International Developments Regarding Indigenous Peoples

Emerging Challenges: Applications of International Law in Canadian Courts

Montreal, November 10-12, 2001

S. James Anaya[(1)]

Largely as a result of their own advocacy at the international level, indigenous peoples or populations are now distinct subjects of concern within the United Nations, the Organization of American states, and other international institutions. While the terminology of *indigenous peoples* or *populations* remains contested, it nonetheless has become widely used. In general, the term indigenous is used in association with groups that maintain a continuity of cultural identity with historical communities that suffered some form of colonial invasion, and that by virtue of that continuity of cultural identity continue to distinguish themselves from others.

It can hardly be disputed that, through their efforts over the last three decades especially, indigenous peoples have been able to generate substantial sympathy for their demands among international actors. This can be seen in several concrete developments. These developments are shaping a body of international human rights law that is focused on indigenous peoples and that lends support to their demands, despite continuing elements of resistance to the indigenous agenda at the international level.[(2)]

ILO Convention No. 169

International developments are contributing to the articulation of a *sui generis* body of international human rights norms that is specifically concerned with indigenous peoples, a body of norms that already finds some expression in the International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples.[(3)] Adopted and opened for ratification in 1989, this Convention builds upon the discussions concerning indigenous peoples and their rights that has taken place within the United Nations since the early 1980s. The ILO developed and adopted its Convention No. 169 as a revision of its earlier Convention No. 107 on the same subject. An international treaty that already has entered into force and been ratified by several states, ILO Convention No. 169 of 1989 represents a marked departure from the philosophy of integration or assimilation underlying the earlier ILO convention.

The basic theme of Convention No. 169 is indicated by its preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live." Upon this premise, the Convention includes provisions advancing indigenous cultural integrity, land and resource rights, and non-discrimination in social welfare spheres; and it generally enjoins states to respect indigenous peoples' aspirations in

all decisions affecting them.

Several indigenous rights advocates - mostly from industrialized countries with fairly well developed legal regimes concerning indigenous peoples - have expressed dissatisfaction with Convention No. 169, viewing it as not sufficiently constraining of government conduct in relation to indigenous peoples' concerns. But whatever its shortcomings, the Convention succeeds in affirming the value of indigenous communities and cultures, and in setting forth a series of basic precepts that follow generally from indigenous peoples' articulated demands. Convention No. 169, furthermore, provides grounds for invoking international scrutiny of the particularized concerns of indigenous groups, pursuant to the ILO's fairly well developed mechanisms for implementing the standards expressed in ILO conventions. These mechanisms include required periodic reporting by states, ILO committee review of the reports, and complaint procedures.

Since the ILO adopted Convention No. 169 in 1989, indigenous peoples' organizations and their representatives increasingly have taken a pragmatic view and expressed support for the its ratification. Indigenous peoples' organizations from Central and South American have been especially active in pressing for ratification. In certain countries that have ratified Convention No. 169 - particularly Bolivia, Mexico, Colombia, and Norway - indigenous groups already have invoked the Convention in domestic and ILO proceedings with some success in their efforts to gain redress for problem situations.

Although relatively few states have ratified Convention No. 169,(4) the territories of those that have - most of them being in the Western Hemisphere - comprise a substantial part of the indigenous world. The failure on the part of other states to ratify the Convention can likely be attributed more to political inertia than to a rejection of the Convention's essential terms. Even those states that have expressed difficulty with the Convention typically have pointed out certain limited problematic aspects of the Convention while manifesting agreement with its core precepts.

Toward UN and OAS Declarations on Indigenous Peoples' Rights

As already suggested, ILO Convention No. 169 is part of a larger body of international developments concerning indigenous peoples. Most prominent among these other developments are ongoing efforts within the United Nations and Organization of American States to develop declarations on the rights of indigenous peoples.

A draft of a United Nations Declaration on the Rights of Indigenous Peoples(5) was produced and adopted in 1993 by the UN's five-member Working Group on Indigenous Populations, which is part of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, an expert body. Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s and that lead to its draft of a declaration on indigenous rights. The draft declaration is now before the Sub-Commission's parent inter-governmental body, the UN Commission on Human Rights, which in 1995 established its own working group to consider the draft.

