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INDIGENOUS PEOPLES AND THEIR ACCESS TO HUMAN RIGHTS

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1. One of the principal complaints voiced by indigenous peoples representatives over the last twenty years in the United Nations Working Group on Indigenous Populations, whose annual sessions are attended by numerous indigenous organisations from all over the world, relates to their lack of access to the same human rights as those of other peoples. As one observer put it some years back, indigenous peoples are still struggling to obtain the right to have rights. However, the main human rights concerns regarding indigenous peoples do not refer only to their unequal access to the benefits of the unhindered enjoyment of universal human rights, nor even a systematic pattern of discrimination of which they are the perennial victims, but rather the denial of their rights qua indigenous peoples.

2. No doubt some progress has been achieved over the years, both at the national level through constitutional reforms and enabling legislation in various states, and also at the international level where indigenous rights have become the subject of widespread debate and new international standards are being established.

INDIGENOUS PEOPLES RIGHTS AND THEIR VIOLATIONS

3. Convention 169 on tribal and indigenous peoples of the International Labour Organisation (ILO) is to date the only international legal document that defines peoples 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 colonisation 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." It also states that "self-identification as

indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."[1]

4. States have used various distinct criteria to define — or fail to define — indigenous peoples as such, and the way this is done may have implications for their human rights, which is why the issue of definition itself becomes a human rights issue. The Draft United Nations Declaration on the Rights of Indigenous Peoples — without providing a definition of its own — states:

> Article 8. Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognised as such.
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> Article 9. Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.[2]

5. Denying the indigenous the right to exist as distinct peoples is considered by many as a denial of a fundamental human right which entails the violation of many other rights, basically economic, social and cultural ones. Whereas numerous states, particularly but not exclusively in North and Latin America, do indeed acknowledge the existence of indigenous peoples within their territories — but do not always recognise their human rights in the same fashion — others tend to avoid the label 'indigenous' for reasons of state.

6. A case in point is Africa. In October 2000, the African Commission on Human and Peoples' Rights of the Organisation of African Unity established an expert working group to examine the concept of indigenous peoples and communities in Africa, study the implications of the African Charter of Human and Peoples' Rights for the well-being of indigenous communities, and suggest appropriate recommendations regarding the protection of the rights of indigenous communities.[3] The working group takes the view that there are indigenous people in Africa, based on the principle of self-identification as expressed in ILO Convention 169. A UN sponsored seminar on multiculturalism in Africa, recommended in 2000 "that African states recognise all indigenous and minority peoples. This should include recognition in the constitution of the dignity and diversity of peoples within the state. Recognition of indigenous or minority identity was considered a first step in the protection of the rights of indigenous peoples and minorities."[4] At the same time, the participants noted that some African states reject the notion of 'indigenous people' because it might lead to an upsurge of "tribalism" and threaten the unity of the state.

7. The states of Asia also present different approaches. The various 'tribal' categories used in some countries may be considered as equivalent to the concept of indigenous peoples, but governments usually deny this identification. In India, for example, the Adivasis are considered as tribal or indigenous peoples, but the latter term is not used in any official document. Whereas a district court in Sapporo recognises the indigenous identity of the Ainu people in Hokkaido, and the Ainu Culture Law adopted by the Japanese Diet refers to them as "an indigenous and small-numbered people", Japanese government reports to the UN Human Rights Committee

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[1] ILO Convention 169, article 1. The indigenous and tribal peoples convention was adopted in 1989 and has been ratified so far by fourteen states. It supersedes Convention 107 of 1957.

[2] The Draft Declaration on Indigenous Rights was adopted by the Sub-Commission for the Promotion and Protection of Human Rights in 1994 and is currently still being considered by the Commission on Human Rights.

[3] 15th Annual Activity Report of the African Commission, Banjul, the Gambia, October 2001.

[4] Report on the Seminar on "Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples" held in Arusha, United Republic of Tanzania 13-15 May 2000, organized by the Sub-Commission on the Promotion and the Protection of Human Rights.

simply state that the Ainu "may be called a minority".[5] In 1997, the Philippines adopted the Indigenous Peoples Rights Act, which recognises several distinct rights of Indigenous Cultural Communities/Indigenous Peoples. Indigenous peoples are also recognised in Australia, New Zealand, Norway, Denmark and Russia, countries in which a long-standing legal tradition provides clear guidelines regarding definition of groups and membership criteria therein. A recent example is the *Federal Law on Guarantees of the Rights of Small Indigenous Peoples of the Russian Federation* of 1999.

8. Most countries of Latin America modified their political constitutions or their national legislation to accommodate indigenous peoples' rights, which had not been legally defined before this time, during the decades of the eighties and nineties. The peace accord that put an end to thirty years of civil war in Guatemala contains a special agreement on indigenous rights and identity. Among the Latin American states having adopted major legal or constitutional revisions concerning indigenous peoples and their rights mention must be made of Bolivia, Brazil, Colombia, Ecuador, Mexico, Nicaragua, Panama, Peru and Venezuela.

9. The Indians and Inuit of Canada, the Aborigines of Australia and the Maoris of New Zealand are considered 'first nations' or aboriginal peoples who have rights that are recognised in international law. These peoples, who lost their land to the colonisers according to the now discredited doctrine of *terra nullius* are reclaiming their territories based on the principle of aboriginal title. The concept has now developed in international law to protect rights of indigenous peoples.[6]

INDIGENOUS PEOPLES DEMAND THEIR HUMAN RIGHTS

10. The annual sessions of the UN Working Group on Indigenous Populations,[7] which has been meeting for twenty years, is an excellent sounding board for the human rights issues that concern indigenous peoples the world over. Though few would deny that indigenous peoples possess — at least on paper — the same rights as all persons, inequality and discrimination in the enjoyment of universal human rights is still a prime obstacle to the full participation of indigenous peoples in the national societies in which they live and in the benefits of economic and social development. The issues referred to in the following paragraphs are taken from the first report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People to the UN Commission on Human Rights, presented in 2002.[8]

Land rights

11. Let me refer in first place to issues regarding land rights as human rights, which constitute a major problem for indigenous communities. From time immemorial indigenous peoples maintain a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as identifiable territorial communities. The right to own, occupy and use land is inherent in the self-conception of indigenous peoples and generally it is in the local community, the tribe, the indigenous nation or group that this right is vested. For economic productive purposes this land may be divided into plots and used individually or on a family basis, yet much of it is regularly restricted for community use only (forests, pastures, fisheries and so on), and the social and moral ownership belongs to the community.

