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Indigenous Peoples, Mining, and International Law

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I Introduction

This paper will outline the major points being discussed in the different forums working on the topic of indigenous peoples and land rights. Therefore, of necessity it will follow a highly abbreviated and schematic form, as its purpose is to highlight the main thrust of the discussion as well as those issues that remain contested. This piece will begin with an historical account of the progressive development of the law, as driven by European invasion and indigenous peoples' resistance and negotiation. With the legal framework in place, this piece will then outline the structural transformations of the international legal system that have ensued with the emergence of human rights standards and supervisory bodies. This overview will conclude with a brief report of past and ongoing work at the most active international institutions in this ambit, including the United Nations and the World Bank.

2 Historical Evolution

Upon Columbus arrival to the 'New World', existing legal doctrines were strained by the first contact with indigenous peoples in the Americas. In the enterprise of conquest and domination, two dimensions must be clearly separated: one, that of legal discourse and, second that of the lure for gold driving the process. Although these two dimensions are inextricably interrelated, they followed different paths, which explains the divergence between normative theory and on the ground history.

2.1 *International Natural Law*

When Europeans arrived to Northern Africa and to the Americas, a highly sophisticated legal dialogue between the Pope and the Kings justified the enterprise of conquest. Several Papal Bulls, granted for the protection of the local indigenous populations and for the spread of Christianity and civilization among them, gave the Portuguese an effective monopoly over their newly established colonies in Northern Africa. These bulls built on centuries of legal and philosophical debate: from the crusades, through the question of investitures, to the status of Indians in the 'New World'.

This last topic burdened the Council of Burgos, early in the Spanish history of conquest, which tried to resolve whether it was legal to enslave Indians in the name of Christianity. The Dominican friars who had traveled to the Indies, like Montecinos and Bartolomé de las Casas, provided overwhelming evidence of the brutality that Spanish conquerors unleashed over the local indigenous populations, enslaving them and forcing them to work in the gold mines. Demographic deterioration occurred through maltreatment, enslavement, suicide, punishment for resistance, warfare, malnutrition due to destruction of the natural environment, and outright extermination (Daes 2001). The figures are striking: the entire population of the Americas decreased by 95 per cent in the century and a half following the first encounter (Stavenhagen 1991).

Francisco de Vittoria appeared in this scenario and must be quoted for his profound contribution to the transformation of the international legal order. Vittoria extended natural law reasoning to the international plane, arguing that all nations and all peoples of the earth

were bound by the *Ius Gentium*. According to his theory, indigenous peoples had true dominion over their lands and could not be dispossessed without just cause. This statement of principle, which is often quoted as his great contribution to indigenous peoples land rights, is offset by his discussion on justifications for Spanish conquest. On this last plane, Vittoria argued that according to natural law, which in his conception is binding upon all peoples, Spaniards had the right to send missionaries, to trade, and to use communal Indian lands. Where Indians placed obstacles to the exercise of these international natural law rights, Spaniards would be justified in resorting to arms to defend their natural law rights.

2.2 Doctrines of Dispossession

In other regions of the world, international legal arguments followed different paths. For example, in Australia and other places, the legal doctrine of terra nullius was resorted to appropriate indigenous lands. According to this roman-law theory, lands that had no owner could be appropriated by nations manifesting such intention. Accordingly, a fictional representation of the world came about: lands were regarded empty or abandoned in spite of indigenous occupancy.

The terra nullius doctrine was apparently set aside by the International Court of Justice in the 1975 Western Sahara Case, where the Court seemed to acknowledge the existence of a theory of international land tenure based on a non-European conception of title. In fact, the Court found

64. [...] it clear that the nomadism of the great majority of the peoples of Western Sahara at the time of its colonization gave rise to certain ties of a legal character. [...] The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories, and their burial grounds in one or other territory. These basic elements of nomads' way of life [...] were in some measure the subject of tribal rights, and their use was in general regulated by customs.

Nevertheless, despite finding that there were “legal ties of allegiance” and “some rights relating to the land”, the ICJ still applied the European notion of acquisition of title as the exclusive criterion.

Another legal theory utilized to deprive indigenous peoples of their lands was that of discovery. According to this mode of land acquisition, in the context of European legal thought, a territory belonged to that nation that discovered it. Like terra nullius, this theory ignored previous occupancy of the land. Discovery, however, received only limited recognition by international adjudicatory bodies, which usually required that discovery as a symbolic act be followed by effective occupation.

