NORMATIVE DIRECTIONS

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This paper maintains that Indigenous rights to access to justice relate to three big clusters of rights: a) non-discrimination; b) cultural rights; and c) self-determination. The paper argues that any attempt to view the issue of access to justice in relation only to one of these rights undermines their basis and thus, undermines them. The non-discrimination aspect ensures that Indigenous Peoples should be treated equally to non-Indigenous people in their access to justice; the Indigenous right to culture underlines the need for some deviation from the national practices in judicial matters and processes; while the principle of self-determination is the foundation for the establishment of separate judicial institutions for Indigenous Peoples that will be designed and implemented with their active participation.

Non-discrimination

It must be stressed how important and far-reaching the principle of non-discrimination can be in seeking to improve Indigenous access to justice. Non-discrimination is important for two reasons: first, for the substantial reasons that will be discussed below; second, because of its binding force in international law. The international system of human rights perceives non-discrimination as such a fundamental principle that it binds states irrespective of whether they have signed the relevant international instruments. Moeckli confirms: "At least important aspects of the right to self-determination binds all states (…). Even more fundamentally, the right to non-discrimination on the basis of race, sex and religion arguably forms part of *jus cogens* according to article 53 of the Vienna Convention on the Law of Treaties and cannot be set aside by treaty or acquiescence."[2] This can be of

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2 Daniel Moeckli, Human Rights and Non-discrimination in the War on Terror. (Oxford: Oxford University Press, 2008) pp. 67–68.

substantial use to Indigenous Peoples in States that have not been very active in signing and ratifying the main human rights treaties, as the States have the obligation to ensure the implementation of such a right and principle.

Therefore, in all cases access to justice must happen on an equal basis for Indigenous Peoples and non-Indigenous populations. The principle of non-discrimination prescribes that States should not create obstacles to Indigenous access to justice. However, international law goes much further than this: States must take measures to ensure that Indigenous Peoples have access to justice on an equal basis to non-Indigenous Peoples. For example, States must ensure that judicial mechanisms are not so far away from Indigenous communities that it becomes unrealistic for the later to reach these mechanisms. It has been argued that in remote communities, access to justice is 'so inadequate that remote Indigenous Peoples cannot be said to have full civil rights'.[3] Living in remote communities is an issue that particularly affects Indigenous Peoples. For example, in Australia, 27% of Indigenous People live in remote or very remote communities compared to just 2% of the non-Indigenous population.[4] Also, States must take measures to ensure that poverty and other lack of socio-economic factors do not impact on Indigenous access to justice. For example, legal aid is a way that Indigenous Peoples among others obtain representation. Several non-governmental organizations (NGOs) have noted that legal aid is currently being cut.

Maybe most importantly, equal access to justice also means that the police and the judiciary act to support Indigenous Peoples rather than to oppose them; and are educated not to act in a prejudiced manner against Indigenous Peoples. This is an important element that hinders very often the realisation of Indigenous rights. In this respect, the

3 Submission by The End Women's Legal Service to the 2003 Australian Inquiry into Legal Aid and Access to Justice in Senate Report entitled *Inquiry into Legal Aid and Access to Justice,* (Commonwealth of Australia, 2004) p. 107, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents, last accessed on 14/01/2014.

4 Australian Government Steering Committee for the Review of Government Service Provision, Report on Government Services. (Canberra: SCRGSP, 2007) p. 2.

example of the (1978) Indian Child Welfare Act in the United States is rather telling: The Act was adopted initially out of concern for the large numbers of Indian children being separated from their families. It imposes a heightened evidentiary standard for terminating the parental rights of an Indian parent or custodian. In the 1970s, 25–35% of Indian children were growing up away from their families and 90% of those with non-Indigenous families.[5] The Act was created in order to reduce such damning percentages. It is notable that if intent is established in such separations, they can be acts of genocide: according to the 1948 Genocide Convention, genocide includes the forcible removal of children from one group (in this case an Indigenous group) to another group (non-Indigenous families) committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. The inclusion of the forcible removal of children from the group in the 1948 Genocide Convention was one of the most controversial paragraphs of the final version of the Convention. Such an act is more an act of cultural genocide, and indeed this is how it was viewed in the Secretariat draft,[6] before being excluded from the provision of the Ad Hoc Committee on cultural genocide in article 2.[7] Since several governments were opposed vigorously to the notion of "cultural genocide," such a term was finally rejected; Greece subsequently proposed the addition of the phrase "[f]" to the list of punishable acts, noting that States who were opposed to cultural genocide did not

