Indigenous Peoples’ Rights, State Sovereignty and the Convention on Biological Diversity

It is often stated that attention to and respect for indigenous peoples’ rights in connection with the Convention on Biological Diversity (CBD) is barred by the principle of state sovereignty. This assertion is incorrect in light of contemporary international law. State sovereignty does not and cannot preclude attention to and respect for indigenous peoples’ internationally guaranteed rights. As one scholar puts it, the principle of sovereignty over natural resources in international law “includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations.” This also applies to implementation of the CBD. This legal briefing explains why.

Sovereignty is not Absolute: Sovereignty is a principle of international law that in essence provides that a state may, subject to any limitations prescribed by international law, freely determine and apply laws and policies governing the people and territory under its jurisdiction. This principle is repeated in a modified form in Article 3 of the CBD, which, in pertinent part, reads that, “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies ….” As can be seen from both of these definitions, state sovereignty does not amount to absolute political or legal freedom; it is limited by the Charter of the United Nations and by other principles of international law. This is very clear in the case of human rights law, which limits and conditions state sovereignty in connection with a state’s treatment of persons and peoples subject to its jurisdiction.

The Charter of the United Nations: Article 2(7) of the UN Charter prohibits interference in states’ internal political affairs. However, it is standard practice within the UN and elsewhere that this provision does not apply to human rights, which are deemed of international concern. As stated by Judge Weeramantry of the International Court of Justice, “the concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. … [T]here is not even the semblance of a suggestion in contemporary international law that such obligations amount to a derogation of sovereignty.” Article 103 of the UN Charter states unequivocally that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international instrument, their obligations under the present Charter shall prevail.” Article 1(3) of the UN Charter defines one of the primary purposes and principles of the UN to be “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Articles 55 and 56 of the Charter require the UN and its members to promote “universal respect for, and observance of human rights and fundamental freedoms for all ….” In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights to elaborate upon and specify the Charter’s human rights provisions and obligations. The Universal Declaration is today widely considered to express general principles of international law and norms of customary law binding upon all states. The CBD must be read consistently with the superior authority of the UN Charter and the Universal Declaration as an authoritative interpretation of the Charter.
**Human Rights Treaties:** In the exercise of their sovereign will, the vast majority of states have voluntarily accepted international legal obligations to promote, respect, protect and fulfill human rights by ratifying international human rights conventions. These and other obligations are not suspended in connection with CBD; Article 22 of the CBD explicitly states this: “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”

**Indigenous Peoples’ Rights:** Human rights instruments, both of general application and those exclusively focused on indigenous peoples, recognize, guarantee and protect indigenous peoples’ rights. These instruments have been ratified by and are binding upon the vast majority of states-parties to the CBD. Under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), for instance, states-parties are obligated to recognize, respect and protect the right “to own property alone as well as in association with others.” In its 1997 General Recommendation XXIII, the UN Committee on the Elimination of Racial Discrimination elaborated upon this calling on states-parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.”

The UN Human Rights Committee (HRC), the body charged with oversight of the International Covenant on Civil and Political Rights, has reached similar conclusions as has the Inter-American Commission on Human Rights (IACHR). Under Articles 1 and 27 of the ICCPR, indigenous peoples’ rights to freely dispose of their natural wealth and to be secure in their means of subsistence, including territorial and cultural rights, must be recognized and safeguarded. The same conclusion has been reached in relation to the International Covenant on Economic, Social and Cultural Rights and by the African Commission on Human and Peoples’ Rights. In the Inter-American system special protections are required for indigenous languages, cultures, economies, ecosystems and natural resource base, including their “ancestral and communal lands,” religious practices, and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives. This conclusion was recently affirmed by the Inter-American Court of Human Rights in a binding decision.

Indigenous peoples’ rights to participate in and consent to activities that affect them are also well established in international human rights law. The 1997 General Recommendation issued by the Committee on the Elimination of Racial Discrimination, for instance, called upon states-parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.” The HRC has found that respect for Article 27 of the ICCPR includes “measures to ensure the effective participation of members of minority communities in decisions which affect them.” The IACHR has found violation of indigenous property rights attributable to state-authorized activities on indigenous lands conducted without indigenous consent, and that human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous peoples have in the occupation and use of their traditional lands and resources and their right not to be deprived...”
of this interest except with fully informed consent, under conditions of equality, and with fair compensation.\textsuperscript{xiii}

**The CBD and Indigenous Peoples’ Rights:** Implementation of many of the CBD’s provisions may impinge upon indigenous peoples’ rights given indigenous peoples’ fundamental and holistic relationship with their traditional lands, territories and resources. The CBD’s Conference of Parties must respect these rights as must the vast majority of its states-parties when giving effect to the Convention at the domestic level. This includes the cultural, spiritual, religious, social, economic and subsistence values of biodiversity for indigenous peoples.