2.3 Treaties with Indigenous Peoples

The enterprise of conquest followed by Europeans in the ‘New World’ also took legal shape through international treaties concluded with local peoples. There was a multiplicity of treaties, which makes unitary categories impossible, but at least three modalities must be singled out. First, certain treaties provided for cession of indigenous lands to nations or even individuals. Other treaties contemplated the creation of a dual regime, granting the colonial

power rights and duties relating to external government, but retaining indigenous autonomy over lands and affairs. The last category of interest here is made up of those treaties which settled borders or frontiers between the conquerors and indigenous peoples, and which thus demarcated spheres of sovereignty and jurisdiction.

These three categories of treaties produced different legal effects, which for the purpose of analysis may be reduced to two: (1) some treaties had the effect of depriving indigenous peoples of their lands and external self-determination. According to these legal arrangements, indigenous peoples either ceded their lands or became subject to the government of the occupying power, thus losing their international personality. In contrast, (2) treaties that settled boundaries had the effect of recognizing international personality to the indigenous communities that entered into them. In fact, in the legal practice of the European powers of the time, these boundary treaties were regarded of equal status with other treaties. These treaties provide further evidence that indigenous peoples were subjects of international law during the XV-XVIIIth centuries.

2.4 XIXth Century: The New International Society

During the XIXth century, European nation-states that had consolidated after the Westphalian break with the medieval era had entered into a new stage in the progressive development of their laws and customs. After Westphalia, the new sovereigns emphasized the consensual dimensions of international law, whereby the will and recognition of the state was the principal source of international law. Indeed, in struggling to set past theories aside, during the XIXth century international law was regarded as the law existing between civilized nations, that was, Christian European States. International law would admit as international subjects only European states and those entities recognized by European States. Accordingly, indigenous peoples were not recognized as sovereigns and/or civilized by the European states, and were thus marginalized from the international community.

The *Cayuga Indians Arbitration* of 1926 between the UK and the US provides evidence of this shift of the international legal system towards the exclusion of indigenous peoples. In this case, the tribunal concluded that the Cayuga Nation and the Cayuga as individuals had no status under international law. The Tribunal still held that general principles of equity, fair dealing and justice recognized by international law established that the Cayuga in Canada were entitled to receive the annuity covenanted with the State of New York in a 1795 treaty. More recently, in October 2001 a US District Court in New York decided to award the Cayuga Nation \$247.9 million US dollars in its land claims against the New York state.

2.5 XXth Century: Decolonization and the New International Economic Order

The political and legal principle of self-determination triggered a radical transformation in the international political landscape, witnessing the creation of a multitude of new states. The principle of *Uti Possidetis Juris* came to inform the demarcation of boundaries of the newly independent states. According to this principle, the colonial administrative boundaries at the time of independence would determine the frontiers of the new states. Clearly, the

Uti Possidetis principle provided the new states with an accessible source of legitimacy and stability in the definition of their boundaries, thereby preventing conflict between them, as well as intervention by the colonial powers. At the same time, the principle transplanted the inequitable structures of colonial domination onto the indigenous occupants of lands, whose territories were again artificially separated by alien frontiers.

The ICJ has ignored indigenous title to land in several cases, including its recent 1994 decision on the *Territorial Dispute* between Libya and Chad over a tract of territory believed to contain uranium deposits. Another clear example of the application of the *uti possidetis juris* is the *Gulf of Fonseca* case, where El Salvador drew the Chamber's attention to the potential conflict between claims based on Spanish documents and those on earlier rights of Indian *Poblaciones*. The Chamber held that,

95-6 It was the administrative boundaries between the Spanish colonial administrative units, not the boundaries between the Indian settlements as such, that were transformed by the operation of the *uti possidetis juris*, into international boundaries in 1821.

The New International Economic Order (NIEO) was a process that sought to radically transform the *anciéne* international regime based on colonial domination, on natural resource plunder, and on inequitable production and consumption patterns into a more fair and just world order. In the NIEO, developing nations would exercise complete sovereignty over their natural resources, as a means of recuperating the wealth that the powerful 'empires' had been exploiting within their boundaries. Consequently, the emphasis of the NIEO was placed on achieving external economic independence, recuperating control over their economic wealth, and implementing development schemes.

