

Circle of Rights

Economic, Social & Cultural Rights Activism: A Training Resource

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SECTION 3– PERSPECTIVES OF SPECIFIC GROUPS

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MODULE 6

ESC RIGHTS OF INDIGENOUS PEOPLES [USING MODULE 6 IN A TRAINING PROGRAM](#)

The Purpose of Module 6

The purpose of this module is to review the international law related to the rights of indigenous peoples and explore international and domestic remedies available to vindicate them.

The module

- *summarizes the historical framework and current situation related to indigenous peoples' rights;*
- *identifies the principal international standards and the areas they cover;*
- *summarizes protections provided in domestic law in Latin America; and*
- *discusses international, regional and domestic mechanisms to protect indigenous peoples' rights.*

A Bleak Future for Indigenous Peoples

In almost all societies where they are to be found, indigenous people are poorer than most other groups. In Australia, for example, aboriginals receive about half as much income as non-aboriginals. In developing countries the poorest regions are those with the most indigenous people. In Mexico, for example, in *municipios* where less than 10% of the population is indigenous, only 18% of the population is below the poverty line. But where 70% of the population is indigenous, the poverty rate rises to 80%.

Indigenous people also fare worse in the non-income dimensions of poverty. In Canada the infant mortality rate for indigenous children is twice as high as the population as a whole. In Peru the Indian population is much more prone to illness than the Spanish-speaking population—and twice as likely to be hospitalised.

Similar disparities are evident in education. In Bolivia and Mexico indigenous children receive on average three years less education than non-indigenous children. And in Guatemala the majority of indigenous people have no formal education—only 40% are literate.

But even when they have the same education as the majority population, indigenous people still face discrimination when it comes to employment. In the United States, for example, around 25% of the earnings shortfall of indigenous people is estimated to result from discrimination—in Bolivia 28%, and in Guatemala close to 50%.

Indigenous people have seen their values and customs destroyed by the incoming population—and have frequently turned to alcoholism or suicide. In developing countries they generally mix to some extent with the majority population, but in the industrial countries many have ended up on reservations, facing a bleak future. [\[1\]](#)

Historical Framework

The rights of indigenous peoples have been specifically recognized and defined internationally as a result of their particular cultural, linguistic, economic, and religious conditions and their socio-political organization. This recognition is also grounded in the peculiarly fragile conditions that indigenous peoples experience and the serious threats they face. These distinguish them from the rest of the population in the societies in which they live, making it necessary to accord them special legal protection in international law and in the domestic legislation of nation-states. This situation has been recognized by international instruments that provide that the rights of indigenous peoples belong to those whose social, cultural and economic conditions distinguish them from other sections of the national community, whose status is regulated wholly or partially by their own customs or traditions, and who are considered indigenous on account of their descent from populations that inhabited the country before the time of the conquest, colonization, or the establishment of the present state boundaries. [\[2\]](#)

The rights of indigenous peoples are considered “collective” rights, which belong to them as peoples and collective subjects, as well as “original” rights, since they are claimed as “historical” rights predating the nation-states. It has been noted in this connection that recognition of the rights of indigenous peoples implies a profound change in the political and cultural perspective by which nation-states are organized. [\[3\]](#) This recognition is based on what some authors have called a “legal order of diversity,” [\[4\]](#) in which nation-states recognize their multiethnic and multicultural character.

In the declaration of the Continental Encounter of Indigenous Leaders and Authorities held in Quito in August 1996, indigenous organizations demanded the right of indigenous communities to exist as peoples. They undertook several national and international initiatives for the recognition of collective rights, which strengthen their self-worth as peoples and the multinational, multiethnic, and multicultural character of nation-states. [\[5\]](#) According to the indigenous organizations present at the gathering, the rights of indigenous peoples must be seen in the context of the processes of building nation-states, which generally are constituted unilaterally and seek to homogenize and deny the rights of other sectors. In sum, indigenous rights are specific rights that have a collective dimension and are claimed as historical and

original rights whose recognition and exercise are necessary to guarantee the life and existence of indigenous peoples.

Current Situation

To better understand the current context in which the rights of indigenous peoples are being recognized, one must analyze the relationship between the indigenous peoples and the nation-states in which they live. In most of the countries with indigenous populations, the relationship has been marked by confrontation—a confrontation between the indigenous organizations that

seek respect for cultural diversity and territorial rights, and the governments and their goals. Governments seek integration of indigenous populations into the schemes of the dominant unitary culture, and the nation's social, political, and economic models are injected into indigenous peoples' traditional territories by state projects. It has been noted:

In the coming decades nation states and indigenous peoples and communities will see the intensification of the tensions that characterize their relationship. This process makes it necessary to develop political and cultural forms by which society can reorganize to make way for diversity and pluralism.⁷

The Narmada Dams and Tribal Peoples

"In the fifty years since Independence, after Nehru's famous 'Dams are the Temples of Modern India' speech (one that he grew to regret in his own lifetime), his footsoldiers threw themselves into the business of building dams with unnatural fervour. Dam-building grew to be equated with Nation-building. Their enthusiasm alone should have been reason enough to make one suspicious. Not only did they build new dams and new irrigation systems, they took control of small, traditional systems that had been managed by village communities for thousands of years, and allowed them to atrophy. To compensate the loss, the Government built more and more dams. Big ones, little ones, tall ones, short ones . . .

