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(Experts Panel, Day 1, Special Session of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 11-15 March 2002)

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SOCIAL, ECONOMIC AND PROPERTY RIGHTS

SECTION V, ARTICLES XVIII-XXI PROPOSED AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Introduction

Mr. Chairman, representatives of the Member States and Indigenous peoples' representatives, I would like to begin my presentation this afternoon by thanking the Chair of the Working Group for inviting me to speak on this distinguished panel. My presentation will focus on Section V of the Proposed Declaration entitled 'Social, Economic and Property Rights'.

Self-determination as a Framework Right

While it was discussed in detail this morning, I will again make reference to the right to self-determination because this right also relates to rights to lands, territories and resources and the right to development as set out in Articles XVIII and XXI, respectively. That the right to self-determination pertains to Indigenous peoples and that states are required to respect Indigenous peoples' right to self-determination is clear from the jurisprudence of the UN Human Rights Committee, the body charged with oversight of the ICCPR.

That self-determination applies to and encompasses rights to lands, territories and resources is equally clear from that jurisprudence. For instance, discussing the situation of Indigenous peoples in an OAS member state, the HRC emphasized that: "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2))." In connection with this the Committee recommended "that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."[1]

The HRC reached similar conclusions – that the State implement and respect the right of Indigenous peoples to self-determination, particularly in connection with traditional lands and resources – in its Concluding Observations on the periodic reports of three other states, one of them also an OAS member State.[2]

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[1] *Concluding observations of the Human Rights Committee: Canada. 07/04/99,* at para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999).

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

In its complaints-based jurisprudence under the Optional Protocol, the HRC has also related the right to self-determination to the right of Indigenous peoples to enjoy their culture under Article 27 of the ICCPR.[3]

The HRC's 1984 General Recommendation on self-determination further illustrates that Article 1 applies to peoples, including Indigenous peoples, within existing states. Therein the HRC stated that Article 1 "imposes specific obligations on States parties, not only in relation to their *own peoples* but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination" (emphasis added).[4]

The right to self-determination not only relates to rights to own and dispose of lands, territories and resources, it also relates to control over those territories and resources. This may best be described as territorial jurisdiction and includes the right to autonomously determine and control the nature and extent of development activities therein, including the right to give or withhold consent.

Perhaps for this reason, Article XXI on the right to development provides that Indigenous peoples have the right to determine their own development paths even if different from that adopted by the national government or other segments of society and the right to consent to development projects and decisions that affect their rights or living conditions. In my opinion, this is a correct interpretation of the law. However, if we look at Article XVIII(5) it becomes apparent that decisions relating to exploitation of natural resources are not included within Article XXI's scope. This is a major failing particularly in light of the devastating impact that these activities have had on Indigenous peoples' rights and even physical survival. I will return to this point again.

I am aware that the right to self-determination makes some states nervous, particularly given that in the past it has been associated with secession. However, in my opinion these fears are unfounded and to fail to recognize Indigenous peoples' right to self-determination is nothing less than discriminatory. I say that it is an unfounded fear because states' territorial integrity is guaranteed both by general principles of international law and by the specific language of the Proposed Declaration. I am referring here to Article XXVI of the PD which unequivocally protects the territorial integrity of states.

For this reason recognition of Indigenous peoples' unqualified right to self-determination in the American Declaration would be an appropriate and necessary step towards remedying the ongoing colonial situation in which Indigenous peoples presently find themselves. Recognition of Indigenous peoples' territorial rights including jurisdiction over those territories is part and parcel of this.

As noted above, almost all of the states present here are already bound to respect the right of Indigenous peoples to self-determination, both by virtue of Article 1 of the International Covenants and by virtue of customary international law. In my opinion therefore, the issue to be addressed here is how to recognize and operationalize that right in the context of an American Declaration rather than arguing the moot point of whether Indigenous peoples are holders of the right.

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[3] *Apirana Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000)), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2.

[4] Human Rights Committee, *The right to self-determination of peoples (Art. 1) : 13/04/84. CCPR General comment 12,* 1984, at para. 6.

The Nature of Standard Setting

When preparing this presentation, I reviewed the Chair's Report for the last two special sessions of this Working Group. In doing so I was struck by the repeated references made by some states to subjecting various provisions of the Proposed Declaration to their domestic legislation. I have to say that this seems to be out of place in an international human rights standard setting exercise. Such an exercise should seek to progressively develop international standards, in the case of the Proposed Declaration at the regional level, to which states should aspire. The Declaration can thus be viewed as a hemispheric statement of ideals and values by which progress can be judged and appreciated.

