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The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions

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Abstract

The article gives an overview of the current status of human rights and poverty in the context of the contemporary struggles of indigenous peoples. It aims to describe the framework of indigenous rights as constituted by, and constitutive of, the relationship between legal processes at the international, regional and national levels. The article also makes links to broader issues such as the racial, ethnic, linguistic and cultural human rights instruments, as well as to the important linkage to international poverty law. It outlines the current status of international legal protection for indigenous peoples before giving different cases in which these legal mechanisms have been used and questioned at the regional and national levels. The article concludes by arguing that indigenous rights standards play an important role in terms of serving as 'ceilings' or 'floors' between which indigenous movements and supporting NGOs can mobilize and find a legal framework to form their case.

1. Introduction

This article is intended to provide an overview of the current status of human rights and poverty issues as they overlap and interact in the context of the contemporary struggles of indigenous peoples around the world. Our approach to these issues is both interdisciplinary and comparative, and is structured around two different kinds of case studies, which are respectively national (Australia) and regional (Latin America, Africa) in character. Each of the regional overviews in turn rely upon certain specific national cases, such as Nicaragua, Colombia, Guatemala, Mexico, Ecuador, and Venezuela in Latin America; and Rwanda, Botswana, Uganda, Congo, Kenya and Algeria in Africa.

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The two key building blocks of our conceptualization of these issues are 1) the dramatic extent to which indigenous status correlates with conditions of poverty in each of these national and regional settings, and in a broader sense throughout the world; and 2) the extent to which the emerging framework of globalized recognition of indigenous rights is both constituted by, and constitutive of, an interactive relationship between *legal* processes at the international, regional, and national levels. These include international actors such as the United Nations, the World Bank, the ILO, UNESCO, international NGOs, and so forth, and regional actors such as, in Latin America, the OAS, Inter-American human rights system, Andean Community of Nations, Mercosur, NAFTA, etc.

Our approach also assumes that indigenous rights issues are inextricably related to broader issues regarding the recognition of the rights of racial, ethnic, linguistic, and cultural minorities in international human rights instruments and standards. These range from the stress in the UN Charter and Universal Declaration of Human Rights on rights of non-discrimination, to that of Article 27 of the International Covenant on Civil and Political Rights (on the rights of individuals belonging to minorities), and various relevant provisions of the UN Convention on the Elimination of All Forms of Racial Discrimination, the 1992 UN Declaration on the rights of minorities, *inter alia*, all the way up to the Declaration and Programme of Action of the UN summit (and NGO Forum) on racism, xenophobia, and related forms of intolerance in Durban, South Africa, August-September 2001, and their regional and national equivalents.

Indigenous rights issues are also understood by the authors as a key aspect of the reconceptualization of international human rights issues (at the 1993 UN summit on human rights and thereafter) in terms of their universal, interdependent, and integral character, and thus as raising questions regarding those of a civil and political character on the one hand and economic, social, and cultural character on the other, as well as both those which are commonly understood as either individual or collective in terms of the spheres of their exercise. They also provide a singularly appropriate context for questioning Eurocentrist assumptions about the supposedly uniquely Western origin of international law and human rights as such, and a principled basis for insisting upon the need to redefine such approaches in terms of a multiculturalist paradigm.

Issues of indigenous rights also belong to a broader, evolving framework of the rights of people living in poverty around the world which may be defined for the purposes of this article as that of 'international poverty law'. This framework seeks to provide a juridical basis for demanding compliance with, and implementation of, the economic, social, and cultural rights which have emerged as the legacy of the struggles of the Group of 77 for a 'New International Economic Order' in the 1970's and 1980's, and which have gradually been elaborated in terms of a 'right to development', the recommendations of UN summits over the last decade in Rio, Beijing, Vienna, Cairo, Copenhagen, Durban, and Johannesburg, the Millennium Development Goals and Comprehensive Development Framework adopted by the IMF and World Bank, the 'general comments' of the Committee on Economic, Social and Cultural Rights, etc. One can also think of

the UNESCO paper on Abolishing Poverty Through the International Human Rights Framework: An Integrated Strategy.¹

Examples of the overlapping character of indigenous rights and the emerging framework of 'international poverty law' include the World Bank's arguable obligation to assess the effectiveness of countries' Poverty Reduction Strategy Papers in terms of the extent to which they address not only narrow poverty-reduction criteria, but also the specific needs and rights of indigenous peoples, as the Bank's own Indigenous Peoples' Policy demands. In a broader context, our assumption here is that poverty reduction strategies – and the theoretical and conceptual frameworks which inform them – must address the specific, disaggregated needs and rights of indigenous peoples with special care and comprehensiveness precisely. This is because indigenous status in settings such as Latin America is so highly correlated with the most pronounced patterns of poverty.

Indigenous rights issues also raise more fundamental questions of citizenship and democracy precisely because of the convergence they present between questions of non-discrimination and those which are ancillary to poverty as a condition associated with economic, social, political, and cultural structures of marginalization and exclusion. In Latin America and Africa, as in Australia, New Zealand, or India, indigenous peoples are generally relegated to a *de facto* status of disempowered, 'second class' citizenship which is intertwined both with their differentiated racial, ethnic, linguistic, and cultural identity and with their socio-economic conditions of deprivation. And this status is further correlated with the prevalence of a 'democratic deficit' including the lack of adequate political representation and 'voice' (implicating rights of consultation and participation) with respect to decision-making processes regarding the matters that most affect them. They also tend to lack access to effective means of legal redress (and legal representation) that might enable them to effectively confront and at least in part transcend such conditions. All of this suggests the need to go a significant distance beyond, and reconceptualize, the comparatively impoverished notions of 'good governance' and 'judicial reform' in vogue in the World Bank's current projects and most recent World Development Reports, and in much of contemporary political science and management studies, which tend to promote the kind of 'low-intensity' democracy characteristic of neo-liberal 'market fundamentalism'.

In the broadest sense then, indigenous rights issues are thus at the cutting edge of what Richard Falk has defined as the "quest for global justice" at the heart of contemporary trends in international law and international human rights.² In Falk's view two complementary logics underpin the current system of world

¹ See <www.unesco.org/uy/shs/povertystrat.ppt>. The strategy paper has been discussed at several consultation meetings, among others in Bergen, Norway, 5–6 June 2003. See the CROP report on the meeting, *Abolishing Poverty Through the International Human Rights Framework: Towards an Integrated Strategy for the Social and Human Sciences* (Bergen, 2003).

² R. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge, New York and London, 2000) p. 17; see generally Chapter 1, pp. 13–35.

order: *statist logic* deriving from the Westphalian view of international society as constituted by territorial sovereign States, and *market logic* deriving from the moving forces of capital efficiency and minimal governmental regulation in an era of globalization.³

Due attention to the recognition of indigenous rights and of the rights constitutive of 'international poverty law', as part of an integral policy analysis and advocacy approach, poses one of the most important contemporary challenges to both of these logics. Falk thus gives special importance to indigenous rights as a case-study in the evolution of patterns of 'global justice':

"It is also worth noting the legal progress that indigenous peoples have made in recent decades. They are no longer merely seen as unprotected victims of the modernizing process, nor are their claims still limited to demanding protection by way of assimilationist norms of nondiscrimination. Indigenous groups have now come to be recognized as groups whose autonomous way of life deserves protection. The question is whether this latter goal, which is now widely enough endorsed by states to qualify as a norm of customary international law, also implies a full right of self-determination."⁴

Two decisive effects of this process are evident at present, according to Falk:

"1) the gradual acceptance that the plight of indigenous peoples is an appropriate item on the agenda of human rights and self-determination; and 2) the shift in indigenous rights discourse from the promotion of assimilation (in the face of discrimination) to the promotion of sustainable autonomy (in the face of assimilation). The normative solution of a generation ago has become the normative challenge of the current generation."⁵

And yet he is also concerned that "the circumstances of indigenous peoples are more difficult and uncertain than ever" and that "they offer no assurance that indigenous peoples can avoid severe displacement, even extinction, given the magnitude of adverse pressures".⁶ Surely the adverse effects on the world's indigenous peoples of the increasing poverty and inequities fostered by neo-liberal macro-economic policies, and by poverty itself under any circumstances as a disempowering force that undermines basic well being, must be factored into this diagnosis.

2. International (Quasi-)legal Protection

Since the 1970s the UN has been involved in a series of initiatives concerning the international legal protection of indigenous peoples. Due to a range of activities by, amongst other bodies, NGOs with a background in indigenous issues, the UN by then started to become aware of the need to take special measures for

³ *Ibid.*, p. 21, emphasis added.

⁴ *Ibid.*, p. 123.

⁵ *Ibid.*, p. 142.

⁶ *Ibid.*

the often forgotten and marginalized indigenous peoples. It might be seen as some sort of a (small) landmark, that in 1977 the International Indian Treaty Council was the first indigenous organization to acquire a consultative status with the Economic and Social Council of the UN.⁷ Some 25 years later, the indigenous peoples' NGOs are generally considered to belong to the best represented ones in the UN system.

