From Protection to Participation?
Shifting Perceptions towards Indigenous Peoples under International Law

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Introduction

“Indigenous Peoples”, as a legal category (Kingsbury 2001:189, 244), has both human rights and functional considerations. The two international conventions on indigenous peoples’ rights (ILO Convention No. 107 and ILO Convention No. 169) depict indigenous peoples as vulnerable societal groups to whom special protection must be afforded. In legal literature, in addition, the definition of indigenous peoples heightens indigenous peoples’ past and on-going situation of oppression, disenfranchisement and exploitation (cf., for example, Daes 1996:22 or Kingsbury 1998:414, 455). Based on this conception, the focus of the initial work of international organisations with regard to indigenous issues was placed on the protection of indigenous peoples against cultural assimilation and dislocation (Oguamanam 2004:348, 362). However, some international organisations are progressively leaving this human rights-based approach aside and are favouring a “functional approach” based on the contribution of indigenous peoples to the realisation of a certain set of common aims (Cabrera 2012:263, 281-289). Under this “functional approach”, indigenous peoples are regarded as equal partners in international governance with special participatory rights.
Some indigenous representatives have already subscribed to this new legal discourse in order to advance their claims for their own legal status and self-determination both at the national and international level. Against this backdrop, this paper analyses the implications of both the human rights-based and the “functional approach” on the understanding of indigenous peoples by international law. In doing so, this paper argues that the use of a “functional approach” implies the recognition of indigenous peoples as emerging subjects of international law with special participatory rights. Furthermore, this approach calls for a re-examination of the — for a long time paternalistic — relationship between indigenous peoples and states.¹

This paper has been divided into three parts. The first part explains the traditional human rights-based approach to indigenous peoples under international law and some of its limitations. The second part elaborates on the “functional approach” to indigenous peoples. It analyses the different ways in which indigenous peoples are expected to contribute to the achievement of certain aims. The third part examines the manner in which the “functional approach” is reflected in the work of international organisations concerning indigenous issues and the legal implications involved.

**Human Rights-Based Approach**

From a human rights point of view, indigenous peoples are represented as a historically disenfranchised and vulnerable group, which is in need of special protection (Cabrera 2012:266). This portrayal was incorporated into the first international convention concerning indigenous peoples, namely ILO Convention No. 107. This document situates indigenous peoples in a “less advanced stage” of development and promotes their integration into non-indigenous society (Preamble, Para. 2; Art. 1, Para. 1 (a), Art. 2, Para. 1).² This perspective was criticised by some indigenous peoples’ advocates to be “assimilationist” as it threatens the preservation of the indigenous identity (Barsh 1987:756; Anaya 2004a:55). This emphasis on indigenous peoples’ integration and development was abandoned in the late-1980s.

¹ In May 2012, the UN Deputy Secretary General opened the 11th session of the Permanent Forum on Indigenous Issues inspiring indigenous delegates converged at the meeting to move towards the day when indigenous peoples are heard, listened to and empowered (UN News Service 2012). Similar wording was used some years ago by the Executive Director of the International Fund on Agricultural Development, who pointed out that that the empowerment of indigenous peoples mattered deeply to the organisation she represented (IFAD 2008).

² This understanding has its roots in the Berlin Conference of 1885 (also called the Kongokonferenz). This conference established the duty of some European countries exercising, at that time, colonial domination or other forms of political control in Africa to “civilise” and protect the Aborigines. Article 6 of the General Act of the Berlin Conference reads, “All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.”
Instead, respect for indigenous peoples’ own way of living became the central focus of the second international convention on indigenous peoples’ rights (ILO Convention No. 169, Preamble, Para. 4 and Art. 5 (b)) and other non-binding human rights instruments addressing indigenous peoples’ rights (e.g. Human Rights Committee, General Comment No. 23 1994; Committee on the Elimination of Racial Discrimination, General Recommendation No. 23 1997). The need to repair the vulnerable situation of indigenous peoples still remains in the current human rights discourse, but the means of achieving this aim shall be respectful of indigenous peoples’ cultural integrity. This implies an understanding of the human right to culture as a right with a collective dimension.