5 *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian Affairs*, 95th Cong., p. 539, as mentioned in Brief of Amici Curiae Association of American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association, Indian Tribes and Other Indian Organisations in support of Respondents in Supreme Court of US, *Adoptive Couple v Baby Girl, a minor under the age of fourteen years et al.*, pp. 6–7, in http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=6&ved=0CEMQFjAF&url=http%3A%2F%2Fwww.indian-affairs.org%2Fprograms%2Fdocuments%2Faaia_icwa_amicusbrief.pdf&ei=V23VUoL0KY_T7Ab1roHwCw&usg=AFQjCNGvfyh4mr98mDUH3NM00734e4hYxg, last assessed on 14/01/2014.

6 Convention on the Prevention and Punishment of the Crime of Genocide, Secretariat and Ad Hoc Committee Draft (May 1947) Doc. E/447, article I (3) a.

7 William Shabas, Genocide in International Law: The Crime of Crimes. (Cambridge, Cambridge University Press, 2000) p. 65.

necessarily contest "forced transfer."[8] Although it was argued during the drafting process that 'no one had been able to quote any historical case of the destruction of a group through the transfer of children,'[9] Australia's stolen generation, among other examples, has proved this statement wrong. In addition, phrases used by States such as "to kill the Indian in the child" verify that at least in some cases, there was clear intent to destroy the group.

Although the (1978) Indian Child Welfare Act aimed at reversing such practices, the results were not always anticipated. Indeed, even though the domestic Centre for Court Innovation has explicitly noted that "the goals of this law will not be achieved without a commitment to system-wide training that reaches the front-line staff at child welfare agencies, the attorneys representing children and parents, individual judges, and tribal leadership,"[10] unfortunately, this has not happened. Hence, the judiciary in seven US states has developed a doctrine to water down the power of the (1978) Indian Child Welfare Act (ICWA) by using the "Indian family doctrine" to claim that the Indian children are not Indian enough to apply the ICWA to them and, thus, justify and allow the continuation of adoption by non-Indigenous couples.

Such practices as well as policies, which limit Indigenous rights to access to justice, are not just acts of discrimination; it is argued that they constitute institutional racism. In the United Kingdom, the MacPherson Report has defined institutionalised racism as follows: "The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin."[11] This definition reflects the situation that most Indigenous Peoples currently face around the world. Institutional racism often creates alienation from

8 *Ibid*, p. 175.
9 *Ibid*.
10 Justine van Straaten and Paul G Buchbinder, Paper on *The Indian Child Welfare Act Improving Compliance through State-Tribal Coordination* published by the Centre for Court Innovation (2011) in http://www.courtinnovation.org/research/indian-child-welfare-act-improving-compliance-through-state-tribal-coordination, last accessed on 14/01/2014, p. 12.
11 UK Home Office, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-I, February 1999, para 6.34. The report can be accessed at http://www.archive.official-documents.co.uk/document/cm42/4262/sli-06.htm#6.34.

the State and fear of the State. The legacy of colonialism, the on-going marginalisation, disempowerment and on-going discrimination often result in Indigenous opposition to any intervention from the police or other public bodies to situations involving Indigenous individuals. Many Indigenous persons prefer to stay away from all State agencies and public bodies and challenge their usefulness. A recent Australian study has confirmed that Indigenous resistance and reaction to discrimination often results in the criminalisation of the Indigenous person discriminated against. And it would be inaccurate to focus only on the judiciary or only on the enforcement bodies and their attitudes. In Malaysia, although Indigenous Peoples have won land cases, the legislature refuses to acknowledge the decisions and change the laws; and/or the government does not implement the decisions of the courts. States must educate their public servants about Indigenous cultures, realities and needs. Otherwise, they clearly are failing their obligations under international law.

Often, the main argument given against additional protection designed to ensure non-discrimination against Indigenous Peoples in access to justice relates to an ill-perceived principle of equal treatment. States argue that they do not wish to implement any additional rights for Indigenous Peoples, because they wish to treat all individuals living within their territory in the same way. This however, is not in accordance with standards of international law. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) requires *effective* protection against discrimination. Both General Comment 18 of the Human Rights Committee and General Recommendation 14 of the Committee on the Elimination of All Forms of Racial Discrimination (CERD) specify that that "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate."[12] Therefore, specific measures such as providing all State documents in the Indigenous languages so that Indigenous individuals can be sufficiently informed are paramount. Yet, it has been reported

12 UNHCHR Committee on the Elimination of All Forms of Racial Discrimination, Prevention of Racial Discrimination, including Early Warning and Urgent Procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination, 48th Sess., A/48/18 (1996) chapter VIII B.

that the Orang Asli in Malaysia would file a case for their land rights but they could not really follow the proceedings as they had no translators. Hence, their right to remedy is seriously hindered by the lack of access to the judicial proceedings.

