women, children, persons belonging to minorities, migrant workers, etc.

There is no denying that indigenous peoples are particularly vulnerable and requiring rights and measures designed to account for that vulnerability. Nor is there any doubt that indigenous peoples have been historically discriminated against, denied equal protection of the law and otherwise disadvantaged and that remedial measures are required to address

⁸⁶ *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Colombia*. 30/11/2001. E/C.12/Add. 1/74, at para. 12

⁸⁷ *Id.*, at para. 33.

⁸⁸ “Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live,” ILO 169, Preamble.

⁸⁹ *South West Africa Cases (Second Phase)*, *ICJ Rep* 1966, p. 6, 305-06 - “the principle of equality before the law does not mean absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.”

this situation.⁹⁰ Nor is there any question that indigenous peoples exhibit different characteristics, situations and needs than non-indigenous persons and peoples - as noted by Osvaldo Kreimer of the Inter-American Commission on Human Rights: "Indigenous peoples, because of their preexistence to contemporary States, and because of their cultural and historical continuity, have a special situation, an inherent condition that is juridically a source of rights."⁹¹

A CERD

Generally, article 1(4) of CERD provides that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"

B HRC

The rights of persons belonging to minorities, as set forth in article 27 of the ICCPR, are special protections over and above the rights enjoyed by all individuals under that instrument. In the case of indigenous peoples:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁹²

C CEDAW

Article 12 of CEDAW requires states to eliminate discrimination in provision of health care so as to ensure that women are able to meet their health goals and needs. In this context, the UN Committee on the Elimination of Discrimination Against Women has advised states that "special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, [including] ... indigenous women."⁹³

⁹⁰ Gen. Rec. XXIII, at para. 3 -- With regard to indigenous peoples, CERD has stated that it "is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.

⁹¹ O. Kreimer, *The Future Inter-American Declaration on the Rights of Indigenous Peoples: A Challenge for the Americas*, at 69-70. In: C. Price Cohen (ed.), *Human Rights of Indigenous Peoples*. Transnational Publishers: Ardeley, New York. (1998).

⁹² *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, at para. 7.

⁹³ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24*, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women - women and health (1999). In, *Compilation of General Comments/Recommendations*, pps. 244-51, at para. 6.

D Inter-American System

It is well established in the Inter-American system that indigenous peoples have been historically discriminated against and disadvantaged and therefore, that special measures and protections are required if they are to enjoy equal protection of the law and the full enjoyment of other human rights. Specifically, the IACHR stated that: “Within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.”⁹⁴ In another instance, it stated the obligation to employ “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources”⁹⁵

E ILO 169

Among others, article 4 states in part that: “1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned; [and] 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.”

F The World Conference on Human Rights

In 1993 The World Conference on Human Rights adopted the Vienna Declaration and Programme of Action. Paragraph 20 of Part I of the document, recommends that: “... States should, in accordance with international law, take concerted **positive** steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.” (emphasis added)

G The Declaration and Programme of Action World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

This “recognize[s] that the indigenous peoples have been victims of discrimination for centuries and affirm[s] that they are free and equal in dignity and rights and should not suffer any discrimination, particularly on the basis of their indigenous origin and identity, and ... stress[es] the continuing need for action to overcome the persistent racism, racial discrimination, xenophobia and related intolerance that affect them” (para. 39).

VII ‘Should’ or ‘Shall’

At the 8th session of the Working Group to elaborate the Declaration on the Rights of Indigenous Peoples, the UK objected to text on the basis that a declaration must not use the term ‘shall’, but must use the term ‘should’ instead. In connection with this, we note that a series of UN and regional declarations uses the term ‘shall’ including the Universal Declaration of Human Rights.

⁹⁴ Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.

⁹⁵ *Id.*, at para. 131.