One of the results of the growing attention to the plight of the indigenous peoples within the UN context was the establishment, in 1982, of the Working Group on Indigenous Populations. The Working Group, consisting of five independent experts from, what is now called, the United Nations' Sub-Commission on the Promotion and Protection of Human Rights and in practice assisted/checked/supported by a range of representatives of governments and indigenous non-governmental organizations, over the years became – in the words of the United Nations itself – the “focal point of international action on indigenous issues”.⁸

Over the years, the Working Group discussed, one might say, every detail of any relevance to the international (legal) protection of indigenous peoples. In the framework of this article, two elements deserve special attention: the preparation of a Draft Declaration of the Rights of Indigenous Peoples and the groundbreaking work for the establishment of a Permanent Forum on Indigenous Issues. These initiatives constituted two elements of (quasi-)legal protection: the identification of clear standards as well as the creation of some sort of a supervisory body in order to see to what extent States do implement the standards they have to live up to.

2.1. *Draft Declaration of the Rights of Indigenous Peoples*

In July 1993, the Working Group agreed on a draft Declaration of the Rights of Indigenous Peoples, and submitted it to the body of which it is a subsidiary organ: the previously mentioned Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission subsequently adopted the draft in August 1994.⁹ The draft Declaration consists of 45 articles, related to, *inter alia*, the right to self-determination, the right to establish media in indigenous languages, the right to land and the use of natural resources, etc., in sum: all aspects of indigenous life. For a correct understanding of the articles, it is important to keep in mind that the Sub-Commission and its Working Group (at least in theory) do consist of experts acting independently from their States and that indigenous representatives actively took part in the deliberations on the contents of the draft. After the adoption of the draft Declaration, in 1994, it was handed over, in

⁷ J. Burger and P. Hunt, 'Towards the International Protection of Indigenous Peoples Rights', 12:4 *Netherlands Quarterly of Human Rights* (1994) p. 407.

⁸ <www.unhcr.ch/indigenous/ind_wgip.htm>.

⁹ See for the draft Declaration: UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

1995, to the United Nations Commission on Human Rights, consisting of representatives of States. The Commission decided to establish a special 'open-ended inter-sessional Working Group' to discuss the draft. So far (June 2004), it had nine sessions, each of them taking some ten days.¹⁰ The work should be done before the end of 2004, in order to make it possible for the General Assembly of the United Nations to adopt the Declaration in December of that year, that is to say: just before (or marking!) the end of the International decade of the World's Indigenous People (1995–2004). That 'deadline', however, is too optimistic, or, if kept, might lead to the adoption of a Declaration which in many ways will be problematic. This result is likely unless the current Working Group speeds up the process, in a way that doesn't lead to badly constructed articles on sensitive (from the perspective of States) and important (from the perspective of indigenous peoples) issues.

One of the core issues relates to the 'right to self-determination'. During a Working Group meeting Australia formulated a position on this issue which reflects a typical reaction many States have when discussing the item. As noted in the report of the relevant session, the representative of Australia noted that participants had different understandings and difficulties with the use of the term self-determination in the context of the draft declaration. For many people it implied the establishment of separate nations and separate laws. Since this would be inappropriate to his country's situation, his Government was unable to accept its inclusion.¹¹

The fear expressed relates to the risk that the right to self-determination will be used by indigenous peoples in order to undermine the territorial integrity of States. This fear fails to account for the indigenous critique of processes of State formation in much of Asia, Africa, and the Americas, which stresses the illegitimate character of State structures. Such structures exclude the recognition of indigenous peoples as pre-existent entities entitled to equal rights within restructured, multiculturalist polities.

However, looking at the records of several sessions, it also seems to be clear that many States are prepared to take the right to self-determination as it developed in international law over the years, that is to say emphasizing the internal aspect of self-determination and preserving external self-determination (secession etc.) for specific situations like occupation after an international war. Such a position has been formulated by for instance Canada. According to one of the reports of the Working Group, the Canadian Government accepted a right of self-determination for indigenous peoples which respected the political, constitutional and territorial integrity of democratic States. In that context, exercise of the right involved negotiations between States and the various indigenous peoples within those States to determine the political status of the indigenous peoples involved and the best means of pursuing their economic, social and cultural development.¹²

¹⁰ See for the latest report of the Working Group: E/CN.4/2004/81, 7 January 2004.

¹¹ UN Doc. E/CN.4/2001/85, p. 15.

¹² *Ibid.*

In other words: according to countries like Canada the right to self-determination relates to 'internal self-determination', while, in addition, the right should be implemented through consensual processes of negotiation. Such an approach might receive broad support within the international community between now and the end of 2004, probably even by the United States of America. Their opinion is that on the one hand, the "'Peoples' entitled to self-determination under international law were the entire peoples of a State or those that constitute themselves a sovereign independent State", and not "particular groups within an existing State". But on the other hand, they said that hopefully "the working group would be able to draft a declaration in which States were encouraged to consider a broad range of autonomy for indigenous peoples in managing their local and internal affairs, including economic, social and cultural matters".¹³ Such regimes of autonomy at the community and regional level have become central to indigenous rights struggles, and State reform measures, particularly in Latin American countries, such as Mexico, Colombia, and Nicaragua.

Directly related to the issue of self-determination, is the question whether the Declaration will make use of the term 'indigenous people' or 'indigenous peoples'. From the very beginning of the debate on the draft Declaration, many indigenous representatives stressed the meaning of the term 'peoples'. For them, using the term is the only way to express that indigenous peoples have their own characteristics that should be recognized and merit preservation.¹⁴ As several reports of the Working Group identify, so far the States have not been able to decide whether the term 'peoples' should be included. One can refer, however, to the position of a State like Finland. Its representative "supported the use of the term 'indigenous peoples' because it made the great number of collective rights in the declaration meaningful".¹⁵ The statement seems to reflect a compulsory logic.

From a historical perspective, it is interesting to note that at the 1993 World Conference on Human Rights many representatives of indigenous peoples were claiming the use of the word 'peoples' instead of 'people', a wish however that was not fulfilled by the State participants: in the final document of the Conference one will vainly look for the word 'peoples'. In the document of the Durban Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance (August-September 2001), however, one can find many references to 'indigenous peoples'. See for instance para. 23, which states that the participants at the Durban meeting "fully recognize the rights of indigenous peoples consistent with the principles of sovereignty and territorial integrity of States . . .", and para. 43, stating that "we also recognize the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical and cultural existence . . .". Those who might think that this terminology can be used to speed up the process of drafting a Declaration on the Rights of Indigenous Peoples,

¹³ UN Doc. E/CN.4/2000/84, p. 7.

¹⁴ See for instance UN Doc. E/CN.4/2001/85, Annex II (Proposals by Indigenous Representatives; Explanatory note on the use of the term indigenous 'peoples').

¹⁵ *Ibid.*, p. 13.

including the terminology 'rights of peoples', however, have to take notice of para. 24 of the Durban Document. It states that the use of the term 'indigenous peoples' in the Durban Document is to be seen "in the context of, and without prejudice to the outcome of, ongoing international negotiations on texts that specifically deal with this issue, and cannot be construed as having any implications as to rights under international law".¹⁶ The Orwellian character of such oxymoronic language (proclamations of 'rights', in effect, that are not intended to be taken seriously) are of deep concern to indigenous rights movements and advocates around the world.

2.2. *A Permanent Forum on Indigenous Issues*

The final document of the World Conference on Human Rights, held in Vienna in June 1993, states that the General Assembly of the United Nations should consider "the establishment of a permanent forum for indigenous people in the United Nations system".¹⁷ Later the General Assembly itself recognized the establishment of a permanent forum as one of the important objectives of the program of activities for the International Decade of the World's Indigenous People.¹⁸ As a follow-up to the relevant resolution of the UN General Assembly, several activities were undertaken within the UN framework, such as two preparatory seminars on the issue, organized in Copenhagen and Santiago, in 1995 and 1997 respectively.¹⁹ They prepared the ground for the establishment, in 1998, of a special working group of the UN Commission on Human Rights, which was given the task to submit concrete proposals for a permanent forum.²⁰

After all these preparations, in 2000 the Commission on Human Rights was able to adopt a resolution, recommending the Economic and Social Council of the UN to establish as a subsidiary organ of the Council a permanent forum on indigenous issues consisting of 16 members, eight members to be nominated by Governments and elected by the Council and, eight members to be appointed by the President of the Council following formal consultation with the bureau and the regional groups through their coordinators. The members were appointed on the basis of broad consultations with indigenous organizations taking into account the diversity and geographical distribution of the indigenous people of the world as well as the principles of transparency, representativity and equal opportunity for all indigenous people, including internal processes, when appropriate, and local indigenous consultation processes.²¹

¹⁶ World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration adopted on 8 September 2001, A/CONF/189/12.

¹⁷ UN Doc. A/CONF.157/24, Part I, sect. II, para. 32.

¹⁸ GA Resolution 50/157 of 21 December 1995, annex.