Tying such standards to domestic legislation, in my opinion, defeats the purpose of setting international standards and does little to promote and enhance protection of human rights, one of the primary purposes of the OAS. The IACHR has stated that the "Proposed Declaration should be understood to provide guiding principles for inter-American progress in the area of indigenous rights."[5] To condition these principles on the terms of domestic legislation, legislation that conceivably could vary substantially from the intent of and underlying goals proclaimed in the Declaration, calls into question the whole rationale behind international standards, especially in the field of human rights.

Additionally, states are not compelled to implement or give effect to a Declaration, so there should be no need to tie the standards to domestic legislation. A Declaration places no immediate obligation on the states and therefore has no direct or mandatory impact on its legislation.

On the other hand, ratified human rights instruments, such as the American Convention of Human Rights, require states-parties to give effect to their provisions and to provide adequate and effective remedies to assert and guarantee the exercise of the rights found therein. This has important implications for the Proposed Declaration; the protections set forth in the Declaration should at least rise to the level of these existing obligations and given its aspirational character should even rise above the level of existing obligations.

It is a general rule of international law, that, while a Declaration is intended to be non-binding and aspirational, it may nonetheless restate binding obligations found in other instruments and custom and its aspirational character does not detract from the binding nature of the obligations restated therein.

This part of my presentation attempts to further elaborate this point by highlighting that much of the substance of the Proposed Declaration is already applicable to and binding upon OAS Member States by virtue of United Nations and Inter-American Human Rights instruments as well as by virtue of principles of customary international law. Also, some of the Proposed Declaration's provisions fall below existing standards and obligations.

To illustrate the convergence between some provisions of the PD and existing obligations, I refer to the recent decision of the Inter-American Court of Human Rights in the *Mayagna (Sumo) Awas Tingni Community Case*. In that case the Court found that

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

> Among indigenous communities, there is a communal tradition as demonstrated by their communal form of collective ownership of their lands, in the sense that ownership is not centered in the individual but rather in the group and in the community. By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.[6]

The Court also stated that: "The customary law of indigenous peoples should especially be taken into account because of the effects that flow from it. As a product of custom, possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership."[7] Finding that Articles 1, 2 and 21 of the American Convention has been violated, the Court then held "that the State must adopt measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage, and customs of these communities."[8]

If we look at Articles XVIII, sub 1, 2 and 8, as well as Article XV, we see a striking similarity between what is stated there and the decision of the Court. Therefore, for those states party to the American Convention, the provisions of the Proposed Declaration mentioned should be considered simply as restatements of their existing international obligations. For those states that have not ratified the Convention, I would argue, using the reasoning and logic applied by the Court, that the same obligations pertain under the American Declaration on the Rights and Duties of Man.

It is important to note that the Court affirmed the collective nature of Indigenous peoples' rights and did not shy away from the use of the term 'territories'. Neither has the IACHR. Discussing state obligations under the American Convention, the Commission stated in 1997, that

> For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group.'[9]

Twenty-five OAS Member States are bound by the American Convention, the remainder by the Declaration, the latter having crystallized as binding customary international law.[10] By my count,

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[6] The Mayagna (Sumo) Awas Tingni Community Case, Judgment of August 31, 2001, *Inter-Am. Ct. H.R. Ser. C No. 76, at para. 149.*
[7] Id., at para. 151.
[8] Id., at para. 164.
[9] *Report on the Situation of Human Rights in Ecuador,* OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.
[10] The American Declaration is binding on all members of the OAS for two reasons: first, as an elaboration of state obligations pertaining to human rights set forth in the OAS Charter and second, the Declaration as a whole has been determined to be customary international law. See, among others, *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention*

10 Member States have ratified ILO Convention No. 169; one has ratified but has yet to deposit its instrument with the ILO. This Convention contains many of the same principles set forth in the Proposed Declaration.

