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wien

# DIPLOMARBEIT

Titel der Diplomarbeit

„The UN Declaration on the Rights of Indigenous Peoples  
within a Human Rights-Based Development Approach“

Verfasserin

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angestrebter akademischer Grad

Magistra (Mag.)

Wien, 2013

Studienkennzahl lt. Studienblatt:

A 057 390

Studienrichtung lt. Studienblatt:

IDS Internationale Entwicklung

Betreuer:

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## ACKNOWLEDGEMENTS

My finished thesis: A small step for mankind but a giant leap for me.

Thanks: A small word of gratitude but a giant feeling for me.

Thanks to Prof. Brocza and Prof. Kuppe from whom I learnt a lot.

Thanks to my parents who always encouraged me in the things I wanted to do and be.

Thanks to my friends for their motivation, guidance, laughter, inspiration and loyalty.



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# LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ECOSOC	United Nation Economic and Social Council
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
HRBDA	Human Rights-based Development Approach
IASG	Inter-Agency Support Group on Indigenous Issues
NGOs	Non-Governmental Organizations
OHCHR	Office of the High Commissioner on Human Rights
TNC	Transnational Corporations
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues
WGDD	Working Group on the Draft Declaration on the Rights of Indigenous Peoples
WGIP	Working Group on Indigenous Populations
WHO	World Health Organization
WTO	World Trade Organization

# 1. INTRODUCTION

“Rights are not a cold legalistic formula to be arbitrated by well meaning, well-educated and sophisticated experts on behalf of the majority. Rather they are a manifestation of what the human spirit aspires to and can achieve through collective and positive struggle. As such they can only be made real by the involvement and empowerment of the community at large...” [Chapman, 2005:4f].

On increasing occasions during a year, indigenous peoples mix up the predominant image of grey and black suits or dresses in the hallways and conference rooms of the United Nations buildings. By wearing a variety of their traditional styles, colors and textures, they remind staff members, spokespeople and governmental representatives of their cultural diversity and that they are also part of the global community and the UN. However diverse their outfits might be, they often share similar historical and ongoing experiences of colonialization, marginalization and discrimination. Thus, as non-state actors, they have come a long way to make their voices heard and their inherent rights acknowledged. A few decades ago, this was still quite impossible.

When Chief Deskaheh, speaker of the Six Nation Council first came to the League of Nations in 1923 to claim self-determination for the Haudenosaunee Nation, he petitioned against Canada’s encroachment onto Iroquois territory. Through major interventions by the United Kingdom and Canada, he was rejected on the grounds of not being a sovereign nation but rather under the rule of Canada. Thus indigenous issues were still not regarded as a matter of global concern but rather domestic problems. [Cornassel, 2008:109f]

Only through changes in the geopolitical order of recent times and increasing globalization could indigenous peoples use those favorable conditions to raise awareness about their concerns. Thus due to their active lobbying and negotiations a new body of international law emerged regarding the recognition of indigenous peoples’ rights. “The Declaration on the Rights of Indigenous Peoples is the most important of these developments globally, encapsulating as it does the widely shared understanding about the rights of indigenous peoples that has been building over decades on a foundation of previously existing sources of international human rights law.” [Anaya, 2008:6] Thus after a process of more than twenty years of campaigning and negotiations, the Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>1</sup> now ensures indigenous peoples not only general human rights but also specific collective rights particularly regarding their right to self-determination, identity and culture, traditional lands and resources as well as their free prior informed consent.

However significantly the adoption of the Declaration was, acknowledgement alone won’t change everyday life of indigenous peoples on the ground. Thus implementing the UNDRIP is another long road ahead.

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<sup>1</sup> From now on also just „the Declaration“

Therefore this paper analyses what potential the Declaration provides as a legal framework and point of reference within a human rights-based approach to development.

The first chapter describes the general circumstances of post-Cold War times which set the scene for a human rights-based approach. Thus by becoming more aware of social and economic rights and due to a shift of economic to human development, discourses of human rights and development increasingly merged together which sparked new approaches towards rights-based initiatives.

The second chapter thus defines indigenous peoples and highlights their cultural diversity and traditional understandings specifically regarding their relationship to lands and resources. Often being amongst the poorest of society, indigenous peoples are seeing themselves on the losing end of mainstream development approaches due to cultural insensitive policies which commonly lead to even more destruction of their surroundings. However, through a different understanding of development, aiming on expanding their opportunities to live a life they want to pursue and thus regarding their strive for self-determination, could offer a new way to take a human rights-based approach into consideration.

Therefore, the third chapter shows how indigenous peoples, tired and frustrated of national policies undermining their inherent rights, started organizing themselves to transnational advocacy networks in order to establish their place within the UN.

As the most comprehensive document on indigenous rights, the UN Declaration is the main focus of the fourth chapter. Demonstrating its novelties regarding drafting procedures, provisions within and finally options for implementation, this section should finally highlight how even as a non-binding instrument, the UNDRIP can be a significant point of reference and legal framework regarding a human rights-based approach.

The fifth and final chapter analyses the specific situation of indigenous peoples in Canada, particularly in British Columbia. Being one of only four countries which voted against the Declaration at the UN General Assembly, Canada's quite contradictory positioning regarding its "First Nations" should be the main focus of this section. Thus while trying to keep up a good image regarding general human rights standards but also indigenous peoples, current models of "reconciliation" actually aim to extinguish indigenous rights. Strategies of First Nations of British Columbia demonstrate growing public and community awareness of those processes and pressure Canada into changing its policies in that regard. Thus finally the paper suggests that by granting indigenous peoples their right to self-determination and thus control over their own affairs, community well-being and the overall situation of First Nations could increase significantly. That again goes in line with the main idea of a human rights-based approach to development, thus improving the lives of people by claiming and implementing their (human) rights.

Referring to the main findings of the paper, the final conclusion should try to answer the question, if Chief Deskaheh would still be rejected at an international level respectively in Canada with his demands for an indigenous right to self-determination.

## 2. METHODOLOGY

### 2.1. Research Questions

As most common development approaches have failed to take into account the specific situation and concerns of indigenous peoples, the first part of this paper analyses the question, if a human rights-based approach to development can offer a more effective and particularly more adequate framework for addressing structural causes of indigenous peoples' marginalization. In this context, the paper also discusses the term "development" itself particularly regarding a much broader and more holistic indigenous understanding of word as well as the situation of indigenous peoples in so called "First World countries".

The second part of the paper examines the question, which various factors have contributed to the emergence of new international norms regarding indigenous peoples, finally leading up to the UN Declaration on the Rights of Indigenous Peoples as the most elaborate human rights document in this regard. By highlighting novelties concerning its drafting process, content and implementation clauses, this section finally asks how this Declaration can be used as a legal framework and point of reference within a human rights-based approach for indigenous peoples to improve their overall situation.

Finally, the present paper examines Canada's quite controversial position regarding indigenous peoples. By analysing how current policies on reconciliation and processes of treaty negotiations are still guided by old colonial doctrines, this part asks if the UNDRIP could serve as a more adequate legal framework for reconciliation processes and thus improving the marginalized position of First Nations even in this fairly rich country by acknowledging their right to self-determination.

### 2.2. Research method

The present paper is an attempt to encapsulate practical experiences made regarding indigenous rights activism through a merely theoretical approach. By concentrating on researching and interpreting various articles, studies and statements, a hermeneutic analysis was used to gain an in-depth understanding on those questions raised. Due to own practical involvements regarding that subject, an empirical study would have been possible as well, acquiring more knowledge and insight through interviews in order to come to a general statement by taking into account conclusions from individual cases. However, the thesis should be considered an attempt to analyze and frame already experienced impressions and understandings of those topics regarding indigenous peoples' struggle for recognition of their

indigenous rights within different theoretical concepts. In turn, it is out of question that in the process of researching and particularly choosing articles and papers often involving quite controversial viewpoints, I was guided by personal perceptions on supporting indigenous activism on a national (particularly in Canada) as well as international, thus UN level. Therefore my subjective interpretation should be taken into consideration regarding the understanding of texts, cultures, views and thinking.

# 3. HUMAN RIGHTS-BASED DEVELOPMENT APPROACH

## 3.1. Setting the Scene – The linking of Human Rights and Development

"Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings...Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom." [Mandela, 2005]

A few decades ago, discussions started on integrating human rights into development cooperation. At the beginning of the 21<sup>st</sup> century they now have turned into a well-established paradigm on an academic level but are also implemented in the actual practice of many related NGOs which have incorporated a rights-based development approach into their work.

For this process to emerge, two main understandings were decisive: first, a recognition of the interrelatedness and indivisibility of human rights, thus becoming more aware of economic, social and cultural rights and secondly, particularly thanks to Amartya Sen and the work of the UN Development Programme (UNDP), a shift in the development cooperation arena from focusing solely on economic development towards a broader understanding of development as human development. [Sitta, 2006:1 f]

Human rights as well as development have turned to infamous buzz-words nowadays. Since both terms are quite general and allow for different meanings, they are frequently used and abused for various claims or justifications by governments, policy-makers, international (financial) institutions, corporations, activists, scholars and field-researchers alike. While activists are eager to change the status-quo and often don't take time to interpret it nor ground their demands on conceptual considerations, they leave criticism unanswered. Those skeptics in turn, tend to interpret human rights and development quite narrowly and unidimensional. Therefore the next section should give an introduction to both concepts and their eventual merging which finally led to the emergence of a human rights-based approach to development.

### 3.1.1. Human Rights

Not many other concepts have been as widely and heavily discussed in recent political debates as human rights. As Amartya Sen points out, “there is something deeply attractive in the idea that every person anywhere in the world, irrespective of citizenship or territorial legislation, has some basic rights, which others should respect” but at the same time have been criticised of being “dubious and lacking in cogency” [Sen, 2004:315].

Critics of human rights discourses usually deny human rights the status as “rights” as such due to their unbinding non-enforceable nature, others reject only certain human rights of being too vague, such as economic, social or cultural rights.

From a legal positivistic perspective, human rights are “the sum total of all subjective rights as laid down in national constitutions and/or international human rights documents” [Nowak, 2003:4]. That way, human rights are only those rights which are nationally or internationally agreed upon and proclaimed in some sort of legislative process.

Following Amartya Sen in his broader understanding of the term, human rights are more than rights in a legal sense but rather shared values or “ethical claims”. Obviously there are many different values which also strongly depend on the regional, social and cultural context. The difficulty lies therefore in choosing which of those values are considered important enough within a society or even international community to be acknowledged as human rights which, according to *Sen*, should exactly be content of human rights discussions and forums since in reference to John Rawls, the viability of human rights is connected to “public reasoning” and “ethical objectivity”. [Sen, 2004:349 ff] “The force of any particular claim to be seen as a human right would be seriously undermined if it were possible to show that such a claim is unlikely to survive open public scrutiny.” [Sen, 2006:2925]

Much criticism has picked up on the point that human rights are based on dominant Western values and thinking. It is not the intention of this paper to go into a deeper discussion on the universalism of human rights which already has been widely discoursed in literature elsewhere. However, considering that at least at its core, human rights are indeed universally shared values, the tenet of the so called “golden rule” is quite interesting. It is the only principle with about the same wording, which is found in all major religions of the world (thus Christianity, Hinduism, Islam, Buddhism and Judaism) and states the basic demand: “Don’t do to others what you don’t want for yourself”. [Nowak, 2003:9] This would suggest that the “golden rule” can be considered a shared value or ethic claim in most societies as an elementary concept of human interaction, thus to respect each other as human beings and with dignity. This again is also the focus of human rights: the life and dignity of human beings as the core around all other human rights such as freedom rights, equality rights, political rights, rights of economic life, collective

rights, procedural rights and specific rights for certain groups (e.g. children, elderly, disabled, etc.) [Nowak, 2003:1 f]. When upheld, human rights make the difference of being or merely existing. They do not only protect the physical integrity of a person but also give human beings purpose and worth by ensuring human dignity and identity as an individual and within a group. [UNCDG, 2006:1].

### 3.1.1.1. Interrelatedness of Human Rights and Ideological Divides

After the horrors of World War II human rights violations could no longer be regarded as solely national matters. Instead, the international community acknowledged that protecting human beings and their dignity from worst abuses and deprivations also lies in their global responsibility. Thus it took states within the newly established United Nations only three years to decide on an international document that would capture the most fundamental human rights, thus ethical claims any human being should be entitled to. Therefore, the Universal Declaration of Human Rights proclaimed in 1948 still is considered the most important human rights document. [Human Development Report, 2000:1 f] Since it was a non-binding declaration, states were quite willing to adopt the document without many rejections. However, transforming the provisions in the Universal Human Rights Declaration into binding obligations in form of a human rights convention, turned out to be rather difficult.

Set in times of the Cold War, there was a clear division of ideologies between Western countries and the Soviet Union states which also had a major influence on the human rights discourse at the time as human rights were often used as “weapon of propaganda for geopolitical interests” [Human Development Report, 2000:3].

Grounded in the basic ideas of the Age of Enlightenment, it was the great achievement of those times that human beings were seen as subjects rather than objects of law, born with rights against the state. These classical non-interference rights are often referred to as “first generation rights” and include mostly civil and political rights such as the freedom of religion, freedom of opinion and expression or right to privacy. Stemming from liberal thinking of the 19<sup>th</sup> century, the main duty of the state was regarded to respect freedoms of individuals but also the market. Thus Western countries criticized countries from the Soviet Union for not granting its citizens civil and political rights and denying them basic freedoms on how to live their life. [Nowak, 2003:23]

On the other hand, socialist states focused on positive duties of the state to protect as well as fulfill the rights of its citizens in order to harmonize individual and collective interests in socialist societies. Instead of demanding non-interference of the state (which was considered to increase the capitalistic divide of society and the state) these so called “second generation rights” called on the state to ensure work, housing, health, education etc. for each individual through granting benefits and services. Thus socialist countries condemned Western countries for their failure to provide their citizens with basic economic and social rights even though they had enough financial resources to do so. [Nowak, 2003:24f]

After decades of discussions, finally the decision was made to draft two separate conventions, one for civil and political rights and one for economic, social and cultural rights to make it possible for states to ratify them separately. Consequently, the different “generations” of human rights but also their underlying socioeconomic ideologies found their normative expression in the two conventions of 1966 (Convention of Civil and Political Rights and the Convention of Economic, Social and Cultural Rights). [Nowak, 2003:24f]

Only much later, during the first major post-Cold War conference on human rights, the Vienna Conference of Human Rights in 1993, participating states strongly reaffirmed the integrated nature of all human rights to be universal, indivisible, interdependent and interrelated<sup>2</sup> as stated in the Universal Declaration of Human Rights and proclaimed the protection of human rights as one of the top priorities of the United Nations. [Cornwall/Nyamu-Musembi, 2004:1423]

### 3.1.1.2. International Human Rights Framework

The Universal Declaration of Human Rights, the Convention of Civil and Political Rights (CCPR) together with its two Optional Protocols and the Convention of Economic, Social and Cultural Rights (CESCR) are commonly referred to as the “Bill of Human Rights”. For those core foundations of an international human rights framework to be effective, the UN set up specific human rights bodies to further elaborate on those rights but also to monitor their compliance. [Nowak, 2003:73ff]

By conducting various studies and research but also due to petitions and claims of violations which were brought to them by individuals, those human rights bodies realized that there was great need to address certain issues of global concern and to further codify specific rights regarding those matters into declarations, conventions or charters. Therefore, the most important conventions in that regard known as the “core human rights treaties” include:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)
- International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW)

[OHCHR, 2005:18 f]

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<sup>2</sup> “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.” (Part 1, para.5 of the 1993 Vienna Declaration and Programme of Action)

Today every state has at least ratified one of the seven most important UN Conventions while more than 80% of all countries have signed four or more. [Arbour, 2006:5] Independent from any ratification in UN documents, many of the human rights principles also became part of international customary law and form an internationally agreed framework of legal norms and instruments which are acknowledged and further elaborated in international and regional legal documents. “The legal force of the norms and standards of the UN human rights system is buttressed by the moral weight of the declarations, proclamations, platforms, programs, plans of action and guiding principles adopted either by resolution of the UN General Assembly or at world conferences convened by the UN. Together with the legally binding norms and standards, they provide the platform for international efforts to respect, promote, protect and fulfill human rights.” [UNCDG, 2006:3]

This process highlights the fact that human rights and their underlying ethical values have transformed over the years, particularly influenced by different ideological understandings but also emerging new global concerns. Thus the international human rights framework has expanded significantly, through increasing studies by the UN human rights bodies themselves but also through more and more involvement of non-state actors raising awareness of structural violations needing to be dealt with. As the major part of the paper will discuss, indigenous peoples have been amongst those new activists who strived for their specific rights regarding their particular situation and cultural distinctiveness.

### **3.1.1.3. Obligations under International Human Rights Law**

Together with humanitarian law, human rights are the only examples where individuals are directly subjects of international law and thus become (human) rights-holders within the normative human rights framework. States are thus the main correlating duty-bearers accountable to respect, protect and fulfill those rights set out in general human rights by being part of the UN community or through ratification, becoming party to binding human rights conventions. Thus, within a human rights framework, states have three main obligations:

1. To respect – Stemming from the liberal idea of demanding states not to undermine or interfere in the way of life, believes and doings of individual citizens, this “negative” non-intervention obligation particularly concerns civil and political rights such as the freedom of religion, freedom of torture, right to privacy, right to life, freedom of speech and opinion, etc.
2. To protect – While the duty to respect only requires the state to refrain from acting, the duty to protect is based on the idea that the state also has an obligation to prevent third parties of violating the enjoyment. Therefore it is not enough for states to abstain from undermining human rights of their rights-holders but they also have a duty to prevent third parties in restricting those rights from others.

3. To fulfill – The obligation to fulfill goes another step further and obliges the state to set positive action to ensure that all human being cannot only potentially but also practically enjoy their rights. Therefore a state has to take necessary legislative, administrative, budgetary or other measures to realize these rights for all rights-holders, particularly concerning economic and social rights which usually have to be nationally institutionalized in order to be effective, i.e. the right to education, health, food or housing. [Nowak, 2003: 48ff]

As a result, it is essential for any understanding of human rights to keep in mind that within the human rights framework, a state has to oblige all three duties for each human right to be fully realized.

Aside from the main duties to respect, protect and fulfill human rights, a state also has to establish judicial, administrative, legislative or other measures for effective remedies in cases a person's human rights have been violated. This also includes reparations to victims for the harm suffered and a state's duty to hold those responsible for violating human rights.

Generally, the right to effective remedies and reparations only refer to civil and political rights while there are hardly any provisions or court cases on violations of economic or social rights. Reasons for this divide again stem from the ideological thinking that latter rights are less judicial and enforceable. Of course, wrongful state action is always easier to address than to decide whether a state has failed its duty for positive action. [Klok/Nowak/Schwarz, 2005:14]

#### **3.1.1.4. Realization of Human Rights**

Under international human rights law states are required to strive for the most effective and fastest possible way to implement their obligations while all UN bodies and programs have the responsibility of assisting countries, especially developing countries to meet their duties. This is also explicitly mentioned in Article 2.1 of the UN Convention of Civil and Political Rights (CCPR) stating that

*“States have to undertake steps, individually and through international assistance and cooperation, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized”.*

Generally, due to the principle of interrelatedness and indivisibility of human rights, they all have to be achieved together since their realization depends on another. In practice though, implementation processes can vary greatly.

As civil and political are implemented through a legislative process of ensuring freedom rights for citizens, these rights are expected to be respected and ensured right away. However obligations to protect and moreover to fulfill particularly economic and social rights can be very costly as any implementation usually involves institutionalizing these rights which many poor countries can't afford. While some core obligations (legislative conformity, non-discrimination and monitoring systems) of economic and social rights also have to be immediately effective and

need to be assured on a minimum level, any further implementation can be realized only progressively. In this regard, states have to take all necessary steps possible to strive for steady fulfillment by developing medium and long-term policies. [ODI, 1999:3] All resources available have to be used effectively as well as funds allocated in national policies, thus a lack of resources alone is not sufficient justification. In turn, the concept of progressive realization takes into account different levels of development and the actual economic situations of states which also has implications on so called “First World” countries. As they have more financial but also administrative and human resources available to ensure the full realization of all human rights, they are also expected to address relative poverty within their countries. [Klok/Nowak/Schwarz, 2005:13]

Consequently, when regarding indigenous peoples particularly in Canada in the last chapter, their socioeconomic conditions are quite drastically lower than those of non-indigenous citizens. While their standard of living might be higher than in other “Third World” countries, they are still “relatively poor” regarding the rest of the population and thus obliges Canada to ensure their human rights as well.

#### **3.1.1.5. Duties of Non-State Actors**

While states are the main duty bearers under international law, obligations can also arise for non-state actors. It is for example the explicit duty of parents to send their children to school under the Convention of the Rights of a Child while the state has to facilitate enough resources to give children access to schools and education. On the other hand individuals in general have the obligation to respect human rights of others, corresponding with the duty of the state to protect human rights from Third Parties.

Due to increased globalization, transnational corporations (TNC) are becoming increasingly important actors also regarding human rights. However, since they are not subject of international law, human rights duties can only indirectly be imposed on them through first setting norms on states to hold multinational companies accountable for their actions. While more awareness is being raised about the major positive as well as negative impacts TNCs can have on development processes and human rights, the international community has mainly used political instead of legal instruments to influence the activities of multinational corporations. Human rights and particularly environmental measures can only serve as internationally accepted standards and thus influence the development of corporate responsibility (as „persuasive authority“). [OHCHR, 2011:9ff]

Therefore many international organizations but also multinational companies themselves have started to come up with voluntary Codes of Conducts that TNCs can sign in order to show their commitment regarding the various rights involved (i.e. OPEC Guidelines for Multinational Enterprises, the UN Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, the UN Global Compact or references to TCNs in the World Summit on Sustainable Development, etc.). While this is surely a positive

development in the right direction, major problems particularly regarding accountability and effectiveness remain. Many of those guidelines are not widely known and thus have not much influence on behavioral changes of companies or consumers (regarding social responsibility). Since there are also almost too many different Codes of Conducts existing, it is easy to lose track on what those are actually stand for. Finally, hardly any mechanisms are in place to monitor and evaluate, if multinational corporations really follow the guidelines and standards, they have committed themselves to. [Perry-Kessaris, 2010:9ff]

## **3.1.2. Development**

### **3.1.2.1. From Economic Development towards Human Development**

The great ideological divide in times of the Cold War regarding human rights as explained before, not only had political implications but also economic origins. Western countries in favor of civil and political rights rooted for individualism in the name of liberty and freedom for their citizens but also trade relations. Instead of the state being the main duty-bearer, a liberalized market was considered the main driving force to tackle economic and social issues and thus focus on market growth as central development paradigm.

In the Soviet Union and other socialist countries however, social justice was seen as the main principle for equality which could only be reached by fulfilling economic and social rights through the intervention of the state as the central planner and provider of goods and services.

As the Soviet Union collapsed, neoliberal theorists found proof of the failing socialist system. They spread the idea of development policies based on a market-driven model to increase an institutionalization of capital flows, foreign investment and privatization while at the same time demanded cuts in public spending on health care, education or social insurance systems in “flawed” government policies. Consequently, for decades the only solution for poverty and development was considered to be economic growth and the integration of emerging markets of developing countries into the globalizing trade. Any concerns about economic and social rights were left unheard or disparaged. “The absence of any clearly defined short-term threat to the social order undermined the rationale for urgent assistance to reduce inequities during the 1990s, leaving globalization as the default development paradigm.”

[Offenheiser/Holcombe, 2009:272 f]

In the end of the 1980s, beginning of the 1990s, it became more and more apparent, that a neo-liberal model alone wasn't able to eradicate poverty but actually often worsened the situation in many countries. Only through this changing global context, the development paradigm of economic growth lost substantially in substance as well as image.

New alternative approaches on development policies emerged and softened the single minded focus on market driven concepts towards discussions on sustainable growth, good

governance and human rights. [Dorsey/Nelson, 2008:96 ff] Along with increased advocacy work of NGOs establishing themselves as important actors during that time, those issues found their way in development discourses and programming, being subject of international conferences, public debates and policies.

Influenced foremost by the work of Amartya Sen on a new understanding of development which concentrated on the freedoms and capabilities of people instead of centering on the market, the United Nations Development Programme (UNDP) contributed significantly towards a new shift from economic development to human development and is defined by the latter as “the process of enlarging the range of people's choices-increasing their opportunities for education, health care, income and employment, and covering the full range of human choices from a sound physical environment to economic and political freedoms”. [Hamm, 2001:1010]. In their annual “Human Development Report” in which the UNDP analysis development processes of all countries in the world, it introduced a new indicator for measuring development: Rather than taking solely income or GDP into account, the so called “Human Development Index” (HDI) uses also other variables based on an arithmetic mean of life expectancy, education and income. This HDI nowadays is commonly used and also other institutions such as the World Bank have adopted more multidimensional concepts of development. [HDI-UNDP]

### **3.1.2.2. Amartya Sen's “Capability Approach” – An Alternative Way of Defining Development**

Confronted with a great variety of definitions and theories of and about “development” the paper should give a short introduction on the capability approach of Amartya Sen and his understanding of development since his definition of development could fit quite well within a rights-based approach to development and moreover specifically regarding indigenous peoples could provide an alternative concept of the term which takes into account their strive for self-determination as further elaborated in the next chapters.

Traditional economic theory concentrated largely on income, growth and economic efficiency of the market to believe that people, rich and poor, will – in the long run - eventually benefit from liberalized trade. *Sen* challenged and highlighted the limitations of this “welfarist” approach, based on assumptions of rational thinking, self-interested individuals and their choices towards “utility maximization” (i.e. the “pareto efficiency” model). [ODI, 2001:1]

By contrast, *Sen* broadened the informational base to include a variety of factors on what reasons people to act and strive for. In his view, development is much more the process of expanding fundamental and real freedoms a person enjoys. „What people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives. The institutional arrangements for these opportunities are also influenced by the exercise of

people's freedoms, through the liberty to participate in social choice and in the making of public decisions that impel the progress of these opportunities“. [Sen, 1999:5]

By focusing on expanding those freedoms and actual opportunities for people to lead a life they want to pursue, it directs attention on ends of development, thus the valued outcomes of development processes. Correlating with civil and political freedoms from a human rights perspective, freedoms also refer to decision-making processes for societies to influence and decide on how those “ends” and thus results of development should look like. Therefore, political participation and open discussions are ends and means of developmental processes at the same time. [Sen, 1999:291 f]

Other factors such as economic growth, income or commodities which many other development discourses see as aims to focus on, are thus regarded not as outcomes of development but rather as means of expanding ones freedoms and opportunities. Thus a higher income for example only provides a person with greater possibilities to do things he/she enjoys or strives for but is not an end in itself.

Respectively, poverty is not a lack of income but is considered as a deprivation of elementary capabilities such as failures of states leading to premature mortality, significant undernourishment, widespread illiteracy or persistent morbidity. This shift of perspective can also address more complex issues of poverty such as “relative poverty” (being poor within a generally rich society, thus for example indigenous peoples in so called “First World” countries) in developed countries which are not well reflected in income distributions due to a lack of a different or insufficient informational base (i.e. Social exclusion, leading to losses of self-reliance, self-confidence, psychological and physical health) but also “coupling” effects of disadvantages (i.e. facing discrimination two-folded, such as women from an ethnic minority, etc). [Sen, 1999:21 and 88ff]

For an instrumental perception, *Sen* identifies five different types of freedoms which advance the general capability of a person:

1. *Political freedoms* – refers to the opportunities that people have to determine who should govern them, on what principles, to criticize them, freedom of political expression and uncensored press, therefore regarding political entitlements associated with democratic systems in the broadest sense.
2. *Economic facilities* – opportunities to utilize economic resources for the purpose of consumption, production or exchange, depending on resources available but also conditions of exchange and availability of finances, highlighting the importance of concerns about distribution alongside aggregative considerations
3. *Social opportunities* – arrangements that societies establish for education, health care, etc. which allow for people's well-being. They are not only significant for the conduct of private lives but also for more effective participation in economic and political activities (i.e. literacy, nutrition, etc.)

4. *Transparency guarantees* – on the presumption that society operates on a basic idea of trust this freedom deals with the openness that people can expect from each other, freedoms to deal with one another under guarantees of disclosure against corruption, financial irresponsibility or illegal dealing etc.

5. *Protective security* – social safety nets preventing people from being reduced to complete misery such as fixed institutional arrangements of unemployment benefits, income supplements, famine reliefs or emergency services. [Sen, 1999: 40]

As it is the case with human rights, those freedoms are considered to be interrelated and interconnected. *Sen* thus criticizes economic development theories which only focus on economic growth and productivity and see social arrangements such as education and health care “luxury matters” which should wait until a state is “rich enough” to afford them. Instead, those factors if implemented actually enhance economic growth as it was the case for instance in context of the “Asian miracle” as *Sen* argues where many Asian countries have invested for years in educating their citizens (“social preparedness”) and together with new technological advancements amplified development drastically [Sen, 1999:49]. Though the income of the population was maybe lower than in other countries, they could achieve a higher length and quality of life by investing in the expenditure of human capabilities.

Amartya Sen never defined or provided a list of fundamental freedoms he regarded crucial. This often was picked up by critics who considered such a numeration to be essential for any possible operationalization or evaluation since otherwise the informational base would be too broad and data not sufficiently available to compare or analyze. Though *Sen* mentions a few freedoms he would consider as being fundamental (long life, avoidance of morbidity, being able to read, write, communicate and take part in society), he reaffirms that they are largely depending on personal values. „In this sense the capability approach has a breadth and sensitivity that give it a very extensive reach, allowing evaluative attention to be paid to a variety of important concerns, some of which are ignored, one way or another, in the alternative approaches“. [Sen, 1999:86]

Regarding a rights-based approach to development and its general idea of enhancing the legal and in turn actual possibilities of people to determine their own lives and well-being, a definition of development according to Amartya Sen can be a vital contribution for a broader understanding of such an approach. “Since declarations of human rights are ethical affirmations of the need to pay appropriate attention to the significance of freedoms incorporated in the formulation of human rights [...], an appropriate starting point must be the importance of freedoms of human beings to be so recognized.” [Sen, 2004:328] Thus human rights legally define and codify certain freedoms people generally strive for, obliging states under international human rights law to set positive actions in order for people to expand their freedoms and capabilities for a life they want to pursue.

### 3.1.2.3. Excursus: A Right to Development

The right to development only has a recent history. Emerging in the context of decolonialization, it finally found its normative expression in the UN Declaration on the Right to Development which got adopted in 1986 as one of the first linkages of human rights and development and was further reaffirmed in various international conferences, especially the Vienna Conference of Human Rights in 1993 or the Millennium Declaration in 2000. [Sitta, 2006:6]

In 1998 independent expert Arjun Sengupta together with an open ended working group were mandated by the UN Commission on Human Rights to conduct studies and analysis on the scope of the right to development. Particularly Arjun Sengupta contributed greatly to conceptualize the right to development in more detail and provided further tools for implementation. Thus the first Article of the Declaration on the Right to Development defines the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.

Rather as a right on its own, it is considered to constitute a synthesis of all human rights put together. In that sense, seeing development as a human right also changes the way development cooperation can be perceived as needs and charity/aid are transformed to right with correlating responsibilities [Sitta, 2006:3]. Interestingly, the right to development is constituted as an individual right on the one hand but also as a collective and solidarity right with a global dimension. “This means that the process of claim is double: an individual has the right to claim his RTD realized by his own country, and the country has the same right in relation with the international community [...] In this sense equity, social justice and democratic participation become essential aspects of development process.” [Sitta, 2006:7]

According to *Sitta*, the concept of a right to development offers added-value to a rights-based development approach due to its clear definition of development as a human right and strong stand on the interrelatedness of human rights. However, other scholars argue to better keep efforts concentrated on economic and social human rights, since many, especially Western countries have opposed the right to development of being too vague and lacking clear responsibilities stemming from it while being afraid of creating one-sided obligations. Therefore chances would be better to remain within the general human rights discourse to pursuit claims in this regard. [Sitta, 2006:10 ff; Hamm, 2001:1009 f]

### 3.1.3. Merging human rights and development

“We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.” [Annan, 2005:6]

After World War II, the discourses of human rights as well as development newly emerged on the global arena. However, for a long time, academics, researchers but also NGO and state policies worked on separate tracks with clear divisions regarding missions, institutions and actors involved.