However, the consequences that these restructuring processes brought about, particularly as they affected vulnerable local communities within the territories of new states, are not to be overlooked. Culturally distinct groups from the dominant society were "expropriated" the natural resources on which their whole civilization had been erected along the centuries past. The NIEO was explicit: natural resources would now belong to the State, not to their traditional users. This new reality obviously created a conflict between the dominant society and marginalized groups; ultimately between the State and customary holders of native title to the natural resources. The paradox lies in that the new States wanted to liberate themselves from external powers, and in so doing, they oppressed communities that had been using the natural resources within their lands since times immemorial.

3 Emergence of International Human Rights Standards

The emergence of human rights standards and supervisory machinery has transformed the structures of the international legal system. The sovereignty of the State has been qualified by the duty to protect and promote the rights of its citizens, now an issue of common concern to the international community and which thus escapes the domain of exclusive jurisdiction reserved for the State. This section will explore three angles of the human rights dimension of indigenous peoples lands: first, an outline of substantive rights, including the right to exist as distinct communities and self-determination. Subsequently, the framework

of international legal instruments together with an outline of the institutional bodies that have been created to oversee the implementation of human rights norms.

3.1 Right to Existence

The right to exist of peoples has been elevated to the category of *ius cogens* in international law, whereby no international treaty may derogate from the obligation incumbent upon all members of the international community to prevent and punish the crime of genocide. Further, genocide has been recognized as an international crime which raises universal jurisdiction to prosecute their perpetrators.

The 1948 *International Convention on the Prevention and Punishment of the Crime of Genocide*, passed unanimously by the United Nations General Assembly, establishes the elements of the crime of genocide. The definitions of the Genocide Convention were reproduced *verbatim* by the 1998 *Rome Statute of the International Criminal Court* (not yet in force), whose preamble recognizes that the cultures of all peoples are pieced together in a shared heritage and that this delicate mosaic may be shattered at any time. In the interpretation of the elements of the crime of genocide, regard must be taken to these preambular ideas; as the International Court of Justice stated in the 1951 case concerning *Reservations to the Genocide Convention*, the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without conventional obligation.

It has been often said that the Genocide Convention deals only with the physical destruction of groups and not with cultural genocide or ethnocide; further, the convention requires specific intent to eliminate the group as such, in whole or in part. These two elements have been under question during the last decades, on the grounds that the close interrelationship between indigenous peoples and their lands renders the distinction between cultural and physical genocide artificial.

On this vein, it has been advanced that the cultural and physical dimensions of existence cannot be separated in the case of indigenous peoples, given the religious and material integration between indigenous peoples and their environment. Further, the 'direct intent' scienter standard has also been challenged as excessively narrow to encompass deliberate acts of environmental destruction that disguise behind the rhetoric of development and economic growth. On this point, it has been suggested that the 'aims and effect' standard would afford greater protection to indigenous peoples and their lands.

The right to exist of peoples also means that they cannot be deprived of their means of subsistence. This norm has been included in both universal United Nations human rights conventions, to be examined below. In the case of indigenous peoples, it has been argued that the right to their means of subsistence encompasses and protects their rivers, forests, seas, and other sources of livelihoods. Consequently, mining operations that pollute the rivers, open roads into the forests, and destroy local ecosystems would violate this fundamental human rights standard.

3.2 Right to Self-determination

The debate over the contours and applicability of the right to self-determination to indigenous peoples remains the most contested issue in the discussion of the United Nations draft declaration on the rights of indigenous peoples. In that debate, two dimensions of this right have been clearly delineated: one external as the right to international personality and/or to secede from existing states, and another internal as the right to autonomy over local affairs and government, including land and natural resources.

From an international legal perspective self-determination is a collective right vested upon all peoples, which has been recognized by both the *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights*. Common Article I paragraph I proclaims that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

It has been much discussed whether self-determination applies beyond the colonial context. It must be stressed that the formulation of the principle of self-determination in the United Nations Charter occurs in the context of the objectives of the organization, rather than in the context of decolonization. It must also be noted that United Nations General Assembly declarations and resolutions that address the issue of decolonization emphasize that the right to self-determination should not be used to disrupt the unity of the state or its territorial integrity.