30 Members have ratified and are party to the Convention on the Elimination of All Forms of Racial Discrimination. States-parties to this Convention are obligated to recognize, respect and guarantee the right "to own property alone as well as in association with others" without discrimination.[11] Failure to recognize and protect Indigenous property ownership and inheritance systems and rights is discriminatory and denies equal protection of the law. This is confirmed by the Committee on the Elimination of Racial Discrimination's 1997 General Recommendation, which called upon states-parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories."[12]

30 Member States have ratified the ICCPR. Article 1 setting forth the right to self-determination as it relates to lands, territories and resources has already been mentioned. Article 27, which contains the rights of persons, including Indigenous persons, belonging to minorities has been found by the UN HRC to also protect Indigenous land and resource rights. For example, in July 2000, the HRC concluded that article 27 requires that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands …" and that "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities … must be protected under article 27…."[13]

In its 1994 General Comment on Article 27, the HRC stated that

> With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them…. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. [14]

Article 30 of the Convention on the Rights of the Child, ratified by 32 Member States, contains almost identical language to Article 27 of the ICCPR and should be interpreted consistently

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on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-American Court of Human Rights, Series A No. 10, at paras. 42-46.

[11] CERD has been ratified by 160 States as of January 2000.

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

[13] *Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments),* at paras. 10 and 11.

[14] *General Comment No. 23 (50) (art. 27),* adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), at 3.

therewith. Therefore, the points made here are also relevant to the rights of Indigenous children, and by implication the larger community, under that instrument.[15]

Finally, the member-states of the Caribbean Community, who form a large contingent of OAS Member-States, adopted the CARICOM Charter of Civil Society on February 19, 1997. This Charter is a Caribbean human rights instrument, Article XI of which provides that "The States recognise the contribution of the indigenous peoples to the development process and undertake to continue to protect their historical rights and respect the culture and way of life of these peoples."

To return to my original point, I have included the preceding points as a way of illustrating that many of the issues and rights raised in the Proposed Declaration have also been addressed in existing human rights instruments, either explicitly or elaborated in authoritative interpretations of those instruments. These rights are thus already part of the body of the international obligations of OAS Member States. This also applies to the collective rights and the term territories and self-determination.

Regional Customary International Law

In addition to ratified instruments, human rights obligations may also be found in international customary law. In particular, I think it important to note that OAS Member States are bound by norms of regional customary international law that protect Indigenous peoples' rights. The existence and applicability of norms of regional custom have previously been recognized by the ICJ and have been commented on by a number of scholars.

Professors Anaya and Williams, for instance, in their recent article in the Harvard Human Rights Journal, state with regard to Indigenous peoples that "domestic state practice, together with relevant practice at the international level, builds customary international law. At the very least, a sufficient pattern of common practice regarding Indigenous peoples' land and resource rights exists among OAS member states to constitute customary international law at the regional level."[16] I see no reason to disagree with this conclusion; indeed, there are compelling reasons to concur.

In addition to ratification of or accession to the human rights instruments noted above, all but one OAS Member State in which Indigenous peoples live have adopted domestic Constitutional and legislative provisions that recognize and guarantee Indigenous land rights, rights to participate in decisions and other rights. While these enactments differ in their precise terms, there is substantial and widespread acceptance of the core principles so that regional norms of customary law have emerged and crystallized.

The Language of the Declaration

Article XIII(7)

Turning to the language of the PD itself, I would like to begin by highlighting Article XIII(7). This Article is not in Section V, but substantially bears on the issue of property rights, so I

[15] The CRC has been ratified by 191 States as of January 2000.

[16] S.J. Anaya and R. Williams, The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System. 14 *Harv. Hum. Rts. J.* 33, at 59.

will deal with it here. This sub-paragraph appears to permit states to unilaterally declare legally recognized Indigenous territories or Indigenous territories "under potential or actual claim" to be protected areas, for instance, national parks, biospheres or nature reserves. This is not an abstract issue; the majority of so-called biodiversity hotspots and other prime areas for conservation are presently inhabited by Indigenous peoples.

In my opinion, this provision is incompatible with Article XVIII's guarantees related to recognition of and respect for Indigenous property rights, the right to self-determination and the right to autonomy and self-government as presently set forth in Article XV, which, among others, recognizes Indigenous peoples' autonomous control over matters related to the environment, land and natural resources.

It may also contravene Article 10(c) of the Convention on Biological Diversity, which requires that states-parties protect and encourage customary use of biological resources in accordance with traditional cultural practices. The Convention's secretariat has interpreted this article to require that Indigenous peoples' rights to own and control their territories and resources must also be respected if customary uses are to be protected.