Thus much of the development field focused on economic growth, social and political conditions, resource control or relocation and economic efficiency. Development NGOs traditionally concentrated on delivering services to the poor, promoting self-sufficiency and community development. They articulated their agendas mainly to multi- or bilateral donors while working together with state institutions or community development NGOs.

Human rights approaches on the other hand emphasized mainly on establishing and monitoring international human rights standards and focused their work on advocacy, campaigning and lobbying. They associate more on an international level at UN institutions, other human rights organizations, usually funded by private donors or foundations. [Plipat, 2005: 19 f; Nelson/Dorsey, 2003:2015 f]

Due to increasing globalization by the mid-1990s, significant changes of power were taking place within the international system. Thus, the classic state-centric model shifted towards new emerging international players such as multinational corporations, social movements and NGOs. Economic liberalization, increased campaigns against large-scale development (infrastructure) projects, and conflicts arising from humanitarian crisis made it clear that such issues had to be dealt with in a much broader scale and couldn't be limited to one field alone any longer.

On an institutional scale, UN bodies reacted to those changing circumstances as mentioned before and also mainstreamed human rights in all areas of their work particularly within the first and second UN Reform Programs launched in 1997 by former UN Secretary General Kofi Annan. Acknowledging the importance of human rights as a reoccurring issue, all UN bodies were called upon to work closely together with the Office of the High Commissioner on Human Rights (OHCHR) and to carry out joint projects and programs which significantly contributed merging policies of development and human rights together. [UNDP-CDG, 2006 V; Plipat, 2005:14 ff]

As one result, several UN Conferences were set up, providing space for discussions on possible ways on how to tackle those challenges which brought together scholars, experts, governmental officials and NGOs from a variety of disciplines to share ideas and perspectives. [Nelson/Dorsey, 2008:29f] During those conferences many human rights and development

NGOs which before operated on similar priorities and subjects but through different policies, took efforts to collaborate on shared agendas and programs of action but also adapted to new skills, methods and languages used in order to set up joint campaigns. [Nelson/Dorsey, 2008:134ff]

As further discussed in Chapter 3, indigenous peoples used those changing global circumstances as well to make themselves heard within the international arena. As part of those new non-state actors emerging within the global scene, indigenous peoples organized themselves to claim their “place” within the UN human rights framework. Using increased awareness towards broader global issues at the time, indigenous peoples managed to raise their concerns regarding their specific situations and put pressure on states as well as international institutions to recognize their indigenous rights.

## 3.2. A Human Rights-based Approach to Development

“Rights-based approaches to development focus on strengthening people's dignity, solidarity, participation and creativity as well as their organizations and leadership. They work to improve the legal and political context in which people live and to support their economic and social initiatives so that their rights can have meaning”. [Chapman, 2005:6]

Concluding from considerations from the above chapter, two developments of the last decades were particularly decisive linking human rights and development discourses together which consequently set the scene for a human rights-based approach (HRBA) to emerge: Changing global contexts led firstly to a broader understanding of human rights, acknowledging the importance of economic and cultural rights but also emphasizing more on positive obligations of states, while secondly development discourses shifted from solely economic towards human development focusing on enhancing the capabilities and freedoms of people.

Facing global issues of poverty and humanitarian crisis, human rights-based development approaches emerged as an attractive alternative to charity assistance. Instead of concentrating on providing aid to satisfy the basic needs of people, this new approach shifted development practices from delivering goods and services to people in need towards empowering them to claim and exercise their rights within the framework of international human rights law to improve their overall well-being.

Like most development discourses, a right-based development approach focuses on improving people's situations, their problems, needs, but also potentials. Unlike other approaches however, a HRBDA not only concentrates on apparent issues of poverty but rather addresses underlying structural root causes. Therefore power relations and constellations on a

local, national and international level, in private and public spheres as well as cultural norms and morals have to be taken into account to truly understand the multiple dimensions of vulnerability and marginalization of the people concerned. [Chapman, 2005:11 ff]

### 3.2.1. From Needs to Rights

As the core principle of a HRBDA, all people have more than just basic needs to be met through charitable development assistance but rather inalienable human rights to food, water, housing or health but also participation or cultural expression which are anchored in the international human rights framework. Changing this perspective from needs to rights brings along significant implications for the development discourse (similar to considerations regarding the right to development) as any deprivation of needs must be considered as a denial of rights. In other words, poverty and marginalization in that sense becomes a state's failure to fulfill its duties regarding human rights as well as setting positive action for realizing particularly economic and social rights. [Osmani, 2005:218]

Comparing a right-based development approach to a traditional charity-based approach *Kirkemann Boesen and Martin* draw following conclusions:

- While a needs-based approach usually focuses only on the physical needs of a person, human rights include a broader understanding of human dignity and well-being (thus also regarding a person's mental and spiritual or social needs)
- Human rights claims always have a corresponding duty-bearer with obligations to fulfill thus automatically raising questions on accountability and responsibility to act (not only acts out of generosity)
- Unlike a charity or needs-based approach through which recipients are "expected" to be grateful when their needs are met by donors, in a rights-based approach people are anticipated to demand their human rights since all people are entitled them without exception or discrimination. [Kirkemann Boesen/Martin, 2007:10]

### 3.2.2. Human Rights Principles in a Rights-based Approach to Development

Human rights-based approaches not only strive for ensuring that human rights standards are met, but also take into account human rights principles which have to guide any processes leading up to fulfilling human rights provisions: interrelatedness of human rights, equality, participation and accountability. Thus, human rights form the content of HRBDA as well as need to be guiding principles for the designing and implementation process. [Dorsey/Nelson, 2008:93]

Indeed, all of those concepts are already common "fashionable" principles of general development discourses. However, reinterpreted as human rights principles, they can gain new relevance within the development discourse since those terms are then embedded in the

international human rights framework and give actors and policies involved more legitimacy for their actions. [Sitta, 2006:4 / Kirkemann Boesen/Martin, 2007:13]

### **3.2.2.1. Universality and Interdependence of all Human Rights**

Human rights are universal, inalienable and cannot be given up or taken away. Since they are basic entitlements of all human beings anywhere in the world at all times, rights-based goals are actually only achieved when those rights are fully realized for everybody. [Arbour, 2006:2]

### **3.2.2.2. Equality and Non-Discrimination**

As one of the core foundations of human rights principles all human beings are entitled to human rights without discrimination of any kind such as race, sex, ethnicity, age, language, religion or disability. Together with the right to life, freedom of torture and freedom of slavery, the right to equality is protected by customary law as well and thus has to be obliged by all states, regardless of any ratification of international treaties.

Considered to be one of the primary preconditions for development and peace, the principle of equality naturally is included in most development discourses and policies. Therefore rights-based approaches often focus on the most disadvantaged, vulnerable groups of society such as women, children, people with disabilities or indigenous peoples but also those who are discriminated in more than one way such as rural women of an ethnic minority etc. Since those people are usually harder to reach, they often receive fewer benefits of general development projects or have less (access to) rights than other members of society [Arbour, 2006:23] Thus particularly in the case of indigenous peoples, development discourses have failed to adequately reach them in terms of accessing their remote areas but more importantly often proved to be cultural insensitive to their traditional understandings and perceptions on well-being (see Chapter 2).

### **3.2.2.3. Participation and Empowerment**

As one of those typical buzzwords of contemporary development discourses, principles of participation are part of many policies from donor states, NGOs, international organizations or international financial institutions (IFIs). Sharing the same destiny as many of those “fashionable” terms, participation and empowerment lost much of their actual meaning and in reality often boil down to informing the people concerned about already planned and “delivered” projects while leaving little space for their ideas and input. Therefore, *Hamm* cautions processes through which states - under the term “participation” - privatize different agendas and state functions by incorporating various organizations that can weaken national governments and their influence on social arrangements. But also local community leaders could influence decisions which might not be in their overall community interest and abuse their powers. Particularly

marginalized groups such as women, children, ethnic groups or indigenous peoples don't get a chance to be involved due to practical or also moral constraints (thus not taking into account the principle of non-discrimination) even though the society at large might participate quite well in development policies. By incorporating all human rights principles, thus in this case also equality and non-discrimination, unwanted or unanticipated consequences and outcomes can be reduced or proactively encountered. [Hamm, 2001:1019 f]

#### **3.2.2.4. Accountability**

Alongside the boom of development initiatives in the last decades more and more global actors appeared in the development arena, establishing a new framework of development assistance which is getting increasingly confusing and intransparent. While states are still the main duty-bearers within international human rights law, other non-state actors such as international organizations, NGOs, international financial institutions and also transnational corporations are becoming increasingly important players on the global arena. Therefore an extended concept of accountability has to shift “from a sole focus on the 'violating state' and assigning responsibility to the actors that may create obstacles to the fulfillment of human rights in a global economy” [Dorsey/Nelson, 2008:173]

In that sense, a HRBDA offers possible ways to face these challenges since it defines a clear relationship between rights-holders and duty-bearers. “Perhaps the most important source of added value in the human rights approach is the emphasis it places on accountability of policy-makers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability” [UN High Commissioner on Human Rights, in: Cornwall/Nyamu-Musembi, 2004:1417]

#### **3.2.3. Implementing a Human Rights-based Approach to Development**

While human rights principles are usually well elaborated on preambles or paper, what really counts is materializing them into reality. Since the actors as well as rights and responsibilities within a human rights framework are manifold, so are the strategies to pursue policies and programs in that regard. Quite generally, main emphasis is put on various ways of capacity building of rights-holders, thus the individual citizens (“bottom up” approaches). On the other hand, governments as primary duty-bearers have to harmonize their national legislature with international law as to reflect human rights standards. Where needed, governments have to be educated on their responsibilities as well as supported in implementation processes. However, it is important to keep in mind, that there are various other non-state actors (NGOs, community organizations, institutions, but also national and multinational corporations, etc.) crucial in ensuring the effective implementation of human rights on the ground. [Arbour, 2006:23ff]

### 3.2.3.1. Capacity building of Rights-Holders

Since a rights-based approach to development focuses on human development and thus the aim of enhancing people's potential as well as opportunities to live a life they want to pursue, main focus should be placed on the rights-holders themselves. Thus, effective strategies of a rights-based development approach concentrates on empowering local actors. "They focus on beneficiaries as the owners of rights and the leaders of development. The human person is at the center of the development process either directly, through its advocate and through national institutions and civil society. The goal is to give people the power, capacities, capabilities, and access necessary to change their own lives, improve their own communities, and influence their own destinies." [Nowosad,2003:4]

In order to give people the power, capabilities and access necessary to improve their own lives as well as communities as a whole, people have to be informed about the rights they are entitled to through broad education and awareness raising programs. Thus rights-holders have to know which rights they actually are granted on a domestic legislature but also have to be aware of the human rights they are entitled to in international law, the state is obliged to ensure. However for them to effectively claim their rights, they also have to be informed on how to get politically involved and participate in governmental processes. Thus the knowledge of complaint mechanisms in cases of violations as well as access to court procedures is decisive in order to hold states and thus duty-bearers accountable for their actions. [Lukas/Kühhas, 2005:13]

### 3.2.3.2. Responsibility and Enforcement of Duty-Holders

Particularly in developing countries, where knowledge and resources are low regarding human rights, programs have to support governmental institutions in setting up panels, human rights and other related institutions in order to translate those sometimes quite abstract human rights standards into the local context and find adequate benchmarks for evaluation.

[Nowosad,2003:4f]

Therefore, rights-based initiatives can work together with state institutions to introduce or strengthen accessible, transparent and effective mechanisms on national but also local level to improve interaction and communication between citizens and governmental officials. Those measures could either be judicial, quasi-judicial or administrative facilities. Further they can or even should also include traditional (indigenous) justice systems regarding domestic contexts for people to identify better with those policies and mechanisms. [Arbour, 2006:24]

As already mentioned before, through a human rights-based development approach the international community and institutions are considered to provide and support states with financial, technical and human resources to increase effective measures in realizing human rights in a national context the (progressive) realization of human rights according to the possible means available to each country. Rather than an act of charity, the global community would be

obliged to generate available measures necessary, in order to fulfill the human rights of all people throughout the world. However, those policies and programs are usually based on developing countries, and further those, willing to strengthen and improve their human rights situation for their citizens on a national level. [Hamm, 2001:1015ff]

### **3.2.3.3. Human Rights-based Approach to Development within the United Nations**

When human rights were being mainstreamed and thus integrated in all working areas of the UN, several UN agencies adopted a human rights-based approach in their agendas. Though UN bodies have gained substantive experience on implementing and operationalizing a RBDA, most of them did so apart from each other which quickly led to different views and standards being used. In order to streamline those various rights-based approaches of UN institutions to increase their effectiveness, an inter-agency workshop was set up in 2003 on “Implementing a Human Rights-Based Approach to Development in the Context of UN Reform”. During that workshop, UN bodies agreed on three main principles of a “UN Common Understanding on a HRBDA” which form the general basis of a rights-based approach to development for all UN agencies:

1. All programs of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights. [UNDP Hijab, 2003:3 f]

### **3.2.3.4. Challenges and Opportunities ahead**

Even though human rights and development discourses have moved closer together and there are lots of policies and initiatives on an academic as well as practical level to link those two issues together there is still more interrelation to be done.

On a substantial or factual level, human rights now are an integral part of many development policies of various international agencies, organizations, international financial institutions, states, or NGOs. Yet, it remains questionable, if those programs actually have any real impact on human rights or reflect human rights principles in the end. Thus it is quite surprising to see that many important development frameworks such as the Millennium Development Goals or the Paris Declaration on Aid Effectiveness do not mention human rights while other instruments only refer to human rights in a preambular way as source of aspiration rather than legal codifications. [McInerney-Lankford, 2009:59 ff]

Regarding status or standing, human rights principles such as participation, non-discrimination, empowerment, good governance and accountability are mainstreamed throughout development practices and activities. Though those principles weren't new to development policies, a human rights-based approach reinterpreted those “targets” or “aims” as obligations and duties with important implications attached. Thus, introducing human rights and thus corresponding state duties to the development discourse is one of the most important added values of the RBDA. Unfortunately, it is also the least established. Even though a positive correlation between human rights and development is widely acknowledged, human rights are still considered merely to function as aspirational principles rather than actual legal obligations. “The tendency even among 'bridging policies' is to integrate human rights in principles, perspectives or considerations rather than obligations, and to leave them without specific anchorage in laws and treaties...in this way, human rights may become part of the general policy narrative, but rarely are the legal ramifications of specific instruments articulated in development policies that reference them, potentially limiting the degree to which human rights can in fact be integrated”. [McInerney-Lankford, 2009:58 f]

### **3.2.4. Strategies of pursuing a Human Rights-based Approach**

While many human rights-based projects and initiatives already exist set out by international organizations, NGOs or national policies, the main focus of this paper should be the different ways of how people concerned (in this context, indigenous peoples) can strive to get their human rights recognized in the first place which is the precondition for implementing them in on the ground afterwards and thus improving their overall well-being.

Due to the quite weak legal revenues international law has to offer, accountability without legal jurisdiction or enforcement has always been a critical point raised regarding human rights law. Thus, if countries are unwilling to comply with internationally agreed standards, there are indeed hardly any legal enforcement measures available which in turn undermines rights-based approaches respectively their effectiveness. However, as with all international norms, the human rights framework offers various alternative ways on how to pressure states to comply with globally agreed standards.

International standards might not have judicial power but they still are regarded “soft law” and thus result in some sanctions if violated, i.e. loss of prestige or credibility in various future national transactions. Though the damage might not be regarded the same as for political or economic sanctions, it still gives states incentives enough to often comply with those “soft laws” once they are set. Therefore a legal set of norms on indigenous rights would encourage states to implement policies towards indigenous peoples in a way that would respect the minimum standards set out in the international human rights framework. [Torres, 1991:146f]

Recognition, agitation and legislation identifies *Amartya Sen* as key ways on pursuing human rights. The first, he calls the “recognition route” and thus refers to acknowledging rights as human rights within the international legal framework set out in declarations, conventions and other legal documents adopted within human rights institutions such as the UN (i.e. the Universal Declaration of Human Rights). “This approach is motivated by the idea that the ethical force of human rights is made more powerful in practice through giving it social recognition and an acknowledged status, even when no enforcement is instituted.” [Sen, 2004:343]

The second approach goes beyond recognition. Thus, through “active agitation”, human rights networks and advocacy campaigns monitor non-compliance of states as well as making those violations visible by publicly hold governments accountable in pressuring them morally as well as politically to stay in line with acknowledged human rights standards (“naming and shaming”). Thus, for example UN treaty bodies are provided with profound monitoring systems which periodically review state performances on realizing and fulfilling human rights in countries and give important recommendations for state policies on improving human rights within the specific national context. [ODI, 1999:3; Arbour, 2006:25]

Finally, national legislation can get “inspired” or encouraged by human rights to implement them into national laws. While that third way might have the strongest influence on state behavior as national enforcement mechanisms are then available, not all rights, particularly those based mainly on moral duties can be adequately sorted by legislature but depend more on social acceptance and public awareness. [Sen, 2004:344ff]

All of those strategies pursuing human rights through a rights-based approach have their weakness as well as strengths and need the involvement of various different actors. Thus it will depend on the specific social and political contexts which (combined) actions will be most adequately and effectively in realizing the rights, the rights-holder in question are entitled to.

The following paper therefore focuses on indigenous peoples (and in the last chapter more specifically Aboriginal peoples in British Columbia, Canada) and their strategies and ways to get their indigenous rights acknowledged and implemented in the national as well as international context.

## 4. INDIGENOUS PEOPLES AND DEVELOPMENT

Taking its general understanding, “development” means a situation is getting better than what it precedes. Thus, indeed, speaking in absolute terms, there have been great improvements in health, sanitary conditions, education and nutrition resulting especially in an average longer life expectancy and a higher material standard. The question remains though, who really profited from development and on what costs.

Indigenous peoples throughout the world commonly are amongst the most vulnerable and marginalized groups of society and often don't benefit equally from development processes. General targets, indicators and goals usually aim towards fulfilling the needs of mainstream society and don't take into account indigenous perspectives and traditional values. Moreover, economic policies carried out within development programs are even endangering their existence, identity and traditional way of life. Through environmental degradation, denied access to their lands and natural resources as well as being faced with systematic discrimination and racism towards them, indigenous peoples feel like there are on the losing end of recent development processes. [Everson/McNeish, 2005:1ff]

While the international community has been getting more aware of the specific circumstances of indigenous peoples, also the development discourses started to adapt their programs to fit more adequately their concerns. Thus initiatives have specifically targeted on indigenous peoples or have adapted common policies to be more cultural sensitive in acknowledging their cultural values and traditions. Though that is a positive step towards acknowledging indigenous distinctiveness, many indigenous peoples themselves are aiming for an alternative concept of development altogether. Having experienced dominant, discriminatory and paternalistic policies, indigenous peoples are often quite unwilling to go along well-intended development initiatives which often still aim directly or indirectly towards integrating as well as assimilating them into the dominant society by generally “catching up”. Instead, indigenous peoples are eager to determine their own future and thus their own terms of development according to their understandings and perceptions of well-being. “Central to their strategies has been the mobilization of Indigenous peoples for recognition of their rights. When we speak of rights, we are speaking of more than legal issues. We are talking more broadly of the life projects that embody visions of the world and the future, and of the inherent right to pursue one's own life.” [Blaser/Feit/McRae, 2004:4]

By first defining indigenous peoples, a short analysis of their cultural distinctiveness should give a better understanding of how main development discourses have inadequately addressed their marginalized and often quite impoverished situation. Thus, the question should be raised, if a human rights-based approach to development could be more suitable and thus effectively transforming their specific claims and aspirations towards a self-determined life into practice.

## 4.1. Defining indigenous peoples

Defining indigenous peoples has always been a controversial issue, widely contended. Since they live in very different settings, the difficulty lies in incorporating all their historic, geographic and cultural characteristics but on the other hand also distinguish them from other ethnic groups such as minorities. In order to be able to capture and integrate them into legal frameworks, scholars, international institutions and states started to put them into the same normative context as minorities regarding their rights and status. This was harshly criticized by indigenous peoples and advocates of their rights since substantive differences exist between indigenous peoples and minorities, most importantly

- priority in time (indigenous peoples are often regarded as the “first settlers”)
- quantitative number (minority implies not being the majority of a population while indigenous peoples could also mark the majority but nevertheless find themselves in a marginalized position),
- a strong territorial connection to their lands.

[Daes, 1996:19]

In 1971, José Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and protection of Minorities (later on Sub-Commission on Human Rights and Fundamental Freedoms) was assigned to conduct a profound study on discrimination against indigenous peoples. Through his research in over 40 countries, he made various important findings. Presenting his final report, the “Study of the Problem of Discrimination Against Indigenous Populations” (“Cobo Indigenous Population Report”)<sup>3</sup> in several parts between 1982 and 1984, he most importantly also came up with a definition of indigenous peoples as “those persons who have historical continuity with the land, ethnic distinctiveness from their segments of the national population, non-dominant political economic and social position, self-identify as belonging to an indigenous community, and are accepted as a member by that community. (Martinez Cobo 1983, as adopted in ESC 1985)” [Peterson, 2010:212] Thus based on the principle of self-identification, Martínez Cobo characterized four factors to be decisive:

1. Priority in time, regarding the occupation and usage of particular territories
2. Voluntary continuation of cultural distinctiveness which includes various aspects such as language, religion and spiritual values, modes of production, social institutions or norms
3. Self-identification, as well as recognition by other groups, or state authorities as being a distinct collectivity
4. Experience of colonialization, marginalization, dispossession, exclusion or discrimination in whether they still are presently persistent or not.

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<sup>3</sup> E/CN.4/Sub.2/1986/7

“The foregoing factors do not, and cannot, constitute an inclusive or comprehensive definition. Rather, they represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts. As such, they may provide some general guidance to reasonable decision-making in practice.” [Daes, 1996:22]

Until now, no generally accepted definition exists of indigenous peoples within the UN terminology but Cobo’s definition remains the unofficial “working definition” when dealing with indigenous issues and documents (i.e. the UN Declaration on the Rights of Indigenous Peoples). Consequently, quite similar criteria were used to define indigenous peoples at the ILO Indigenous and Tribal Peoples Convention from 1989 (Convention Nr. 169) as well as from the Working Group on Indigenous Populations. [UNDG, 2009:8f]

## 4.2. General situation of Indigenous Peoples

Many indigenous peoples have suffered and continue to do so from the consequences of historic injustice towards them, including colonization, discrimination, loss of their traditional lands and resources as well as denial of control over their own way of life. To establish political power over territories and benefit from local resources, colonizers were eager to drive indigenous peoples off their lands often based on the ideological justification of “terra nullius<sup>4</sup>” to back their actions. The results of those experiences are still visible today.

It is estimated that there are around 300 to 370 million indigenous peoples worldwide, belonging to about 5.000 indigenous cultures in more than 70 countries. They continue to be over-represented amongst the poor as they constitute 15 percent of the world's poor while only making up 5 percent of the world's population. In regard to the extremely rural poor people, they represent even one-third of the total number. [DESA, 2009:21]

### 4.2.1. Patterns of Indigenous Poverty

Through various studies and analysis a pattern can be identified which links indigenous peoples and poverty: Throughout very different cultural and geographical contexts, indigenous peoples are commonly poorer or less advantaged than non-indigenous people within a state. This is also the case even in wealthier nations such as in Canada, the US or Australia. In 1999 the Director-General of the World Health Organization (WHO), Gro Harlem Brundtland concluded in her well-

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<sup>4</sup> Terra nullius is a Latin phrase meaning “land without owners,” and in international law is used to indicate land claimed by a sovereign power. Beyond that definition it is commonly also applied in the context of European colonialization. Thus also the so called “doctrine of discovery” restates terra nullius and is often used regarding British Colonies claiming lands at the moment of discovery, justifying it on the ground to be the first “civilized” sovereign nation. [UAN NativeNet]

known “Brundtland Report” on the situation of indigenous poverty: “Life expectancy at birth is 10 to 20 years less for indigenous peoples than for the rest of the population. Infant mortality is 1.5 to 3 times greater than the national average. Malnutrition and communicable diseases, such as malaria, yellow fever, dengue, cholera and tuberculosis, continue to affect a large proportion of the indigenous peoples around the world ... Indigenous peoples are over-represented among the world’s poor. This does not mean only that they have low incomes ... indigenous people are less likely to live in safe or adequate housing, more likely to be denied access to safe water and sanitation, more likely to be malnourished.” [Brundtland, 1999]

*McNeish and Everson* observed that not only are indigenous peoples usually poorer than their non-indigenous counterparts, but they also experience poverty through quite similar ways throughout the world, concerning related causes. Thus they make following key points in this regard:

1. Indigenous peoples poverty is multi-dimensional and often have many different measure and non-measurable aspects to it
2. Indigenous poverty is related to their cultural differences to the dominant society. Lack of understanding and respect to their alternative ways and values on how they see themselves and their environment have often resulted in assimilation policies, forcing them to integrate into mainstream society.
3. Indigenous poverty commonly results through racism and discriminatory assumptions against indigenous peoples and can lead to further exclusion and denial of access to services
4. Indigenous poverty is related to social marginalization leading to less power to participate politically, economically or culturally within the nation-state but also on an international level.

[Everson/McNeish, 2005:35f]

Since development approaches mostly focus on poverty issues concerning the dominant society and / or urban areas, the specific settings of indigenous peoples regarding their geographical remoteness but also their refusal to give up their traditional values and ways of life are often neglected. [Damman, 2007:504 ff]

#### **4.2.2. Environmental Degradation and Loss of Lands**

Access to their lands and resources, protection and preservation of their traditional territories have thus been key claims of indigenous peoples concerning their livelihoods. Since many indigenous peoples occupied their lands without ever having any legal titles to them, they are often driven away in the name of large scale development projects and extracting industries. Legal rights on natural resources are commonly very strictly defined and hardly ever include sub-soil resources, making indigenous peoples vulnerable to mining activities, etc. without giving their consent or being consulted. They thus face negative impacts of development projects disproportionately high to include landlessness, joblessness, homelessness (loss of houses but

also of cultural space), socioeconomic but also psychological marginalization, food insecurity (malnourishment, etc.), increased morbidity and mortality, loss of access to common property (waters, forests, cultural and/or sacred sights) and disruption of social institutions. [DESA, 2009:54/88 ff]

Neoliberal market strategies and compliance with international trade regulations of the World Trade Organization (WTO) intensified pressure on indigenous peoples and are often weakening or even eliminating indigenous rights to their lands and natural resources. For example due to the liberalization of agricultural products and allowing imports of cheap crops through the WTO Agreement on Agriculture, indigenous communities' small-scale agriculture and sustainable farming practices were overrun by land reforms in favor of big companies and large plantations.

“As the pressures on the Earth’s resources intensify, indigenous peoples bear disproportionate costs from resource-intensive and resource-extractive industries and activities such as mining, oil and gas development, large dams and other infrastructure projects, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects.” [DESA, 2009:18]

Those processes not only constitute a major threat to their food security and thus health issues but also to their spiritual and mental well-being. “Land is the foundation of the lives and cultures of indigenous peoples all over the world. This is why the protection of their right to lands, territories and natural resources is a key demand of the international indigenous peoples’ movement and of indigenous peoples and organizations everywhere” [UNPFII, 2009:54]

Therefore, any serious attempt of development approaches to tackle indigenous poverty would certainly have to deal with land rights issues of indigenous peoples and their effective participation and consent on project initiatives that affect them.

### **4.2.3. Indigenous Peoples in “Developed” Countries**

Regarding the situation of indigenous peoples within those so called “First World” states, they also commonly live in communities in the most impoverished areas and worst sanitary, health and other socioeconomic conditions. In general, indigenous peoples live shorter, have poorer health care and education and suffer higher unemployment rates. For instance, a native child born in Australia today can expect to die almost 20 years (in Canada 17, in the USA 11) earlier than a non-native baby. Indigenous Peoples in the US face 600 times higher rates of tuberculosis than his non-indigenous companion, a disease hardly ever visible anymore in developed countries but crucial regarding indigenous communities. [DESA, 2009:22ff and 161ff]

When the UNDP in a recent study only applied their Human Development Index (HDI) only on indigenous peoples in developed countries, staggering discrepancies became visible. While all of the major “First World” countries with indigenous population such as Canada, Australia, New Zealand and the US rank in general ratings mostly under the top 10 countries regarding living standards and development, the HDI positions indigenous peoples far less

behind (i.e. Native Americans in the US at 30, Maori of New Zealand at 73 and Australia's Aborigines even at place 100) thus making their situation comparable to many so called "Third World" countries. Thus, "in all four countries, predominantly English-speaking settler cultures have supplanted indigenous peoples to a large extent, leading to enormous indigenous resource losses, 'the eventual destruction of indigenous economies and a good deal of social organization, precipitous population declines and subjection to tutelary and assimilationist policies antagonistic to indigenous cultures'". [Cornell, Stephen in: DESA, 2009:23]

### 4.3. Indigenous Peoples and the Development Discourse

As already discussed in the previous chapter, development approaches up until the mid-1980s mainly focused on economic growth and regarded poverty simply as a lack of income though some of this ideology still remains valid today. Generally, development policies also pushed towards nation-building processes in developing countries in order to create one common identity with shared aspirations, values and interests of the people, leaving little to no space for cultural diversity. Thus, other ethnic groups with distinct cultures such as indigenous peoples who continued to live according to their traditional ways were seen as "backward", "uncivilized" and therefore a hindrance for development processes. States and governmental institutions were encouraged to build towards integrating and assimilating other ethnic groups which often resulted in a loss of cultural diversity, a phenomenon also referred to as "ethnocide" (purposeful elimination of different ethnic cultures by a state). [Damman, 2007:531 f]

In recent years along with the emergence of new themes such as sustainability, climate change or cultural diversity, indigenous peoples' knowledge of the environment and sustainable living has increasingly been recognized as a valuable source of information. Thus international conferences such as the Rio Summit of 1997 and publications like the Brundtland Report acknowledged the importance of their input as „guardians of nature“ while indigenous peoples also fit well in new doctrines of the World Bank or the Inter-American Development Bank on sustainability. Thus indigenous peoples got focused on *because of* rather than *despite* their cultural distinctiveness. [Blaser/Feit/McRae, 2004:10]

Through increased awareness of indigenous peoples and their cultural distinctiveness, anthropologists and development field researchers have been keen on gathering information on indigenous knowledge and traditional practices. Thus providing those sources on techniques and modes of non-Western economic systems, they contributed in finding alternative ways of development thinking. [McNeish, 2005:229] However, despite the facts that those changes towards cultural preservation and more cultural sensitive ways of reducing poverty, the general

focus remained on anti-poverty strategies planned and carried out mainly by non-indigenous professionals. More holistic initiatives of indigenous peoples to consider economy not as a separate issue but within a cultural setting, remained largely invisible except in those cases where they easily fitted in external industries or could be dealt with in bureaucratic frameworks. [McNeish, 2005:231] Particularly those sophisticated check-and-balance systems of international institutions and governmental bodies eager to fight corruption as well as improve accountability and limit funds, participation in many cases was and still is only possible through controlled and strictly defined ways. Even though indigenous peoples' contributions to development discourses are theoretically recognized, real efforts are thus often hampered in practice. [Damman, 2007:535]

Thus taking their traditional knowledge of nature and the environment as an important example, those practices and wisdom are now generally recognized and accepted within sustainability discourses. However, it is usually referred to as a "body of knowledge", thus an abstract source of information and detached from its holder(s) and then often used and abused as a commodity (i.e. problems involving bio piracy etc.). Indigenous peoples are therefore highly concerned about those developments since for them, traditional knowledge rather is a way of life, including the personal and spiritual relationship to their lands. [McGregor, 2004:77ff]

Indigenous Peoples themselves approached those development discourses in different ways. On the one hand, indigenous peoples who might pragmatically realized that if they don't try to go along development processes, they get run over by them, have called on adapting mainstream approaches to at least fit within their particular context. By modifying targets, indicators and methods, general development frameworks such as the Millennium Development Goals would then reflect their cultural diversity more adequately.