¹⁹ UN Docs. E/CN.4/Sub.2/AC.4/1995/7 and E/CN.4/1998/11.

²⁰ UN Docs. E/CN.4/1999/83 and E/CN.4/2000/86.

²¹ See E/CN.4/RES/2000/87, 28 April 2000, adopted by a roll-call vote of 43 votes to none, with nine abstentions. The ECOSOC adopted its resolution on the permanent forum on 31 July 2000; it did so by consensus.

In addition, it decided that "States, United Nations bodies and organs, inter-governmental organizations and non-governmental organizations in consultative status with the Council may participate as observers", while "organizations of indigenous people may equally participate as observers in accordance with the procedures which have been applied in the Working Group on Indigenous Populations".²²

The mandate of the Permanent Forum relates to the discussion of "indigenous issues within the mandate of the Council relating to economic and social development; culture, the environment, education, health and human rights", and in doing so the Forum will, amongst other things, "provide expert advice and recommendations on indigenous issues to the Council . . . raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system; and prepare and disseminate information on indigenous issues".²³ As foreseen, however, the Forum's core task will be to see whether States are living up to the Declaration of the Rights of Indigenous People(s), to be adopted before the end of 2004. The Permanent Forum holds annual sessions of ten working days. Its first meetings took place in May 2002, 2003 and 2004 in New York.²⁴

2.3. *The Special Rapporteur on the Rights of Indigenous People*

The United Nations Commission on Human Rights avails itself of a series of 'Special Rapporteurs' on countries and on thematic issues. The Commission's 2001 session decided to appoint a Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People.²⁵ This was in the light of the ongoing Decade of the World's Indigenous People and of "the growing interest of the international community in the full and effective protection of the human rights of indigenous people". The Rapporteur's functions include "to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms". In addition, the Rapporteur wants them "to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy these violations".²⁶ The Rapporteur, the sociologist Rodolfo Stavenhagen from Mexico (elected despite the opposition of many indigenous NGOs and the opposing candidacy of 1992 Nobel Peace Prize Laureate Rigoberta Menchu), presented his first report at the 2002 session of the Commission. He identified a number of particular topics, *inter alia*, the impact of development projects on the human rights

²² *Ibid.*

²³ *Ibid.*

²⁴ <www.unhchr.ch/indigenous>, p. 1. During its first meeting, the Permanent Forum elected Ole Henrik Magga from Norway as its chairperson. See <www.un.org/News/Press/docs/2002/HR4589.doc.htm>.

²⁵ E/CN.4/RES/2001/57, 24 April 2001, adopted without a vote.

²⁶ *Ibid.*

and fundamental freedoms of indigenous communities; participation of indigenous peoples in decision-making processes; and old and new forms of discrimination against indigenous people.²⁷

In April 2003, the Special Rapporteur presented his first thematic report, focussing on the impact of large scale or major development projects on the human rights and fundamental freedoms of indigenous peoples and communities. Mr. Stavenhagen noted that when such developments occur in areas occupied by indigenous peoples, it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, and much less foreseen, by the authorities and agents promoting the developments.²⁸ He also started making on-site country visits, which in his view can become “an important pillar of the mandate as they provide a means for assessing the extent to which the protection, assistance and development needs of indigenous peoples and communities are being met at the local and national level”.²⁹ In 2002, the Special Rapporteur undertook visits to Guatemala³⁰ and the Philippines,³¹ and the following year to Mexico and Chile.³² In 2004 he visited Colombia and Canada.³³ These visits also reflect the kind of interactive processes between the international, regional, and national levels which are central to our approach here.

2.4. The Protection of Indigenous People(s) within the Broader UN Framework

Apart from the attention given to indigenous peoples within fora specifically created for them, several other UN bodies and organizations have paid or still pay attention to indigenous people(s). Examples include the International Court of Justice, more specifically its 1975 Advisory Opinion on the Western Sahara (see below), the ongoing involvement of the International Labor Organization, especially given its Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, which applies to “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status retain some or all of their own social, economic, cultural and political institutions” (Article 1(1)(b)). Furthermore, the Convention underlines the importance of self-identification, the so-called ‘subjective element’ in every definition of indigenous peoples: “Self-identification as indigenous . . . shall be regarded as a fundamental criterion for determining the

²⁷ E/CN.4/2002/97 and Add.1.

²⁸ See <www.unhchr.ch/indigenous/rapporteur.htm>.

²⁹ *Ibid.*

³⁰ E/CN.4/2003/90/Add.2.

³¹ E/CN.4/2003/90/Add.3.

³² Reports on these last two visits have been presented to the Commission on Human Rights in April 2004. See E/CN.4/2004/80/Add.1.

³³ Reports are not yet available.

groups to which the provisions of this Convention apply" (Article 2(3) ILO Convention 169).

One of the UN Conventions in which the issue of protection of (persons belonging to) indigenous peoples is reflected, is the 1965 Convention on the Elimination of All Forms of Racial Discrimination. As it states in Article 1(4), "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination . . .". In addition, Article 2(2) speaks about the duty for States, "when circumstances so warrant", to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them". In the periodical reports presented to and discussed by the supervisory UN Committee on the Elimination of Racial Discrimination many indigenous situations are brought up.

As far as the relevance of general human instruments is concerned, one can also think of the 1966 International Covenant on Civil and Political Rights (ICCPR), especially the article in the Covenant which was created for the legal protection of (persons belonging to) minorities and indigenous peoples, Article 27.³⁴ It is relevant to note that the Article doesn't create collective rights; it starts from the rights belonging to individual members of the minorities, followed by the possibility to exercise these rights "in community with the other members of the group". However, it has become clear, especially through the case *Lubicon Lake Band v. Canada*,³⁵ that the Human Rights Committee has no objection to "a group of individuals, who claim to be similarly affected, collectively to submit a communication". The *Lubicon Lake Band v. Canada* case relates to indigenous claims, as some other cases brought before the Human Rights Committee do. The most famous one is the case *Sandra Lovelace v. Canada*, relating to an Indian woman who married a non-Indian man, and accordingly lost her right to live on Indian reserve lands.³⁶ Additionally, it can be noted that the Human Rights Committee is of the opinion, as expressed in the General Comment on Article 27 of the ICCPR, that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves

³⁴ See on this and other issues in relation to the *locus standi* for minorities and indigenous peoples, A. Meijknecht, *Towards International Legal Personality: The Position of Minorities and Indigenous Peoples in International Law*, (Intersentia/Hart, Antwerpen/Groningen/Oxford, 2001), *passim*. See also M. van de Bosch and W. van Genugten, 'International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples – Comparing Underlying Concepts', 9 *International Journal on Minority and Group Rights* (2002), pp. 195–233.

³⁵ *Lubicon Lake Band v. Canada*, Case 167/1984. UN Doc. A/45/40, Vol. II. This point of view has been repeated several times, among other things in the case *Apirana Mahuika et al. v. New Zealand* (case 547/1993, view of 20 October 2000).

³⁶ Case 24/1977, UN Doc. A/36/40, p. 166.

protected by law".³⁷ The Committee clearly speaks about the life-style of peoples as a whole, not only of its individual members, although only the latter can bring cases to it. This, however, is a matter of admissibility rather than of substantive case-law (see the *Lubicon Lake Band v. Canada* case, quoted before).

3. Implications for National Cases: Some Examples

Indigenous peoples can be found all over the world. This chapter selects some typical cases in order to illustrate the results of the local (legal) struggle many indigenous peoples are fighting. It was decided to deal with one famous case in detail (the Australian *Mabo* case) and to attempt a more general description, although based on specific cases as well, of the legal situation of indigenous peoples in Latin America and Africa.

3.1. *The Australian Aborigines*

3.1.1. *The 1992 Mabo Case Judgement*

The Australian *Mabo* case is, after a bit more than ten years, still a landmark decision in the field of the protection of indigenous peoples, which is also highly relevant for the purpose of this article on the interaction between national, regional and international protection. In addition, although having many typical Australian characteristics, its history also reflects a range of issues which are at stake in many other indigenous situations too.

The history of the Aborigines in Australia is closely linked to the way the British Crown behaved since it entered the Australian territory some 200 years ago, more specifically: 26 January 1788 when the first invading British arrived at their shores.³⁸ Since then, the Aborigines, although having lived in the country for tens of thousands of years, were in a defensive position. They were denied their right to land, or even worse: Australia was declared to have belonged to nobody ('*terra nullius*') when the British colonial powers entered the picture, which is more than what the phrase says literally. 'Terra Nullius' in this context is the effective equivalent of a '*tabula rasa*' in terms of the recognition of indigenous rights as pre-existent to the establishment of colonial rule. British rule was established, while the official 20th century Australian policy in relation to the Aborigines was based on the concept of assimilation, meaning that all Aborigines would have to live the way white Australian citizens did. This policy of denial of the specific characteristics of the Aboriginal population, started to evoke strong reactions in the beginning of the 20th century and in the 1930s led to strikes and "walk-offs by Aboriginal people in the mission stations in eastern Australia".³⁹ In

³⁷ CCPR/C/21/Rev.1/Add.5, 26 April 1994, Par. 7.