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[5] See UN document E/CN.4/2002/97, par. 98.
[6] *Ibid.*, par. 30.
[7] The WGIP is made up of five members of the Sub-Commission, but at its open annual sessions in Geneva hundreds of indigenous organisations participate actively as observers with consultative status.
[8] (E/CN.4/2002/97)

12. This has often been recognised in the national legal system, but just as often certain kinds of economic interests have attempted — and frequently succeeded — in turning communal possession into private ownership, a process which began during the colonial period in many countries and intensified during post-colonial times. In Mexico, for example, the break-up of indigenous agrarian communities in the nineteenth century was one of the causes that led to the Mexican peasant revolution of 1910. The Mapuche communities in southern Chile suffered the disintegration of their communal territories during the military dictatorship in the nineteen seventies, and they are currently engaged in a drawn-out struggle to retain what is left of them. In the Philippines, the law recognises the right of indigenous communities to their ancestral domains, but as legal title to many of these domains has been transferred over the years to private owners, indigenous peoples are hard put to obtain recognition of their claims. Nowadays mining, logging and commercial farming interests have taken over many of these domains, while other indigenous areas suffer from what observers aptly name "development aggression."[9]

13. Land rights issues affect indigenous communities in many parts of the world. In Malaysia, for instance, reportedly the greatest threat today to the culture and identity of the Orang Asli people is their dispossession from their traditional homelands. In Cambodia, in contrast, collective ownership of land is granted by the State to the indigenous communities, but the UN General Assembly notes that illicit logging 'has seriously threatened full enjoyment of economic, social and cultural rights by many Cambodians, including indigenous people'.[10]

14. Human rights organisations now work with indigenous communities to protect the lands to which they have a right according to international and national legal standards. A case in point is the landmark decision of the Inter-American Court of Human Rights in favour of the Awas Tingni indigenous community in Nicaragua. After a lengthy process, the Court considered in August 2001 that the state violated the right to judicial protection and the right to property as contained in the American Convention on Human Rights of the members of the Awas Tingni community, and instructed the state to adopt within its domestic legal system, in conformance with article 2 of the American Human Rights Convention, measures of a legislative, administrative and whatever other character necessary to create an effective mechanism for official delimitation, demarcation and titling of the indigenous communities' properties, in accordance with the customary law, values, usage and customs of these communities.[11]

15. Similar judgements are known to have been made by the courts in other states as well, so that indigenous land rights can, and indeed are, sometimes protected by favourable legal and court action. These are, however, exceptional cases because generally indigenous communities do not have easy access to the judicial system and in a number of countries such remedies are not available to the indigenous at all, as was reported to the Special Rapporteur during his recent official missions to Guatemala (September 2002) and the Philippines (December 2002). It therefore appears that in the future efforts must be made to improve access to the judicial system by indigenous communities and to reform the legal system when indigenous peoples are denied access to legal recourse.

16. Even when laws are in principle available to the indigenous, these are not always implemented in their benefit. Numerous states report on recent legislative activity by which indigenous rights are seemingly protected, but indigenous organisations also report that their implementation leaves much to be desired. How to implement existing legislation effectively is as important for the rights of indigenous peoples as the adoption of such legislation itself. Moreover, not all

[9] Information received by the Special Rapporteur during an official mission to the Philippines, December 2002.
[10] See UN documents A/RES/55/95 of 28 February 2001; also E/CN.4/RES/2000/79 of 27th April 2000.
[11] Judgement Summary and Order of the Inter-American Court of Human Rights. Issued 31 August 2001, in the case of The Mayagna (Sumo) Indigenous Community of Awas Tingni vs. the Republic of Nicaragua.

legislation governing the ownership, use and access to land and other natural resources is favourable to the protection of indigenous rights. In some countries recent legislation undermines traditional communal or tribal holdings and opens the way to their dispossession by third parties or other private or corporate interests. Moreover, there may be contradictory laws, as appears to be the case between provisions of the Mining Act and the Indigenous Peoples Rights Act in the Philippines.

17. The land rights issue refers not only to the availability of land for productive purposes (agriculture, forestry, herding, hunting and foraging) by individual members of indigenous communities. While this is certainly of the greatest importance because the lack of access to productive land sentences rural indigenous families to poverty and impels their members to migrate in search of work, not always successfully, there are other factors involved as well. Indigenous communities maintain historical and spiritual links with their homelands, geographical territories in which society and culture thrive and which therefore constitute the social space in which a culture can reproduce itself from generation to generation. Too often, this necessary spiritual link between indigenous communities and their homelands is misunderstood by non-indigenous persons and is frequently ignored in existing land-related legislation.

18. The recognition of indigenous territorial rights is necessary for the full protection of the human rights and fundamental freedoms of indigenous peoples and in a number of States such rights have indeed been legislated. One such case is the long struggle the Inuit people of northern Canada for legal redress concerning ancient land rights and aboriginal title. After linking their land claims to territorial autonomy, the Inuit negotiated a political agreement with the government, whereby they achieved the creation, in 1999, of the self-governing territory of Nunavut. Rather than weaken national unity, which some observers feared would happen, this arrangement has strengthened the federal structure of Canada and met the claims and aspirations of the Inuit people. In Panama seven indigenous peoples, the Ngöbe, Kuna, Emberá, Wounaan, Buglé, Naso and Bri Bri, who together represent 8.3% of the national population, are mostly concentrated in five legally constituted territorial units (*comarcas*) which make up almost 20% of the country's total land area. These *comarcas* are semi-autonomous regions governed by local councils and traditional governors *(caciques)*. Regional autonomy, sometimes expressed as the right to self-government and self-determination, is a widespread demand of indigenous peoples.

