

## **A RIGHTS-BASED APPROACH TO PUBLIC PARTICIPATION AND LOCAL MANAGEMENT OF NATURAL RESOURCES**

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### **ABSTRACT**

International legal instruments manifest a recognition by the global community of the importance of local communities, especially indigenous populations, in sustainable management of biological resources. The issue is one that concerns both human rights and environmental protection, two of the fundamental values and aims of modern international society. At Rio and after, the emphasis was placed on identifying and articulating procedural rights that can serve the aim of environmental protection, especially rights to environmental information, public participation, and remedies for environmental harm. Today, both environmental texts and human rights texts grant rights of public participation in environmental decision-making and suggest the importance of local management of forests and other resources. Specific human rights guarantees have been supplemented by the jurisprudence of supervisory organs applying the norms in an environmental context. Indigenous peoples have been afforded particular rights in the light of their traditional links to their lands. Farmers also benefit from some international guarantees. The full implementation of the rights afforded would be a major step in both human rights and environmental protection.

### **INTRODUCTION**

Rural communities, especially indigenous peoples and forest dwellers, have sustainably used and managed their surrounding biological resources for centuries. They have developed important technologies and arts, mastering crop varieties and irrigation methods, maintaining delicate ecosystems, and sustainably using flora and fauna. Indigenous peoples' and local communities' knowledge is thus vital to conserving and sustainably using forests.

At present, both local communities and the natural resources on which they depend are rapidly diminishing. By one estimate, 85 Brazilian indigenous groups disappeared in the first half of the twentieth century<sup>2</sup> as their traditional forest lands were consumed. These facts raise both human rights and environmental concerns which may be answered through developing and applying legal techniques that support local participation in decision-making and management of natural resources.

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<sup>2</sup> D. RIBEIRO, DE INDIOS E A CIVILIZACAO (1965).

## HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

The international protection of human rights and environmental protection represent two of the fundamental values and aims of modern international society. While each subject area has developed in large part independently of the other, the earlier evolution of human rights law has influenced and sometimes inspired innovations in international environmental law. In turn, the emergence of concern for the environment has encouraged international lawyers and activists, at least since the 1972 Stockholm Conference on the Human Environment, to explore and attempt to understand and utilize the interrelationship and even interdependence of human rights and environmental protection. As these efforts have multiplied, the two fields have undergone a degree of convergence despite differences in priorities and emphases.

Some human rights guarantees have been *incorporated into international environmental instruments*. This approach selects from among the catalogue of human rights those rights most relevant to the aims of environmental protection, in particular rights such as freedom of association for members of non-governmental environmental organizations and the right to information concerning potential threats to the environment. Alternatively, many individuals and groups have *invoked global and regional human rights guarantees and institutions* when environmental harm occurs. This approach is supported by indications of the impact of environmental deterioration on fundamental human rights. A study done in 1998 estimated that 40 percent of the world's deaths can be attributed to environmental factors such as chemical pollutants, tobacco, and malnutrition.<sup>3</sup> Waterborne infections account for 80 percent of all infectious diseases worldwide because some 1.2 billion people in developing countries lack clean and safe drinking water. In many areas industrial and household wastes are dumped directly into rivers and lakes. Air pollution adversely affects the health of 4 billion people. With some 2.5 billion kg of pesticides used worldwide each year – a 50 fold increase over the past 50 years – about 3 million cases of human pesticide poisonings are reported each annually. The human rights approach seeks to ensure that the environment does not deteriorate to the point where the right to life, the right to health, the right to a family and private life, the right to culture, the right to safe drinking water, and other human rights are seriously impaired. As Judge Weeramantry of the International Court of Justice expressed it:

*The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.*<sup>4</sup>

The 1972 Stockholm Conference proclaimed in the oft-quoted Principle 1 of the Final Declaration that:

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<sup>3</sup> Pimental, D., *Ecology of Increasing Diseases: Population Growth and Environmental Degradation*, BIOSCIENCE (October 1998).

<sup>4</sup> Gabcikovo-Nagymaros Case (Hungary-Slovakia), I.C.J., Judgment of Sept. 25, 1997 (Sep. Op. Judge Weeramantry) p. 4.

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*

While this formulation stops short of proclaiming a right to environment, it clearly links human rights and environmental protection. It sees human rights as a fundamental goal and environmental protection as an essential means to achieve the "adequate conditions" for a "life of dignity and well-being" that are guaranteed.