3.3 Right to Non-Discrimination

The right to equality and non-discrimination lies at the heart of international human rights law. Accordingly, racism is condemned in all its forms, a theme that was explored exhaustively during the recent 2001 Durban *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*. The conference affirmed the importance attached to the values of solidarity, respect, tolerance, and multiculturalism and recognized that indigenous peoples have been victims of discrimination for centuries. The conference also recognized the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical, and cultural existence.

The *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) deals specifically with the problem of discrimination, and its supervisory body has received communications alleging violation of this right. Such is the case with Australia's 1998 *Native Title Amendment Act*, which allowed unilateral government extinguishment of native land rights. The Committee was of the view that this amendment act violated Australia's international responsibilities, and urged the government to suspend the Act's implementation. Significantly, the Committee affirmed that indigenous peoples' land rights are recognized in international law, and that the international community now understands that doctrines of dispossession are illegitimate and racist.

3.4 United Nations Universal Human Rights Conventions

The seminal 1949 *Universal Declaration on Human Rights*, passed unanimously by the United Nations General Assembly and now accepted as international customary law, gave rise to the preparation and conclusion of the 1966 *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) and the 1966 *International Covenant on Civil and Political Rights* (ICCPR). Both instruments contain provisions that may be interpreted to ensure protection to indigenous peoples' land rights, such as the right to religion, family, and cultural integrity.

During several decades, it was argued that only civil and political rights belonged to the category of human rights, while economic, social, and cultural rights belonged to the realm of social aspirations. The recent 1993 Vienna *World Conference on Human Rights* dispelled this argument by categorically affirming the interdependence of all human rights. In other words, the rhetoric of development and economic growth may not be utilized to justify violations and systematic denial of human rights, be it in their cultural or political dimensions. Recently, the debate has further expanded to encompass third-generation, solidarity rights, which are those vested in peoples, such as the rights to a healthy environment, to peace, and to self-determination, and which require solidarity at all levels of society for effective implementation.

Special note deserves the ICCPR formulation of the right to cultural integrity, which provides that persons belonging to ethnic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The United Nations Human Rights Committee (HCR) is the treaty-based body entrusted with oversight of the ICCPR, including complaints against countries that have ratified the ICCPR *First Optional Protocol* alleging violation of protected rights. The HRC has stated in its General Comment on Article 27 that this provision extends to economic activity, where the activity is an essential element in the culture of an ethnic community. The Committee has further stated that,

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

Examining a petition submitted by the Lubicon Lake Band of Cree, the Committee of Human Rights concluded that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and timber development within the ancestral territory of the Lubicon Lake Band. The Committee also found that the natural resource development activity compounded historical inequities to threaten the way of life and culture of the Lubicon Lake Band.

Then in the context of the Lansman cases, the Human Rights Committee addressed the specifics of mining projects in indigenous peoples lands. In those cases, the Committee noted that,

9.8 [...] economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if the mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the author's rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

Besides the ICCPR, the ICESCR, and the CERD examined above, there are several other international human rights treaties that deal with torture (CAT), gender discrimination (CEDAW), and children's rights (CRC). There is a supervisory committee for each of these treaties that monitors the way in which State parties are fulfilling their human rights obligations. In addition to receiving complaints from individuals (except ICESCR and CRC), the committees consider reports on how governments are implementing treaties. Although these reports open a space for leveraging progress towards implementation by encouraging openness and dialogue, the reporting system has many problems, including late submissions, lack of resources for evaluating reports, lack of publicity, and lack of influence of the Committees' comments and recommendations on governments.

3.5 Inter-American Human Rights System

The Inter-American Human Rights System has evolved over the latter half of the XXth Century to afford protection to indigenous peoples' rights to property, rights to family, right to judicial protection, among others. In the implementation of substantive standards contained in the 1947 *American Declaration of the Rights and Duties of Man* and in the 1969 *American Convention on Human Rights*, the Inter-American Commission on Human Rights (IACHR) has played a fundamental role.

Since it was established in 1959, the IACHR has contributed to the protection and promotion for the rights of indigenous peoples through on-site visits, country reports, friendly settlements, and individual petitions. The IACHR has produced several special reports that focus on the human rights situation of indigenous peoples in member countries, including Colombia (1993, 1997), Guatemala (1993), Ecuador (1997), Brazil (1997), Mexico (1998), and Peru (2000), and the situation of the Miskitos in Nicaragua (1984) and the situation of Communities of Peoples in Resistance in Guatemala.

