

Native People's Rights

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Article abstract

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L'auteur conclut dans cette optique qu'il est primordial d'accéder à une reconnaissance effective des droits des peuples indigènes et cela, par l'intermédiaire de garanties constitutionnelles et de conventions internationales.

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Erica-Irene DIAES **

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* Instead of the term "native people" the term "indigenous populations" will be used throughout the present text. The latter term is an accepted one by most States in which indigenous populations live, several indigenous populations organizations and the competent organs and bodies of the United Nations system.

** Chairperson of the United Nations Working Group on Indigenous Populations and Chairperson of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

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Introduction

The issues and problems related to the fundamental freedoms and human rights of indigenous populations are complex, controversial, multi-form, acute, timely and of vital importance. Therefore, it is an imperative task of every competent scholar, scientist, human rights organization or higher learning institution and in particular of the organs and bodies of the United Nations system to examine and consider them systematically with a view to their just solution.

Contemporary civilization is basically the civilization of human rights of everyone without any discrimination. Humanity has a sacred duty to protect that civilization by any peaceful means and especially by the rule of law and not to compel man to have recourse, as a last resort, to rebellion against tyranny and oppression.¹

The common ground on which all civilizations meet is that they are composed of human beings, who are born free and equal in dignity.

The International Bill of Human Rights, which includes the Universal Declaration and the International Covenants on Human Rights, the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination as well as other relevant international human rights instruments, purport to protect everyone's freedoms and rights without any distinction as to race, religion, colour, descent or national or ethnic origin.

It is well known that massive or gross denials of human rights arising mainly from discrimination and on the aforesaid grounds outrage the conscience of mankind and endanger the foundations of freedom, justice, peace and security in the contemporary world.

1. Preambular paragraph 3 of the *Universal Declaration of Human Rights*.

Especially, indigenous populations are entitled to all fundamental freedoms, human rights and humane and just treatment, recognized by the aforesaid international instruments, by other relevant international instruments, including ILO's Tribal Indigenous Populations Convention N^o. 107/1957 and the ILO's recommendation thereto and relevant treaties and agreements as well as by national constitutions and legislation.

Some progress in this direction has already been made, in particular in some economically and socially developed countries — including Australia, Canada, New Zeland, Scandinavian Countries and the United States — but much remains to be done. In this connection and taking into account the political, social and economic factors, which are the main determinants of the survival, fate and future of indigenous populations and the diversity of their social and cultural institutions, traditions and customs, the recognition, promotion and protection of the following basic rights should be considered of vital importance for indigenous populations.

1. Basic Rights of Indigenous Populations

1.1. The rights to life, to physical integrity and to security of person

The right is a basic human right, recognized in the aforementioned human rights instruments and in several other relevant international instruments. However, this right is grossly and repeatedly violated in some countries in the case of indigenous populations.

Unfortunately, painful reports have been received by competent United Nations bodies, that in some countries even the odious crime of genocide is committed against indigenous populations.

Murder, arbitrary executions, massacres, disappearances and persecution of indigenous communities are carried out by official armed groups. Arson and deprivation of the traditional sources of survival are a direct cause of death. The right to life of indigenous populations is further affected by conditions which are a source of physical and mental harm to individuals. The lack of water, natural food and changes of environmental conditions are also causes of hunger, malnutrition and death. Nuclear and other military testing on indigenous lands constitute a high danger against the life of indigenous populations. They are also suffering in some cases of grave violations of their right to life as a consequence of armed conflicts in which indigenous populations are involuntarily involved.

1.2. The right to humane treatment and to not be subjected to torture

Every member of indigenous populations is entitled to a humane and fair treatment. No one member of the indigenous communities shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one member of the above mentioned communities shall be subjected without his free consent to medical or scientific experimentation.

1.3. The Principle and the Right to Self-determination

The principle of self-determination is mentioned in the *Charter of the United Nations* and in a great number of other international and regional instruments. In connexion with the right to self-determination, Article 1, paragraph 1 of both International Covenants on Human Rights, which already had come into force by 1976, expressly provides that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

The meaning of the principle and the right of self-determination has been the subject of controversy between recognized scholars and the implementation of relevant United Nations resolutions have in a great number of cases been completely disregarded.

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, has entrusted two of its former members Prof. Gros-Espiell and Dr. Christescu with the elaboration of two relevant studies. The basic aim of these studies is to make a contribution to the ongoing process of securing full implementation of United Nations resolutions relating to the rights of peoples under colonial and alien domination to self-determination and, consequently, to make a contribution to the struggle against colonialism in all its forms. Both studies have successfully analysed the political decolonization which means external self-determination for colonial peoples and territories.

In accordance with my opinion the term "self-determination" can mean: first, the right of an entity to determine its international status, sometimes referred to as *external self-determination*.

Secondly, the right of a state population to determine the form of government and to participate in the government, sometimes extended to include democratization or majority rule and often called: "internal self-determination".