On the other hand, many indigenous peoples rejected general development discourses altogether and strived to find their own alternative concepts of improving their situations towards their own more holistic understanding of well-being.

While the first thus is based on the main idea of integration and adaption of development processes, the latter way would assume to "indigenize" development as such to find their own alternative means to (collective) well-being. [IPCIG, 2009:5]

### **4.3.1. Integrating Indigenous Peoples' Concerns into Development Approaches**

According to the Millennium Project Report of 2005 the introductory statement reads: "Whatever one's motivation for attacking the crisis of extreme poverty - human rights, religious values, security, fiscal prudence, ideology - the solutions are the same. All that is needed is action". The critical point to be made regarding to this statement is that the kind of action taken, depends on the solution found in the first place and thus the correct analysis of the problem. If indigenous

peoples are not included in reports, they are also likely to be left out when solutions and actions are chosen. [Damman, 2007:517 f]

While questioning the whole Millennium Development Goals initiative as such, the UN Permanent Forum on Indigenous Issues (UNPFII), a UN body particularly concerning indigenous peoples, argued that the global indicators commonly used are not culturally sensitive or adequate for indigenous peoples' realities and perceptions on poverty respectively well-being. In its 4<sup>th</sup> session, the UNPFII thus raised concerns “that indigenous issues are often absent from Millennium Development Goals and poverty reduction processes and from Millennium Development Goals reports [...] Unless the particular situation of indigenous peoples are adequately taken into account, some Millennium Development Goals processes may lead to accelerated loss of lands and natural resources for indigenous peoples, and thus of their means of subsistence and their displacement, as well as to accelerated assimilation and erosion of their culture.” [UNPFII, 2005:3]

Since international and national indicators need to be suitable for monitoring progress as well as comparisons, they normally are strictly defined and only include general data on society. Thus also former UN Special Rapporteur on the Rights of Indigenous Peoples realized that “it is amazing how little information about the actual situation and condition of indigenous populations public officials in many countries possess” which is partly due to a lack of awareness based on anti-indigenous attitudes or unintentionally due to a deficiency of evaluations of social programs. [Stavenhagen, 2009:362]

With a few exceptions most country reports on progress of the MDGs don't include the input of indigenous peoples or data on their situation. Therefore “disaggregated data is needed to extend the analysis beyond simple national averages that can be misleading, signal false progress or mask disparities related to ethnicity”. [Damman, 2007:505 f] The UNPFII thus identifies four key points to better integrate indigenous peoples in the MDG programming:

1. indigenous peoples and their individual and collective human rights need to be recognized
2. policies have to be set up to ensure universal access to quality and cultural sensitive social services
3. MDG projects and programming should be cultural sensitive and include indigenous peoples' participation and their free prior informed consent to avoid losses of land or assimilation processes
4. Guidelines for drafting the MDG country reports should regard indigenous peoples' participation throughout the whole process.

[DESA, 2009:40]

### 4.3.2. „Indigenizing“ Development<sup>5</sup> - “Life Projects” instead of Development

Instead of talking about indigenous development concepts, the different authors in Blaser/Feit/Mc Rae refer to the term “life projects” which is considered more adequately reflecting indigenous peoples’ view and holistic understanding. “Life projects diverge from development in their attention to the uniqueness of people’s experiences of place and self and their rejection of visions that claim to be universal. Thus, life projects are premised on densely and uniquely woven ‘threads’ of landscapes, memories, expectations and desires.” [Blaser, 2004:26] As mentioned before, much of their identity and factors of well-being are related to the collectivity of the community as well as their place where they live, thus their traditional lands. Therefore “life projects” are much more place-centered instead of claiming abstract universal development approaches which might be adopted accordingly on the ground.

Indigenous peoples' cultures are very diverse but are based on a profound relationship to their lands and territories. They don't see themselves outside of nature but rather as part of their surrounding as one holistic and all-encompassing way of life. Thus it is important to consider other essential elements to their culture such as spirituality, languages, social institutions and traditional knowledge as interrelated. Spirituality for instance defines their relationship with the lands and social interaction which gives their lives meaning and purpose. Within this worldview they regard their identity, traditions and activities as cultural heritage of the group, rather the individual. Their first loyalty of belonging also goes towards the collective indigenous community rather than towards their citizenship of the nation-state. This is also the reason why collective rights as well as the right to self-determination are of such great relevance to indigenous peoples. [DESA, 2009:51 f; Everson/McNeish, 2005:103 f]

Thus many of common underlying principles of development discourses such as individualism, productivity, technology, rationality, efficiency or globalization are in sharp contrast to those valued by indigenous peoples’ perceptions of well-being like sustainability, collectivity, spirituality, process-orientation and locality. Thus there is a sharp contrast to dominant modern values. This disparity of values has been described as “cultural poverty”, thus the inability to practice customary principles and values and thus to live a good life. [DESA, 2009:15]

Therefore, indigenous peoples have rejected bottom-down projects which by all well intentions but underlying paternalism try to integrate them within the overall national identity. However, in resisting development, indigenous peoples are not solely taking a defensive approach but are offensive in the sense that they constitute a proactive way of maintaining their cultural diversity. Thus life projects “...are oriented to achieving autonomy in deciding our own future. We do not want somebody else taking us by the hand to lead us wherever they want to

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<sup>5</sup> The term “indigenizing development” was drawn from a publication by the IPCIG with the same title.

go. We want to advance our own projects so that what is done in the communities has continuity and so that the knowledge and skills brought by the technicians we hire will be transmitted to our youth. We are searching for ways to unite all our communities under one organization. We are trying to recover the way of our ancestors in organizing our communities. Who better than ourselves to do this and to fight for and defend our territories?" [Barras, 2004:51]

### **4.3.3. A Human Rights-based Approach to Development for Indigenous Peoples**

After decades of development discourses which insufficiently addressed the underlying causes of indigenous poverty, thus particularly long historical experiences of colonialism, assimilation and discrimination, indigenous peoples still find themselves in a marginalized position within nation-states and moreover on the losing end of development projects which are actually considered to improve the situation of all citizens.

Within changing circumstances on national and international levels, indigenous peoples started to organize themselves and bring their claims to a self-determined way of life and thus future to the global arena. They challenged assertions that the recognition of their cultural understandings should fit within the past colonial structures or national norms, but rather have demanded the acknowledgment of their rights to self-determination, land and resources, own institutions and exercise of their cultural customs, thus defining their own "life projects". [Blaser/Feit/McRae, 2004:7ff] Therefore, by considering indigenous peoples' legal struggle through a human rights-based development approach, the term "development" has to be carefully applied, not to fall back on paternalistic policies but rather regard development in a way that is appropriate to indigenous peoples' understandings.

As will be discussed in greater detail in the next chapter, indigenous people have always strived particularly for their right to self-determination as one of their primary claims within their advocacy campaigns nationally and internationally. Though many countries strongly opposed that concept due to fears of implications to succession and thus their territorial integrity, the intention of a right to self-determination was not primarily aimed to succeed from the nation-state but rather to determine their own ways of live, thus maintain their cultural identities and traditions as sovereign nations.

Going back to Amartya Sen's definition of development as expanding a person's freedoms and capabilities to live a life he/she wishes to pursuit could open a possibility to adequately address the more holistic perspective of well-being and a general "good life" of indigenous peoples. According to such an understanding of development, a human rights-based approach thus can enhance the actual freedoms and capabilities of indigenous peoples to live a life according to their values and believes, irrespectively of how each individual community

chooses the extent they want to integrate or adapt to the dominant society or remain quite strongly within their traditional ways of life. [Sen, 2004:335f]

Within a human rights-based approach towards expanding their freedoms to determine their own future, indigenous claims have been two-fold: Firstly, as all human beings entitled to universal human rights they have demanded the realization of their civil and political rights (most importantly regarding participatory rights) as well as socio economic rights which often haven't been implemented equally to indigenous peoples within national policies. However, they secondly also have demanded acknowledgment of their specific concerns by striving for a new set of human rights norms particularly regarding their values and beliefs. Thus, if taking into consideration that human rights are generally based on ethical claims, which the (international) community regards fundamental for a person's dignity and well-being, indigenous peoples are pursuing recognition for their own understandings of essential values to be recognized as fundamental (for example, emphasizing on collective human rights regarding community rather than only individual well-being). [BC Foundations-Global Actions]

As the next chapter will show, indigenous peoples thus accomplished to have their indigenous rights embedded in international documents, specifically dealing with their situation and concerns, most importantly the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) or the ILO Convention Nr. 169. Through this legal indigenous rights framework, indigenous peoples established their place within international human rights law and have now specific tools at hand to demand states to fulfill not only their basic human rights but more importantly their particular indigenous rights for them to maintain their cultural identity and ways of life.

## 5. TRANSNATIONAL INDIGENOUS ADVOCACY – TOWARDS AN INDIGENOUS RIGHTS-BASED DEVELOPMENT APPROACH

As non-state actors indigenous peoples have come a long way on claiming specific rights for them on an international and national level, resulting in growing (legal) acceptance of indigenous peoples' rights. Due to favorable conditions within the United Nations<sup>6</sup> and together with support of international NGOs and other supporters of their claims, (indigenous) advocacy networks were amongst the most significant players for pressuring international institutions as well as states to adopt and recognize indigenous rights.

Especially in the case of indigenous peoples and their struggle to find their “place” within the UN, highlights the importance as well as reciprocal relationship that transnational advocacy networks gained in framing global agendas within international (human rights) law. Thus, they have tribute significantly in transforming international norms as well as broadening understandings of human rights. “Many of the changes in the arenas in which Indigenous peoples carry on their struggles have been reshaped in these last decades by the initiatives of Indigenous peoples themselves. But much of the terrain has also been dramatically reshaped by others, through the changing roles of the nation-state and of NGOs, the growing importance of transnational corporations and global flows of capital, the expansion of media networks, and the rise of the environmentalist and human rights movements. These changes have altered Indigenous peoples' strategies of struggle to survive and to retain the autonomy they still exercise.” [Blaser/Feit/McRae, 2004:7]

### 5.1. “New Rights Advocacy”

*Dorsey and Nelson* define the term of “new rights advocacy” as “advocacy on social, economic, or development policy, at local, national, or international levels, which makes explicit reference to internationally recognized human rights standards [...] and targets a broad range of actors” [Dorsey/Nelson, 2008:19] Due to increased linkages of human rights and development (as already discussed in the first chapter) activism networks started to embrace human-rights based approaches but also economic and social rights concerns within the development field resulting

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<sup>6</sup> While the UN definitely was the most important international organization to claim their (human) rights which is also the reason, why this paper will focus on the UN in particular, indigenous peoples also have used other institutions to take their concerns into account (i.e. ILO, WIPO, World Bank, WTO, etc.)

in new shared activities, strategies and projects for campaigning. At the same time, influenced by the major UN Conferences taking place in the mid-1990s and the beginning of the millennium, new substantive rights were put on the agenda (i.e. right to water, but also indigenous rights) which provided advocates with further legal frameworks to strengthen their claims. Thus, its novelty refers to both the means of action as well as the content as a dual concept. [Dorsey/Nelson, 2008:19ff]

As discussed in the first chapter, within a human-rights based approach, international legal frameworks are used to strengthen claims on international institutions and particularly states to ensure human rights standards and principles in order for people to enjoy and expand their freedoms for well-being.

Turning away from state-centered models based on a Westphalian understanding of international law, non-state actors emerged quite rapidly on the global scale and gained significant powers in shaping international agendas. Analyzing dynamics on how those transnational advocacy networks, international institutions and states operate in framing issues, setting norms and thus changing international legal frameworks in the end, can contribute to a broader understanding on the emergence of new international norms. Many authors have highlighted the fact that particularly regarding indigenous peoples, transnational advocacy was particularly important to draw more attention on indigenous peoples and instruments available.

While some authors argue, that those changes on perceiving indigenous issues was made available by international institutions, providing indigenous delegates and supportive advocacy networks space within global forums, others reverse the concept and suggest that this was only due to intense pressure and campaigning work of transnational advocacy groups beforehand. Thus, *Sargent* concludes that “network campaign pressure has been instrumental in the differing spaces that have been provided for minority rights and indigenous rights at the United Nations. In turn, the provision of that space has had an effect on the continued strength of networks and actors within those networks [...] and, resultantly, the pressure that they may bring to bear on states regarding international norms.” Therefore, “indigenous rights are seen as a success story of transnational advocacy at the United Nations.” [Sargent, 2012:144]

Taking into account particularly advocacy campaigning and activism during the Working Group on Indigenous Populations (WGIP) as later on discussed in more detail, this reciprocal relationship of indigenous activism being on the one hand precondition but on the other hand also the result of UN institutions providing them a place within the human rights machinery is visible throughout the process.

### 5.1.1. Transnational Advocacy Networks

*Keck and Sikkink* have defined their concept of transnational advocacy networks (TAN) as “forms of organization characterized by voluntary, reciprocal and horizontal patterns of communication and exchange” who “promote norm convergence or harmonization at the

regional and international levels by pressuring target actors to adopt new policies, and by monitoring compliance [...] to contribute to changing the perception that both state and societal actors may have of their identities, interests and preferences, to transforming their discursive positions, and ultimately to changing procedures, policies and behaviour.” [Keck/Sikkink, 1999:90f] Advocacy networks thus are usually motivated by shared values and common discourses rather than material concerns. Through particularly exchanging formal as well as informal information they are framing their issues for public audiences and international institutions.

Researching on transnational advocacy networks *Keck and Sikkink* came up with the so called “boomerang pattern” which describes the way, national social movements have used the international arena in order to press their governments to ensure certain rights and standards in domestic policies. Thus, when national advocacy isn’t successful to change governmental policies towards their legal claims, activists seek support from “outside” international networks and institutions to in turn influence their government again, therefore resulting in a “boomerang” effect. “Where governments are unresponsive to groups whose claims may none the less resonate elsewhere, international contacts can ‘amplify’ the demands of domestic groups, pry open space for new issues, and then echo these demands back to the domestic arena.” [Keck/Sikkink, 1999:93]

Later other authors have taken up that model but refined it, arguing that some non-state transnational advocacy networks can pressure directly states into adapting their policies without relying on international institutions. Others again suggested that both, domestic and international networks are crucial since the first has more access to local authorities and information about social and political arrangements while the latter keeps avenues open in cases of need for international activities relating to the “boomerang pattern”. [Sargent, 2012:128]

*Keck and Sikkink* thus show how transnational advocacy can bring about change to international legal frameworks through various levels of influence. Generally, social networks and movements draw attention to new issues through media, discussions, hearings etc. and set the agenda for their concerns to become part of the public debate. Therefore networks can influence current discourses on an academic but also political level of national and international organizations. Within the global arena transnational advocacy networks need to focus on key actors as well as slowly contributing in changing established procedures in order to further institutionalize new standards within international legal frameworks. If new norms are then recognized, states have to be pressured again in complying with those emerging norms and implement them into national policies, thus completing the “boomerang pattern”. [Keck/Sikkink, 1999:98f]

Keeping those stages of influence in mind, the same structures of influence become quite visible through transnational indigenous advocacy claiming their rights within the international human rights framework. Frustrated with continuous setbacks at a national level indigenous peoples turned to the international community for recognition of their status and

rights. Thus they were hoping to be able to use the UN mechanisms available to put pressure on the governments to fulfill their obligations resulting from international human rights law.

## 5.2. Formation of Transnational Indigenous Advocacy

“In many languages and styles, we sought to initiate a creative, transformative vision of human rights to challenge a complacent world order. We probed for agreement on how the existing Human Rights Conventions of the United Nations should be applied to Indigenous peoples. The Working Group had to produce more than talk and shared visions. If we wanted a better life in an improving world, we had to picture the impossible and translate it into text. We had to explain our dreams to human rights experts and baffled government representatives – and all within the limitations of the six official languages of the United Nations law.” [Henderson, 2008:49]

When indigenous peoples started forming national and panindigenous movements in the late 1970s, early 1980s, human rights were not the first obvious choice for them to frame their rights. Due to their colonial experiences, human rights activism was still partly linked to liberating missionizing work and didn't offer much for those who rejected assimilation. Moreover human rights or minority rights were neither completely addressing their collective rights nor distinctive land rights, which have always been fundamental concepts for indigenous peoples. [Engle, 2011:151f]

### 5.2.1. Moving from the National to the International Level

Facing ongoing policies of assimilation and moves by governments towards extinguishing indigenous peoples as such (factually or culturally) or their specific rights (as will be shown in the case of Canada in the last chapter), particularly indigenous peoples from former British colonies (thus foremost US and Canada) started national resistance movements in the late 1960s, early 1970s. Thus, indigenous nations took strong positions and strived for their freedom as sovereign peoples, partly inspired by the decolonialization processes of the times. [Torres, 1999:165; Tully, 2000:40ff] To call on broader public attention, indigenous nations formed networks such as the “American Indian Movement” (AIM) through which they gained more public awareness through demonstrations, protests or actions, taking the “Oka Crisis” in 1990 for an example, concerning a land dispute between the Mohawk Nation and the town of Oka in Quebec, Canada over traditional land claims. Over time, those national movements began transforming into broader regional advocacy networks such as the “Indian Law Resource Centre”, “Indian Council of South America” or “Inuit Circumpolar Conference”. [Torres, 1991:165]

One of the first to realize the importance in working jointly together on an international level was George Manuel of the Shuswap Nation in British Columbia, Canada. In turn, he already traveled in the early 1970s to many indigenous communities around the world in order to learn and share experiences of domination and oppression as well as resulting problems at present times. As it became visible that they all were facing similar concerns, George Manuel founded the “World Council of Indigenous Peoples” in 1975, an international organization that united Indigenous peoples from around the world in order to have one organization through which indigenous peoples could speak with an unified and thus stronger voice. [CWIS]

By gaining more ground, indigenous movements raised more public awareness about their concerns and were also successful in winning several court cases in their favor. However, for the most part, on a national level, states still rejected their demands particularly for their right to self-determination or collective rights to their territories and resources. Frustrated of setbacks and the limited domestic mechanisms available, they turned to the international arena with their quest to self-determination (correlating with the “boomerang pattern”).

However, many indigenous activists understood quickly, that they had to soften their positions in order to get accepted and heard within international – mainly state-centric- institutions, particularly after facing implicit but also explicit rejections towards any moves favoring their claims as sovereign nations. While some traditional leaders weren’t willing to give up their strong positions in that regard and thus rejected compromising approaches by playing along international state-dominated lines (see more on that idea of “illusion of inclusion” at the end of the chapter), others took a more pragmatic stand and started framing their concerns through a more liberal, general language of human rights, which was highly welcomed by UN bodies, increasingly willing to deal with indigenous concerns. [Engle, 2011:151f]

Up until the late 1960s indigenous peoples were regarded solely issues of national concern. While a few countries already had some policies concerning indigenous peoples, those were largely formed by national interests and ideological trends. Thus, domestic norms varied widely and had no international standards to orientate. “Since most domestic and international actors did not acknowledge the existence of an indigenous problem, they neither recognized a need for discussing aboriginal affairs nor established a norm for the treatment of indigenous peoples. Instead, each state dealt with its own indigenous groups as it saw fit, often with little or no supervision from the international community.” [Torres, 1991:151] In turn, the UN didn’t feel a need to deal with indigenous peoples as long as states generally upheld human rights standards. Moreover, during decolonialization, the international community was hoping that indigenous peoples would benefit from those political changes as well since commonly “liberated peoples” were commonly all considered “indigenous” without further specification. [Charter/Stavenhagen, 2009:10] Consequently, the UN Human Rights Commission even dealt with minority rights only to some extent while indigenous problems were hardly noticed at all.

Therefore, it is even more surprising to see that those two issues of minority rights and indigenous rights which were considered to “overlap”, took quite different routes within the UN

system. As *Sargent* notices (referring to *Kymlicka*), indigenous peoples were much more successful in establishing their place within the UN even though states have been more hostile towards indigenous claims from the start, compared to minorities or other ethnic groups. Facing often outright opposition to the idea of indigenous rights, the question is how indigenous peoples could, seen as a relatively clustered inhomogeneous and marginalized group of non-state actors, create UN structures for their concerns while minority groups couldn't achieve the same recognition. [Sargent, 2012:127]

## 5.2.2. Indigenous Strategies and Diplomacy

“The power of Indigenous diplomacy did not reside in military or economic power, but within our heritage, consciousness, and behavior. Our power was expressed in the development of international dialogue and consensus-building on basic human rights and relationships [...a] path which was compatible with our own legal traditions of consensus and respect for others and their differences” [Henderson, 2008:50]

Unlike other social movements forming out of oppression and marginalization by the state, often unstructured, poorly organized and lacking knowledge of institutional procedures, indigenous nations quickly gained experience in framing their national concerns on an international level. A new generation of indigenous academics, eager to use their acclaimed skills to be heard and respected within international institutions started organizing workshops and provided information to other community members on international (human rights) law and institutional processes. Together with traditional leaders of the local communities, they developed diplomatic strategies and a conciseness of indigenous rights to position themselves in the global arena. [Henderson, 2008:29] Those “word warriors” as *James Tully* describes them, contributed as transmitters to transform indigenous political theories and understandings into modern established legal frames which were easier acceptable and understandable for public debates, academics and national as well as international institutions within the UN. [Tully, 2000:50ff]

This ability to effectively consent on shared positions and then in turn, frame their views to present them united as their legal claims was crucial for indigenous advocacy' success. On the other hand, they usually also managed to keep close ties to local communities at the grassroots level. “It is because networks are able to establish collaborative, mutual supportive relationships between and among its various members that it is able to successfully achieve its aims. Thus the strength of ties both domestically and internationally are important factors in the success that a campaign may have.” [Sargent, 2012:130]

### 5.2.2.1. Setting Agendas within the UN

Becoming more aware of indigenous issues, the Commission on Human Rights assigned its Special Rapporteur on Human Rights, José Martínez Cobo, to conduct the famous “Cobo-Study”

which was already mentioned in the previous chapter. However, the report not only provided the most comprehensive definition of indigenous peoples but due to its wide-ranging study on discrimination of indigenous peoples, it was generally regarded as a “highly valuable contribution to the clarification of basic legal, social and cultural problems relating to indigenous populations” (Resolution 1984/35). Thus the Cobo-Study drew increasing attention to indigenous concerns as it most importantly showed that general human rights documents weren’t sufficiently addressing problems indigenous peoples were facing. [Williamsen-Díaz, 2009:22ff] However, the report also had immediate effects for indigenous peoples on local levels. Through various country visits, the Special Rapporteur encouraged indigenous peoples to provide relevant information, frame their specific concerns but also to organize themselves in order to make their voices heard on a national and international scale. Thus many indigenous peoples did get inspired by the attention given to them and increasingly came to conferences and other forums, the UN were then already willing to provide. [Peterson, 2010:206ff]

In 1993, the UN General Assembly also showed its commitment regarding improving the situations of Indigenous Peoples throughout the world and proclaimed the first “International Decade of the World’s Indigenous People” from 1995 to 2004 with the main theme “Indigenous People: partnership in action”. Thus the decade aimed to encourage new partnerships between indigenous peoples, the states, other groups and the UN by setting new activities and programs within specialized agencies and mechanisms on indigenous issues, promoting and protecting indigenous rights as well as adopting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which was in the drafting process at that time. [IWGIA] Although new awareness was raised amongst UN bodies but also states and other organizations about indigenous concerns, many indigenous peoples were disappointed with the effective results. Thus also *Corntassel* ironically concludes that more appropriately, the main theme of the decade should have been called “indigenous people: partnership inaction”. [Corntassel, 2007:138] Considering, that a “Second International Decade of the World’s Indigenous People” has been proclaimed from 2005 to 2014 to further strengthen and reaffirm the objectives of the first decade, the UN itself might agree with *Corntassel* and other likeminded indigenous peoples. [IWGIA]

Building on self-confidence on their positions and demands and frustrated with slow efforts coming from the UN itself, indigenous peoples started to draft their own declarations on different international or regional forums to formulate their aspirations on paper. Examples are the Resolution of the Inuit Circumpolar Conference, recommendations of the Fourth Russell Tribunal on the Rights of the Indians of the Americas or the San José Declaration of 1981. [Peterson, 2010:207f] Thus moving tactically and opportunistic from one session to the next, they presented their issues at the Commissions, UN treaty monitoring bodies and other international organizations such as the ILO, UNESCO or WIPO. At various world forums such as the Rio Earth Summit (1992), World Conference on Human Rights in Vienna (1993) or World Summit on Social Development (1995) indigenous peoples started holding their own conferences and

formed plans of action on their views regarding general matters of those conferences. [Henderson, 2008:55ff; Peterson, 2010:205ff]

In order to gain more leverage for their goals, indigenous advocacy networks also joined together with various already existing transnational organizations and movements on topics such as environment, women and children, armed conflicts or discrimination to organize shared campaigns and gain more attention by media, public hearings and academic discourses.

Thus, catching on to indigenous concerns and their claims, media used advances of communication technologies of that time and covered more and more issues on indigenous peoples and even investigated on violations of their rights. The presence of media at global forums where indigenous peoples raised their concerns also helped to get their statements made public “at home” through local and national channels which provided indigenous activists a great opportunity for “naming and shaming” their states.[Niezen, 2000:128]

Also academics, universities, scholars and research institutes started conducting studies on current situations of indigenous peoples, publishing their reports and findings through various means. [Torres, 1991:151ff] Thus, back in the 1960s and 70s, social scientists and legal scholars were considered to have the only “objective” knowledge on indigenous peoples and thus were the only ones that could speak meaningfully on their behalf. As part of their demand on self-determination, indigenous rights movements also started claiming the right to be able to speak for them<sup>7</sup>. *Peterson* argues that anthropologists took those indigenous demands into consideration and slowly redefined their self-conception and stepped back as the role of “transnational professional community, best positioned to claim authority as experts on indigenous affairs in international forums”. [Peterson, 2010:207f] Since international institutions and governments couldn’t rely on those scholars and social scientists to provide needed information and insights on indigenous issues, the stage was set for indigenous advocates and delegates to claim their seats at the UN and raise points in their own regard.

### 5.2.3. The Working Group on Indigenous Populations (WGIP)

Established in 1982, the Working Group on Indigenous Populations (WGIP) was the first UN body that was specifically dedicated to indigenous peoples and thus became the most important platform for indigenous advocacy.

Composed of five independent experts, one from each of the UN regions (Africa, Asia, Latin America and the Caribbeans, Eastern Europe, Western Europe and Others) the WGIP met for a maximum of five days usually prior to the sessions of the Sub-Commission of Human Rights in Geneva and had a two-folded mandate assigned to it:

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<sup>7</sup> I.e. Vine Deloria Jr, one of the most important indigenous political scientists often attacked anthropologists of making a career advancement of discussing indigenous issues without being beneficial to indigenous peoples themselves

1. To review developments and new events on a national, regional or international level, concerning the promotion and protection of human rights and fundamental freedoms of indigenous peoples.

During their annual sessions, the members of the Working Group received information on the situation of indigenous peoples through oral or written statements from governments, specialist agencies of the UN and indigenous organizations which they later reported back to the Sub-Commission. Thus, the statements of the participants provided the basis of analysis to fulfill their second mandate, namely setting standards. However, the Working Group was not authorized to examine or look into special cases or complaints, nor could it give recommendations to specific countries which was often quite frustrating to indigenous delegations. [OHCHR-WGIP]

2. “To develop international standards concerning the rights of indigenous peoples, taking account of both the similarities and the differences in their situations and aspirations throughout the world”.

The major outcome of the second mandate was the drafting of the UN Declaration on the Rights of Indigenous Peoples (see next chapter). However, the body also encouraged many studies and international conferences regarding indigenous peoples and economic development, cultural heritage, their relationship to land, sustainable development and other issues of concern to indigenous peoples. [OHCHR -WGIP]

### **5.2.3.1. Changing Institutional Procedures**

One of the most striking features of the WGIP was the grand participation of numerous indigenous delegations at the annual meetings which not only attended the conferences but also actively submitted statements and were heard by the members to raise their concerns and proposals. This was possible due to a decision taken by the first chairman of the WGIP, Asbjorn Eide, who took a strong stance for indigenous participation with significant influence on the ongoing process.

According to the general rules of the UN, only representatives of governments, other bodies or international organizations could participate at UN conferences. NGOs were only allowed within those forums if they had a so called “ECOSOC status” thus being “legitimate” and accepted by the UN Economic and Social Council (ECOSOC). By that time only a very few indigenous organizations had such an ECOSOC status which would have limited participatory possibilities for indigenous representatives at WGIP meetings. Asbjorn Eide soon realized that the true “experts” on indigenous issues were the indigenous peoples themselves and thus made the decision to open the annual Working Group conferences to all indigenous peoples to ensure broad participation. In turn any indigenous delegations could attend and raise their concerns but with a “proviso that the WGIP could take this permission away from them if they departed from

the applicable procedures in the WGIP's sessions and that, if necessary, this would be done without hesitation". [Williamsen-Díaz, 2009:26f]

The following grand participation of numerous indigenous delegations at the annual meetings, who not only attended the conferences but also actively submitted statements and raised their concerns to the members of the WGIP became one of the most striking features of the Working Group and thus became the most open body within the UN system. For many indigenous peoples the Working Group also was the first place to participate and to gain experiences within the international arena and therefore used the Working Group as a „stepping stone" to further engage in other UN forums. [Eide, 2009:36]

To make it not only theoretically but also in reality possible for indigenous peoples to come to Geneva to attend the Working Group meetings, the UN General Assembly established a "the Voluntary Contributions Fund" in 1985 which assisted hundreds of indigenous delegates with their expenses over the time of its existence. [Williamsen-Díaz, 2009:29]

Thus at the first Working Group meeting only 14 indigenous organizations participated, two of them from outside of North America. By the 9<sup>th</sup> session, more than 70 indigenous organizations participated while at the end of the WGIP, the number reached 2.500 indigenous delegates from around the world. "The Working Group was the first international ceremony of Indigenous peoples, and it became an integral part of Indigenous diplomacy. [...] Through the long days in the UN meeting rooms and the uneasy nights in Geneva, we pursued an elusive consensus. Individual loneliness receded as we extended friendships and sympathy to the Indigenous peoples around our mother, the earth." [Henderson, 2008:48]

### 5.2.3.2. WGIP – Platform for Indigenous Networking and Advocacy

During their attendance at the Working Group, indigenous peoples could campaign through mainly three ways:

1. Presenting speeches: The quite flexible rules of procedure allowed the Working Group members to enable all participants to contribute to discussions and present statements during the sessions, though on a negative side, that often resulted in a very restricted time available for each speaker.
2. Providing information: The work from the Working Group members wasn't limited to the annual meetings. Rather, they provided studies about indigenous land rights, past treaty arrangements, or cultural heritage of indigenous peoples. Those reports were often based on information from indigenous peoples, governments, NGOs or other independent experts and later were circulated at the following sessions.
3. Acquiring new contacts: The WGIP was an important opportunity for indigenous delegates to establish new contacts with a wide range of people, other indigenous organizations and networks but also experts, scholars and activists interested in indigenous issues. Thus a lot of times, informal meetings during and after the official

sessions were more important for indigenous advocacy than their attendance at the official sessions.