In its 1997 *Report on the Situation of Human Rights in Ecuador* for example, the IACHR observed that for indigenous peoples the continued utilization of traditional systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Further, the IACHR observed that control over the land includes the capacity for providing the resources which sustain life and the geographical space necessary for the cultural and social reproduction of indigenous peoples.

The IACHR has further elaborated a doctrine on the right to property in cases involving indigenous peoples' rights to lands. In 1985 for example, the IACHR recommended that the government of Brazil set and demarcate the boundaries of the Yanomami Park in the Amazonian Forest after finding, *inter alia*, that the authorization to exploit the resources of the subsoil of the Indian territories was the origin of massive human rights violations. The

IACHR has also been instrumental in securing land rights to indigenous peoples by mediating friendly settlements, such is the 1998 agreement between the Enxet-Sanapaná people and Paraguay.

Recently in 1998, the IACHR submitted the Awas Tingni case to Inter-American Court of Human Rights, alleging that Nicaragua had violated the indigenous community's right to property over their ancestral lands by granting a logging concession to a Korean timber corporation. In its 2001 Judgment, the Court considered that an evolutionary interpretation of international human rights instruments was warranted and found that the Convention protects the right to property of the members of indigenous communities over their communal lands. The Court also found that Nicaragua violated the Convention by failing to demarcate indigenous lands and by granting concessions for the exploitation of resources within these lands. In its reasoning, the Court emphasized that,

149. [...] Among indigenous peoples there exists a community tradition over a communal form of collective property over the land, in the sense that title to land is not held by an individual but by the group and its community. Indigenous peoples have the right to live freely in their own territories, right which is based solely upon their existence; the close relationship that indigenous peoples maintain with the land must be recognized and comprehended as the fundamental basis of their cultures, their spiritual lives, their integrity, and their economic subsistence. For indigenous communities, the relationship with the earth is not merely a question of possession and production, but a material and spiritual element that they must enjoy fully, including for preserving their cultural legacy and transmitting it to future generations. (*unofficial translation*).

The IACHR has also elaborated a doctrine on collective rights, which afford indigenous communities group rights over their lands. In this regard, the IACHR has taken the approach that individual and collective rights are not opposed but, rather, are part of the principle of full and effective enjoyment of human rights. This approach has inspired the draft declaration on the rights of indigenous peoples prepared by the IACHR for the OAS, after extensive consultations with indigenous peoples, and particularly those articles that deal with cultural, political, and economic rights. This draft declaration is currently under discussion by the political organs of the Organization of American States.

4 International Institutions

4.1 The United Nations

The United Nations first focused its attention formally on the problems of indigenous peoples in the context of its work against racism and discrimination. Indigenous peoples began lobbying the United Nations through non-governmental organizations such as the World Council of Indigenous Peoples and the International Indian Treaty Council during the 1970s. Responding to the legitimacy of their demands and to studies initiated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1982 the United Nations Economic and Social Council (ECOSOC) established a working group and charged it with the task of elaborating a declaration on the rights of indigenous populations. In 1993, the Sub-Commission Working Group produced a draft declaration on

the matter, which is now being considered by the United Nations Human Rights Commission.

- *Draft Declaration on the Rights of Indigenous Peoples*

The draft declaration builds upon a decade of consultations with indigenous peoples, who have voiced their concerns during the annual meeting of the working group in Geneva and in other forums. The draft declaration formulated an array of collective rights, such as the right to maintain and develop their distinct cultural identities, and the right to participate fully in the affairs of the metropolitan State. The draft declaration also contains several provisions safeguarding indigenous peoples' land rights, such as for example the following provision,

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied and used.

The declaration is categorical in its protection to indigenous peoples' right to remain on their lands. It explicitly states that, "indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned...". Still and all, notice must be flagged to the fact that the draft declaration remains a soft-law instrument, which provides evidence of emerging customary norms and duties.

- *Thematic Reports*

The UN Sub-Commission has also produced several thematic reports on particular aspects of indigenous peoples' relations with the contemporary world order. The seminal report by Special Rapporteur Martinez Cobo of Ecuador on "The Problem of Discrimination against Indigenous Populations" was completed in 1984. He addressed the human rights issues raised by mining in indigenous peoples lands by stating that,

"543. Where possible within the prevailing legal system, the resources of the subsoil of indigenous land also must be regarded as the exclusive property of indigenous communities. Where this is rendered impossible by the fact that the deposits in the subsoil are the preserve of the State, the state must [...] allow full participation by indigenous communities in respect of: the granting of exploration and exploitation licenses; the profits generated by such operations; the procedures for determining damage caused and compensation payable to indigenous communities as a result of the exploitation of the resources of the subsoil of indigenous land and in the consideration of all consequences of such exploration and exploitation activities.