"[Big Dams are] a brazen means of taking water, land and irrigation away from the poor and gifting it to the rich. Their reservoirs displace huge populations of people, leaving them homeless and destitute . . .

"A huge percentage of the displaced [in India] are tribal people (57.6 per cent in the case of the Sardar Sarovar Dam). Include Dalits and the figure becomes obscene. According to the Commissioner for Scheduled Castes and Tribes, it's about 60 per cent. If you consider that tribal people account for only eight per cent, and Dalits fifteen per cent, of India's population, it opens up a whole other dimension to the story. The ethnic 'otherness' of their victims takes some of the pressure off the Nation Builders. It's like having an expense account. Someone else pays the bills. People from another country. Another world. India's poorest people are subsidising the lifestyles of her richest . . ."⁶

According to indigenous organizations, there are five key points in the relationship between states and indigenous peoples that have to do with their rights:

1. *Territories*: At issue here are the claims for control and recovery of the territory in which the lives of the indigenous peoples, including their reproduction and development, unfold. (See Module 18 for more discussion on land rights.)
2. *Social and political organization*: This refers to the right of indigenous peoples to have their own forms of social and political organization, to make decisions on their own matters, and to participate fully in all levels of decision-making in the structures of the states of which they are part. It also refers to an organizational dynamic aimed at creating a network of solidarity among indigenous peoples to press their claims and provide for their participation.
3. *Economic development*: Indigenous peoples have a right to control their own economies, attending to the needs of their own systems of production. It includes the right to participate in the benefits of the economic development plans promoted by the states.
4. *Development of a platform*: Such a platform would make it possible for indigenous peoples to press their demands, which range from land and territorial claims to cultural and technical grievances, economic development, customary law and political participation.
5. *Valuing their identity*: This is related to recognition of the ethnic and cultural diversity in each of the states with indigenous populations.

International Standards Recognizing the Rights of Indigenous Peoples

Beginning in the second half of the twentieth century, advances have been made in recognizing and protecting the specific rights of indigenous peoples in various international agencies and in the domestic legislation of most countries. In 1957 the International Labour Organization adopted Convention No. 107 concerning the Protection and Integration of Indigenous and Tribal Populations and other Tribal and Semi-tribal Populations in Independent Countries. This was a first effort to establish a set of standards for protecting indigenous peoples. The emphasis in this convention was on integration rather than on recognition of the distinct characteristics and rights of indigenous people. Later, as a result of the convention's shortcomings and inadequacies in the current context, the ILO revised it. This effort concluded with the adoption in 1989 of Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. It confers international recognition on the specific rights of indigenous peoples, and has already been ratified by many nation-states, making it applicable domestically in those countries.

In 1982 a Working Group on Indigenous Peoples was created under the auspices of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. This working group prepared a Draft Universal Declaration of the Rights of Indigenous Peoples that is currently under discussion in the United Nations. It is a very broad and effective instrument for recognizing the rights of indigenous peoples worldwide. In 1993, within the framework of the World Conference on Human Rights held in Vienna, those specific rights won clear and express recognition as collective rights.

For its part, the Organization of American States (OAS), through the Inter-American Commission on Human Rights, has produced many statements and reports on the situation of

indigenous peoples' rights in different countries. The Commission prepared an American Declaration on the Rights of Indigenous Peoples, which contains broad recognition of the principal rights of indigenous peoples in the Americas. It is awaiting approval by the OAS General Assembly.



Economic Development and Self-Identity

Sometime in the distant past the Orang Suku Laut of Indonesia left the land to start a life on the sea. Known now as "sea nomads," they have lived on the Riau-Lingga archipelago waters of Indonesia for centuries. They can be recognized by the presence of wooden boats with leaf roofs; the boats serve both as transportation and shelter. The life of the Orang Suku Laut began to change in the second decade of the nineteenth century. From living totally as sea nomads they gradually shifted to become seminomadic; depending upon the climate and monsoon winds, from time to time they would move to temporary dwellings on land. Later, a few groups began to live in permanent dwellings, erecting groups of huts on the shorelines, near mouths of rivers and along riverbanks.