Almost twenty years later, in resolution 45/94, the UN General Assembly recalled the language of Stockholm, stating that it:

*Recognizes that all individuals are entitled to live in an environment adequate for their health and well-being; and calls upon Member States and intergovernmental and non-governmental organizations to enhance their efforts towards ensuring a better and healthier environment.<sup>5</sup>*

At Rio and after, the emphasis was placed on identifying and articulating procedural rights, especially those of environmental information, public participation, and remedies for environmental harm. The Rio Declaration promotes individual rights to information, participation and remedies although it avoids rights language, calling for public participation on the ground of efficiency: "Environmental issues are best handled with the participation of all concerned citizens at the relevant level" (Principle 10). Principle 10 goes on, however to provide that individuals shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The imperative "shall" contrasts with the numerous use of "should" in other Rio Principles and indicates the importance of the issue to the participating states.

This paper looks at the environmental and human rights instruments that support rights of public participation in environmental decision-making and local management of natural resources. It gives particular focus to the rights of local communities and indigenous peoples.

## **PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING**

The process by which rules emerge, how proposed rules become norms and norms become law, is highly important to the legitimacy of the law and legitimacy in turn affects compliance. To a large extent, legitimacy is a matter of participation: the governed must have and perceive that they have a voice in governance through representation, deliberation or some other form of action. Participation may take place through elections, grass roots action, lobbying, public speaking, hearings, and other

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<sup>5</sup> *Need to Ensure a Healthy Environment for the Well-Being of Individuals*, G.A. Res. 45/94, U.N. GAOR, 45<sup>th</sup> Sess., U.N. Doc. A/RES/45/94 (1990).

form of governance whereby various interests and communities participate in shaping the laws and decisions that affect them.

The major role played by the public in environmental protection is participation in decision-making, especially in environmental impact or other permitting procedures. Public participation is based on the right of those who may be affected, including foreign citizens and residents, to have a say in the determination of their environmental future. As noted above, the Rio Declaration, Principle 10, recognizes a right to public participation. The preparation of the Rio Conference was itself an important step in encouraging the participation of non-governmental organizations and the representatives of economic interests. The Global Forum of Rio, a meeting of non-governmental organizations parallel to the official conference, represented world public opinion in favor of conserving the world's ecosystems. The Rio Declaration reflects and confirms the importance of this opinion. In addition to Principle 10, the Declaration includes provisions on the participation of different components of the population: women (Principle 20), youth (Principle 21), and indigenous peoples and local communities (Principle 22). The democratization of the international negotiating process reflected in the Declaration is a fundamental contribution of the Rio Conference.

Public participation also is emphasized in *Agenda 21*. The Preamble to Chapter 23 states:

*One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.*

Section III identifies major groups whose participation is needed: women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists, and farmers. *Agenda 21* calls for public participation in environmental impact assessment procedures and participation in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work. *Agenda 21* encourages governments to create policies that facilitate a direct exchange of information between the government and the public in environmental issues, suggesting the EIA process as a potential mechanism for participation.

The right to participate has two components: the right to be heard and the right to affect decisions. Principle 23 of the 1982 *World Charter for Nature* provides most explicitly:

*All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct*

*concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.*

Most recent multilateral and many bilateral agreements contain references to or guarantees of public participation. The *Climate Change Convention*, Article 4l(i) obliges Parties to promote public awareness and to "encourage the widest participation in this process including that of non-governmental organizations." The *Convention on Biological Diversity* allows for public participation in environmental impact assessment procedures in Article 14(1)(a). Outside the UNCED context, the 1991 *Espoo Convention on Environmental Impact Assessment in a Transboundary Context* requires states parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm. In a final decision on the proposed activities, the state must take due account of the environmental impact assessment, including the opinions of the individuals in the affected area. The *Desertification Convention* goes furthest in calling for public participation, embedding the issue throughout the agreement. Article 3(a) and (c) begins by recognizing that there is a need to associate civil society with the actions of the State. The treaty calls for an integrated commitment of all actors--national governments, scientific institutions, local communities and authorities, and non-governmental organizations, as well as international partners, both bilateral and multilateral.<sup>6</sup> Other agreements referring to public participation are the:

- Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes* (Geneva, November 18, 1991), Article 2(3)(a)(4);
- Convention on the Protection and Utilization of Transboundary Rivers and Lakes* (Helsinki, March 17, 1992), Article 16;
- Convention on the Transboundary Effects of Industrial Accidents* (Helsinki, March 17, 1992), Article 9;
- Convention for the Protection of the Marine Environment of the Baltic Sea* (Helsinki, April 9, 1992), Article 17;
- Convention for the Prevention of Marine Pollution of the North-East Atlantic* (Paris, September 22, 1992), Article 9;
- Convention on Civil Responsibility for Damage resulting from Activities Dangerous to the Environment* (Lugano, June 21, 1993), Article 13-16;
- North American Convention on Cooperation in the Field of the Environment* (Washington, D.C., September 14, 1993), Article 2(1)(a), 14;
- Convention on Cooperation and Sustainable Development of the Waters of the Danube* (Sofia, 29 June 1994), Article 14;
- Protocol to the 1975 Barcelona Convention on Specially Protected Zones and Biological Diversity in the Mediterranean* (Barcelona, June 10, 1995), Article 19;
- Joint Communique and Declaration on the Establishment of the Arctic Council* (Ottawa, September 19, 1996), Preamble and Articles 1(a), 2, 3(c);
- Kyoto Protocol to the United Nations Framework Convention on Climate Change* (December 10, 1997), Article 6(3).

