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Access to Justice for Indigenous Peoples In International Law

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The status and rights of indigenous peoples have been recognized by international law. However, there remains debatable whether or not such recognition has been translated into providing access to justice to such peoples when their rights are violated. Therefore, the research has been conducted to examine the extent to which international law allowing access to justice for indigenous peoples given that state remains the dominant subject in international law and in some countries the state itself seems to be reluctant to recognize the status and rights of indigenous peoples in its territory. It shows that several mechanisms can be used by indigenous peoples under the international legal system in the context of access to justice although they are argued to be insufficient in securing the status and rights of indigenous peoples as such mechanisms are very fragmented and practically challenges.

Keywords: indigenous peoples, access to justice, international Law

I. Introduction

It is estimated that there are about 370 million indigenous peoples in 90 countries; although this reflects only 6% of global population, they demonstrate highly diverse communities in terms of cultural and biological diversity.[2] Living sustainably with the environment has made them able to maintain biodiversity as well as natural resources, including mineral resources within their areas. However, indigenous peoples have suffered injustices and discrimination since the colonial period for example: occupation, forced assimilation and integration, and involuntary relocation.[3] Their existence has continued despite threats due to economic develop-

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2 Secretariat of the United Nations Permanent Forum on Indigenous Issues (UNFPII), 'Introduction' in the United Nations DESA, State of the World's Indigenous Peoples (United Nations, New York 2009) 8 <http://www.un.org/esa/socdev/unpfii/en/publications.html> accessed 21 March 2011

3 Contreras-Garduno and Rombouts, Collective Reparations for Indigenous Communities Before the Inter-America Court of Human Rights (2010) 27 Merkouries – Crim Jus & HR 07

ment and expansion of mining, paper and bio-fuel production, large dams and other industrial activities.

As distinct and minority groups sometimes without adequate protection at the national levels, indigenous peoples would clearly depend on the international regime to protect their status and rights. Although many scholars argue that their status and rights have been recognized under international law, access to justice for such peoples if their rights are violated by other entities remains questionable. Therefore, this essay aims to provide a discussion on the extent to which international law allows access to justice for indigenous peoples when subject to violations. Before establishing such discussion, it is worth mentioning the development of international law in dealing with indigenous peoples to provide a clear picture of the discussion.

II. Indigenous Peoples and International Law

Indeed, the definition of term 'indigenous peoples' remains debatable among legal scholars. However, for practical reasons within the United Nations the term consistently refers to the definition given by Jose. R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities:

> *"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or part of them. They form at present non-dominant sectors of 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 pattern, social institutions and legal system."*[4]

Therefore, there are two criteria to identify indigenous peoples, namely objective and subjective criterion. The objective criterion has several

4 The Concept of Indigenous People prepared by the Secretariat of the for the Workshop on Data Collection and Disaggregation for Indigenous Peoples in New York, 19-21 January 2004, UN Doc. PFII/2004/WS.1/3. See also the ILO Convention No. 169, Article 1(1) for another definition of tribal and indigenous peoples.

elements as follows: 1) Occupying ancestral land with historical continuity since a time preceding the invasion of colonial societies; 2) Preserving their culture, i.e. religion, lifestyle, dress, means of livelihood, language etc; 3) Maintaining their distinct social and political systems based on customary law; 4) Willing to preserve and transmit their identity and ancestral land to future generations. On the other hand, the subjective criterion requires a 'self-identification' from indigenous individuals to consider themselves as parts of an indigenous group and 'an acceptance from the group'.[5]

The recognition of indigenous peoples in international law has required a long period of time. In the fifteenth and sixteenth centuries an American Lawyer, Charles Hyde, concluded, "the American Indians [and indigenous peoples in general] have never been regarded as constituting persons or States of international law;" therefore, they did not have any right over areas where they inhabited.[6] A contemporary international initiative carried out by indigenous groups to influence the international regime could date back in 1923 when Clinton Rickard, Deskaheh or the chief of the Council of the Iroquois Confederacy visited the League of Nations in Geneva concerning a conflict between the Confederacy and Canada.[7] Although the effort failed to raise support from the League due to its incompetency in which such conflict was regarded as a domestic dispute, it did give an inspiration for indigenous groups who exhausted domestic remedies and sought for justice through international mechanisms.[8]