Since 1989 the administrative regions of which the archipelago is a part have become the center of a governmental development project, now entitled the Indonesia-Malaysia-Singapore Growth Triangle (IMSGT). Starting in 1992 the government initiated another development project, which includes building six bridges linking various islands of the archipelago. Industrial estates and marine resorts are being built along the shorelines. As a result of these development projects the natural habitat of the Orang Suku Laut-both on the water and on land-is changing rapidly. All of this development is seriously disrupting the patterns and livelihood of the Orang Suku Laut. Their traditional way of life is seriously threatened, as is their capacity to feed themselves. The Indonesian government considers the Orang Suku Laut to be an "isolated community." As such, they are not legally recognized, and thus receive no protection or recourse that might be available under Indonesian law to other communities.

An Indonesian NGO, the Saka Kemuning Foundation, works with the Orang Suku Laut to help them fulfill their basic needs, increase their awareness about their rights to cultivation of natural resources and to have access to social, economic and educational opportunities, and to express their own sociocultural identity.

Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

Convention No. 169 is a progressive instrument, as it takes cognizance in an all-encompassing and complete way of the demands of indigenous peoples in recent decades. On adopting Convention No. 169, the ILO observed that

in many parts of the world these peoples do not enjoy fundamental human rights to the same extent as the rest of the population, recognizing their aspirations to take control of their own institutions, their way of life, and their economic development . . . The basic concepts of the Convention are respect and participation. Respect for one's own culture, religion, social and economic organization, and identity.

Convention No. 169 is an international legal instrument that broadly sets forth binding provisions for the protection of indigenous peoples' rights, inspired by respect for their cultures, ways of life and traditional forms of organization. It also establishes specific mechanisms by which states are to carry their obligations in this regard. The issues and rights addressed by the convention in greatest detail are:

- The right of indigenous peoples to be considered "peoples" with their own identity and the historical rights that derive from that condition. Indigenous peoples have claimed this right, since they do not consider themselves "populations" or "communities," but peoples who have particular ways of life and organizational forms, as well as their own culture, territory and language. The term "peoples" in the new convention reflects this idea. The convention applies to peoples considered indigenous because they descend from populations that inhabited the country at the time of the conquest or colonization, or from the establishment of the current state boundaries, and that preserve their own social, economic, cultural and political institutions. Nonetheless, the convention itself declares: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law" (art. 2).
- Adoption of measures by the states: Convention No. 169 stresses in article 2 that governments must assume responsibility for developing coordinated actions, with the participation of the indigenous peoples, to protect the latter's rights and guarantee respect for their integrity. These must include measures to ensure that they enjoy the same rights and opportunities as all other members of the population, on an equal basis. They must also promote the full realization of the ESC rights of these peoples, and help eliminate socioeconomic differences. Furthermore, articles 4 and 5 require states to adopt special measures to safeguard the persons, institutions, property, work, cultures and environment of indigenous peoples, and to ensure that their social, cultural, religious, and spiritual values and practices are recognized and protected.

- Participation of and consultation with indigenous peoples in all matters having to do with their life and organizations are fundamental threads running through the whole document. The convention expressly states in article 6 that indigenous peoples must be consulted by means of appropriate procedures, and in particular through their institutions, when legislative or administrative measures are to be taken that may affect them. Means should be developed to allow for their participation at all levels of decision-making in the agencies responsible for the policies and programs that concern them. In addition, the governments should ensure that studies are undertaken, in cooperation with indigenous peoples, to evaluate the social, spiritual, cultural and environmental impact of development activities on these peoples.
- Customary law: In another innovation, Convention No. 169 recognizes the right of indigenous peoples to use their own customs and customary law to deal with their affairs and resolve their conflicts. Indigenous peoples have the right to preserve their own customs and institutions, and traditional methods are to be used for dealing with crimes or offenses committed by members of the indigenous peoples so long as they are not incompatible with fundamental rights defined by the national legal system. Moreover, the authorities and courts called on to give their views on criminal matters should bear in mind the customs of the indigenous peoples in respect of such matters.
- Right to land and territory: Another innovation in Convention No. 169 is that it provides broad recognition for the right to life and includes within that the right to the territory which is the entirety of the space in which the physical, cultural, social, spiritual, political and economic life of the indigenous people unfolds. The convention takes as its starting point the special relationship indigenous peoples have to the lands they have traditionally occupied or used. Article 14 imposes an obligation on states parties in the following terms: “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized . . . Adequate procedures shall be established within the national legal system to resolve land claims by the people concerned.”

Furthermore, in terms of the rights of indigenous peoples to the natural resources on their lands, the convention indicates that special protection should be afforded to these rights, which include the use, management and conservation of the resources. In addition, if the ownership of mineral resources or resources of the subsoil belong to the state, the governments must establish procedures for consulting the indigenous peoples to see whether their interests would be adversely affected by exploitation of the resources. They should, in any case, participate in the benefits of such activities. (See Module 18.)

- Recruitment and conditions of employment: Convention No. 169 includes provisions that require the governments to adopt special measures to guarantee effective protection for indigenous workers with respect to recruitment and employment conditions. Similarly, as regards vocational training and handicrafts, it provides that the states shall take measures to promote the voluntary participation of indigenous peoples in vocational training programs that should be based on the economic environment, social and cultural conditions, and specific needs of these peoples. (See Module 10.)