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<sup>6</sup> See also, Articles 10(2)(e), 13(1)(b), 14(2), 19, and 25.

The various international efforts to promote environmental rights in environmental instruments produced a landmark agreement on June 25, 1998, when thirty-five states and the European Community signed a *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*.<sup>7</sup> The Convention builds on prior texts, especially Principle 1 of the Stockholm Declaration. Indeed, it is the first environmental treaty to incorporate and strengthen the language of Principle 1. The Preamble expressly states that ‘every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.’ The following paragraph adds that to be able to assert the right and observe the duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. These provisions are repeated in Article 1 where states parties agree to guarantee the rights of access to information, public participation, and access to justice. The Convention acknowledges its broader implications, expressing a conviction that its implementation will ‘contribute to strengthening democracy in the region of the UNECE.’

The Convention obliges states parties to collect and publicly disseminate information, and respond to specific requests. (Article 4-5) Each party is to prepare and disseminate a national report on the state of the environment at three to four year intervals. In addition, it is to disseminate legislative and policy documents, treaties, and other international instruments relating to the environment. Each party must ensure that public authorities, upon request, provide environmental information to a requesting person without the latter having to state an interest. Public authorities means, in addition to government bodies, any natural or legal person having public responsibilities or functions or providing public services. The information has to be made available within one month, or in exceptional cases up to three months. In addition to providing information on request, each state party must be pro-active, ensuring that public authorities collect and update environmental information relevant to their functions. This requires that each state party establish mandatory systems to obtain information on proposed and existing activities which could significantly affect the environment. This provision is clearly aimed at the private sector and is supplemented by Article 5(6) which requires states parties to encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, through eco-labeling, eco-auditing or similar means. States parties are also to ensure that consumer information on products is made available.

To enhance the effectiveness of the Convention, the states parties must provide information about information, i.e. the type and scope of information held by public authorities, the basic terms and conditions under which it is made available and the procedure by which it could be obtained. The Convention also foresees the establishment of publicly-accessible electronic sites that should contain reports on the

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<sup>7</sup> The Convention was sponsored by the United Nations Economic Commission for Europe and is open for signature by the 55 members of the UNECE, which includes all of Europe as well as the United States, Canada, and states of the former Soviet Union. States having consultative status with the UNECE may also participate.

state of the environment, texts of environmental legislation, environmental plans, programs and policies, and other information that could facilitate the application of national law.

The treaty provides numerous exceptions in Article 4(4) to the duty to inform, in the light of other political, economic and legal interests, but the Convention states that all exceptions are to be read restrictively and the state may provide broader information rights than those contained in the Convention. In addition, where non-exempt information can be separated from that not subject to disclosure, the non-restricted information must be provided. Any refusal to provide information must be in writing and with reasons given for the refusal. Reasonable fees may be charged for supplying information. The government has special disclosure obligations in case of any imminent threat to human health or the environment. Despite these interpretive provisions, many environmental groups have expressed concern that the exceptions will result in the withholding of extensive and crucial information.

Public participation is guaranteed in Articles 6-8, and is required in regard to all decisions on whether to permit or renew permission for industrial, agricultural and construction activities listed in an Annex to the Convention as well as other activities which may have a significant impact on the environment. The public must be informed in detail about the proposed activity early in the decision-making process and given time to prepare and participate in the decision-making. During the process, the public must have access to all relevant information on the proposal including the site, description of environmental impacts, measures to prevent and/or reduce the effects, a non-technical summary, an outline of the main alternatives, and any reports or advice given. Public participation can be through writing, hearings or inquiry. All public comments, information, analyses or opinions shall be taken into account by the party in making its decision. All decisions shall be made public, along with the reasons and considerations on which the decision is based.

In addition to providing for public participation regarding decisions on specific projects, the Convention calls for public participation in the preparation of environmental plans, programs, policies, laws and regulations. Further, states parties are to promote environmental education and to recognize and support environmental associations and groups.

