Háskólinn á Akureyri
Félagsvísinda- og lagadeild
Lögfræði
2006

Indigenous Peoples' Rights:
Has the evolution of indigenous peoples rights in international law reached the status of custom?

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Lokaverkefni í Félagsvísinda- og lagadeild

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Lokaverkefni til 90 eininga
B.A.-prófs í Félagsvísinda- og lagadeild
Leiðbeinandi: Dr. Rachael Lorna Johnstone

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Lokaverkefni til 90 eininga B.A. prófs í Félagsvísinda- og lagadeild

Leiðbeinandi: Dr. Rachael Lorna Johnstone

Yfirlýsingar:

Ég lýsi því hér með yfir að ég einn er höfundur þessa verkefnis og að það er ágóði eigin rannsókna.

Undirskrift

Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A.-prófs í félagsvísinda- og lagadeild.

Undirskrift

Abstract

This paper discusses the argument that some specific group rights of indigenous peoples have evolved into an international custom and if there can be found a minimum definition on the meaning of the word "indigenous". The eminent scholar James Anaya, proposes that because of submissions by a great many states regarding indigenous issues in various international forums, especially in the United Nations, a consensus has formed that indicates the emergence of an international custom. These group rights can be identified as the right to the traditional land owned, the right of self-governance or autonomy, and the right to culture.

To create an international custom according to the traditional way requires both *opinio juris* and state practice. This would mean that the majority of submissions regarding the specific group rights in question would be harmonious.
To examine his argument three things were examined. First a list of 40 states that all have indigenous peoples within their border was compiled. Then a search was made for all submissions regarding indigenous issues made by those states within the United Nations forums, such as the Working Group on Indigenous Populations, the Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples and the UN Third Committee, which deals with Social, Humanitarian and Cultural matters to name a few. Secondly, to get a picture of the form of protection already existing for indigenous peoples, this paper examines all of the constitutions of the states chosen to see if they hold any protection or recognition of indigenous peoples rights. Thirdly, it is examined how many of the forty states have ratified the only international instruments that deal specifically with indigenous rights, namely the ILO *Indigenous and Tribal Populations Convention nr.107* from 1957 and *the Indigenous and Tribal Peoples Convention nr. 169* from 1989.

The conclusion of this paper is that the uniformity and harmony, or will needed for a custom to evolve is absent and even if the emphasis on the state practice part of custom-making is heavily suppressed and greater emphasis is put on submissions

from states, the conclusion must be the same, that specific group rights for indigenous peoples have not yet evolved into an international custom.

Útdráttur

Þessi ritgerð fjallar um það hvort einhver hópréttindi frumbyggja hafi náð stöðu venjuréttar í alþjóðalögum og einnig um hvort mögulegt er að fá niðurstöðu um lágmarksskilgreiningu á hugtakinu "frumbyggi". Hinn virti fræðimaður James Anaya leggur það til að vegna þess hversu mörg ríki hafa tjáð sig í ræðu og riti um málefni frumbyggja á mörgum vettvöngum, en þó aðallega í sameinuðu þjóðunum, þá hafi myndast samhljómur sem gefur til kynna að venjuréttur hafi fæðst um þessi hópréttindi frumbyggja. Þessi hópréttindi eru rétturinn til sögulegra landssvæða sinna, rétturinn til sjálfsákvörðunar eða sjálfsstjórnar og rétturinn til menningar.

Til að skapa venjurétt hefur venjulega verið talið að bæði þurfi þar til *opinio juris* eða huglæga skyldu og beinar aðgerðir í samræmi við hana hjá stórum meirihluta þjóðanna . Þetta þýðir að sem flest ríki þurfi að vera samhljóma um ákveðið efni til að það öðlist stöðu sem alþjóðleg venja.
Til að skoða nánar hver staðan er í raun og veru voru þrjú atriði könnuð. Í fyrsta lagi var gerður listi með 40 ríkjum sem öll eiga það sameiginlegt að hafa frumbyggja innan landamæra sinna. Síðan var gerð leit í skjalasafni Sameinuðu Þjóðanna að öllum ræðum sem þessi ríki hafa flutt um málefni frumbyggja í nefndum og ráðum t.a.m. Vinnuhópur um Málefni Frumbyggja (Working Group on Indigenous Populations), Opni-Vinnuhópurinn um gerð uppdráttar um Réttindi Frumbyggja (the Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples) og Þriðju Nefndina, sem fjallar um málefni sem tengjast félagsmálum, mannréttindum og menningu. (U.N. Third Committee).
Í öðru lagi voru allar stjórnarskrá þessara völdu landa skoðaðar með það í huga að rannsaka hvort og þá hversu vel réttindi frumbyggja væri varin í þeim, og í þriðja lagi var skoðað hversu mörg þessara ríkja hafa fullgilt einu alþjóðlegu samningana sem fjalla eingöngu um réttindi frumbyggja, sem eru samningar Alþjóðaverkamannasambandsins nr. 107 og nr. 169 um réttindi frumbyggja og þjóðflokka.

Niðurstaðan er sú að ekki finnst sá samhljómur eða vilji meðal ríkjanna til að uppfylla skilyrði þau sem venja er fyrir að uppfyllt séu til að skapa aþjóðlega venju. Þó svo að hinn huglægi hluti væri nær eingöngu notaður án tillits til beinna aðgerða ríkja væri niðurstaðan sú sama. Sérstök hópréttindi tilhanda frumbyggjum getur því ekki talist hafa náð stöðu venjuréttar að svo stöddu.

Formáli

Málefni frumbyggja hafa verið mér hugföst síðan ég var lítill strákur að hlusta á sögur um hvernig Kólumbus hafði fetað í fótspor Leifs Heppna og siglt til Ameríku og að í kjölfarið hafi hafist eitt grimmdarlegasta tímabil mannkynssögunar þegar „háþróaðir" evrópubúar lögðu undir sig Ameríku í nafni páfans og græðginnar. Þetta gerðist fyrir meira 400 hundruð árum síðan. Það er sorglegt og reyndar alveg ólíðanlegt, að enn í dag eru frumbyggjar víða um heim sem þurfa að þola ólýsanleg brot á því sem við köllum í dag grundvallar-mannréttindi. Þetta er staðreynd sem oft sést á sjónvarpsskjánum en gleymist svo von bráðar. Haustið 2005 kom samnemandi minn og snillingur, Vigdís ósk Sveinsdóttir, að tali við mig og spurði hvort ég væri til í að vera með í liði sem myndi keppa í smá lögfræðikeppni. Þessi litla keppni reyndist svo vera ein virtasta keppnin í heimi lögfræðinnar eða hin alþjóðlega málflutningskeppni laganema Philip C. Jessup, International law Moot competition.

Þessi keppni snýst um að ILSA, (alþjóðafélag laganema) býr til erfiða milliríkjadeilu milli tveggja ímyndaðra ríkja sem laganemar um allan heim þurfa að kryfja til mergjar og keppa svo sín á milli sem sækjendur eða verjendur. Að þessu sinni var málið verulega spennandi og tekið var á vafaatriðum í alþjóðalögum eins og verktakafyrirtækjum sem taka að sér verkefni sem tengjast stríðsrekstri, t.d. hver er ábyrgur fyrir mannréttindabrotum þeirra? Einnig var fjallað um hvernig eitt ríki skiptist í tvö ný ríki. Upp koma þá spurningar um stöðu þeirra í sameinuðu Þjóðunum, ábyrgð á gömlum milliríkjasamningum og þesshättar. En athyglisverðasti flöturinn á málinu var það sem sneri að frumbyggjum sem áttu hlut að máli og áttu á hættu að missa lífsviðurværi sitt vegna athafna annars ríkisins og einkafyrirtækis skráð í hinu ríkinu. Þetta þýddi að keppendur þurftu að grandskoða þessi málefni, bæði lagalegu hliðar þess og einnig raunveruleikann sem býr þar að baki. Í stuttu máli er hægt að segja að frumbyggjar víða um heim búa við skelfilegar aðstæður. Þó er von, því á vettvangi Sameinuðu Þjóðanna hefur samt sem áður mikill árangur náðst og stefnir í að sú þróun aukist á næstu árum. Þessi ritgerð fjallar um stöðu réttinda frumbyggja í alþjóðalögum og reynir að svara því hvort einhver hópréttindi þeirra hafi náð stöðu venjuréttar.

Ég vill sérstaklega þakka leiðbeinanda mínum, Dr. Rachael Lornu Johnstone, fyrir hennar frábæra og óeigingjarna þátt í þessari ritgerðarsmíð. Einnig vil ég þakka þeim Pétri Leifssyni, Margréti Heinreksdóttur, Guðmundi Alfreðssyni og Ágústi Þór Árnasyni fyrir þeirra mikla innlegg og góða kennslu.
Að lokum vil ég þakka ástkærri eiginkonu minni, Sonju Magnúsdóttur, fyrir dygga hvatningu og stuðning við gerð ritgerðarinnar, en án hennar hefði þessi ritgerð líklega ekki orðið að veruleika.

Þór Hauksson Reykdal
Félagsvísinda- og lagadeild Háskólans á Akureyri

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Introduction

Indigenous peoples have, for a long time, been fighting for their basic and fundamental human rights. These rights are codified in various international instruments and declarations, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial Discrimination, The convention on the Rights of the Child and others. These deal mostly with unalienable individual rights such as the right to life, liberty, religion and culture. They also prohibit all discrimination based on distinctions such as colour, race, religion, nationality and political opinion.