The focus within the UN on indigenous issues during the 1980s and 90s spawned initiatives in other international arenas, including that which lead to ILO Convention No. 169 and the initiative within

the OAS to develop its own declaration on the subject. Having been authorized by the OAS General Assembly to develop a "juridical instrument" regarding indigenous groups, the OAS Inter-American Commission on Human Rights adopted in 1996 a Proposed American Declaration on the Rights of Indigenous Peoples.(6) The Proposed American Declaration is now being considered by specially designated inter-governmental working group of the OAS Permanent Council, in consultation with interested indigenous representatives.

The UN and OAS draft texts that are currently under consideration are similar in terms of scope of coverage and in the nature of the rights affirmed. Like the ILO's Convention No.169 on Indigenous and Tribal Peoples, both draft texts embrace a philosophy that, in contrast to earlier dominant thinking, values the integrity of indigenous communities and their cultures; and the texts identify indigenous groups and individuals as special subjects of concern for the states in which they live and for the international community at large. Further like the ILO Convention, the draft UN and OAS texts presuppose that indigenous peoples will exist as parts of the states that have been constructed around them, but with robust group rights, including rights relating to land and natural resources, culture, and autonomy of decision-making authority. The draft UN and OAS texts are more sweeping than ILO Convention No. 169 in their articulation of such rights; the UN text is the most far reaching, going so far as to articulate "a right of self-determination" for all indigenous peoples.(7)

With the increase in international attention to the articulation of indigenous peoples' rights has come an expanding core of international opinion on the content of those rights, a core of opinion substantially shaped by indigenous peoples' contemporary demands and supported by years of official inquiry into the subject. This is reflected at least partly in the text of ILO Convention No. 169 and confirmed in the discussions over the UN and OAS declarations. Since Convention No. 169 was adopted in 1989, government comments directed at developing UN and OAS declarations on indigenous rights generally have affirmed the basic precepts set forth in the Convention; and indeed, despite continuing contentiousness between indigenous peoples and states over the language of the declarations and certain of the declarations more far reaching provisions, government comments indicate movement toward a consensus that even more closely accords with indigenous peoples' demands.

The Articulation of Norms Concerning Indigenous

Peoples in Other International Instruments

Numerous other international developments, including resolutions adopted at major UN conferences over the last several years, manifest responsiveness to indigenous peoples demands and contribute to a developing international consensus on indigenous peoples' rights. Resolutions adopted at the 1992 United Nations Conference on Environment and Development include provisions on indigenous people and their communities. The Rio Declaration, and the more detailed environmental program and policy statement known as Agenda 21, reiterate precepts of indigenous peoples' rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development. The Vienna Declaration and Programme of Action, adopted by the 1993 United Nations World Conference on Human Rights, calls on states to respect the diversity of indigenous peoples and "their distinct identities, cultures and social organization," and it urges

greater focus within the U.N. system on the concerns of indigenous peoples. Resolutions adopted at the 1994 UN Conference on Population and Development, the Fourth World Conference on Women in 1995, the 1996 World Summit for Social Development, the Second United Nations Conference on Human Settlement in 1996 (Habitat II), and the World Conference against Racism in 2001 similarly include relevant provisions on indigenous people and affirm prevailing normative assumptions in this regard.

Indigenous Peoples' Rights as Based on Widely

Ratified Human Rights Instruments of General Applicability

Apart from the above developments, the rights of indigenous peoples can be seen as part of international law on the basis of relevant provisions of widely ratified human rights treaties and other instruments of general applicability. Article 1 of the widely ratified International Covenant on Civil and Political Rights affirms that "[a]ll peoples have the right of self-determination." The UN Human Rights Committee, which is charged with monitoring compliance with the Covenant, has stated that the right of self-determination affirmed in article 1 protects indigenous peoples', *inter alia*, in their enjoyment of rights over traditional lands and resources, and that the unilateral extinguishment of an indigenous group's ancestral rights in land is a violation of article 1. In commenting upon Canada's most recent report under the Covenant, the Committee recommended that, in relation to the aboriginal people of Canada, "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."(8)

The Human Rights Committee has most frequently relied on article 27 of the Covenant in pronouncing on the rights of indigenous peoples. Article 27 of the Covenant states, "[i]n those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." In its General Comment on article 27, the Committee held this provision of the Covenant to establish affirmative obligations on the part of states with regard to indigenous peoples in particular, and it interpreted article 27 as covering all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.(9) This interpretation of article 27 is confirmed in the Committee's adjudication of complaints submitted to it by representatives of indigenous groups pursuant to the Optional Protocol to the Covenant.