The provisions of Article 9 on access to justice mirror many human rights texts in requiring proceedings before an independent and impartial body established by law. Each state party must provide judicial review for any denial of requested information, and a remedy for any act or omission concerning the permitting of activities and 'acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.' Standing to challenge permitting procedures or results is limited to members of the public having a sufficient interest or maintaining impairment of a right; however, the Convention provides that environmental non-governmental organizations 'shall be deemed' to have sufficient interest for this purpose. Standing to challenge violations of environmental law is open to the public, including NGOs 'where they meet the criteria, if any, laid down in national law.' (Article 9(3))

The Convention's topic has induced the drafters to take small steps towards the creation of compliance procedures and enhancement of public participation on the international level. Primary review of implementation is conferred on the Meeting of the Parties, at which non-governmental organizations 'qualified in the fields to which

this Convention relates' may participate as observers if they have made a request and not more than one-third of the parties present at the meeting raise objections. (Article 10) This is a common provision in international environmental agreements. The Convention adds, however, a provision on compliance review (Article 15) which mandates the establishment by the Meeting of the Parties of a 'non-confrontational, non-judicial and consultative' optional arrangement for compliance review, which 'shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.' This tentative language marks the first time a petition procedure has been contemplated in an international environmental agreement.

If the compliance procedure is established when the Aarhus Convention comes into force, it will mark an important step in enhancing the effectiveness of international environmental agreements. At present, nearly all environmental agreements vest authority over issues of implementation and compliance in the Conference or Meeting of the Parties, a plenary and political body. In some cases small secretariats are created, but which lack broad competence. It is largely due to the weaknesses in existing environmental compliance mechanisms that many persons concerned with environmental rights have turned to human rights law.

The right to public participation also is widely expressed in human rights instruments. Article 21 of the *Universal Declaration of Human Rights* affirms the right of everyone to take part in governance of his or her country, as does the *American Declaration of the Rights and Duties of Man* (Article 20) and the *African Charter* (Article 13). Article 25 of the *International Covenant on Civil and Political Rights* provides that citizens have the right, without unreasonable restrictions "to take part in the conduct of public affairs, directly or through freely chosen representatives . . . ." The *American Convention* contains identical language in Article 23.

In sum, the right to participation is so widely expressed that almost no international environmental treaty omits it from its operative provisions. In human rights law, it is one of the fundamental rights guaranteed by all human rights instruments, being inherent in the rule of law and democratic governance. As such, the right to participation may be considered to form part of the corpus of general international law.

## **RIGHTS OF INDIGENOUS PEOPLES**

There are over 200 million indigenous people in the world and many of them live in some of the world's most vulnerable ecosystems: the Arctic and tundra, the tropical rainforests, the boreal forests, riverine and coastal zones, mountains and semi-arid rangelands. In the last 40 years or so, these lands have come under pressure as governments, development banks, transnational corporations and entrepreneurs search out resources to supply a growing demand. The territories used and occupied by indigenous peoples often are seen as important repositories of unexploited riches. Once largely inaccessible, these regions and their mineral deposits, hydroelectric potential, hardwoods, oil and new farm and pasture lands have been put within reach by modern technology.

Indigenous peoples<sup>8</sup> are particularly affected by environmental harm. As found by the special rapporteur on human rights and the environment:

*indigenous peoples have a special relationship with the land and the environment in which they live. In nearly all indigenous cultures, the land is revered; "Mother Earth" is the core of their culture. The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations. According to the indigenous view, land should not be torn open and exploited--this is a violation of the Earth--nor can it be bought, sold or bartered. Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management. These systems, including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing, were for a long time considered inefficient, unproductive and primitive. However, as world opinion grows more conscious of the environment and particularly of the damage being done to fragile habitats, there has been a corresponding interest in indigenous land-use practices. The notion of sustainability is the essence of both indigenous economies and their cultures.*<sup>9</sup>

Where there is unrestrained deforestation, forest-dwelling indigenous peoples may be forced from their traditional homelands, may thereby be denied a means of livelihood, may be driven to take refuge among strangers and, in the most extreme cases, may fall victim to diseases against which they have no immunity. Similarly, desertification, a phenomenon which is as much man-made as it is an act of nature, has led many self-sufficient pastoralists to an impoverished existence in refugee camps. Even smaller scale environmental sacrifices--the inundation caused by dam-building, mining, prospecting and so on--have affected indigenous peoples all over the world, causing them to leave lands they have occupied for generations, often without their willing consent or any compensation.

The instruments adopted at the United Nations Conference on Environment and Development (UNCED) recognize the special role of indigenous peoples role in developing traditional practices that are essential for conserving and sustainably using the environment in general and biological resources in particular. The Convention on Biological Diversity, for example, calls on its parties to encourage customary use of biological resources, exchange traditional and indigenous knowledge, and develop methods of cooperation for the development and use of indigenous and traditional technologies.<sup>10</sup> Article 8 on in situ conservation requires each state to preserve

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<sup>8</sup>Although there is no clear definition of the term "indigenous peoples", a certain number of criteria have emerged in the course of discussions in the Working Group on Indigenous Populations. Indigenous peoples are the descendants of the original inhabitants of territories since colonized by foreigners; they have distinct cultures which set them apart from the dominant society; many have, until comparatively recently, had a high degree of control over their development; indigenous peoples have a strong sense of self-identity.