While Articles 8j and 10c of the CBD are especially relevant to indigenous peoples, most of the CBD’s articles require scrutiny. This is especially the case for those dealing with identification, establishment and management of protected areas. Implementation of these articles must recognize and respect indigenous rights of ownership, control, management and use of traditional lands, territories and resources from inception. Protected areas must not be established without prior resolution of these rights, in a manner consistent with international human rights law, and without indigenous peoples’ free and informed consent. Subject to indigenous consent, indigenous ownership and management of protected areas, or in some cases co-ownership and co-management of these areas, must be considered as a viable and appropriate method of implementing the CBD and as a means of resolving disputes should they arise.

**The Ecosystem Approach:** The preceding is fully consistent with the ecosystem approach which acknowledges that decision-making and management of biodiversity are best carried out using the institutions and governance mechanisms most suited at the ecosystem-level, including recognising the central role of indigenous peoples. The first principle of the ecosystem approach, adopted by the COP in Decision V/6, states the following:

**Principle 1:** The objectives of management of land, water and living resources are a matter of societal choice.
Rationale: Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other local communities living on the land are important stakeholders and their rights and interests should be recognized. Both cultural and biological diversity are central components of the ecosystem approach, and management should take this into account. …

**The Vth World Parks Congress: ‘Best practice’ on Protected Areas:** The WPC is held every 10 years and is viewed as the preeminent global forum on protected areas. The main outcomes of the WPC were the Durban Accord, the Durban Action Plan and a series of recommendations. The Action Plan acknowledged “that many mistakes have and continue to be made and … we believe that there is an urgent need to re-evaluate the wisdom and effectiveness of policies affecting indigenous peoples and local communities.”\textsuperscript{xiii} This was complemented by a number of concrete targets including:

- establishment of participatory mechanisms for restitution of traditional lands and territories incorporated into protected areas without indigenous peoples’ free, prior and informed consent by 2010;
• full respect for indigenous peoples’ rights when establishing and managing protected areas, and;
• meaningful participation by indigenous peoples in protected area management.\textsuperscript{xiv}

Additionally, an action point was included under Key Target 3, calling for the strict elimination of the “resettlement of indigenous peoples and local communities and the involuntary sedentisation of mobile indigenous peoples without prior informed consent.”\textsuperscript{xv} The WPC also conveyed a ‘Message’ to the CBD in which it “noted that protected areas may have a negative impact on indigenous peoples, including mobile indigenous peoples, and local communities, when their rights and interests are not accounted for and addressed and where they do not fully participate in and agree to decisions that affect them. It further noted the importance of securing indigenous peoples’ rights to their lands and territories as an imperative to guarantee sustainable protected areas.”\textsuperscript{xvi}


\textsuperscript{iv} The International Court of Justice has confirmed that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation,” including the Charter of the United Nations and subsequently developed customary international law. \textit{Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia}, ICJ Rep. 16 (1971), at 31. See also, Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

\textsuperscript{v} \textit{General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997}. UN Doc. CERD/C/51/Misc.13/Rev.4.

\textsuperscript{vi} \textit{Concluding observations of the Human Rights Committee: Canada. 07/04/99}, at para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999). See, also, \textit{General Comment No. 23 (50) (art. 27)}, adopted by the Human Rights Committee at its 1314th meeting (fiftieth session). UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).


\textsuperscript{ix} \textit{Mayagna (Sumo) Awas Tingni Community Case}, Judgment of 31 September 2001.

\textsuperscript{x} \textit{General Comment No. 23 (50) (art. 27)}, adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), at 3. See, also, Joani Lansman et al. vs. \textit{Finland (Communication No. 671/1999)}, CCPR/C/58/D/671/1995, 15.

\textsuperscript{xi} \textit{Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua)}, para. 142.


\textsuperscript{xiii} \textit{Durban Action Plan, Outcome 5}, at 25. Available at: \url{http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/wpc/durbanactionplan.pdf}

\textsuperscript{xiv} \textit{Durban Action Plan, Outcome 5}

\textsuperscript{xv} \textit{Durban Action Plan, Outcome 2}, at 15.

\textsuperscript{xvi} Message of the Vth World Parks Congress to the Convention on Biological Diversity. Available at: \url{http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/wpc/cbdmessage.pdf}