"544. No mining whatsoever should be allowed on indigenous land without first negotiating an agreement with the indigenous peoples who will be affected by the mining, guaranteeing them a fair share of the revenue that may be obtained."

Subsequent studies focused on treaties entered into by indigenous peoples, on indigenous peoples cultural heritage, and on indigenous peoples' right to permanent sovereignty over their natural resources. Recently in 2001, the final working paper on "Indigenous Peoples and their Relationship to Land" was presented by the Special Rapporteur Daes. The UN Human Rights Commission has taken stock of these studies, and in 2001 appointed Rodolfo Stavenhagen for a three-year period as Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. His work is underway.

- *Permanent Forum on Indigenous Issues*

After a series of meetings and discussion in the context of the Decade of Indigenous Peoples, in 2000 the ECOSOC established the Permanent Forum on Indigenous Issues. The Permanent Forum is expected to provide advice and recommendations to the ECOSOC on indigenous issues relating to economic and social development, culture, the environment, education, health, and human rights. The Permanent Forum is also expected to raise awareness and to prepare and disseminate information on indigenous issues. The Forum will be comprised of 16 experts (8 nominated by governments and 8 by the President of the ECOSOC) and is expected to meet for 10 days each year. It is proposed that it will hold its first session in New York from 6-17 May 2002.

4.2 International Labor Organization Convention 169

The International Labour Organization (ILO) is the oldest of the specialized agencies of the UN system, as well as the most active in promoting the rights of indigenous peoples, particularly their social and economic rights. The ILO's has taken the lead in elaborating international standards, monitoring their implementation through periodic state reporting and 'representations' mechanisms, and facilitating technical cooperation programs.

ILO Convention 169 stands as the only international treaty dealing with indigenous peoples and land rights. This instrument was concluded in 1989 and came to replace ILO Convention 107, which had focused on the goal of integration and assimilation rather than on the protection of indigenous peoples lands, culture, and distinctiveness. ILO 169 contains several procedural and substantive safeguards for indigenous peoples' rights over their lands, including for example Article 15, "the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded". Further, property rights are specifically protected by ILO 169, which provides that the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. ILO 169 also includes the obligation of States to consult with indigenous peoples even when natural resources remain under state ownership. The relevant provision reads as follows,

In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view of ascertaining whether and to what degree their interests would be prejudiced, before undertaking or

permitting any programs for the exploration or exploitation of such resources pertaining to their lands.

ILO 169 ensures indigenous peoples' control over their lands, legal status, and development. It further guarantees their environment from harmful alien interference and provides for internal structures of community organization. The implementation of these minimum international standards by national constitutions and domestic legislation in a large number of countries is also evidence of emerging norms of international customary law.

Article 24 of the ILO Constitution provides that a national or international employers' or workers' organization may submit a "representation" to the ILO on the grounds that a member State has failed to observe or has not satisfactorily ensured the application of a ratified Convention. A tripartite committee will examine the representation and submit a report to the Governing Body for adoption, which may require that the government take specific measures to resolve the problem. This dispute settlement machinery has forged constructive alliances between workers' unions and indigenous peoples, whereby the latter have submitted representations providing evidence on the State's failure to comply with its international obligations. In the context of indigenous peoples' lands, cases have been brought by organizations from Denmark, Mexico, Bolivia, Colombia, Ecuador, and Peru.

Finally, the ILO carries technical cooperation programs that promote the active participation of indigenous and tribal peoples at all levels of project implementation and decision-making, from design to evaluation. Other technical cooperation activities address the living and working conditions of indigenous peoples. These characteristics of the programs are thus varied and tailored to the specific needs of the communities under focus, and they have been implemented in South and Southeast Asia, Africa, and the Americas.

4.3 United Nations Development Program

The UNDP promotes programs for sustainable human development and administers a number of special-purpose funds to the effect. Its engagement with indigenous peoples is extensive and has involved small grants programs, as well as regional and national programs. These programs have focused on poverty eradication, environmental conservation, conflict prevention and resolution, and cultural revitalization. Besides actual funding of projects, the UNDP has also opened forums where indigenous peoples have been invited to discuss issues of policy, such as the Civil Society Organization Advisory Committee and the Executive Board meetings.