Access to natural resources

19. The land rights issue cannot be separated from that of access to, and use of, natural resources by indigenous communities. These rights are recognised in Convention 169 of the ILO (Article 15) and in articles 28 and 30 of the draft UN Declaration. The Inter-American Draft Declaration on the Rights of Indigenous Peoples has similar wording.[12]

20. Indigenous organisations have insistently demanded that attention be paid to these rights, because access to the natural resources available in their habitat is essential for their economic

[12] ILO Convention 169, Art. 15. 1: "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." UN Draft Declaration on the Rights of Indigenous People: "Article 28. Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources". Article 30: "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources." The Inter-American draft Declaration on the Rights of Indigenous Peoples, adopted by the Inter-American Commission on Human Rights: Article 18.4: "Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence."

and social development. Too frequently, such resources are being extracted and/or developed by powerful corporate interests (oil, mining, logging, fisheries, agribusiness, biotechnology, and so on) with little or no benefits for the indigenous communities that occupy the land, or even with direct or indirect harmful effects on the indigenous people. Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues and some national legislation specifically protects the interests of indigenous communities in this respect, in numerous instances the rights and needs of indigenous peoples are disregarded, making this one of their major human rights problems.

21. Indigenous communities possess traditional knowledge systems regarding the fauna and flora of their habitat that have enabled them to live harmoniously with nature over the centuries and obtain from their direct environment not only food but also building materials, products for healing and many other purposes. They have, in fact, been able to sustain their cultures on the basis of the balanced management of environmental resources. This equilibrium is being shattered at an alarming rate by savage economic "development", with sometimes disastrous consequences for the indigenous peoples. The Convention on Biological Diversity, adopted by the United Nations in 1992, addresses the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. (Article 8 [j]).

SUSTAINABLE DEVELOPMENT AND LEVELS OF LIVING OF INDIGENOUS PEOPLES

22. Indigenous people are very often found among the poorest strata in society, their levels of living are considered to be substandard in many respects. Studies have shown high levels of infant mortality, lower than average nutritional levels, lack of public services, difficulty of access to social welfare institutions, lower than average delivery of the services provided by such institutions, inadequate housing and shelter and other indicators associated in general with the idea of human development. A World Bank study on poverty and indigenous people in Latin America shows that the latter are among the poorest populations in this region.[13] The Special Rapporteur's personal findings in Guatemala, Mexico and the Philippines confirm this tendency. Very often, however, disaggregated statistical data are not available, and the United Nations Human Development Index at the country level does not generally provide the relevant information. Indigenous organisations at the UN Permanent Forum on Indigenous Issues demand that such data be compiled and made available. The annual UN Human Development Report should certainly disaggregate data according to ethnic criteria, whenever possible, so that social and human development evaluations and assessments may be improved.

23. Many states have recognised these problems and promote special policies and measures designed to improve the levels of living of indigenous people. In other areas public policies are not oriented in this direction and the needs of indigenous populations have been neglected. Numerous statements made by indigenous representatives to the WGIP over the years, and other information gathered by independent research bodies, confirm this tendency. For instance, the Committee on Indigenous Health expressed its concern at the nineteenth session of the WGIP that the gap between the health of indigenous peoples and the rest of society is widening, despite all efforts by national governments and international agencies. Great inequalities between indigenous and non-indigenous peoples can also be observed in the delivery of social services such as health, education, housing and public utilities as well as in the allocation of public resources for social and economic investment. The accumulated effects of this situation over the decades leads to a condition in which economic, social and cultural rights of indigenous peoples

[13] George Psacharopoulos and Harry Anthony Patrinos (Eds.). 1994. *Indigenous People and Poverty in Latin America. An Empirical Analysis*. Washington, D.C., The World Bank, p. 206-207.

are being seriously undermined through public policies and investment strategies that are simply growth-oriented but indifferent to human rights.

24. Recent experience has shown that economic growth must go hand in hand with social concerns if the results are to be effective and make a difference in the lives of individuals and communities. A new approach is taking hold in international discourse: *human-rights centred sustainable development*, meaning that unless development can be shown to improve the livelihoods of people within the framework of the respect for human rights, it will not produce the desired results. This approach may be of particular importance for indigenous peoples whose human rights have frequently been neglected when not actually impaired by traditional economic development approaches.

DAMS, DEVELOPMENT AND INDIGENOUS RIGHTS

25. Among major development projects undertaken in recent decades in indigenous areas, large multipurpose dams have had dramatic effects on the conditions of living of indigenous peoples. Sometimes the impact is beneficial, often it is devastating, but it is never negligible. The World Commission on Dams Reports:

> Large dams have had serious impacts on the lives, livelihoods, cultures and spiritual existence of indigenous and tribal peoples. Due to neglect and lack of capacity to secure justice because of structural inequities, cultural dissonance, discrimination and economic and political marginalisation, indigenous and tribal peoples have suffered disproportionately from the negative impacts of large dams, while often being excluded from sharing in the benefits.[14]

26. To the extent that many of these projects are located on the ancestral territories of indigenous peoples, it is not surprising that they should raise the issue of the rights to land, the right to prior consent about use of this land, the right to participation in the decision-making process regarding the implementation of such projects, the right to share in the potential benefits, and beyond this, the right of indigenous peoples to self-determination.

27. In various UN and other forums, indigenous organisations have signalled their concern about negative impacts of major development projects, one of the recurrent issues being loss of land and territories. The lack of control over their natural resources has become a widespread worry. Very often these projects entail involuntary displacements and resettlement of indigenous communities. As a result, violations of civil and political, economic, social and cultural rights occur with increasing frequency, prompting indigenous peoples to launch major protest or resistance campaigns in order to bring public attention to their plight, besides engaging the judicial system or appealing for administrative redress, as well as lobbying the political system.