I outline below a number of points supporting positive protection of Indigenous Peoples in promoting their access to justice:

First, States have the *responsibility* to take positive measures. States do not have discretion as to the decision to take measures: they do not have the right, but the responsibility to take positive measures. Of special interest is the comment of CERD about the opinion of the United States that special measures are "allowed," but not required. CERD's response was:

> "With regard to affirmative action, the Committee notes with concern the position taken by the State party that the provisions of the Convention permit, but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups. The Committee emphasizes that the adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2, of the Convention."[13]

The Committee has repeatedly linked Indigenous access to justice with the non-discrimination principle: in August 2012, CERD referred to Ecuador's attempts to take measures to ensure Indigenous access to justice. CERD has recently also referred to problems in federal States' policies in Indigenous access to justice when commenting on Canada's report. The Committee said that although Canada may have taken positive measures, the practices at the provincial and territorial state levels differ.

Secondly, a distinction has been drawn by CERD "between special and temporary measures for the advancement of ethnic groups on the one hand and permanent rights of Indigenous Peoples on the other

13 CERD, Concluding Observations of CERD: United States of America, 59th Sess., CERD/C/304/Add.125 (2001).

hand."[14] General Recommendation 32 (2009) consolidates the practice of CERD in distinguishing permanent rights from special measures:

> "Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as…the rights of Indigenous Peoples. (…) The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures."[15]

The recommendation also states that "special measures should clearly benefit groups and individuals in their enjoyment of human rights"[16] as well as suggesting that States parties "should ensure that special measures are designed and implemented on the basis of prior consultations with affected communities and the active participation of such communities"[17]—a provision that assists communities in securing genuine benefit from the measures in terms that they understand and accept.

Cultural Rights

In addition to the principle of non-discrimination, Indigenous rights to access relates to Indigenous cultural rights. I have analysed Indigenous cultural rights elsewhere;[18] here, I wish to stress that the rights of Indigenous Peoples to culture must be taken into account both when the national system of justice is reviewed and assessed and

14 CERD, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, 70th Sess., CERD/C/NZL/CO/17, (2007) para. 15.
15 CERD, The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 75th Sess., CERD/C/75/Misc.7/Rev.2 (2009) para. 15.
16 *Ibid* para. 33.
17 *Ibid* para. 18.
18 Alexandra Xanthaki, *Indigenous Cultural Rights* in M Weller and J Hoffman eds., *Oxford Commentaries on International Law—The Rights of Minorities: A Commentary on the United Nations Declaration on the Rights of Indigenous Peoples.* (Oxford: Oxford University Press, 2014). (forthcoming); also see Elsa Stamatopoulou, *Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights* (2012) 34 Human Rights Quarterly. p.1172.

when separate Indigenous judicial systems are established. Indigenous Peoples' understanding of their rights, including access to justice, is often informed by their unique outlooks on, and practices associated with, justice. These may in some respects differ from dominant approaches to justice. It has been argued in the literature that the following Indigenous judicial customs and practices work well and have positive results in the community:

- Indigenous sentencing courts, including circle courts;
- Indigenous community-based structures and bodies;
- Indigenous community-based family violence programs;
- Indigenous night patrols and other community-initiated policing strategies;
- Indigenous mentoring programs;
- Indigenous community-based alternatives to prison;
- Correctional programs delivered by Indigenous community members and
- Cultural immersion programs within prisons.[19]

Notwithstanding which specific measures will be chosen in each region and each precise time, the specific characteristics of Indigenous Peoples must be taken into consideration in the design of justice systems.[20] It is those States with quality processes for *ongoing* engagement with Indigenous communities that have been developing effective criminal justice policies. For example, the American Bar Association's Centre on Children and Law found that "talks and/or agreements between neighbouring state and tribal governments frequently fail because there had been inattention to the history, cultural considerations, and important political or fiscal realities that form an ever-present context for tribal/state co-existence."[21]

19 See Fiona Alison and Chris Cuneen, *The role of Indigenous Justice Agreements in improving social and legal outcomes for Indigenous people,* (2010) 32 Sydney Law Review. p. 666.