³⁸ M. Dodson, 'New perspectives for Aboriginal land rights', in: L. van der Vlist (ed.), *Voices of the Earth, Indigenous peoples, new partners, & the right to self-determination in practice*, (International Books/NCIP, Utrecht, 1994), p. 83.

³⁹ *Ibid.*

the 1960s, the first major legal step followed: the people of Yirrkala on the Gove peninsula in the Northern Territory took their case to the Northern Territory Supreme Court. The case was lost, however, due to the *terra nullius* myth.⁴⁰ It would take until the 1990s when this concept was put aside by the Australian Supreme Court. It did so in the famous 'Mabo-case'.

In the case *Mabo and Others v. Queensland*,⁴¹ the legal rights of the members of the indigenous Meriam people of the Murray Islands were in question. The Murray Islands lie in the Torres Strait. Their total land area is of the order of nine square kilometers. The biggest is Mer (known also as Murray Island). The people who were in occupation of these islands before European contact and who have continued to occupy the islands to the present day are known as the Meriam people.

In the Mabo case six members of the Court (one judge dissenting) decided that the common law of Australia "recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands . . .".⁴² As a matter of fact the (very lengthy) judgment reads like a novel, detailing aspects typical for the way indigenous peoples are dealt with all over the world (not only in Australia). For that reason, this chapter does not comment upon the judgment, but lets it 'speak for itself'. The Mabo case is also especially relevant to our purposes in this chapter, since it exemplifies the increasing tendency for international law in specific ambits such as that of indigenous rights, to be 'made' by regional and domestic decision-makers. An additional example is the *Awasi Tigni* case from Nicaragua decided by the Inter-American Court of Human Rights, discussed below.

The judgment in the Mabo case contains some interesting observations as to the situation existing on the islands before the Europeans arrive:

"Communal life based on group membership seems to have been the predominant feature of life. Many of the activities of daily life were social activities which took place in the context of group activities of a ceremonial or ritualistic nature. Behaviour was regulated in the interest of the community by social pressures . . . It seems that before European contact social cohesion was sought by the combined operation of a number of factors. Children were inculcated from a very early age with knowledge of their relationships in terms of social groupings and what was expected of them by a constant pattern of example, imitation and repetition with reinforcing behaviour . . . Sorcery, magic and taboo were obviously important cohesive factors and a source of sanction."⁴³

Contacts with Europeans were initially few and sporadic. There were occasional visits by passing ships in the early 19th century. In 1834, two young British castaways were rescued and they stayed on Mer until a ship called there two years

⁴⁰ *Ibid.*

⁴¹ *Mabo and others v. Queensland*, (No. 2) (1992) 175 CLR 1 F.C. 92/014, High Court of Australia, 3 June 1992.

⁴² *Ibid.*, para. 2.

⁴³ *Ibid.*, para. 3.

later. The ship's captain, Captain Lewis, recorded that the natives "acknowledge no chief, each family being distinct and independent of each other. Quarrels frequently take place which, after a fight are generally followed by a speedy reconciliation".⁴⁴

Other observations, made in 1879 by Captain Pennefather, relate, among other things, to the ownership of the land, indicating that there was at least to some extent something like individual property, but also to the specific historical ties indigenous peoples experience with the territories they are living on:

"The natives are very tenacious of their ownership of the land and the island is divided into small properties which have been handed down from father to son from generation to generation, they absolutely refuse to sell their land at any price, but rent small portions to the beche-de-mer men and others. These natives, though lazy like all Polynesians on their islands, build good houses and cultivate gardens, they are a powerful intelligent race and a white man is as safe if not safer residing amongst them . . ."⁴⁵

Basically, the Australian High Court found that there was apparently "no concept of public or general community ownership among the people of Murray Island, all the land of Murray Island being regarded as belonging to individuals or groups".⁴⁶ The Judgement went on: "The ultimate determining factor in terms of the control and disposition of land was simply what was acceptable in terms of social harmony".⁴⁷ Other observations relate to the system of local government:

"The Governing body consists of the native chief or 'mamoose', assisted and advised by the councillors or elders of the village, with a staff of native police to uphold his authority and to keep order among the inhabitants or visitors . . . The mamoose acts as a police magistrate and governor, with power to deal summarily with offences and breaches of local regulations, and is directly responsible for the behaviour and cleanliness of his village to the Government Resident and Police Magistrate at Thursday Island. He may inflict punishment by fine or imprisonment upon minor offences, but misdemeanours and serious offences must be reserved for the bench at Thursday Island. The councillors attend at courthouse to assist the mamoose with advice and, in order of seniority, may act on his behalf during his absence. They also meet to confer monthly with the mamoose upon any questions concerning the conduct of affairs. The native island police, under a native sergeant, are responsible to the mamoose for the good behaviour of the inhabitants, etc., and may arrest and lock up offenders till the next meeting of court. They have also to inspect and see that each householder keeps his premises and grounds clean, and that the portion of the public road adjacent to his residence is kept in good repair and order; also that the public properties (coconut-trees, fish-traps, etc.), and buildings (court-house, lock-up, school-house, etc.) are not damaged or destroyed."⁴⁸

⁴⁴ *Ibid.*, para. 4.

⁴⁵ *Ibid.*, para. 12.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, para. 19.

⁴⁸ *Ibid.*, para. 17.

Having made and quoted these observations, the Court then summarizes the defendant's argument:

"when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown".⁴⁹

This proposition, according to the Court, "invites critical examination".⁵⁰ If it would be right, it would mean that

"the interests of indigenous inhabitants in colonial land were extinguished when British subjects settled a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. This Court must now determine whether, by the common law of this country, the rights and interests of the Meriam people of today are to be determined on the footing that their ancestors lost their traditional rights and interests in the land of the Murray Islands on 1 August 1879."⁵¹

In terms of the Court, the great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognized the sovereignty of the respective European nations over the territory of "backward peoples" and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest. And, according to the Court, various justifications for the acquisition of sovereignty over the territory of these "backward peoples" were advanced, such as ones related to the benefits of Christianity and European civilization, as well as the notion, based on the reasoning of John Locke, that new territories could be claimed by the new sovereign because they are "uncultivated".⁵²

As the Court rightly observes, the theory of *terra nullius* has been critically examined by the International Court of Justice (ICJ) in its Advisory Opinion on the Western Sahara.⁵³ There, the majority judgment reads:

"it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* . . . at the time of the act alleged to constitute the 'occupation' . . . Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not

⁴⁹ *Ibid.*, para. 25.

⁵⁰ *Ibid.*, para. 28.

⁵¹ *Ibid.*

⁵² *Ibid.*, para. 33.

⁵³ *Advisory Opinion on the Western Sahara*, (62) (1975) ICJR, p. 39.

generally considered as effected unilaterally through 'occupation' of terra nullius by original title but through agreements concluded with local rulers."⁵⁴

This quote from the ICJ Advisory Opinion brings the Australian Court to the conclusion that "the notion that inhabited land may be classified as terra nullius no longer commands general support" and that "if it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".⁵⁵ The ICJ Advisory Opinion in this case is yet another example of increasing degrees of interaction between the international and national levels in the emerging globalized system of indigenous rights. Additionally, the Court adds that the common law does not necessarily conform to international law, but "international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights".⁵⁶ And according to the Court it is contrary both to international standards and to the fundamental values of our common law "to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands".⁵⁷

In the end, the Court finds that

"the common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land . . . The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists."⁵⁸

In this quote, one might say, all the grievances brought forward by many indigenous representatives in as many international and national fora come together in the most fundamental form: basically they are victims of power play. Not addressing that issue, would be the same as denying the fundamental character of most of their problems.

3.1.2. *Follow up to the Mabo Judgement*

Several aspects that have been decided upon in the *Mabo* case received further attention in the 1996 *The Wik Peoples v. The State of Queensland & Ors* case.⁵⁹

⁵⁴ Quote taken from the *Mabo Judgement*, para. 40.

⁵⁵ *Ibid.*, para. 41.

⁵⁶ *Ibid.*, para. 42.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para. 63.

⁵⁹ *The Wik Peoples v. The State of Queensland & Ors*, High Court of Australia, 23 December 1996.

In this case, the Wik Peoples claimed to be the holders of native title over certain areas of land in Queensland. Those areas include or consist of land known as the Holroyd River Holding and the Mitchellton Pastoral Leases. In 1915 and 1919, pastoral leases had been granted by the Crown to non-Aboriginal lessees over the Mitchellton Pastoral Leases. In 1945 and 1973 pastoral leases had been granted by the Crown to non-Aboriginal lessees over the Holroyd River Holding. The Wik Peoples claimed that their native title was not extinguished by the granting of pastoral leases. Without going into this decision in too much detail – the technical elaborations in the judgment go beyond the scope of this article and are not very relevant for other indigenous situations all over the world – the case is important because of the ways it deals with the entitlements to territories like the ‘freehold’ and ‘leasehold’ titles. The basic finding of the Court was that – apart from the outcome in the present case – native title was not necessarily removed or extinguished by pastoral leases.