While Article XIII(8) may be based on view that protected areas are relatively benign, concrete cases from this region and others have demonstrated that Indigenous peoples' rights can be and are violated in connection with protected areas. For this reason, the stated policy of the World Conservation Union, a body composed of both governments and non-governmental organizations, requires that conservation activities respect Indigenous peoples' rights to own and manage their territories and resources. It also recognized that protected areas may be owned and managed by Indigenous peoples. [17]

Similarly, the WorldWide Fund for Nature, one of the World's largest conservation organizations, adopted a *Statement of Principles on Indigenous Peoples and Conservation*, which endorsed the UN Draft Declaration on the Rights of Indigenous Peoples, accepts that constructive engagement with Indigenous peoples must start with a recognition of their rights and upholds the rights of indigenous peoples to own, manage and control their lands and territories.[18]

In my opinion, Article XIII requires revision to remove the apparent conflict with the rights to lands, territories and resources set forth in Article XVIII. It could be amended to state that protected areas should not be established on Indigenous territories, legally recognized or otherwise, without Indigenous peoples' free and informed consent and without the prior resolution of territorial rights issues. It should also provide for Indigenous peoples' right to declare their own territories to be protected areas and to own and manage them separately or in cooperation with state or private agencies.

This would be consistent with the right to self-determination, standards developed by international conservation agencies and with Indigenous peoples' rights under CERD. The UN Committee of the same name has interpreted CERD to require that states-parties: "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands,

[17] IUCN, 1994, *Guidelines for Protected Area Management Categories*. Commission on National Parks and Protected Areas, IUCN, Gland

[18] WWF, 1996, *WWF Statement of principles: indigenous peoples and conservation*. Gland, WorldWide Fund for Nature International.

territories and resources…,"[19] and to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."[20]

Land and Resource Rights (Article XVIII)

The importance of strong and effective guarantees for Indigenous peoples in relation to their lands, territories and resources has already been highlighted. These rights and guarantees are related to and inseparable from other human rights such as the right to cultural integrity and the right to self-determination.

Article XVIII (1 and 2)

Turning to the language of Article XVIII, I will start with paragraphs 1 and 2, which contain the basic principles related to recognition and protection of Indigenous peoples' rights over lands, territories and resources. These paragraphs are consistent with the Inter-American Court's decision in the *Awas Tingni Case* discussed earlier and are all ready applicable to Member-States as part of the obligations contained in the American Convention and Declaration.

Natural Resources and Resource Exploitation (Article XVIII(4)(5))

Paragraph 4 dealing with legal protection for rights over natural resources is appropriate and largely consistent with existing international standards. However, it and other Articles of the PD are compromised and undermined by paragraph 5, which is substantially inadequate to protect Indigenous peoples' rights. This paragraph concerns establishment or maintenance of official mechanisms or procedures for Indigenous peoples' participation in decision-making in cases where the state, as is the case in most of the Americas, owns subsoil minerals and resources on the land.

Even a cursory review of Indigenous peoples' experience with logging, mining and petroleum, for example, demonstrates that these activities have frequently had a substantially negative impact on the rights, lives and even very survival. It is no coincidence that the majority of complaints filed by Indigenous peoples with intergovernmental human rights bodies concern the negative impact of these activities and attendant human rights violations.

Paragraph 5 merely allows Indigenous peoples some degree of access to decision making in which they may be able to influence the activity and possibly ensure that some form of mitigation measures are in place. This is inadequate in light of actual experience and in light of other international standards.

In contrast to paragraph 5, a number of international instruments require that Indigenous peoples' free and informed consent be obtained prior to the state authorizing or approving resource exploitation on Indigenous lands and territories. CERD, for instance, has recognized Indigenous peoples' right to "effective participation . . . in decisions affecting their land rights, *as required under*

[19] *General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997*. UN Doc. CERD/C/51/Misc.13/Rev.4.
[20] *Supra* note 184, at 1.

article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples" (emphasis added).[21]

Similarly, in a case involving logging on Indigenous lands, the IACHR has previously found a violation of the right to property in Article 21 of the American Convention because the concession was issued without first obtaining the consent of the affected community.[22] Both the IACHR and CERD decisions are echoed in Article 30 of the UN Draft Declaration, which provides that

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Art. 6(2) of ILO 169, while not requiring that consent be obtained, does require that consultations with Indigenous peoples be undertaken "with the objective of achieving agreement or consent." This includes decisions about resource exploitation.