These individual rights are different from the specific group rights that many feel indigenous peoples are also entitled to, above other segments of the population of the states they belong to. As far as I can see, there are only three rights of this kind: the right to the traditional land owned or used by indigenous peoples since pre-history, the right of self-governance or autonomy, and the right to culture, since the traditional lifestyle and religions of indigenous peoples are often, literally, deeply rooted into the soil of their ancestral land. This makes the group right to culture for indigenous peoples different in my opinion than the individual right as expounded in Article 27 of The ICCPR and Article 15 of the International Covenant on Economic, Social and Cultural Rights[1] Because the self-identity of indigenous people, as a group, is more often than not the combination of these three rights rolled into one, it becomes different than just the right to dress a certain way or to express yourself a certain way. The right to culture for indigenous groups would then differ from the right of a single member of an indigenous group who would choose to adhere to a different culture than his old tribe embraced (for instance if a member marries outside the tribe). This right then belongs to a group that is capable of sustaining a culture but each person must have the individual right to accept it upon himself.[2] One could argue that because these three group rights are so

[1] ICESCR. Art. 15
[2] See further General Comment no.23, especially in this context para 6.2; UN Document: High Commissioner for Human Rights, General Comment No. 23: The rights of minorities (Art. 27) : . 08/04/94. CCPR/C/21/Rev.1/Add.5

integrated in the lives of indigenous peoples that to deny one of these rights is in fact the denial, or the very least the diminishment of the other two.
Researching indigenous rights leads to a growing literature on indigenous issues. Chief among the scholars contributing on this issue is James Anaya with his book *Indigenous Peoples in International Law.* Anaya's work raised my curiosity regarding two specific issues that will be the basis for this paper.

The first issue is the argument put forward by Anaya that some aspects of indigenous group rights have become, or have recently crystallized into, international customary law.[3] I was intrigued by the way he argued how the normative nature of custom-making had change in recent times due to the appearance of multinational organizations and bodies such as the United Nations (UN), the International Labour Organization (ILO) and many other international actors.
Therefore in Chapter 1, I will review the traditional way of how custom evolves in international law, which is the *opinio juris* that is illustrative of the psychological element or the belief that the norm in question has reached the status of law and the state practice that forms the other necessary ingredient of custom. I will then compare this traditional way with the argument made by Anaya and his emphasis on the importance of state participation in the form of oral and written submissions in international forums[4] regarding indigenous issues. Also in Chapter 1, I will examine the apparent disagreement between international actors on the definition "indigenous" and what criteria is needed by a group to be considered indigenous, and as such then, be entitled to the specific group rights mentioned. Sovereign states and indigenous groups have made substantive remarks upon the definitions that are used in international law. These definitions stem mainly from documented work done by UN bodies[5], the ILO[6] and the World Bank.[7] I will review these documents and compare the definitions contained in them and then further compare the result of that with

[3] James Anaya, Indigenous Peoples in International Law, 2nd ed. ((Oxford: Oxford University Press, 2004) p. 61
[4] Forums such as ILO working commission when making Convention 169, in the U.N. the Working group on Indigenous populations,
[5] Such as work by the U.N. Working Group on Indigenous Populations (WOIP) , the 1983 Cobo report and the 1996 Daes report.
[6] ILO Conventions nr. 107 and 169.
[7] World Bank Group, "*The World Bank Operational Directive 4.20*"

submissions made by states and indigenous groups to identify if there exist common minimum criteria.

In Chapter 2 an examination will be made into the statements and conduct of forty independent states that are known to have indigenous peoples within their borders that fulfil the minimum criteria identified in Chapter 1.[8] As regards the *opinio juris* an examination was made of statements regarding indigenous rights issues submitted by those states before three specific UN bodies. These are the UN Third Committee, which deals with Social, Humanitarian and Cultural matters, the Working Group on Indigenous Populations and the Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples. In researching these submissions, special attention was given to statements that directly deal with the three specific group rights identified above or, like in many cases, the lack there-of.

In Chapter 3, two specific elements of conduct of the states were investigated. The first was to examine the constitutions of those forty states with regards to any specific indigenous rights to be found. The reason for this is that the trend seems to be that the most progressive states, such as many South-American states, will ensure the rights of indigenous peoples within their constitutions, which can be viewed as an ultimate act of state practice, often following years of other legislative acts that have expanded the rights of indigenous groups within the states. The second was to examine if any of those forty states have ratified the only international instruments that deal specifically with indigenous rights, namely the International Labour Organisation (ILO) Conventions 107 from 1958 and Convention no. 169 from 1989, although ratifying international treaties is not considered state practice as such, it is important to learn the extend to which states have been willing to commit to these instruments that deal with these specific rights.

To find the submissions from state to the various UN bodies of the 40 selected states the internet search engine at the United Nations home page was utilized. It offered the option to select a member state from a list and then select a subject to search for, in this case the subject was “indigenous”. This resulted in documents from bodies as the Working Group on Indigenous Populations, the Open-ended Inter-Sessional

[8] See Appendix I

Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples and the UN Third Committee, which deals with Social, Humanitarian and Cultural matters to name a few. These documents form the basis for the *opinio juris* part of the thesis.

To get an idea of the practice of states regarding indigenous rights and see the form of protection already existing for indigenous peoples within their internal legal orders, this paper examines all of the constitutions of the states chosen to see if they hold any protection or recognition of indigenous peoples rights. It seems to me, through my research, that constitutional protections for indigenous peoples become embedded into each constitution only after years of legislative and administrative practice on behalf of the states in question. It also seemed beneficial to add to this thesis how many of the forty states chosen have ratified the only international instruments that deal specifically with indigenous rights, namely the ILO *Indigenous and Tribal Populations Convention no. 107* from 1957 and *the Indigenous and Tribal Peoples Convention no. 169* from 1989.

I started this investigation with the firm believe that the group rights mentioned had crystallised into an international custom as stated by Anaya. Unfortunately, the conclusion of this paper is that the uniformity and harmony, or will, needed for a custom to evolve, as traditionally expounded by scholars, is absent, even if the emphasis on the state practice part of custom-making is heavily suppressed and greater emphasis is put purely on submissions from states. Of course this thesis examines only a small part of the argument presented by Anaya regarding the evolution of the rights in question and so is neither an exhaustive nor an authoritative answer to the question. But I feel it is indicative of the fact that specific group rights for indigenous peoples have not yet evolved into an international custom.

1 DEFINITIONAL ISSUES

1.1 What is international custom?

James Anaya states that some aspects of indigenous rights have already crystallized into international customary law. His argument is based largely upon statements made by governments, NGOs and other relevant groups regarding indigenous issues in forums such as the General Assembly (GA), Sub-Commission on the Promotion and Protection of Human Rights, the Working Group on Indigenous Populations and others[9]. He emphasises the role of oral and written submissions from states stating that in these "multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a *pull toward compliance* […] even in advance of a widespread corresponding pattern of physical conduct."[10] He thus maintains that a consensus has been reached by almost all the authorative actors and these statements are indicative of custom even though these statements have not been followed through with much positive action on behalf of the states.

Although indigenous groups had tried to raise the awareness of the international community since well before the 1920´s, no real progress was made until in 1971,[11] when a resolution was passed by the UN Economic and Social Council asking the Sub-Commission on Prevention of Discrimination and Protection of Minorities[12] to make a report on discrimination against indigenous populations. The report was done under the auspices of the special rapporteur J.M. Cobo and finished in 1983.
It was an impressive and detailed work on indigenous people the world over. The Cobo report became the standard document on the issues of indigenous people within the UN framework.[13]

[9] Such as at the ILO and the Rio Convention, to name just two.
[10] Anaya, *supra* note 3, p. 61
[11] although the International Labour Organization had created a flawed instrument on indigenous rights in 1957, see Anaya, *supra* note 3, p. 58
[12] Now called the U.N. sub-commission on the promotion and protection of Human Rights.
[13] Anaya, *supra* note 3, p. 62

The UN Human Rights Commission and the Economic and Social Council founded the Working Group on Indigenous Populations in 1982 manned with independent human rights experts. This working group became a platform for dialogue between indigenous groups, NGOs and states. The result of the work done by the working group was the draft UN. Declaration on the Rights of Indigenous Peoples which, was adopted by the sub-commission on the promotion and protection of human rights in 1994, submitted it to the Commission on Human Rights, where it has remained, in a Working Group to this day, due to the reluctance of states to commit to these issues.

In 1989 the ILO Convention on Indigenous and Tribal Peoples was made to replace the older instrument and marks another big step in the progress of indigenous rights, not least because of the nature of the ILO and the work process it has that brings together workers, employers and states.[14] Thirty-nine governments participated in the conference committee adding to the growing consensus regarding specific rights of indigenous peoples. During this time regional bodies also added to the development of indigenous rights. The Organisation of American States (OAS), for example, asked the Inter-American Commission on Human Rights to prepare an instrument on the rights of indigenous people. During the discussions by the members of the OAS regarding this instrument further consensus developed on the specific form of the rights in question. Further developments were made by contributions by the World Bank, the Rio Declaration and agenda 21, the World Conference on Human Rights in 1993, the World Summit on Social Development and the World Conference Against Racism, and together add weight on the consensus building argument made by Anaya regarding the crystallization of specific indigenous rights into a customary norm.[15]

In the last 80 or so years the nature of customary international law has changed or rather, evolved, significantly. Instead of the interchangeable nature of treaties and custom that allowed states to object to their applicability there is now a new vision of custom that allows it to trump both treaties and domestic legislation.[16] Through instruments such as the Vienna convention on the law of treaties and the adopted Draft Articles on State Responsibilities, principles of customary law have now more

[14] Anaya, *supra* note 3, p. 64
[15] Anaya, *supra* note 3, p. 65
[16] Antonio Cassese, International Law, (Oxford: Oxford University Press, 2004) p. 118

weight than they ever had.[17] The ICJ, for example has underscored these changes in cases where it discusses the nature of *erga omnes* principles.[18]

Under article 38.1(b) of the statute of the ICJ lists "international custom, as evidence of a general practice accepted as law" as a source of law.[19] The statement of general practice is usually construed to mean action or statements by the state and the belief that those actions amount to law (*opinio juris*) or that they are mandated by social, economic or moral duty (*opinio necessitates*). Some scholars, such as Anaya maintain that a greater emphasis can now be placed on the *opinio juris* part but others dispute this emphasis, maintaining that such elements are hard to pin down and concrete action on behalf of the states, over time, is more reliable to measure the progress of custom.[20]

The traditional view of how custom evolves in international law, has always included both *opinio juris* and concrete state practice that is illustrative of the psychological element or the belief that the subject has reached the status of law. The International Court of Justice, in the North Sea Continental case said that "*State practice, including that of states whose interest are specifically affected, should…[be] both extensive and virtually uniform*."[21] This does not mean that a single state or a few states can prevent the custom from materializing by non-compliance or defiance of the emerging custom, especially if all the other states view this non-compliance as a breach.