<sup>9</sup> Commission on Human Rights, Human Rights and the Environment, Preliminary Report Prepared by Mrs. Fatma Zhora Ksentini, Special Rapporteur, E/CN.4/Sub.2/1991/8, 2 August 1991, para. 25.

<sup>10</sup> Convention on Biological Diversity, adopted June 5, 1992, 31 I.L.M. 818 (1992), Articles 10, 17, 18.

indigenous and local communities' practices and to promote wider application of traditional knowledge, innovations, and practices. Rio Declaration Principle 22 provides that "[s]tates should recognize and duly support the identity, culture and interests [of indigenous peoples and local communities] and enable their effective participation in the achievement of sustainable development."

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Agenda 21, Chapter 21 also emphasizes the importance of traditional knowledge and practices. With regard to forest and vegetation protection, it requires governments to research indigenous people's traditional uses of forest resources, to collect and record indigenous farming knowledge, and facilitate the transfer of environmentally sound technologies.<sup>14</sup> Chapter 15 more generally addresses the role of indigenous and local communities, calling for action "with the support of indigenous people and their communities" and for mechanisms to involve indigenous and local communities in ecosystem conservation and management. It mentions existing treaties<sup>15</sup> and the draft universal declaration on indigenous rights and provides that indigenous people and other communities "may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas." It calls on governments in particular to provide incentives for conserving biodiversity through traditional methods of agriculture, agroforestry, forestry, and range and wildlife management.<sup>16</sup>

Among environmental agreements, the most innovative in regard to indigenous rights and responsibilities is the *Declaration on the Establishment of the Arctic Council*.<sup>17</sup> A major feature of the Council is the involvement of indigenous peoples as Permanent Participants, based on "recognition of the special relationship and unique contributions to the Arctic of indigenous peoples and their communities" (Preamble). Three organizations, the Inuit Circumpolar Conference, the Sami Council and the Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation, are specifically included in the Declaration. Other groups may participate, up to one less than the number of member states, if they meet the criteria

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<sup>13</sup> Convention on Biological Diversity, adopted June 5, 1992, 31 I.L.M. 818 (1992), Articles 10, 17, 18.

<sup>14</sup> Agenda 21, paras. 11.4(g), 14.26(b) and 14.28(b).

<sup>15</sup> It should be noted that traditional hunting rights of Arctic indigenous peoples are regularly accorded in international conventions on whaling and fishing. See Chapter VIII.

<sup>16</sup> Agenda 21, para. 15.5(d). Chapter 26 indicates some of the means that might be used to secure the involvement of indigenous peoples and local communities including arrangements to strengthen active participation in national formulation of policies, laws, and programs; and involving indigenous people and their communities in national and local resource management and conservation strategies. States may also provide for self-management of resources.

<sup>17</sup> Canada-Denmark-Finland-Iceland-Norway-the Russian Federation-Sweden-United States, *Declaration on the Establishment of the Arctic Council*, Ottawa, September 19, 1996, *reprinted in* 35 I.L.M. 1382 (1996).

set forth in Article 2 of the Declaration including having a majority Arctic indigenous constituency. The category of Permanent Participation is created, according to the Declaration “to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.”

On the human rights side, the only international human rights treaty specifically concerned with indigenous peoples is the International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries.<sup>18</sup> Its purpose is to provide for indigenous peoples to enjoy the benefits of development while ensuring that their diversity is respected and protected. Article 2 generally requires governments to protect the rights of indigenous peoples and to guarantee respect for their integrity. Article 7 guarantees participation in decision-making processes. It provides that indigenous peoples have the right to decide development priorities affecting their lives and lands. They are entitled to control their own economic, social, and cultural development and participate in plans for national and regional development that may affect them directly. Governments also must take measures, in cooperation with indigenous peoples, to protect and preserve their environments and territories (Art. 7.4) Article 13 adds that governments shall respect the special importance of indigenous peoples’ relationship with their lands, particularly the collective aspects of this relationship.

Indigenous groups also may invoke provisions of the *Covenant on Civil and Political Rights* to protect their land and culture from environmental degradation. The United Nations Human Rights Committee has interpreted Article 27<sup>19</sup> of the Covenant on Civil and Political Rights in this broad manner:

*With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. ... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole<sup>20</sup>*

The invocation of Article 27 presents the matter under the rubric of the right to cultural life rather than the right to physical life, even though the survival of the group,

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<sup>18</sup> ILO convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, 28 I.L.M. 1382 (1989).

<sup>19</sup> CCPR Article 27 provides that members of minority groups “shall not be denied the right, kin community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” CCPR, art. 27.