The approach adopted by or pursuant to these instruments is consistent with the observations of the UN Centre for Transnational Corporations made in a series of reports that examined the investments and activities of multinational corporations on Indigenous territories.[23] The fourth and final report concluded that multinational "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development…."[24]

To conclude, if the Declaration is to provide adequate protection for Indigenous peoples' rights and be consistent with existing obligations, it should employ the same language as Article 30 of the UNDD and require that free and informed consent be obtained. Experience in countries that have used this standard in their domestic legislation has demonstrated that it does not hinder resource exploitation and has led to mutually beneficial rewards shared by Indigenous peoples, the state and society at large.

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[21] *Concluding Observations by the Committee on the Elimination of Racial Discrimination : Australia.* 24/03/2000. CERD/C/56/Misc.42/rev.3. (Concluding Observations/Comments), at para. 9.

[22] Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua), at para. 142, *cited in*, The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of February 1, 2000, *Inter-Am. Ct. H.R. (Ser. C) No. 66* (2000). See, also, Case 11.577 (Awas Tingni Indigenous Community - Nicaragua), *Annual report of the IACHR.* OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), April 16, 1999, 1067, para. 108.

[23] The CTC reported four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples (UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54) and; a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations "to mitigate the adverse impacts of TNCs on indigenous peoples' lands, and increase indigenous peoples' participation in relevant government and TNC decision-making." (UN Doc. E/CN.4/Sub.2/1994/40)

[24] *Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations.* UN Doc. E/CN.4/Sub.2/1994/40, at para. 20.

Resettlement (Article XVIII(6)

Article XVIII(6) addresses relocation and, in my opinion inappropriately, permits involuntary relocation in certain circumstances.

As this issue is very important, I have devoted some effort to reviewing international practice and standards to provide some background to the subject. According to a major UN study on the rights of victims of gross violations of human rights, involuntary resettlement "is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities."[25]

For Indigenous peoples, forcible relocation can be disastrous, severing entirely their various relationships with their ancestral lands. The UN Sub-Commission on the Promotion and Protection of Human Rights, has observed that "where population transfer is the primary cause for an indigenous people's land loss, it constitutes a principal factor in the process of ethnocide;"[26] and, "[f]or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications."[27] Other UN documents also describe this as ethnocide.[28]

Due to the importance attached to Indigenous cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights issue.[29] Strict standards of scrutiny are employed and Indigenous peoples' free and informed consent must be obtained.[30] Also, relocation may only be considered as an exceptional measure in extreme and

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25 *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur.* UN Doc. E/CN.4/Sub.2/1993/8, at 10. See, also, *Forced evictions: Analytical report compiled by the Secretary-General.* UN Doc. E/CN.4/1994/20, for an enumeration of the various human rights implicated by resettlement; and, *Report of the Representative of the Secretary-General on legal aspects relating to the protection against arbitrary displacement*. UN Doc. E/CN.4/1998/53/Add.1

26 *The human rights dimensions of population transfer, including the implantation of settlers. Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano.* UN Doc. E/CN.4/Sub.2/1993/17*, at para. 101.

27 Id., at para. 336.

28 This is consistent with Article 7 of the UN draft Declaration, which provides that "Indigenous Peoples have the collective and individual right not to be subjected to ethnocide or cultural genocide, including prevention of and redress for: … (b) Any action which has the aim or effect of dispossessing them of their lands, territories and natural resources; (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights…."

29 For instance, the Special-Rapporteur on Religious Intolerance was mandated by the Commission on Human Rights in 1996 to include Indigenous land rights within in his or her reports on state compliance with the Declaration on the Elimination of All Forms of Religious Intolerance. The Commission invited the Special-Rapporteur, "to take into account the spiritual relationship that Indigenous communities have with the land and the significance of traditional lands for the practice of their religion, and to examine the history of events which are responsible for the violation of these communities' right to freedom of religion and religious practice." *Commission on Human Rights Res/1996, Religious Freedom of Indigenous Peoples.*

30 Among others, ILO 107, art. 12, ILO 169, art. 16(2), draft UN Declaration, art. 10, Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII. See, also, *Progress report prepared by the Special Rapporteur on the human rights population transfer, including the implantation of settlers*. UN Doc. E/CN.4/Sub.2/1994/18, at paras. 24-5.

extraordinary cases such as natural disasters. The implicit statement contained in these standards is that forcible relocation is prohibited as a gross violation of human rights.[31]