Another factor that is important to determine is if the nature of the custom in question is relevant to the number of states needed to evolve a custom. To explain further we can ask, in the absence of treaties, if states that have no automobiles can create a custom regarding car safety or traffic control?[22]

[17] Antonio Cassese, International Law, (Oxford: Oxford University Press, 2004) p. 117-119
[18] For example see the International Court of Justice (ICJ) cases – Barcelona Traction case (second phase); Armed Activities on the Territory of the Congo; Democratic Republic of the Congo v. Rwanda
[19] Statute Of The International Court Of Justice, Article 38.1.(b)
[20] Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) p. 70-71
[21] ICJ North Continental Shelf case - paras. 60-82 of the Judgment
[22] see further, land locked states: Cassese, *supra* note 16, p123

It is also clear that individual human rights are the concern of all states, since they are all made up of individual human beings. But what about group rights for specific groups, such as indigenous peoples that fulfill the definitions of indigenousness? There are many states that do not have oppressed indigenous minority groups, or at least not recognize any within their territory. Can these states create a custom without the participation of those states that have indigenous peoples?

If a specific issue concerns only ten states, and they all come to belief that a certain custom has evolved and is respected by them all, would the eleventh state be bound by that "custom"? What if there were only five states?[23] It is my conclusion that the number of states is not the main criteria but the clear practice and *opinio juris* of those states that the matter directly concerns, plus silence or at least no opposition from other states, usually those with no interests in the subject matter.

This can be affirmed by the rapid way that the customary law regarding the sovereignty of state airspace and the almost instant crystallization of the non-ownership of orbital space around the earth shortly after the lunch of sputnik in the 1960s.[24] In the case of the non-ownership of the earth's orbit, not many states could show concrete action in other forms than with statements, since only two states were capable of putting hunks of metal into orbit at that time. But another crucial factor could be that both of those superpowers directly involved, agreed on the concept of non-ownership.[25] An interesting question would be: what if one of the superpowers had decided that it wanted orbital ownership directly above its territory? Would the custom have crystallized anyway? The answer to this seems to be that it would not have emerged or, at the least taken more time to do so.[26]

Some scholars argue that humanitarian law dictate a different criterion for the forming of custom and have the Martens clause at the centre of their argument.[27] The Martens clause brings into the equation the "laws of humanity" and the "dictates of

[23] A fitting analogy is the creation of a new state, which would instantly be bound by international custom and erga omnes principles, presumably regardless of the overall number of existing states. (Cassese p. 124)
[24] Shaw, *supra* note 20, p. 74
[25] Cassese, *supra* note 16, p 120
[26] *Id*. p 124
[27] See for instance Cassese, *supra* note 16, p 121-3

the public conscience."[28] These should, in order to protect human rights, lessen the emphasis on the action part in the custom creation process and give rise to the psychological or "*opinio*" part. This argument is very much in line with the argument put forward by Anaya on the rights of indigenous peoples regarding the *opinio juris* of states through participation in multinational settings. These participations, mostly statements, because they have been made by many states and most concur on the same basic minimum of group rights, that they can be seen as norms of a customary nature. This would still need a relatively coherent voice among the majority of those states regarding themselves as having a interest in the subject matter of indigenous peoples´ rights. In his book he states that thirty-nine states participated in the creation of the ILO convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.[29] The fact that only ten states have ratified that convention does not put much backing into a claim that a consensus was reached by those thirty-nine states. He also discusses the participation of many countries and writes that "virtually every state in the Western hemisphere eventually came to participate in the working group discussion on the declaration" meaning the UN draft declaration on the rights of indigenous peoples. He then gives an example of a total of six countries that made oral or written submissions to the working group and in a footnote points toward the UN archives.[30]

To substantiate the argument of custom by way of a variation of the Martens Clause method, as done by Anya, any large group of states that have aired their view on indigenous issues will have within it a large majority that will have to agree or converge with regards the minimum collective rights believed to belong to indigenous peoples.

[28] Cassese, supra note 16, p 121-2
[29] Anaya, supra note 3, p. 64
[30] *Id*. p.63- 64

1.2 WHAT DOES "INDIGENOUS" MEAN IN INTERNATIONAL LAW?

1.2.1 Definitional issues regarding indigenous peoples

According to an estimate made by the director of the Raoul Wallenberg institute, Guðmundur Alfreðsson, there are at least 12.000 to 14.000 groups that can be listed as a minority, indigenous or a tribal group with up to a 1,5 billion individual members. This constitutes approximately a fourth of the human population.[31]
The official estimate on specific indigenous peoples is somewhere between 200-400 million individuals in over 70 countries.[32] The difference then, between peoples that have been labelled "indigenous" on the one hand and other minorities or tribal groups on the other, is around a billion individuals. The definition of the term "indigenous" is therefore a significant issue.

At first glance at the indigenous rights literature there seems to be a disagreement on the very subject of what defines a group so that it can rightly be called indigenous as to fit within the specific rights that have emerged within international law.
The term "*indigenous peoples"* has a narrow meaning in the contemporary international legal discourse and there are usually references to three main bodies of work that are used as guides to define what it is to be indigenous. These are from the ILO, the UN and the World Bank.

There is also an emerging body of work that comes from the indigenous peoples themselves, organizations, such as the World Council of Indigenous Peoples, The Indian Law Resource Center, The International Indian Treaty Council, and The Nordic Sami Council.[33]

What follows is a detailed examination of the actual terms used in these documents and pronouncements.

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[31] Guðmundur Alfreðsson. 2005, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law." Nazila Ghanea, Alexandra Xanthaki, (eds.) *Minorities, Peoples and Self-Determination*, (Boston: Martin Nijhoff Publishers) p. 164
[32] U.N. Internet source. http://www.un.org/av/photo/subjects/hgindig.htm
[33] Guðmundur Alfreðsson, Maria Stavropoulou, (eds.) *Justice Pending, Indigenous Peoples and Other Good Causes*, (Martinus Nijhoff Publishers, 2002) p. 73

1.2.2 United Nations Definitions

In the Year 1982 the United Nations Working group on Indigenous populations (WGIP) accepted the proposed definitions written under the supervision of Mr. José Martinez Cobo[34], who was the special Rapporteur on Discrimination against Indigenous Populations. In it he identifies the criteria then seen as the necessary ingredients needed to fulfil indigenousness:

> Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant.[35]

These were then found to have some limitations, especially with regards to very isolated and marginal groups. So in 1983 they were expanded to include that to be indigenous the group could also be descendants of those who were living in the territory at the time when foreign groups of different ethnic and cultural origin arrived and because of their isolation have remained culturally the same but under the authority of a state whose national culture is alien to theirs.[36]

In 1996, under strong leadership by Erica-Irene A. Daes, The WGIP made an in-depth study on definitional issues regarding indigenous peoples, with special emphasis on input from indigenous representatives themselves.

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[34] *Id.*
[35] The Problem of Discrimination Against Indigenous Populations, (1983 The Cobo Report.) UN Document E/CN.4/Sub.2/1986/7 Add.4
[36] Wikipdia, Article, "*Indigenous Peoples*", para. 2, Internet source.

Although the indigenous groups do not favour clear cut definitions Daes however noticed that definitions were a necessary element for understanding the concept of indigenous issues within the international legal arena. She then pointed to four definitive factors:

> 1) Priority in time, with respect to the occupation and use of a specific territory;
> 2) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
> 3) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
> 4) An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not these conditions persist.[37]

These definitions do not however constitute a clear-cut U.N. policy but are rather general guidelines and are not seen as inclusive nor comprehensive definitions.[38]

1.2.3 ILO definitions

The International Labour Organization has been active in furthering the rights of indigenous and tribal peoples at least since the 1920s. Since becoming a part of the U.N. it has participated regularly at the Working Group on Indigenous Populations.[39]

It was the International Labour Organization that first emerged into the international scene with an instrument that dealt specifically with indigenous peoples issues in 1957. The Convention No. 107 and its accompanying Recommendation 104, defined indigenous issues largely from a sovereign state mentality and with minimum input from the subjects in question, that is, the indigenous peoples themselves. The focus

[37] Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes on the concept of "indigenous people" (The Daes Report), COMMISSION ON HUMAN RIGHTS Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations Fourteenth Session29 July-2 August 1996, UN Document E/CN.4/Sub.2/AC.4/1996/2.
[38] *Id.*
[39] ILO, "*Background on ILO work with indigenous and tribal peoples*", (Internet Source)

of Convention No. 107 was assimilation and integration of indigenous peoples into the sovereign state they inhabited rather than to assure and protect the uniqueness of the culture and heritage they possessed as groups. State governments were given discretion to implement and coordinate the integration of indigenous groups into their fold and to equalise their individual rights with regards to other citizens.[40]

Article 2 paragraph 1 states that "Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries."