<sup>20</sup> General Comment 23 paras. 7, 9 in *Compilation* at 41. See *Kitok v. Sweden*, Comm. 197/1985, II *Official Records of the Human Rights Committee 1987/88*, UN Doc. CCPR/7/Add.1, at 442 (Swedish 1971 Reindeer Husbandry Act held not to violate rights of an individual Sami as a reasonable and objective measure necessary for the continued viability and welfare of the minority as a whole).

*qua* group, may be at stake. In a rare case decided on the merits, the Committee decided that Article 27 was not violated by the extent of stone-quarrying permitted by Finland in traditional lands of the Sami.<sup>21</sup> The applicants, forty-eight Sami reindeer breeders challenged the decision of the Central Forestry Board to permit the quarry. The Committee observed that a state may wish to encourage development or economic activity, but found that the scope of its freedom to do so must be tested by reference to the obligations of the state under article 27. The Committee explicitly rejected the European doctrine of margin of appreciation, holding that measures whose impact amount to a denial of the right to culture will not be compatible with the Covenant, although those which simply have a “certain limited impact on the way of life of persons belonging to a minority” will not necessary violate the treaty. The Committee also referred to its General Comment on Article 27, according to which measures must be taken “to ensure the effective participation of members of minority communities in decisions which affect them.”

The Committee concluded that the amount of quarrying which had taken place did not constitute a denial of the applicants’ right to culture. It noted that they were consulted and their views taken into account in the government’s decision. Moreover, the Committee determined that measures were taken to minimize the impact on reindeer herding activity and on the environment. In regard to future activities, “if mining activities in the Angeli area were to be approved on a large scale and significantly expanded” then it might constitute a violation of Article 27. According to the Committee, “[t]he State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.”<sup>22</sup>

In *Bernard Ominayak and the Lubicon Band v. Canada*,<sup>23</sup> applicants alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands. The Committee characterized the claim as one of minority rights under Article 27 and found that historic inequities and more recent developments, including the oil and gas exploitation, were threatening the way of life and culture of the Band and thus were in violation of Article 27.

In the Inter-American system, the Commission established a link between environmental quality and the right to life in response to a petition brought on behalf of the Yanomani Indians of Brazil. The petition alleged that the government violated the *American Declaration of the Rights and Duties of Man*<sup>24</sup> by constructing a highway through Yanomani territory and authorizing the exploitation of the territory’s resources. These actions led to the influx of non-indigenous who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the

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<sup>21</sup> Communication No. 511/1992, Ilmari Lansman et al. v. Finland, Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996).

<sup>22</sup> Other cases involving Sami reindeer breeders include Communication No. 431/1990, O.S. et al. v. Finland, decision of 23 March 1994, and Communication No. 671/1995, Jouni E. Lansmann et al. v. Finland, decision of 30 October 1996.

<sup>23</sup> Communication No. 167/1984, Decisions of the Human Rights Committee, UN Doc. CCPR/C/38/D/167/1984 (1990).

<sup>24</sup> Pan American Union, Final Act of the Ninth Conference of American States, Res. XXX, at 38 (1948), reprinted in OAS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (1996).

government had violated the Yanomani rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI).<sup>25</sup>

Apart from deciding the individual complaints brought to it and discussed above, the Inter-American Commission on Human Rights has the authority to study the human rights situation generally or in regard to specific issues with a member state of the OAS. In two recently published studies, the Commission devoted particular attention to environmental rights in Ecuador<sup>26</sup> and Brazil.<sup>27</sup> In regard to Ecuador, the Commission noted that it had been examining the human rights situation in the Oriente region for several years, in response to claims that oil exploitation activities were contaminating the water, air and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness.<sup>28</sup> It found, after an on-site visit, that both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts of oil exploitation in their drinking and bathing water, in the air, and in the soil. The inhabitants were unanimous in claiming that oil operations, especially the disposal of toxic wastes, jeopardized their lives and health. Many suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. In addition, many claimed that pollution of local waters contaminated fish and drove away wildlife, threatening food supplies.

The Commission in its discussion of relevant human rights law emphasized the right to life and physical security. It stated that

*[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.*<sup>29</sup>

In this regard, States Parties may be required to take positive measures to safeguard the fundamental and non-derogable rights to life and physical integrity, in particular to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury.

The Commission also directly addressed concerns for economic development, noting that the Convention does not prevent nor discourage it, but rather requires that it take place under conditions of respect for the rights of affected individuals. Thus, while the right to development implies that each state may exploit its natural resources,

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<sup>25</sup> Case 7615 (Brazil), INTER-AM.CH.R., 1984-1985 ANNUAL REPORT 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

<sup>26</sup> Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997)[hereinafter *Report on Ecuador*].

<sup>27</sup> Inter-Am.C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev. 1 (1997).

<sup>28</sup> *Report on Ecuador*, *supra* note 100, v. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report.

<sup>29</sup> *Report on Ecuador*, *id.* at 88.