A 1998 report conducted by the Secretary General of the UN concluded that "an express prohibition of arbitrary displacement is contained in humanitarian law and in the law relating to indigenous peoples"[32] which requires that the free and informed consent of those to be displaced is obtained. The same report concluded that "Where these guarantees are absent, such measures would be arbitrary and therefore unlawful. Special protection should be afforded to indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."[33]

The need for increased protections for Indigenous peoples has also been noted by the IACHR. In 1972, the Commission issued a resolution entitled *Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination*. This resolution stated, *inter alia*: "That for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[34] The need for special protections was recently reaffirmed by the Commission in article VI of proposed Declaration and in a 1997 Country Report. In that report, the Commission stated that

> Within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.[35]

Returning to the issue of relocation, another UN study date 1994 found that the principle of consent in connection with relocation, at least in the case of Indigenous peoples, has acquired the status of a binding general principle of international law or customary international law.[36] The IACHR concurs. As early as 1984, the Commission stated "The preponderant doctrine" holds that the principle of consent is of general application to cases involving relocation.[37]

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[31] UN Commission on Human Rights resolution 1993/77 states that the practice of forced evictions constitutes a "gross violation of human rights" and urged governments to undertake immediate measures, at all levels, aimed at eliminating the practice. It also urged governments to offer legal security of tenure on all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon the effective participation, consultation and negotiation with affected persons or groups.

[32] *Internally displaced persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39* UN Doc. E/CN.4/1998/53

[33] *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement.* UN Doc. E/CN.4/1998/53/Add.1, at Sec. IV, para. 4.

[34] *Annual Report of the IACHR, 1972, at 90-1.*

[35] Report on the Situation of Human Rights in Ecuador, *OEA/Ser.L/V/II.96 doc.10, rev.1, at p. 115. See, also, article 1(4) of the Convention on the Elimination of Racial Discrimination, both alone and in connection with article 5.*

[36] *Progress report prepared by the Special Rapporteur on the human rights population transfer, including the implantation of settlers.* UN Doc. E/CN.4/Sub.2/1994/18, at para. 25.

[37] *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin,* OEA/Ser.L/V/II.62, doc.26. (1984), 120.

Finally, in its 1999 Concluding Observations on an OAS member state the UN Human Rights Committee concluded that relocation and compensation in connection with a hydroelectric dam almost certainly would not comply with the rights of Indigenous peoples under Article 27 of the ICCPR. In this respect, it stated "When planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them."[38]

As can be seen from the preceding, inclusion of the requirement that Indigenous peoples' free and informed consent be obtained is consistent with international law. It is also consistent with the policies of the European Union and the Inter-American Development Bank both of which prohibit relocation absent Indigenous peoples consent.[39]

The problem in this paragraph does not lie here but in the exception to the rule, namely that Indigenous peoples may be relocated without consent if exceptional and justified circumstances so warrant in the public interest. The language relating to the public interest is overly broad and ambiguous and in many countries in this hemisphere classification of an activity or programme as being in the public interest is a non-justicable political question and therefore cannot be challenged in the courts. This raises serious questions about applicable remedies.

To conclude, given the fundamental human rights violations related to involuntary relocation of Indigenous peoples, this paragraph should be amended to, at a minimum, remove the language concerning the public interest. The joint proposal made by the National Congress of American Indians, the Upper Sioux Community, the Amerindian Peoples Association of Guyana and the Toledo Maya Cultural Council repeated in GT/DADIN/doc.53/02 contains appropriate language.

Intellectual Property Rights (Article XX)

Indigenous peoples intellectual and cultural property rights or intellectual and cultural heritage rights as they are also known, have been the subject of a great deal of international attention in recent years. Much of this attention has been focused on how to design an adequate international framework to protect Indigenous intellectual and cultural property rights. While a great could be said

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[38] *Concluding observations of the Human Rights Committee : Chile. 30/03/99. CCPR/C/79/Add.104. (Concluding Observations/Comments*) CCPR/C/79/Add.104, 30 March 1999, at para. 22

[39] European Union: Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998). Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), at Section IV, para. 4 -

> Those indigenous and other low-income ethnic minority communities whose identity is based on the territory they have traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of resettlement. They often lack formal property rights to the areas on which they depend for their subsistence, and find themselves at a disadvantage in pressing their claims for compensation and rehabilitation. The Bank will, therefore, only support operations that involve the displacement of indigenous communities or other low-income ethnic minority communities in rural areas, if the Bank can ascertain that: the resettlement component will result in direct benefits to the affected community relative to their prior situation; customary rights will be fully recognized and fairly compensated; compensation options will include land-based resettlement; and the people affected have given their ***informed consent*** to the resettlement and compensation measures. (emphasis added)

on this subject, I will confine my comments to two issues: 1) why the "special measures" specified in paragraph 1 are needed and 2) why paragraph 3 is inconsistent with international law.