As a separate forum available only for indigenous peoples and non-governmental organisations (thus no governmental representatives), the “Indigenous Peoples Caucus” usually took place before the sessions of the Working Group and after each day of meetings for indigenous peoples to exchange information, recapture new developments but most importantly to work on common strategies and formulate joint statements for submissions to the members of the Working Group or other UN-human rights bodies. [OHCHR-WGIP]

### 5.3. Conceptual Legal Frames of Indigenous Peoples’ Claims

“The proliferation of domestic and international declarations, the publications of various studies, the creation of international bodies dealing exclusively with indigenous issues and the attention given by states to indigenous concerns are all evidence of the crystallization of a norm protecting indigenous rights.” [Torres, 1991:156]

By increasing their presence within international forums, indigenous peoples emerged as a new concept within international law. At the start, they were neither accepted as peoples regarding sovereign nations nor did they themselves wanted to be limited to minorities. Their claims for (collective) rights regarding their traditional understanding and believes didn’t fit into the general established concepts of international (human rights) law. “Uncertainty on this issue has had the benefit of encouraging the flowering of multiple approaches, but it also has done much to heighten national dissensus on questions involving indigenous peoples, and it has been a serious obstacle to negotiation in the United Nations [...] of proposed Declaration on the Rights of Indigenous Peoples.” [Kingsbury, 2002:189] *Kingsbury* thus identifies five different conceptual frames which indigenous peoples’ claims were based on:

1. Human rights and non-discrimination claims
2. Minority claims
3. Self-determination claims
4. Historic sovereignty claims
5. Claims as indigenous peoples

“Each of these conceptual structures has its own style of argument, historical account and canon, patterns of legitimation and delegitimation, institutional adherents, discursive community and boundary markers. Each depends on simple premises to define its locus [...] which] have been adopted and adapted in political struggles” [Kingsbury, 2002:190]

### 5.3.1. Human Rights and Non-Discrimination Claims

Generally, equality of all human beings is one of the fundamental principles of human rights also including the elimination of discriminatory laws which only a certain group of society is entitled to. Drawing from historical experiences, there consist dangers in establishing norms that treat ethnic groups differently from another, a point of concern sometimes overlooked by advocates of legal pluralistic discourses. However, rejecting indigenous peoples on those grounds would be narrow sighted.

Looking at different court jurisprudence concerning indigenous claims and non-discrimination, *Kingsbury* identifies three different approaches of states in this regard: The first position denies indigenous peoples any particular rights or distinctive character on the grounds that all human beings are equal and human rights are universal. However, many states have already recognized that upholding the principle of equality, norms can be modified to favor indigenous peoples due to their marginalized, often vulnerable position. Thus, this second approach acknowledges the need for positive action for general all people who are in a less favorable position and thus “not equal yet”.

The third and final approach goes a step further and thus acknowledges the need for affirmative measures of the state but ground their justification on the specific situation of indigenous peoples, thus on redress and reconciliation of historic (and present) injustices they have suffered and still continue to do so. [Kingsbury, 2002:195ff]

Regarding international law, Article 1 (4) of the UN Convention on the Elimination of Racial Discrimination (CERD) notes that in order to achieve equality of all people, special protection is needed for the most vulnerable, marginalized groups of societies to overcome consequences of historic and long-term discrimination and marginalization. This might involve specific focus on positive measures as well as preferential treatment (“positive discrimination”) of those concerned until equality is achieved. [Damman, 2007:520; Kingsbury, 2002:197ff] Regarding indigenous peoples, the UN Declaration on Indigenous Peoples also states in Article 21 (2) that “states shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social condition.”

Thus, the concept of equality and non-discrimination is important since many states and international institutions are quite willing to frame indigenous issues within that prominent principle of human rights though additional legal frames are often needed to sufficiently consider indigenous believes and cultural identity. [Kingsbury, 2002:202]

### 5.3.2. Minority Claims

Even though indigenous have always opposed being categorized as minorities, human rights advocates, national courts and UN institutions have used Article 27 of the UN Convention on Civil and Political Rights (ICCPR) since it provides the most important legal source for a “right to culture” within international law to justify indigenous claims and addressing their issues. Though the UN Committee on Human Rights, the monitoring body of the ICCPR, was reluctant to regard indigenous demands under Article 1 of both human rights conventions concerning peoples’ right to self-determination, it “increasingly has interpreted Article 27 in a creative and expansive manner so as to elude some of the structures states may have hoped to set upon it.”<sup>8</sup> [Kingsbury, 2002:204f]

The Committee thus has acknowledged that culture can manifest itself through various forms and especially regarding indigenous peoples, through a distinct relationship with traditional lands and resources. In turn, indigenous peoples have been quite successfully raising concerns through claiming violations of their right to culture on Article 27 ICCPR.

Going back on to the three main state obligations arising within human rights law (to respect, protect and fulfill rights), states therefore have the duty to primarily respect indigenous peoples’ cultures and must restrain from any action or policies that could endanger their identities and values of becoming extinct or assimilated into mainstream society. Further, governments also have to protect their cultural identities from being restricted by others. Due to discrimination and marginalization, states therefore have to ensure that indigenous peoples can live and express their cultural traditions within the dominant society without being denied those rights not only theoretically but also in reality. Particularly regarding the right to culture, the obligation to set positive measures is considered to be very important in order for ethnic groups to preserve their identities and cultural ways but also includes effective participation of indigenous members about policy decisions that affect them [see UN Human Rights Committee, General Comment No. 23: The Rights of Minorities, 1994].

Consequently claims based on minority rights such as Article 27 ICCPR served as a strong base for demanding recognition of their cultural identity, religions, languages and traditions, thus those issues where minority and indigenous demands overlap. However, regarding their demands particularly on the right to self-determination or collective (land) rights, Article 27 of the ICCPR, constructed as a classical individual right (addressing individual members of minorities), falls short on providing adequate safeguards. [Kingsbury, 2002:212f]

### 5.3.3. Self-Determination Claims

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<sup>8</sup> For example: *Ominayak vs. Canada*, 45th Session, Supplementary Note 40, Annex 9. A/45/40 (1990).

The right to self-determination was expressively mentioned for the first time in international law in Article 1(2) and Article 55 of the UN Charter, the latter stating “With a view to creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. Thus, for the first time, an international institution focused not on the principle of the primacy of the state and thus on a territorial concept of control (established with the treaty of Westphalia in 1648) but rather towards “peoples” as addressees and members of international UN law. This was an important step particularly in the times of decolonialization though it also raised a lot of questions: Who are those “peoples” the document referred to? Does any ethnic group within a country have the right to self-determination and if so, does this also include a right to succession?

As many African nations and minority groups demanded their independence from colonial ruling, there was a need for clarification on whom to apply the concept of self-determination, to “not let it get out of hand”. Therefore General Assembly Resolution 1541, adopted in context of the “UN Declaration on the Granting of Independence to Colonial Countries” from 1960 drastically restricted the applicability of this principle to be valid only for those territories “which are geographically separated and distinct ethnically and/or culturally from the country administering it”. In other words, the so called “salt water thesis” was only referring to a right to self-determination for those colonized peoples who were separated by salt water from their colonizers. Therefore, it clarified the concept of self-determination not being applicable for ethnic groups or nations who live within a territory of former colonizers such as most prominently the US, Canada, Australia, or New Zealand. [Thornberry, 1989:871ff] Strongly opposing that limited understanding, indigenous peoples started referring to their position as living in the “Fourth World”, thus once sovereign nations who are still maintain a special status but have been forcefully integrated into states and thus are not recognized within international law. [Wiessner, 2008:1152]

The right to self-determination is also stated in article 1 of both human rights conventions (ICCPR and ICESCR) affirming self-determination as a human right to all peoples. Referring to their position as once sovereign nations who are now living in the “Forth World”, indigenous peoples claimed their right to self-determination as a right which all peoples are entitled to. Thus *Morgan* argues, by framing their demands on the grounds of equality respectively non-discrimination, indigenous peoples contributed in developing international law in the sense that they broadened the general understanding of self-determination which was actually never supposed to have greater meaning than in reference to decolonizing processes. [Morgan, 2004:486f]

The “UN Friendly Relations Declaration” concerning relations and cooperation between countries thus reaffirms the UN Charter by recognizing the right to self-determination founded on the principles of equal rights, peace and security which has to be acknowledged and upheld by all states. Consequently, indigenous peoples have argued, instead of threatening the territorial

integrity of nation-states leading to instabilities and conflicts, the acknowledgement of their right to self-determination would actually contribute peace and stability within a country. [Morgan, 2004:490f] Thus, the “UN Friendly Relations Declaration” also states that “in implementing the right to self-determination, there are various modes of self-determination which extend beyond the right of secession and which do not conflict with territorial sovereignty or the political unity of a State.” [Henriksen, 2001:9]

External aspects of a right to self-determination does include the right to succession and to form an independent state in cases where national policies are undemocratically and insufficiently representing the whole population and in turn lose their right of ruling over those excluded community or people. Therefore, succession would be the ultimate implementation or remedy of peoples not being able to determine their own political status freely. [Henriksen, 2001:9f; Thornberry, 1989:876] Following that argument, some authors suggested that governments would need to address indigenous concerns and realize their rights since otherwise indigenous peoples had a right to succeed under international law. [Morgan, 2004:486ff]

*Anaya* thus stresses that indigenous peoples are not primarily aim to succeed but rather redefine their relationship with existing nation-states. In other words, the substance of the right to self-determination is not an urge to form an independent state. “Rather, peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be full and equal participants at all levels in the construction and functioning of the governing institutions under which they live.” [Anaya, 2009:188]

Internal aspects of the right of self-determination usually are regarded through participatory rights of democratic countries for peoples to freely pursue their economic, social and cultural development. “However, it can also mean the right to exercise cultural, linguistic, religious, territorial or political autonomy within the boundaries of the existing states.” [Henriksen, 2001:10f]

Thus, *Wiessner* identifies different rights which would have to be guaranteed in order to provide an appropriate legal framework for indigenous self-determination concepts: As a major foundation of their culture and identity, states have to recognize their collective right to traditional lands as well as their correlating right to free prior informed consent to any developments affecting those territories. Thus, they have to be entitled to establish their own political institutions for self-governance as to determine their own way of life as well as their cultural traditions and customs. [Wiessner, 2008:1175] Thus those rights already include the most important provisions within the adopted UN Declaration on the Rights of Indigenous Peoples which confirms the idea that their right to self-determination serves as a “general umbrella principle in the light of which the exercise of all other rights must be assessed.” [Stavenhagen, 2009:365]

### 5.3.4. Historic Sovereignty Claims

Regarding their claim for self-determination, indigenous peoples are referring to earlier pre-colonial sovereignty as nations. Thus, many treaties and other arrangements signed by them and colonizing or trading powers were grounded on a nation-to-nation understanding, premising both parties to be in turn subjects/peoples under international law. Consequently, indigenous peoples' loss of their independence and sovereignty as peoples was a violation of those treaties and would be regarded prohibited in most cases under contemporary international laws of treaties (i.e. resulting in "internal colonialization"). Therefore, some indigenous peoples have contested those treaty violations particularly regarding regaining their sovereignty as nations once again. [see Tully, 2000:37ff]

According to *Kingsbury*, claims on historic sovereignty are thus based on hopes of redressing consequences of past wrongdoings and include a moral claim towards the states, but takes little account on changes of recent times. "Whereas self-determination is mainly a forward-looking program, the historic sovereignty program is organized to be concerned with restoration of the *status quo ante*." [Kingsbury, 2002:235ff] However, particularly the last chapter of this paper will show, that claims of becoming a sovereign nation once again is not limited to sentimental memories of the past but can be articulated and implemented within modern-day frameworks in order to leave colonial doctrines behind and rather restructure the relationship of indigenous peoples and former colonizing powers towards a model of mutual respect and status. [see RCAP, 1996]

### 5.3.5. Claims as Indigenous Peoples

"Normative texts and the growing body of legal practice are beginning to establish some common understandings on legal issues that are not reached fully through adaption of established categories and must be addressed through a normative and institutional program based on 'indigenous peoples as a legal category.'" [Kingsbury, 2002:239f] In turn, indigenous peoples had to form a global indigenous identity but also to base their claims on self-determination or non-discrimination as "peoples in order to differentiate themselves from other "groups", "minorities" or "populations".

Unlike other interest groups or ethnic minorities within states, they not only have been claiming specific rights as citizens but rather an alternative concept of citizenship all together. By considering their first loyalty as members of their indigenous collectivity instead of citizens of the nation-state, they call on being accepted as direct subjects of international law without the intermediation through a state. [Eversole/McNeish, 2005:101ff] "Because human beings develop diverse and often overlapping identities and spheres of community—especially in today's world of enhanced communications and interaction on a global scale—the term 'peoples' should be

understood in a flexible manner, as encompassing all relevant spheres of community and identity.” [Anaya, 2009:186]

In turn, the term “peoples” became a highly disputed issue regarding indigenous issues due to its implications concerning a right to self-determination and many states strictly opposed the usage of the term “peoples” since they were afraid of threatening their territorial integrity. [Willemsen-Diaz, 2009:22ff] As a result, the term “indigenous populations” commonly became part of the UN terminology even though indigenous peoples usually continued to refer to themselves as “peoples”. Also *Daes* concludes that no differences can be found “between ‘indigenous’ and ‘peoples’, based upon the efforts of international organizations to define these terms in this century.” [Daes, 1996:19]

*Kingsbury* cautions however that through establishing and pushing such a strong indigenous identity, members within the collective community then don’t not have the chance to frame their rights through other identities, such as indigenous women who might step back from trans-indigenous women’s movements which would be in some cases more effective for them to realize their particular concerns. Consequently, *Kingsbury* concludes, it is important to keep all concepts of legal norms in mind to base indigenous claims on which provides a flexibility to use several different argumentations depending on the substance of the claim but also the addressees. “Globally, the range of concepts and the host of ways in which they can be connected and reconciled render unconvincing any insistence on a single homogenizing structure that is alien to the political discourse and social patterns in some societies, or simply is unpopular with the regime” or international institutions. [Kingsbury, 2002:248]

## 5.4. Critical (indigenous) Voices towards a Legal Framework for Indigenous Rights

"It is still true that the first part of self-determination is the self. In our minds and in our souls, we need to reject the colonists’ control and authority, their definition of who we are and what our rights are, their definition of what is worthwhile and how one should live, their hypocritical and pacifying moralities. We need to rebel against what they want us to become, start remembering the qualities of our ancestors and act on those remembrances. This is the kind of spiritual revolution that will ensure our survival." (Taiaiake Alfred, Mohawk Nation, 2005) [Corntassel, 2008:106]

### 5.4.1. Framing and Reframing Indigenous Rights

Despite the benefits international (human) rights law has offered indigenous peoples, *McNeish and Eversole* also warn on its limitations. Through the emergence of new international norms for

indigenous rights, international law created a legal framework as well as mechanisms and official forums for indigenous peoples. However, that same framework also limits their rights to particularly those provisions set out within the established framework. Subsequently, it makes it harder for indigenous advocates to appeal for rights outside that standard normative framework, either to extend their scope or define new ones. "The foundation of international rights discourse on an acceptance and enforcement of individual liberal citizenship means that more radical communal claims such as cultural identity, common land or 'strategic exclusion' [...] cannot be officially justified. In this sense, while Western legal forms offer a powerful language in which to make claims against nation-states, their liberal formations also channel and constrain the kinds of wrongs enunciated and the remedies demanded." [Eversole/McNeish, 2005:99f] This is especially evident regarding those indigenous peoples which contrast general liberal understandings of human rights law, construed around nation-state and individual citizen rights such as their demand to self-determination or collective rights. Thus also *Watson* uses the metaphor of trying to fit a circle within a square when attempting to mold indigenous understandings and believes within the general human rights system. "Instead of protecting Aboriginal peoples, 'human rights' bring to order our regulation and containment. That is because the keepers of power determine the questions of humanity and that which constitutes the rights of humans, and they are ultimately positioned to enable or disable humanity." [Watson, 2011:629]

#### **5.4.2. Co-optation– the Concept of "Illusion of Inclusion"**

Though maybe indigenous peoples now share the same conference rooms within UN institutions, *Corntassel* as well as *Watson* question if this really led to a restructuring process of their relationship with states and if their voices are truly heard within the global forum. Looking at indigenous advocacy through the last decades, there could be a danger of mainstreaming indigenous issues and thus limiting the effectiveness of indigenous activism rather than enhancing it by relying on international structures.

Due to increasing indigenous activism and mobilization of media and scholars in various fields, *Corntassel* argues, the UN institutions couldn't ignore indigenous concerns any longer. In turn, instead of excluding indigenous peoples completely from UN institutions, they provided them with restrictive opportunities and mechanisms to participate. Citing sociologist Michael Lacy, *Corntassel* introduces "co-optation" as a method through which "the power holder intentionally extends some form of political participation to actors who pose a threat." [Corntassel, 2007:139] By institutionalizing their activism into controlled channels, indigenous peoples would have to adapt their actions and claims to fit in the orderly bureaucratic procedures of international institutions and their codes of conduct, which *Corntassel* refers to as tactics of "blunting and channeling". Consequently, indigenous peoples are (generously) allowed to participate in programs which are sponsored by states or institutions as "stakeholders", "partners of states" or "cultural informants" leaving it up to a few "chosen" indigenous representatives to

speak on the behalf of an entire class of subjects. [Watson, 2011:636f] Thus giving them an illusion of inclusion on an global level, indigenous activism would thus be transferred from concentrating on local grassroots movements of traditional communities away towards less “dangerous” forms of activism at international forums where indigenous advocates work closer together with states. Therefore, striving for internationally too narrowly defined frameworks of self-determination, indigenous peoples are falling for diverting energies away from more substantive issues about their collective rights, their territories, livelihoods, and revitalization of indigenous cultures, languages and practices. [Corntassel, 2007:139ff] Citing Dene political theorist *Glen Coulthard*, “the politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that Indigenous peoples’ demands for recognition have historically sought to transcend”. [Corntassel, 2008:115]

Considering the amounts of time and financial efforts, indigenous delegates have to take upon themselves to be able to come to UN forums in either Geneva or New York, the few minutes of speaking time, indigenous representatives only get to present their concerns and situations can be quite frustrating and unproportional specifically taking into account that governments are not limited in their time. In some cases, governments even managed to influence conference agendas to actually prevent indigenous peoples from receiving the floor. Other times, indigenous delegates have been facing visa problems when trying to enter the US to participate at the sessions of the UN Permanent Forum on Indigenous Issues which takes place in New York and thus missed important meetings and schedules due to bureaucratic procedures at the borders. [ECOSOC-UNPFII, 2008]

Despite those concerns and dangers which *Corntassel* illustrates and also need to be taken seriously, gaining international grounds and participating within the spaces the UN institutions provided, indigenous peoples have shown to outweigh challenges of co-optation. It goes without saying that many of those new indigenous leaders speaking on behalf of their communities within international arenas, settled quite comfortably in the newly acclaimed seats next to governmental representatives, presenting standpoints which only vaguely corresponded with the original claims of the traditional leaders and communities back home. However, most transnational indigenous activists still keep close ties to the grassroot levels and many times exactly even traditional leaders and elders also find their way to the UN to share their experiences.<sup>9</sup>

As mentioned before, through coming to international forums, particularly the Working Group on Indigenous Populations, indigenous peoples were also able to exchange and share concerns and strategies with each other and thus strengthen and reaffirm their demands towards the state which definitely has had a very positive spin-off effect.

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<sup>9</sup> Based on information drawn from own experiences at sessions of the WGIP

## 6. UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES – ESTABLISHING INTERNATIONAL INDIGENOUS NORMS

The “UN Declaration on the Rights of Indigenous Peoples” was finally adopted by the UN General Assembly on 13th of September 2007 by an overwhelming majority of member states. It thus represents the most complete international instrument for the protection and recognition of indigenous peoples’ rights

Only through the extensive transnational advocacy and lobbying by indigenous peoples for more than two decades, they managed the establishment of an international document that guarantees their cultural survival within the existing UN human rights system. While the International Labour Organization already came up with two conventions dealing with indigenous peoples, the UNDRIP extends the rights set within the ILO documents and shows distinctive and novel features regarding its process of drafting, content and further implementation which according to *Charter* suggests enhancing its overall legitimacy within international law.

### 6.1. Excursus: The Development of Indigenous Norms within the International Labor Organization (ILO) – from Assimilation to Participation towards Self-Determination

The International Labour Organisation (ILO), founded in 1919 was the only member of the United Nations family that already started in the 1970s dealing with indigenous people’s rights and their protection, largely due to the great exploitation of indigenous labour and their often horrendous working conditions.

In 1957 the International Labour Organization adopted the first instrument specifically concerning indigenous peoples, the “Indigenous and Tribal Populations Convention” (ILO Convention No. 107) which gives guiding principles on how governments should treat their indigenous peoples within the country. At the time the Convention was adopted, indigenous peoples were still regarded as “backward” societies which have to be integrated in the mainstream society. Therefore the main goal was for “governments to take primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries” (Article 2,

ILO Convention No. 107). This action by states should promote their integration and assimilation within the overall society and foster their socio-economic development. [MacKay, 2002:7f].

Only in 1989, after more and more indigenous delegations started to make themselves heard on an international level correlating with the drafting process of the Declaration on the Rights of Indigenous Peoples within the UN, the International Labour Organization set up a “Meeting of Experts” in 1986 to review and update ILO Convention No. 107. The experts agreed that the Conventions guiding principles of integration and assimilation of indigenous peoples wasn't an adequate and accepted approach any longer. Thus, “ILO Convent No. 169 concerning Indigenous and Tribal Peoples in Independent Countries” (in short “ILO Convention No. 169”) adopted in 1989 was focused on participation. Instead of trying to assimilate or integrate indigenous peoples into the main society as it was the case in ILO Convention No. 107, the international community recognized the importance of indigenous peoples' cultural survival within the larger society and acknowledge their rights to participate in national policies. [Barsh, 1990:209f]

Convention No. 169 is the only binding international instrument on the rights of indigenous peoples. However, only a few countries have ratified the ILO document, mostly Latin- and South American states. “Despite the relatively small number of ratifications from outside the Western Hemisphere, the general normative underpinning and specific human rights principles of the Convention have acted and still act as a powerful catalyst for the consolidation at the international level of the common normative understandings regarding the rights of indigenous peoples” [Anaya, 2008:11].

As the next chapter will show, the UNDRIP, finally adopted by the UN General Assembly in 2007 took another step forward to ensure indigenous peoples' rights and entitles indigenous peoples not only with participatory rights but rather includes their right to self-determination as well as acknowledging for the first time the wrongdoings during the colonial conquests.

## 6.2. Drafting the UN Declaration on the Rights of Indigenous Peoples

“The Declaration does not represent solely the viewpoint of the United Nations, nor does it represent solely the viewpoint of the Indigenous Peoples. It is a Declaration which combines our views and interests and which sets the framework for the future. It is a tool for peace and justice, based upon mutual recognition and mutual respect” [Malezer, 2007:1]

In 1977 the UN organized a “International NGO Conference on Discrimination against Indigenous Peoples in the Americas” in Geneva, the new UN headquarter of human rights where

more than 400 participants gathered. "Over 100 Indigenous peoples testified about effects of natural resources, exploitation, 'development' projects, repression and genocide on our peoples. This was the first time that Indigenous peoples had given testimony on our own behalf in a conference organised within the United Nations system." [Venne, 2011:559f] During this conference the idea of a declaration as well as an UN body specifically on indigenous rights came up which should ensure continuous involvement with indigenous issues at the UN level. [Barsh: 1986:371]

With the establishment of the Working Group on Indigenous Populations (WGIP) in 1982 it was still somewhat unclear how the second mandate ("standard setting") was going to be realized. Therefore more emphasis was put on the first mandate ("review of developments"), which was confined on collecting data of indigenous peoples. Due to criticism from indigenous organizations and governments the Sub-Commission assigned the members of the Working Group to draw more attention to the "standard setting" mandate and thus develop in context of national and international instruments a document on indigenous rights. [Barsh, 1986:372]

Thus the goal was set to develop an international instrument that would on the one hand acknowledge indigenous peoples as subjects of international law and recognize their general human rights but on the other hand also guarantee them their own specific (collective) indigenous rights. It was the hope of the members and participants of the Working Group at the time, that such an instrument would contribute to a similar development as it was the case with the "UN Declaration on the Granting of Independence to Colonial Countries and Peoples") influencing decolonialization processes. [Barsh, 1986:378; Daes, 2009:55]

### 6.2.1. Drafting a Declaration

Based on a proposal made at the 4<sup>th</sup> session in 1985 by Erica-Irene Daes, chair of the Working Group at the time, any document on indigenous peoples should be based on principles which had already been presented by indigenous organizations before<sup>10</sup> and which provided the most basic but crucial elements the declaration would later incorporate, namely the exercise of their cultures, traditions, languages and institutions, recognition of their traditional territories and natural resources and most importantly the right to political, economic and cultural self-determination for indigenous peoples. Taking those into consideration, Erica-Irene Daes composed a draft text of seven so called "draft principles":

1. Right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the UN and International Bill of Human Rights
2. Right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.

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<sup>10</sup> foremost the "Declaration of Principles (Indigenous Draft Principles) which were adopted at a preparatory meeting of indigenous peoples to the session of the WGIP in 1987 which consisted of 22 Articles. [Venne, 2011:568f]

3. Collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty and security of person
4. Collective right to maintain and develop their ethnic characteristics and identity.
5. Collective right to protection against any act which has the aim or effect of depriving them of their ethnic characteristics or identity. This protection shall include prevention of any form of forced assimilation, any propaganda directed against them etc.
6. Collective right to participate fully in the economic, political and social life and to have their specific character reflected in the legal system and in the political institutions of their country
7. Duty of the territorial State to grant - within the resources available - the necessary assistance for maintenance of their identity and their development.

[Commission on Human Rights, Report of the Working Group on Indigenous Populations on its Fourth Session, Annex V, in: Venne, 2011:571]

In the following sessions of the Working Group the main objective was to draft the provisions within the declaration guided by discussions, meetings and statements made by all participants. Thus on the one hand, those rights needed to be applicable to all indigenous peoples in various different settings around the world, but on the other hand had to be of realistic nature and precise enough to have a chance on getting passed later on at the UN General Assembly. Thus particularly a few topics, heavily discussed and debated on before in national as well as international forums, turned out to be the main points of divergences also at the Working Group when governmental representatives and indigenous delegates were called upon to agree on provisions, their wordings and scopes. [Daes, 2009:61]

#### **6.2.1.1. Self-Determination**

Several states proposed to narrow the term down to internal self-determination and therefore making a clear distinction between a right to self-determination within the context of decolonialization and that of people within a nation-state. Indigenous delegates on the other hand didn't want to limit the concept to some forms of autonomy. Rather they strived for a right within the declaration which would guarantee them protection of colonialization or forced removal from their traditional lands. Thus the Nordic Sami Council presented a joint statement together with the Haudenosaunee Nation to use the wording of Article 1 of the human rights conventions (ICCPR and ICESCR) which was unanimously accepted by the members of the Working Group followed by a "standing ovation" from indigenous delegates. Thus Article 3 of the draft text stated

*"Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".*

In order to undermine worries of states that this principle would have any implications for a right to succession, but would rather strive for ensuring active and equal participatory rights within the nation-state, Article 31 limited Article 3 through the following paragraph:

*"Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions."*

[Daes, 2009:64]

#### **6.2.1.2. Definition of Indigenous Peoples**

Referring back to the discussions about a general definition on indigenous peoples, members of the Working Group finally concluded to have no official definition in the declaration but to use the one of the Cobo Study as a working definition which includes objective criteria such as historic continuity as well as a subjective factor of self-identification. [Daes, 2009:63f]

#### **6.2.1.3. Collective Rights**

Questions were raised if the declaration should grant rights to individuals as it was the case with all other major UN documents (i.e. also regarding minority rights in Article 27 ICCPR) or also to include collective rights. Many states thought collective rights to be fundamentally inconsistent with general human rights instruments while indigenous peoples saw collective rights as a main precondition to exercise their indigenous rights effectively. They argued, since the declaration did take particularly their situation and context into account, it should also extend the narrow standardized system of Western thought towards a collective concept of legal norms. Finally an agreement could be reached to include an paragraph to the preamble which would acknowledge individuals as addressee of the declaration as well as indigenous peoples as a collective.

[Buchanan, 1996:107]

#### **6.2.1.4. Right to Traditional Territories**

Former Article 25 of the draft declaration explicitly recognized their spiritual as well as material relationship to their traditional territories which was also considered important for any exercise of their right to self-determination. Some states, foremost Canada, wanted a more precise definition of the terms "lands", "territories" and "natural resources" since it wasn't clear at the time if those terms would only refer to areas indigenous peoples are living and using in present times or rather have been using traditionally in the past but lost them over processes such as colonialization. [Daes, 2009:71] However, limiting the scope of their land rights wasn't accepted

by the Working Group so that the later Article 26 of the UNDRIP guarantees indigenous peoples now the right to

*"own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights."*

After eight years of negotiations, the WGIP could agree on a final draft text in 1993, consisting of 19 preambles and 45 articles which again were divided into eight parts each with a specific topic:

- Part 1 reaffirms indigenous peoples' right to equality and non-discrimination as an individual but also as a collective who also have right to self-determination
- Part 2 guarantees indigenous peoples protection of physical existence and cultural identity
- Part 3 to 5 lists further rights on issues of special concern to indigenous peoples in the exercise of their rights to equality, self-determination and collective identity including religious, spiritual, cultural and linguistic freedoms as well as indigenous institutions regarding education, health, economy and communications
- Part 6 focuses on economic rights, land rights and the usage of natural resources as well as cultural and intellectual property rights
- Part 7 provides general guidelines for indigenous peoples exercising possible concepts of autonomy within a state
- Part 8 reaffirms commitments of states and the international community to acknowledge and implement indigenous peoples' rights

[Daes, 1995:495f]

The draft text of the "Declaration on the Rights of Indigenous Peoples" was later unanimously accepted by the Sub-Commission and presented to the Human Rights Commission with the recommendation to pass the document at the UN General Assembly within the UN-Decade of Indigenous Peoples (1995 and 2004). [Daes, 2009:72f]

## **6.2.2. Debating and Negotiating the Draft Text**

As an expert mechanism, the Working Group on Indigenous Populations consisted of human rights lawyers, diplomats and governmental officials who had much experience on related issues. Thus they could be relied on to be sympathetic to indigenous peoples and in general positive notion of new international norms of indigenous rights. Making sure the draft declaration

also finds acceptance by states which finally have to vote on the text at the UN-General Assembly, the Human Rights Commission set up an intergovernmental working group to further discuss the text and to finalize its wording.

Even though the UN Commission on Human Rights didn't give way to indigenous peoples urge to become members of the "Working Group on the Draft Declaration on the Rights of Indigenous Peoples" (WGDD)<sup>11</sup> as well, it finally allowed indigenous organizations to participate at the meetings even without ECOSOC status once again (as it was the case in the Working Group). [Peterson, 2010:202f] States opposed this decision but when indigenous delegates threatened to leave the meetings and thus endanger the declaration's legitimacy and credibility, governments (reluctantly) accepted their presence since by this time indigenous peoples already developed a strong position within UN forums. [Tauli-Corpuz, 2007:3] "The arguments and strategies of the nation-states were neither new nor creative; they were oppressively familiar. What was new was that they had to listen to our responses. In the political hierarchy of the nation-states, we were ignored; in the working group, these same governments had to live with our visions and voices." [Henderson, 2008:53]

Since this Working Group was only made up by state representatives instead of more favorable independent experts, indigenous peoples were very concerned that any modifications taking place in further discussions would weaken or exclude their rights within the draft text. Thus at the time only three states (Bolivia, Fiji Islands and Denmark) declared to accept the present document without changes necessary. Therefore, indigenous peoples presented a joint statement through the Indigenous Caucus and urged the Working Group on the Draft Declaration to immediately accept and implement the draft text without any further deliberations (so called "no change position"). [Henriksen, 2009:79]

In turn, first sessions turned out to be quite strenuous since neither indigenous peoples nor governmental representatives wanted to ease off their strong positions. The situation was also hampered by the mutual suspicion: governments were afraid that indigenous peoples had "hidden agendas" such as implications of self-determination, while indigenous peoples didn't trust governments out of their long and painful historical experiences with them. Thus the chairperson of the WGDD, Louis Enrique Chavez made the strategic decision early on to start working on the articles easier to agree on towards those heavily disputed while guiding "the work towards negotiations without, however, it being perceived as such." [Chavez, 2009:100f]

A few indigenous delegations began to comprehend their radical "no change position" wouldn't be seminal and moreover could threaten the whole process as also the UN Commission on Human Rights urged participants to end discussions on the declaration in time. However other indigenous representatives strongly believed in not giving away any more of their rights and thus insisted on not modifying the wording of the draft text. These divergences of opinions led to

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<sup>11</sup> From now on: Working Group on the Draft Declaration

tensions between indigenous delegates within the Indigenous Caucus while on the other hand, states started forming common positions on their side to oppose indigenous peoples more united.