20 CERD, Report of the Committee of the Elimination of Racial Discrimination: Namibia, Sess., 72–73. CERDA/63/18 (2009) para. 305.

21 Stanley Feldman and David Withey, "Resolving State-Tribal Jurisdictional Dilemmas" (1995) 79 Judicature. p. 156.

A positive example in this respect has been the Indigenous Justice Agreements (IJAs) in Australia. These agreements were put in place after the 1997 Royal Commission into Aboriginal Deaths in Custody and have been agreed between the government and Indigenous bodies in New South Wales, Queensland, Victoria and Western Australia. They constitute significant strategic frameworks, intended to address Indigenous over-representation in the criminal justice system through improved delivery of justice programs to Indigenous communities with an emphasis upon Indigenous self-determination.[22] They address several important Indigenous concerns, including "social, economic, and cultural issues; justice issues; customary law; law reform; and government funding levels for programs."[23] Measures agreed upon vary from specific targets for reducing the rate of Indigenous over-representation in the criminal justice system to specific methods of service delivery and include monitoring and evaluation. The agreements form a refreshing set of initiatives in a period that saw more punitive approaches to law being favoured and also reluctance towards any reform to the justice system or recognition of Indigenous rights in this respect. According to Alison and Cuneen, these agreements have been effective to a large degree and have improved the accountability of State bodies initiating independent monitoring and evaluation.[24] In addition, Indigenous communities have actively participated in the design and implementation of these agreements: "Indigenous community engagement, self-management and ownership where they have set up effective and well-coordinated community-based justice structures and/or led to the development of localised strategic planning, as well as through encouraging initiatives that embody such ideals."[25]

Caneen emphasises that such agreements show that "Indigenous demands are more likely to be met by a transformation in the justice system that allows the development of a hybrid system where

22 See *supra* note 18.
23 *Ibid*.
24 *Ibid.*
25 *Ibid.*

traditional legal bureaucratic forms of justice are combined with elements of informal justice and Indigenous justice."[26]

Indigenous Customary Laws and Systems

The right of Indigenous Peoples to maintain their customary laws and systems is a rather unexplored issue in the literature, even though it is a recognised right by the UN Declaration on the Rights of Indigenous Peoples (UN Declaration). Article 34 recognises the right of Indigenous Peoples to promote, develop and maintain their institutional structures and juridical systems. Although the text includes the limiting clause "in the cases where they exist," it is still a major success for Indigenous Peoples. This was especially evident during the elaboration of the UN Declaration, where States were reluctant to accept the use of the phrase "Indigenous laws" and "Indigenous juridical systems." This was partly because of the wide belief that law is at the core of the State mechanism. However, this idea—albeit true in many respects—does not fully cover the realities of today's States.

In the interpretative statements delivered after the adoption of the Declaration, Australia objected to the position of Indigenous customary law above the national law. The Australian delegate stated:

> "Customary law is not law in the sense that modern democracies use the term; it is based on culture and traditions. It should not override national laws and should not be used selectively to permit the exercise of practices by certain Indigenous communities that would be unacceptable in the rest of the community."[27]

This statement deviates from current standards of international law, as the "processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the

26 Chris Caneen, *Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship*? (2009) 20 Current Issues Criminal Justice. pp. 323–336 & 335.

27 UNHRC, Submission: Universal Periodic Review of Canada, 61st Sess., UN Doc. A/61/PV.107 (2007) p. 12.

Charter of the United Nations *and international law*."[28] As confirmed by the International Court of Justice, "the fundamental principle of international law [is] that it prevails over domestic law."[29] In this respect, making the rights recognised by the UN Declaration subject to national law would not make sense.

The definition of what exactly customary laws are is important in guiding the specific customs that will be used in justice systems. In a paper in 2013 on glossary of relevant terms, the World Intellectual Property Organization (WIPO) used Black's Law Dictionary which defines "customary law" as law "consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws."[30] Customary law was also defined as "locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life."[31]

Svensson has noted:

> "Customary law is, moreover, a complex concept; it refers to ecological, political, legal as well as cultural aspects, and it is constituted by a combination of certain customs and a set of legal perceptions people in a specific culture may have. It is the customs that are law generating which are of interest, not customs as such. As a working definition, customary

28 Human rights and international solidarity, UN Commission on Human Rights Res. 2005/55,61st session, UN Doc. E/CN.4/RES.2005/55 (2005) Preamble. [emphasis added]; See also UNHRC, Urgent Need to Improve the U.N. Standard-Setting Process and Importance of Criteria of 'Consistent with International Law and its Progressive Development', 62nd Sess., UN Doc. E/CN.4/2005/WG.15/CRP.3 (2005).