The Role of Individual Rights in Indigenous Cultures

India has a diverse collection of indigenous peoples or tribal communities that follow what has been termed a tribal jurisprudence. The concept of private property is alien to such a tradition, and common property resources are the basis of community interaction. The community has usufructuary rights to the forests on which they are dependent, and even cultivated land is a common property resource. In places such as Himachal Pradesh, the line between private and common property is blurred—often land when under cultivation is privately controlled, and when fallow, is used by the community in general for grazing of cattle and other community activities.

The spread of the modern legal system and the introduction of the concept of private property tore at the very fabric of these communities. Efforts by the state to address this problem through legislation which forbids the alienation of tribal lands to non-tribals has had limited effect. One area of conflict has been the assertion by women of their right to inherit property within the tribal legal systems, which recognize only collective rights.

Some years ago a fact-finding team went into the Jharkhand region of Bihar, a predominantly tribal area. During the course of the fact-finding, one of the members of the team, Madhu Kishwar, editor of a women's magazine called *Manushi*, found that women of the Ho tribe suffered greatly as a result of denial of land rights. She filed a writ petition invoking the equality clauses of the Indian Constitution and seeking the application of the Indian Succession Act, 1925, to the Ho tribals.⁸ While on the face of it there can be no objection to the demand for equal property rights for Ho women, what the writ petition also unthinkingly did was seek the termination of the system of common property rights practiced by the tribe, since common property rights are not recognized by the Indian Succession Act. It has been argued that rather than impose an alien jurisprudence, albeit one which is based on rights, on such communities, it should be the choice of marginalized sections within the community to explore the possibilities of such systems to grow and evolve with the times. "The destruction of tribal societies means the destruction of ways of life, philosophies and traditions which are a rich source of cultures which teach values based on co-operation, rationality and consensus, in contrast to the capitalist values of competition, elections and conflict."⁹

- Health and education: Article 25 of Convention No. 169 provides that governments must ensure that adequate health services are made available to indigenous peoples and must seek to have such services be the latter's own responsibility and under their own control. The services should be community-based to the extent possible, be administered in cooperation with the interested peoples, and take account of their cultural, social and geographic conditions, as well as their methods of prevention, curative practices and traditional medicines. In terms of education, the convention requires that educational programs and services earmarked for indigenous peoples should be developed in cooperation with them so as to answer to their particular needs, history, knowledge, and value system. In addition, the governments should recognize the right of these peoples to create their own institutions and means of education, and it is noted that wherever possible, the children of indigenous peoples should be taught to read and write in their own language or in the language that is most commonly spoken in the group to which they belong. (See Modules 14 and 16 on the rights to health and education, respectively.)

The Rights of Indigenous Peoples in Domestic Law

In acknowledgment of the diversity and multicultural nature of Latin America, considerable efforts have been made to recognize and enact the rights of indigenous peoples in statutes and constitutions in various Latin American countries. Most current statutory and constitutional law in Latin America establishes clear principles regarding the rights of indigenous peoples:

- The Constitution of Panama (1972) recognizes indigenous languages and bilingual education (art. 84); the right of indigenous peoples to their own cultural standards (art. 104) and to economic, social and political participation in national life (art. 120); and a guarantee for the indigenous communities of the lands they need for attaining their economic and social well-being, as well as their collective ownership (art. 123). It also recognizes indigenous electoral districts (art. 141[5]).
- The Constitution of Ecuador (1978) recognizes indigenous languages as part of the national culture (art. 1). The education systems in indigenous areas are to use the indigenous languages, and Spanish is the language for intercultural relations (art. 27). Provisions are included regarding community and cooperative ownership of the land (art. 51).
- The Constitution of Guatemala (1985) establishes the right to cultural identity (art. 59) and special protection for ethnic groups, recognizing, respecting, and promoting their ways of life, customs, traditions, forms of social organization, use of indigenous attire, languages and dialects (art. 66). It also includes provisions aimed at protecting the lands of indigenous communities, family property and low-cost housing, as well as credit and technical assistance—all necessary to guarantee the possession and development of the land (arts. 67 and 68).
- The Constitution of Nicaragua (1987) recognizes that the country is multiethnic (art. 8) and enshrines political, social, and ethnic pluralism (art. 5). Similarly, the state recognizes the existence of the indigenous peoples, stating that they enjoy the rights, duties and guarantees of the Constitution. It especially recognizes the rights of indigenous peoples to develop their identity and culture, to have their own forms of social organization, and to administer their local affairs. The Constitution also establishes that the Nicaraguan state should pass a law to adopt an autonomous regime for indigenous peoples and other ethnic minority communities of the Atlantic Coast region (art. 89).