On the first point, I noticed that a number of states present at the last session of the Working Group had objected to the use of the language "special measures" in relation to protection of Indigenous intellectual property. These objections are misplaced for the following reasons:

1) the classification of Indigenous intellectual and cultural heritage as human rights distinguishes Indigenous intellectual property rights from generic intellectual property rights, which are normally legal rights defined by statute, and illustrates a fundamental distinction in the underlying rationale for protection: Indigenous intellectual and cultural property rights are directly related to cultural integrity and survival whereas generic intellectual property rights are designed to protect innovation and ensure commercial benefits flow to the innovator while also ensuring that knowledge and innovations enter the public domain after a specified time.[40] While the latter considerations also apply to Indigenous intellectual property rights, the former does not apply to generic intellectual property rights. Therefore, the reasons for protecting Indigenous knowledge are of a radically different order from those relating to generic intellectual property rights.

2) Indigenous intellectual property rights have a number of inherent characteristics, such as collectivity and intergenerational knowledge, that do not fit existing categories of intellectual property. Consequently, if these rights are to be recognized and protected new legislation will be required or existing legislation will have to be amended and other so-called special measures will be needed, for instance, to provide for legal personality for collective entities to hold intellectual property rights.

Conceptual Differences Between Indigenous and Non-Indigenous Intellectual Property

First, intellectual property rights are designed to protect the property rights of individuals, including corporate entities and other legal persons: they do not apply to collective rights or communal ownership. This is problematic, particularly when dealing with Indigenous traditional knowledge or cultural manifestations, which are, with certain exceptions, the collective property or heritage of the people(s) concerned.

Second, intellectual property rights are generally recognized for limited amounts of time, usually a specified number of years. Obviously, temporal limitations would defeat the purpose of recognizing Indigenous intellectual property rights, if the peoples or communities in question were to lose control after a short period of time.

Finally, intellectual property rights apply to knowledge that is new or just developed, not to knowledge that already exists. In the case of Indigenous Peoples, traditional knowledge and cultural manifestations have been developed through generations of practice and innovation and would most likely not be considered new knowledge. This problem is further compounded if others have adopted, modified and/or added their own innovations to existing Indigenous knowledge.

With regard to paragraph 3, I say that it is inconsistent with international law because it conflicts with the standard set in Article 8j of the Convention on Biological Diversity, an international treaty binding on the vast majority of OAS Member States. Article 8j requires that

[40] In 1992, the (now) UN Sub-Commission on Human Rights issued a resolution which states, among others, that protection of Indigenous intellectual and cultural property "is essential to the indigenous peoples' cultural and economic survival and development."

Indigenous knowledge be utilized only with the prior agreement or prior and informed consent of Indigenous peoples. Paragraph 3, while somewhat broader in scope, should be consistent with this standard.

The Right to Development (Article XXI)

The right to development found Article XXI has been discussed previously. In particular, it was noted that this right is subsidiary to the larger right of self-determination, which recognizes the right of all peoples to freely pursue their economic, social and cultural development. It was also noted that Article XXI defines development in narrow terms, excluding resource exploitation, which is covered by Article XVIII(5).

This Article deals with development decisions and planning that take place within Indigenous communities and peoples as well as externally developed development plans. With regard to the former, Indigenous peoples' right to determine and implement their own development path is recognized, even if different from that of the state, while the state maintains its obligation to provide the means for Indigenous development at least to the same level as that enjoyed by other sectors of society. This is consistent with the right to self-determination and with the UN Declaration on the Right to Development.

Concerning external development plans, Indigenous peoples' right to consent is recognized, but subject to the same overly broad and potentially arbitrary exception encountered in the Article on relocation. The use of consent here is appropriate and consistent with other international standards, including ILO 169, Article 7. However, I suggest the paragraph be amended to remove the "public interest" exception for the same reasons given in connection with relocation.

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