28. Three examples are provided in the box below.

Colombia

The Emberá-Katío indigenous people have traditionally lived in the area surrounding the Sinú and Verde Rivers in northwestern Colombia (departments of Córdoba and Antioquía). Their ancestral territories were legally recognised as two Indigenous Resguardos (Reserves) in 1993 and 1996, and are inhabited by about 500 families. The Emberá-Katío are one of the several indigenous peoples who have suffered most from the persistent violence of Colombia's civil war. Over many years, they

[14] World Commission on Dams (2000). Dams and Development. A New Framework for Decision-Making. The Report of the World Commission on Dams. (See chapter 4, "People and Large Dams-Social Performance", particularly the section on Indigenous Peoples). Available on www.dams.org .

have been negotiating with the authorities regarding a project to build several large hydroelectric dams that would flood a good part (up to 7000 hectares) of their traditional territories.

Concerned about the negative ecological and economic effects that the Urrá1 dam would have on their cultures and social organisation, the Emberá Katío traditional authorities (cabildos) have been subject to great pressures and been accused of being guerrilla supporters and "enemies of progress". Since 1992 some of their land was expropriated as being of "public interest" and the privately owned Urrá company received a license to begin work on the project without prior consultation with the indigenous communities (mandatory according to the Colombian constitution).

In 1994 the company and Colombia's National Indigenous Organisation (ONIC) agreed on a framework for mandatory consultation before the beginning of the second phase of the project, involving flooding and functioning of the dam. A proposed Ethno-Development Plan established compensation for eventual negative impacts of the dam on the Emberá-Katío. However as the river was diverted, new damaging impacts emerged, such as making it difficult for the indigenous to navigate and fish in the river. Despite an evolving conflict, the company obtained the government license to flood the area. This was later nullified by Colombia's Constitutional Court, which declared that the process violated the fundamental rights of indigenous peoples, and ordered a new consultation process as well as compensation for the Emberá Katío.[15] In 1998, violence escalated and several indigenous families were forced to leave their homes under threat. Property was destroyed, and more seriously, several indigenous leaders were assassinated or forcibly disappeared presumably by paramilitary forces, whereas others became the alleged victims of the Revolutionary Armed Forces of Colombia (FARC).

In 2000, a new agreement was reached between the government, the company and the indigenous communities. Besides promising social and health services to be provided by international agencies, the agreement acknowledged the Emberá Katio's neutrality in the civil war, their full territorial autonomy, and their non-combatant condition.[16] Nevertheless, violence continued against the Emberá in the form of assassinations, forced disappearances, arbitrary detentions and threats, some of which has been attributed to paramilitary groups and some to the FARC.

The UN High Commissioner for Human Rights in Bogotá denounced the forced displacement of an Emberá community of 800 people, including 250 children, due to threats by the FARC and called upon the national government to take adequate protective measures.[17] In a letter to the Special Rapporteur, the ONIC restates its position that mega-projects are the main cause of current conflicts between the indigenous peoples and the state.

The survival of the Embera-Katío people is at stake. Several of their most and prominent leaders have been killed in the last five years. The Urrá I dam is being built without their consent, involving involuntary displacements, social and economic disorganisation and cultural disruption. They resent the construction of this dam as a threat to their way of life, and some of the impacts that have already been reported seem to support this view. These include: diseases which were unknown to the area, scarcity of fish and other basic elements of their diet, and most significantly, the disruption of the river, which represents a central place in their spiritual relationship of the Emberá Katío people to their land. Combined with the effects of continuing political violence, the Emberá Katío face the danger of not being able to survive as a distinct people: a clear case of ethnocide.

[15]Sentence T-652/98. The absence of a formal consultation process about the project is, according to the Court, a violation of the right to participation, of the right to due process, and of the principle of the multicultural character of the Colombian nation.

[16] Acta de acuerdos entre el Gobierno Nacional, la empresa Urra S.A. y los Cabildos Mayores de Rio Verde y Río Sinú, y Comunidad de Seguido. Ministerio de Medio Ambiente, Bogotá April 25th. 2000.

[17] Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos.
Comunicado de Prensa. Condena a desplazamiento de indígenas Emberá en Tierralta. 17 de octubre de 2002

India

The Sardar Sarovar Dam in India is the largest of 30 large, 135 medium and 3000 small dams to harness the waters of the Narmada river and its tributaries, in order to provide large amounts of water and electricity for the people of Gujarat, Maharashtra and Madhya Pradesh. With a proposed height of 136.5 m, the government claims that the multi-purpose Sardar Sarovar Project (SSP) will irrigate more than 1.8 million hectares and quench the thirst of the drought prone areas of Kutch and Saurashtra in Gujarat. Others counter that these benefits are exaggerated and would never accrue to the extent suggested by the government. Instead the project would displace more than 320,000 people and affect the livelihood of thousands of others. Overall, due to related displacements by the canal system and other allied projects, at least one million people are expected to become uprooted or otherwise affected upon completion of the project. Indeed, the development surrounding the Narmada River has been labelled "India's greatest planned human and environmental disaster", a far cry from former Prime Minister Nehru's idealisation of dams as the "secular temples of modern India." [18]

Two thirds of the over 40,000 families expected to be displaced by the reservoir's creation will be tribal people or Adivasis. Their displacement from their traditional lands and resources significantly impacts on the ability of Adivasis to fully enjoy their human rights. Resettlement away from their territory means the destruction of their lifestyles and village organisation.

In the early nineties opponents to the dam staged a series of non-violent protests, prompting the World Bank, after commissioning an independent review which underlined the flaws in the project, to cancel the remaining $170 m. on its loan of $450 m. Work on the dam continued nevertheless, despite attempted judicial restraint, and by the summer of 2002 the water level in the reservoir rose much higher than initially expected, threatening many more people and villages with flooding. The government's rehabilitation and resettlement measures for "oustees" (displaced persons) appeared to be insufficient, generating protest activities by the affected villagers within the rising waters themselves, many of whom maintain that they will never abandon their land to the dam, even if it means death by drowning.