29 ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, (26 April 1988) I.C.J. 12, para. 57.

30 WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Glossary of Key Terms related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, 25th Sess., UN Doc. WIPO/GRTKF/IC/25/INF/7 (2013) annex, pp. 8–9.

31 *Ibid.*

> law will be conceived as traditional knowledge-based rules. In my view, customary law discourse has a two-dimensional feature: first it is a matter of political strategy of actions; second it has to do with the management of traditional, locally anchored knowledge." [32]

The above definitions reveal some characteristics that customary laws may include:

- They must be more than mere customs. Rather, Indigenous customary laws are "complex systems of rules and practices which may have legal and juridical effect."[33]
- They can be oral or written; codified or not. As customary laws are closely tied to ethical, cultural and spiritual principles, their application does not necessarily follow the logic of positive law and attempts to codify or assimilate customary law into the positive law system may lead to changes in its nature and the loss of its underlying principles, nature and dynamism.
- However, they have to be viewed by the community as having binding effect, rather than simply describing actual practices.
- They may concern different aspects of community life; for example, they can relate to natural resources or inheritance, cultural and spiritual behaviour, etc.
- In addition, Indigenous customary laws are not static, in the same manner that tradition and culture are not static. They evolve and adapt to the social and economic changes.
- Finally, some will be "formally" recognized by and/or linked to the national legal systems of the country in which a community resides.

Scholars in the field of legal pluralism have written extensively about issues of justice, property rights, religion, natural resources and human rights. They have investigated the relationship between customary law and State law and debated the impact of transnational law. Indeed, discussions around Indigenous customary law have

32 Tom Svensson, *On customary law: Inquiry into an Indigenous Rights Issue,* (2003) 2 Acta Borealia. p.95.

33 *Supra* note 29, at annex, pp.8–9.

taken place before, just not within the remit of Indigenous rights and international law. For example, a lot of relevant discussion took place in Africa in the 1960s about the recognition of Indigenous customary law.[34] The colonial States recognized legal pluralism at the time only as a set of rules dependent on the colonial States' structures. The materials the State officials drew at the time "was mainly the interpretation of Western-educated lawyers on Indigenous law that would then be applied in practice by Western-style law courts and second, that it gave legal validity and permanence to the views of old tribal leaders and stifled progress."[35] Twining rightly criticises such an approach; according to him, legal pluralism is the co-existence of two or more legal orders in the same time-space context.[36] He continues: "It is gradually accepted that a conception of law confined to state law (…) leaves out too many significant phenomena deserving sustained juridical attention."[37]

However, although practice worldwide has accepted sub-national juridical systems, international law has not followed. Today, there is still no explicit recognition of the right of sub-national groups to their customary laws and systems. Certainly the rights of Indigenous Peoples to their customary laws and systems seem to be more explicitly accepted than the rights of minorities. In specific, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities urges States "to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture (…) traditions and customs" but makes minorities' customs dependent on national law. ILO Convention No. 107 also makes the retention of Indigenous customs dependent on national law. Article 4.2 of ILO Convention No. 107 maintains that "due account shall be taken of the cultural and religious values and

34 Kaius Tuori, *Legal Pluralism and Modernisation: American Law professors in Ethiopia and the downfall of the reinstatements of African Customary Law* (2010) 62 Journal of Legal Pluralism.; also see William Twining, *The restatement of African customary law: A Comment* (1963) 3 Journal of Modern African Law. p.221.
35 *Ibid.*
36 William Twining, Legal Pluralism 101. (UCL and University of Miami Law School, 2010), http://www.ucl.ac.uk/laws/academics/profiles/twining/Legal_Pluralism_101_2010.pdf
37 *Ibid.*