As a result, many following attempts have been undertaken concerning indigenous peoples in international law from treaties, declarations to other specific provisions. The International Labour Organization (ILO) Convention No. 107, for instance, does recognise the rights of indigenous peoples, including the right to collective lands, despite the fact that the Convention is dominated by the idea of assimilating and integrating indigenous peoples into dominant society[9]. With regard to recognition of indigenous peoples in international law, it is argued that there are at least four layers of recognition, which are: the human rights regime concerning individual rights,

5 F. Lenzerini, 'The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law' in F. Lenzerini (ed) Reparation for Indigenous Peoples: International and Comparative Perspective (OUP, Oxford 2008) 76

6 J. Anaya, Indigenous Peoples in International Law (OUP, Oxford 2000) 22

7 Indian Defense League of America, Levi General: Iroquois Partiot's Fight for International Recognition [online] <http://idloa.org/pages/deskaheh.html> accessed 22 March 2011

8 J. Anaya (n5) 46

9 See Article 2 (1) of the ILO Convention No. 107

the human rights regime dealing with collective or solidarity rights; the environmental law regime; and, ad hoc regimes on indigenous peoples.[10]

A. Human Rights Regimes Concerning Individual Rights

Since an indigenous individual is a human being and lives within the jurisdiction of states, she/he should benefit from states' obligations to protect and to fulfill his/her individual rights for example the right to life. Moreover, Article 27 of the 1966 Covenant on Civil and Political Rights (ICCPR) stipulates,

> *"[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*

Although the article above does not mention 'indigenous peoples' explicitly, the Human Rights Committee in its General Comment No. 23 specifically clarifies that 'indigenous peoples' are applicable under such provision in particular with regard to enjoyment of 'their own culture'.[11] However, it is frequently claimed that the notion of individual rights could not protect indigenous peoples as a whole to some extent.[12] The right to property, for instance, especially land ownership, which is based on the Western notion of private property, may be problematic to be implemented within indigenous peoples' territories. In fact, land, usually, is under a collective ownership and as a vital element for indigenous peoples' existence.

B. Human Rights Regimes Concerning Collective Rights

It is difficult to deny that some groups, particularly indigenous peoples, would continually face many problems related to their collective identity due to inadequate protection of their collective rights and uniqueness at the

10 A. Fodella, International Law and the Diversity of Indigenous Peoples (2006) 30 Vermont L Rev 565-594

11 M. Scheinin, 'Indigenous Peoples' Rights Under the International Covenant on Civil and Political Rights' in Castellino and Walsh (ed) International Law and Indigenous Peoples (MNP, Leiden 2005) 5. See Paragraph 7 of the General Comment No. 23.

12 A. Fodella (n 9) 575

first place. This shows that there is a need to safeguard indigenous' collective rights in order to provide direct protection for their collectivity.[13]

Indeed, collective rights have been recognized by a wide range of human rights instruments, both international and regional. The 1966 Covenant on Civil and Political Rights (ICCPR) Article 1(1) stipulates, "All peoples have the right of self-determination." The phrase 'all peopie[s]' in such article reflects the collectiveness of the right to self-determination. At regional levels, the African Charter on Human and Peoples' Rights is regarded as the first legally binding instrument that recognizes the collective rights.[14] Besides providing the rights of self-determination (Art.20), the African Charter also explicitly mentions that people have, among others, the right to a healthy environment (Art.24) and the right to development (Art.22). In addition, the American Convention on Human Rights also takes a same stance in this regard. This could be seen from its application in the case Awas Tingni v Nicaragua (discussed below). However, recognition of such collective rights does not mean to exist as a firm basis of groups to bring a claim against violations of such rights since the groups' claim for remedies in the international human rights regime remains controversial.[15]

C. Environmental Law Regimes

Many environmental agreements have also recognized indigenous peoples since they play a significant role in preserving the environment and managing the natural resources sustainably. For example Principle 22 of the 1992 Rio Declaration on Environment and Development states,

> *"[i]ndigenous people and their communities...have a vital role in environmental management and development...State should recognize and dully support their identity, culture and interests and enable their effective participation in the achievement of sustainable development".*