Adivasis were not involved nor consulted in the dam construction process. Only the Adivasi population who live in the area that will be submerged in the reservoir are eligible for compensation and resettlement. However, many more will be affected indirectly, who are not considered as eligible for rehabilitation. Secondary consequences have also displaced Adivasi villages and affected their lives and livelihoods.

Whereas the government has offered comprehensive resettlement and compensation packages to "landless" Adivasis displaced from their homes, observers point out that in practice they have not fully benefited from them. The promised lands in Gujarat did not materialise or were of poor quality, whereas in Madya Pradesh the government had no resources to resettle displaced Adivasis. Moreover, resettlement has been delayed for many years and it is reported that 75% of the displaced people have not been rehabilitated. To the extent that the law does not recognise customary rights to land and that therefore Adivasis may be considered "encroachers" on government land, they have not received adequate compensation for their losses. It appears that the Government has omitted to deal with the numerous non-quantifiable losses experienced due to the dam such as loss of access to religious sites and social disintegration. Displacement due to the SSP has led to fragmentation of Adivasi communities as well as loss of cultural identity. Resettlement areas are often unsuited to the communal lifestyle of Adivasis, particularly if they have been resettled in communities of non-tribal people who reject the tribal way of life or have had to move to the cities.

[18] John R Wood, "India's Narmada River Dams: Sardar Sarovar under Siege" in Asian Survey Vol. XXXII (10) Oct 1993, p 968.

Involuntary displacement readily leads to a violation of several economic, social and cultural rights. Despite claims to the contrary, resettled Adivasis have generally had to suffer a reduction in their standard of living, the loss of livelihood resources, and a reduction of health standards. Neither have their educational needs been adequately met. There have also been reports of violence and the use of force by the police upon protesters and resisters to displacement. The Narmada Authority decided in May 2002 to allow the dam height to rise to 95m even though over 35,000 families displaced when the dam height reached 90m have still not been resettled. Submergence due to the monsoons and raising the dam's height have destroyed the crops and homes, rendering villagers homeless. They now reportedly face a severe food and drinking-water shortage.

The Sardar Sarovar dam and other similar projects on the Narmada river raise a number of complex issues. Originally, the interests and aspirations of the affected Adivasi population were not considered in the project design and implementation. As a result of continued lobbying by tribal and human rights organisations, the government of India now recognises that the issues raised by the affected communities must be taken into account. Yet the implementation of measures intended to mitigate the negative effects and increase the benefits of the project for the Adivasi population has lagged behind and is considered as insufficient by the people involved. The human rights of the Adivasis must be included as at priority in the implementation of this development project and others of its kind. Only with the full and informed consent of the tribal people concerned will a truly human rights-centred development, as recommended by the General Assembly, become possible. An immediate step would be to halt any further rise in the reservoir's water level until the outstanding issues of rehabilitation and resettlement are fully solved to the satisfaction of the affected population, through constructive dialogue and negotiation between the parties.

Philippines

The San Roque Multipurpose Project in the Philippine Cordillera region involves the construction of a large dam on the Agno river which will be used primarily for power-generation and secondarily for irrigation and flood-control. Construction of the dam and power plant were completed in July 2002 and the water began to rise in August. The construction site covers about 34 square kilometres, but the irrigation and flood-control components will extend over a much wider area, involving around 30 municipalities in three provinces. The dam reservoir is expected to submerge eight small upland villages that are home to indigenous people.

Many other villages are bound to be affected by sediment build-up and upstream flooding as the reservoir gets silted. To mitigate the potentially negative impact of these processes, the implementation of a Watershed Management Plan is underway. The irrigation component of the project will service more than 70,000 hectares of Riceland, while the area to be serviced by the flood-control component is estimated at about 125,000 hectares.

The area upstream of the dam is occupied by Ibaloy, Kankaney and Kalanguya indigenous peoples. About 120 households of eight indigenous villages have been dispersed by the local effects of the rising waters of the dam. Furthermore, nearly 5,000 indigenous households (about 26,000 individuals) are going to be affected by the sedimentation and flooding to be expected from the reservoir's eventual situation, and more than 3,000 households will be affected by watershed management. A high rate of sedimentation takes place because of continued dumping of muck waste and impoundment of tailings from several large mining operations, which threatens to seriously alter the traditional activities of numerous indigenous communities in the area. The watershed management plan, intended to mitigate project-impact, involves curtailing some of the traditional activities of the indigenous communities, such as small-scale ore mining (which does little to affect the environment), banning the harvesting of timber products that are used for home-construction and kitchen-fuel purposes, and regulating subsistence swidden agriculture which is usually considered

as sound agro-forestry management. Instead, large commerce-oriented agricultural production is being promoted as well as livestock raising for the market, that imply widespread clearing of vegetation and induced massive soil erosion in both the upper and parts of the lower river basin.

The project has several human rights implications. Firstly, environmental disruption; secondly, the displacement of population, some which appears to have been undertaken forcibly, but mostly through insistence on the implementation of the project in the face of community resistance and persuasion. Gradually, the people's resistance to the project has grown silent. Most importantly, indigenous people's land rights have been disregarded. Proprietary ancestral rights of indigenous families have not been given due recognition, but as project implementation progressed some families about to be displaced accepted some form of compensation, which was then cited as indication of consent. In fact, none of the affected communities participated in the planning of the project itself, and none freely gave their consent to its implementation. But many individuals participated in the consultations concerning impact-mitigation measures, and all of them are now bound by the enforcement of those measures, which imply drastic changes in livelihood engagements.

The watershed managers are steering the households away from the peasant livelihood mix traditional to their indigenous communities, towards the monocultures that tend to define the production of vegetables, flowers, broomgrass, and livestock for the market. Starting with their lending of capital for the new livelihood ventures, the watershed managers are introducing the households to new economic relations that may or may not be good for the communities. Whatever the final results, the debates stirred by the dam projects has already disrupted local social relations considerably.