To reinforce their “no change position” and draw public attention on their struggle for their rights, six indigenous representatives started a traditional hunger strike for four days in December 2004 and called on the UN Commission on Human Rights to set appropriate steps to not weaken their indigenous rights within the declaration any further. “We will not allow our rights to be negotiated, compromised, or diminished in this U.N. process, which was initiated more than 20 years ago by Indigenous Peoples’ the hunger strikers’ press release asserts. ‘The United Nations itself says that human rights are inherent and inalienable, and must be applied to all Peoples without discrimination’” [Cultural Survival\_Hungerstrike] Even though many indigenous organizations supported the hunger strike and its intentions, some indigenous delegations were critical of such radical strategies and considered it “political suicide”. [Tauli-Corpuz, 2007:5]

In 2005, after almost 10 years of negotiations only two articles were agreed upon. Article 5 dealt with the right to a nationality while Article 43 concerned equal rights and freedoms to indigenous men and women alike. Thus, they only restated already generally accepted human rights norms and were composed as individual rights which made it easy for indigenous peoples and particularly states to accept them. [Tauli-Corpuz, 2007:4f]

In need of major progress and more open discussions, the “Patzcuaro Workshop” took place in September 2005 under the auspices of Mexico and in cooperation with the Office of the UN High Commissioner for Human Rights. Away from official UN buildings, informal exchanges of viewpoints brought some positions together, in order to start the 11<sup>th</sup> session of the WGDD with the aim to finally finish negotiations. [de Alba, 2009:112f] Concluding on those agreements made, the Chair of the WGDD, Louis Enrique Chavez presented a comprehensive proposal for compromises to be acceptable for both, states as well as indigenous peoples. They included the following previously already disputed provisions.

### **6.2.2.1. Right to Self-Determination**

It was clear from the very start that indigenous peoples wouldn’t negotiate anymore about the wording of Article 3. For governments to agree, a new Article 3(a), now Article 4 was included which narrows Article 3 down to imply only internal self-determination as before Article 31 of the draft text did in its version of 1994.

While former Article 31 refers to the right to autonomy and self-government “as a specific form of exercising their right to self-determination”, Article 4 states “in exercising their right to self-determination”. Thus Article 31 in conjunction with Article 3 states the right to autonomy and self-government as *one* form of exercising indigenous self-determination

compared to Article 4 which focuses on those concepts as *the way*, indigenous peoples can realize their right to self-determination. [Koivurova, 2008:10ff]

Even with Article 4 implying only an internal right to self-determination, states were still afraid, Article 3 could be read on its own and thus would have implications of giving indigenous peoples some right to succession. Thus a reference to the “Friendly Relations Declaration” from 1970 was proposed, regarding the territorial integrity of states, which explicitly notes that any rights set out in the UNDRIP cannot threaten the territorial integrity or political unity of states. [Koivurova, 2008:12] Thus, after the adoption of the Human Rights Council, Article 46(1) was amended - heavily criticized by many indigenous delegates - to read as follows (change in bold):

*“Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”*

#### **6.2.2.2. Definition of Indigenous Peoples**

While many states wanted to have a clear definition of indigenous peoples in the declaration to be able to define addressees of the rights within, indigenous delegates were reluctant to narrow down the applicability of the declaration by defining on exact terms who indigenous peoples were. In the end a compromise was found by not including a definition in the Declaration but also getting rid of Article 8 of the draft text which would have given indigenous peoples a right to define them and thus the addressee of the declaration through self-identification. [Chavez, 2009:103]

Therefore in the final text, a preambular article was added to clarify the diversity of indigenous peoples throughout the world:

*“Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.”*

#### **6.2.2.3. Collective Rights**

The question about collective rights was also solved through a new paragraph in the preamble which guarantees the rights within the declaration to individuals and indigenous peoples as collectives alike. Thus Article 1 further reaffirms that collective rights as group rights don't undermine or substitute the rights of individuals but exist next to each other. Therefore an indigenous person for example doesn't lose his/her indigenous rights by leaving his/her community. Moreover Article 35 also states that indigenous peoples have the right to define their own obligations and responsibilities for their members.

#### 6.2.2.4. Free Prior Informed Consent

From the beginning, states heavily opposed any right that would give indigenous peoples a “veto power” regarding matters that might affect them. Chavez proposed to not oblige states to reach consent with indigenous peoples but to force them to conduct negotiations with indigenous peoples in good faith, aiming to achieve their free prior informed consent. This concept finally was adopted in Article 19. [Castro/Díaz, 2006:350f]

#### 6.2.2.5. Right to Traditional Lands and Territories

Article 25 which referred to indigenous peoples’ special relationship to their lands was amended insofar as the material aspect was canceled, only leaving their spiritual relationship in the wording.

Main Article 26 was newly structured. Paragraph 1 now guarantees indigenous peoples a general fundamental right to their lands, territories and natural resources while Paragraph 2 and 3 then go in more detail about its arrangements. “The inclusion of strong land rights in the Declaration is a positive development for indigenous peoples and international law. Notwithstanding this, ownership, possession, development and control are limited to lands that indigenous peoples presently possess; their rights to lands from which they have been expelled is recognized, but the content of this right remains very vague. Also, even in cases of lands presently occupied, the language of the *Declaration* does not specify whether indigenous peoples have the right to *ownership*; rather, it adopts a broad approach that may include ownership *or* possession.” [Xanthaki, 2009:4]

The proposal finally was adopted on the last day of the extended 11<sup>th</sup> session of the Working Group on the Draft Declaration on February 3<sup>rd</sup> 2006 and thus ended years of negotiations. “The aim of these revised Chairman’s proposals was to enable a comprehensive and integral interpretation of an alternative to the Sub-Commission Text, and which would include the necessary balance for achieving a consensus or, at least, for making it acceptable to the majority. This is why it was announced as a compromise text.” [Chavez, 2009:105]

### 6.2.3. Adoption of the UNDRIP at the Human Rights Council

Through the overall restructuring process of the UN concerning human rights bodies, resolution 60/251 introduced the new UN Human Rights Committee (HRC) on May 15<sup>th</sup> 2006 which replaced the current UN Commission Human Rights and its expert mechanism, the Sub-Commission on Human Rights. At that time the first session of the new Human Rights Committee was anxiously awaited since it needed to position itself within the UN reforms as a

productive body with a more efficient functioning. Amongst other agenda items, the UN Declaration was supposed to be passed in its first session in June 2006 to refer the document to the UN General Assembly. [De Alba, 2009:118ff]

Already in the forefront, indigenous peoples advocated the UNDRIP at the meeting of the “UN Permanent Forum on Indigenous Peoples” (more details on this UN body later in the chapter) in May 2006 particularly convincing those 47 states which were members of the new Human Rights Committee about the importance of the Declaration. Indigenous peoples could quite surely count on the acceptance from most Latin American countries while African and Asian states were considered unsure about their positions. However, since only a minority of governments really disapproved of the UNDRIP, the Human Rights Committee went ahead and voted on it on June 29<sup>th</sup> 2006. Thus the Declaration got accepted by a vast majority of states with only two rejections, namely the Russian Federation and Canada. This day was celebrated by indigenous peoples as an historic event of finally acknowledging their indigenous rights within the United Nations. [Tauli-Corpus, 2007:6]

Therefore, the next step was the passing at the UN General Assembly. Indigenous representatives and favorable states were hoping that the Third Committee of the UN General Assembly would accept the declaration to be voted on without further hesitation. However to the surprise of many, Namibia presented a joint statement (“Aide memoire”) of various African states (“African Group”) at the meeting of the Third Committee and asked to postpone any voting on the UNDRIP to September 2007 in order to have more time for further negotiations and clarifications on the wordings of the Declaration. The approval of the African Group’s amendments to the draft resolution for the adoption of the UNDRIP by the Third Committee was a huge disappointment to indigenous delegates as once more they got the impression, not being equally recognized within the “UN family”. [De Alba, 2009:126ff; Tauli-Corpus, 2007:9] But also the legitimacy of the Human Rights Committee was put into question as it undermined its work in general by disapproving one of the first actions the HCR, namely accepting the Declaration in its first session.

#### **6.2.4. The African Group’s Position**

As stated before, the sudden positioning of African states came to a surprised to many participants since they weren’t much involved in the whole drafting process the years and decades before. This was partly due to the limited capacities of diplomats and other governmental personal in Geneva but also because of little attention the issue of indigenous peoples was given in regional and national politics. Therefore many African governments took note of the UNDRIP only through its acceptance at the HRC. As they didn’t have much insight in the drafting process and thus final content of the text, they were concerned on the implications and obligations arising from it. Informally, more powerful states disapproving the UNDRIP (such

as Canada, the US, Australia, New Zealand and the Russian Federation) also influenced African states by reconfirming them in their doubts about the Declaration. [De Alba, 2009:128; Barume, 2009:171ff]

To counteract these tendencies the African Commission on Human and Peoples' Rights (ACHPR) presented a comprehensive report in which they tried to answer all the concerns raised by the African Group in their Aide-Memoire. Together with information on the newest developments in international law regarding self-determination of indigenous peoples, definitions and rights, it also included extensive references to various national legislature of African states already dealing with indigenous issues and their rights, already harmonizing to a large extent with the content of the UNDRIP. Thus in the end, African diplomats became more willing to change their opinions about the UNDRIP. However, they also didn't want to bear the responsibility of the UN declaration not passing the UN General Assembly in the end. [Barume, 2009:174ff]

### **6.2.5. Final adoption of the UNDRIP at the UN-General Assembly**

At the same time, indigenous organizations intensified their lobbying work. The Indigenous Caucus set up a "Steering Committee" which included indigenous representatives from all regions and could – if necessary – be at the relevant forums to promote their standpoints on a personal level with governmental officials and provide them with information regarding the UNDRIP and their indigenous rights. Together with favorable countries particularly Mexico, Peru and Guatemala, they strategically focused their efforts on those countries which were still uncertain or ready to negotiate further positions such as most African and Asian states. Consequently they ended discussions with the so called "Group of 7" (Canada, Australia, New Zealand, the Russian Federation, Colombia, Guyana and Suriname) which were unwilling to change their position regarding the Declaration. Thus, they wanted all new amendments incorporated which were brought in at the Third Committee before they would approve the document in the end. [Tauli-Corpuz, 2007:11ff]

At the 6<sup>th</sup> session of the UN Permanent Forum on Indigenous Issues (PFII) indigenous peoples especially increased advocacy efforts, pressing governments to vote in their favor. Furthermore, PFII chairperson at the time, Victoria Tauli-Corpuz invited the president of the UN General Assembly, Sheikha Haya, the Chair of ECOSOC as well as the Chair of the Human Rights Committee, Louis de Alba to the opening of the PFII session in order to reconfirm their commitment towards passing the UNDRIP at the 61<sup>st</sup> session of the UN-General Assembly in September 2007. As a consequence, its president Sheikha Haya, assigned Ambassador Hilario Davide of the Philippines to officially mediate between conflicting positions of states towards the UN Declaration. He conducted several informal meetings with the African Group and the "Group of 7" in order to find common grounds but he soon came to the conclusion that most likely some

compromises would have to be found in order to pass the declaration and suggested in his final report to the UN General Assembly to amend a few articles which wouldn't undermine indigenous rights and could be interpreted in the light of the UNDRIP. [Tauli-Corpuz, 2007:13]

On the 13<sup>th</sup> of September 2007, the UN Declaration on the Rights of Indigenous Peoples was voted on and got adopted by the UN General Assembly with almost all states voting in favor of the declaration (143 in favor, 11 abstentions). Not surprisingly, Canada, the USA, Australia and New Zealand (the so called "CANZUS states") remained the only four states voting against the UNDRIP. After more than two decades of drafting and negotiating, the UNDRIP was finally acknowledged by the international community and thus created the most important international legal framework for indigenous rights.

After the adoption, Victoria Tauli-Corpuz and Lez Malezer, chair of the Global Indigenous Caucus took the opportunity on this historic day to thank all indigenous delegations, (indigenous) experts and NGOs who contributed to the making of the declaration. "Through the adoption of the Declaration on the Rights of Indigenous Peoples, the United Nations marks a historical milestone in its long history of developing and establishing international human rights standards. It marks a major victory for Indigenous Peoples who actively took part in crafting this Declaration. This day will be forever be etched in our history and memories as a significant gain in our long struggle for our rights as distinct peoples and cultures. The 13th of September 2007 will be remembered as a day when the United Nations and its Member States, together with Indigenous Peoples, reconciled with past painful histories and decided to march into the future on the path of human rights." [Statement, Tauli-Corpuz, 2007:1]

Referring back to *Keck and Sikkink's* levels of influences transnational advocacy networks can have to bring about change within international legal frameworks, indigenous peoples proved successful in using various strategies of advocacy and diplomacy to finally have the UNDRIP adopted. Thus through increasing awareness about their concerns beforehand, they set agendas at the UN, providing them with a space in order to make their voices heard. Moreover, indigenous peoples even managed to change established working procedures in their favor by being able to participate openly at the Working Group on Indigenous Peoples as well as the Working Group on the Draft Declaration. In turn, their grand attendance influenced the institutionalization of new standards and norms on another level, as stated by *Keck and Sikkink* in theory. Even though indigenous peoples had to compromise on many provisions, they accomplished quite a lot, taking into account the overpowering position of states, thus setting new standards of indigenous rights which haven't been recognized before within international law. [see Keck/Sikkink, 1999:98f]

## 6.3. Content of the UNDRIP

“By particularizing the rights of indigenous peoples, the Declaration seeks to accomplish what should have been accomplished without it: the application of universal human rights principles in a way that appreciates not just the humanity of indigenous individuals but that also values the bonds of community they form. The Declaration, in essence, contextualizes human rights with attention to the patterns of indigenous group identity and association that constitute them as peoples.” [Anaya, 2009:193]

The UNDRIP reflects the consensual views of international human rights law. Recognizing the cultural diversity and multiple contexts of indigenous peoples, the Declaration provides them with individual and collective minimum standards to ensure their survival. “We now have an ‘expected range of functioning’ or ‘a required level of achievement’ by which to measure the exercise and enjoyment of our fundamental human rights.” [Dorough, 2009:266]

The preambular paragraphs repeat the recognition of international instruments that guarantee fundamental rights of indigenous peoples but also refer to existing general international human rights and their principles within international law, including the Charter of the United Nations, the ICESCR, the ICCPR, the ICERD as well as the right of self-determination. The preamble further recognizes the respect of indigenous peoples’ culture, knowledge and traditional practices as well as their international engagement and advocacy.

The 46 operative articles elaborate the individual and collective rights of indigenous peoples by reaffirming standard human rights and the principle of non-discrimination as well as specific rights important within their specific context. Thus they form a minimum “standard to be pursued” (Article 43) and leave room to elaborate and extend those rights in the future (Article 45). The articles of the UNDRIP also define obligations of states throughout the document (usually in paragraph 2 of each Article) to set forth positive and effective measures in order to realize their human rights duties for realization of the rights in the declaration.

### 6.3.1. General Human Rights and Non-Discrimination

Human rights apply to all human beings, thus also indigenous peoples. This quite general recognition might not seem necessary to acknowledge but particularly in the context of their situation often facing structural discrimination and marginalization, it is essential to reaffirm them regarding indigenous peoples. Thus, in order to ensure equality and non-discrimination for all people, the UNDRIP calls upon states but also international institutions to set positive action and effective measures in order to secure human rights for indigenous peoples in an equal matter.

Non-discrimination is thus a major objective of the UNDRIP and has been a major principle of framing their demands in indigenous advocacy. [see Kingsbury, 2002:193ff]

Thus, Article 1 of the UNDRIP guarantees indigenous peoples the full enjoyment of all human rights and fundamental freedoms set out within international human rights law and Article 2 states their free and equal status. While this doesn't provide any further substantive input, both articles however are addressed towards the individual but also the collective, which is particularly important for indigenous peoples and their cultural understanding. Thus, collective rights recognized within the UNDRIP particularly regarding their right to self-determination, maintaining their culture and right to their lands are a novelty concept for human rights documents.

Other articles address general human rights, such as their right to nationality, life, physical and mental integrity, education, access to the labor market, but also participatory rights regarding their civil and political rights. Those rights are then considered specifically important for indigenous peoples and have to be understood and further implemented in a cultural sensitive way regarding their beliefs and traditions. For example, regarding the right to education, Article 14 states,

*"1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*

*2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.*

*3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language."*

This illustrates how a general human right is solely reaffirmed, thus that every indigenous person has a right to (receive) education but in the specific context of indigenous peoples, the state should also respect and ensure the possibility for them to establish own educational institutions according to their cultural traditions as well as the duty to set positive measures to provide educational systems, indigenous peoples have access to and are able to be taught in their own culture and languages.

### **6.3.2. Self-determination and Participatory Rights**

Heavily contested until the end, Article 3 recognizes that indigenous peoples, like any other peoples have a right to self-determination, referring to the same wording of Article 1 of the two UN human rights conventions (ICCPR and IESCR) :

*"Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

Thus, as mentioned before, the substance of the right to self-determination is "the right of all peoples to control their own destinies under conditions of equality". Therefore, Anaya argues that succession from independent states represents just one possible way of redress in cases of violations of that right. Since indigenous peoples all share similar experiences, past and present, with colonial processes which are mainly responsible for their discriminated and marginalized position nowadays, eliminating those structural problems and working towards indigenous peoples' survival and identity can therefore be considered as a form of remedy against violations of their right to self-determination by recognizing their distinctive cultures. "The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors." [Anaya, 2009:191] Therefore the UN Declaration requires states to take effective measures such as "treaties, agreements and constructive arrangements" (Article 37) in order to fulfill indigenous peoples' right to self-determination. [Anaya, 2009:192]

Article 4 specifies but also limits the way in indigenous peoples can exercise that right:

*"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."*

Other articles set further safeguards in this context, entitling them to maintain and strengthen their own institutions (Article 5 and 20), educational systems (Article 14) judicial systems (Article 34) and particularly also land right and tenure systems (Article 25 – 32) but also guarantee their participation within national policies affecting them (Article 18 and 19). Thus Article 18 give indigenous peoples the

*"Right to participate in decision-making in matters, which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."*

while Article 19 states

*"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior informed consent before adopting and implementing legislative or administrative measures that may affect them."*

Consequently, recognizing their cultural distinctiveness and strengthening their own traditional institutions, also entitles indigenous peoples to participate effectively in national policies and have access to governmental services based on the principle of non-discrimination.

### 6.3.3. Historic Injustice

“Despite the contemporary absence of colonial structures in the classical form, indigenous peoples have continued to suffer impediments or threats to their ability to live and develop freely as distinct groups in their original homelands. The historical violations of indigenous peoples’ self-determination, together with contemporary inequities against indigenous peoples, still cast a dark shadow over the legitimacy of state authority in many instances.” [Anaya, 2009:190]

Historic injustice and redress thereof is one major objective of the UNDRIP which is generally stated within its preamble:

*“... indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”*

Further, remedial measures to be taken by the state are specifically mentioned again in the context of indigenous peoples’ right “to practice and revitalize their cultural traditions and customs” (Article 11) and particularly regarding their lands:

*“right to redress for restitution or, if not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” (Article 28)*

Those measures of redress of historic and ongoing wrongdoings are foremost based on the principle of equality and non-discrimination to ensure positive steps taken.

Article 37 also ensures indigenous peoples the right to recognition and upholding of treaties, agreements and other constructive arrangements concluded between them and states (or their successors) which also have to be honored and respected to avoid any further treaties to be broken without redress for violations in that regard.

### 6.3.4. Cultural Distinctiveness

Since their cultural identity, beliefs and traditions are crucial for indigenous peoples, a key objective of the Declaration concerns the effective protection of indigenous culture. The preambular articles thus acknowledge their cultural distinctiveness by “recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such” and thus

contributing to the “diversity and richness of civilizations and cultures, which constitute the common heritage of humankind”.

Since indigenous peoples have often been and still are victims of “ethnocide” and denied of exercising their culture, Article 8 (1) goes further than the general prohibition of genocide in international law (restated in Article 7(2)) but moreover bans any “forced assimilation or destruction of their culture”. [Wiessner, 2009:4]

The rights regarding indigenous peoples’ cultural protection elaborate on Article 27 ICCPR, recognizing a general right to culture but which hasn’t sufficiently addressed their specific contexts. [see Kingsbury, 2002:202ff]

The UNDRIP thus entitles them to practice and revitalize their cultural traditions and customs (Article 11) as well as maintain, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions (Article 31). Indigenous peoples also have the right to establish and control their own educational systems (Article 14) and media in their own language (Article 16), which are both crucial to maintain their traditional languages.

### 6.3.5. Right to Lands and Territories

As one key aspect of their culture and identity, their relationship to traditional lands and territories is explicitly acknowledged in article 25 and further elaborated quite extensively (Article 25 till 32).

Foremost, Article 26 recognizes indigenous peoples’ right to own and use their traditional lands:

- “1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
- 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.*
- 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”*

Compared to similar articles in the ILO Convention Nr. 169 which only mentions lands indigenous people own or use (in present times), the UNDRiP also includes territories they have possessed or used before and which might have been taken away from them during the history of colonialization.

This highlights again the focus and objective of the Declaration on reparation of historical injustices against indigenous peoples. In that respect, article 28 specifically calls for restitution and compensation for lands taken away, confiscated or damaged in form of other land or if

preferred by indigenous peoples, in money. Article 26, paragraph 2 and 3 as well as article 27 also recognize indigenous peoples' traditional tenure and usage systems which are to be respected by the states. This principle is also linked to their right to self-determination and being able to establish and control their own political and economic institutions through traditional systems.

Another aspect of indigenous peoples' right of owning and using their lands is the right to keep others from using it. Therefore article 29, 30 and 32 deny governments the possibility of storing or disposing hazardous materials as well as conducting military activities or developmental projects on indigenous lands without their free, prior informed consent to such measures. [Castro/Diaz, 2006:347]

## 6.4. The UNDRIP as a New Legal Framework within an Human/Indigenous Rights-based Approach

*"With the adoption of the Declaration, it is clear that the UN nation-state members have the capacity to accommodate indigenous peoples. These standards provide the necessary framework for a human rights-based approach and for a new conceptualization of indigenous and state relations. As such, the Declaration should be regarded as the new "manifesto" for positive international and domestic political, legal, social and economic action. Now the challenge is to compel states to act, to induce them to take their duties and obligations seriously, and to share our sense of urgency in implementing the Declaration."* [Dorough, 2009:266]

It is always a significant success for the international community if another UN document on human rights is adopted and in this case particularly for indigenous peoples and all other actors which were involved over more than two decades of its making. In the end, the UN Declaration – as other international agreements as well – will be judged in the end on its actual (positive) changes for indigenous peoples in their everyday lives.

Referring back to conclusions drawn on merging human rights and development policies (see Chapter 1) a lot of times human rights standards are recognized and acknowledged but rather as a source of aspirational principles instead of actual legal obligations to be implemented in domestic legislature. This is even more so the case concerning declarations which are non-binding instruments unlike conventions or other binding international agreements with monitoring mechanisms. Thus, human rights might contain the word "rights" and are considered highly valuable standards of reference, states can be hold accountable to, but in the end, even after remain "heartwarming sentiments" though real actions or changes in domestic laws are lacking behind. [McInerney-Lankford, 2009:58ff]

This has been also one of the major critiques of human rights-based approaches, respectively of any human rights discourse. Therefore, "many indigenous people and human rights activists ask themselves what good a Declaration is if it is not legally binding and will therefore not bring hard legal results. Similarly, state officials may consider that supporting the Declaration is certainly a gesture of goodwill but does not carry any real obligations for the governments concerned. [...] At best, the Declaration is considered to be 'soft law' which can be ignored at will, particularly as it does not include enforcement mechanisms." [Stavenhagen, 2009:355]

Regarding human rights in that context, *Amartya Sen* refers to Kant's concept of "imperfect obligations". Unlike "perfect obligations" which define specific duties of a particular agent for the realization of those rights, "imperfect obligations" don't address anybody specific and thus remain sometimes unfulfilled but nevertheless are important to be acknowledged. Since they are ethical values the international community has regarded as fundamental, their significance lies in the recognition that certain rights are appropriate entitlements for all human beings, or specifically in this regard to indigenous peoples. [Sen, 1999:227ff] Thus the legitimacy of human rights lies in themselves and when codified in documents, they form an agreed legal framework for the global community to respect. Those "soft laws" might not have judicial power and cannot be enforced but they still, through their ethnic claim, provide incentives for states to comply once those standards are adopted. [Torres, 1991:146f]

#### **6.4.1. Legitimacy of the UNDRIP**

Regarding the legitimacy of international documents, *Charter* identifies three major factors which strengthen their perception: process, content and engagement with the document. Thus those three types of legitimacy, she argues, increases the underlying quality necessary for states to voluntarily adopt and implement international norms which don't have judicial power and lack mechanisms in cases of non-compliance. Legitimacy *Charter* thus defines as "the quality in international norms that leads states to internalise a pull to voluntarily and habitually obey those norms, even when it is not necessarily in their interests to obey and despite the lack of a sovereign or sanction for failure to comply." [Charter, 2009:281]

Regarding in particular the UNDRIP, *Charter* thus shows that due to the specific context of the Declaration as well as its distinctive and partly even innovative features, it provides strong implications to gain much greater legitimacy than other declarations.

#### 6.4.1.1. Process Legitimacy

The more institutionalized, transparent and ordered a process of drafting an international document is and the more time is spent and various actors are involved, the less likely it is for a final text to be seen as solely “politically” and not considered to be attached to legal norms, *Charter* argues. Considering those factors, the UNDRIP proves to be particularly genuine.

Hardly any other UN document went through such a lengthy period of time to be drafted, spanning almost 25 years which implies robustness of its character and content. Further during that process, it passed six UN organizations and procedures under the UN Charter before getting adopted, including intergovernmental as well as expert bodies (Working Group on Indigenous Populations, Sub-Commission on Human Rights, Working Group on the Draft Declaration, Human Rights Committee, Third Committee of the UN General Assembly and the UN General Assembly). [Charter, 2009:282ff]

If anything, the most outstanding feature regarding the drafting process of the UNDRIP was its open participatory character. Thus the first principles of the declaration were based on drafts of indigenous peoples themselves and were then further elaborated by indigenous delegations, UN experts of the WGIP and state representatives. Since indigenous peoples didn't need ECOSOC status to participate, the WGIP became the most open forum within the UN in terms of accessibility to non-state actors and their particular view-points. [Charter, 2009:286f]

Of course, it goes without saying that there was also criticism involved. Thus, though it was possible for any indigenous delegation to attend, there was no way to measure or control who those representatives were or on whose behalf some of them attended. Further participation was narrowed down quite problematically when the Declaration was considered in the final phase of the drafting process which was particularly crucial since states (as well as indigenous peoples) tried hard to get their saying on the final wording on many of the controversial articles. However indigenous delegates only had the opportunity to speak in private meetings and had no formal status equal to those of governmental representatives. African states however also appealed that they haven't had many possibilities to participate as actively as other countries to provide their input due to budget restraints. [Charter, 2009:287]

#### 6.4.1.2. Content Legitimacy

Content legitimacy refers to the substance of a document, its fairness, coherence and determinacy which gives a norm legal but also political authority. Through the UNDRIP, indigenous rights were acknowledged for the first time within the UN in a comprehensive way, recognizing their distinctive cultural identities but also aiming to reverse historical injustices of the past. Though some of the norms within the UN provide quite new features of international norms (such as collective rights) they are based on different justifications or legal grounds: human rights, minority rights, or sui generis rights of international law. The possible

indeterminacy resulting of it, could in that case also enhance its acceptance since the UNDRIP provides enough flexibility to be implemented in various different domestic contexts. [Charter, 2009:287ff]

### 6.4.1.3. Engagement Legitimacy

Lastly, post-adoption, legitimacy of a document can also be increased through its engagement with it by states, NGOs, scholars, media, international institutions or advocacy movements, thus also human rights-based approaches.

Through interaction and drawing attention on those norms, states cannot ignore their existence and finally are pressured into accepting them. Indigenous peoples have been actively promoting and raising awareness about the UNDRIP, on a local level, by campaigning and informing their communities, litigating their cases based on rights from the UNDRIP at national courts or presented violations of the UNDRIP in (shadow) reports to UN human rights monitoring bodies. Consequently a few national and regional courts already used the UNDRIP as a reference and integrated it in their legislature. On the other hand, general UN treaty bodies as well as UN mechanisms on indigenous issues have been promoting its implementation (as further discussed in the following). [Charter, 2009:292ff]

### 6.4.2. Legal Status of the UNDRIP within the UN human Rights Structure

Though much has been said about the legitimacy of the UNDRIP and its legal status as a framework for rights-based discourses regarding indigenous peoples, it still is in the end an UN declaration and thus a non-binding international document. This fact was highlighted mainly by states, regarding it an important, but non-binding tool to contribute to the realization of indigenous rights. Particularly those countries voting against the adoption of the declaration pointed out that the UNDRIP is “an aspirational declaration with political and moral force but no legal force” which “is not intended itself to be legally binding or reflective of international law” as the Australian representative specified, while for example Canada stated it would have “no legal effect” within the state. [Rodríguez-Pinero Royo, 2009:315] However, that’s exactly not the case with declarations.

Unlike conventions, on which states are only bound to comply by ratification and thus becoming part of the treaty, a declaration has to be recognized as an international standard regardless of voting against it. Thus, once adopted by the UN General Assembly, that “soft law” becomes part of a globally acknowledged consensus. In any case, the rights set out in a declaration are still *legal* norms, meaning they have determinative political force for compliance, irrespective if they are stemming officially from binding or non-binding documents. [Rodríguez-Pinero Royo, 2009:317]

Some authors even went so far as to conclude that through that particular features of the UNDRIP and its enhanced legitimacy (also referring back to *Charter*), the Declaration already enjoys similar status as a binding instrument. *Bartolomé Clavero*, current member of the UN Permanent Forum on Indigenous Issues (UNPFII) for example argued that due to the forum provided for drafting the UNDRIP, the declaration was equivalent to that of the two human rights conventions. Indeed, Article 42 of the UNDRIP also uses an unusual strong language when calling on states for its promotion and implementation for “full application” and thus is also the first human rights document declaring its own binding character without any foundation in a convention or treaty. [Rodríguez-Pinero Royo, 2009:316f]

#### 6.4.2.1. UNDRIP Provisions as Customary International Law

While the UNDRIP regardless of its exceptional features remains not binding, some argue that there is existing international consensus on some of the provisions set out in the UNDRIP whose significance expands to other human rights instruments and their interpretation. Indeed, as mentioned before, many of the rights in this declaration only reaffirm already existing human rights norms also mentioned in binding documents and are monitored by treaty bodies. Thus, foremost *Anaya* and *Wiessner* have suggested that contrasting to statements made by particularly those states which rejected the declaration, some of the rights in the UNDRIP can even be regarded to have become customary international law. [Anaya/Wiessner, 2007]

They start by referring to requirements for norms to become customary international law, defined by the International Court of Justice (ICJ) according to which “there needs to be a very widespread and representative state practice in support of the purported new rule, including the specially affected states, as well as a feeling to be obligated (*opinio iuris*)<sup>12</sup>”. Drawing information from different surveys conducted on states and state practice regarding indigenous peoples, they examine the entitlement of indigenous people to maintain and develop their distinct cultural identity, spirituality, languages and traditional ways of life, which various articles in the UNDRIP refer to. The studies confirm that a lot of the policies of assimilation are driven away by new programs on preserving and revitalizing indigenous culture though many don’t include actual legal guarantees. [Anaya/Wiessner, 2007]

Regarding a right to self-determination, it becomes more difficult and mostly depends on its interpretation. Though many, specifically African states, still limits that principle concerning their territorial integrity, many countries found different ways on providing indigenous peoples forms of self-government and autonomy concepts through which they have established their own institutions. Thus, even though some states may oppose the principle of self-determination on various grounds, the question of the scope and thus its interpretation cannot be regarded as a denial of the right itself. [Anaya/Wiessner, 2007]

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<sup>12</sup> Stated in the “North Sea Continental Shelf Case”

The same can be said about the right to “demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used”. Though there might be some disagreement on the extend of that norm, the concept of *terra nullius* has certainly been delegitimized throughout and many states have been influenced to start demarcation procedures, settle earlier treaty agreements on lands (though those processes can also be controversial, referring to British Columbia, Canada in the next chapter) or are securing indigenous rights to lands through various concepts of autonomic regions. At least, since the groundbreaking judgment of the Inter-American Court’s judgment in 2001 regarding the Awas Tingni community in Nicaragua which recognized the existence of a collective right to land for indigenous peoples<sup>13</sup> this right is considered customary international law as well. [Wiessner, 2008:1158]

“The language of 'rights' and 'status' is the language of law. By participating in this process and the concern shown over the years for special rights and status of indigenous peoples on the international plane, the four opposing states [of the UNDRIP] have demonstrated an *opinio iuris*, a willingness to be bound if the provisions as finally formulated were in line with their detailed policy preferences” and thus makes them “part of the world consensus on customary international law” [Anaya/Wiessner, 2007; Wiessner, 2008:1165]

### 6.4.3. The Applicability of General Human Rights Monitoring Mechanisms

The difference between the normative value of some provisions within the UNDRIP which can be considered customary international law and the actual legal status of the document as a non-binding declaration is specifically relevant concerning the monitoring mechanisms of those rights. While for example conventions are provided with treaty bodies which monitor compliance of those states that ratified the convention, declarations lack such mechanisms. However, just because the UNDRIP is not provided with a supervising body, it doesn’t mean the rights within cannot be evaluated and monitored. Thus *Luis Rodríguez-Pinero Royo* has shown comprehensively how existing monitoring mechanisms can be used in order to observe and further implement the provisions in the UNDRIP. [Rodríguez-Pinero Royo, 2009:318ff]

#### 6.4.3.1. UN Treaty Bodies

Many of the rights within the UNDRIP are generally acknowledged and mentioned in other binding UN human rights conventions. Thus, UN treaty bodies have been already open to interpret those rights extensively to take into account indigenous peoples’ contexts and cultural particularities.