of the forms of social control existing among these populations;" and article 7.1 maintains that "regard shall be had to their customary laws;" and article 7.2 allows Indigenous Peoples to "retain their own customs and institutions" but only where these are not incompatible with the national legal system or the objectives of integration programmes. In addition, article 8 proclaims that "to the extent consistent with the interests of the national community and the national legal system," the methods of social control and the Indigenous customs in regard to penal matters are to be respected. In other words, although articles 7 and 8 recognise Indigenous customary laws, the language used and its qualifications act as a double sword. The requirement of compatibility of Indigenous customs and institutions with non-Indigenous ones does not stand well in today's vision of Indigenous rights. Although the convention is now closed for ratification, it is still in force in 18 States, some with significant Indigenous populations. All provisions above are currently interpreted by the ILO bodies within the spirit of ILO Convention No. 169, the UN Declaration and general international law standards, without the limitations that were intended at the time of the drafting of the Convention. Hence, the ILO Convention No. 107 should not be quickly discarded, as it still offers protection of Indigenous cultural rights. For example, recently, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEARC) asked Iraq to provide information about measures that take Indigenous customary laws and their methods of social control into account,[38] while El Salvador was asked to provide more information about the effect of the Cultural Development Policy on the cultural heritage of Indigenous Peoples.[39]

ILO Convention No. 169 is more forthcoming in its protection of Indigenous cultural rights. Article 2(1) ensures that States must take action to promote the full realization of Indigenous cultural rights "with respect for their social and cultural identity, their customs and traditions and their institutions." The Convention asks States to take special measures to "safeguard" the cultures of Indigenous Peoples (art. 4). The

38 CEARC, 102nd ILC Sess., Direct Request (CEARC)- Indigenous and Tribal Populations Convention, 1957 (No. 107)- Iraq (2012)
39 CEARC, 101st ILC Sess., Direct Request (CEARC)- Indigenous and Tribal Populations Convention, 1957 (No. 107)- El Salvador (2011).

"social, cultural, religious and spiritual values and practices of these Peoples shall be recognised and protected" according to article 5 of the ILO Convention No. 169 and "due account shall be taken of the nature of the problems which face them both as groups and as individuals." More specifically, the Convention requires that the "integrity of the values, practices and institutions" of Indigenous Peoples "shall be respected" (article 5b). Article 8 of the ILO Convention No. 169 requires States to give due regard to the customs or customary laws of Indigenous Peoples, when applying national laws and regulations. The ILO has explained that the criteria of article 8(1) are cumulative, in other words Indigenous customs can be restricted only when incompatible *both* with the national legislation and the international human rights standards.[40] Article 9 asks for respect of the Indigenous methods that deal with offenses and customs with respect to penal matters. The ILO monitoring mechanisms have discussed on several occasions the obligations that derive from the above provisions, especially related to customary laws and sanctions. In 2012, the CEARC asked Fiji to indicate areas where there is "an interaction between customary law and written law of the country and how the judiciary has dealt with cases of such nature, by providing copies of court decisions."[41]

Indigenous communities have been disappointed that the Convention does not view Indigenous cultural rights under the framework of self-determination; this though should not detract from the effectiveness of the instrument. Indeed, the Convention has been used by several national courts on cases related to customary rights. For example, the Constitutional Court in Bolivia used the ILO Convention No. 169 provisions on cultural rights regarding sanctions imposed by an Indigenous community to its members and recognized the Indigenous sanctions, even though it said this was not an absolute right and was limited by constitutional requirements and human rights law.[42]

40 ILO, Indigenous and Tribal Peoples Rights in Practice, A Guide to ILO Convention No. 169. (Geneva: International Labour Standards Department, 2009) p. 82.
41 CEARC, 102st ILC Sess., Direct Request (CEARC)- C169- Indigenous and Tribal Peoples Convention, 1989 (No. 169) Fiji, (2012).
42 Constitutional Court of Argentina, Constitutional Judgment 0295/2003-R, File 2002-04940-10-RAC,
Judgment of 11 March, 2003.

Similarly, the Constitutional Court of Colombia also used article 8 to hold that the decisions of Indigenous communities that apply sanctions in accordance with Indigenous customary community law constitute valid decisions within their jurisdiction, unless they contravene the Constitutional guarantees for fundamental rights.[43] Although these decisions are great and their limitation of Indigenous laws before constitutional provisions go further than ILO Conventions No. 107 and No. 169, they were held before adoption of the UN Declaration in 2007 (2003 and 1994 respectively) and hence do not incorporate the evolution that the UN Declaration has represented in Indigenous customary laws. Article 34 of the UN Declaration embodies the right to self-determination as expressed in the Preamble and articles 3, 4 and 5 of the Declaration. Here the right to cultural autonomy is not separated from the right to self-determination as opposed, for example, to articles 1 and 27 of the ICCPR, which separate self-determination and cultural autonomy respectively. Conversely article 34 of the UN Declaration draws together self-determination and cultural autonomy.