Indigenous peoples' traditional knowledge is also recognized in Article 8(j) of the 1992 Convention on Biological Diversity. Its 2010 Nagoya Protocols on Access to Benefit Sharing would be a mean of providing access to distributive justice for indigenous communities. Every entity that

13 A. Fodella (n 9) Ibid

14 A. Fodella (n 9) 578

15 See D. Shelton, Remedies in International Human Rights Law (2nd ed, OUP, Oxford 2005) 246

uses traditional knowledge belongs to indigenous groups for commercial purposes shall fairly share its benefit to the groups (Art.5 of the Protocol). Furthermore, the 1946 International Convention on Regulation of Whaling provides a special treatment by permitting indigenous peoples who are whaling for subsistence purposes while commercial whaling activities being banned by the International Whaling Commission.

D. Ad Hoc Regimes on Indigenous Peoples

There are at least two instruments that should be considered as special regimes dealing with indigenous peoples, namely the ILO Conventions (No.169 and No.107) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The revision of the 1957 ILO Convention No.107, the 1989 ILO Convention No.169, arguably is the most "concrete manifestation of the growing responsiveness to indigenous peoples' demands".[16] It also moves away from the idea of assimilation and integration brought by the previous Convention since such an idea has raised longstanding criticism from indigenous communities and violating of their right to self-determination.[17]

On the other hand, the UNDRIP is regarded as "undoubtedly the most progressive of international instruments dealing with indigenous peoples' rights."[18] The Declaration that had been negotiated since 1993 was finally adopted by the UN General Assembly on 13 September 2007 by vote 144 in favor of its adoption and 4 countries against, namely the US, Canada, Australia and New Zealand.[19] A wide range of rights is covered within the Declaration from the rights to self-determination (Art.3), land rights (Art.26), traditional knowledge (Art.31), language (Art.13), as well as compliance provisions (Arts.41-42).

Therefore, it seems clear that the status and rights of indigenous peoples have been recognized by a wide range of instruments under international law from human rights and environmental law treaties to special regimes on indigenous peoples. In addition to these instruments, there is

16 J. Anaya (n 5) 47

17 J. Anaya (n 5) 47

18 C. Charters, 'Reparation for Indigenous Peoples: Global International Instruments and Institutions' in F. Lenzerini (ed) Reparation for Indigenous Peoples: International and Comparative Perspective (OUP, Oxford, 2008) 168

19 Anaya and Wiessner, The UN Declaration on the Rights of the Indigenous Peoples: Toward Re-Empowerment (2007) 3 Jurist <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> accessed 21 March 2011

another layer of recognition, namely directions or safeguarding provisions within financial institutions and development agencies (World Bank and UNDP)

III. Access to Justice for Indigenous Peoples[20]

With regard to access to justice at domestic levels, indigenous groups have to exhaust domestic procedures available before using international mechanisms. The effectiveness of such procedures should be seen on case-by-case basis since for some cases they are able to deliver justice for indigenous groups such as the recent case of Aguinda et al. v ChevronTexaco[21] in Ecuador. For other cases, however, the procedures are ineffective due to the involvement of states that fail to act in due diligent to protect indigenous peoples' rights.

At international levels, 'access to justice' usually refers to the International Court of Justice (ICJ) and other international tribunals. Under the state-centric international legal system, however, only states can bring a claim before the tribunals. This shows how states, as the main player in the international legal regime, seem reluctant to provide "direct access to international court."[22] Furthermore, if there are issues of indigenous people's rights in cases brought by states before the ICJ, it even avoids giving any decision in "meaning full legal effect" to such rights. The Court just focuses on the merits claimed by the states concerned for example in the Western Sahara Advisory Opinion and Territorial Dispute (Libya v Chad).[23] Therefore, learning from experience, indigenous groups seem less attracted to the ICJ in seeking justice.