This human rights-based understanding is also reflected in the classical definitions of indigenous peoples in international law, as the one elaborated by UN Special Rapporteur José Martínez Cobo in 1982. The definition reads:

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

(Martínez Cobo 1983:Paras. 379, 380)

Some of the criteria laid down in this definition have human rights implications. The criterion of historical precedence, for example, advocates the acknowledgment of indigenous peoples as first nations entitled with self-determination (Engle 2010:96). The non-dominant situation of indigenous peoples speaks for an obligation of the international community to protect indigenous peoples against racial or legal discrimination (Committee on the Elimination of Racial Discrimination, General Recommendation No. 23, Para. 4 (b)). The criterion of cultural distinctiveness is associated with the obligation to respect indigenous peoples’ traditional lifestyles (Human Rights Committee, General Comment No. 23, Para. 7).

The human rights-based approach to indigenous peoples has some limitations. One of these limitations lies in the use of historical arguments to justify the recognition of indigenous peoples’ right to self-determination. Originally, the term “indigenous” was shaped within the context of colonialism in America and Australasia. It was used to define those who inhabited the country before colonialism (de Vitoria 1917:116). Today, there is an increasing number of ethnic groups from Asia, Africa and even from Europe who do not fit within this classical understanding of “indigenous”, but

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3 This has been the position of North American indigenous groups to claim both internal and external forms of self-determination (Engle 2010:77).
seem to face similar cultural or racial discrimination within their countries. Accordingly, the scope of application of this seemingly human rights-based definition of indigenous peoples is temporally and geographically limited.

A second limitation of the human rights-based approach is its foundation on an absolute understanding of indigenous peoples as a non-dominant sector of the society. There are, however, several situations in which indigenous peoples, in fact, represent the majority of the population and have greater access to power than other non-indigenous groups (see the chapter by Hauser-Schäublin). Within the indigenous sector itself, politically powerful indigenous organisations appear to be privileged over minority indigenous associations (see the chapter by Müller). For this reason, it is essential to critique the label “indigenous” and, thus, its connotation of “repression”.

Despite its aforementioned limitations, the human rights-based approach to indigenous peoples is reflected in some provisions of the UN Declaration on the Rights of Indigenous Peoples. The preamble of the Declaration recalls the “historical injustices”, “colonization” and the on-going situation of dispossession suffered by indigenous peoples (Paras. 5, 6 and 9).

**Functional Approach**

While indigenous peoples are subjects of special protection in the human rights discourse, in other fields of international law (international environmental law, international law of culture, law of development cooperation, etc.) indigenous peoples play a more active role. This approach, which is understood as a “functional approach”, centres upon the potential contribution of indigenous peoples to the attainment of certain international goals. These include, among others, environmental protection, food security, human health, economic development cooperation, and promotion of cultural diversity. The following paragraphs provide an examination of these different contributions of indigenous peoples through a “functional” perspective.

**Indigenous Peoples and Environmental Protection**

The first contribution of indigenous peoples relates to environmental protection. Indigenous peoples have often been regarded as good role models of environmentally sustainable living, particularly due to their close attachment to the land (Richardson 2009:338, 340; Tenant 1994:20). The Rio Declaration on Environment and

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4 Critical perspectives on the use of historical arguments as the justification for indigenous peoples’ rights can be found in Aukerman (2000:1011); see also Cabrera (2012:273-278). Self-identified African indigenous communities have argued that they have felt “invisible” to the United Nations (Permanent Forum on Indigenous Issues 2006).