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<sup>13</sup> „It is the opinion of this Court that 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, which is also recognized by the Constitution of Nicaragua.”

Taking as an example the right to adequate housing recognized in the ICESCR in Article 11 (1) within the right to an adequate standard of living, the Human Rights Committee pointed out in General Comment Nr. 4 of that right, that housing standards and their adequacy are dependent on social, economic, cultural, climatic, ecological and other factors which have to be realized based on a local definition rather than a national norm. Further it stresses the need for housing laws and policies to leave room for the expression of cultural diversity and housing diversity but also the obligation of the state to make sure that those materials and resources needed for constructing them are to them. [Damman, 2007:524f] Thus, the monitoring body of the ICESCR now can take into account Article 23 of the UNDRIP which entitles indigenous peoples in making decisions on the design of services, including amongst others housing for interpretative purposes when dealing with indigenous peoples' claims under the right of housing.

The Committee on the Elimination of Racial Discrimination (CERD) has also played an increasingly important role in combating different forms of discrimination against indigenous peoples. Already before the adoption of the UNDRIP which now can serve as source of reference, the CERD Committee regarded indigenous peoples in its recommendation No. 23 on the interpretation of the norm of non-discrimination to protect aspects of indigenous cultural identity and language, economic and social development, effective participation, and rights over lands, territories and resources. Called on by indigenous individuals or communities, it addressed sexual and gender-based discriminatory measures against indigenous women or other administrative legal measures by states discriminating indigenous peoples through its reports and recommendations. [Anaya, 2008:8]

Regarding the situation of indigenous women and children, the UNDRIP includes specific articles to pay particular attention to their often even more marginalized position (Article 22) which can be relied on by the Committee on the Elimination of Discrimination against Women (CEDAW) respectively the UN Convention on the Rights of the Child (CRC) when dealing with indigenous issues.

#### **6.4.3.2. Human Rights Council and its Universal Periodic Reviews**

The Human Rights Council (HRC), consistent of 47 members is a subsidiary body of the UN General Assembly and has the primary function to promote universal respect for the protection of human rights to address and make recommendations on situations of violations of human rights, including gross and systematic violations (paragraph 2 and 3 of Resolution 60/251). Thus a key innovative feature of the HRC is its "Universal Periodic Review" (UPR), a peer-review mechanism of each state's compliance with human rights obligations. What has been criticized from the start was the fact that unlike the UN Commission on Human Rights before, the Council is not an independent expert body but an intergovernmental mechanism. Therefore, the accountability of the member states within (and their position or actions regarding human rights in their own countries) was put into question from the start as well as its implied limitations the UPR thus brings along.

Nevertheless, the UPR is the most comprehensive monitoring mechanism since its mandate covers the whole human rights framework, including the UNDRIP. Consequently, the rights within the Declaration can serve as a significant reference for states to realize their human rights commitments regarding indigenous peoples but also for the Human Rights Council to evaluate the implementation and fulfillment of state obligations in their reports and recommendations. “While the Declaration becomes gradually mainstreamed in the practice of both states and human rights bodies and mechanisms, it is to be expected that the Declaration will also be mainstreamed in the UPR process, contributing to defining the human rights obligations of the states under review.” [Rodríguez-Pinero Royo, 2009:322f]

#### **6.4.3.3. Other UN Bodies and International Mechanisms**

Also other UN bodies have considered indigenous issues in their work or recommendations before but now have the UNDRIP as a legal framework to refer back to base their positions on. The UNESCO for example already acknowledged the cultural diversity of indigenous peoples worldwide while particularly regarding indigenous peoples and environmental issues the UN Convention on Biological Diversity recognized their specific traditional knowledge in paragraph 8(j) of the Convention. As mentioned before, also the Inter-American Commission confirmed indigenous collective land rights in its interpretations and Article 9 of the Inter-American Charter of the Organization of American States calls on promoting and protecting the rights of indigenous peoples, which can now effectively be done by taking the provisions of the UNDRIP into consideration. Just recently, the Special Rapporteur also called on the World Bank to take the Declaration into account in their Operational Policy 4.10 on indigenous peoples regarding environmental and social safeguard policies which have to be applied when lending from the World Bank for specific projects. [Anaya, 2013]

“The practice of international bodies and mechanisms in recent decades has significantly contributed to building an understanding of the rights of indigenous peoples on the basis of general human rights norms and a wide array of international instruments. The authoritative interpretation of these norms has contributed to the gradual crystallization of a universal common understanding of the minimum content of the rights of these peoples as a matter of international law and policy.” [Anaya, 2008:10f]

## 6.5. Implementing the UNDRIP

“The adoption of the Declaration [...] – important though it was – will not in itself change the everyday lives of men, women and children whose rights it champions. For this we need the political commitment of states, international cooperation, and the support and goodwill of the public at large, to create and implement a range of intensely political programmes, designed and undertaken in consultation with indigenous peoples themselves.” [Anaya/Kang, in: Charter, 2009:280]

Though monitoring mechanisms do exist within the human rights structure, translating and actually implementing those rights in the national context is another. “The debate on the legal status of the Declaration tends to obscure the fact that the real question is indeed not whether or how the Declaration should be monitored but how the specific rights affirmed in the Declaration can be made effective, improve the lives of indigenous peoples and individuals and prevent the serious violations from continuing.” [Rodríguez-Pinero Royo, 2009:329] The challenge therefore lies in using the Declaration effectively and make it visible within the human rights framework to be able to contribute on enhancing the realization of indigenous rights and thus their overall well-being.

### 6.5.1. UN Bodies and Specialized Agencies

While general UN human rights bodies can use the UNDRIP as a point of reference and interpretative purposes regarding their functioning as monitoring bodies to hold states accountable of their commitments, the UNDRIP calls on the UN in general and its organs, specialized agencies and particularly the bodies which specifically regard indigenous peoples to strive for the full application on the Declaration (Article 41 and 42).

#### 6.5.1.1. Special Rapporteur on the Rights of Indigenous Peoples

In 2001 the Commission on Human Rights appointed Mr. Rudolfo Stavenhagen as the first “Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples”<sup>14</sup> due to its growing concerns about the marginalization and discrimination of indigenous peoples worldwide. Since neither the already established Working Group on Indigenous Populations (WGIP) could take up individual complains nor is the Permanent Forum on Indigenous Issues (PFII), the Special Rapporteur is the only UN body for indigenous peoples that can act on specific individual appeals. Thus, indigenous peoples can make so called “urgent

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<sup>14</sup> From now on also „Special Rapporteur“

action appeals” in cases where an indigenous individual or a whole community is under severe and immediate danger of human rights violations.

Another important part of the Special Rapporteur’s mandate is on- site country visits where he can meet with governmental officials as well as with indigenous communities and organisations to investigate and gather information on a variety of sources about occurring violations of indigenous rights and make recommendations and proposals on activities and measures on enhancing the rights of indigenous peoples in the particular state. [OHCHR-Special Rapporteur]

Those “recommendations” though actually non-binding have shown to have a crucial influence on domestic processes towards establishing policies and mechanisms ensuring the rights of indigenous peoples.

While the Commission initially has outlined his mandated under the whole human rights framework in general, the Human Rights Council has adapted the function of the Special Rapporteur to also promote and implement the UNDRIP in carrying out his activities as well. Thus current Special Rapporteur, James Anaya and the High Commissioner for Human Rights reaffirmed their commitment after the adoption of the Declaration “to working together towards the realization of the rights contained in the Declaration, so that increasing numbers of the world’s indigenous peoples can truly live in dignity and peace. [Anaya/Kang, 2008]

#### **6.5.1.2. Expert Mechanism on the Rights of Indigenous Peoples**

With the restructuring process of the human rights system within the UN and the establishment of the Human Rights Council but also following demands of indigenous peoples who were afraid of losing their institutional open forum within the UN, the “Expert Mechanism on the Rights of Indigenous Peoples” (EMRIP) became the succeeding body of the WGIP with the mandate to conduct thematic research on indigenous issues. Thus it covers the same function of its former body but doesn’t have a mandate for “standard-setting” which many indigenous peoples have criticized. Regarding the UNDRIP the EMRIP nevertheless can make important contributions on promoting and drafting authoritative interpretations on the standards of the Declaration in their studies and advisory role to the Human Rights Council.

Thus the EMRIP could provide information to the HRC based on contributions by states, the expert members and indigenous delegates on how the Declaration can be further operationalized. On suggestion by the participants, studies could also provide best-practice examples and give further guidance through a commentary in order to support states in putting the rights within the UNDRIP into practice. [Burger, 2009:305f]

### 6.5.1.3. Permanent Forum on Indigenous Issues

The Permanent Forum on Indigenous Issues (PFII) is an advisory body to the Economic and Social Council (ECOSOC) and is therefore situated the highest among all UN-bodies concerning indigenous peoples. Thus its establishment in 2000 was an important signal for indigenous peoples regarding the significance of their concerns and was considered as one of the main objectives during the “International Decade of the World’s Indigenous Peoples”. The mandate of the Permanent Forum of Indigenous Issues is quite extensive and focuses on mainstreaming and giving expert advice and recommendations on indigenous issues within the UN system as well as preparing and distributing information on indigenous peoples. [OHCHR-PFII]

As one of the striking features of the Permanent Forum, it secured indigenous peoples an explicit formal voting right, quite a novelty for non-state actors within UN institutions. Thus the body is made up of sixteen independent experts, eight of them are nominated by governments, the other eight from indigenous organizations. [OHCHR-PFII] However, as many indigenous peoples critically stated, this equal number of governmental and indigenous representatives gives little hope of deciding on strong positions or reports in favour of indigenous peoples as state representatives would need to agree as well.

Due to its major mainstreaming function, Article 42 of the UNDRIP also explicitly refers to the PFII to promote the Declaration and its full application. Thus, the UNDRIP now provides the Forum with a clear framework of reference in its role to coordinate and integrate indigenous issues within the UN activities. “For the UN Permanent Forum on Indigenous Issues, the Declaration will become the major foundation and reference in implementing its mandate to advise members of the economic and Social Council and the UN agencies, programmes and funds on indigenous peoples’ human rights and development.” [Tauli-Corpuz, 2007:1]

### 6.5.1.4. UN Departments, Organizations, Funds and Specialized Agencies

To ensure not only the theoretical mainstreaming and promotion of the Declaration but also effectiveness, Article 41 and 42 of the UNDRIP call on the organs, specialized agencies and other international intergovernmental organizations to contribute for the full application “through the mobilization, inter alia, of financial cooperation and technical assistance” (Article 41). “Implicit in this commitment made by the General Assembly is the realignment of programme priorities, budgets and even staffing of the operational parts of the UN so that they can respond effectively to the aspirations set out in the Declaration” though it goes without saying that this can only be accomplished with the corresponding support of the governmental and institutional bodies responsible for those funds and finances. [Burger, 2009:308f]

In that regard, there are already two UN initiatives existing which work towards further enhancing the cooperation and implementation of indigenous issues. The UN Development

Group (UNDG) introduced “Guidelines on Indigenous Peoples Issues” in 2008 to integrate indigenous peoples’ rights and issues into all UN country programs and ensure their effective participation and decision-making throughout, which gives indigenous peoples a greater chance to determine their future in development programs and policies affecting them.

The second relates to the ongoing work of the Inter-Agency Support Group on Indigenous Issues (IASG), established by the Permanent Forum on Indigenous Issues in order to effectively fulfill its duty within the UNDRIP for its promotion and implementation. The IASG focuses on the dissemination of information regarding indigenous issues, capacity-building, programming, and strengthening positions for the implementation of the UNDRIP. Thus it for example started to translate the UNDRIP in local indigenous languages but also has worked closely together with governmental officials and UN country teams, offering advice and support in creating policies and legislative changes in order to implement the UNDRIP into domestic laws. [Burger, 2009:309f]

## 6.5.2. The Role of States

Article 38 of the Declaration calls for positive action by the states and requires that “states, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration” (Article 38). This general mandate is further elaborated in calling on positive action by the states on almost each right within the Declaration. Further, article 4 and 39 also oblige governments to support indigenous institutions and self-governing systems through technical and financial aid.

Thus realizing the provisions within the UNDRIP will require changes in the broader structure of key policy areas which Erica-Irene Daes referred to as “belated state-building” regarding strengthening the role of indigenous peoples and ending their discriminatory and marginalized position within the nation-state. [Anaya, 2008:14]

A few countries already made normative references in their constitutional processes such as Bolivia, Ecuador or Nepal where domestic courts are called upon to enforce indigenous peoples’ rights. *Clavero* shows that while before constitutional law was often used to wipe out any existing cultural pluralism in the name of one national identity, legal reforms have taken place in the 20<sup>th</sup> century particularly in Latin American states. Largely influenced by the strong movements of indigenous peoples on a national but also international level, the Declaration provides an important framework for those countries of domestic application of its provisions. In Bolivia for example, only a few months after its adoption, the UNDRIP was already incorporated fully in its constitutional law. [Clavero, 2009:348ff]

All four states which have opposed the adoption of the Declaration at the UN General Assembly (Canada, Australia, New Zealand, USA) have now formally recognized the UNDRIP afterwards. Australia made the first step and already officially acknowledged the document in

2009 while governmental representatives of New Zealand and the US made a confirmative statement during the 9<sup>th</sup> session of the Permanent Forum on Indigenous Issues in 2010 (regarding the US, President Obama only officially recognized the UNDRIP later in the year). Canada was less eager but stated it would implement the Declaration insofar as it is not intervening with national law (Canada's position will be further discussed in the next chapter). [BC Foundations - UNDRIP]

### 6.5.3. The Role of Non-State Actors

With the adoption of the Declaration, the great energy as well as focus of lobbying and campaigning works of transnational indigenous networks, delegations and other NGOs which before was concentrated on the international UN level, has to be targeted on putting the efforts of the last decades to the national and local communities thus realizing the rights on the ground. In order to close the major "implementation gap" which still exists between rights on paper and the practical reality of indigenous peoples worldwide, former Special Rapporteur on the Rights of Indigenous Peoples argues to turn the concept of "glocalization" around. [Stavenhagen, 2009:367]

Thus, before the adoption of the UNDRIP, the primary idea was to "think locally and act globally" in order to get their traditional values and beliefs heard at the UN. Now, having their indigenous rights confirmed within an international document, they have to strive for implementing it at the domestic level, thus "think globally and act locally" (which correlates with the "boomerang pattern" introduced by *Keck and Sikkink*). [Stavenhagen, 2009:357f]

Through their activism during the years of advocacy work at the UN, indigenous peoples gained first-hand experience on international relations and diplomacy which now they can use to begin their efforts at the national level to introduce new ways engaging courts, legislative organs, the public media and academic research on their behalf. [Dorough, 2009:267]

As rights' holders, indigenous peoples also have the positive obligation to strengthen and develop their own institutions, cultural traditions and customs as well as environmental responsible role for their territories and resources. Thus many "bottom up" rights-based projects and community-based work have sparked within indigenous communities seizing opportunities of changing legislative processes within their states to establish their own judicial systems, language centers or land tenure rules, though much of their possibilities depends heavily on the corresponding governmental bodies in power. [Dorough, 2009:270ff]

Current Special Rapporteur James Anaya also stresses the vital role of civil society as a whole in diminishing prejudices and discrimination of indigenous peoples within a state. Local NGOs as well as international organizations thus play a key role of mainstreaming and encouraging indigenous peoples' rights and can promote a constructive dialog between indigenous peoples and governments. But also local and transnational businesses have an important responsibility

since they can massively affect the lives of indigenous peoples and thus are called upon to respect the standards of the Declaration, particularly regarding Article 32 of the UNDRIP concerning development or resource extraction projects affecting indigenous territories. [Anaya, 2008:23]

Thus concluding from the points made above, nothing will change about the legal status of the UNDRIP as a non-binding instrument without enforcement mechanisms. Reality also doesn't seem to give much hope on the so called "implementation gap" to ever fully diminish.

On the other hand, the UNDRIP provides a comprehensive framework of indigenous rights which were established with great participation of indigenous peoples who can now use their established networks, knowledge, confidence and increased public awareness to strive for realization of their rights on a local level. States are also encouraged to use the Declaration together with support available from UN bodies and NGOs promoting indigenous rights to implement them into their national legislature while those countries, ignoring or violating indigenous rights will find it harder to justify their position since the UNDRIP now provides a legal framework to claim rights within and hold states accountable on their obligations under international human rights law.

## 7. THE UNDRIP AS A LEGAL FRAMEWORK FOR AN INDIGENOUS RIGHTS-BASED APPROACH TO DEVELOPMENT IN PRACTICE –BRITISH COLUMBIA, CANADA

The UNDRIP offers great possibilities as a point of reference for international institutions but foremost for governments to restructure their relationships with indigenous peoples living within their nation-states. The process of indigenous peoples establishing themselves as subjects within international law and the final almost unanimously adoption of the Declaration at the UN General Assembly led to the emergence of new international indigenous norms. Those minimum standards of rights are thus considered world consensus and states are called upon to implement the UNDRIP in their national policies.

However, from all states actually voting on the UNDRIP (143 in favor, 11 abstentions, 4 rejections), only Canada, Australia, New Zealand and the US, thus the so called “CANZUS states” voted against the Declaration. “While certain states (USA and Australia) have opposed the Declaration at nearly every juncture throughout its 30-year history at the UN, two other states – Canada and New Zealand – which, while generally considered to be at the forefront of international human rights and strongly supportive of emerging international human rights norms, also vocally opposed and voted against the Declaration.” [Lightfoot, 2010:84f] Both of the latter states however also enjoy a fairly good reputation regarding their indigenous policies and agendas, contrasting their harsh rejections and doubts of the UNDRIP. *Lightfoot* explains that paradox phenomenon through her assertion of “over-compliance”. Thus, those states actually aren’t really progressive regarding indigenous matters but effectively resisting emerging indigenous norms which is reflected in federal and provincial governments’ denial of particularly the right to self-determination as well as rights to lands and resources.

### 7.1. Concept of Over-Compliance

*Lightfoot* identifies five different ways how states can respond to new emerging norms (of indigenous rights): non-compliance, under-compliance, partial compliance, compliance and over-compliance. Thus a country shows compliance if its commitment reflects international standards, under-compliance if they fall below those standards and partial compliance by committing to some standards while not implementing others. Over-compliance occurs therefore, when states

go beyond the expected international norms regarding some provisions while they fail to comply with others. . Taking into account a state's policy commitments to international indigenous rights instruments, specifically ILO Convention Nr. 169 and the UNDRIP her studies suggest (amongst other conclusions) that there are only three states which are over-compliant regarding indigenous rights: New Zealand, Australia and Canada, interestingly enough exactly those countries which oppose the UNDRIP with the exception of US (which in her view is under-compliant). [Lightfoot, 2010:88ff] Thus *Lightfoot* argues that there is a pattern of reconciliation common to particularly New Zealand and Canada as they are caught between their colonial legacy on the one hand and their postcolonial image of generally strong human rights supporters also specifically regarding indigenous norms on the other. [Lightfoot, 2010:85f]

This model thus offers an interesting starting point to analyze the effectiveness of the UNDRIP as a new legal framework for indigenous rights within a human-rights based approach. The Declaration includes some quite high level commitments on states "given the major, if not subtly revolutionary, international challenges involved in the emerging indigenous rights regime" as well as its strong calls for recognition and "full application" of states and international institutions but still is non-binding without any particularly monitoring or enforcement mechanisms. [Lightfoot, 2010:87] In order to keep their good as well as progressive image regarding indigenous policies in line with those "over-compliant" states such as Canada or New Zealand would need to adopt those evolving indigenous rights norms to realize their obligations within international human rights law, though actually being reluctant and opposed to strong demands of indigenous peoples.

How are those states as duty-bearers reacting to that challenge? More importantly, how do indigenous peoples as right-holders find ways to hold states accountable in cases of non-compliance striving for recognition and foremost implementation of the rights they are entitled to? Focusing on Canada and more specifically the province of British Columbia, this chapter should give a practical analysis of the theoretical concepts introduced in the chapters before.

## 7.2. Native (Aboriginal) Title and Concepts of Reconciliation

*"The position of indigenous peoples in today's society is mostly a consequence of the famous doctrine of the 'three C's', civilization, christianization and commerce, for which international law, as the legal instrument of colonial conquest, was largely culpable"*  
[Gilbert, 2003:199]

Recent developments of the last decades regarding the emergence of new international norms of indigenous peoples' rights, as discussed in the previous chapters didn't leave Canada and other common law countries cold. A new body of jurisprudence emerged from those global

processes regarding indigenous land rights which is often referred to as “native title doctrine” or more specifically “Aboriginal title”<sup>15</sup> regarding Canada. Thus Aboriginal or native title generally is considered a collective right to lands under which indigenous peoples have the right to its use and occupation. Thus the concept is based firstly on a doctrine of continuity regarding pre-existing indigenous customary land rights which European conquest didn’t extinguish unless expressly stated and secondly on the doctrine of recognition of those land rights having their legal source in the occupation prior of the Crown’s assertion of sovereignty. [Gilbert, 2007:590]

While the objective of this doctrine of Aboriginal title for reconciliation between the state and indigenous peoples is quite remarkable, there is a big question “regarding the development of a legal framework on the interaction between historical wrongs and present-day land claims.” [Gilbert, 2007:585]

### 7.2.1. Canada’s Model of Reconciliation

As mentioned before, Canada enjoys a fairly positive image regarding its human rights standards but is also considered progressive in its approach to acknowledging indigenous rights. Through general perception, Canada recognizes aboriginal rights in its constitution, established self-governing concepts for Inuit over Nunavut territory or just recently officially apologized for past actions regarding residential schools. [Pratt, 2004:44] On the other hand, it represents the only country at the UN which voted twice against the UNDRIP (at the Human Rights Council and the UN General Assembly) and was already several times harshly criticized by different UN treaty bodies for its indigenous policies.

This paradoxical behavior is a result of Canada’s specific concept of reconciliation as *Lightfoot* argues, which is driven mostly by two factors: On the one hand, Canada demonstrates high concerns for its international reputation as “good human rights steward” and thus encourages positive action towards reconciliation of its past actions of colonialism. On the other hand Canada wants certainty over land rights issues to secure its Crown’s sovereignty also in the future and thus resists any demands regarding self-determination of indigenous peoples or other emerging indigenous norms. By focusing on its multicultural image and concept of equality of all people, Canada concentrates its policies regarding indigenous peoples on “closing the gap” on standard of living instead of acknowledging indigenous sovereignty or collective land rights, thus root causes of their marginalization. [Lightfoot, 2010:101ff, see also Cornell, 2006:10f] Policies on aboriginal peoples thus have aimed on socio-economic integration and interpreted demands to self-government or broader self-determination (as stated in Article 3 respectively 4 of the UNDRIP) as administrative measures through which indigenous peoples’ political power is reduced to managing program funds usually designed by federal or provincial government bodies to address problems of poverty and marginalization. In other words, Canada took the principle of self-determination and turned it into self-administration models by changing

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<sup>15</sup> “Aboriginal” is used in this synonymously for the term “indigenous” as common in the Canadian context of its indigenous peoples (as well as “First Nations”)

central governmental bureaucracy into an indigenous administration apparatus. *Cornell* identifies similar approaches in Australia, New Zealand and the US, thus the infamous “CANZUS states” and argues that it is a clear sign that these states restrain on acknowledging emerging concepts of indigenous rights to self-determination. Rather, they apply same policies of integration and assimilation regarding minorities through a concept of multiculturalism based on equality of all. [Cornell, 2006:9ff] Thus in that regard, *Colin Scott* concludes “It is cruel irony indeed to suggest that Aboriginal people should now be denied differential rights on grounds that this would be racist, in most cases forcing them to assimilate to the lowest socio-economic denominator with nothing more than the cold comfort of assurances that they enjoy rights ‘equal’ to those of other Canadian citizens. It is hard to escape a sense of double standard.” [Scott, 2004:223]

This concept of reconciliation varies highly from an indigenous model of reconciliation which would foremost renounce the Doctrine of Discovery in national norms and replace it with respectful negotiations in good faith and on equal status concerning rights to self-determination, land tenure systems and other partnership agreements. [Lightfoot, 2010:102] Thus in opposition of a *terra nullius* approach indigenous sovereignty can be considered an ethical frontier on acknowledging and recognizing indigenous self-determination within contemporary policies and measures affecting indigenous peoples. Taking indigenous sovereignty therefore as an analytical point of reference on how states deal with indigenous peoples, *Pratt* concludes “the state’s framework for managing indigenous-state relations in both countries [Canada and Australia] works to reinforce, rather than challenge, the colonial ideologies and assumptions upon which its very existence is based.” [Pratt, 2004:45]

### 7.3. From the Doctrine of Discovery to the UN Declaration on the Rights of Indigenous Peoples

“Successive governments have tried - sometimes intentionally, sometimes in ignorance - to absorb Aboriginal people into Canadian society, thus eliminating them as distinct peoples. Policies pursued over the decades have undermined - and almost erased - Aboriginal cultures and identities. This is assimilation. It is a denial of the principles of peace, harmony and justice for which this country stands - and it has failed. Aboriginal peoples remain proudly different. Assimilation policies failed because Aboriginal people have the secret of cultural survival. They have an enduring sense of themselves as peoples with a unique heritage and the right to cultural continuity. This is what drives them when they blockade roads, protest at military bases and occupy sacred grounds. This is why they resist pressure to merge into Euro-Canadian society - a form of cultural suicide urged upon them in the name of 'equality' and 'modernization'.” [RCAP, 1996]

In order to consider different concepts of reconciliation and indigenous self-determination, the historical context and frameworks of interaction between Aboriginal peoples and the state has to be taken into account.

### 7.3.1. Treaty Making Processes in Canada

Already before any European arrival, indigenous nations established peace and shared the wealth of the lands through treaty ceremonies. While this understanding didn't change when signing treaties with Europeans coming to their territories, latter had a somewhat ambivalent intent. European settlers did regard indigenous peoples on a nation-to-nation basis through mutual respect but they also expected indigenous peoples to acknowledge the authority of the monarch as well as cede large parts of their lands to the Crown. [RCAP, 1996]

The first source of Aboriginal title is considered the "Royal Proclamation" in 1763 which was aimed on normalizing conditions in the colonies and to avoid conflicts with Aboriginal peoples. Thus, the Proclamation stated that "Indian peoples should not be disturbed in their use and enjoyment of the land" and necessarily had to give their consent on any purchase of their lands by the British Crown. In times of the ruling principle of *terra nullius* or the Doctrine of Discovery, the Royal Proclamation was quite progressive in terms of mutual recognition of indigenous peoples as self-determined nations, thus already acknowledging some sort of Aboriginal title. [Lightfoot, 2010:99]

Though the Proclamation recognized and protected indigenous rights to their lands, these safeguards also resulted in negative consequences for indigenous peoples. Thus on the other side of the medal, the concept of protection was used against them, changing increasingly over time from preservation of Aboriginal lands and cultures to assimilation policies in order to mainstream indigenous peoples into the dominant society through compulsory education, social and economic restructuring processes and missionary work. [RCAP, 1996]

With the growing number of European settlers there was urgent need to settle on indigenous territories. While they couldn't arbitrarily take the land within an understanding of *terra nullius* due to legal basis of the Royal Proclamation, British colonizers thus signed several substantial treaties with Aboriginal peoples from the late 19<sup>th</sup> century until the 1920s, negotiated by the new federal government aiming to extinguish Indian title to the lands of newly claimed regions. Thus, in 1867 the Confederation of Canada was signed as a partnership agreement between the English and French colonizers regarding the management of lands and resources and amongst others also indigenous matters though no reference was made towards Aboriginal nations as sovereign nations. [RCAP, 1996]

Following up on those events, the "Indian Act" was passed in 1876, a very paternalistic document mainly focusing on Aboriginal status, thus registered indigenous peoples, their band systems as well as related administrative measures which eliminated much of indigenous

powers to determine their own membership definitions and way of political organization. [BC Foundations – Indian Act]

The “Indian Act” officially defined Aboriginal peoples and their rights stemming from that status, dividing them into four different “categories”: Status Indians, Non-Status Indians, Metí (descendants from unions of aboriginal peoples and European settlers) and Inuit. Thus only those indigenous peoples (and further down their descendants) were considered “Status Indians” which were included in an “Indian Register” (based on a nation-wide census conducted). Consequently, all those missed by authorities conducting the survey and therefore didn’t show up in the registry were “Non-status Indians” and in turn weren’t entitled to Aboriginal title, etc. “Status Indians” could lose their status either voluntarily through enfranchisement or for an indigenous status woman by marrying a non-status man (and in turn also her children) though latter provision was amended after being heavily criticized. [BC Foundations – Indian Act] Unlike in the US where the definition of who is indigenous and who isn’t is up to the indigenous tribes themselves, Aboriginal peoples in Canada can’t decide on their own membership statuses but are officially stated through the “Indian Act”. [Lightfoot, 2010:99f; Pratt, 2004:49; RCAP, 1996]

Another important aspect of the Indian Act was the introduction of the Band Council System, formally setting up the political system and structure of the various “bands” of First Nations which replaced traditional systems of social organization until the present day. Each band council is comprised of one official Chief and some councillors who are usually elected by band members. However the Band Council derive their authority from the Indian Act and thus are subject to federal and provincial law. Consequently they are drawing their financial resources from the government which gives the state quite an amount of power and influence over decisions taken by the Band Council members, often leading to corruptions and misrepresentation towards their communities. [BC Foundations – Indian Act]

Due to increasing pressure of Aboriginal peoples through litigation and urgent letters to the Queen and British Parliament but also through emerging international indigenous movements, the Supreme Court took those developments into account when deciding on its ground-breaking *Calder case* judgement in 1973 regarding the Nisga’a agreement. In its decision, the Supreme Court recognized the existence of Aboriginal title in Canada as a unique right, independent of any enactment but rather rooted in indigenous prior occupation of the land which hasn’t been extinguished through sovereignty by the Crown. [Pratt, 2004:49f]

Following this decision and increased pressure to affirm indigenous rights, “existing Aboriginal and treaty rights” were granted constitutional protection in its new Constitution of 1982 under Section 35 (1). This norm was highly valuable for indigenous peoples since it recognized them as a form of third power regarding their Aboriginal title within the Canadian federal system. Thus, it also created a legal framework for Aboriginal peoples to address their long standing claims on their lands. However, Section 35 of the Constitution only relates to and thus protects those Aboriginal rights which still exist up to that point in history and haven’t been extinguished

prior in time, i.e. through treaties. As Aboriginal title was not further defined, it was largely up to the courts to determine its specific nature and scope. Consequently, uncertainty remained regarding which territories were covered by Aboriginal title, having to be negotiated on a case-to-case basis or litigated before courts. [Lightfoot, 2010:100f]

Finally in 1997, the Supreme Court of Canada made one of the first substantive statements on Aboriginal title in its *Delgamuukw decision* specifying the scope and nature of Aboriginal title, definition of proof to that title as well as justification tests for infringement. Thus, Aboriginal title is a right *sui generis*, therefore unique in nature regarding various dimensions due to its

- inalienability (land rights can only be transferred to the Crown)
- source (occupation prior to the Royal Proclamation forming the legal proof of possession as well as the relationship between the common law and prior existing systems of Aboriginal law)
- communal nature (collective right to land).