This has occurred because local mechanisms for the protection of indigenous rights have not been effective. The indigenous communities of the municipality of Itogon tried to avail themselves of the legal mechanisms provided by the law to stop the project, but they were not successful. They also petitioned the National Commission on Indigenous Peoples (NCIP), but were rebuffed. Thus, the laws designed to protect the indigenous communities were in fact ignored.[19]

Language rights

29. Indigenous people generally maintain a cultural distinctiveness of their own which distinguishes them clearly from other groups in society and from those sectors that are usually identified by the concept of "national or mainstream culture". Mention must be made in the first place of the importance of language in providing an essential cultural distinctiveness to any people. Language is not only a medium of communication, but also a crucial element in the structuring of thought processes and in providing meaning to the natural and social environment of any person. A language community is also an epistemic community, that is, it links people through their participation in a common medium and in shared understandings. Indigenous language communities provide their members with the full range of cultural meanings attached to the use of a shared idiom. Most indigenous languages are very ancient and while they have undergone changes –just as any other language — they are transmitted from generation to generation and thereby help preserve the continuity of a language community and its culture. The public often dismisses indigenous languages as mere "dialects", or something less than a structured language, therefore denying them an identity of their own, which is another case of cultural discrimination.

[19] Information on the San Roque Multipurpose Dam Project was provided by Ápit Takó, Alliance of Peasants in the Cordillera Homeland, through Tebtebba, the Indigenous Peoples' International Centre for Policy Research and Education, Baguio City, October 2002.

30. Language rights are an essential element of the cultural rights that all persons enjoy under international human rights standards. The right to one's own language pertains not only to individuals but also to communities, nations and peoples. If a language community as such is denied the collective and public use of its language (for example, in schools, the media, the courts, the administration) then any individual's right to this language is severely curtailed. Therefore, language rights are nowadays proclaimed as human rights. Numerous States have now adopted legislation concerning the protection of regional, minority or indigenous languages. For example, the Education Act of New Zealand ensures funding for Maori pre-schools, primary schools, secondary schools and universities. The impetus for this came from Maori mothers insisting that Maori reclaim the education of their children from birth through to adulthood.[20] The Ainu people of northern Japan have almost entirely lost the use of their language due to the implementation by the state over decades of an assimilationist policy. They are now claiming respect for their language rights as an essential part of their cultural integrity.[21]

31. In historical perspective, however, state policies have not always recognised or protected the languages spoken by indigenous peoples or ethnic minorities. On the contrary, the intention of official linguistic, educational and cultural policies has often been the assimilation of such groups into the national mainstream, thus leading to language and cultural loss. It has only been in recent years that these processes have been seen as being in violation of the human rights of the members of such linguistic communities, and they have sometimes been considered as a form of ethnocide.[22]

32. Nowadays in some countries indigenous languages are recognised as national languages, at least in the regions in which they are widely used, and sometimes they have been accorded official status of some kind or another. In other cases, they may no longer be actually repressed but only tolerated as a private medium of communication but are not accorded any official status. In numerous indigenous linguistic communities around the world, it is common to find members of the older generation who maintain their language whereas youth and children are more prone to suffer language loss, particularly when assimilationist policies are carried out. Article 30 of the Convention on the Rights of the Child is clear: "In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."[23] UNESCO's Universal Declaration on Cultural Diversity adopted in November 2001 underscores that the conservation of cultural diversity will be a fundamental ethical precondition to the promotion of human rights and fundamental freedoms, particularly those of minorities and indigenous peoples.

The right to education and culture

33. The use of the mother tongue in education and public communications is an important issue in the definition of the human rights of indigenous peoples. In contrast to the formerly widely extended and dominant idea of formal schooling as an instrument of assimilation and acculturation, through which indigenous children learn to speak the national language and replace their own mother tongue, current thinking on the subject tends more towards the opposite direction. Bilingual and intercultural education has become the object of educational policy for indigenous communities in many parts of the world. Specialists in education agree that

[20] See UN document E/CN.4/2002/97, par. 60.
[21] Interviews with members of the Ainu Association of Hokkaido, Japan, December 2002.
[22] Ethnocide is a process of cultural change and destruction as a result of specific policies that undermine a cultural community's ability for self-preservation.
[23] The wording of this article is based on Article 27 of the International Covenant on Civil and Political Rights.

early schooling in both the native mother tongue and the official language of the state is of great benefit to indigenous children, who may become proficient in the vehicular language of the wider society without losing their vernacular idiom.

34. Nevertheless, despite the best of intentions, the teaching of native tongues in schools has its difficulties. In the first place, many indigenous languages lack their own alphabets and do not have a written tradition. Secondly, the formal teaching of the vernacular tongue and of the vehicular or official idiom as a second language requires special training and pedagogical skills which indigenous teachers often lack. In Mexico, for example, where official bilingual education in indigenous areas has a history of many decades, the output level of students in bilingual schools is still below that of the national average. Furthermore, the preparation of textbooks and teaching materials in indigenous languages usually lags behind those in areas where the national or official language is taught exclusively. In many countries, school administrations (either public or private) are not set up to handle indigenous bilingual education effectively. To that extent, the indigenous right to education in their own languages is not being adequately implemented and requires serious attention in the future. In Guatemala, the peace accords establish the right to bilingual and intercultural education for indigenous children, but the Special Rapporteur has been informed that this policy is yet to be fully implemented.

35. Even more problematic is the idea of multicultural or intercultural education, because this involves not only local schools but also the regional and national school systems and the educational philosophy of any country where there are indigenous peoples. The notion of multicultural and intercultural education leads to a complete revision of educational contents and methods in countries where it is applied. It basically means that the cultural diversity of the country should be reflected in the curriculum and the preservation and promotion of cultural diversity should become an objective compatible with democratic governance and the enjoyment of human rights by all. In some cases, this approach will require the revision of traditional ideas held by majority or dominant cultural groups about national culture and identity. Indigenous peoples' organisations often need to remind the world that their own cultural specificities are also contributions to a universal culture and not mere relics of a disappearing past. The rights of indigenous peoples to culture and education (the whole gamut of cultural rights, in fact) include the right to the enjoyment and protection of their own cultures in a wider, multicultural world.