Thirdly, the right of a state to maintain its national unity and territorial integrity and to govern its affairs without external interference and without violation of its boundaries.

Fourthly, the right of a State and of a State population, especially claimed by the less developed countries, to cultural, social and economic development ; and finally, the right of a minority or an indigenous group or nation mainly within State boundaries to special rights related not only to protection and non-discrimination, but possibly to the right to cultural, educational, social and economic *autonomy* for the preservation of group identities. Indigenous people also want to have property rights to their land added to the above mentioned list of rights related to self-determination.

In any case, I expressly would like to state that in my opinion the interpretation of the term "self-determination" specifically excludes the right of "*secession*". Accordingly, *internal self-determination* seems to be suited for application in particular in states where indigenous populations constitute the majority of these populations, for example, in Bolivia, Guatemala and Peru.

In some other parts of the international community, indigenous populations have traditional and legitimate Governments, a culture, a history and racial and religious ties, a common economic base, and territories. Thus, such characteristics entitle them to recognition as peoples. In Panama, for example, the indigenous group, the Bocas del Toro is self-governing and has recently requested the Government of Panama that the region they occupy should be preserved.

In some other countries, indigenous populations already have been given the opportunity to participate in shaping the political and social life of a State and consequently it could not be said that these indigenous populations totally have been denied the right to self-determination within the boundaries of the States concerned.

Some government representatives and namely the representative of Canada expressed the opinion at the United Nations Working Group, during its third session, that self-determination in an external sovereignty sense, does not apply in international law to enclave populations within non-colonial States. However, he stated further "practical forms of self-government within the framework of the State is necessary and possible".

1.4. The right to recognition as a person before the law, etc.

Every member of indigenous populations shall have the right to recognition everywhere as a person before the law. The States in which

populations live should also recognize indigenous populations as such, as well as their territory, institutions, religion, traditions and customs.

1.5. The right to land and to natural resources

The land rights of indigenous populations include surface and sub-surface rights, full right to interior and coastal waters and right to adequate and exclusive economic zones within the limits of international law.

The right of the indigenous populations to continue peacefully in the use, enjoyment and occupation of ancestral lands without unwanted intrusion, supervision or development should be respected. Also, the right to ownership over lands traditionally occupied by indigenous peoples should be recognized.

The preservation of the life and the culture of indigenous populations is inextricably linked to indigenous land. Indigenous populations have a unique and spiritual relationship to their land, which is different from the Western European concept of land ownership. For these populations land is not simply a means of production or an exchange value, but it is a territory, an identity, a part of the social organization itself. It is impregnated with emotional, cultural, social, philosophical and religious values. "Land", as they often say, "is our Mother" !

Dispossession of indigenous populations from their territorial base, the displacement to, or resettlement in places with different environmental conditions, the deprivation of natural resources as basic as water and natural food in areas where they lived and the loss of lands and sites, could bring a disruption in the life and social and legal order of indigenous communities and plunge them into suffering hunger, poverty, diseases and moral despair.

Discovery, conquest and unilateral legislation do not constitute legitimate grounds for States to claim or retain the territories or natural resources of indigenous populations.

Land rights of indigenous peoples should be guaranteed by the constitution of the State in which the indigenous peoples live.

Accordingly, the right to land and to natural resources and their development and exploitation should be the subject of consultations and consent between the governments of states in which indigenous populations live and the indigenous populations themselves, thus avoiding the creation of causes for the eruption of political and violent confrontations between the government concerned and their indigenous populations.

Without the ownership of their lands, indigenous populations are vulnerable to exploitation and lack the enthusiasm, concern, ability and financial resources upon which to build a better future.

1.6. The right to maintain indigenous culture, religion and language

The cultures of indigenous populations are part of the culture of mankind. The annihilation of indigenous culture and of their distinct identity, or the destruction of their archeological sites or religious or historic monuments constitute the crime of ethnocide or cultural genocide.

The original rights to their material culture, including archeological sites, artifacts, works of art and technology lie with the indigenous populations. States should permit indigenous populations to retain their own laws, customs, and institutions in general where these are not incompatible with the national legal system. Indigenous populations have the right to receive education in their own language or to establish their own educational institutions.

Languages of indigenous peoples should be used by states in all dealings between them and indigenous populations on the basis of equality and non-discrimination. It should be noted that illiteracy rates are alarmingly high in certain indigenous communities.

1.7. The right of the indigenous populations to be previously consulted for technological and scientific investigations conducted within their territories

Indigenous populations and, in particular their leadership have the right to be previously consulted and to authorize the realization of technological investigations to be conducted within their territories and to have access to the results of such investigation.

1.8. The right to participate in the political life of the State and to be represented in the legislative, executive and judicial authorities of the State

Members of indigenous groups of communities should be entitled to participate in the political life of the State on the basis of equality and non-discrimination with other citizens of the State. The indigenous populations should be also entitled to be represented in the legislative and executive authorities of the State, the Courts and Civil Service.