5 This is, for example, the case of some indigenous peoples in Fiji (Minority Rights Groups International 2012:169).

6 A political and sociological analysis on the division within the indigenous sector in Bolivia, as well as on the differential treatment given by the government of Evo Morales (who is well-known as the first indigenous president in Bolivia) to different indigenous organisations can be found in Schilling-Vacaflor (2010).
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Development (principle 22) proclaims indigenous peoples as vital actors in the achievement of sustainable development (see chapters by Sanmukri and Steinebach). Similarly, the Convention on Biological Diversity underscores the important role of indigenous peoples in the use and conservation of biological and genetic resources (Art. 8(j)). This understanding is also reflected in the “Report of the World Commission on Environment and Development: Our Common Future” (World Commission on Environment and Development 1987). It states that indigenous and tribal peoples are,

repositories of vast accumulation of traditional knowledge and experience that links humanity with its ancient origin. Their disappearance is a loss for their larger society, which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems.

(World Commission on Environment and Development 1987:114, 115)

Some scholars criticise the way indigenous peoples have been included in the ecological discourse. Arturo Escobar, for example, notes:

ethnic and peasant communities living in tropical rain-forest areas of the world are finally being recognized as owners of their territories (...), but only to the extent they accept to treat it – and themselves – as reservoirs of capital.

(Escobar 2012:203)

In fact, in many instances, it is indigenous peoples themselves who use this environmental discourse as a means to bolster their classical claims for self-determination, participation and autonomy (Morgan 2004:481-491). The UN Permanent Forum on Indigenous Issues7 now supports the engagement of indigenous peoples in the achievement of environmental objectives of the United Nations (UN Permanent Forum on Indigenous Issues 2008, Para. 4). Furthermore, it has called upon the United Nations (UN) to create mechanisms for indigenous peoples’ participation in relevant negotiations concerning climate change (UN Permanent Forum on Indigenous Issues 2008, Para.30).

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7 The UN Permanent Forum on Indigenous Issues was created in 2000 by the UN Economic and Social Council as one of its advisory bodies on indigenous issues. It is composed of indigenous representatives of different regions of the world. For more information on the role and competences of the UN Permanent Forum on Indigenous Issues, see ECOSOC Res. 2000/22.
Indigenous Peoples and Traditional Knowledge

The second contribution of indigenous peoples lies in the use of their traditional knowledge. From a legal perspective, traditional knowledge encompasses all individual or collective innovations and practices for the conservation of biodiversity, traditional medicine and expressions of folklore, among others, developed by indigenous peoples and carrying a socio-economic value.\(^8\) It has been internationally recognised that the traditional knowledge of indigenous peoples is of enormous significance in the conservation, use and evolution of biodiversity, as well as in the management of climate change (Convention on Biological Diversity, Preamble, Para. 12; The Nagoya Protocol, Preamble, Para. 20; Andean Community of Nations, Decision 391, Preamble, Para. 5; Ottawa Declaration, Preamble, Para. 6) (see Groth 2007). The Arctic Council,\(^9\) for instance, has underscored the importance of the use of Arctic indigenous peoples’ traditional knowledge in the planning and implementation of climate change adaptation measures (Nuuk Declaration 2011:6).

The use of traditional knowledge is also considered as fundamental in meeting the demands of food security and human health. The International Treaty on Plant Genetic Resources for Food and Agriculture underlines the major role of indigenous farmer communities in assuring food and agriculture production through their use of traditional practices (Art. 9, Para. 1). Similarly, the World Health Organisation stresses the importance of facilitating access to traditional medicines of indigenous and local communities on behalf of the global population (2002). This explains the scientific community’s push towards the creation of an international legal regime for access to genetic resources and traditional knowledge involving indigenous communities (Chege Kamau et al. 2010:246, 254).

In light of this, indigenous peoples’ traditional knowledge has become a cross-cutting issue. This has motivated the international community, in general, and international organisations, in particular, to invest time and resources towards the establishment of partnerships with indigenous communities, both at the local and international level (see Sanmukri in this volume).\(^10\) In fact, as will later be explained, traditional knowledge has been, in many cases, the springboard used by indigenous peoples to gain access to international forums (UN Permanent Forum on Indigenous Issues 2008, Para. 30).

Indigenous Peoples and Cultural Diversity

Another functionality of indigenous peoples is the promotion of cultural diversity. The international community affirmed in the Convention on the Protection and Promotion

\(^8\) Further elaboration on the concept of traditional knowledge can be found in WIPO (2002).