In *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*, the Human Rights Committee determined that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band.(10) The Committee found that the natural resource development activity compounded historical inequities to "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."(11) The Committee has also found that indigenous religious and cultural traditions are protected by articles 17 and 23 of the Covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the Committee determined that these articles had been violated by France

when its territorial authority allowed the construction of a hotel complex on indigenous ancestral burial grounds.(12) For its part, the OAS Inter-American Commission on Human Rights has similarly invoked provisions of the International Covenant on Civil and Political Rights, particularly its article 27, in examining the human rights situations of indigenous groups.(13)

The primary terms of reference for the Inter-American Commission are in the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man. These documents are also is the basis of legal entitlements and corresponding state obligations favorable to indigenous group demands. The Commission has interpreted article 4 of the American Convention, which broadly affirms the right to life, as requiring that states take measure to secure the natural environments of "indigenous peoples [that] maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein."(14) More directly supporting indigenous peoples' rights in lands and natural resources is the right to property affirmed in article 21 of the Convention and in article XXIII of the American Declaration. In 1998, the Commission itself filed a complaint against Nicaragua for violation of indigenous land rights before the Inter-American Court of Human Rights, the OAS judicial body that formally has the power to issue legally binding decisions against states that have recognized its competence. The Court in this case ruled that Nicaragua violated the right to property by not taking sufficient measures to guarantee the traditional land and resource tenure of the Mayagna indigenous community of Awas Tingni and by granting a concession for logging on the community's traditional lands(15).

Another important international treaty is the International Convention on the Elimination of All Forms of Racial Discrimination. Like the two other human rights treaties just mentioned, the Convention Against Discrimination no where specifically mentions indigenous groups or individuals. Yet it also has been held to have particular implications in favor of indigenous peoples. The Committee on the Elimination of Racial Discrimination (CERD), which promotes implementation of this Convention, has issued a General Recommendation that identifies such implications. In its General Recommendation on Indigenous Peoples, CERD has called upon state parties to take special measures to protect indigenous cultural patterns and traditional land tenure, in order to avoid the kind of discrimination that has deprived indigenous peoples of the enjoyment of their distinct ways of life.(16)

Emerging Customary International Law

It is evident that indigenous peoples have achieved a substantial level of international concern for their interests, and with this concern there is substantial movement toward a convergence of international opinion on the content of indigenous peoples' rights. The developments toward consensus about the content of indigenous rights simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to articulated norms. The discussion of indigenous peoples and their rights promoted through international institutions and conferences has proceeded in response to demands made by indigenous groups over several years and upon an extensive record of justification. The pervasive assumption has been that the articulation of norms concerning indigenous peoples is an exercise in identifying standards of conduct that are required to uphold widely shared values of human dignity. Accordingly, indigenous peoples' rights typically have been posited as deriving from previously accepted, generally applicable human rights

principles such as non-discrimination, self-determination, and property. The multilateral processes that build a common understanding of the content of indigenous peoples' rights, therefore, also build expectations of behavior in conformity with those rights.

Under modern legal theory, these processes that generate international consensus about indigenous peoples' rights are processes that build customary international law. The existence of norms of customary international law is significant in that states generally are bound by them, including those states that have not ratified relevant treaties. As a general matter, norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behavior in conformity with the norms. The traditional points of reference for determining the existence and contours of customary norms are the relevant patterns of actual conduct on the part of state agencies. Today, however, actual state conduct is not the only or necessarily determinative indicia of customary norms. With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a pull toward compliance, even in advance of a widespread corresponding pattern of physical conduct. It is thus increasingly understood that explicit communication, of the sort that has been ongoing in United Nations and other international forums in regard to indigenous peoples' rights, is itself a form of practice that builds customary rules.

The claim here is not that each of the authoritative documents and decisions referred to above can be taken in its entirety as articulating customary law, but that collectively they represent core normative precepts that are now or are becoming widely accepted among authoritative actors and that, to this extent, are indicative of emerging customary law. Again, this is significant because customary international law, once crystalized, imposes obligations upon constituent units of the world community independently of obligations formally assumed by acts of treaty ratification or accession.

Norms concerning indigenous peoples that are grounded in human rights precepts and generally accepted by the international community provide motivation for states to take initiatives to bring about conditions that are in conformity with the norms. Over the last several years, numerous states have enacted constitutional provisions or laws that more or less reflect the developing international consensus about indigenous peoples' rights. Of course, a great deal remains to be done to see these constitutional provisions and laws fully implemented, just as for many indigenous peoples the emerging international customary norms remain an ideal rather than a reality. Nonetheless, the international customary norms are tools by which indigenous peoples may appeal to authoritative actors in both domestic and international settings and hold states responsible for acts or omissions that are adverse to their interests.