36. The preservation of indigenous cultures (including tangible and intangible elements, arts and artefacts, traditions, knowledge systems, intellectual property rights, ecosystem management, spirituality and so on) is an essential component of a comprehensive indigenous human rights package. This may seem self-evident to anybody who takes cultural rights as set out in the International Bill of Human Rights for granted. In fact, the preservation of indigenous cultures is not a natural process at all. The contrary is more likely, because as has been well documented in the specialised literature on the topic, public policies have frequently been designed to eliminate and transform indigenous cultures because their existence has often been considered as detrimental to the idea of national integration and development. Many countries adopted specific policies to "assimilate" indigenous peoples into the wider "national" culture within the framework of cultural and social modernisation. While such ideas no longer command the support they used to have, and whereas more and more States adopt positions favourable to multiculturalism, there are still numerous cases in which the cultures of indigenous peoples are under strong outside pressures to change, when they are not actually on the verge of extinction.

37. The idea of multiculturalism does not imply the artificial preservation of indigenous (or tribal) cultures in some sort of museum, but only the right of every human community to live by the standards and visions of its own culture. Certainly, cultures change over time, but whether there will ever be one universal culture or any number of interrelated local, regional, ethnic, and national cultures, only time will tell. In human rights terms, it is clear that cultural rights pertain

to every individual, yet these rights can only be fully enjoyed by all persons in community with other members of the group. Thus indigenous peoples require guarantees that their cultures will receive the respect and consideration that other groups in society also enjoy, and that they will have the freedom to develop their cultural creativity in communion with other members of their group. At the international level, these issues have been taken by UNESCO and by the World Intellectual Property Organisation (WIPO) with regard to the cultural heritage and intellectual property of indigenous peoples. The African Commission on Human and Peoples' Rights has set out guidelines that require states to take specific measures aimed at the promotion of cultural identity and the "awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the populations".[24]

Social organisation, local government, customary law

38. Cultural identities are sustained not only by a discrete list of "elements" that every member of a cultural group "carries along" as he/she goes through life. In fact, these elements may vary from individual to individual and they may, and frequently do, change over time. Therefore, it is not the contents of a culture that defines any group's identity. Rather, it is in the field of social organisation that identities are wrought and sustained. To the extent that a system of social relations defines the identity of each individual member and his/her link to the group as a whole, the social institutions and relationships characteristic of a given community are the necessary frame of reference for any culture to thrive. Indigenous communities know this well, because when they claim the right to maintain their social organisation in the face of the pressures of the wider society, they are actually appealing for the preservation of their culture.

39. Too often, the larger society has taken the stance that indigenous social institutions are contrary to the national interest or, worse, are morally reprehensible. This position was taken for a long time by the dominant institutions in colonial empires. The question is frequently debated whether adherence to indigenous communal institutions may lead under certain circumstances to the violation of individual human rights (for example, the rights of women and girls).

40. Local community organisation is often upheld by adherence to a generally accepted system of customs and *mores* or customary law, which in numerous countries is not accorded any formal legal recognition and may in fact be considered as competing with the formal state legal system. Do community members who accept the norms of unwritten customary law stand in violation of a country's legal system? Does the application of customary law violate nation-wide legal norms? Yet what about situations in which the application of positive law entails a violation of community norms and customs? Might that not constitute a violation of human rights as well?

41. These issues are dealt with in different ways by individual states (and by different scholars) and the various solutions run from some form of accepted legal pluralism to the absolute rejection by the official legal system of any kind of indigenous customary law, with a number of possibilities in between. Under what circumstances might the application of indigenous legal systems (customary law) threaten internationally accepted standards of individual human rights? Conversely, under what circumstances could the limitation or elimination of indigenous customary law violate the human rights of members of indigenous communities?

42. Since time immemorial, local communities have evolved some form of local government within the structure of a wider polity into which they have been integrated as a result of historical events. Indigenous communities are no exception. Throughout history, local communities have struggled to defend their autonomy against outside encroachment, sometimes successfully,

[24] African Commission 1990: 417-8.

sometimes not. To the extent that indigenous people were incorporated into state structures not of their own choosing during times of colonisation or the expansion of the modern nation state, their local forms of government were modified or adapted to suit the interests and needs of the state, creating tensions that have often led to conflict and violence.

43. Indigenous organisations seek to preserve or regain the right to local (and sometimes regional) self-government; they consider this right as part of the fundamental freedoms which international law accords to all peoples. Through negotiations and treaties, constitutional reform or special legislation, indigenous peoples have been able in numerous instances to establish agreements with states regarding this right to self-government. In other cases, however, this has not been possible, and national- or regional-level government units still take it upon themselves to administer the affairs of indigenous communities. Indigenous affairs ministries, departments or bureaus often have specific mandates to that effect and local indigenous governments need to deal with these institutions rather than with those of the national political or administrative system in general. Indigenous organisations may consider this to be a form of discrimination, whereas governments argue that such arrangements are designed for the protection of indigenous people themselves, in keeping with their best interests (as defined by the state).

Political representation, autonomy, self-determination

44. Indigenous self-organisation has made considerable progress over the years. From the local level to the regional, national and international levels indigenous peoples' associations have become social and political actors in their own right, as witnessed by their continuing participation in the yearly sessions of the WGIP. They speak with many voices but on the fundamental issues of their human rights, their objectives and their aspirations they are usually in remarkable agreement. In some countries, they are now recognised as legitimate partners and interlocutors of governments and other social sectors on the national scene. In other countries, the going has been more difficult, their organisations may not be officially recognised and their human right to free association may not be completely respected. To the extent that the rights of indigenous peoples themselves are sometimes neglected and ignored within existing power structures, their organisations and other human rights advocacy associations that take up their cause may also become victims of abuses and be denied adequate protection under the law. Numerous communications to this effect have been addressed over the years to the UN Office of the High Commissioner on Human Rights (UNHCHR), the ILO Committee of Experts and, among others, the Inter-American Commission of Human Rights.