\(^9\) The Arctic Council is an intergovernmental forum composed of eight countries located in the northern hemisphere. It has the aim of protecting the Arctic environment (Ottawa Declaration, Preamble, Paras. 1 and 4).

\(^10\) Evidence of this is the framing of the so-called “UN-REDD” (UN Collaborative Initiative on Reducing Emissions from Deforestation and Forest Degradation), which attempts to create collaborative partnerships between states and indigenous communities to reduce CO\(_2\) emissions. More information on this programme can be found in: UN REDD Programme Strategy (2011-2015).
of the Diversity of Cultural Expressions that “the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect of all cultures, including the culture of persons belonging to minorities and indigenous peoples” (Art. 2, Para. 3). This has also been reflected in the UN Declaration on the Rights of Indigenous Peoples (Preamble, Para. 3), the Vienna Declaration and Programme of Action (Preamble, Para. 13; see also General Assembly Resolution 1993, Para. 6), the UNESCO Declaration on Cultural Diversity (Art. 4), among many others.

Indigenous peoples have been very often portrayed as groups existing outside modernity (Allen 2006:315, 318). They have been depicted either as “pre-modern societies” in need of civilisation (Rajapogal 2003:29) (as was in the case in ILO Convention No. 107) or as the “victims of progress” (Tenant 1994:1, 17) (as occurred in ILO Convention No. 169). Whether from one perspective or the other, recognition of “indigenous peoples” as subjects of special rights appears to depend on the maintenance of a particular distinct culture or orientation towards the world and nature (Borrows 2009:408). Such an understanding would play against those indigenous individuals or communities which have progressively started to integrate into mainstream society. On the other hand, representation of indigenous peoples as “backward societies” could also lead one to the problematic conclusion that certain indigenous groups or individuals might still be regarded as “incapable” of representing themselves before states and the international community, but could do so only through NGOs.\footnote{One of Survival International’s general aims is to “support legal work to ensure that tribes are expertly represented” (http://www.survivalinternational.org/info).} At this point, one should take into consideration that even long-standing indigenous groups are undergoing a voluntary or probably inevitable process of integration with the so-called “modern world”.\footnote{An example of the integration of certain indigenous groups with the “modern world” is the case of the Native American groups in Nevada (Ahmad 2006).} This raises the question, what will the future of this culturally-based construction of “indigenous peoples” be?

\section*{Indigenous Peoples and Economic Development Cooperation}

Finally, the last contribution of indigenous peoples refers to the fundamental role they play in ensuring successful economic development cooperation. A number of international financial institutions, including regional development banks, have designed operational policies on indigenous peoples to assure their participation in the preparation and implementation of development programmes and projects. This is, for example, the case with the World Bank (2005), the Inter-American Development Bank (2006), the Asian Development Bank (1998), and the European Bank for Reconstruction and Development (2008). Although one could, at first sight, argue that these policies are to a large extent based on a human rights-based approach, there is, nevertheless, an implication of a new function of indigenous peoples, that is, their
collaboration in the successful implementation of economic development projects within their territories.\textsuperscript{13}

In the case of the World Bank, indigenous peoples seem to be regarded as potential backers of World Bank-financed projects (Cabrera 2012:289). The World Bank’s latest operational policy on indigenous peoples attempts to

make the development process more inclusive of indigenous peoples by incorporating their perspectives in the design of development programmes and poverty reduction strategies, and providing them with opportunities to benefit more fully from development programs.