The Rights of Indigenous Peoples in the New Constitution of Venezuela

A new Constitution has recently been approved in Venezuela. The text was drafted by the National Constitutional Assembly of 1999, whose 131 members were elected by popular vote. Of the 131 assembly members, three were representatives of Venezuela's indigenous peoples and communities. They were elected directly by the indigenous organizations, pursuant to the rules for election to the Assembly approved in a popular referendum by the Venezuelan people.

Recognition of the rights of indigenous peoples in the new Constitution is the result of the struggle waged by the indigenous members of the Constitutional Assembly, together with indigenous organizations nationwide and various allied organizations. With this recognition,

the Venezuelan Constitution is now one of the most advanced and sweeping in Latin America.

In September 1999 in an historic ceremony indigenous organizations from throughout Venezuela presented a document with their main proposals for the new Constitution to the President of the Constitutional Assembly. This proposal was put together with discussions and contributions from numerous meetings, community assemblies, regional congresses and the First Congress of Indigenous Peoples of Venezuela, held in Ciudad Bolívar in March 1999.

The proposal made by the indigenous peoples recognized that the indigenous peoples existed as groups of cultures prior to the formation of the Venezuelan State, and considered the rights of indigenous peoples as first nations.

The Assembly's Committee on the Rights of Indigenous Peoples began to work on and enrich this proposal with the help of advisers and specialists supportive of the indigenous cause. As a result of a tireless effort on the part of the indigenous members of the Constitutional Assembly and their advisers, the Constitutional Commission ended up including most of the proposals made in the report by the Committee on the Rights of Indigenous Peoples. A chapter on indigenous peoples' rights was included in the draft Constitution, which was forwarded to the plenary for debate.

Indigenous organizations from throughout the country, especially the Pemón, Warao, Arawako, Wayuú, Kariña, Añú, Ye'kuana, Jivi, Piaroa, Piapoco, Yanomami, Baré, and Curripaco, maintained a presence at the legislative palace throughout the proceedings. Of the country's different sectors, it was the indigenous organizations who remained vigilant throughout the process, with a daily and massive presence in the corridors. Day after day they met to evaluate and plan, to lobby and to peacefully demonstrate to press their claims. It was a very long wait. They waited day after day for the time to come for discussion of the chapter that contained their rights. They passed the time making crafts, dancing and praying, with chants by the shamans, and forming friendships in the midst of the struggle.

The Committee on Security and Defense of the Assembly, presided over by a group of military officers, opposed the proposal of the indigenous peoples, alleging that it represented a threat to the country's sovereignty and endangered its future territorial integrity. It based its arguments on a four-day visit to the border, where members "observed" that the indigenous groups were being manipulated by nongovernmental organizations, transnational corporations, missionaries and churches. The committee insisted that one could not grant constitutional rights to the indigenous peoples over their traditional lands and territories, and that the term "indigenous peoples" ("pueblos indígenas") should not be used, because the Venezuelan "people" are one, and no distinctions can be drawn-special rights should not be given to some to the detriment of the others.

The Committee on the Rights of Indigenous Peoples argued that the indigenous peoples had conserved and protected their territories for hundreds of years, and that in the border areas they were really the ones who exercised sovereignty, given the neglect of the State.

On Sunday, 31 October 1999, the time came to discuss the Chapter on Indigenous Peoples'

Rights in the plenary. The indigenous representatives, in their traditional attire and paints, had occupied the entire upper section of the Senate chamber. The session began. The first to take the floor was General Visconti, who after asserting that the proposals of the indigenous peoples represented an attack on Venezuela's sovereignty, asked that the discussion be deferred and that a special committee be appointed to discuss the chapter. The indigenous members of the Assembly and their allies responded. There was no consensus. The Assembly split between the militarists and the supporters of indigenous rights; it was decided to leave the matter for discussion in a special committee. A national debate ensued on the question of indigenous rights, clarifying who were with the indigenous peoples and who, answering to entrenched interests, refused to recognize their rights as the original inhabitants of this country.

The special committee began its discussion. Several members of the Assembly, specialists and advisers participated. Finally, after tough negotiations, an agreement was reached whereby the Committee on Security and Defense accepted the term "pueblos indígenas" with the inclusion of an article that would make it clear that the indigenous peoples were part of the single, sovereign and indivisible Venezuelan State and People, and that the use of the term indigenous peoples does not connote the implication of the term "peoples" in international law. In addition, the word "territory," demanded by the indigenous peoples, was replaced by "habitat."

Finally, on 3 November 1999, the plenary of the assembly approved the chapter on the Rights of Indigenous Peoples as a package; much solidarity was shown by most members of the Assembly. Once the chapter was approved, the indigenous peoples present embraced and sang the national anthem. It had taken five hundred years for their rights as first nations to be recognized.