Consequently, when subject to violations, indigenous peoples who have exhausted domestic remedies are more likely to use other procedures

20 The term "access to justice" here refers to not only access to courts or judicial procedures but also access to "remedies offered by competent public authorities which are not courts of law but can nevertheless perform a dispute settlement function." See F. Francioni, 'The Rights of Access to Justice under Customary International Law' in Francioni, (ed) Access to Justice as a Human Rights (UOP, Oxford, 2007) 4

21 The Provincial Court of Justice of Sucumbios found that the corporation was liable for environmental damages as well as socio-cultural damages suffered by the indigenous peoples in Orellana and Sucumbios. See the Jugdment at http://chevrontoxico.com/news-and-multimedia/2011/0306-chevron-found-guilty-of-massive-contamination-in-ecuador.html 25 March 2011

22 D. Shelton (n 14) 189

23 W.M. Reisman, Protecting Indigenous in International Adjudication (1995) 89 AJIL 354-356

available. Although the procedures are believed inadequate,[24] they could benefit the protection of the indigenous peoples rights for certain extents. The procedures are scattered within the UN system, treaty regimes, regional human rights regimes, and other procedures within financial institutions.

A. Procedures within the UN System

Although specific judicial procedures are not provided by the UN system for indigenous peoples,[25] the system does provide several mechanisms than can be used by indigenous peoples. There are three specific bodies dealing with indigenous issues, namely the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples.

In terms of the UNPFII, many argued that it is the first and the most important institutional development of the recognition of indigenous peoples within the UN system.[26] The Permanent Forum is mandated to provide advice and to recommend the UN Economic and Social Council (ECOSOC) in indigenous issues related to economic and social development, culture, the environment, education, health and human rights, as well as to build awareness and coordination on such issues within the UN bodies (ECOSOC Resolution 2000/22). Under Article 42 of the UN Declaration on the Rights of Indigenous Peoples, the Permanent Forum is arguably mandated to monitor the implementation of the Declaration. Moreover, meetings conducted by the UNPFII are usually opened to governments, international organizations as well as indigenous peoples' representatives; therefore, indigenous' representatives may raise their issues and recommend their perspectives during sessions for public forums.[27]

Furthermore, unlike the Expert Mechanism that mainly focuses on "studies and research-based advice", the Special Rapporteur is mandated to "examine the situation of indigenous peoples worldwide" based on

24 J. Anaya, Indigenous Peoples in International Law (2nd, OUP, Oxford, 2004) 218-219

25 M. Trask, 'Chapter VII: Emerging Issues' in the United Nations DESA (n1) 223

26 R. Coulter, Using International Human Rights Mechanisms to Promote and Protect Human Rights of Indian Nations and Tribes in the United States: An Overview (2007) 31 American Indian Law Review 578. See also Castellino and Walsh, 'Conclusion' in Castellino and Walsh (n 10) 399

27 J. Anaya (n 23) 220

receiving communication and visiting specific countries[28]. In this regard, indigenous groups may freely communicate concerning their situations and the enjoyment of their rights in particular country to the Rapporteur.[29] However, the main weaknesses of procedures provided by these three entities are the facts that they seem overlapped and complex especially on their relations not only among themselves but also within the UN bodies and to the states in practice, and more importantly, their recommendations are not legally binding to states.

B. Treaty-Based Mechanisms

Although there are many treaty-based mechanisms in international law that may benefit indigenous peoples this section only discusses two regimes commonly used by indigenous peoples, namely the ILO Conventions and the ICCPR.

1. The ILO Conventions

Both the International Labor Organization (ILO) Conventions No. 169 and No. 107 require states that have ratified them to report periodically to the Committee of Experts on Application of Conventions and Recommendations as a committee to supervise the implementation by the states parties. If a state has not ratified the ILO Convention No.169 but it is a party to the ILO Convention No.107, the state concerned is bound by the ILO Convention No.107 and, otherwise, its provisions of assimilation and integration are excluded from supervision or monitoring activities.[30] In addition to the reporting procedure, the ILO also provides complaint-based mechanisms with regard to its conventions, including the Conventions No.107 and No.169. However, the complaint procedures may not applicable for indigenous groups directly because they are not constituents of the ILO but they may be represented by a labor union that is willing to bring a complaint on their behalf.[31] In the case Wixarrika (Huicol) of Mexico in 1998, for instance, the National Trade Union of Education Workers (SNTE) brought a complaint before the ILO Governing Body on behalf of

28 Secretariat of the United Nations Permanent Forum on Indigenous Issues (n 1) 4
29 R. Coulter (n 25) 583
30 J. Anaya (n 23) 250
31 J. Anaya (n 23) 249. See Article 24 of the ILO Constitution

the Union of Huichol Indigenous Communities of Jalisco concerning land conflict between indigenous peoples and the Mexican Government.