Regarding its scope, the Supreme Court ruled that Aboriginal title includes the right to exclusive use and occupation of the land which also includes resources such as minerals. Usage of those lands is not restricted to traditional customs (thus non-traditional exploitations are legitimate as well) but finds its limit in the *sui generis* nature of Aboriginal title thus indigenous specific attachment and relationship to their territories (i.e. if the land traditionally was used as a hunting ground, the land cannot be exploited in a way that hunting is then not possible anymore).

[Hurley, 2000:8ff]

On the ground that Section 35 of the Constitution was aimed to reconcile the prior occupation of indigenous peoples with the assertion of Crown's sovereignty, Aboriginal title is not absolute but can be infringed if justified under certain circumstances. Thus infringement is only possible if the legislative objective is substantial and compelling and "must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples" (*Delgamuukw*, paragraph 161) in other words, only if infringement still respects the responsibility of the Crown towards indigenous peoples. Possible ways that would be guaranteed are considered fair compensation or prior consultation of indigenous peoples affected though the Supreme Court also listed various goals which would allow infringement of Aboriginal title: "the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment and endangered species, the building of infrastructure and the settlement of foreign population to support those aims" (*Delgamuukw*, paragraph 165). [Dacks, 2002:241; Hurley, 2000:13f]

Concluding on its prior statements, the Supreme Court encouraged federal and provincial governments as well as Aboriginal people to find solutions for unsettled claims on Aboriginal title not through litigation but rather through negotiation in good faith. [Hurley, 2000:16]

While federal as well as provincial governments were fairly reluctant in negotiating treaties with indigenous peoples before, those new rulings regarding Aboriginal title propelled

authorities for action to finally start dealing with the various unsettled land right claims falling within Aboriginal title and secure certainty over those unsolved land disputes. [Pratt, 2004:51f]

### 7.3.2. Situation in the Province of British Columbia - The British Columbia Treaty Process

Particularly in the western province of British Columbia (B.C.), those legal developments and implications regarding Aboriginal title play a significant role. Unlike other eastern provinces in Canada, hardly any treaties were signed neither in earlier days during European settlement nor afterwards in the 18<sup>th</sup> or 19<sup>th</sup> century. While the European settlers at the time knew, treaties needed to be made before they could stay on those indigenous lands (as stated in the Royal Proclamation of 1763) they simply refused to and thus ignored Aboriginal title. Therefore, the area of today's British Columbia was actually settled through the Doctrine of Discovery or *terra nullius* as colonizers just took the land without any treaty-making and effectively left indigenous peoples with the same results in their lives. Consequently, with the exception of Treaty Nr. 8 known as the Douglas Treaties on the north east corner of the province, most of the land in British Columbia has never been extinguished through treaties nor otherwise ceded and therefore falls within the scope of Aboriginal title recognized in the Constitution of 1982 Section 35. [Pratt, 2004:49f]

Apprehensive about the stronger position indigenous peoples were gaining due to increased international advocacy and thus increasing engagement of UN human rights bodies with indigenous concerns as well as legal implications regarding Aboriginal title (particularly regarding the *Calder case* in 1973, their constitutional recognition in Section 35 and later on through the *Delgamuukw decision* in 1997), federal and provincial governments became eager to settle land claims of indigenous peoples in British Columbia not to lose power over those lands and natural resources.

Consequently, Canada was in need of an approach to on the one hand deal with its colonial past though without losing (political as well as economic) power over those lands and natural resources actually covered by Aboriginal title while on the other hand keeping its progressive reputation regarding indigenous peoples. Thus, referring back to Canada's model of "reconciliation", the federal and provincial governments introduced the so called "Comprehensive Land Claim Policy" do to the trick and provide a legal framework for negotiating and in turn settle their relationship with First Nations, rights and responsibilities once and for all. [Lightfoot, 2010:102] Instead of expressively rejecting indigenous peoples' rights all together and thus risking their good "human rights image" also regarding indigenous peoples, they presented those treaty negotiations as an opportunity for indigenous peoples to settle their claims without having to litigate them at court, while receiving entitlements regarding self-governance or administration

over various issues. However, at the same time, the negotiations have been dominated by unequal power relations and effectively aim to limit their rights over lands and resources. “By allowing indigenous peoples a small measure of self-administration, and by forgoing a small portion of the moneys derived from the exploitation of indigenous nations’ lands, the state has created an incentive for integration into its own sovereignty framework.” [Alfred, 2001:30]

### **7.3.2.1. Comprehensive Land Claim Process**

In order to facilitate the so called “Comprehensive Land Claim Process” between the three parties, thus the federal and provincial government as well as Aboriginal peoples for negotiations, the British Columbia Treaty Commission was established in 1991 which mainly led negotiations through the six-stage process:

At the first step, an indigenous community needs to prove three things in order to be able to start negotiating (1. Statement of Intent to Negotiate): claimed land has never been extinguished, indigenous peoples have historically occupied it and the group is an identifiable and recognizable Aboriginal group. If they are successful in verifying those matters (2. Readiness to Negotiate), negotiations start on a framework agreement which sets out (a limited amount of available) issues which should be included in the treaty (3. Negotiation of Framework Agreement). This concept is then further discussed leading to a nonbinding Agreement-in-Principle (AIP) which is the most time consuming and most difficult stage of the process (4. Negotiation of Agreement-in-Principle). Once this is sorted and signed by the parties, the Final Agreement transforms the AIP into a modern treaty (5. Negotiation of Final Agreement), clarifying powers amongst the three parties as well as their roles and responsibilities of each level of government in the affected territories. Thus the Final Agreement gets implemented (6. Negotiation of Final Agreement) and “becomes a constitutional document guiding future interactions between Aboriginal and non-Aboriginal peoples affected by the treaty”. [Alcantara, 2007:345ff]

Right now, there are 60 Aboriginal nations participating in the BC treaty process with 49 negotiations under way. While 44 of them still are at stage 4 (Negotiation of Agreement-in-Principle), only six indigenous nations made it to stage 5 (Negotiation of Final Agreement) but actually only two First Nations have completed the process and are in the implementation phase right now. [BCTC]

### **7.3.2.2. Incentives for Negotiations**

Those indigenous peoples becoming part of the BC Treaty Process foremost aim to get their Aboriginal title implemented thus maximize their control over lands and resources as well as protection of their cultural traditions in order to maintain their indigenous identities and determine their own future regarding socio economic development. On the other hand, Aboriginal peoples

also wanted acknowledgment and redress of past wrongdoings by colonizing powers.

[Alcantara, 2007:351ff]

In contrast, federal and provincial governments primarily want to create certainty regarding land rights and thus secure benefits from economic development projects in the region.

By negotiating those treaties with aboriginal peoples, the federal and provincial government aims to settle any past, present or future possible land claims. Thus any rights which are not content of the treaty extinguish and also cannot be litigated before courts. "The governments have maintained their position on the final and fixed content and meaning of Aboriginal title after a land claim is settled. The governments' goal in claim negotiation is to end the great uncertainty that surrounds the concept of Aboriginal title and that limits their authority to develop Crown land. Their approach to certainty that the documents establishing land claim settlements will articulate 100 percent of the rights to land and resources that the First Nation signatories possess." [Dacks, 2002:243]

Another major incentive for the Crown is encouraging economic development in those areas. The question is, for whom. Thus the federal government has stated that one of their primary purposes of negotiating treaties with indigenous peoples is to empower them by helping them to increase their capacities for governance since uncertainty "is a barrier to economic development for all Canadians and has hindered the full participation of Aboriginal peoples in land and resource management." (Federal Policy for the Settlement of Native Claims) [INAC in: Alcantara, 2007:351] Therefore the provincial government has invested much effort in maintaining a widespread public relation campaign to promote the positive benefits for Aboriginal peoples through those negotiated agreements. However, past actions regarding economic development on those lands showed hardly any efforts in involving indigenous peoples in decision-making or consultation processes, making it questionable why the government wants to take First Nations "on board" now.

Rather, governments are actually more interested in creating certainty on land rights for them and their business alliances to benefit from increasing economic development of those territories rich in various natural resources. Thus the underlying reason for certainty actually stems from the goal to extinguish Aboriginal title through treaty negotiations in order clear the way for unlimited investments in extractive industries and other measures of exploiting traditional lands belonging to Aboriginal peoples. Particularly since the *Delgamuukw decision* expressively states, that Aboriginal title also includes rights to minerals and other natural resources to be exclusively possessed and used by indigenous peoples with only specific exceptions of justified infringements, the provincial but also federal government fear of losing out on economic opportunities. [Alcantara, 2007:351ff]

### 7.3.2.3. Extinguishment or Modification of Indigenous Land Rights

While B.C. government still promotes those negotiations of being genuine and conducted in good faith towards finding specific agreements with each First Nations, the content and provisions within are strikingly similar. Thus while justifying the lengthy periods of time that those negotiations sometimes take, the Final Agreements concluded can be considered more or less blueprints from the first treaty signed by the Nisga'a First Nations, showing the governments' inflexibility in recognizing or giving in to any more rights than they wanted to grant in the first place. [Manuel, 2006]

The Nisga'a First Nations were the first to go through that process and to sign the Final Agreement. As a result, they were granted self-governance over about eight percent of their original traditional territory while the loans resulting from lengthy negotiations get deducted from the 190 million Canadian dollars they receive in order to set up an economic basis for their communities. "As far as I am aware, this is the first time in the history of Great Turtle Island that an indigenous people, or at least 61 percent of its eligible voters, has voluntarily surrendered their rights as indigenous peoples, not to mention surrendering over 90 percent of their territory, and accepted their status as a distinctive minority with group rights within Canada. This appears to be the first success of strategies of extinguishment (release) and incorporation by agreement." [Tully, 2002:50, see also Corntassel, 2008:106]

Thus, the Final Agreements often are over a few hundred pages long, making it difficult to comprehend for many Aboriginal peoples who often don't understand the whole implications the treaties bring along. Thus key provisions include the modification (thus effectively extinguishment) of Aboriginal title protected by the Constitution before negating on the new rights gained within the Final Agreement. Any other rights, indigenous peoples might have enjoyed before through Aboriginal title and are not included in the treaty are extinguished. Most significantly that means that their inherent collective rights protected by the federal Constitution with a much broader scope than usual land rights are turned into normal private property rights (so called "fee simple rights") under provincial jurisdiction. This also has the effect that those traditional territories, now under tax exemptions will become subject to tax payments and since they are no longer inalienable unlike Aboriginal title, can be taken away by provincial government and given to private owners if indigenous peoples are no longer able to afford paying those taxes on it. Most likely this will lead to the dissolution of Indian communities and increased poverty and loss of cultural identity amongst indigenous peoples as they will be driven off their traditional lands they have a strong connection to. [Manuel, 2006]

Those provisions in the end, will give federal and provincial governments certainty they strived for because those Final Agreements set out all rights indigenous peoples have in the present and future which also can no longer be claimed outside the agreement in Courts, making it "the Bible" to those First Nations accepting them. [Manuel, 2006] "

#### 7.3.2.4. Unequal Power Relations

Through all of the rules and procedures attached, the negotiation processes actually place indigenous peoples in a much weaker position to negotiate compared to the provincial and federal government

First of all, Aboriginal peoples have to prove that their Aboriginal title hasn't been extinguished. Thus, since actually the Crown wrongfully conquered their lands through the Doctrine of Discovery while indigenous nations have occupied the land prior in time, some authors suggest that it should actually be up for the Crown to prove that they have legally acquired the territory from indigenous peoples, putting the burden of proof on Canada. [Tully, 2002:47]

During the process of negotiations indigenous peoples have little power to change or influence the agenda and usually can only negotiate on those issues already proposed by the federal comprehensive land claims policies. Moreover, they have to adopt western knowledge and forms of proof, discourse as well as use documents, maps and prepare legal statements which they often cannot do on their own. Thus they have to hire (white) lawyers, linguists or historians which are very costly. As a result, many Aboriginal groups have ended negotiations since it was too expensive for them to continue. Most of the time, indigenous groups have had to borrow money from the federal government in advance to pay back later after the treaty is negotiated. In several cases those sums have equalled the amount they were supposed to receive under their treaty settlements. Thus many indigenous nations are left in great debt if they leave negotiations early, making the debt-burden a large incentive to stay at the negotiation tables. [Alcantara, 2007:355f]

Due to the federally established Band Council system, the organizational structure of indigenous nations, elected Chiefs of Aboriginal nations might actually not represent the traditional leaders chosen by their communities through traditional voting procedures. As those elected Band Council members get paid exclusively by the government, chances of corruptions and manipulation is quite high and often enough, those representatives negotiated deal not in the best interest of their peoples. "In essence, under the CLC process, the federal, provincial and territorial governments have become rights-granting entities while the Aboriginal groups have become petitioners, forced to prove validity of their claims to the governments before they can receive lands, rights, self-government, and jurisdiction", rights indigenous peoples actually already have from the start through Section 35 (1) of the Canadian Constitution. [Alcantara, 2007:353f]

Thus the BCTC process creates the paradox situation in which on the one hand indigenous peoples actually do enjoy Aboriginal title over their non-seized lands within British Columbia which has again be confirmed by the *Delgamuukw Decision* in 1997 and thus would actually have the main power to determine the rules and procedures of negotiations but generally feel like they have no other chance to effectively get control of their lands and self-

government other than through treaty negotiations. On the other hand the federal and provincial government is fully aware of the fact that due to the doctrine of Aboriginal title many land settlement claims are uncertain which also constitutes a huge barrier for them since any investments are on uneasy legal grounds and thus are eager to settle claims in absolute terms for the future. "This is a contradiction in their own thinking; aboriginal title has already been judicially recognized. We don't need to do more than apply that on the ground. That's where we differ - they don't want to acknowledge that our title covers every square inch of our territories and it always will." [Manuel, 2010:5]

In response, many Aboriginal nations have chosen not to get involved in those treaty negotiations since they didn't want to get involved in a lengthy and costly process through which their constitutional recognized collective land rights are diminished in the end. "By not getting started on the process, they can avoid being manipulated by it when it reaches the point where they may feel pressured to accept an unsatisfactory settlement because they will have no means to repay these debts should they not settle." [Dacks, 2002:247]

Considering the points from above, one can agree with *Alcantara* who refers to the British Columbia Treaty Process as a time of "regime change" due to its significant and wide reaching implications of the rights of indigenous peoples in the present and future. [Alcantara, 2007:348]

However, what are the alternative options available? Either sitting on / even getting pulled over the negotiation tables or instead trying to claim their rights through litigating at courts, both processes are lengthy and needs a lot of financial and legal resources in order to gain a successful outcome.

With hundreds of claims still unsettled and negotiation process sometimes taking over decades to finish, frustration raises amongst indigenous peoples as in the meantime trees are still getting cut and minerals extracted from their traditional lands without their consent or share of benefits. Thus, ignoring their constitutional rights under Section 35 (1) of the Constitution and the ruling of the Supreme Court in the *Delgamuukw decision*, the provincial government of British Columbia continues to invest in large scale industrial projects and makes deals with (multinational) corporations regarding the extraction of natural resources on lands actually covered by Aboriginal title without properly involving Aboriginal peoples. Thus, indigenous peoples in British Columbia are faced with a situation where their recognized indigenous rights are denied by the government on two levels: first, on an international level Canada is reluctant towards implementing their rights set out in the UNDRIP and second, unwilling to protect their national indigenous rights regarding Aboriginal title. [Alcantara, 2007:348ff]

However, particularly indigenous peoples from Canada have been amongst those with strongest positions regarding their sovereignty claims and also one of the first to raise their voices within international institutions. Thus, as mentioned in the introduction, Chief Deskaheh already went to the League of Nations in 1923 to demand self-determination for Aboriginal peoples. George

Manuel contributed significantly in the early 1970s to the emergence of increased advocacy networks of indigenous peoples, most importantly by establishing the “World Council of Indigenous Peoples” in 1974 while now his son Arthur Manuel stepped in the shoes of his father and keeps reminding UN institutions as well as communities on a local level that Canada still doesn’t acknowledge Aboriginal rights, neither nationally nor internationally.

## 7.4. Mechanisms of change – indigenous rights-based activism

“It is clear that the existing leadership and negotiators are too weak to create the kind change required to ensure recognition and coexistence therefore it is up to the people to take action that will force this fundamental change and stop these agreements before it is too late. [...] Never in the history have our people been in a similarly strong position to create fundamental change to our situation based upon recognition of our land rights, but these Final Agreements could mean a gigantic step backwards and destroy the efforts of our past leaders and peoples. [...] The Indigenous grassroots need to step to the plate and change the existing dynamics or we will lose once and for all our rights as Indigenous Peoples. We will lose our lands, our title and rights for all future generations and we will be to blame for it.” [Manuel, 2006]

Though there are a variety of strategies for rights-holders to claim the rights they are entitled to, the present paper will focus on some examples of indigenous activism in order to get their rights recognized and implemented. Through the specific context of Canada and especially British Columbia, prominent strategies of human rights-based initiatives could turn out quite successful. Since Canada shows much effort in keeping up its image as “human rights steward” measures regarding “naming and shaming” might prove to be more effective than in other countries which are less interested in their international reputation. Due to the widespread engagement and public awareness, many other NGOs working on different related issues can cooperate together to set up larger campaigns of networks, activists and participants. On a local level, experiences in the past and present have shown that in context of ongoing treaty processes in British Columbia and their underlying unequal power relations regarding Aboriginal peoples and the governments, it is crucial for First Nations to know and understand their rights in order to have a stronger position on the negotiation table.

Taking the UNDRIP as well as Aboriginal title as a main point of reference regarding their affirmed rights, Aboriginal peoples have demanded their rights through those strategies in order to remind Canada of its duty to realize their national and international indigenous rights. The following should provide just a few examples of how First Nations in British Columbia took different types of actions on a local, provincial and international level.

## 7.4.1. Human / Indigenous Rights Activism on the Ground

### 7.4.1.1. Capacity Building – Knowledge of Rights<sup>16</sup>

One of the most important strategies within a rights-based approach is focusing on capacity building of the rights-holders involved. Thus the people concerned, in that case Aboriginal peoples need to be aware of the legal norms they actually possess. Only if they know what rights they are entitled to under international and national law, they have the possibility to increase engagement with it, frame their concerns and claim them.

Through many negotiation processes it became visible, that band council members who negotiated the Comprehensive Land Claims (CLC) didn't know much about Aboriginal title, its scope, nature and implications on land usage, etc. On the other hand, federal and provincial governments have provided the B.C. Treaty Commission with many financial as well as human resources to send well-trained lawyers, information materials and marketing measures to the communities to turn negotiations in their favor. Concerned about those developments and unequal power relations, Arthur Manuel of the Shuswap Nation in British Columbia stepped in the shoes of his father, George Manuel and now travels to indigenous communities throughout the provinces (but also around the world) to raise awareness of their indigenous rights. In workshops and speeches, he presents their rights within the UNDRIP and their implications for Aboriginal peoples in Canada as well as their rights and status regarding Aboriginal title.

Particularly for Aboriginal peoples who started negotiations or are in the midst of it, knowing their constitutional rights and effects of i.e. the *Delgamuukw decision* on their right to use and possess their traditional territories is decisive. As mentioned before, since only those rights brought up by indigenous peoples and are finally included in the Final Agreement are becoming the new framework for all of their rights, now and in the future, extinguishing any others they were entitled to before (primarily through Aboriginal title). In that sense, legal capacity training of indigenous peoples becomes a crucial factor within an indigenous rights-based approach regarding Aboriginal peoples in British Columbia. "For the most part, they have little idea as to what is actually in the final agreements or their consequences. These documents are over 200 pages long, full of complex legal jargon that requires lawyers or negotiators to explain. They have also been crafted largely behind closed doors, primarily by lawyers & government negotiators (which is also why they are almost identical, word-for-word), with little if any community involvement (or even knowledge of)." [Manuel, 2007]

Regarding international strategies, Arthur Manuel regularly holds workshops together with other indigenous organizations to inform indigenous individuals and communities on possibilities on how to get active on an international level. Thus the main treaty bodies and human rights

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<sup>16</sup> Conclusions are drawn mostly from first hand experiences with indigenous communities in British Columbia, September 2009 as well as several meetings and interviews with Arthur Manuel

procedures get explained but also practical information can be provided on how to write official statements or “shadow reports” in order for them to be presented to UN officials (thus regarding international strategies).

#### **7.4.1.2. Local Protests**

In other cases, indigenous groups have used road blocks, local protest camps as well as demonstrations to raise awareness on their situation but also make a strong stance against the ongoing violations of their indigenous rights.

One of those incidences which shows quite well how provincial governments deny Aboriginal peoples their confirmed rights in order to facilitate large scale projects on indigenous lands regards, the ski resort “Sun Peaks” in the heart of British Columbia. To expand the small ski hill “Tod Mountain” based on traditional territory of three Aboriginal bands, the B.C. government signed an agreement in 1993 with a private corporation (now Sun Peaks Resort Corporation) to develop the ski facilities and develop the area into a large ski resort. Thus, even though that land was covered under Aboriginal title and therefore under control of First Nations, the provincial government sold the area to the business company without the consent of those three bands, thus actually undermining federal jurisdiction.

Through this development deal, those lands could be sold for high prices to private owners while indigenous peoples haven’t gotten any compensation or share of benefits. Moreover the ski resort has disastrous effects on the environment since many natural values are getting clear cut and chemicals are used for artificial snow which contaminates plants, wild life but also the water in the surroundings. [Turtle Island News]

Local aboriginal activists in turn have set up protest camps, staged demonstrations and held road blocks to show not only the provincial government that they are violating their inherent rights. Thus, they also raised awareness amongst business developers letting them know that the land settlement claims in that area are disputed and thus any of their financing at risk. Further information was also brought to tourists, tourist offices and related parties encouraging them not to go to Sun Peaks ski resorts where indigenous rights are being violated. Finally, litigating the case before the court, the Supreme Court ruled in their favor and stated that Adam Lake Indian Band, one of the three bands holding Aboriginal title in that area were not properly consulted and the provincial government thus failed in its duty. [Vancouver Sun, 8.3.2011]

#### **7.4.2. Networking Strategies**

Another strategy used by Aboriginal peoples which proved to be quite effective is framing their concerns under one big campaign and find common grounds with other movements and organizations such as human rights organizations, environmental organizations, trade unions, anti-globalization movements, etc. Thus indigenous peoples can contribute in providing their

perspective on certain issues while together those national or international campaigning networks can gain much more public attention and thus increasing their chances on getting heard by provincial and federal governments.

As *Keck and Sikkink* already showed, those transnational advocacy networks based on groups that foremost share the same values, ideas and formal as well as informal information have the ability to influence a much broader public understanding. Since they are not “powerful in the traditional sense of the word, they must use the power of their information, ideas and strategies to alter the information and value context within which states make policies.” [Keck/Sikkink, 1999:95] Thus one of their strategies is identifying and providing explanations for powerful events taking place which also catalyst networks themselves.

One such event was the Olympic Games in Vancouver, British Columbia in 2010. Due to its international significance and related grand media coverage, a variety of organizations and movements which before have worked more separately on their agendas and only loosely formed common campaigns, started already early on, in the forefront of the sporting event to cooperate on different levels. Each of those interest groups could thus provide their point of view, knowledge and detailed information on the (negative) impacts the two week spectacle particularly on the environment, indigenous peoples, social welfare systems, housing, etc. [Schwarz, 2009]

Together they formed the “Olympic Resistance Network” (ORN) which gained much national but also international media attention through their different campaigns, protests and joint statements regarding the massive effects of the event such as ecological destruction (despite Canada’s presentation of “sustainable” and “green games” many untouched valleys were clear cut and other natural reserves destroyed to make way for large scale infrastructure projects, extended ski areas, highways and resorts), exploitation of women and children due to increased prostitution, criminalizing activism and resistance going along with large scale police controls and security operations as well as huge public debts which in turn reduced social and cultural services as well as welfare services. [Schwarz, 2009]

Indigenous peoples, already amongst the poorest of society thus suffered the most negative impacts of that sporting event particularly regarding the destruction and sell-out of their traditional territories. Through their main slogan “No Olympics on Stolen Native Land” the symbolic phrase effectively made colonial history of the province visible as well as questioned the provincial governments’ authority to conduct business on those lands.

The event also showed again, how indigenous culture came “handy” when promoting the Olympic Games as “green” and sustainable. By offering them special benefits in return, Canada managed to convince four First Nations from the area to present themselves as official “host nations” and “official partners” though they only made up less than a tenth of the whole indigenous population affected by the event. “Canada is deliberately trying to buy its way around its terrible human rights record by creating a media spin behind the Four Host First Nations. Canadians should be embarrassed that Canada has resorted to this kind of cheap and shallow scheme, instead of addressing the substantive human rights problems Canada has with

indigenous peoples. Bluntly, this kind of human rights trickery by Canada is similar in deception to an athlete using drugs to win Olympic gold.” [Manuel, 25.1.2010]

### 7.4.3. Strategies on an International Level

As already discussed in the previous chapter, even though the UNDRIP itself doesn't have any specific mechanisms to ensure compliance, indigenous peoples have been quite successful in calling on other UN treaty bodies in order to raise their concerns about Canada's violations of their rights. Since Canada is also quite aware of its international reputation within the global community, referring to the legal framework of the UNDRIP can be used as an important legal point of reference to “name and shame” Canada within international institutions.

#### 7.4.3.1. Urgent Action Request at the CERD Committee

Tsawwassen Nation, located within the Vancouver area, is one of the two First Nations which already negotiated a Final Agreement through the Comprehensive Land Claim Process. Though the communities did vote in favor to sign and implement the agreement, the procedure leading up to the elections was highly controversial as members were offered financial incentives beforehand, left alone the already unequal power relations within negotiations and provisions as such as explained previously.

As a member of the Tsawwassen Nation who still lives with her family on the traditional lands of her ancestors, Bertha Williams voted against the Final Agreement. Fully aware of its consequences, she resisted the short-term benefits of quick cash all band members were to receive in return of modifying their Aboriginal title into private property and thus risking to be taken away for public use under provincial jurisdiction (i.e. in cases taxes cannot be afforded since tax exemptions then no longer exist). [Globe and Mail. 21.06.2008]

Through meetings with human rights activist Arthur Manuel who provided her with the most relevant information regarding rights under Aboriginal title but also through the UNDRIP, he encouraged her to take action. Since the Final Agreement was already put into force by 2009, making any lengthy and costly litigation measures before national courts too late, Bertha Williams and other First Nations in similar positions prepared a joint statement regarding their situation and presented it to the UN CERD Committee. In their joint statement, they argued that Canada's Comprehensive Land Claim Policy discriminates indigenous peoples since traditional indigenous property rights are extinguished and systematically aren't recognized. Further it discriminates those indigenous individuals who voted against the Final Agreement but in the end lose their Aboriginal title anyways if their band votes in favor of the Agreement. Therefore, Bertha Williams requests in her urgent action request

*“Today, I fear for my children, that they will not have a homeland; because the land will be expropriated. If I have no homeland, then my soul is gone. Why urgent action? I see my rights*

*as an Aboriginal extinguished, forced to assimilate, as of April 3, 2009. I do not want to give up my inherent land rights and Aboriginal Title to my traditional territory.[... I have exhausted all means to put forth my concern to the Canadian Government. I requested to be heard at the Aboriginal Affairs Committee at the House of Commons, but was denied. I cannot go to court because it will cost ten's of millions of dollars and a good ten to twenty years of time. I know what Aboriginal Rights and Title means to me; I know the Provincial and Federal government of Canada know exactly what it means; this is why it will be stolen from me. My birthright was bargained for like a commodity. It is up to me as an individual to give it up. As it stands, other band members in my community made that decision for me, within the flawed treaty process." [Williams, 2009]*

In response, the chairperson of the UN CERD Committee, Fatimata-Binta Victoire Dah, wrote an official letter to Canada to comment on those alleged violations. Further she urged that whenever there is an "encroachment on the traditional lands of indigenous peoples," the state would be required to submit a report whenever the UN committee requests it. Though the UN treaty body doesn't have direct authority over Canada's policies, it was a strong statement and later on also picked up in its recommendation within the monitoring review of Canada's performance regarding CERD. [BC Local News, 22.3.2009]

In its concluding observation, the CERD Committee further recommended in its final report of 2012, that Canada should "implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards and the State party's legislation" as well as "continue to seek in good faith agreements with Aboriginal peoples with regard to their lands and resources claims under culturally-sensitive judicial procedures, find means and ways to establish titles over their lands, and respect their treaty rights" (Recommendation Nr. 20) [CERD-Report]

#### **7.4.3.2. UPR Mechanism of the Human Rights Council**

In February 2009, the "Indigenous Network on Economies and Trade" (INET)<sup>17</sup> submitted a "shadow report" to the Human Rights Council, elaborating on specific concerns of indigenous peoples particularly in British Columbia and thus invites "the UN Human Rights Council to consider, as part of Canada's universal periodic review, to review recent treaty provisions regarding extinguishment, modification, release, and the non-assertion of Indigenous rights, question Canada about the underlying policy and rationale for these outcomes, and recommend Canada to transform its policies to be consistent with international law and the self-determination of Indigenous Peoples." [INET Report, 2009:5] Thus INET strongly emphasizes the fact, that

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<sup>17</sup> INET is a platform for all indigenous peoples in Canada and the US, working jointly towards the protection of indigenous proprietary interests and their economies.

Canada still resists implementing the UNDRIP and thus continues to violate indigenous rights (particularly their right to self-determination, collective land rights and free prior informed consent within the B.C. treaty process). [INET Report, 2009:2ff]

While the Human Rights Council did incorporate those concerns in their UPR Report, Canada in turn, “accepted less than half of the 68 recommendations from member states that stemmed from its last review in 2009, partially rejecting 22 and completely rejecting 14. The rejected advice fell in areas such as aboriginal rights, racial discrimination and fighting poverty.” [Vancouver Sun, 25.4.2013] However, more than 80 countries already picked up on the continuous rejections of Canada towards changing its policies on Aboriginal peoples and filed some documents questioning violations of land rights, inequalities in education, health, drinking water, sanitation, food insecurity and ongoing racism. [UBCIC, 29.4.2013]

### 7.4.3.3. Conclusions and Challenges ahead

Canada’s position regarding Aboriginal peoples won’t change overnight. Policies which indirectly are still based on the old Doctrine of Discovery which serves as a justification until today to undermine Aboriginal title or indigenous rights, recognized in the legal framework of the UNDRIP.

Though Canada was eager to react to emerging indigenous norms on an international level as well as domestic developments in its jurisprudence, it has failed to address indigenous foremost demands on self-determination and collective land rights. Thus federal as well as provincial governments “have been reluctant to engage with the issues that form the core of Indigenous concerns. They have preferred to focus on the socio-economics of integration and typically have interpreted self-government as an administrative project in which Indigenous populations are allowed to manage programs designed—usually by central governments—to address social problems and economic marginality.” [Cornwell, 2006:9] Moreover, promoting on-going negotiation process in British Columbia as a progressive model of guaranteeing indigenous peoples their rights in compliance of new emerging international indigenous norms, Canada actually undermines their specific rights as Aboriginal peoples by modifying them into “normal” rights, i.e. regular private ownership rights to land. Referring back to *Lightfoot*, “this model of reconciliation not only excludes features of the indigenous model of reconciliation, such as co-management of resources, but in certain cases such as the British Columbia Treaty process, actually acts pre-emptively to avoid a renegotiation of power relations between First Nations and Canada. In short, Canadian over-compliance is actually a form of state resistance to the emerging global consensus in indigenous rights.” [Lightfoot, 2010:103]

However, due to increasing awareness of Canada’s true policies on indigenous peoples by media, NGOs, business alliances but also – and most importantly – of indigenous communities themselves, federal as well as provincial governments will have a harder time continuing their current policies. By informing indigenous peoples on the local level about their

rights and effects of negotiations within Comprehensive Land Claim Policies, they are becoming more aware of what negative impacts those Final Agreements can have to their communities and more First Nations will reject getting involved in treaty negotiations but rather claim their Aboriginal title.