- The Constitution of Brazil (1988) contains a chapter aimed at guaranteeing the rights of indigenous peoples. The social organization, customs, languages, beliefs and traditions of the indigenous peoples are recognized, along with their original rights to the lands they traditionally occupy. The federal government has the responsibility to demarcate, protect and respect all their properties (art. 231). In addition, the lands permanently inhabited by the indigenous groups, those used for their productive activities, those essential for the preservation of the resources necessary for their well-being, and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions, are defined in broad terms. In addition, it is expressly noted that the lands of the indigenous peoples are inalienable, may not be disposed of, and are not subject to prescriptive claims. It further provides that indigenous peoples, their communities and their organizations have standing to pursue legal actions on behalf of their rights and interests; the Public Ministry intervenes in all the steps of the process (art. 232).
- The Constitution of Colombia (1991) begins by recognizing and protecting the ethnic and cultural diversity of the Colombian nation (art. 7) and the political rights of indigenous peoples, creating an additional two seats in the Senate for election, in a national electoral district, by indigenous communities. Similarly, the Colombian Constitution, within the scheme of territorial organization, created what are called indigenous territorial entities, which enjoy autonomy for managing their own affairs (arts. 286, 287, 329 and 330), which are to be governed by councils constituted and regulated in accordance with the uses and customs of their communities. Furthermore, it is provided that the indigenous *resguardos* are collective property and are

inalienable (art. 329), and that the exploitation of the natural resources in the indigenous territories shall be without detriment to the cultural, social and economic integrity of the indigenous communities (art. 330).

- The Constitution of Paraguay (1992) expressly recognizes the existence of indigenous peoples, defined as cultural groups that predate the formation of the Paraguayan state (art. 62); the right of indigenous peoples to preserve and develop their ethnic identity in their respective habitat; the right to freely apply their system of political, social, economic, cultural and religious organization, and their right to enforce customary indigenous law (art. 63). Furthermore, the Paraguayan Constitution also recognizes that indigenous peoples have the right to community ownership in the land, of sufficient extent and quality to preserve and develop their particular ways of life (art. 64); such lands are nonattachable, indivisible, nontransferable and not subject to prescriptive claims. Similarly, indigenous peoples are recognized as having the right to participate in the country's economic, social, political and cultural life (arts. 66 and 77); and indigenous persons are exempted from social, civil or military service and from the public taxes set by law (art. 67).
- The Constitution of Mexico (1992) states that the Mexican nation is multicultural, originally based on its indigenous peoples and provides that the law shall protect and promote the development of their languages, cultures, uses, customs, resources and specific forms of social organization, and shall guarantee their members effective access to the judiciary (art. 4). In addition, the Mexican Constitution notes that the law shall protect the integrity of the lands of indigenous peoples and that in any agrarian trials or proceedings to which they are a party, their legal practices and customs shall be taken into account in the terms established by law (arts. 27 and 4).
- The Constitution of Peru (1993) provides that all persons have a right to their ethnic and cultural identity and that the state recognizes and protects the ethnic and cultural plurality of the nation (art. 2). The Constitution makes the indigenous languages official (art. 48) and guarantees the right to communal property in the lands of the peasant and native communities (art. 88), whose legal existence and capacity it recognizes (art. 89). It allows the authorities of the native communities to exercise judicial functions pursuant to their customary law within their territory (art. 149).
- The Constitution of Bolivia (1994) expressly indicates that the ESC rights of the indigenous peoples, especially in respect of their community lands, are to be recognized, respected and protected by law, guaranteeing the use and sustainable exploitation of natural resources, as well as protection of the peoples' identity, values, languages, customs and institutions (art. 171). In addition, it notes that the Bolivian state recognizes the legal standing and natural authorities of the indigenous communities to perform the functions entailed in administering and enforcing their own laws, as an alternative means of resolving disputes, based on their uses and customs (art. 171).

Mechanisms to Protect and Implement the Rights of Indigenous Peoples

International mechanisms

United Nations Working Group on Indigenous Populations

The United Nations Working Group on Indigenous Populations was created in 1982 to promote the protection of the rights of indigenous peoples worldwide. The working group holds regular sessions each year, normally in July and August, at UN headquarters in Geneva. During these sessions, it examines, together with experts, the human rights situation of indigenous peoples worldwide. Indigenous organizations have the opportunity to participate and to submit their reports and complaints, which are processed by the working group.