“the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.”<sup>30</sup> The Commission concluded that

*[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being ...The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.*<sup>31</sup>

The Commission elaborated on these rights, stating that the right to seek receive and impart information and ideas of all kinds is protected by Article 13 of the American Convention. According to the Commission, information that domestic law requires be submitted as part of environmental impact assessment procedures must be “readily accessible” to potentially affected individuals. Public participation is viewed as linked to Article 23 of the American Convention, which provides that every citizen shall enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives.” Finally, the right of access to judicial remedies is called “the fundamental guarantor of rights at the national level.” The Commission quotes Article 25 of the American Convention that provides everyone “the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by th[e] Convention.”

The Commission called on the government to implement legislation enacted to strengthen protection against pollution and to clean up activities by private licensee companies and to take further action to remedy existing contamination and prevent future recurrences. In particular it recommended that the State take measures to improve systems to disseminate information about environmental issues, enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.

The report on Brazil also included a chapter on indigenous rights. Among the problems discussed are those of environmental destruction leading to severe health and cultural consequences. In particular their cultural and physical integrity are said to be under constant threat and attack from invading prospectors and the environmental pollution they create. State protection against the invasions is called “irregular and feeble” leading to constant danger and environmental deterioration.

United Nations and OAS organs have drafted Declarations on the Rights of Indigenous Peoples. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a draft on August 26, 1994, which it submitted to the Commission on Human Rights for further action.<sup>32</sup> The

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<sup>30</sup> *Id.* at 89.

<sup>31</sup> *Id.* at 92, 93.

<sup>32</sup> Resolution 1994/45, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46<sup>th</sup> sess. 1994, *reprinted in* 34 I.L.M. 541 (1995). The chair of the Working Group on Indigenous Peoples also prepared a special study on the protection of the cultural

Commission decided on March 3, 1995 to establish an intergovernmental working group to review the draft. As of its 1998 session, the Commission had not yet approved the Declaration. The OAS Declaration was adopted in the framework of the Inter-American Commission on Human Rights and submitted to the OAS General Assembly for adoption at its June 1998 session in Bogota, Colombia.

Both declarations emphasize the land rights of indigenous peoples, including archaeological and historical sites. Part VI of the U.N. draft details such rights, including the right of indigenous peoples “to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard” (Article 25). Specific protection is also afforded to medicinal plants, animals and minerals. Indigenous peoples have the right to special measures to control, develop and protect their genetic resources, including seeds, medicines, and knowledge of the properties of fauna and flora.. Indigenous are given the right to own, develop control and use the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. Restitution of or compensation for lands taken without free and informed consent is required.

Further environmental protection is afforded in Article 28, which provides that 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. Assistance is to be provided for this purpose. Military activities and storage or disposal of hazardous materials is prohibited, although the former may take place with the free consent of indigenous peoples. Part IV of the U.N. draft contains other procedural rights, including the right of indigenous peoples to participate fully at all levels of decision-making in matters which may affect them.

The U.N. General Assembly, in the context of the International Decade of the World’s Indigenous Peoples (1994-2004), has noted that the goal of the decade is to strengthen international cooperation for the solution of problems faced by indigenous peoples in various areas, including the environment. It has called for increased participation of indigenous peoples in activities for the decade, affirming its conviction of their contribution to environmental advancement of all countries of the world.<sup>33</sup>

## **FARMER'S RIGHTS**

The issue of protecting traditional knowledge and local resources is one that goes beyond indigenous peoples to encompass local communities in general, particularly farmers that have been instrumental in conserving, improving and contributing to plant genetic resources. The international community is divided over whether intellectual property rights or other equitable considerations should apply to farmers’ developments of plant genetic resources or whether plant genetic resources constitute part of the common heritage of mankind or the natural resources of sovereign states. The FAO *Global System for the Conservation and Utilization of Plant Genetic*

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and intellectual property of indigenous peoples. See E.-I. Daes, *Discrimination against Indigenous Peoples: Protection of the Heritage of Indigenous People*, E/CN.4/Sub.2/1994/31.

<sup>33</sup> G.A. Res. 52/108 of December 12, 1997, A/52/641.

*Resources* attempts to reconcile competing interests by providing in an International Undertaking that such resources are the common heritage, but subject to the overriding sovereign rights of nations over their genetic resources.

The debate over the place of farmers' rights in this system remains unresolved, in spite of the FAO Resolution 5/89 that accepts the concept of farmers' rights arising from their contributions, rights it sees as vested in the international community as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuation of their contributions. At the Fourth International Technical Conference on Plant Genetic Resources, held in 1996, with participants from 150 countries, the issue was particularly contentious. Nonetheless, a reference to farmers rights, as defined in FAO resolution 5/89 remained in the text. The final text of the *Leipzig Declaration on Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture* recognizes "the needs and individual rights of farmers and, collectively, where recognized by national law, to have non-discriminatory access to germplasm, information, technologies and financial resources."