In this case, since the dispute settlement was pending in a domestic agrarian tribunal, a committee that examined the case, in Paragraph 41 of its decisions noted, "there are [domestic] procedures in place to resolve land disputes...accessible to indigenous communities and that, with respect to this case in particular, it appears that such land claims are being examined in depth [by the domestic agrarian tribunal]."[32] It seems that although the exhaustion of domestic remedies is not required by the ILO procedures, in practice, a complaint that has not exhausted such remedies may be less convincing.[33]

2. The International Covenant on Civil and Political Rights

The Human Rights Committee as the treaty body of the ICCPR functions to review the state parties' report on the compliance of such Covenant. Non-governmental organizations as well as indigenous groups are encouraged to provide submission or information in assisting the Committee to list particular issues before reviewing[34] and making "general comments" of the parties' reports. It is argued that the reporting and monitoring procedure under the Committee contributes indirectly toward effective access to justice. As Martin Scheinin puts, such procedure that provides "systematic and comprehensive periodic review" on states' compliance, in the long-term, may improve "the understanding of scope and substance of the treaty provisions"; as a result, this may "provide a point of departure for dealing with novel issues under the complaints procedure."[35] Having said that, there is no sanction could be given by the Committee to states' parties that delay their report submission.[36]

Under the Optional Protocol, the Committee may also receive 'individuals communication' as a complaint procedure. However, the Committee has no obligation to examine such communication and it is only applicable for individuals against states that have ratified the Protocol.[37] Moreover,

32 <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=17&chapter=16&query=Mexico%40ref&highlight=&querytype=bool&context=0> accessed 26 March 2011

33 J. Anaya (n 23) 249

34 R. Coulter (n 25) p.581

35 M. Scheinin 'Access to Justice before International Human Rights Bodies' in Francioni (n 19) 136

36 R. Coulter (n 25) 580

37 F. Francioni (n 19) 42

the right to self-determination that is commonly used as the ground of indigenous peoples' complaint is also excluded by the Protocol since such right is collective in nature. In fact, people or a group's complaints are not applicable under the individual communication regime.[38]

More recently, the Human Rights Committee has applied more progressive approaches with regard to the right to self-determination. In the case Chief Bernard Ominayak and the Lubicon Lake Band v Canada[39], for instance, the Committee took a stance that Bernard Ominayak, the Chief of the Lubicon Lake Band, "as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in Article 1 of the Covenant."[40] However, his complaint could be accepted by the Committee on the basis of Article 27 of the ICCPR ("persons belonging to minorities") instead; and, on the merits, the Committee stated that Canada had violated such article.[41]

Despite the progressiveness of the Human Rights Committee, its report and complaint procedures have some major barriers. The biggest one is the fact that the Committee's decisions are not legally binding, difficult to enforce to and sometimes ignored by the states concerned.[42] Hence, it is concluded that "indigenous efforts in these fora have not had significant results in the resolution of conflicts,"[43] and the ICCPR and its Optional Protocol is still far from providing effective access to justice for indigenous peoples.

C. Regional Human Rights Regimes

It is frequently claimed that regional human rights regimes play important roles in delivering justice to victims of human rights violation. At least there are two relevant regional regimes in the context of indigenous peoples' rights, namely under the Inter-America System and the African Commission on Human and Peoples' Rights.