In paragraph 3 of the same article it further states that: "The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative."[41]

The definitions of who were applicable under the Convention were given under articles 1 and 2:

> 1a) Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations
>
> 1b) Members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and

[40] Anaya, supra note 3, p. 54
[41] Anaya, supra note 3, p. 55

> cultural institutions of that time than with the institutions of the nation to which they belong.[42]
>
> 2) For the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.[43]

Almost immediately the Convention drew criticism from various directions, not least from various indigenous groups. The ILO soon began working on another convention and this time with more involvement from indigenous groups.[44] The outcome was the Convention No. 169 on Indigenous and Tribal peoples.
It defines indigenous peoples as:

> **a)** Tribal peoples in countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations
> **b)** Peoples in countries who are regarded by themselves or others as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain, or wish to retain, some or all of their own social, economic, spiritual, cultural and political characteristics and institutions.[45]

In addition, the Convention establishes self-identification as another important principle.[46]

[42] ILO 107
[43] ILO 107
[44] Anaya, supra note 3, p 54-6
[45] ILO, Indigenous and Tribal Peoples Convention no.169, 1989, articles 1-2
[46] *Id.*

1.2.4 World Bank definitions

The World Bank initiated Directive 4.20 in 1991 to guide its policy concerning development projects that could adversely affect indigenous peoples and their interests. The directive gives a set of definitions to help task managers of the Bank to identify indigenous groups.[47]

> 3. The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.
>
> 4. Within their national constitutions, statutes, and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.
>
> 5. Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labour or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:
>
> (a) a close attachment to ancestral territories and to the natural resources in these areas;
>
> (b) self-identification and identification by others as members of a distinct cultural group;
>
> (c) an indigenous language, often different from the national

[47] World Bank Group, "*The World Bank Operational Directive 4.20*" (internet source)

language;

(d) presence of customary social and political institutions; and

(e) primarily subsistence-oriented production.[48]

1.2.5 Indigenous peoples definitions of themselves

Many groups that consider themselves indigenous have become well organized, well educated and effective advocates of indigenous peoples rights in the international arena. These offer several definitions on what indigenous means, for example, the *World Council of Indigenous Peoples* provides the following definition:

> Indigenous peoples are such population groups who from ancient times have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others.[49]

Most indigenous groups agree on the three most important aspects of identification: 1) self-identification, 2) Ancient and historical connection to territory, and 3) group membership.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. M. Dodson, for example stated: "there must be scope for self-identification as an individual and acceptance as such by the group. Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories. ..."[50]

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[48] World Bank Group, "*The World Bank* Operational Directive *4.20*"

[49] Dr. Darrell Addison Posey, Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships, P. 7

[50] Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes on the concept of "indigenous people" (The Daes Report), COMMISSION ON HUMAN RIGHTS Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations Fourteenth Session29 July-2 August 1996, UN Document E/CN.4/Sub.2/AC.4/1996/2. para. 35

This also concurs with the words of the representative of the *Sami Council* who stated that "even without a definition it should be relatively easy to identify … **[**those who are indigenous**] …** by using the criteria of the Cobo report which is adequate to determine whether a person or community is indigenous or not. Factors such as historical continuity, self-identification and group membership are cardinal criteria in this regard".[51]

1.3 Analysis

The Cobo Report recognises that priority in time and distinctive cultural aspects constitute the main criteria in identifying indigenous people. This is then further supported by the Daes report, that specifically uses the term "priority in time" and links this priority to the usage of the traditional land by the indigenous peoples and the voluntary continuance of their culture. The Sami council supported these conclusions, as have other indigenous groups since.

The same theme is apparent in the both ILO instruments, which almost use the same wording regarding the recognition of priority in time and distinctive cultural heritage. The Operational Directive published by the World Bank is more general in its definition and is not only directed at indigenous peoples in the narrow sense but includes "tribal groups" and scheduled tribes" in the definition of those who have a "certain essential and unique characteristics" and have a "close attachment to ancestral territories and to the natural resources…"[52]

Indigenous peoples themselves invariably also state their opinion on the definition that agrees with the two definitions mentioned above, although they feel that the right to self-identification should override most other criteria, especially by states and other international actors. This does not change the fact that these groups always list the priority in time and cultural aspects as essential. The World Council of Indigenous People for instance recognises indigenous people as those groups "who from ancient

[51] *Id.*
[52] *Id.*

times have inhabited the lands where we live" and have "having certain essential and unique characteristics".[53]

Also supporting this is the words by the Aboriginal and Torres Strait Islander Social Justice Commissioner when he declares the "crucial and fundamental importance is the historical and ancient connection with lands and territories" [54]

The result of this comparative analysis is that a clear consensus exists that identify the two main criteria that can be explicitly used to define who are and who are not "indigenous":

1. Priority in time. This is the historical and ancient connection with the lands or territories in question; and
2. Cultural distinctions. This can include distinctive language, or religion or customs or various traditions.

The disagreement on definition therefore seems to be superficial rather than substantive. The reluctance of the human rights movement to firmly establish a minimum definition of the term indigenous seem to stem from the wish to pacify the two opposing actors, the states and the indigenous groups, with the result of an illusory ambiguity, which disappears with a minimum degree of comparative research.

What complicates things further is the debate over the terms "self-determination of peoples" as it is stated in the U.N. Charter and the term "territories" as this could mean the loss of valuable land and resources of the state into the hands of indigenous groups.[55] Also adding further to both these terms is the fear of some states that recognising groups as "indigenous", and, even worse, "indigenous peoples" those same groups of people will then at once secede from the old parent state and start

[53] *Id.*
[54] *Id.*
[55] Anaya, supra note 3, p 129; Guðmundur Alfreðsson. 2005, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law." Nazila Ghanea, Alexandra Xanthaki, (eds.) Minorities, Peoples and Self-Determination, (Boston: Martin Nijhoff Publishers) p. 170

their own independent state. The result of which would drive the membership of the U.N. into the thousands, making it completely inoperable.
This is of course a fear that is largely unfounded and exaggerated, and completely beside the point because, in my mind, fundamental and unalienable rights must be held separate from the question of their use or potential consequences of their implementation.

The term "peoples" has two meanings and two origins that are relative to the discussion of indigenous rights. One comes from the U.N. Charter and deals with the so called "external self-determination" of states that were planning to shake off their colonial rulers after the second world war and the other evolved in America within the work done by the Organisation of American States and speaks of the recognition of indigenous groups as peoples living within the states themselves. In other words, the meaning was expanded from meaning one set of peoples within one state to include the reality that many peoples live within a single state, also called internal self-determination.[56]

So, from the standpoint of sovereign states, the definition of indigenous must be as narrow as possible, so as to exclude as many groups as possible and thus protect state sovereignty and state control over resources. To counterbalance this position the indigenous groups emphasise the right of each group to define themselves as indigenous or not, depending on their interest at any given time.

The international human rights movement must disregard these extremes.
Institutions, like the Commission on Human Rights, who are actively promoting the rights of indigenous peoples to their ancestral lands and the resources they own must have clear and minimum definitions to work with. As is stated by the U.S. Government when they commented on the draft Declaration on Indigenous Peoples, "In principle, it would seem important to have a universally-accepted definition of "indigenous" to ensure that the instrument is "sufficiently precise to give rise to identifiable and practicable rights and obligations", in the language of general

[56] Guðmundur Alfreðsson, Lecture, Lögfræðitorg. University of Akureyri. Spring 2005.

Assembly resolution 41/120."[57] This is important because the task at hand is specific: identify the people who were robbed of everything. Their lands, their lives, their future, their culture and their human dignity. Neither state nor any individual group by themselves can be made the sole determiner of who can and cannot be defined as an indigenous group. The right to self-identification and self-expression is tied up in the Culture of each group and is, as such should be an inalienable right. This however does not mean that each groups self-identification can dictate the definition needed to establish if a group is indigenous or not under international law.

2 Submissions to the United Nations Bodies

The main forums within the United Nations that have been used as platforms for governments to express their views on indigenous issues are the Working group on Indigenous peoples, the Open-ended inter-sessional working group on a draft United Nations Declaration on the Rights of Indigenous Peoples and the UN Third Committee on Social, Humanitarian and Cultural issues.

Before these bodies, delegates from the countries participating in them have made various statements regarding indigenous rights and what they are. The states selected in this study can be categorised into three groups.

2.1 States that identify specific group rights

The first group contains those states that identify one or more of the specific indigenous group rights that need protecting and give evidence of how they themselves have taken domestic measure regarding those.

[57] Economic and Social Council, Comission on Human Rights, Fifty-second session, Working Group established in accordance with Commission on Human Rights resolution 1995/32. UN Document: E/CN.4/1995/WG.15/2/Add.2. Para. 9.

2.1.1 Russia

As an example, the Delegate of the Russian Federation said that his Government had as a priority the issues of indigenous peoples. As evidence of this he pointed to legislation aimed at strengthening the special rights of indigenous people to social, economic and cultural development and also to protect their traditional land and resources.[58]

2.1.2 Finland

At the Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, the Finnish representative clarified the position of the Finnish Government that the rights of the Sami people were protected within the Constitution that came into force in 1995. The Sami as indigenous people have the rights to their own language and culture.[59]
Another Finnish representative addressing the Working Group on Indigenous Peoples in its sixth session stated that the Sami people have a constitutional right over the presently state owned land in northern Lapland. He further stated that in Finland indigenous people would have a say in the uses of the resources that are on their traditional land.[60]

2.1.3 Brazil

The representative of the Government of Brazil, opening of the international Decade of the International Decade of the World's Indigenous People, stated that Brazil was very active in the U.N. regarding the activities of the international year and in the work leading up to the international decade regarding indigenous rights. The Government of Brazil stated that the rights of indigenous people were protected by

[58] UN Document A/C.3/60/SR.20. General Assembly Sixtieth session Official Records, Third Committee, Summary record of the 20th meeting Held at Headquarters, New York, 20 October 2005.
[59] UN Document: E/CN.4/1995/WG.15/2. Economic and Social Council, Comission on Human Rights, Fifty-second session, Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples, First session, 20 November - 1 December 1995
[60] UN Document: E/CN.4/Sub.2/AC.4/1988/2. Economic and Social Council, Comission on Human Rights, Sub-Commission on Prevention Discrimination and Protection of Minorities, Working Group on Indigenous Peoples, Sixth Session 1-5 August 1988

the constitution, this protection included land rights for traditionally owned land. The rights of the indigenous people to their culture; customs; and language was both enshrined in the constitution and were also a high priority of the federal government.[61]

2.1.4 Argentina

Argentina participated fully in the making of the draft United Nations Declaration on the Rights of Indigenous Peoples. Argentina stated that many aspects of indigenous rights were already incorporated in domestic legislation and the rights of indigenous groups were enshrined in the Constitution, which was revised in 1994. The Argentine Government further recognised the legal personalities of indigenous groups and their title of community ownership over the land traditionally owned by them. The Argentine delegate strongly indicated the will of Argentina to protect these rights and said "the legislative branch being empowered to regulate the handing over of other lands suitable for human development, and establishes that none of those lands shall be alienable, transferable or subject to charges or seizure and possession of the lands they traditionally occupy".[62]

Argentina proclaimed that it had a tradition of respect for indigenous people and that the protection of the culture and traditions were an integral part of government policy as could be seen within domestic law.[63] Another representative of Argentina stated that the National Institute for Indigenous Affairs, an organ created by the government, was "entrusted with the responsibility of regularizing property titles with a view to the distribution of land and the implementation of plans relating to housing and the environment."[64] He further stated that the government was committed to "associate indigenous people with the management of their interests…"[65]

[61] UN Document: A/49/PV.82, General Assembly Official Records, Forty-ninth Session, 82nd Meeting, 8 December 1994, New York
[62] UN Document: E/CN.4/1995/WG.15/2. Economic and Social Council, Comission on Human Rights, Fifty-second session, Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples, First session, 20 November - 1 December 1995
[63] *Id*.
[64] UN Document: A/C.3/55/SR.25. General Assembly, Third Committee, 25th meeting, Tuesday, 17 October 2000, New York, Page 5-6
[65] *Id*.