(World Bank 2005:Para. 22(b))

Furthermore, one of the objectives of this policy is to enhance the capacity of the said communities in implementing, monitoring and evaluating development programmes (World Bank 2005, Para. 22(f)). This may have a historical explanation behind it. During the 1980s, the World Bank was harshly criticised for the negative consequences of its development projects in territories occupied by indigenous peoples (Kingsbury 1999:323, 324). It, thus, became clear that these projects would only be successful if supported by such affected populations (Cabrera 2012:288).\textsuperscript{14}

\textbf{Functional Approach Entwined with Participation}

The functional approach to indigenous peoples has been captured by the preamble of the UN Declaration on the Rights of Indigenous Peoples (Preamble, Paras. 3 and 11). Based on this approach, the Declaration (Preamble, Para. 15) and other UN documents have made use of words such as “cooperation” or “partnership” to describe how the relationship between states and indigenous peoples should be. Even before the adoption of the Declaration, the UN and other intergovernmental bodies started to create special mechanisms to enhance the participation of indigenous peoples in international negotiations concerning the environment, culture and development. The UN Permanent Forum on Indigenous Issues is a good example in this regard.\textsuperscript{15} Furthermore, voluntary funding mechanisms have been established to

\textsuperscript{13} For further analysis on the functional approach to indigenous peoples in the context of international development cooperation, see Cabrera (2012:281-289).

\textsuperscript{14} The apparently human rights-based approach of the World Bank policy on indigenous peoples is obscured by the long-standing refusal of the Bank to recognise the right of indigenous peoples to free, prior and informed consent in relation to the implementation of economic development projects (Mackay 2010:316).

\textsuperscript{15} The Permanent Forum aims to enhance cooperation among states, the UN and indigenous organisations in issues of mutual interest (ECOSOC Res. 2000/22).
facilitate participation of indigenous and local communities in international debates concerning indigenous issues.\(^{16}\)

Indigenous peoples have been granted special participatory rights particularly in international environmental forums. The Agenda 21\(^{17}\) requires states to include indigenous peoples in the decision-making, planning and implementation of sustainable development strategies (Section III, Para. 26). Based on this, indigenous peoples are, today, one of the nine major groups participating in negotiations within the UN Sustainable Development Division (UN Sustainable Development Platform Knowledge). In a similar manner, the Arctic Council has conferred the status of permanent participants upon indigenous arctic organisations (Declaration on the Establishment of the Arctic Council, Para. 2).

Indigenous peoples are also taking part in international negotiations concerning traditional knowledge. Indigenous delegates participate in the meetings of the “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” in the World Intellectual Property Organisation (Secretariat of WIPO 2011). In addition, the Conference of the Parties to the Convention on Biological Diversity has involved indigenous organisations in negotiations related to traditional knowledge (COP Decision VII/16, section G, Para. 10).

The remainder of this section identifies some complexities and challenges ahead in the recognition of indigenous peoples’ legal status and participation in the international realm.

Emergence of new “Indigenous Peoples”

Since the idea of partnership between international organisations and indigenous peoples sounds compelling, more and more indigenous organisations are coming into existence in order to catch the attention of international organisations. For many years, the international indigenous peoples’ movement comprised basically organisations from North-America, Latin-America and Australasia which resorted to the “first-people argument” to assert their claims for self-determination (Engle 2010:46-66). However, as early as when the United Nations decided to include indigenous organisations in the drafting process of the Declaration on the Rights of Indigenous Peoples (ECOSOC Res. 1982/34), emerging Asian and African indigenous groups began to appear on the international scene. To justify their “indigeneity”, these organisations have resorted to both human rights and functional arguments (Erueti 2011:93, 115). This is, for example, the case of the Indonesian indigenous alliance Aliansi Masyarakat Adat Nusantara (AMAN), which highlights the “capacity of Indigenous Peoples to maintain and expand their traditional wisdom in protecting the earth, water, and all natural wealth contained within nature” (see the chapters by Arizona/Cahyadi, Müller, Steinebach, Grumblies, Klenke, and Hauser-Schäublin in

\(^{16}\) One of these mechanisms is the UN Voluntary Fund for Indigenous Peoples (GA Res. 40/131, December 13, 1985).