1. The Inter-America System

38 Lewis-Anthony and Scheinin, 'Treaty-Based Procedures for Making Human Rights Complaint Within the UN System' in Hurst Hannum (ed) Guide to International Human Rights Practice (4th ed, Transnational Publisher, New York 2004) 46

39 Chief Bernard Ominayak and the Lubicon Lake Band v Canada Communication No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990) <http://www1.umn.edu/humanrts/undocs/session45/167-1984.htm> 26 March 2011

40 Chief Bernard Ominayak (n 38) Para.13.3

41 Chief Bernard Ominayak (n 38) Para.33

42 M. Trask (n 24) 223

43 M. Trask (n 24) 223

There are two important bodies under the Inter-America System dealing with human rights: the Inter-America Commission on Human Rights and the Inter-American Court of Human Rights. In order to exercise its main function "to promote, respect for, and defense of human rights" as stated in Article 41 of the American Convention on Human Rights), the Inter-American Commission may receive a "petition or communication" from any person, groups or NGOs concerning violations of the American Convention (Art. 45 (1)) provided that domestic remedies have been exhausted, and the Commission may recommend that such violations to be heard before the Inter-America Court of Human Rights. The Court, on the other hand, has jurisdiction to "comprise all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it" (Art. 62(3)) only by states parties and the Commissions with a "final and not subject to appeal" judgment (Art. 67).

In practice, the Court has been known by its progressive approach to examine many indigenous cases.[44] One of the most successful paths taken by the Inter-America Court on Human Rights to solidify the protection of indigenous peoples' rights over their ancestral lands and resources could be seen in the case Mayagna (Sumo) Awas Tingni v. Nicaragua.[45] The case law was concerning the actions from the Nicaraguan Government to give a logging concession to a Korean company on the Awas Tingi indigenous territories without informing and receiving the consent from the communities, and it was examining, among others, whether or not the Government had violated the Article 21 of the American Convention on the right to property.

After a long process in the Commission, the case then transferred to the Court. In 2001, the Court concluded that the Nicaraguan Government had violated the rights of indigenous peoples, especially the right to property and demanded the Government to take necessary steps in protecting such rights and to pay a fine to the communities.[46] As far as the right to property is concerned, the court decision is "the first legally binding decision by an international tribunal to uphold collective land and resource rights of indigenous peoples in the face of state's failure to do so".[47] Although Article

44 See Contreras-Garduno and Rombouts (n 2) 15

45 See J. Vuotto, Awas Tingni v Nicaragua: International Precedent for Indigenous Land Rights? (2004) 22 Boston U Intl L J 220

46 Awas Tingni v Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001) <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> 27 March 2011

47 Anaya and Grossman, The Case Awas Tingni v Nicaragua: a New Step in the International Law of Indigenous Peoples (2002) 19 Arizona J Intl & Com L 2

21 is individual in nature, the Court took "an evolutionary interpretation" by stating, "article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property."[48] The Awas Tingni case is argued as "a model for legal and political recognition of indigenous land rights" with the Inter-American Court of Human Rights as it's enforcing instrument,[49] and has been followed by other parallel cases, such as Yakye Axa v. Paraguay and and Sawhoyamaxa v. Paraguay.

Another distinct development through the Inter-American System could be seen from the Petition of the Inuit Indigenous Peoples. The petition attempted to establish a connection between human rights and climate change and claimed that the US, as the biggest emitter of greenhouse gases, has been responsible for causing climate change, which influenced the enjoyment of the Inuit Indigenous Peoples' rights.[50] Although it failed to make the US responsible, the petition has triggered the development of human rights approaches to climate change.

2. The African Commissions on Human and People's Rights

The African Commissions on Human and People's Rights is established by the African Charter on Human and Peoples' Rights in order to promote such rights and to monitor their implementation. The Commission also provides complaint procedures either under "communication from states" (Arts.47-54) or "other [individual] communication" (Arts.55-59). The latter refers to communication submitted by other than states, for example individuals, NGOs as well as indigenous peoples. Such communication does not require the exhaustion of domestic remedies, provided that their process is "unduly prolonged" (Art.56).

The commission also may receive an actio popularis in which it has explicitly been formulated in the case of Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria (2001).[51] The case was concerning violations of the rights of Ogoni Communities in Ni-

48 Awas Tingni v Nicaragua (n 45) Para.148

49 J. Vuotto (n 44) 243

50 Petition to the Inter-America Commission on Human Rights Seeking Relief from Violation Resulting from Global Warming Caused by Acts and Omissions of the United States, Submitted by Sheila Watt-Cloutier, with the Support of the Inuit Circumpolar Conference, on Behalf of All Inuit of the Artic Regions of the United State and Canada (2005)