## CONCLUSION

The interrelationship between human rights and environmental protection is undeniable. Human rights depend upon environmental protection, and environmental protection depends upon the exercise of existing human rights such as the right to information and the right to public participation. Recently, the concept of environmental justice has come to play an important role in international environmental law and policy as a means of integrating human rights and environmental law, even as the content and scope of the term remains under discussion. It is increasingly recognized that favorable natural conditions are essential to the fulfillment of human desires and goals. Preservation of these conditions is a basic need of individuals and societies. Environmental justice encompasses preserving environmental quality, sustaining the ecological well-being of present and future generations, and reconciling competing interests. There is also an element of distributional justice, as it has become clear that the poor and marginalized of societies, including the global society, disproportionately suffer from environmental harm.

The full implications of the right of public participation and other human rights for indigenous peoples and local communities extend beyond the right to be heard in decision-making by a third party to encompass implementing and in some cases making the decision itself, or local management. As was stated in the Rio Declaration and experience has shown, local management can improve environmental conditions. As a principle of governance, decentralized decision-making is widely favored, particularly in respect to the application of environmental norms, whether the latter are adopted globally, regionally, or nationally. Many environmental policies and instruments include this approach, referring to it as the principle of subsidiarity. The principle of subsidiarity, which is a general organizing principle of governance, means *making and implementing decisions at the lowest effective level of government or other organization*. Each higher level of government is view as "subsidiary" to the level below it, serving as a safety net to step in when the lower level cannot resolve problems for whatever reason. It is a libertarian approach that suggests as a starting point that individuals should be permitted without interference to resolve all problems

they have the means and capacity to resolve. Only when the scope of the problem exceeds individual capacities should the next higher level of governance (family or community) step in as the (subsidiary) decision-maker. If the local community is ineffective to resolve the problem, the state steps in and so on. International regulation and implementation is needed and appropriate for problems of global scope such as depletion of the ozone layer and climate change.

Subsidiarity is an organizing principle of the European Union and also is found in many sections of Agenda 21. The *Treaty of European Union* Article 3B provides that in conformity with the principle of subsidiarity Community action is to be taken only when the objectives can be attained better through regional action than through measures taken by the individual member states. Chapter 18 of Agenda 21, respecting integrated water resource management, similarly calls for delegation of water resources management to the lowest appropriate level, including decentralization of government services to local authorities, private enterprises and communities. The role of the national level is to develop integrated water resources planning and management in the framework of the national planning process and to establish regulation and monitoring of freshwater, based on national legislation and economic measures.

The *Convention to Combat Desertification* reflects the subsidiarity principle throughout its provisions; indeed, its dominant feature is its emphasis on the role of local people and communities. The Convention requires states to channel authority and resources to the local land users and communities, including NGOs. Rather than create new norms regarding soil, its focus is on empowerment and facilitating networks of action. The first principle of the Desertification Convention (Article 3(a)) commits government to encourage the full participation of local communities in developing and implementing environmental programs.

The core of the Desertification Convention is the obligation to develop National Action Programs. The Convention devotes far less attention to the content of the programs than it does to the process by which they are adopted. It requires participatory mechanisms, including representatives of government, local communities, and land users, and calls for ongoing discussions and effective communication between local and national levels. Article 19 provides guidance for capacity-building. The *London Protocol on Water and Health to the UN Convention on Transboundary Watercourses* directly calls for application of the subsidiarity principle, stating that action to manage water resources should be taken at the lowest appropriate level (Article 5(1)(b)).

Finally, the *Convention on Biological Diversity* indicates the preference for decentralized implementation. Its call for *in situ* conservation is linked to the role of indigenous and local communities and women in the conservation and sustainable use of biological diversity. Among the actions called for, states are to support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced (Article 10(d)).

Subsidiarity thus includes a preference for local control. It is based on an assumption that decentralized decision-making will enhance personal autonomy, cultural diversity, and public participation, facilitating choices based on the particularities of local conditions, especially where the local population will bear the highest environmental and developmental costs. At the international level, it also reflects traditional notions of state sovereignty.

Problems that transcend the community and/or cannot be effectively resolved locally will necessitate solutions at the national, regional or global level. In some cases, political obstacles to local action must be overcome by regulation at the national level. Similarly, international environmental law may be required to surmount national political reluctance to adopt sound environmental policies, which is especially likely when environmental damage may be exported at relatively low cost. This is one basis of international watercourse agreements that control the emissions of upstream states and marine environment conventions regulating land-based pollution of the seas. Shared resources, transboundary ecosystems that form a physical unit, and international commons obviously require international regulation by the states concerned. Only with the cooperation of all levels of governance, from local communities to the international community of states and non-state actors, can sustainable development and protection of natural resources be achieved.