The Indigenous Knowledge Programme is another important initiative of UNDP and pursues the following objectives: (i) participation of indigenous peoples in international conferences and process of their concern, (ii) conservation of indigenous knowledge through research on customary laws and traditional resource rights, and (iii) allocation of funding for indigenous self-help initiatives that address poverty reduction and organization-building at community level. This program has funded two projects in Asia and one in South America, but future implementation is yet to be decided by its Steering Committee.

4.4 The World Bank: The Review of OP 4.20

The World Bank (IBRD) exercises important influence in the development of international standards, either by filling the regulatory vacuum of borrowing countries, either by pushing the implementation of what then crystallize as customary norms. In 1982, the IBRD issued *Operational Manual Statement 2.34*, the purpose of which was to protect the interests of 'indigenous groups' in bank financed development interventions. In 1991, the IBRD issued a revised *Operational Directive (OD) 4.20*, which intended to expand the emphasis from protection towards participation in, and benefits from, bank-financed development projects.

The IBRD has recently engaged in a wide review of all its ODs, in an effort to clarify existing binding safeguards policies, which would ultimately lead to greater compliance. It has been argued that the creation of the Inspection Panel in 1993 has triggered this process, given that only then did safeguard policies acquire teeth and enforceable meaning. In any event, the conversion of directives to policies provides opportunities for strengthening the rights of potentially affected persons suffering from 'development' projects, but also opens windows through which existing safeguards may be watered-down, thereby reducing the level of protection to vulnerable persons, groups, and communities.

The transformation process of OD 4.20 into OP/BP 4.10 has been structured upon global and regional consultations, of which the last round ends on 15 February 2002. After such date, the IBRD will comment and revise draft OP/BP 4.10, with a view to submitting a final version for approval by the Board of Directors early 2002.

In spite of this formal engagement by the IBRD with relevant stakeholders, draft OP/BP 4.10 does not include many of the most important recommendations made by indigenous peoples in the first round of consultations, including: the right to prior and informed consent, indigenous monitoring of Bank projects, and fair 'mitigation' requirements. Other concerns raised by indigenous peoples throughout the consultation process, and concerning the new the draft policy, include:

- Requirements concerning Indigenous land and resource issues are not clear.
- Provisions for legal protections are now optional instead of mandatory.
- Provisions for peoples affected by protected areas are unclear.
- It allows for involuntary resettlement of indigenous peoples.
- It does not meet existing international human rights standards.

Further, Draft OP/BP 4.10 contains provisions dealing specifically with mining in indigenous peoples lands. The relevant paragraph reads as follows:

14. *Commercial Use of Lands and Resources.* When Bank-assisted projects involve the commercial exploitation of natural resources (including forests, mineral, and hydrocarbon resources) on lands owned, or customarily used by indigenous groups, the Borrower:

(a) informs these groups of their rights to such resources under statutory and customary law; (b) informs them of the potential impacts of such projects on their livelihoods, environments and use of natural resources; (c) consults them at an early stage on the

development of the project, and involves them in decisions which affect them; and (d) provides them with opportunities to derive benefits from the project.

As in all project which affect indigenous groups, adverse impacts upon them are avoided or minimized, and benefits should be culturally appropriate.

The extent to which Draft OP/BP 4.10 affords greater protection to indigenous peoples remains open to question. Rather, it seems that provisions such as article 14 do not meet existing land tenure standards, as this provision could be resorted to justify forced resettlement of indigenous communities from their ancestral lands, in exchange for inadequate compensation for harm and loss of livelihoods. Further, opportunities to derive benefits from intended development may be negligible when contrasted to potential material and cultural loss.

5 Conclusion

As this brief overview of the evolution of international legal theory and of the emergence of human rights standards reveals, indigenous peoples are on their way to recuperating their international legal personality. There are yet many issues that remain unresolved, including the prominent question of definition: who is indigenous? Still, contemporary international law is evolving towards recognizing the particular contribution that indigenous peoples' distinct relationship with their lands has to offer to the cultural mosaic of humanity. In the quest for achieving a nature/human continuum, indigenous peoples have a multitude of narratives to share.