45. Beyond respect for their human rights, indigenous organisations also claim the right to political representation qua indigenous peoples at the national level, an issue that may or may not be compatible with existing political structures. More insistent has been the demand for some kind of autonomy, and in a number of countries this has been achieved whereas in others it is not contemplated in current legal arrangements.

46. One of the more controversial topics surrounding the human rights and fundamental freedoms of indigenous peoples concerns the widely debated right of peoples to self-determination. In their statements to international forums indigenous representatives demand the recognition of their right to self-determination as peoples. Equally insistently, some states argue that such a right should not extend to the indigenous. The concept of self-determination is closely linked to the use of the term "peoples". There does not appear to be a clear and unequivocal definition of this term in any of the multiple international legal instruments that have been adopted over the last half century nor, for that matter, in national legislation. Without a clear definition that may command a broad consensus, it is not obvious what the debate is really all about. In political science and legal literature the term is usually linked to all the citizens of an existing state,

whereas in more sociological texts the notion of a "people" refers to certain commonalties, shared identities and identifications. Governments have generally tried to avoid referring to indigenous groups as "peoples" (in the legal sense attributed to this notion in international law), and this is one of the reasons why there has been so little progress of late in the draft declarations on indigenous rights in the United Nations and the Inter-American system. The ILO Convention 169 qualifies its use of the term, the Vienna Human Rights Congress in 1993 eschewed it, and the Durban Declaration on Racism, Xenophobia and Related Forms of Intolerance (2001) tried to avoid using the concept. It finally managed to be accepted in the World Summit on Sustainable Development (Johannesburg 2002), where "…the vital role of the indigenous peoples in sustainable development" is recognised.[25]

47. To the extent that the right of peoples to self-determination is basic to the full enjoyment of all other human rights,[26] and that indigenous peoples legitimately claim for themselves the right to be so recognised and acknowledged, the denial of this right to indigenous peoples is still one of the unfinished points on the world human rights agenda. States should be encouraged to adopt the current draft declarations on indigenous rights being considered in the UN Human Rights Commission and the Organisation of American States, fully respecting the articles referring to the right to self-determination. Those states which have not yet done so should also be encouraged to ratify the Indigenous and Tribal Peoples Convention 169 of the International Labour Organisation.

CONCLUSIONS

48. As the cases referred to in the preceding paragraphs show, there are recurring patterns in the violations of the human rights of indigenous peoples everywhere. Land dispossession, discrimination and violence against indigenous individuals and communities, relocation and insufficient delivery of social services (health and education, among others) are recurring themes in communications and statements issued by indigenous representatives in international forums. Among situations denounced by indigenous representatives as well as concerned non-governmental organisations we may mention mining and logging activities affecting indigenous livelihoods, flooding of indigenous ancestral territories due to multipurpose projects, environmental destruction because of the building of oil pipelines, and violence against indigenous leadership who fight for the rights of their communities. Discrimination against indigenous peoples is often reflected in insufficient funds or investments for economic growth, lack of resources for social and cultural services, and national priorities which lie elsewhere than in the area of indigenous development. Discrimination against indigenous and tribal peoples, including women, in the area of labour, including forced labour in the form of debt bondage, and inhuman working conditions affecting a large number of "scheduled tribe"[27] workers, has been noted by the ILO Committee of Experts.

49. In some countries with indigenous peoples, their rights still have to be recognised and acknowledged in the national legislation. In others, where such legislation has been adopted (even if not perfect), the problem lies in its inadequate implementation. The difficulties encountered in the system of administration of justice are one of the major obstacles to indigenous peoples' access to human rights. Discrimination and bias against indigenous peoples

[25] The Johannesburg Declaration on Sustainable Development, September 4, 2002, paragraph 25. www.johannesburgsummit.org .

[26] "All peoples have the right to self-determination" states Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant of Civil and Political Rights (ICCPR) adopted by the General Assembly in 1966.

[27] The term "scheduled tribes" is generally used in India to refer to Adivasis; it was coined and used in colonial times.

in the judiciary is a recurrent theme of complaints and grievances by indigenous representatives, sometimes acknowledged by the judicial authorities themselves. It often relates to the vital role of customary law in indigenous communities, which may not be recognised as such, or actually relegated and ignored by national authorities. Opening the administration of justice to indigenous law is often a contentious business and may involve contrasting conceptions of law and justice, which the courts and the public administration are not always well equipped to handle. These issues may be dealt with differently in countries with a tradition of case law legal systems and countries whose legal system dates back to Roman law and the Napoleonic code. In some countries of Asia and Africa legal pluralism is in fact acknowledged, but others prefer one unified and codified legal system in which usually indigenous non-written customary legal traditions do not find a place.

50. The full enjoyment of human rights by indigenous peoples requires not only a change in legal perceptions and judicial traditions, but more often than not a thorough rethinking of the concept of the nation-state. Indeed, most modern states are based on the myth of a single culturally homogeneous nation occupying a specific territory and linked by a single legal and administrative structure. This nineteenth century fiction, propagated by some European states, is not, however, a universal phenomenon. It has become even less so in the post-colonial world in which massive migrations and a globalised economy weaken the very model of the nation state. The full access of indigenous peoples to human rights requires a reconceptualisation of the model of the monocultural, monoethnic nation state. Albeit, many people around the world are not yet ready for this transformation.

51. The human rights of indigenous peoples have made some progress in recent years, both at the national as at the international level. Yet much more remains to be done. The coming decade will be crucial in determining whether this progress will continue and become consolidated, or whether it will flitter away as only one more utopian aspiration that was not followed up with sufficient vigour and persistence.