Following the *Mabo* Judgement, the Australian legislature adopted the 1993 Native Title Act (full title: An Act about native title in relation to land or waters, and for related purposes). This law, which has since been amended several times, for instance after the 1996 Wik judgment and lastly in 2001,⁶⁰ consists of a huge series of articles regarding related items like “extinguishment of native title”, “effect of validation on native title”, “entitlement to compensation”, “indigenous land use agreements”, “contractual effect of registered agreement on National Native Title Register”, “management or regulation of water and airspace”, “approved gold or tin mining acts”, the “arbitral body”, the “appointment of Registrar”, etc. In sum, the Act basically relates to the procedures that have to be followed in order to get indigenous claims realized. In terms of its Article 3, the main objects of the Act are:

- “(a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.”

In the Preamble one can find the background motivation to the Act. It is interesting to read, also because of its linkages to the *Mabo* judgment, for example, that: “The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.” And as far as the actual underlying reasons for the Act are concerned:

“This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal

⁶⁰ Native Title Act 1993, Act No. 110 of 1993 as amended. See the compilation on the internet, incorporating amendments up to Act No. 24 of 2001, prepared by the Office of Legislative Drafting, Attorney-General’s Department, Canberra.

peoples and Torres Strait Islanders concerning the use of their lands. As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.”

Whether the law will realize its underlying goals, is a matter of controversy in today’s Australia. Many indigenous and non-indigenous authors have welcomed but also strongly criticized the 1993 Native Title Act, particularly several amendments added later. As one of these critics notes,

“many millions of taxpayers dollars are being spent opposing claims – far, far more than by those indigenous groups making them. There is, of course, a massive imbalance in the resources available to those making claims and those opposing them. The Yorta Yorta, for example, in the first contested Native Title case before the Federal Court, found themselves confronting the combined might of three State governments, the Murray Darling Irrigation Authority and a host of smaller parties, represented by a cohort of . . . and barristers and supported by unknown numbers of solicitors, bureaucrats and other ancillary staff for the duration of the eighteen months of hearing. Given such circumstances it is difficult to see any effective means of reducing the length and complexity of Native Title cases unless other parties learn to accept the underlying principles and spirit of the Mabo decision. It is ironic that those opposing claims used such delays as a major plank of their argument that the 1993 Act was ‘unworkable’.”⁶¹

Having an Act is one thing; having a satisfactory reality is often something else. This has also been noted by the UN Committee on the Elimination of Racial Discrimination, which, in 1999, expressed its concern with the 1998 amendments to the Native Title Act, which had the effect of restricting the possibilities for the Aborigines to realize their claims. The Committee believed that the amendments were a step back in comparison to the 1992 *Mabo* judgment and the original 1993 Native Title Act.⁶² The Committee’s reaction to the Act is another example of international attention regarding developments at the national level.

3.2. *Contemporary Indigenous Rights Trends in Latin America and Africa*

3.2.1. *Patterns of Constitutional Recognition in Latin America*

Historically indigenous peoples in Latin America have not ‘existed’ from the vantage point of constitutional law. But this post-independence tendency reversed the limited recognition of their customary, ‘tribalized’ rights in a manner parallel to that described and critiqued by Mahmood Mamdani in his (1996) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*,⁶³ that was characteristic of the system of the ‘Law of the Indies’ during the Spanish colonial period. This system tended to define all society in terms of an apartheid-like separation between the irreducible spheres of the ‘*república de los españoles*’ (the

⁶¹ R. Hagen, at <www.netSPACE.net.au/~rodhagen/nativetitle.html>.

⁶² UN Doc. CERD/C/54/Misc.40/Rev.2.

⁶³ M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton University Press, Princeton, New Jersey, 1996).

republic of the Spaniards) and the '*republica de indios*' (the republic of the 'Indians') respectively.⁶⁴ Independence brought the tendency to negate the continuing existence of indigenous peoples with their distinct identities, languages, cultures, and autochthonous political and economic structures (*de facto* pre-existing nationalities), in favor of the imposition of notions of an artificial equivalence between the region's emergent nation-States and their supposed cultural homogeneity. This conception of the unitary nation-State, borrowed from Napoleonic France (and which was a re-elaboration of its Westphalian origins), and its concomitant negation of the recognition of indigenous rights, became hegemonic throughout Latin America during the balance of the 19th century. Nonetheless the concrete diversity of the presence of indigenous peoples throughout the region has persisted, and since 1987 has begun to be recognized again in a significant number of Latin America's constitutions.

Donna Lee Van Cott has recently suggested that there is an emergent regional trend in terms of the recognition of indigenous rights in Latin America that she characterizes as "multicultural constitutionalism".⁶⁵ Van Cott applies this concept to cases where there has been 1) the discursive recognition of a State's multicultural character; 2) legitimization of indigenous customary law (in terms of a framework of legal pluralism); 3) systems of indigenous communal property; 4) official status accorded to indigenous languages and cultures (at least within their territories, but sometimes at the national level), and 5) the establishment of officially supported bilingual/intercultural education programs (in Van Cott's view a possible sixth element of this model is the recognition of some kind of system of local autonomy – regional and/or municipal – grounded in a specific territorial area, but she ultimately excludes it from her framework because of its controversial status in terms of the definition of the permissible reach of indigenous rights of self-determination when they are perceived to undermine the original dimensions of the statist logic identified by Falk above). Van Cott's framework is thus significantly weakened in its persuasiveness and completeness by giving much less importance to the issue of the recognition of rights of autonomy than either Falk or most indigenous rights organizations and international NGOs specialized in indigenous issues tend to. Nevertheless, Van Cott's approach is fruitful as a point of departure for studying present day indigenous issues in the Latin American context.

According to Van Cott's in-depth review nine of the eighteen recent cases of constitutional reform processes in Latin America have incorporated at least three out of the five forms of recognition of indigenous rights summarized above. In her view the most notable examples include Nicaragua (1987) – where the trend first manifested itself – Colombia (1991), Paraguay (1992), Mexico (1992,

⁶⁴ A. Lira, 'La extrana anomalia. Realidades indigenas en el Mexico del Siglo XIX', in A. Hernandez et al. (eds), *Cultura y derechos de los pueblos indigenas de Mexico*, (Archivo General de la Nacion/Fondo de Cultura Economica, Mexico City, 1996).

⁶⁵ D. Lee van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, (University of Pittsburgh Press, Pittsburgh, 2001).

1996), Peru (1993), Bolivia (1994), Panama (1994), Guatemala (1998), and Ecuador (1998).⁶⁶

There have been both retreats and advances since Van Cott's book was published. Her inclusion of both Guatemala and Mexico on this list has ended up being over-optimistic in light of subsequent events in both countries, with the net result that the recognition of indigenous rights in detailed peace accords with insurgent groups has not yet been translated into needed legal reforms. But Mexico actually ended up taking a step backwards in the level of legal recognition of indigenous rights obtained in its 1992 constitutional reforms by enacting additional reforms in April 2001. These fall well short both of the relatively advanced standard set by the 1996 San Andres peace accords with the Zapatistas (closely modeled on the requirements of ILO Convention 169 and of the draft proposed UN declaration), and that of much more generous constitutional reforms in the region such as those of Nicaragua, Colombia, Ecuador, and Venezuela (1999). In contrast, the latter case represents the most recent example of advancing recognition of indigenous rights. It included relatively strong versions of issues such as the protection of indigenous intellectual property rights and of rights with respect to the exploitation of natural resources and of bio-diversity in their lands and territories.

Rights of autonomy are recognized to varying degrees in the cases of Nicaragua (1987), Colombia (1991), Panama (1994), Mexico (1996), and Guatemala (actually measures of decentralization and regionalization with potential enabling implications as to autonomy, 1998). Nicaragua, Colombia, and Panama have the strongest provisions in this regard, with Mexico and Guatemala, as noted above, cases where initially heightened expectations have given way to dashed hopes – and increasing frustration, for the indigenous rights movements implicated in reform efforts – over the last three to four years. Contrary to Van Cott's perhaps unduly optimistic perspective as to the overall positive trend towards increasing recognition of indigenous rights in the region's constitutional reforms over the last 15 years, there appears to be a tendency to cut back on such reforms (for instance in Mexico and Guatemala) or to put ceilings on their reach. In countries like Bolivia, meanwhile, issues of indigenous rights have become increasingly politicized as part of broader struggles regarding the impact of neo-liberal economic policies and the U.S. backed 'anti-drug' war on the country's indigenous majority.