Finally, one should not forget the important contribution of the Inter-American system of human rights protection in defending and promoting Indigenous rights. In the *Aloeboetoe* case, the Inter-American Court of Human Rights considered the marriage customs of the Saramaca people in apportioning compensation to the victims' next of kin and took into account the customary marriage practices of the Saramacan people in its decision as to who qualified as family members who would be awarded reparations.[44] The Inter-American Court also ordered reparations to reinforce the cultural traditions and customary law of the Achí Mayan Peoples when their culture was almost destroyed through human rights violations.

43 Constitutional Court of Colombia, Judgment T-254/94, Judgment of 30 May, 1994 (Rapporteur: Eduardo Cifuentes Muñoz).
44 *Aloeboetoe et al. v Suriname (Reparations) 1993* IACHR Series C 15; 1–2 IHRR 208.

Some Challenges

Still, the maintenance of multiple legal systems within the State brings with it some challenges that have to be discussed:

1. *Conflicts with other human rights*

Many States are very reluctant to allow for Indigenous alternative judicial arrangements. They often use the argument of potential discriminatory outcomes or processes that such arrangements may have. For example, the Australian report on Customary Law states that customary law may mean control of the judicial processes by male elders who were themselves or family members were perpetrators of crimes.[45]

UN bodies have also expressed their concern. The Committee on the Rights of the Child has expressed its concern for on-going discrimination against Indigenous children that touches all aspects of life, including cultural rights;[46] and customary laws and cultural practices that have a detrimental effect on Indigenous children and especially girls.[47] Similar comments have also been issued by the Committee of the Committee on the Elimination of Discrimination against Women (CEDAW), especially with respect to Indigenous cultural practices that have a negative effect on Indigenous women.[48]

Article 1 of the UN Declaration confirms that the instrument is not to be examined on its own, but is part of the whole international human rights edifice. In addition, article 46.2 is a general clause recognising that the Declaration is subject to limitations "interpreted in accordance

45 Northern Territory Law Reform Committee, Report of the Committee of Enquiry, Report on Aboriginal Customary Law, (Darwin: NTLRC, 2003) p. 15.
46 Committee on the Rights of the Child, Consideration of the reports submitted by States parties under article 44 of the Convention: Concluding observations Union of Myanmar, 59th Sess., UN Doc. CRC/C/MMR/CO/3-4 (2012), para. 96.
47 CRC, Concluding observations on the consolidated second and third report of Namibia, 61st Sess., UN Doc. CRC/C/NAM/CO/3-4 (2012) para. 30 (a) & (b); also *supra* note 45.
48 For example, CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination of Women, Mexico, 52nd Sess., CEDAW/C/MEX/CO/7-8 (2012) paras. 34–35; CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination of Women, Paraguay, 50th Sess., CEDAW/C/PRY/CO/6 (2012) para. 32.

with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith,"[49] which are values that are common for the whole humanity. They include the principle of non-derogation of some rights, such as the right to life and prohibition of torture; and also include the core of human rights, the essence of each human right. Indigenous leaders have recognised repeatedly that no cultural practices and beliefs can violate these values and no real adjustment can be initiated to these rights. Understanding the UN Declaration as part of international law, as noted in articles 1 and 46, provides some directions about these cases.

The recognition of Indigenous laws and systems does not endanger human rights any more than the recognition of non-Indigenous or national customs. International law is open to the cultural allegiances that the individual has and views them as concentric circles around the person. All circles are protected as they all contribute to the enrichment and development of the individual. This model emphasises the commonality of values and ideas of different cultural frameworks, including Indigenous and non-Indigenous cultures. Revisibility and re-evaluation of specific expressions of cultures occur in all cultures, including the Indigenous ones, and must *prima facie* come from the group itself. Also, any assessment about a cultural practice must allow for a certain deference for the group's "own interpretive and decision-making processes in the application of universal human rights norms, just as States are accorded such deference."[50] Therefore, no preconceived hierarchy between the Indigenous right to custom and any other right is desirable and can be concluded by applying the UN Declaration on the Rights of Indigenous Peoples. Even when a custom violates a non-derogable right or the core of another right, a solution that would accommodate both rights must be found. However, at the very last instance, the custom that violates the core of another right

49 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49, article 46.