The specific contours of a new generation of international customary norms concerning indigenous peoples are still evolving and remain somewhat ambiguous. Yet the core elements of the developing norms--including precepts of non-discrimination, self-determination, land and resource rights, and cultural integrity--are confirmed and reflected in the extensive multilateral dialogue and processes of decision focused on indigenous peoples and their rights.

Conclusion

Indigenous peoples have inserted themselves prominently into the international human rights agenda. In doing so they have created a movement that has challenged state-centered structures of power and longstanding precepts that failed to value indigenous cultures, institutions and group identities. This movement, although fraught with tension, has resulted in a heightened international concern over indigenous peoples and a developing constellation of internationally accepted norms that are generally in line with indigenous peoples' own demands and aspirations. These norms find expression in ILO Convention No. 169, other international instruments, and authoritative decisions by international bodies, and they are otherwise discernible in the ongoing multilateral discussion about indigenous peoples and their rights. In essential aspects, the articulated standards concerning indigenous peoples can be seen as developing into customary international law.

The full extent of international affirmation of indigenous peoples' rights is still developing as indigenous peoples continue to press their cause. Nonetheless, commensurate with the degree of their acceptance by relevant international actors, new and emergent norms concerning indigenous peoples are grounds upon which nonconforming conduct may be subject to scrutiny within the international system's burgeoning human rights regime. For many indigenous peoples, such scrutiny may be a critical, if not determinative, factor in the quest for survival. The movement toward a new normative order concerning indigenous peoples is a dramatic manifestation of the capacities for social progress and change for the better that exist in the human rights frame of the contemporary international system.

1. Samuel M. Fegtly Professor of Law, The University of Arizona.

2. *See* S. James Anaya, *Indigenous Peoples in International Law* (Oxford Univ. Press, 1996); Siegfried Wiessner, "The Rights and Status of Indigenous Peoples: A Global Perspective and International Legal Analysis, *Harvard Human Rights Journal*, vol. 12 (1999), p. 57.

3. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force September 5, 1991) .

4. These include Argentina, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay, and Peru.

5. Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993; adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26 1994, U.N. Doc. E/CN.4/1995/2/, E/CN.4/Sub.2/1994/56, at 105 (1994).

6. Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-Am.Comm. on Human Rights Feb. 1997, in: 1997 Inter-Am. Com. H.R. Annual Report, OEA/Ser.L/V/III.95.doc.7, rev. 1997, pp. 654-676 (proposal by the Inter-Am. Comm. H.R.). This proposed text was a revision of an earlier draft, which the Inter-American Commission had published in September of 1995. See OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995).

7. *See* Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra*, art. 3.

8. *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, 07/04/99, CCPR./C/79/Add.105.

9. Human Rights Committee, General Comment No. 23 (60) (Art. 27), adopted April 6, 1994.

10. Communication No. 167/1984, Hum. Rts. Comm. A/45/40, Vol. II, annex IV.A, para. 32.2.

11. *Id*. at para. 33. *See also* Länsmann et al. v. Finland, Communication No. 511/1992, Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994) (*Länsmann I*) (reindeer herding part of Sami culture protected by article 27); J.E. Länsmann v. Finland, Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1-2.4, 10.1-10.5 (*Länsmann II*) (Sami reindeer herding in certain land area is protected by article 27, despite disputed ownership of land; however, article 27 not violated in this case); Kitok v. Sweden, Communication No. 197/1985, Hum. Rts. Comm., A/43/40, annex VII.G (1988) (article 27 extends to economic activity "where that activity is and essential element in the culture of an ethnic community").

12. Francis Hopu v. France, Communication No. 549/1993, CCPR/C/60/D/549/1993 (views adopted 29 July 1997).

13. *See, e.g.*, The Miskito Case, Case 794 (Nicaragua), Inter-Am.C.H.R., *Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 10 rev. 3, at 76-78, 81 (1983); The Yanomami Case, Case 7615 (Brazil), Inter-Am C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 at 24, 31 (1985); Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev., at 03-04 (1997).

14. *Id*. at 106.

15. Inter-Am. Ct. H. R., *Case of Mayagna Indigenous Community of Awas Tingni*, Judgment of 31 Aug. 2001(full text in Spanish and excerpts in English available at www.indianlaw.org).

16. CERD, General Recommendation XXIII(51) concerning Indigenous Peoples, adopted at the Committee's 1235th meeting, on 18 August 1997.