One fundamental task of the working group in recent years has been to prepare the Draft Universal Declaration of the Rights of Indigenous Peoples, which is under discussion in several organs of the United Nations and is ultimately to be submitted to the General Assembly. Though as a declaration it will not be binding, it should provide guidance for national legislation on indigenous rights. The World Council of Indigenous Peoples has said that the Draft Declaration

is largely a progressive declaration, especially given the broader political context of some of its provisions, self-determination and land rights in particular. . . . One of the most important aspects of the draft with respect to lands and territories is in the provision on ethnocide (art. b), which recognizes that actions that have the “objective and effect” of dispossession and depriving the indigenous peoples of their lands, territories and resources is tantamount to cultural genocide, or ethnocide.¹⁰

Other United Nations bodies

Other organs in the United Nations may be used to defend the rights of indigenous peoples. These include the Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee and the general mechanisms of the ILO for examining complaints under Conventions 107 and 169. The CERD, the supervisory organ of the International Convention on the Elimination of All Forms of Racial Discrimination, examines violations of the collective rights of the indigenous peoples, in so far as they constitute discrimination against these peoples. Under article 9 of the convention, states are required to submit reports every two years on their compliance with the convention and on the legislative, judicial and administrative steps they have taken; after examining the reports the CERD may make general suggestions and recommendations. One mechanism for indigenous peoples’ participation is the submission of their own reports, parallel to those submitted by the states, to enable the CERD to compare the information presented by the states with the information presented by the indigenous peoples and their organizations.

Indigenous communities may also submit complaints to the Human Rights Committee of the United Nations to seek protection when faced with situations that violate their fundamental rights. The committee has received and processed violations of rights such as the right to self-

determination, belonging to an indigenous people, and rights over land and territories. The committee has made important pronouncements in its decisions.¹¹

Patents and Cultural Rights

In November 1999 the US Patent and Trademark Office (PTO) reexamined and rejected a 1986 patent claim by a US citizen to the Ayahuasca plant, which has religious uses among the groups indigenous to the Amazon. The claim had been challenged by indigenous tribes from several Amazonian countries grouped in the Coordinating Body of Indigenous Organizations of the Amazon (COICA), along with the Coalition for the Amazonian Peoples and their Environment and the Center for International Environmental Law (CIEL). The PTO ruling was grounded on the scientific finding that the 1986 claim described cultivars that could not be distinguished from others previously described. The ruling helps to forestall the private appropriation, outside of their communities, of the potential economic benefit to be derived from centuries-old traditions of tribal and indigenous peoples, as well as the commodification of traditional cultural values.¹²

Regional mechanisms

Inter-American System for the Protection of Human Rights

There are two bodies within the Inter-American system that can be used to defend indigenous peoples' rights—the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. (See Module 30 for further discussion on remedies available in the Inter-American system.)

The Inter-American Commission on Human Rights has made visits to various countries in response to grave violations of the rights of indigenous peoples and has issued reports on those particular situations in the cases of Guatemala (1981, 1983, 1985, 1993); Bolivia (1981); Suriname (1983, 1985); Nicaragua (1981, 1993). With respect to the petitions in individual cases of indigenous peoples, the commission has issued reports in the case of the Guahibos in Colombia and the Miskitu in Nicaragua.¹³



commission in the case of the Yanomamis of Brazil (1985), on the protection for the ESC rights of indigenous peoples, we cite some of the key sections. The case concerned the grave situation and gradual death of the Yanomamis due to the building of roads in their territory, prospecting and other activities on their lands, all to the detriment of their health as well as cultural and spiritual integrity. The commission noted in its decision that

the violations alleged originate in the construction of the Transamazonian highway, BR-210, which runs through the territories of indigenous peoples; in the failure to create the Yanomami park for the protection of the cultural heritage of this indigenous group; in the authorization to exploit the wealth of the subsoil of indigenous territories; in allowing the massive penetration in the indigenous territory of newcomers who carry diseases . . . and in not ensuring the medical care essential for the persons affected and finally for proceeding to displace the Indians from their ancestral lands.¹⁴

In that decision, the commission declared that the government of Brazil was responsible for the violation of several rights, including the right to preservation of health and well-being, and it recommended that the government adopt preventive and curative health measures to protect the life and health of the indigenous peoples, and that pursuant to its legislation it should proceed to delimit and demarcate ancestral lands. In addition, the commission recommended that the government adopt various measures to protect the land against, among others, gold prospectors, known as *garimpeiros*, who had invaded the Yanomamis' territory by the thousands. The decision also underscores the responsibility of the Brazilian state for failing to adopt measures in a timely and effective manner to protect the human rights of the Yanomami. This means that states may incur responsibility not only for their acts but also for their omissions, when they fail to adopt protective measures.

Referring to this case, one author has noted:

On linking the violation of the human rights of the Yanomami directly to the violation of the right to land, the Commission took an important step towards the eventual recognition of the right of indigenous peoples to their traditional lands, as an intrinsic element of the international norms in place.¹⁵

Another important case that demonstrates the real possibilities of the Inter-American system is the petition against the Paraguayan government with respect to the grave situation of the Enxet indigenous communities in the Chaco region of Paraguay and the illegal occupation of their ancestral lands. This case was brought before the Inter-American Commission on Human Rights in December 1996 by the Center for Justice and International Law (CEJIL) and *Fundación Tierra Viva*. In the framework of a friendly settlement proposed by the commission, the Paraguayan government recognized the arguments presented and organized a plan for the recovery of these communities' lands, which included economic investment. The case alleged a violation of the indigenous communities' right to land recognized by the Paraguayan Constitution, drawing on article 29 of the American Convention on Human Rights, which establishes that when a right is incorporated in the domestic law, especially in the Constitution, it is possible to allege that right before the Inter-American system. It was thus possible to turn to the Inter-American system to argue a violation of the right to land recognized in a domestic legal

system.