50 James Anaya, International Human Rights and Indigenous Peoples. (Aspen CO: Aspen Publishers, 2009) p. 26.

cannot continue.[51] This is how articles 12–14 in conjunction with articles 1 and 46.2 of the UN Declaration must be read.

2. *Hierarchy of systems*

For example, in Malaysia the traditional institutions are often undermined by the State or hybrid systems. These bodies are often established to represent Indigenous communities but gradually become the oppressor themselves as they are seen to represent the views of Indigenous Peoples even though their Indigenous composition is very limited. Therefore, Indigenous Peoples have noted that in 'there is a need for a re-definition of the relationship between Indigenous Peoples and the State through effective negotiation processes'.[52]

Also in Africa, the colonial State legal pluralism recognized Indigenous law only as a set of rules, while the contemporary idea of deep legal pluralism attempts to take into account Indigenous law but considers its existence independent of state structures. So, it is an often committed mistake that the interpretation of Indigenous laws and systems relies on Western-educated lawyers that would then be applied in practice by Western-style law courts. Also, the choice of who will be chosen to give his or her opinion on the Indigenous laws is usually made on the basis of convenience of the State rather than knowledge. In this issue, positive has been the new Administration of Justice Act for Greenland and a new Criminal Code for Greenland which entered into force in January 2010. District courts maintain a local presence and staff and district judges are recruited among the local population.

3. *Interpretation of Indigenous laws and systems—Capacity building*

51 Alexandra Xanthaki, *Multiculturalism and International Law: Discussing Universal Standards*, (2010) 32 Human Rights Quarterly.

52 Indigenous Governance systems in Asia, Submission by the Asia Indigenous Peoples' Pact (AIPP) Foundation to the Study by the Expert Mechanism on the Rights of Indigenous Peoples entitled Indigenous Peoples and the Right to Participate in Decision-Making, 3d session (2010) of the Expert Mechanism on the Rights of Indigenous Peoples, Office of the High Commissioner on Human Rights, found in http://www2.ohchr.org/english/issues/Indigenous /ExpertMechanism/3rd/docs/contributions/AIPP.doc

The other major challenge to the Indigenous political systems is the building of the capacity of these institutions to address more effectively the more complex present-day realities and situations of Indigenous Peoples. For example, Indigenous institutions are increasingly confronted by outside entities such as corporations, international financial institutions promoting "development projects" that severely limit the rights of Indigenous communities and more often than not entail the extraction or expropriation of Indigenous lands and resources. In Malaysia, hybrid organisations such as the Village Security and Development Committees (JKKK) are seen as tools of the government to dominate and control the Indigenous Peoples or as organisations that act as 'the ears and eyes' of the government.[53]

Who will decide whether the Indigenous structure, custom and right is in conflict with international human rights and on what basis?[54] Suffice to say that first, the individual whose rights are in question must be the initial point of reference; second, that the group must be allowed to exercise its own rules of interpretive and decision-making processes in the application of universal human rights norms;[55] and third, that conflicts between international human rights and Indigenous rights would put in motion the Lovelace test of proportionality, necessity, equity and balance of rights.[56]

Also, there is a need for Indigenous experts to give their expertise on Indigenous laws. For example, in Palau "the courts are increasingly viewed as becoming a part of customary processes of dispute resolution, while the inclusion of chiefs in legislature and state government bodies is seen as forging a compromise between western and customary models of governance."[57] This notion of compromise is also apparent in the Loyalty Islands Environment Charter, "which

53 *Ibid*.
54 James Anaya, Indigenous Peoples in International Law. (Oxford, Oxford University Press, 2004) 133.
55 *Supra* note 50, at p. 26.
56 Lovelace v. Ontario, 2000 (1) S.C.R 950 (SCC 37).
57 Brendan Tobin, The Role of Customary Law in Access and Benefit-sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries. (Switzerland: WIPO & UNU, 2013) pp.1–97.

seeks to articulate customary law principles in a fashion coherent to a western legal system."[58]

Other questions that have to be addressed include more depth in the relationship between Indigenous and non-Indigenous systems of law and how they can interact with mutual respect but also efficiency; whether the Indigenous customary laws will also bind non-Indigenous Peoples that are in Indigenous areas or not; and what form of recognition the Indigenous customary laws may take.

Notwithstanding all the challenges and also the need for further reflection on customary international laws and systems, one cannot deny that important steps have been made. Certainly, the implementation of the UN Declaration on the Rights of Indigenous Peoples will push for further reflection and discussion on such matters.

58 *Ibid*.