In the cases of Ecuador (1998) and Venezuela (1999) a new mixed approach combining advances with reversals in one package emerges, with important steps forward in certain respects (especially as to rights of nondiscrimination, collective rights, and rights of political representation) being matched – or even exceeded, this is a matter of vigorous debate – by regressions such as their denial of rights of autonomy in tandem with a pronounced rhetorical insistence on a unitary con-

⁶⁶ *Ibid.*, pp. 265, 266–268, Table 4. See also A. Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America*, (Stanford University Press, Palo Alto, 2000).

ception of the State. In Ecuador, for example, home to what is perhaps the region's largest, most creative, and most successful indigenous rights movement thus far, a series of successful mobilizations culminated in 1998 with the adoption of extensive constitutional reforms including the most extensive recognition of indigenous rights in the country's independent history. But the movement's central demand for the redefinition of Ecuador as a 'multinational' State in terms of notions of regional autonomy (its most organized indigenous groups tend to describe themselves as 'nationalities') was rejected during the same reform process, and again in 2000 amid the virtual collapse of democratic rule.

The same kind of Westphalian 'statist logic' prevailed in Venezuela as well, where despite the other advances noted above, the Venezuelan State of that country's contradictory 'Bolivarian Revolution' led by Hugo Chavez reaffirmed indigenous peoples' place as part of a "unitary, sovereign and indivisible state", but imposed a specific duty on indigenous peoples "to safeguard national sovereignty and integrity" (Article 126 of the 1999 Constitution). The same Article went even further (in a unique example among all the cases cited above) and borrowed ILO Convention 169's admonition about the use of the term 'people' in conjunction with the country's indigenous citizens not having any implications "in the sense given to the term by international law". This is a direct reflection of how the stalemate over the anti-Westphalian, anti-statist implications of the recognition of rights of 'self-determination' for indigenous peoples (and thereby implicitly of the right of autonomy, at minimum) have helped stall, if not derail, both the draft proposed UN and Inter-American declarations of indigenous rights. The April 2001 constitutional reforms in Mexico borrow Venezuela's insistence on statist logic by affirming that "[t]he Mexican nation is one and indivisible" (Article 2), and by granting the rhetorical recognition of a supposed right to autonomy that is not given any kind of anchoring in any specific territorial space, nor any substantive content, in a manner reminiscent to that of the Durban Declaration's admonitions and limitations as to the status of indigenous peoples under international law.

This illustrates how the impact of international standards of recognition can vary in different circumstances: in Mexico and Guatemala in 1996 and 1998 ILO Convention 169 helped serve as a source of pressure (and inspiration) to enhance local standards, whereas language taken directly from it (Venezuela 1999, Mexico 2001) or its most restrictive interpretations served to help douse expectations of further advances in other instances (Ecuador 1998).

In relation to the Latin-American context, it is also interesting to note that in 1997 the Inter-American Commission on Human Rights adopted a Draft American Declaration on the Rights of Indigenous Peoples.⁶⁷ The Draft Declaration resembles in many ways the UN Draft Declaration that has been discussed above, but also contains some specific articles. To mention just one: Article IV states that "[i]ndigenous peoples have the right to have their legal personality

⁶⁷ During its 95th regular session, on 26 February 1997; see <www.cidh.org/indigenous.htm>.

fully recognized by the states within their systems". The Inter-American Draft is presently subjected to debate by the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States.⁶⁸

3.2.2. *One Specific Case: The Decision by the Inter-American Court of Human Rights in the Awas Tingni Case*

The Inter-American Court and Commission of Human Rights have emerged in the last few years as important players in terms of the regional level of the evolving human rights architecture in the Americas. This importance is likely to be enhanced by the decision of the Inter-American Court in *Caso de la Comunidad Mayagna (sumo) Awas Tingni v. Nicaragua (Case of the Indigenous Mayagna Community of Awas Tingni)* (decision rendered 31 August 2001).⁶⁹

The issue presented was whether the rights of the Sumo indigenous people in the Awas Tingni Community of Nicaragua's Atlantic Coast region to property and judicial protection had been violated by the Nicaraguan government's decision to grant concessions to SOLCARSA, a foreign transnational corporation, for logging on the Community's traditional lands "without either consulting with the Community or obtaining its consent".⁷⁰ The case is especially interesting because it puts to rest one of Latin America's strongest national indigenous rights laws (and the first in the most recent wave of similar reforms elsewhere in the Americas, as suggested by Donna Lee Van Cott's model of "multicultural constitutionalism" (see above)).

The majority opinion in the *Awas Tingni* decision by the Court was grounded explicitly, and exclusively, on Articles 21 and 25 of the American Convention on Human Rights, the regional equivalent of the Universal Declaration of Human Rights and of the 1966 Covenants which seek to give it binding force. The decision finds that the Nicaraguan government failed to fully implement the land rights provisions of its own indigenous rights laws, and that such a lack of diligent implementation is itself a violation of international law (in this case of the Inter-American Convention on Human Rights). The Court's reasoning stressed the intimate connection between indigenous land rights and indigenous identity in the context of development processes that threaten to overwhelm and swallow both. The decision is also noteworthy because it sets a regional precedent which is a potentially historic landmark arguably applicable to similar struggles of indigenous communities elsewhere in the Americas against the incursion of transnational corporate interests into their lands in order to exploit the natural resources, such as that of the peoples of the Amazonian basin region in Ecuador, the U'Wa in Colombia, Mayans in the Ruta Maya region in the States of

⁶⁸ See most recently: the summary of the meeting of 2 March 2004: OEA/Ser.K/XVI/GT/DADIN/SA.6/04.

⁶⁹ The full Spanish text and excerpts from the English text and an English summary are available on-line through the web-pages of the Indian Law Resource Center, which participated in the case, at <www.indianlaw.org/body_awas_tingni_summary.html>.

⁷⁰ *Ibid.*

Campeche, Yucatan, Chiapas, and Quintana Roo in Mexico, as well as in Guatemala, Belize, and Honduras, etc.

Although the Court's decision was unanimous, several judges took the opportunity to issue separate concurring opinions. The majority rested its conclusions exclusively on the provisions of the American Convention cited above, but Judge Sergio Garcia Ramirez's (a former Attorney General of Mexico) separate concurring opinion stressed the relevancy and importance of other provisions of international law as implicit but unfortunately unacknowledged additional sources of the Court's reasoning and a basis for its findings. According to Garcia Ramirez a previous Consultative Opinion of the Court establishes that its interpretation of treaties such as the American Convention should not only take into account the accords and instruments formally related to it, "but also the system within which it is inscribed" as a referent.⁷¹ This is further evidence of the emergence of a new international system of indigenous rights with global, regional, and national implications and structural expressions that have an interactive relationship, and increasingly a life of their own independent of the sovereign will of national States.

In this Consultative Opinion the Inter-American Court in turn cites the International Court of Justice's reasoning in regard to its Advisory Opinion as to the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970): "An international instrument must be interpreted and applied in the context of the overall juridical system prevailing at the moment this interpretation is undertaken" (unofficial translation).⁷² This is the rationale which leads Judge Garcia Ramirez to ground the logic of the IACHR decision in the emerging international system of indigenous rights which notably includes Articles 13(1) and 14(1) of ILO Convention 169 (regarding indigenous peoples' rights to government recognition and effective protection of their rights of land ownership, steps to identify lands traditionally occupied, establishment of adequate procedures to resolve land claims: provisions expressly relied upon by Garcia Ramirez in paragraph 7 of his separate concurring opinion) and Nicaragua's pioneering 1987 constitutional reforms (referred to in paragraph 10 of his separate concurring opinion). In his view such provisions are not only "useful – but moreover indispensable" elements which provide a foundation for the IACHR decision.

3.2.3. *African Parallels?*

According to Mamdani, Africa's neo-colonial 'patrimonialist' State feeds the explosiveness of racial/ethnic cleavages which are latent hold-overs from the colonial period, and have led to armed rebellions by insurgent groups rooted in

⁷¹ Opinion Consultiva OC-16/99 (El Derecho sobre la Asistencia Consular en el Marco de las Garantías del Debido Proceso/The Right to Information regarding Consular Assistance in the Framework of Due Process Guarantees, para. 113).

⁷² *I.C.J. Reports* 1971, p. 16 and 31; see p. 113 of the IACHR opinion (Garcia Ramirez' separate concurring opinion, paragraph 5).

the most marginalized ethnic and regional sectors over the last 50 years in settings as diverse as the Mau Mau rebellion in 1950s Kenya, the Mulelist insurgency in the Congo of the 1960s, the anti-apartheid movement among urbanized migrant laborers in the 1970s and 1980s, and the Ruwenzuru 'peasant guerrilla movement' on the Uganda/Zaire border between 1962 and 1980.⁷³ Additional, more recent examples could be drawn from evidence documenting the marginalized status of the San/Basarwa/Bushmen in Botswana and Namibia, that of the Impunyu Batwa people in Rwanda and Uganda, and Bagyeli ('pygmy') people in Cameroon, and remedial measures seeking to redress similar patterns of inequity through legal reforms stressing the recognition of multicultural rights (especially language rights) in countries such as South Africa (1994), Eritrea, and Ethiopia.