\(^{17}\) Agenda 21 is a voluntarily implemented action plan with regard to sustainable development which resulted from the UN Conference on Environment and Development of 1992.
this volume). Since there is no universal definition of indigenous peoples under international law, one could argue that none of these groups should be denied the right to label themselves as “indigenous”. Thus, today, new indigenous organisations have emerged, such as the Asia Indigenous Peoples’ Pact, comprising indigenous groups from India, Pakistan, Bangladesh, Thailand, and Indonesia, among others (AIPP 2012). Yet, at the national level, some of these self-identified indigenous communities from Asia and Africa are regarded by their national governments merely as minorities or tribal populations (Cabrera 2012:276).

Some other culturally distinct groups such as Afro-descendant communities – not considered as “indigenous” in the classical sense – are searching for recognition of their own collective rights (Cabrera 2012:280). In doing so, they have already initiated a campaign for the recognition of their own identity and own collective rights as independent from the indigenous identity (Marchesi 2011). Others have rather preferred to construct their own indigenous identity (Cabrera 2012:280). This second option has prevailed in some Latin-American countries where indigenous peoples have achieved political recognition and have been assured access to governmental structures (Cabrera 2012:278-281).

Problems concerning Participation

It is important to reflect more on the ways and means through which indigenous organisations are meant to exercise participation in international forums. Some indigenous organisations contend that their participation in international negotiations is ineffective and limited (Joint Statement of the Grand Council of the Crees (Eeyou Istchee) et al. 2011, Para. 7; Grand Council of the Crees (Eeyou Istchee) 2011, Para. 74). Moreover, they claim that participation of indigenous peoples in global governmental structures should be full and effective based on their recognition as self-determined groups under international law in accordance with the UN Declaration on the Rights of Indigenous Peoples (Joint Statement of the Grand Council of the Crees (Eeyou Istchee) et al. 2011, Para. 9).

In fact, in many cases, indigenous groups which are afforded the opportunity to participate in international law and decision-making processes only hold “observer status” (Conference of the Parties to the CBD, Decision IV/9, Para. 2; Secretariat of WIPO 2011:2). Moreover, indigenous organisations are often assimilated into non-governmental organisations (NGOs) (Human Rights Council 2012, Para. 10-12). However, this paper submits that more participation necessarily depends on the answer to the following long-standing controversial question: Who has the right to represent the interests of indigenous peoples at the international level? Due to the

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18 See statement of the Aliansi Masyarakat Adat Nusantara (AMAN) on the official website of the Asia Indigenous Peoples’ Pact (AIPP), http://ccmin.aippnet.org/index.php?option=com_content&view=article&id=5&Itemid=8. However, the creation of new targeted categories for the identification of certain vulnerable groups in the international realm has been regarded by some as unsustainable (Kymlicka 2007:8).
complexity of this issue, possible answers to this question have to be left for further research.

**Conclusions**

International Law has looked at indigenous peoples through two different lenses: a “human rights-based approach” and a “functional approach”. The first approach emphasises “protection”, whereas the other centres upon “participation”. A human rights-based approach falls short of capturing the current dynamics of some indigenous groups. On the contrary, from a purely “functional perspective”, it would not make any difference whether a group is indigenous in its classical sense or not. What matters in this case is how a particular community can contribute to the achievement of environmental protection, sustainable land-use and cultural diversity, among others.

It has been demonstrated throughout this paper that the functional approach is intrinsically entwined with the recognition of indigenous peoples’ participatory rights in international law and policy-making. This has been specially boosted by international organisations. In this context, participation of indigenous peoples in international negotiations emerges as a practical necessity, rather than as a legal duty.

The number of policies and mechanisms enhancing participation of indigenous peoples at the international level has increased significantly within the last two decades. This seems to be parallel to the emergence of new indigenous peoples in the international arena seeking international legal recognition. Nevertheless, the participation recognised to indigenous peoples in international forums seems to be limited.

This paper argued that the use of a functional approach has benefited indigenous peoples in the sense that they have started to be regarded as actors of international governance, rather than mere recipients of norms and policies affecting them. At the same time, the paper recognised the danger of absolutism in the use of a functional approach. There is a possibility, within this approach, of ignoring the indigenous groups which do not subscribe to the roles that international law has defined for them.