51 Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria. Communication 155/96, Case No. ACHPR/COMM/A044/1 (2001) <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> 27 March 2011

geria due to exploitation of oil and gas in their areas and the Commission found that the Nigerian Government had violated such rights. This case was regarded as the first "involving violations of nearly all categories of rights and particularly the right to a general satisfactory environment" and as "a landmark not only in this respect, but also in the Commission's articulation of the duties of governments in Africa to monitor and control the activities of multinational corporations."[52]

Therefore, from both Inter-America and African human rights procedures, it seems that indigenous peoples' status and rights could effectively be protected by progressive and innovative approaches to human rights treaties. The judges on the case Mayagna (Sumo) Awas Tingni v. Nicaragua are right when saying "human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions." (Para.146). Hence, every person or group in society could benefit from such human rights treaties despite not explicitly stated in their provisions. It should be noted, however, these regimes are based on regional jurisdiction; thus, they would not affect the protection of indigenous peoples' right in other regions. Indigenous communities in Asia may continue to suffer from violations without any adequate mechanisms for justice from international judiciary organs.

D. Other Procedures

Besides the procedures discussed above and national courts, there other possible mechanisms could be used, namely procedures under financial institutions and international initiatives. For example, the UN Global Compact, a collaborative initiative between the UN, corporations, development agencies and NGOs to "promote responsible corporate citizenship", is argued to be a forum to deliver distributive justice to indigenous peoples as in the Westpac-Cape York Indigenous Peoples Partnership in Australia. However, before this partnership taking place the Westpac Bank had been criticised by indigenous peoples from the Kakadu National Park since the Bank assisted a mining company financially to operate within the National Park.[53] It seems that by establishing partnership with indigenous peoples in different places (Cape York), the Bank attempts to change its image to look

52 D. Shelton, Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria) Case No. ACHPR/COMM/A044/1 (2001) 96 American Journal of International Law 941

53 See Leeora Black, Westpac Australia and the Cap York Indigenous Partnership in the UNGC and OHCHR, Embedding Human Rights in Business Practice II (2007) 16-25 <http://www.unglobalcompact.org/>

friendlier to indigenous peoples. Moreover, the UN Global Compact is also not a legally binding instrument and has been criticised by human rights activists as 'bluewash' with little impacts to change corporate behavior.

With regard to financial institutions, indigenous groups affected by a project funded by such institutions may bring a complaint through mechanisms available within the institutions for example the World Bank Inspection Panel or the Independent Investigation Mechanism of the Inter-American Development Bank or the Accountability Mechanism of the Asian Development Bank. These mechanisms, however, have been criticized due to their lack of transparency, the absence of effective remedies and of being incapable of solving the problems.[54] This shows that other procedures above are also insufficient to deliver justice to and protect the rights of indigenous peoples.

IV. Conclusion

The development of modern international law, particularly human rights law, has contributed to a wide range of recognition of the status and rights of indigenous peoples. However, an increase in recognition does not seem to be followed by effective access to justice when such rights are subject to violations. Although some mechanisms have been provided under international law, they remain problematic to be reached by indigenous communities due to the complexities and fragmented nature of these mechanisms.

Moreover, it seems that the difficulties to provide specific and uniform access to justice for indigenous peoples reflects the diversity of indigenous legal systems and the nature of problems faced by indigenous peoples. In addition, the requirement on the exhaustion of domestic remedies may require a long period of time while it is difficult for example to freeze a government's concession in corporate logging or mining activities that violate indigenous peoples' rights. As a result, the impacts of such activities would continue to affect the enjoyment of their indigenous rights, even if in the future the decision of the tribunal is in favor to the indigenous peoples.

54 See Clark, the World Bank and Human Rights: the Need for Greater Accountability (2002) 15 HHRJ 220. See also D. Brodlow, Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions (2005) 36 Geo. J Intl L 485

Indeed, this is still far from granting indigenous peoples with adequate access to justice in international law. However, indigenous peoples may continue to use the existing procedures as an instrument to defend their rights as in many cases some indigenous groups arguably benefit from the procedures despite their weaknesses. Thus, learning from this experience as well as the historical development of recognition of the status and rights of indigenous peoples, by using the existing procedures creatively and persistently indigenous groups would be possible to develop more effective access to justice in the future.

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