In general the concept of indigenous peoples is widely shunned within Africa in favor of an insistence on the use of alternative terms such as 'tribes' or 'ethnic' groups. Mamdani speaks of 'tribalism' as the concept applicable to his case studies, noted above, but the London-based Forest Peoples Programme identifies the Impunyu Batwa and Bagyeli respectively as 'indigenous',⁷⁴ just as researchers such as Good and Molutsi do with respect to the San/Basarwa/Bushmen in the context of Botswana.⁷⁵ Good and Molutsi's paper also refers to them as the country's "underclass . . . the most exploited and impoverished of all", and describes the dominant characteristics of their "continuing dispossession" in contemporary Botswana as including "their unique absence of land rights . . . wide-ranging sociocultural disabilities, and their lack of autonomous political organizations with which to articulate their demands at the national level".⁷⁶ They also noted the 1998 UNDP Human Development Report's references to disparities between urban and rural sectors in Namibia, and their specific focus on notably differential rates of poverty when disaggregated by language group: 65 per cent among the San, versus eight per cent among English-speakers, ten per cent among German-speakers, 11 per cent among speakers of Afrikaans, and 21 per cent among the dominant Tswana elite among the Black African population.⁷⁷ Such gross disparities lead Good and Molutsi to conclude, in a comparative vein, that the San "are clearly worse off than other indigenous minorities such as the Sami of Norway and Australian aborigines".⁷⁸

The Forest Peoples Programme (FPP) study (2001) cited above approaches the same kinds of issues identified by Mamdani, Good and Molutsi, and the 1998 UNDP report, from the specific perspective of its monitoring of World Bank pro-

⁷³ Mamdani, *supra* note 63.

⁷⁴ Forest Peoples Programme (FPP), *Report on a Consultation with Bagyeli Pygmy Communities Impacted by the Chad-Cameron Oil-Pipeline Project*, written by J. Nelson, J. Kenrick, and D. Jackson, (London, 2001).

⁷⁵ K. Good and P. Molutsi, unpublished paper, 'The State and Poverty in Botswana', presented at the workshop on the Role of the State in Poverty Alleviation, Botswana, October 1997.

⁷⁶ *Ibid.*

⁷⁷ K. Good and P. Molutsi, 'The State and Extreme Poverty in Botswana: the San and Destitutes', *Journal of Modern African Studies* (37, 2, June 1999).

⁷⁸ *Ibid.*

jects in Africa that it considered subject to the Bank's Indigenous Peoples' Policy. The report examines nine different projects in depth, which involve issues of compliance with both the Bank's Indigenous and Forestry policies, with three included from Africa. Two of these (the First and Second Integrated Forestry Projects in Rwanda and the Conservation project involving Bwindi and Mgahinga National Parks in Uganda) involved the assessment of impacts on the Impunyu Batwa indigenous people; the third (the Chad/Cameroon Petroleum Development and Pipeline Project) involved the Bagyeli ('pygmy') indigenous people.

The Rwanda study draws heavily on grassroots monitoring efforts of project impact by the Communauté des Autochthones du Rwanda (CAURWA) in the Gishwati region. The first Integrated Forestry Project (IFP I) ran from 1980–87 and the second (IFP II) from 1987–94. According to FPP's summary, "both projects aimed to protect the remaining natural forest in northwest Rwanda by relieving human pressure" on them, and "by developing a high productivity cattle and dairy industry in Gishwati using productive pastures in degraded forest areas".⁷⁹ But according to FPP "implementation was severely deficient as legal covenants were disregarded and funds were used to propel deforestation to make way for pastures and plantations". As a result forestry staff caused "great resentment" among local people "because they excluded them from their plans and expropriated their land for plantations . . . The project also caused the indigenous Impunyu Batwa people to be involuntarily resettled outside Gishwati forest. The Bank admits that 'no resettlement program was foreseen under the project and the Batwa became internally displaced persons'".⁸⁰

IFP II was "supposed to redress the deficiencies of IFP I through forest protection; forestry and rural afforestation: integrated forestry, agriculture and livestock land use; and the maintenance of fuelwood plantations established under the first project"; but the "second project continued to cause deforestation", which was further compounded by Rwanda's bloody civil war and genocides between 1990 and 1994 which indirectly "further intensified forest degradation as internal refugees arrived in the region to use forest resources for their survival".⁸¹ After all was said and done, as the second project concluded, "the Bank confirmed that both [IFP I and II] had failed *and that the treatment of indigenous peoples had been 'highly unsatisfactory'*".⁸²

According to the CAURWA study:

"The Impunyu describe how they had previously lived as nomadic hunters and gatherers procuring food and materials from the forest and trading forest products with neighboring agricultural peoples. They complain that as a result of the projects they were obliged to leave their territories against their will and resettle on the margins of the forest. The destruction of the forest meant that they could no longer practice the forest-based livelihood that underpinned their traditional

⁷⁹ Forest Peoples Programme study, p. 25, Box 10.

⁸⁰ *Ibid.*, all of this with reference to IFP I.

⁸¹ *Ibid.*

⁸² *Ibid.*, emphasis added.

society and culture. Loss of their resource base has converted them into landless labourers who work as porters or farm workers. They must now purchase their food, while households without employment and income must beg for food from non-Batwa neighbors. Those Batwa who do have land plots cannot even afford to buy hoes to till them and so have been obliged to sell their land to Hutu or Tutsi farmers for meagre prices in order to buy food to survive... Impunyu people were not consulted during the preparation and implementation of either project. Neither had they been involved in consultations during monitoring and project follow-up...⁸³

Much of what is described here raises potential issues of violations of various relevant provisions of ILO Convention 169 and of the draft proposed UN declaration of indigenous rights, as well as of the Bank's applicable policies. This is how CAURWA summarizes the claims of the affected indigenous group:

"The Impunyu therefore ask for compensation for the destruction of their way of life. They wish to know why the project failed to comply with OMS 2.34 [the Bank Indigenous policy applicable until September 1991] that required 'preinvestment studies' and stated that 'tribal people' should not suffer accelerated assimilation; and that there should be 'adjudication and redress of grievances' for tribal peoples adversely affected by loan operations. The main lesson learned from these disastrous projects is that Bank loans to borrower countries with deeply entrenched hierarchical social and political systems can be severely damaging to indigenous peoples if proper safeguards are not adhered to. The challenge is to find mechanisms for insuring policy adherence by both the Bank and its clients. CAURWA argues that a key step in this direction would be legal reform, training, and educational initiatives to strengthen the rights of indigenous peoples like the Batwa and change social attitudes in borrower countries."⁸⁴

No meaningful, enforceable remedies would be available to the Impunyu directly pursuant to ILO Convention 169 even if Rwanda had ratified it; its greatest potential effect (other than of its moral force) would be if, having been ratified, it were actually enforceable in Rwandan courts as part of Rwandan domestic law. There is no Rwandan indigenous rights law with recognition of rights and remedies akin to those arguably available given the comparatively enhanced status of indigenous rights under constitutional reforms such as those of Venezuela, Ecuador, Colombia, or Nicaragua, noted above. The Uganda National Parks project also had adverse effects on the Batwa people including "their expulsion... from their forest territories", serving to "exclude them" and "destroying their forest-based economy and leaving them severely impoverished... The park authorities admit... that the evictions left them as beggars and landless labourers."⁸⁵

The third example is the FPP evaluation of the Chad-Cameroon Petroleum Development and Pipeline Project, with a total cost of USD 3.5 billion dollars, and to be implemented through a consortium originally including Exxon, Chevron, Petronas of Malaysia and the governments of the two countries

⁸³ Communauté des Autochtones du Rwanda, cited in FPP 2001.

⁸⁴ *Ibid.*

⁸⁵ FPP study, p. 27, Box 12.

involved. World Bank funding of approximately USD 240 million dollars is a small part of the total, but according to FPP “is considered fundamental to secure it against political risk”.⁸⁶ According to FPP:

“Many aspects of the project have been the subject of controversy. NGOs allege infringements of at least five of the World Bank’s policies, including the indigenous peoples’ policy. A persistent lack of participation has been noted throughout the project’s preparation. Among the concerns about the projects raised by the NGOs are the following: . . . the pipeline will cross the forests of SW Cameroon and transect the territory of the Bagyeli, a so-called ‘pygmy’ people, who mainly live by hunting and gathering and as occasional labourers in Bantu villages. An initial ‘Indigenous Peoples’ Plan’ introduced to comply with Od [Operational directive] 4.20 [of the World Bank] was deficient as it did not address fundamental issues such as the legal recognition of Bagyeli rights, Cameroonian policy on indigenous peoples and institution building. The Plan also underestimated the likely impacts of the project on forests and fauna and their potentially negative consequences for Bagyeli livelihoods. The governance structure of a proposed endowment fund to compensate affected Bantu and Bagyeli groups, does not make adequate provisions for participation or training. The probability is that benefits will accrue unequally to dominant group.”⁸⁷

And according to the same organization:

“The Bagyeli are indeed a highly marginalised and vulnerable group. They are not recognized as Cameroonian citizens, have no identity papers, never participate in local elections, have no recognized collective land and property rights under either national law or Bantu customary law. They are thus marginalised in all local decision-making. They have not been well-informed about the implications of the project for their future. No mechanism has been established for the effective participation of the Bagyeli in decision-making and there are no state agencies actively protecting their interests or promoting their welfare. The Bagyeli feel alienated from the project, which they believe will cause a degradation and loss of their forest resources as well as immediate damage to huts and small cultivated areas. The case study recommends the creation of mechanisms for *culturally appropriate* participation of the Bagyeli in decision-making, clarification of Bagyeli rights, especially to land and provision of adequate compensation for those who will be adversely affected by the project.”⁸⁸

3.2.4. *Comparing the Latin American and African Experiences*

There are many shared elements between the Latin American and African case studies discussed previously and the focus and implications of the Inter-American Court decision regarding the State’s obligation to protect indigenous land rights. Whether the key actor whose actions trigger the violation is a State or the World Bank, the essential issues seem to converge: the rights of indigenous communities to the adequate recognition and protection of their land rights, and rights to be consulted as to, and to participate in the implementation of projects which

⁸⁶ *Ibid.*, 26, Box 11.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

implicate the exploitation of natural resources in their lands and territories, are fundamental to the defense of their very integrity and continued existence as identifiable groups. There are important historical and cultural differences between the contexts where such questions arise, as we have sought to convey, and of course the extent to which such rights are actually recognized, and of course can be very different the forms and contents of such protection. At the end of the day, however, the similarities between Latin America and Africa – as well as Australia, the other region discussed in this article – vastly exceed and outweigh the differences, and the need for a more just global and national order recognizing such rights. The cases and trends discussed also show that, as UN Special Rapporteur on Indigenous Peoples and their Relationship to Land, Mrs. Erica-Irene A. Daes, said in her final report, “an important evolution is taking place” on a global scale towards the increasing recognition of such rights.⁸⁹ Despite all the loopholes, this should not be forgotten.

4. Linking International, Regional and National Regimes of Legal Protection: Conclusions and Final Remarks

The core question of this article is to assess to what extent in the field of indigenous (legal) issues interaction between national, regional, and international actors takes place and whether it is helpful in creating a more favorable environment for the recognition of the rights of indigenous peoples throughout the world, as exemplified in this article in terms of our case studies from Australia, Latin America, and Africa. Our discussion of trends and cases leads to the following conclusions and final remarks:

1. It is clear that in the discussion on the UN Draft Declaration of the Rights of Indigenous Peoples the *real* interaction so far takes place between the States participating in the discussion. On a core issue like the ‘right to self-determination’, many States have shown to be reluctant, afraid as they are regarding the implications of more protection of indigenous peoples in that respect. On the other hand, it is interesting to note that it becomes clear to many States that the right to self-determination according to international law is not automatically related to secession, but basically starts with all kinds of forms of ‘internal self-determination’ (autonomy). The quote taken from Canada (in the section on the Draft Declaration of the Rights of Indigenous Peoples) is illustrative in that respect. Furthermore, the playing field for the ‘match between international and national actors’ will be different as soon as the Declaration is in fact adopted. If the Declaration is understood to be a step backward, from an indigenous perspective, the struggle will continue; if it is on balance more positive than not, the text will be used by many indigenous peoples in

⁸⁹ Erica-Irene Daes, *Human Rights of Indigenous Peoples; Indigenous Peoples and their Relationship to Land*, E/CN.4/Sub.2/2000/25, para. 114.

their struggle for better protection within local and regional contexts all over the world. In that respect it is interesting to keep in mind that, so far, the Draft Declaration contains Article 37 which states that "States shall take effective and appropriate measures, in consultation with the peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice". It is important to note, that Article 37 does not speak of States that voted in favor of the Draft. In other words, as soon as the Draft HAS been adopted, the whole community of States is obliged to take appropriate action in conformity with its terms. The Declaration will of course not be immediately, technically binding in the narrow legal sense – it is not a treaty – but to our mind this is not as problematic as it might seem at first sight. Having a treaty might sound better, but such instruments are in fact of little added value if not ratified with sufficient universality (*cf.* the situation as to ILO Convention 169). By the same token going the treaty route would give States the opportunity to act and appear as if they were in favor of greater recognition of the rights of indigenous peoples, while at the end of the day they can withhold this protection by not ratifying the treaty. A broadly supported Declaration, together with the notion that broad support can be translated into the assumption that the Declaration reflects generally recognized customary law, *de facto* or in a state of progress, might then be a much better alternative, and have greater impact in practice.

2. The Permanent Forum on Indigenous Issues has a mandate which includes interaction between the national and the international level: discussion of "indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights" etc. cannot be done without being fed with information 'from the ground', while in addition, the way the issues are discussed can be very helpful for national indigenous groups fighting for their rights. It can help them analyze their own problems and make them see that they are not alone. The future core task for the Permanent Forum, however, will be to see whether States are living up to the Declaration of the Rights of Indigenous Peoples. By then, it will probably discuss concrete situations, leading to intense discussions between the body itself and national governments. The future course of such processes is not predetermined. The function of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People in that respect has already evolved some steps further than what was originally contemplated. It includes the right to gather information on violations of the human rights and fundamental freedoms of indigenous people within States, while the Rapporteur, among many other things, can make use of the possibility to undertake country visits. Such visits can be seen as a physical form of the interaction between the international and the national level. In addition, in the section on The Protection of Indigenous People(s) Within the Broader UN Framework we showed that within the United

Nations framework indigenous issues are not only dealt with in specialized bodies but also by supervisory bodies like the Human Rights Committee.

3. In the discussion of the Australian *Mabo* case and its follow-up we found references to case law by the International Court of Justice (its Advisory Opinion on the Western Sahara), while we also noticed that the UN Committee on the Elimination of Racial Discrimination expressed its concern with the 1998 amendments to the Native Title Act, restricting the possibilities for the Aborigines to realize their claims. This is another, concrete, example of the affects of international attention for developments on the national level, and the other way round. Furthermore, on a more abstract level, one can state that internal Australian processes would never have gone the way they did, without the developments taking place simultaneously on the international level.
4. In the Latin American context the complex relationship between patterns and structures of recognition of indigenous rights at the international, regional, and global levels is exemplified by the recent *Awas Tigni* decision issued by the Inter-American Court of Human Rights, interpreting the reach of the Inter-American Convention of Human Rights. In this case, as noted above, the Court has adopted a much more detailed and expanded view of a Nicaraguan indigenous community's right to legal recognition of its customary land rights than that of either ILO Convention 169 or the Nicaraguan Constitution. Yet the Nicaraguan Constitution, on the other hand, recognizes a right to autonomy for these same indigenous groups that goes much further than that of most other constitutions in Latin America, or than that of the draft proposed UN or Inter-American declarations, and ILO Convention 169 does not address issues of autonomy as such in any case. In some instances then recognition of the same right is stronger or weaker than in others, certain rights have obtained recognition at one level and not at another, and yet somehow all of these standards must be understood in a manner consistent with each other, and as varying but ultimately convergent expressions of a powerful underlying trend favoring greater recognition of indigenous rights, but their continuing subordination to, or at a minimum negotiated cohabitation with persistent notions of post-Westphalian State sovereignty. It is still not clear in the African setting to what extent the regional human rights system contemplated by the new African Union, as the successor to the Organization of African Unity (OAU), will effectively engage issues of African indigenous rights in a manner parallel to that of the OAS.
5. Meanwhile in both the African and Latin American contexts it is clear that there is an increasing convergence between debates and struggles regarding indigenous rights issues and broader questions regarding the viability of post-colonial State structures undermined both by internal strife and devastating external pressures attributable to the imposition of neo-liberal, and ultimately neo-colonial policies by the West through institutions such as the IMF, WTO, and World Bank. The recent collapse of global trade talks at the WTO meeting in Cancun, Mexico in the face of the combined resistance of dependent

agricultural economies in Asia, Africa, and Latin America to the continuation of such policies exemplifies these challenges.

6. Finally, it will be evident from our discussion of the national and regional case studies that processes of recognition of indigenous rights at these levels vary in their pace and depth, and that their trajectory of development is at times uneven and inconsistent. Sometimes advances at the international level (e.g. the adoption, diffusion, and impact of the standards contained in ILO Convention 169; the contents of the draft proposed UN declaration on indigenous rights; and/or the World Bank's internal Indigenous Peoples' Policy) help spur struggles for recognition at the national level. In other instances the limits of such standards and processes – e.g. the lack of ratifications of ILO Convention 169 as well as its weak implementation and supervisory mechanisms; the failure so far to agree on sensitive core topics within the discussion on the UN declaration; and the Bank's inconsistent compliance with and failures to fully implement its own policy – undermine the efforts of indigenous rights advocates and activists at the national level. In this way indigenous rights standards and discussions at each of the three levels (national, regional, and international) can serve as either 'ceilings' or 'floors' in the interaction with each other and with the evolving demands of indigenous social movements and NGO's active in the area of indigenous rights, depending on the context at any specific historical moment and in varying institutional contexts.