2.1.5 Australia

A representative speaking for the Australian Government regarding indigenous issues during the consideration on the draft U.N. Declaration on the Rights of Indigenous Peoples voiced his governments warning against forceful integration of indigenous peoples into the mainstream, saying that "Australia believes that attempts to actively pursue such exclusive political arrangements lead only to the bloodshed and ethnic cleansing we have seen recently in former Yugoslavia, the Caucasus and parts of Africa. Rather, the demands by peoples for internal self-determination, generally expressed as the maintenance of their cultural identity, including their language and spiritual beliefs, should be capable of accommodation by national governments."[66] In 1987 the Minister for Aboriginal Affairs, Mr. Hand, stated that he saw self-determination as a "vital issue", which must ensure "that Aboriginal and Islander people are properly involved in all levels of the decision-making process in order that the decisions are taken about their lives."
In 1990 the House of Representatives Standing Committee on Aboriginal Affairs stated that it was important to ensure "…aboriginal control over the decision-making process as well as control over the ultimate decision a wide range of matters including political, and economic, social and cultural development."[67]

2.1.6 Bolivia

Addressing the issues of indigenous peoples during the discussion of the Third Committee, Bolivia stated that it was a "multi-ethnic and a multicultural State with a well-defined policy of respect for the rights of indigenous peoples." The Government had also claimed to have, provided legal reform incorporating the rights of indigenous people into its domestic law with special emphasis on international principles relating to indigenous issues. The spokesperson for Bolivia also maintained that a Constitutional Court had been set up and this court would be highly beneficial for

[66] UN Document: E/CN.4/1995/WG.15/2. Economic and Social Council, Comission on Human Rights, Fifty-second session, Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples, First session, 20 November - 1 December 1995, para 11
[67] *Id.* para 17

indigenous peoples since they had specific constitutional rights.[68] The Government of Bolivia said it was committed to the process of political and social reform for the benefit of its indigenous people. The indigenous communities were slowly taking greater part in the political process. The Government of Bolivia had taken steps to introduce native language education at the primary level in the Quechua, Aymará and Guaraní communities. The representative also referred to the recent Administrative Decentralization Act which would help the indigenous and peasant communities and also that "other legal measures had brought indigenous people into the national social security system and formalized their territorial rights."[69]

2.1.7 *Kenya*

Mr. Ole Ntimama speaking on behalf of Kenya in general in the General Assembly said that the saving of indigenous people was a crucial task and they needed "moral and material" support to be able to ascend to their right of self-management and control. The representative of Kenya recognized that the problems of indigenous people in different areas of the globe were similar, consisting in the very survival against overwhelming odds of colonizers and other enterprises. He stated that traditionally indigenous peoples were the guardians of the land and now that the wildlife was under threat of destruction he warned that the destiny of the world and the destiny of indigenous people were intertwined. "Save the indigenous people and you will have saved the world. Destroy the indigenous people and you will have destroyed the world". He concluded that the culture, language and tradition of the indigenous people should be respected and he confirmed the intention of the Government of Kenya to fully respect, protect and recognize the fundamental rights of all people of Kenya and in particular the indigenous people with the aim of integrating them into the mainstream with the rest of Kenya's population. [70] Given the tone and content of the speech, this integration would probably mean greater participation of indigenous people in everyday live, rather than any kind of forceful integration.

[68] UN Document: A/C.3/53/SR.27. Third Committee, Summary record of the 27th meeting, New York, 28 October 1998.
[69] UN Document: A/C.3/51/SR.31. Third Committee, 31st meeting, 11 November 1996, New York, page 5-6
[70] UN Document: A/49/PV.82, General Assembly Official Records, Forty-ninth Session, 82nd Meeting, 8 December 1994, New York, p 1-3

2.1.8 Peru

Peru said that the Government was committed at all levels to insure the rights and development of indigenous peoples with the aim of promoting their participation in the democratic process, based on respect for human rights and fundamental freedoms. The Government of Peru further stated that it was focused on protecting the cultural identity of all indigenous groups.[71]

2.1.9 Sweden

Dr Rolf H. Lindholm, representing Sweden in a 1993 statement to the Working Group on Indigenous Populations, invoked the sad factual situation of indigenous people in the World due to oppression and discrimination.
He stated the view of the Swedish Government that group rights must have their basis in individual rights and that group rights must not weaken or erode the application of individual rights. He further claimed that indigenous group rights should therefore be rooted on non-discrimination, similar to the approach taken with the Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities. Sweden also put forward the idea that land rights of indigenous people could benefit from the concept of usufruct, which has been recognised by the supreme court of Sweden as a customary norm regarding the use of the Sami population of their traditional land. Although the Sami people do not have ownership *per se* they do still have a legal right, or entitlement to its use.[72]

2.1.10 United States of America

The United States Government delegate, for example, maintained that his Government was deeply "committed to promoting and protecting indigenous rights throughout the United States, as well as throughout the world."
He further stated that under the U.S. constitution protected both individual and group rights to their property and cultural distinctiveness. He further stated that interaction

[71] UN Document A/C.3/60/SR.20. General Assembly Sixtieth session Official Records, Third Committee, Summary record of the 20th meeting Held at Headquarters, New York, 20 October 2005.para 26
[72] UN working Group On INDIGENOUS POPULATIONS Eleventh session 19-30 July 1993

between the U.S. and Indian tribes were conducted on as between states, rather then as between a state and a minority groups.[73]

2.1.11 Canada

Addressing the working Group on Indigenous Peoples, the representative of Canada stated that the highest level of the government, were deeply involved in discussion with indigenous representatives on proposals for constitutional change.
The Government of Canada was further seriously committed to restoring traditional land back to their owners. To this end the Government of Canada had developed a comprehensive lands claim settlement plan. Through this method many claims had been settled involving many indigenous groups, like the Nunavut Land Claims Agreement act regarding territory that was larger than the state Finland.[74] A representative of Canada also underscored the Commitment of Canada to respect the indigenous cultural, Social and economic rights with full involvement with the indigenous groups themselves.[75]

2.1.12 Summary

Of these states the Governments of Russia, Finland, Brazil, Argentina and Canada identified both the right to culture and the right to traditional lands. Kenya identified the right to traditional land and the right to self-government. Peru and the U.S.A. only identified the right to culture and Australia talked about the importance of the right to self-determination.

[73] UN Document: E/CN.4/1995/WG.15/2/Add.1. Economic and Social Council, Comission on Human Rights, Fifty-second session, Working Group established in accordance with Commission on Human Rights resolution 1995/32, p 7
[74] UN Document: E/CN.4/Sub.2/AC.4/1988/2. Economic and Social Council, Comission on Human Rights, Sub-Commission on Prevention Discrimination and Protection of Minorities, Working Group on Indigenous Peoples, Sixth Session 1-5 August 1988
[75] UN Document A/C.3/60/SR.20. General Assembly Sixtieth session Official Records, Third Committee, Summary record of the 20th meeting Held at Headquarters, New York, 20 October 2005.

2.2 States that equate indigenous rights with individual rights

The second group of states are generally in favour of indigenous rights but try to equate them with individual rights already established within their domestic legal order, rather than special group rights. Some of these states, such as Chile and New Zealand mention cultural rights, but I feel they are speaking too generally and do not amount to the recognition needed to belong to the former group in 2.1.

2.2.1 Malaysia

Malaysia, for example, recognised that indigenous communities were protected, just like every other community and individual with regard to their culture, traditions, religion and language. The Government of Malaysia further stated that it was committed with involving ”indigenous peoples in the country’s development efforts.” Malaysia claimed also to have taken measures to include indigenous peoples in participation in the management of resources.[76]

2.2.2 Mexico

The Government of Mexico submitted that ownership and private property is not without limit and does not constitute an absolute right. The Mexican nation is the sole giver of land rights and ownership to private individuals or groups, such as indigenous peoples.[77]

2.2.3 New Zealand

In the Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples, New Zealand stated that indigenous people should have the freedom to maintain their own identities, cultures and their ways of life.[78]

[76] UN Document: A/C.3/51/SR.31. Third Committee, 31st meeting, 11 November 1996, New York.
[77] *Id*. p 5-6
[78] UN Document: E/CN.4/1995/WG.15/2. Economic and Social Council, Comission on

2.2.4 Chile

The representative of Chile during the meeting of the Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples stated that since the democratic change in Chile in 1990 a great progress had been made regarding indigenous people and their rights within Chile. The Government of Chile also reminded the attendees that since that time Chile had been an active supporter of the indigenous cause throughout the globe. The representative also wanted to make clear the position of Chile that only through representation could the vital rights of indigenous peoples like social and cultural rights be guaranteed.[79]

2.2.5 Sudan

The delegate from Sudan, speaking at the General Assembly expressed her country's opinion that respect for all human rights must be ensured without discrimination. Sudan voiced its hope that the International Decade of the Worlds Indigenous people would result in measures that would recognise their full rights and help preserve their customs and way of life.
The Government of Sudan also maintained that there were virtually no problems regarding the rights of indigenous people in Sudan since there was no difference between their rights and Sudanese human rights in general. She further explained her Government's vision of the meaning of self-determination as the right to liberation from colonial rule and the right to determine their own lives according to traditional ways.[80]

These states do see the rights of indigenous people as important but do not go so far as to say that they should be protected above or beyond any other domestic groups. Malaysia and Sudan make it quite clear that this is so while Mexico and New Zealand are more general. Chile stated that only by encouraging indigenous people in the involvement of government could they ensure their own rights.