Through increasing advocacy networking and forming alliances with other NGOs and social movements, also national as well as international media and public at large sees the true handling of Canada regarding Aboriginal peoples. Thus, just recently, media around the world have shown images of First Nations protesting throughout the country, demonstrating against recent constitutional changes which severely undermine environmental standards and indigenous issues once more. Using social media, the so called “Idle No More” movement spread rapidly and soon not only included First Nations all over Canada but also other NGOs and advocacy networks frustrated and concerned for a long time by new developments under the Conservative government. “Currently, this government is trying to pass many laws so that reserve lands can also be bought and sold by big companies to get profit from resources. They are promising to share this time...Why would these promises be different from past promises? We will be left with nothing but poisoned water, land and air. This is an attempt to take away sovereignty and the inherent right to land and resources from First Nations peoples.” [INM]

Therefore if Canada really wants to live up to its claim of being progressive regarding indigenous policies and are favouring a model of true reconciliation respecting Aboriginal title, federal and provincial governments should drop their policy on Comprehensive Land Claims which undermines and actually resists indigenous rights. Instead Canada needs to fully recognize the UN Declaration on the Rights of Indigenous Peoples as a new legal framework to implement Aboriginal title on the ground.

## 7.5. Human Rights-Based Development through Self-Determination

“Aboriginal people do not want pity or handouts. They want recognition that these problems are largely the result of loss of their lands and resources, destruction of their economies and social institutions, and denial of their nationhood. They seek a range of remedies for these injustices, but most of all, they seek control of their lives.” [RCAP, 1996]

In order to contribute in restoring the relationship between Aboriginal and non-Aboriginal people in Canada, the Royal Commission on Aboriginal Peoples (RCAP) was established in 1991. In

times where living standards of Aboriginal peoples were <sup>18</sup> “shamefully low” and frustration amongst them raised on negotiations being neither equal nor appropriate to settle grievances, the mandate of those four indigenous and three non-indigenous commissioners was to conduct a comprehensive study of concerns regarding First Nations and to give recommendations to the government in that regard. [RCAP, 1996] Visiting almost 100 communities and having held nearly 200 days of public hearings, aboriginal communities told them over and over that most of their poverty patterns stem from negative effects of domination and assimilation leading to weakened foundations of their cultural heritage, alienation causing self-destruction and anti-social behavior as well as social problems amongst aboriginal youth. Instead of addressing those causes of indigenous marginalization, the Commission stated that “our central conclusion can be summarized simply: The main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong.” [RCAP, 1996]

### 7.5.1. General Economic and Social Development Programs

When former UN Special Rapporteur on Indigenous Peoples, Rudolfo Stavenhagen visited Canada in 2004, he noted in his final report the “unacceptable gap” between Aboriginal and non-Aboriginal peoples. “Economic, social and human indicators of well-being, quality of life and development are consistently lower among aboriginal people than other Canadians. Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution, are all much higher among aboriginal people than in any other sector of Canadian society, whereas educational attainment, health standards, housing conditions, family income, access to economic opportunity and to social services are generally lower”. [Stavenhagen, 2004:2]

Therefore, even as a fairly rich country, Canada has yet failed to ensure indigenous peoples their right to an adequate standard of living and well-being. Going back on the main duties of states regarding the realization of human rights, by signing binding UN documents such as the International Convention on Economic, Social and Cultural Rights (ICESCR), Canada has to take all possible steps to the maximum of available resources to progressively achieve the full realization of rights recognized within the convention. [Klok/Nowak/Schwarz, 2005:13] Since realization thus depends on the different levels of development and actual economic situation of a country, Canada as a “First World” country would therefore have a higher standard to fulfill than other poorer countries as it has more means available to particularly address structural problems as it is the case with marginalization of Aboriginal peoples in Canada.

Though the Special Rapporteur did acknowledge that a great amount of programs and projects and considerable financial resources have been made available by the federal,

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<sup>18</sup> Though the recommendations of the RCAP were written and published in the early 1990s, the socio economic as well as political situation hasn't changed much for indigenous peoples, so using „present tense“ regarding the Commission's conclusions would still seem adequate almost 20 years later.

provincial and territorial governments to close the existing gap between Aboriginal and non-Aboriginal people, those services are often poorly coordinated among different departments thus resulting in deliverance gaps. “While indigenous people living off reserve have access to programs and services designed for the general population, these programs and services are not necessarily aligned to the specific needs of indigenous peoples, nor do they necessarily incorporate an understanding of the cultural practices and values of indigenous peoples and how this affects the delivery of services.” [Amnesty International, 2006:7]

In those cases, where indigenous peoples started organizing specific programs on and off reserves themselves to better address the underlying causes of marginalization and poverty within Aboriginal communities, for example employment counseling, health centers or shelters for women escaping from domestic violence, they have been chronically underfunded by federal and provincial governments. In turn, without having consistent and stable financial resources available, no long-term policies and programs could get implemented in order to make effective changes in people’s lives. [Amnesty International, 2006:7]

These inadequacies of general economic and social development initiatives reflect conclusions drawn in Chapter 2 regarding indigenous peoples and development discourses. Thus those programs don’t address underlying structural causes of their marginalization, such as ongoing experiences of domination and assimilation as well as discrimination towards First Nations which confirms again the main conclusion of the Royal Commission regarding those policies by federal and provincial governments. “The policies of the past have failed to bring peace and harmony to the relationship between Aboriginal peoples and other Canadians. Equally, they have failed to bring contentment or prosperity to Aboriginal people.” [RCAP, 1996]

Since in Chapter 2 it was argued, that a human rights-based approach to development could be more adequate to address concerns of indigenous peoples, the following section considers possible ways on how to apply such an approach within the context of the struggle of First Nations in Canada, specifically in British Columbia.

Firstly, the UNDRIP should be analyzed in the light of the ongoing negotiation processes in British Columbia. Since the current “Comprehensive Land Claim Policy” undermines indigenous rights by merely aiming to extinguish Aboriginal title but also doesn’t acknowledge new emerging international norms of indigenous rights, the British Columbia treaty processes aren’t adequate frameworks for effective models of reconciliation. Thus, the UNDRIP could provide an important legal foundation for a truly progressive model of reconciliation based on equal status and mutual respect to enhance chances for a renewed sustainable relationship between Aboriginal and non-Aboriginal people.

On the basis of the first point, the paper addresses findings of various studies that suggest a profound correlation between indigenous sovereignty respectively self-determination and community well-being. Thus, by recognizing Aboriginal sovereignty within a new model of reconciliation (regarding the first point), the overall situation of indigenous communities is likely

to improve since policies, set up by indigenous peoples themselves would more effectively address community concerns.

## 7.5.2. UNDRIP as a New Legal Framework for Reconciliation and Negotiation in British Columbia

Due to the underlying perceptions and violations of indigenous rights within the “Comprehensive Land Claim Process” it was not surprising that Canada was resisting the UN Declaration on the Rights of Indigenous Peoples from the start.

Only by the time all of the other CANZUS states (thus Australia, New Zealand and US) officially recognized the Declaration after initial adoption at the UN General Assembly, the Canadian government (reluctantly) acknowledged the UNDRIP as an solely “aspirational document” though having “no legal effect” in Canada due to its non-legally binding nature. Thus Canada states “although the UNDRIP does not reflect customary international law or change Canadian laws, Canada believes that the UNDRIP has the potential to contribute positively to the promotion and respect of the rights of Indigenous peoples around the world.” [AANDC]

However, as shown in the previous chapter this position is quite outdated. Even though the UNDRIP is in fact a non-binding document, it is still considered “soft law” under international right and thus forming a global consensus of minimum standards on how relationships of states and indigenous peoples should be conducted and restructured in order for governments to fully acknowledge their status and rights. In an earlier judgement of the Federal Court regarding a complaint of human rights violation about child-welfare services on indigenous reserves, the court argued, that “the Supreme Court of Canada has recognized the relevance of international human-rights law in interpreting domestic legislation”. Thus as part of the international human rights framework, the UNDRIP has to be taken as a point of reference also by Canadian federal and provincial jurisdiction to interpret the legitimacy of indigenous rights and their claims. Quebecian lawyer Paul Joffe therefore suggests to read and interpret the Declaration into Section 35 of the Constitution recognizing Aboriginal and treaty rights. [Media Knet, 6.3.2013] Moreover, as previously discussed, some of those rights are also regarded as customary international law such as the right to consultation and free prior informed consent, collective right to lands as well as some forms of (internal) self-determination. [see Anaya/Wiessner, 2007]

Through the perspective of a human rights-based approach, federal and provincial government policies would have to aim on realizing the rights set out in international legal framework, mainly the UNDRIP. Thus main provisions of those partnership agreements should correspond with the objectives of the UNDRIP and most importantly entitle indigenous peoples to their right to self-determination to be able to determine their own future, protect their collective inherent land rights (relating to Aboriginal title) and gain their free prior informed consent for any projects that affect them respectively their lands. Negotiation procedures leading up to those agreements would

also have to foresee ways that ensure those processes are also based on main human rights principles: interrelatedness of human rights, equality and non-discrimination, participation and empowerment as well as accountability.

- Interrelatedness of human rights – instead of “over-compliance” thus ensuring some easier rights to implement (such as socio economic rights) while neglecting or even resisting other human rights, all indigenous rights set out in the main human rights documents and particularly in the UNDRIP have to be respected and recognized
- Equality and non-discrimination – negotiations have to be based on mutual respect and the recognition of equal status of indigenous peoples and federal and provincial governments
- Participation and empowerment – Prior to any negotiations, First Nations have to be profoundly informed about their current status, provisions to be included and as well as their implications and consequences in the future in a comprehensible way. Negotiations themselves need to be transparent and have to ensure that indigenous communities as a whole have effective means to participate have their opinions and concerns heard and taken into account in order for them to make well informed and aware decisions.
- Accountability – indigenous representatives, negotiating on their people’s behalf should be chosen through traditional voting procedures which enhance their legitimacy amongst indigenous peoples but also their accountability regarding any actions or decisions taken. On the other hand, complaint procedures would need to be set up in order for First Nations to hold official authorities negotiating on behalf of federal and provincial governments responsible in case of violating their duties throughout the process.

Consequently, if taken seriously, a model of reconciliation truly progressive and in the light of new emerging international indigenous norms particularly regarding their right to self-determination and collective land rights would take the provisions of the UNDRIP into account and provide for the main human rights principles to be ensured leading up to any agreement. Thus the UNDRIP would provide for a substantive legal framework to restructure the relationship of indigenous and non-indigenous peoples. Thus through providing them with equal status as a sovereign nation, First Nations would have the ability to manage their own affairs and more effectively address community concerns contributing to increased and sustainable well-being of their people.

### **7.5.3. Improving Indigenous Well-being through Self-Determination**

As already mentioned in the Chapter 2, the term “development” usually doesn’t resonate well with indigenous peoples. Too many times well-meant initiatives or policies claimed to “develop” their communities have failed to adequately address their needs as indigenous peoples and most often have had controversial negative impacts.

However, seeing development in the light of Amartya Sen’s definition of development as expanding people’s freedoms and capabilities to be and do according to his/her wishes and

aspirations, thus for general well-being, could shed a new light on the term. Consequently, indigenous peoples' strive for self-determination could be considered not as an end in itself but rather as means to community well-being and a general good life according to their own values and traditions. Taking into account findings of various studies on Aboriginal peoples in Canada but also the US and Australia, conclusions indeed show a correlation between their self-determination and improvement in socio economic situations of their communities. [RCAP, 1996; Cornell, 2006; Ladner, 2009; Anderson, 1997; Anderson/Dana/Dana, 2005]

### **7.5.3.1. Changes of Political Status – First Nations as Sovereign Nations**

Corresponding with the main understanding of the UNDRIP, the Royal Commission on Aboriginal Peoples regarded in the study, the recognition of indigenous self-determination as one major precondition of reconciliation and thus the foundation for any relationship between indigenous and non-indigenous peoples. Guided by the principles of recognition, respect, sharing and responsibility this would have to be more than just a political or institutional change but rather a change of commitment. Therefore new provisions would need to affirm Aboriginal peoples as sovereign nations instead of minorities or a race within Canada.

The Commission thus recommended to incorporate First Nations within the federal system as a third order next to the federal and provincial government based on their constitutional recognition in Section 35. Integrated in the framework of Canada's federation, indigenous peoples could then choose a model of self-governance which reflects their traditions and circumstances to govern their own affairs while working together with the federal and provincial governments based on mutual respect and equal status. [RCAP, 1996]

### **7.5.3.2. Self-Governance**

Replacing traditional systems of social organization with the Indian Band Council System through the Indian Act caused many problems amongst indigenous peoples. Aimed to easily administer indigenous affairs by giving elected band councils the power to manage local administrative matters while still maintaining overall authority, Canada's government didn't provide them with the necessary tools, jurisdiction or accountability measures to effectively serve their communities' best interest. "Beyond these inabilities that resulted from a lack of legitimacy (perceived or actual), lack of jurisdiction, lack of autonomy, and lack of revenue, many band councils have also proved themselves unable to disable communities in crisis because they lacked the necessary leadership skills, responsibilities and accountability. While leaders associated with traditional governance were raised to be leaders because they exhibited the requisite characteristics for good governance, those who succeed in the hyper-democratic processes of band government elections often do not exhibit characteristics of or knowledge of good leadership and good governance – and they simply cannot cope." [Ladner, 2009:90]

Thus *Imai* concludes that on the one hand, the Indian Act doesn't provide for enough power of the band council to make own decisions to deal with concerns, band members are facing with. Contrary, the Indian Act also gives band councils too much power regarding since band councils' decision don't necessarily need to involve political participation processes of band members and thus lack in accountability. [Imai, 2007:10] Consequently, the Band Council System in place cannot react and manage problems and concerns indigenous communities are faced with since the system as such doesn't correspond with their traditional understanding of social organization and further is still largely depending on federal and provincial legislature and financial resources leading to questionable power relations.

While the Royal Commission showed that self-governance is a major factor for reconciliation, it doesn't go in much detail on how this would affect indigenous peoples in reality. *Landner* generally concludes that much of the present literature thus proves a direct correlation between self-determination and community well-being but usually fails to provide explanations on causes or gives suggestions. [Landner, 2009:93]

However, in the 1980s, the US based organization "Harvard Project on American Indian Economic Development" conducted a comprehensive study on emerging patterns of indigenous economic within some reserves. Taking into account information of almost 70 indigenous nations in the US, the research concluded that "the most consistent predictors of sustainable economic development on Indian reservations are not economic factors such as location, educational attainment or natural resource endowments but rather largely political ones." [Cornell, 2006:13] Thus, particularly three factors were considered decisive for socio economic success within indigenous nations:

1. Indigenous sovereignty or self-rule – Decision making power has to be transferred to indigenous peoples from a constitutional level over law making towards setting policy agendas to determine their own matters. "They have to put in place an institutional environment that their citizens support and which can encourage and sustain economic activity and community initiatives that fit their strategic objectives and opportunities." [Cornwell, 2006:17]
2. Capable governing institutions – In order for indigenous peoples to exercise their decision making powers effectively, they need to be able to establish institutions such as tribal courts, skilled administration, management of resources and companies, etc. within transparent, fair and stable conditions
3. Congruence between formal governing institutions and Indigenous political culture - Formal institutions need to reflect ideas and cultural understandings of the community or nation on how authoritative positions are organized and carried out to enjoy greater legitimacy. [Cornell, 2006:14]

The research showed that in those cases where indigenous nations extended and effectively implemented their decision making powers from law making to determining policy agendas, their socio economic situation has risen usually do to increased legitimacy of indigenous authorities

and their accountability towards the communities. It goes without saying that those factors are no guarantee of success but it provides the possibility for sustainable development to happen particularly by transferring government entities to resource roles while leaving indigenous peoples to decide for themselves on governing institutions, law-making, managing lands and resources and development of community strategies. [Cornell, 2006:16f]

While indigenous self-administration policies in the US showed little success in changing socio economic conditions of indigenous nations, the situation turned for the better when indigenous peoples slowly took over federal programs and redesigned governing institutions to run their own affairs. Soon, those more adequate and cultural sensitive institutions showed effects in fewer unemployment rates, emergence of various economic enterprises, less welfare receivers and more active management of social as well as cultural programs in revitalizing their traditions, languages, etc. [Cornwell, 2006:19] Conducting a similar study regarding First Nations in Canada, *Cornell, Curtis and Jorgensen* come to similar conclusions: "There is ample evidence that [...] the model of genuine self-governance instead of simple self-administration is far more likely to produce societies that prosper. For this reason, among others, it deserves the support not only of First Nations but of other governments that wish to see those nations emerge at last from decades of poverty and despair." [Cornwell/Curtis/Jorgensen, 2004:29]

### 7.5.3.3. Land Rights and Economic Development

"All over the world and throughout history, collective control of lands and resources has been the key to prosperity and the basis of the powerful idea of 'home' that gives a people their common identity." [RCAP, 1996] Thus the Royal Commission acknowledged that Aboriginal peoples need enough land to have the physical but also cultural and spiritual space regarding their special relationship to their traditional lands. Their own control and use over their lands would also be a major contribution for their self-reliance (i.e. regarding food sovereignty or financing self-governance). Thus, the RCAP also concluded that historical self-sufficiency of Aboriginal peoples was mainly destroyed by taking away control over their lands and resources, but also through laws that actually have hindered economic activities on reserves by restricting the flow of capital and decision-making power from First Nations through the Indian Act. In turn, business often has been monopolized by non-aboriginal entrepreneurs. "Ownership of lands and resources is essential to create income and wealth for Aboriginal individuals and nations. But ownership is not enough. Communities and nations that want to control the wealth available from their resources don't want to leave operation of their economies to outside specialists." [RCAP, 1996]

*Anderson* points out that those First Nations actively pursuing strategies of economic development did so by implementing a mostly collective approach with social entrepreneurship

at its foundation. In line with their cultural beliefs and understandings, their main business objectives have included:

- Gaining greater control of activities on their land and resources
- Ending dependency on governments by achieving economic self-sufficiency through self-determination
- Preservation and strengthening traditional values and applying them to their business activities
- Improving overall socioeconomic situations of individuals, families and larger communities

[Anderson, 1997:1499; Anderson/Dana/Dana, 2005:47]

By being in control of their own institutions and policies First Nations can set up programs for capacity building reflecting their traditional values and understandings to provide community members with necessary skills to increase their chances of employment but also specific schooling in administrative as well as accounting, etc. to be able to effectively self-govern their nations. [RCAP, 1996]

#### **7.5.3.4. Canada's positive Obligations within a Human Rights-based Approach**

As the main duty bearer within the international human rights framework, Canada has to respect, protect and fulfill the rights set out in general human rights law either through ratification of UN binding conventions or regarding rights in non-binding instruments such as the UNDRIP, by just being part of the UN community. Thus going back to conclusions drawn in the first chapter, Canada has to respect and thus acknowledge their human but also their inherent indigenous rights. However, it is also on Canada to provide First Nations not only with the legal framework for them to set up their own governmental and other institutions but also set affirmative measures.

“To equip Aboriginal people for the tasks of nation building that lie ahead, structural change - new laws, new bodies to implement them - must be accompanied by measures to give people hope, new capacities for self-management, and the confidence to take charge in their communities and nations.” [RCAP, 1996] Thus, instead of focusing on general socioeconomic development initiatives which have yet failed to show positive long-term results, federal as well as provincial government should make necessary resources available for aboriginal peoples' way to self-reliance. Moreover, according to its duty to protect human rights as well, Canada has an obligation to prevent third parties of violating or restricting the enjoyment of rights. Thus, federal as well as provincial government would need to set legislative, administrative and other relevant measures such as hindering national or multinational corporations from exploiting lands and resources under Aboriginal title without prior informed consent of First Nations concerned. However, as the example of “Sun Peaks Ski Resort” or the Olympic Games showed, Canada is

more eager to develop their profits on territories under Aboriginal title and thus sets steps to actually increase the restriction and violations of indigenous rights instead of protecting them. [Turtle Island News]

Thus also the Committee on Economic, Social and Cultural Rights, monitoring body of the same convention was concerned in its report on Canada about “the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal peoples from their lands, as recognized by RCAP and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.” [CESCR, 1998]

The “Aboriginal Affairs and Northern Development Canada”, the main governmental institution responsible for indigenous issues states itself “Canada's endorsement of the UNDRIP underscores its ongoing goal of ensuring that Aboriginal peoples contribute to and benefit from Canada's development and prosperity as a nation.” [AANDC] While acknowledging the positive impact the provisions of the UNDRIP could have on indigenous peoples, endorsing and thus officially recognizing the UNDRIP alone doesn't have much effect on indigenous peoples' lives if Canada actually continues to undermine the Declaration in practice.

Drawing from the main conclusions, indigenous self-determination can be an important factor for community well-being as they indigenous knowledge and agendas are taken into account, resources are in their hands to manage and thus legitimacy and accountability of local leaders being responsible for their actions towards the community increases. [Cornwell, 2006:17]

Corresponding with the main idea of a human rights-based approach to development and by seeing development as enhancing the actual freedoms and opportunity of indigenous peoples to live a life according to their understandings and aspirations, the situation of First Nations communities' well-being could significantly improve if Canada would recognize their national and international indigenous rights.

#### **7.5.4. From Rights to Responsibilities – Sustainable Self-Determination**

While federal and provincial governments need to recognize, protect and fulfill indigenous rights and foremost their right to self-determination as sovereign nations, it is also on indigenous peoples themselves to take charge of their future. If they aren't provided with any substantive freedoms to control or manage own affairs, indigenous peoples cannot be hold responsible for missing or insufficient progress regarding their situation. However, by gaining rights and control over their future through self-determination, it also imposes the duty on them to consider options and opportunities available and be responsible for their communities' well-being. [see Sen, 1999:284]

Therefore *Henderson* encourages indigenous peoples to face up to the challenge and show responsibility as self-determining human beings. Having the “ink on paper” doesn’t change anything for the better, he argues, unless Aboriginal peoples themselves become active, internalize their concept of self-determination and human rights and push the state to fulfill its obligations in that regard. [Henderson, 2008:101f]

Also *Corntassel* suggests turning rights-based movements to community-based responsibility movements. Thus Aboriginal peoples should redirect their efforts and powers to the local level, engaging in diplomatic and trade relationships with other indigenous nations and thereby taking the involvement of the state as much as possible away from everyday concerns. [Corntassel, 2008:121ff]

“To live up to the concept of self-determining human beings articulated in the Declaration is our responsibility as indigenous peoples. The vision behind the Declaration was to create a means to reform and empower our traditions and humanities, to create a teaching that would make us greater, individually and collectively. [...] We must understand that the genuine core of empowerment is human responsibility and reconciliation. We must improve our people, ourselves and our consciences. We must re-imagine and remake our traditional institutions, and reconcile them with our vision of human rights.” [Henderson, 2008:100]

## 8. CONCLUSION

*"British Columbia – the best place on earth"* – At least, this is what the official slogan of the province has promised for several years. However, being true or not, depends on who is answering.

Canada usually ranks amongst the top countries within the Human Development Index (HDI) on standard of living while Vancouver, British Columbia has been one of the cities with the best quality of life for many years in a row. Eager to maintain its good reputation on human rights standards as well as their progressive policies regarding indigenous rights, Canada has been showcasing its multicultural society and great outdoors.

Asking First Nations however, they tell a different story. As a common pattern of indigenous peoples around the world, they are being amongst the poorest in society due to historical and ongoing experiences of colonialization, racism, discrimination and marginalization. While Canada tries to sell a new model of reconciliation by negotiation processes to settle unsolved claims and thus strengthen their socioeconomic development, those policies still are grounded on old understandings of the "Doctrine of Discovery". Thus lacking knowledge of their inherent rights and impacts of those Final Agreements and confronted with huge amounts of debts they had to loan in order to afford negotiations, First Nations are pushed to accept short term pay-outs while giving up their Aboriginal rights. Thus they "put the community at risk by leading them into an unsustainable future under the banner of 'self-governance'." [Corntassel, 2008:106f].

As mentioned in the introduction, Chief Deskaheh went to the League of Nations, the main international institution of the time to claim sovereignty for his people, the Haudenosaunee Nation. Considering the major conclusions of the present paper, would he still be rejected by the global community regarding his concerns respectively by the Canadian government in his strive for self-determination?

On an international level, indigenous peoples definitely gained grounds and made their voices heard within the UN. While indigenous activists still have to face setbacks and actual effects of their advocacy strategies are limited, recent developments have shown that their efforts and strives for their rights have borne fruits. Indigenous peoples proved that even as non-state actors, they used the opportunities available for them in their favors. Compared to the overwhelming power of states, they had to compromise on a lot of issues and also a few indigenous activists with strong viewpoints refused to give in but rather step out of the UN system instead of adapting their positions. In the end though, the Declaration includes novelties in its procedural process and content that wouldn't have considered possible a few decades ago. Thus, it offers a comprehensive framework within a rights-based approach giving hope for the

future to strive further to expand indigenous rights, having a quite profound foundation with the UNDRIP to refer to.

However, the mills of – specifically international – law grind slowly to show results on the local ground. Thus indigenous peoples still face many setbacks and get frustrated with ongoing rejections of their internationally acknowledged rights on a national level. Considering its current policies particularly regarding the British Columbia Treaty Processes, it is not surprising that Canada has been reluctant from the start to recognize new emerging norms and standards of indigenous rights, particularly regarding self-determination and collective land rights. Since no enforcement or non-compliance measures exist to ensure indigenous peoples their rights, it is up to their increasing human right activism, using various strategies of raising public awareness within the country but also at UN institutions to pressure Canada into recognizing but moreover realizing their rights on the ground.

Consequently, if Chief Deskanheh came to the UN nowadays claiming self-determination for his peoples, he would find various forums available for him to present his demands. By now, the international community has acknowledged that the problems indigenous peoples are facing aren't solely a national matter but have to be taken into account on an international level providing them with specific mechanisms and rights to address their concerns. Thus, the UNDRIP provides a legal framework for indigenous rights which also includes a right to self-determination.

Regarding Canada's position on Chief Deskanheh's claims, not much has changed. Canada still justifies its rejection towards granting First Nations self-determination through fears of their national sovereignty. Thus most likely, Chief Deskanheh would have to return home with the same results as almost a century ago. However, Canada and other likeminded states will find it increasingly difficult to justify their position as some of the provisions of the UNDRIP are already considered customary international law and thus are binding. Further, general UN monitoring bodies also progressively incorporate indigenous peoples' concerns in their recommendations and after the adoption of the UNDRIP now have a framework at hand for references and interpretative purposes.

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## ABSTRACT (English)

Up until the 1960s, indigenous peoples were not regarded as a matter of international concern but rather a domestic problem. Only through changes in the geopolitical order of Post-World War times and increasing globalization could indigenous peoples gain ground within the global arena.

Over-represented amongst the world's poor, they see themselves on the losing end of mainstream development approaches due to cultural insensitive programs and large scale projects often leading to severe destruction and exploitations of their traditional lands and cultures. Tired and frustrated of national policies undermining their inherent rights, indigenous peoples started organizing themselves in the beginning of the 1970s to transnational advocacy networks in order to strive for recognition of their indigenous rights on an international scale. Due to shared experiences of colonialization, assimilation and discrimination, indigenous peoples soon found common positions and proved successful to strategically use the favorable conditions of the times and gained ground within the United Nations which was increasingly willing to deal with indigenous concerns.

In the emergence of new international norms regarding indigenous peoples, particularly their right to self-determination, collective land rights, cultural distinctiveness and their free prior informed consent, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provides the most comprehensive and progressive international legal framework for indigenous rights.

Instead of focusing on poverty eradication, indigenous peoples primarily focus on their right to self-determination to be able to determine their lives as well as future according to their cultural values and traditions. Thus through a different understanding of development, which aims on expanding the freedoms and opportunities of people based on considerations of Amartya Sen, a Human Rights-based Approach to Development (HRBDA) could offer an alternative way to reflect their strive for their indigenous rights. Thus, even as a non-binding instrument, the UNDRIP offers a main point of reference in order to press states to fulfill their duties within international human rights law by realizing those new emerging indigenous norms.

Though Canada generally enjoys a fairly good international reputation, policies regarding First Nations have merely focused on closing gaps on socio economic standards while particularly in the province of British Columbia, ongoing negotiation processes on unsettled lands are trying to extinguish their constitutionally recognized Aboriginal title, thus collective land rights. While those policies have failed so far to address systematic root causes of marginalization, studies suggest that by recognizing their right to self-determination and thus fulfilling its duty within international human rights law, Canada could significantly improve the overall situation and well-being of First Nations.

## ABSTRACT (German)

Bis Ende der 1960er Jahre wurden indigene Völker noch nicht innerhalb der internationalen Gemeinschaft wahrgenommen, sondern eher als nationales Problem von Staaten selbst betrachtet. Erst durch geopolitische Veränderungen der Nachkriegszeit konnten sich indigene Völker auch auf der globalen Arena etablieren.

Zwar leben überdurchschnittlich viele Indigene unter der Armutsgrenze, doch werden sie meistens von allgemeinen Entwicklungsansätzen übergangen, die ihre spezifische kulturellen Sichtweisen außer Acht lassen und sogar oftmals zu der Zerstörung sowie Ausbeutung ihrer traditionellen Länder und Kulturen beitragen. Unzufrieden und ernüchtert von Rückschlägen im eigenen Staat, haben sich indigene Völker seit Anfang der 1970er Jahre zu transnationalen aktivistischen Netzwerken zusammengeschlossen, um auf einer internationalen Ebene Anerkennung für ihre angestammten Rechte zu fordern. Durch ihre ähnlichen Erfahrungen mit Kolonialismus, Assimilierung und Diskriminierung, konnten sie bald eine gemeinsame Position entwickeln und so die günstigen Umstände ausnützen, innerhalb der Vereinten Nationen gehört zu werden.

Diese sich neu entwickelnden internationalen Normen, vor allem bezüglich einem Recht auf Selbstbestimmung, kollektive Landrechte, kulturelle Diversität und ihr freier, vorinformierter Konsens wurden schließlich in der UN Deklaration für die Rechte Indigener Völker (UNDRIP) kodifiziert, welche nun den umfassendsten internationalen Referenzrahmen für indigene Rechte darstellt.

Indigenen Völkern geht es in ihren Anliegen daher nicht primär um Armutsbekämpfung, sondern vor allem um das Recht auf Selbstbestimmung, daher ihr Leben bzw. ihre Zukunft selbst bestimmen zu können. Ein alternatives Verständnis von Entwicklung als Erweiterung der Freiheiten und Möglichkeiten sein Leben nach eigenen Vorstellungen zu gestalten, basierenden auf Grundgedanken von Amartya Sen, könnte eine andere Betrachtungsweise darstellen, das Streben von indigenen Völkern nach Selbstbestimmung zu erfassen. Als wichtiger Referenzrahmen für indigene Rechte kann daher die UNDRIP selbst als rechtlich unverbindliches Instrument innerhalb eines HRBDA genutzt werden, um Staaten an ihre Verpflichtungen bezüglich die Umsetzung von Menschenrechten zu erinnern, in diesem Fall insbesondere indigener Rechte.

Obwohl Kanada generell eine recht gute internationale Reputation genießt, konzentrieren sich Agenden bezüglich indigener Völker meist auf sozioökonomische Maßnahmen, oder versuchen vielmehr speziell in der Provinz British Columbia, die verfassungsrechtlich anerkannten Landrechte von First Nations zu beseitigen. Um seinem positiven Image wirklich gerecht zu werden, könnte Kanada massiv zu einer Verbesserung der Situation von indigenen Völkern beitragen, in dem es indigene Rechte, jedoch insbesondere ihr Recht auf Selbstbestimmung anerkennt und umsetzt, wie Studien bereits belegen.

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