1.9. Other political, civil, economic, social and cultural rights

Indigenous populations should be entitled to all other political, civil, economic, social and cultural rights which are universally recognized by relevant human rights instruments and especially by the *International Bill of Human Rights* and by Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. In particular, special attention should be paid by states to the protection of the right of indigenous populations to public health, medical care, social security and social services which in some parts of the international community are insufficient and sometimes do not exist at all.

2. The United Nations Working Group on Indigenous Populations

In connexion with the mandate, work and objectives of the United Nations Working Group on Indigenous Populations, the following main points should be highlighted :

The most competent bodies of the United Nations dealing extensively with the protection of human rights and the complex problems of the indigenous populations are the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. As early as 1972 the Sub-Commission entrusted the Special Rapporteur Mr. Jose Martinez Cobo to elaborate a "Study of the Problem of Discrimination against Indigenous Populations". This study, which is a major contribution to the presentation of the problem of discrimination against indigenous populations and contains a great number of valuable conclusions and recommendations. The Sub-Commission has recommended and the Commission on Human Rights has duly approved a few days ago that because of its importance the above-mentioned Cobo's study should be issued in full and widely disseminated to Governments, specialized agencies and other academic and research institutions. In particular, the Commission decided that the conclusions and recommendations of the above-mentioned study should be printed with a suitable introduction by the United Nations Secretary-General.

One of the most useful and important Special Rapporteur's proposal is the working *definition* of indigenous populations for the purpose of international action that may be taken affecting their future existence. Thus, in accordance with the proposal of the Special Rapporteur, indigenous populations may be defined as follows :

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity ; as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”.

This definition is accepted as a working definition by a great number of indigenous populations.

Another manifestation of the deep and sincere concern shown by the United Nations' competent organs and bodies for the indigenous populations is the creation of the Working Group on Indigenous Populations. The relevant recommendation was made by the United Nations Sub-Commission on Prevention Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982. In that resolution the Council authorized the Sub-Commission to establish annually a Working Group on Indigenous Populations to meet for up to five working days before the annual sessions of the Sub-Commission in order to :

- (a) Review developments pertaining to the promotion and protection of Human Rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyse such materials, and to submit its conclusions to the Sub-Commission bearing in mind the report of the Special Rapporteur of the Sub-Commission ;
- (b) Give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world.

This Working Group had already three successive annual sessions during which a constructive dialogue between indigenous populations and representatives of various governments has been established. Thus, this Working Group has become the first permanent United Nations forum devoted to the consideration of the rights, eliminations of discriminations and the problems of indigenous populations.

One of the most important recommendations by the Working Group was the establishment of a United Nations Voluntary Fund for allowing indigenous populations to participate in the work of the Working Group on Indigenous Populations.

This recommendation was adopted by the Sub-Commission and approved by the Commission on Human Rights two weeks ago.

Also, the Commission on Human Rights approved without a vote, during its last session ended a few days ago, another important resolution related to the recognition and respect of the rights of indigenous populations and to the future work of the working group.

In this resolution the Human Rights Commission

- (a) Reaffirms its determination to do everything possible to promote the enjoyment of the rights of indigenous populations ;
- (b) Expresses its appreciation to the Working Group on Indigenous Populations for its valuable work ;
- (c) Urged the Working Group to intensify its efforts in carrying out its Plan of Action, to develop international standards based on a continued and comprehensive review of developments pertaining to the promotion and protection of the Human Rights of Indigenous Populations and of the situation and aspirations of indigenous populations throughout the world ; and
- (d) Requested the Secretary-General to give all necessary assistance to the Working Group in discharging its tasks.

Conclusions and Recommendations

The following are my basic concluding remarks and recommendations :

1. The effective recognition, promotion, protection and restoration of the fundamental freedoms and rights of indigenous populations should, as soon as possible, be implemented. The principles of the rule of law, equality and non-discrimination should be strictly observed.
2. Constitutional safeguards for the protection of human rights including the landrights of indigenous populations and legislative remedies should be adopted.
3. Genocide is a crime under international law and ethnocide and cultural genocide constitute serious crimes. These crimes should be severely punished in accordance with the relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Indigenous populations constitute a vital force which should be properly educated and advanced in order to realize their full potential and to maximize and optimize their contribution to their own welfare and progress and that of the wider societies and countries in which they live and in which they represent a dynamic and heretofore largely under-utilized human and mental assets.
5. Consultations between governments of states and indigenous populations should be started and continued until a just solution to the acute and urgent problems of indigenous populations may be adopted. The work of the United Nations' competent bodies, and especially the endeavours of the United Nations Working Group on Indigenous Populations, should be continued and encouraged.

Finally, faith in fundamental human rights and the dignity and worth of every human person, should be the guiding spirit of our current movement for a better human world in which freedom, dignity, justice, rule of law, security and peace will prevail.