Human Rights, Fifty-second session, Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples, First session, 20 November - 1 December 1995
[79] *Id.*
[80] UN Document: A/C.3/51/SR.29. Third Committee, 29th meeting, 8 November 1996, New York.page 8

2.3 States in denial

The third group contains those states that will not admit that there are any indigenous groups or peoples within their borders, only submit reservations or comments on definitional issues or simply remain mostly silent on the issue altogether.

2.3.1 Japan

The Japanese agent addressing the Open-Ended Inter-Sessional Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples conveyed the view of the Japanese Government that all language regarding the rights of indigenous people should be accurate and free of all vagueness. The definition of "indigenous" should be made concrete, without which much confusion would ensue. He further expressed the view that the term "collective rights" was not (as of 1995) a part and parcel of international instruments and was as such not yet firmly established. The Government of Japan counselled caution when dealing with the indigenous rights and pointed out that ample protection was already in place by the individual rights that had been firmly established in international law.[81]

2.3.2 China

The Chinese representative stated that there were no indigenous peoples in the whole of china, since the different nationalities had lived for "aeons" on Chinese territory. But although he claimed there were no indigenous peoples in China, the Chinese Government was fully supportive of the rights of those people in other countries that have been oppressed for so long and should have equal economic, social and cultural rights as other citizens of their respective countries.
The Government of China also expressed their puzzlement as to why the Centre for Human Rights had categorized many Chinese minorities as indigenous and had failed to rectify this mistake, despite the Chinese Government's best effort to show them the

[81] UN Document: E/CN.4/1995/WG.15/2/Add.2. Economic and Social Council, Comission on Human Rights, Fifty-second session, Working Group established in accordance with Commission on Human Rights resolution 1995/32.

errors of their way.[82] The Chinese official also maintained that without scientific definition of the term "indigenous" only confusion would be achieved and no real progress could be made.

2.3.3 Ukraine

The Ukrainian delegate proclaimed that any specific group rights of any indigenous group that would establish a privilege above other segments of the population would violate the Ukrainian Constitution. Indigenous Group rights were therefore not viable in the Ukraine. [83]

2.3.4 Morocco

Morocco stated that the term "indigenous peoples" was only likely to lead to an ambiguous interpretation that would clash with international law. Morocco also cautioned the usage of the term peoples as it had strong links to the question of self-determination to the principle of territorial integrity and the concept of sovereignty.[84]

2.3.5 Summary

These four states deny or diffuse indigenous rights each for their own reasons. To venture a guess the question of land ownership and control of resources would be a very likely reason along with the worry about demands for more autonomy from different ethnic groups.

Of the forty states, no substantial submissions were found regarding indigenous issues from Algeria, Botswana, Cameroon, Namibia, Nigeria, India Syria, Tanzania, Tunisia, Thailand, Paraguay, Pakistan and Panama,

[82] UN Document: E/CN.4/1995/WG.15/2. Economic and Social Council, Comission on Human Rights, Fifty-second session, Open-ended inter-sessional working group on a draft United Nations declaration on the rights of indigenous peoples, First session, 20 November - 1 December 1995, para 4
[83] *Id.* para 5
[84] UN Document: E/CN.4/1995/WG.15/2/Add.2. Economic and Social Council, Comission on Human Rights, Fifty-second session, Working Group established in accordance with Commission on Human Rights resolution 1995/32.

2.4 Reality check

The submissions that states make internationally only represent their version of the truth. These statements on indigenous peoples in this chapter are no different. To get a more balanced view on these matters the conclusions and recommendations of the Committee on the Elimination of Racial Discrimination often offers a clearer picture on the real progress of states or the lack thereof.

In this paper Brazil stands at the front of the line regarding progressive protections for indigenous peoples, at least according to state officials. In the 2004 report from the Committee on the Elimination of Racial Discrimination on the status of Brazil noted many positive things, some of which regarded indigenous people specifically. Among those were "the entry into force, in January 2003, of the new Civil Code which is in line with the 1988 Constitution and eliminates discriminatory restrictions on the exercise of civil rights by indigenous peoples contained in the former 1916 Civil Code."[85] The Committee also notes the entry into force of the ILO convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.
But the Committee also has concerns and recommendations for Brazil that extends to indigenous peoples. These include "the persistence of deep structural inequalities affecting black and mestizo communities and indigenous peoples"[86], the racial segregation faced by those same peoples, both in rural and city areas, that only relatively small part of quilombo territories have been officially recognized and have yet to get deeds to their lands, the increase in racist organisations, such as neo-nazi groups and that illiteracy among the indigenous, black or meztizo group is high and that these illiterate people cannot be elected to public office.[87]
Bearing in mind the reality of the difference between statements by governments and government action the most concrete protection states can give to their citizens are constitutional in nature. It is therefore an interesting examination to see how many of the forty states chosen in this survey have *embedded* protections for their indigenous peoples into their constitutions.

[85] UN Document: CERD/C/64/CO/2. Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination(on Brazil).
[86] Id.
[87] Id.

3 Examination of Constitutions and ratification of the ILO treaties on indigenous peoples

The constitutions of these forty states can be categorised into three groups. The first group has some protection for the indigenous group rights, the second group have constitutions that recognise indigenous peoples without protecting specific group rights, and the third contains those constitutions that do not recognise indigenous peoples at all.

3.1 Constitutions that have protection for indigenous group rights

The first group are those constitutions that have all or some of the Indigenous group rights, Culture, Autonomy or Land rights, e
3mbedded into their constitution:

3.1.1 Brazil

Into this group falls the Brazilian constitution is one of a handful of progressively pro indigenous constitutions. Chapter VIII deals specifically with indigenous issues guaranteeing the recognition of social organization, customs, languages, creeds and traditions. It also preserves the rights of indigenous peoples to their native traditional lands and property. In article 231 paragraph one, it details that "Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those which are indispensable to preserve the environmental resources required for their well being and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions."[88]
A great emphasis is also made on bilateral discussions between the Government and indigenous peoples regarding any issue affecting indigenous interests.[89]
The Brazilian Government ratified the ILO Convention on Indigenous Populations nr. 107 in 1965 and in line with its progressive policy on indigenous matters ratified the new ILO Convention no. 169 in 2002.[90]

[88] The Brazilian constitution, 1988 revised 1995
[89] The Brazilian constitution, 1988 revised 1995 Article 231 paragraph 3.
[90] ILO. Ratificaction status. Internet source

3.1.2 Colombia & Bolivia

The Constitution of Colombia is similar to the Constitution of Brazil in that it protects and promotes in a specific way all three specific group rights of its indigenous citizens, the right to culture, land and self-governance. It also gives two specific seats in the Senate to the indigenous community.[91] In article 9 it also lays down strict rules regarding land use, stating, that "Exploitation of natural resources in the indigenous (Indian) territories will be done without impairing the cultural, social, and economic integrity of the indigenous communities. In the decisions adopted with respect to the said exploitation, the government will encourage the participation of the representatives of the respective communities."[92]

This is also the case with the constitution of Bolivia, which under article 171 similarly recognises and protects these rights to culture, autonomy and territorial rights to traditional land.[93] Both these governments have ratified the ILO Convention no. 107 and the Convention on Indigenous Peoples no. 169.[94]

3.1.3 Paraguay (Venezuela & Guatemala)

The constitution of Paraguay is one of the most progressive in its articulation of indigenous rights. In Chapter V article 62 it firstly recognises ethnic groups "whose culture existed before the formation … of the state of Paraguay."[95] In articles 63, 64 and 65 the indigenous peoples are given autonomy to apply their own political, social-economic and religious policies. Also guaranteed are certain land rights on which they can preserve and develop their culture. These lands are exempt from taxes and a strong prohibition is made against any involuntary removal of those ethnic groups from their territories.[96] In line with these South American constitutions are also the constitutions of Venezuela[97] and Guatemala,[98] with strong indigenous protection embedded in them, although lesser in the case of Guatemala.

[91] The Constitution of Colombia, 1991, Article 171
[92] The Constitution of Colombia, 1991, Article 330 paragraph 2
[93] The constitution of Bolivia, 1967, with reforms of 1994, 1995, and 2002, Article 171
[94] International Labour Organization. Ratification of Treaties. Internet source.
[95] The Constitution of Paraguay, 1992, chapter V Article 62
[96] *Id.* chapter V, articles 63-65
[97] The Constitution of the Bolivarian Republic of Venezuela, 1999, articles 119-126
[98] Constitution of the Republic of Guatemala, 1985, revised in 1993, articles 66-9

3.1.4 Argentina

Under Article 17 the Argentinean constitution recognises the ethnic and cultural priority of the indigenous peoples of Argentina, with a special guarantee of the legal rights to their traditional land. It also guarantees "their participation in issues related to their natural resources and in other interests affecting them."[99]

The Government of Argentina ratified the 1957 ILO Indigenous and Tribal Populations Convention, and in the year 2000 denounced that one and ratified ILO Convention 169 on Indigenous peoples in its place.

3.1.5 Fiji

In the Constitution of the Republic of the Fiji Islands ownership is guaranteed according to custom and that the Fijian and Rotuman indigenous peoples have a group right to their religion, language, culture and traditions. These groups are also promised the right to self-governance. [100] Fiji ratified the ILO Convention no. 169 in 1998.

3.1.6 Mexico

The Mexican constitution recognises the multicultural nature of the country and the existence of the indigenous peoples from before the colonization and their unique Social, cultural and political institutions. The constitution then guarantees the protection of those institutions and to implement specific actions to promote and protect several aspects of the lives of the indigenous people, such as in education, social benefits and land rights.[101] Mexico has updated its ratification of ILO Convention 107 to the new model of Convention nr. 169

[99] The Constitution of the Argentine Republic, 1994, Article 17
[100] Constitution of the Republic of the Fiji Islands, 1997, chapter 2 article 6
[101] The constitution of Mexico, 1917, reformed 2004, chapter I Article 1 and chapter VIII

3.1.7 Peru

In Peru the constitution protects the languages of the Quechua, Aymaran and other indigenous peoples.[102] In article 89 it also protects the cultural identities of the communities of the native farmers, recognising for them self-governance within the limit of the law.[103] Peru ratified the ILO Convention no. 107 in 1960 and upgraded to Convention no. 169 in 1994.