National mechanisms

Each nation-state with an indigenous population has both administrative and judicial mechanisms for defending and protecting the rights of indigenous peoples. As regards judicial procedures, most of the constitutions in Latin America establish mechanisms for the effective protection of citizens' rights known as *acciones de amparo* or *acciones de tutela*. These remedies can be used by indigenous peoples to protect their specific rights.

One especially interesting example of the use of this mechanism is found in Colombia, where there is a constitutional court that takes cognizance of violations of rights recognized in the Constitution. The indigenous organizations of Colombia have turned to this court several times, bringing *acciones de tutela*, alleging the violation of their rights to the land and to cultural diversity within the Colombian nation. In several cases the constitutional court has issued opinions favorable to the constitutional protection of indigenous rights. In a 1993 decision which resulted from an *acción de tutela* brought by the *Organización Indígena de Colombia* on behalf of the Embera-Katío indigenous community against the *Corporación Nacional de Desarrollo* and the *Compañía de Maderas del Darién*, indigenous rights were recognized and protected. It was deemed that the omission by the *Corporación* and the acts of the *Compañía* violated and threatened the fundamental rights of the indigenous community. These included the rights to life, work, property, ethnic integrity—both cultural and territorial—the right to the special protection of the state as an ethnic group, as well as the rights set forth in international treaties on indigenous peoples, such as ILO Convention No. 169, ratified as domestic law. The acts had to do with logging in the indigenous territory by the company, and the omissions were those of the corporation in failing to adequately consider the environmental and cultural harm being caused. This judgment highlights the violation of ESC rights of the indigenous peoples:

The judge, in the exercise of the constitutional jurisdiction, finally established the violation of and threat to the rights to work, to integrity, to special protection as an ethnic group . . . since the devastation of part of the forests of the indigenous *resguardo*, in his view, made their working conditions more burdensome, injured their cultural and territorial identity, and seriously endangered their traditional mode of production.¹⁶

Author: The author of this module is Luis Jesús Bello.

USING MODULE 6 IN A TRAINING PROGRAM

NOTES

1. United Nations Development Programme, *Human Development Report 1997*, 43.

2. International Labour Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989, article 1.

- [3.](#) Edelberto Torres Rivas, *Consideraciones sobre la condición indígena en América Latina y los derechos humanos*, (San José: Inter-American Institute of Human Rights, 1996), 403.
- [4.](#) Jorge Dandler, “*Hacia un Orden Jurídico de Diversidad*,” in *De Amerindia hacia el tercer milenio*, Instituto Nacional Indigenista (UNESCO-INI, 1991), 59.
- [5.](#) *Agencia Latinoamericana de Información, Servicio Informativ*. No. 238 (August 1996), 14.
- [6.](#) Arundhati Roy, *The Cost of Living* (London: Flamingo, 1999), 15-16.
- [7.](#) Iturralde y Diego, “*Los pueblos indígenas y sus derechos en América Latina*,” *Revista Justicia y Paz, Centro de Derechos Humanos “Fray Francisco de Vitoria*,” no. 25 (May 1992), 21.
- [8.](#) See *Madhu Kishwar vs. State of Bihar* (1992) 1 Supreme Court Cases 102.
- [9.](#) See Nandita Haksar, “Human Rights Lawyering: A Feminist Perspective,” in *Engendering Law: Essays in Honour of Lotika Sarkar*, eds. Amita Khanda and Archana Parashar, (Lucknow: EBC, 1999).
- [10.](#) World Council of Indigenous Peoples, UN Draft Declaration on the Rights of Indigenous Peoples, (Ottawa, 1994, mimeographed).
- [11.](#) Daniel O’Donnell, *Protección internacional de los derechos humanos, Comisión Andina de Juristas-Fundación Friedrich Naumann*, 2nd ed. (Lima, 1989), 354-357.
- [12.](#) Taken from “Patent on Sacred Plant Revoked,” *Colombia Update* 11, nos. 3 and 4 (Winter/Spring 2000): 21.
- [13.](#) Shelton H. Davis, *Land Rights and Indigenous People: The Role of the Inter-American Commission on Human Rights* (Cambridge, 1988).
- [14.](#) Inter-American Commission on Human Rights, *Coulter et al.*, Resolution No. 12/85, Case 7615, Brazil, 5 March 5 1985, OAS/Ser.L/V/II.66, doc.10 rev 1, 1 October 1985, 4-34.
- [15.](#) O’Donnell, op. cit., 364.
- [16.](#) Ibid.

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