3.1.8 Panama

In Articles 84 and 86, the constitution of Panama "recognizes and respects the ethnic identity of the national indigenous communities…" and languages. It also guarantees the state will support them in developing their material, social and spiritual values and culture.[104]

Although Article 123 guarantees to the indigenous peoples a "reserve of necessary earth and the collective property of the same ones for the profit of its economic and social well-being", article 122 balances the rights of indigenous peoples with the duty of the state to develop the land and states that "The policy established for this Chapter will be applicable to the indigenous communities in agreement with the scientific methods of cultural change." This is rather ambiguous but it leaves the impression that the state will have the upper hand regarding indigenous land rights and resources.[105] These provisions are similar in nature to the provisions in the Constitution of the Republic of Guatemala from 1985 Constitution, which was reformed in 1993.[106] Both countries ratified the ILO convention 107 but only Guatemala has updated to the Convention on Indigenous Peoples nr. 169.[107]

[102] The constitution of Peru, 1993, reformed 2005, Article 48
[103] *Id.* Articles 89 and 149
[104] Constitution of the Republic of Panama of 1972, reformed in 1978, 1983 and 1994. Article 84 and 86
[105] Constitution of the Republic of Panamá of 1972, reformed in 1978, 1983 and 1994. Articles 122 and 123
[106] Articles 66-68 Constitution of the Republic of Guatemala from 1985 Constitution which was reformed in 1993
[107] ILO. Ratificaction status. Internet source

3.1.9 Canada

The constitution of Canada holds a section dedicated to indigenous people guaranteeing them the existing aboriginal and treaty rights already sign by Canada. It also lists the three specific groups of indigenous peoples that are entitled to the rights in question, the Inuit, the Indian and the Metis peoples.[108] There are no specific rights listed in the constitution itself regarding indigenous rights but in article 35, paragraph 1(a) and (b) the Government promises a constitutional conference and to allow aboriginal Canadians to participate in them.[109]

3.1.10 Finland

The rights of the Sami indigenous people are protected in the Finnish constitution under section 17 and under section 121. The Finnish constitution gives specific rights to the indigenous peoples to maintain and develop their language and culture. Although the delegate from Finland to the U.N. claimed that the Sami land rights were guaranteed in the constitution no specific article or clause can be found that supports that claim.[110]

3.1.11 Summary

The constitutions that recognise all three rights are the constitutions of Brazil, Colombia, Bolivia, Paraguay, Venezuela, Guatemala and Canada. The constitutions of Argentina, Mexico and Fiji protect the right to culture and the right to traditional lands. The constitution of Peru protects the right to culture and the right to self-government. The constitutions of Panama and Finland only protect the indigenous right to culture.

[108] The Constitution of Canada. The Constitution Act, 1982 Article 35
[109] *Id*. Article 35 paragraph 1 (a) and (b)
[110] The Finnish Constitution, 1999, Section 17, 121

3.2 Constitutions that recognise indigenous peoples without protecting specific group rights

3.2.1 Guyana

The constitution of Guyana from 1980 lays down a very firm policy regarding the ownership and possession of land and land rights. The rights of indigenous Indians are underscored in the constitution in correlation with the Amerindian Lands Commission Act, and together constitute a fairly strict property rights regime.[111] In the similar way of other constitutions of a socialist nature the constitution of Guyana does not promote any other indigenous group rights above "ordinary" individual rights.

3.2.2 New Zealand

The constitution of New Zealand does not recognise indigenous people directly but protects the rights of minorities to their culture, language and religion stating that "A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority."[112]

3.2.3 India

The Indian constitution does not name indigenous people but speaks about Scheduled Castes and Scheduled Tribes and the need to protect them from exploitation. The Government is given fairly free reign to elevate the status of these groups in a kind of affirmative action with regards to social, educational and economical issues. It also gives the state permission to ensure representation by these groups and that they can

[111] Constitution of the Co-Operative Republic of Guyana 1980; see also http://www.guyana.org/NDS/chap22.htm - Chapter 22: Amerindian Policies – National Development Strategy
[112] The constitution of New Zealand , New Zealand - Bill of Rights Act 1990 – section 20.

accept public appointments.[113] India ratified the Convention on Indigenous Populations nr. 107 in 1958 but has not ratified the Convention no. 169.

3.2.4 Malaysia

The Constitution of Malaysia is one of the few constitutions that identifies twenty-seven specific indigenous groups and lists them in a special clause.[114] Although no special group rights are nor named specifically above individual rights, there is an interesting clause that states that "any provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land)" is not invalidated nor prohibited by the article in question.[115] In simple words this could allow the state to promote specific group rights above other segments of the population in order to achieve the goals of protecting or advancing indigenous rights.

3.2.5 Norway

The Norwegian constitution is short in their guarantee of rights regarding the Sami people. In Article 110 (a) "[I]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.[116] Norway ratified the ILO Convention no. 169 in 1990.[117]

3.2.6 Philippines

In the 1987 Constitution of the Philippines it declares that "[t]he State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."[118]

[113] The constitution of India, 1950, Articles 16, 30 and 46
[114] The Constitution of Malaysia, 1957, amended 1963, article 161A paragraph 7
[115] Id. article 8 paragraph 5 (c)
[116] The Constitution of the Kingdom of Norway, 1995
[117] ILO. Ratificaction status. Internet source
[118] Section 22. 1987 Constitution of the Philippines

3.2.7 Russia

The Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation.[119]

3.2.8 Sweden

The Swedish constitution does not name indigenous peoples or the Sami people directly but in Article 2, paragraph 4; it insures that " Opportunities" should be promoted for ethnic, linguistic and religious minorities.[120]

3.3 Constitutions that hold no recognition of indigenous peoples at all

3.3.1 Australia

In Australia after the 1967 referendum all negative mention of aboriginal people was removed and now there is no reference to them in the constitution.[121]

3.3.2 Algeria

Other than the reference in the preamble of the three components of peoples that constitute Algeria, namely Islam, Arabity and Amazighity, there are no specific rights for indigenous peoples.[122]

3.3.3 Botswana

The Constitution of Botswana is contains articles that can only be viewed as quite hostile to indigenous rights, especially regarding property rights relating to land and resources. In article 8.1a it states that:

[119] Section 1 Chapter 3. Article 69. The Constitution of The Russian Federation Ratified December 12, 1993
[120] The Constitution of Sweden, 1975 - Chapter 1 Basic Principles. Article 2.
[121] The Constitution of Australia, 1900
[122] The Constitution Of the People's Democratic Republic of Algeria. Preamble. 1989 revised in 1996

> "the taking of possession or acquisition is necessary or expedient—
> (i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;
> (ii) in order to secure the development or utilization of that, or other, property for a purpose beneficial to the community; or
> (iii) in order to secure the development or utilization of the mineral resources of Botswana;"

And further in paragraph 5:

> (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—
> b. to the extent that the law in question makes provision for the taking of possession or acquisition of—
> (i) enemy property;
> (ii) property of a deceased person, a person of unsound mind, a person who has not attained the age of 21 years, a prodigal, or a person who is absent from Botswana,[123] for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein.[124]

Given that indigenous people have no protection in the constitution these provisions give the Government easy access to all the resources they want, and obviously not encouraging to those who frequently travel abroad.

3.3.4 Cameroon

The only mention on indigenous rights in the constitution of the Republic of Cameroon is in the preamble where it is stated, that "the State shall ensure the

[123] Emphasis added.
[124] The Constitution of Botswana, 1966, amended 2002, Articles 8 and 9

protection of minorities and shall preserve the rights of indigenous populations in accordance with the law". No specific group rights are mentioned or explained but only that their "rights", shall be protected by law.[125]

3.3.5 China

The constitution of the Peoples Republic of China does not identify any indigenous peoples. The constitution recognises on the other hand "rural economic collectives".[126] They do not however have any specific group rights above other segments of the population.

3.3.6 Kenya

In the Constitution of Kenya there is no specific protection for indigenous people in it other than prohibition against discrimination based on race, which most constitution have and is regarded as an individual right. It holds a rather detrimental clause regarding the taking of land by the Government. In Article 118 paragraph 2a and b the Government can take any land for any purpose as long as it is a purpose of the state.[127]

3.3.7 Morocco

Morocco does not mention indigenous peoples but guarantees that "[t]he national races shall enjoy the freedom to profess their religion, use and develop their language, literature and culture, follow their cherished traditions and customs, provided that the enjoyment of any such freedom does not offend the laws or the public interest. "And to illustrate what constitutes the public interest the state claims ownership over all resources in order to develop the nation.[128]

[125] The constitution of the Republic of Cameroon. Preamble.
[126] The Constitution of the People's Republic of China, 1982, Article 8
[127] The Constitution of Kenya, 1987, revised 1992 Article 118 paragrap 2,a and b -
[128] The constitution of Morocco, 1996, Article 18 and 21

3.3.8 Burma

The preamble to the Burmeese Constitution claims to be "in accordance with the wishes of the people, after extensive and thorough discussions with them, for the purpose of building a peaceful and prosperous socialist society to which the working people of the national races have long aspired."
The constitution itself holds no special protection for indigenous peoples.[129]

3.3.9 Namibia

The Constitution of Namibia contains no direct protections for indigenous people, but in article 40, tribalism is banned for the protection of the citizens of Namibia, which is surprising since many indigenous peoples and minorities live and survive in tribal communities.

> *Article 40 - Duties and Functions*
> l) To remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies.[130]

3.3.10 Nigeria

The Constitution of Nigeria does not promote any specific indigenous rights but is without a doubt the most old fashioned towards indigenous peoples' rights as it relates to the right to distinctive culture and effort towards integration. In article 15 paragraph 2 (c) it promises to "encourage inter-marriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties;" The result of which would end the problem of "indigenous" nature.[131]

[129] The Constitution of Burma, preamble.
[130] The Constitution of Namibia 1990,, article 40
[131] The Constitution of the Federal Republic of Nigeria, 1999, article 15

3.3.11 Pakistan

The Constitution of Pakistan does not recognise any special rights of indigenous peoples. On the contrary in article 172 all land that is deemed ownerless land, shall be under government ownership along with "All lands, minerals and other things of value within the continental shelf or underlying the ocean within the territorial waters of Pakistan shall vest in the Federal Government."[132] And further undermining indigenous land rights under Article 157 the state can build hydroelectric or thermal power plants in any province they choose in order to develop the Electric capacity of Pakistan.[133] Pakistan ratified ILO convention no. 107 in 1960.

3.3.12 Sudan

In the Constitution of The Republic of Sudan there are no protection for indigenous peoples. On the other hand there at least two clauses that can be viewed as detrimental to indigenous rights. Article 9 claims the right for the Government to exploit all natural resources and in article 16 the opposite of multi-ethnic ideals are promulgated in a social morality clause:

> "The State shall also encourage society to adopt good customs, noble traditions, righteous manners, encourage the individual to participate effectively in the social life, and protect the unity of the country, the stability of government and the development of its civilization in conformity with admirable ideals."[134]

3.3.13 Tunisia, Syria, Japan & Chile

The Tunisian and Syrian Constitutions hold no protections of indigenous rights but both states ratified the ILO Convention no. 107; Syria in 1959 and Tunisia in 1962.[135]

The Japanese constitution does not recognise any right of indigenous peoples.[136]

[132] The constitution of Pakistan. 1999, amended 2004, Article 172
[133] The constitution of Pakistan. Article 157
[134] Constitution Of The Republic Of Sudan, 1998
[135] ILO. Ratificaction status. Internet source

The constitution of Chile holds no special clauses regarding the rights of indigenous people.[137]

3.4 Analysis

This survey of submissions and actions gives the impression that there is not a convincing consensus regarding indigenous group rights, whether measured by oral or written submissions from states nor from the actual conduct of ensuring those rights, i.e. with constitutional protection or the ratification of the ILO instruments on indigenous peoples.

Of the forty states examined with regards to oral and written submissions, eleven states openly discussed the need for protection of special indigenous group rights or stated the implementation of such rights within their domestic legal order.[138] Twelve states recognised that indigenous peoples should have their human rights protected without specifically discussing any rights that go further than basic human rights.[139] Seventeen states either did not recognise indigenous peoples or groups within their borders did not participate in discussions other than raising reservations or comments on definitional issues or did not submit anything substantial on indigenous matters that could be found.

For the argument that Anaya puts forwards a "preponderance"[140] of states should be in harmony on one or more of those special group rights under examination. With the data used in this survey the indication is that there is not a major consensus with regards to those group rights.

[136] The constitution of Japan, 1947
[137] The constitution of Chile, 1980, amended 2005
[138] States fitting under the first group but not quoted in the paper: Colombia, Guyana, Venezuela
[139] States fitting under the second group but not quoted in the paper: Myanmar –norway – Philippines-Guatemala
[140] Anaya, *supra* note 3, p 61-4

Conclusion

There are two important elements that I feel can be identified as the conclusion of this paper. The first is that there are no specific group rights, that can be said to be concretely crystallized, for that there is simply not enough harmony or similarity in the submissions of the states examined. The other is that great change that has taken place between 1990 and 2002. In this decade the tenor and content of submissions has evolved in favour of indigenous peoples and hopefully in the not too distant future, the special recognition of indigenous group rights will fully crystallize.
Another surprising element of this study is that only eleven of the countries have specific indigenous rights embedded into their constitutions. Most of those have added these changes in the last ten years or so.
A lesson can also be learned in that those countries that have amended their constitutions have invariably been more active in other areas of domestic legislation and executive action.
A big step in securing the rights of indigenous people in Africa and elsewhere would be constitutional amendments.
The acceleration of indigenous rights has, in the last few years, been fastest for Latin American states. As recent political changes show[141], indigenous peoples there have been successful in a number of countries. It comes as no surprise to me now, after this analysis, that they have the strongest position were indigenous rights have been secured in the constitutions.

The right to culture for individuals has reached a great consensus as can be seen by the number of states that have ratified the International Covenant on Economic, Social and Cultural Rights.[142] The meaning of these rights is that all individuals within all groups have the same right to culture, and no group has a greater right than any other, be they indigenous or not. The struggle of the indigenous peoples so far has been to get equal rights to other segments of their countries. The road ahead as I can see it is that the indigenous group right to culture must be seen as more than the

[141] Like in Bolivia and Venezuela, with indigenous presidents recently elected.
[142] With 149 signatories so far. UN web page: status of ratification. Link: http://www.unhchr.ch/pdf/report.pdf

aggregate of individual rights since the ability of the indigenous peoples to maintain their culture is often different than it is for more technologically advanced peoples. This is due to the nature of the indigenous peoples attachment to their ancestral lands, which is often an integral part of their religion as well. As can be seen in many of the South-American Constitutions there is a special reference of the right to culture for the indigenous peoples. Some of these have been added in the last decade, which, I think shows that these two rights, the right to culture of the individual and the indigenous group right to culture are two distinct things that need to be emphasised more, and in favour of the indigenous peoples.

Regarding the right to self-government there is also a growing trend among the states to support this, especially when discussing the term self-determination and invariably express the desire that indigenous people can have self-government as long as they don't try to secede from the state or demand external self-determination. Another conclusion that could be arrived at after examining the statements made by the forty governments is that a clear minimum definition of what constitutes "indigenousness" would speed the evolution of indigenous group rights. As found in chapter 1.2 this minimum criteria does exist and should be made concrete and incorporated into the Draft Declaration on Indigenous peoples. Without it, it is likely that reluctant states will use this lack of definition as an excuse for as long as possible and thus delay the crystallization of the emerging custom regarding special indigenous rights.
The right to property, including land that traditionally has belonged to the indigenous people and any resources found on that remains more contested by the states. In my mind this is the heart of the reluctance of states to respect all the fundamental rights that are due indigenous peoples. It is hard for those in power, mostly Europeans and their descendants in former colonies to face up to the reality of the nature of universal and fundamental human rights they created, at first, exclusively for themselves.

When the French and the Europeans that later founded the United States created the first instruments for human rights they did not apply to Non-Europeans. It is well known that Jefferson himself for instance kept slaves happily during his lifetime. The brutal colonial rule by the Europeans provides further evidence for this opinion and the fact that human rights did not take off until after the World War II. This is often explained by the fact that until then Europe was mostly in the hands of Kings and

Autocrats and with the founding of the UN the institutional form was finally in place to implement human rights. I on the other hand suspect that because so many Europeans suffered horrendous violations of their universal human rights during WWII that was the catalyst that created the U.N. human rights system.

The fact that the powers continued to brutalise their colonies as late as the 1970s also supports this view.[143] But the remarkable thing was that soon, illuminated men began to see that these rights were, in fact, universal and should be applied equally to all human beings, not just Europeans. This realization has monumental consequences. It means that all the indigenous peoples that were robbed of their land, liberty, and human dignity have those same inalienable rights. This also means that they have property rights. The fact that this property right belongs to a group cannot be made to weaken the right in question. This goes for other inalienable rights as well, such as the right to ones faith and the right to ones liberty. If it did it would mean that the right to faith could disappear when you enter a religious group or would lose your liberty when belonging to a tribe.

What is it then that stops the states from giving back that which rightfully belongs to the indigenous people and makes them speak of usufruct like the Swedish Government? The answer is economics or the battle for resources. The position of states regarding property rights of indigenous peoples is mostly indefensible, and eroding fast. My conclusion is that the indigenous peoples do have property rights that are comparable to the rights enjoyed by Europeans and which are protected by them at all costs. However, it is only recently that the average western citizen has begun to realise that indigenous peoples, and in fact all peoples, must have the same rights as the rest of us have, without exception, because surely the inherent rights must be separate from the potential use or consequences of their implementation. The alternative would erode the human rights system that has been developed since the 1940s.

[143] "human rights." Encyclopædia Britannica. 2006. Encyclopædia Britannica Online. 11 July 2006 <http://search.eb.com/eb/article-219335>. See also "Algeria." Encyclopædia Britannica. 2006. Encyclopædia Britannica Online. 11 July 2006 <http://search.eb.com/eb/article-220553> ; "Latin America, history of." Encyclopædia Britannica. 2006. Encyclopædia Britannica Online. 11 July 2006 <http://search.eb.com/eb/article-9108632>.

Appendix I[144]

Indigenous Peoples In the chosen States

Berber	Algeria
Whichi, Mapuche.	Argentina
Aboriginals	Australia
Ayoreo, Tupi, Whichi	Bolivia
Bushmen	Botswana
Bororo, Awá, Tupi, Tapirape	Brazil
Duala	Cameroon
Innu, Inuit, aboriginals	Canada
Mapuche	Chile
Tibetans, Kazakhs, Jingbo	China
Nukak, Nasa	Colombia
Fijian, Rotumans	Fiji
Sami	Finland
Native Americans	Guatemala
Makuxi	Guyana
Adivasi	India
Syriacs	Iraq
Ainu	Japan
Maasai, Ogiek	Kenya
Semang	Malaysia
Native Americans	Mexico
Berber	Morocco
Naga, Chin, Karenni	Myanmar
Bushmen	Namibia
Semang	New Guinea
Maori	New Zealand

[144] This is not a comprehensive list. Some states have more indigenous groups living within their borders. See further: List of indigenous peoples. Link: http://en.wikipedia.org/wiki/List_of_indigenous_peoples

Pigmy	Niger
Ogoni	Nigeria
Sami	Norway
Kalasha, Syriacs	Pakistan
Embera	Panama
Ayoreo	Paraguay
Urarina, Yora, Jivaroan	Peru
Semang	Philippines
Sami, Inuit, Komi	Russia
Nuba	Sudan
Sami	Sweden
Syriacs	Syria
Maasai	Tanzania
Akha	Thailand
Berber	Tunisia
Native Americans	USA
Warao, Wayuu	Venezuela
Tupi, Guaraní	Uruguay
Komi	Ukraine

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