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THE ISSUE OF INDIGENOUS PEOPLES AT THE UNITED NATIONS: SELECTED PROBLEMS

Abstract

The paper is a critical analysis of the index of norms and mechanisms protecting the collective rights of indigenous peoples established at the United Nations. The norms and mechanisms for the rights of indigenous peoples have been studied from two viewpoints: firstly, through the prism of how the norm of ‘the right to self-determination’ is created and implemented within the framework of international cooperation; and secondly, as collective rights, which are both a form of implementation of the individual human right and its complement. The United Nations Declaration on the Rights of Indigenous Peoples has been analysed with the use of the legal and dogmatic method. The conclusion provides an assessment complemented by *de lege ferenda* postulates.

KEYWORDS

indigenous peoples, United Nations (UN), collective rights, right to self-determination, United Nations Declaration on the Rights of Indigenous Peoples

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ludy tubylcze, ONZ, prawa kolektywne, prawo do samostanowienia, Deklaracja praw ludów tubylczych

1. INTRODUCTION

The study is a critical analysis of the index of norms and mechanisms protecting the collective rights of indigenous peoples established at the United Nations. The norms and mechanisms protecting the rights of indigenous peoples are examined, on the one hand, through the prism of the way in which the norm of ‘the right to self-determination’ is created and implemented within the framework of international cooperation; on the other hand, as collective rights being a complement and a form of implementation of the individual human right. The fundamental normative accomplishment of the UN, i.e. the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is analysed with the use of the legal and dogmatic method. The conclusion provides an assessment complemented by *de lege ferenda* postulates.

It is a truism to state that human rights nowadays count as individual rights,¹ the axiological basis of which is the obligation to respect human dignity, originate from collective² and political rights³. Bearing in mind the historical roots of human rights in the indigenous peoples’ rights, the past intertwines with the present.⁴ The rights of indigenous peoples are, first of all, collective rights.⁵ The indigenous peoples’ rights co-create preliminary norms, which, through collective rights, comply

¹ It is not, however, an exclusive state. Both universal norms of international law (e.g.: Articles 1(2) and 55 of the Charter of the United Nations as well as Article 1(1) and (2) of the International Covenant on Civil and Political Rights) and many national systems (such regulations are included, for example, in the constitutions of Angola and South Africa) protect collective rights. See: <https://www.un.org/en/about-us/un-charter/full-text>; <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>; https://www.constituteproject.org/constitution/Angola_2010.pdf?lang=en; <https://www.gov.za/sites/default/files/images/a108-96.pdf> (accessed 20.07.2020).

² For instance, the Peace of Augsburg (1555) established the principle of *cuius regio eius religio*.

³ For instance, the 1689 Bill of Rights and the 1689 Claim of Right in the United Kingdom.

⁴ See: C. Bisaz, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, Leiden 2012, pp. 43–126.

⁵ It means that: (i) the right-holder is collective; (ii) the exercise of the right pertains to a legally protected collective good; (iii) the interest behind the right is of collective nature. See: *Group Rights*, Stanford Encyclopaedia of Philosophy, <https://plato.stanford.edu/entries/rights-group> (accessed 20.07.2020).

with the obligation to respect human dignity. The implementation of collective rights pertaining to indigenous peoples is positively correlated with the individual rights of these group members that are both related to belonging to the group (to indigenous peoples) and independent of it.⁶ The recognition of the collective rights and obligation to respect them neither constrains the individual human rights nor weakens them. The recognition of the collective rights is a derivative of the interpretation of human rights in line with the *pro homine* principle.

2. ANTECEDENTS

The second half of the twentieth century is a turning point in the process of building national awareness and aspirations, derived from this awareness, to have a national state. These aspirations were gradually satisfied, which does not mean that all nations have implemented the right to self-determination. However, even incomplete (in the subjective aspect) implementation of the nations' rights particularly reveals the discrimination of indigenous peoples as a social group. Individuals belonging to indigenous peoples have suffered due to the infringement of fundamental human rights and freedoms for decades; they have been deprived of the opportunity to take advantage of the rights that similar groups have enjoyed. The first step towards discovering the indigenous peoples' rights, compiling the list of those rights and their implementation was the noticing and recognition of the indigenous peoples' subjectivity. Although the issue of indigenous peoples was raised by the international community in the second half of the twentieth century, the limited effects of action taken are a failure of the international community and international institutions established to ensure equal treatment of individuals and social groups. At the same time, addressing this issue is an element of the third wave in the articulation of the right to self-determination and its implementation.

The right to self-determination was formulated for the first time in the Fourteen Points speech of President Woodrow Wilson given on 8 January 1918.⁷ The document recognized the rights of:

- the populations of colonial territories to equal consideration of their interests while determining the questions of sovereignty (point 5);
- free nations to enjoy the full sovereignty (point 7);
- the peoples of Austria-Hungary to autonomous development (point 10);

⁶ See A. H. Nuila, *Collective Rights in the United Nations Declaration on the Rights of Peasants and other People Working in Rural Areas*, FIAN International Briefing Note, March 2018, https://www.fian.org/fileadmin/media/publications_2018/Reports_and_guidelines/droits_collectifs_UK_web.pdf (accessed 20.07.2020).

⁷ https://avalon.law.yale.edu/20th_century/wilson14.asp (accessed 20.07.2020).

- nations of the Balkan states – Rumania, Serbia and Montenegro to statehood within historically and nationally established lines (point 11);
- the Turkish portion of the Ottoman Empire to statehood (point 12);
- nationalities under Turkish rule to autonomous development (point 12);
- Polish national groups to their state (point 13).

Nevertheless, it is difficult not to perceive the different treatment of social groups:

- the first one, nations (including ‘Polish national groups’), were granted the right to statehood;
- the rights of the second, national minorities, were limited to the right to autonomous development;
- however, with respect to the colonial populations, the decision was postponed.

It would be difficult to determine objective criteria for different treatment of the status of the indicated groups, which are also internally diverse. The depth and inhomogeneity of the stratification is visible on the example of the simultaneous recognition of ‘national groups’ and, consequently, their rights, but the rights are not identical when it comes to the content and scope. With reference to the Italian national group, the recognition of its existence implied the right to inhabit interdependently with the course of the border (point 9), while with reference to national groups inhabiting the territory of future Turkey, it resulted only in granting the right to autonomy (point 12). Nevertheless, this differentiation approved by the international community became a foundation of further legal and institutional solutions and gave rise to the League of Nations. However, the recognition of the status of national groups as temporary by the Covenant of the League of Nations constituted a significant difference. The Covenant acknowledged, as a principle, the right to statehood of peoples and nations, i.e. to independent governance, yet postponing its realization with regard to ‘peoples not yet able to stand by themselves under the strenuous conditions of the modern world’.⁸ Not disputing the right to and basis of the assessment of the peoples’ ‘ability’, one should point to the assumption that they were not ‘yet’ able and imposing the obligation to provide care on the nations that had such an ability.

The guardian mandatory was to guarantee the well-being and development of the peoples, and this responsibility was recognized as ‘a sacred trust of civilization’, which should be a result of the capacity to govern independently. The Covenant clearly distinguished the group of peoples associated with the indigenous population of Africa and South Pacific Islands.

⁸ Article 22 of the Covenant of the League of Nations, February 1920, https://libraryresources.unog.ch/ld.php?content_id=32971179 (accessed 20.07.2020).

This first stage of exercising the right to self-determination resulted in numerous social groups asserting the right and establishing, mainly in Europe, new states. However, not all groups took advantage of the right to self-determination in the interwar period.

Consequently, the same objective was set by the United Nations. States recognized the right to self-determination as one of the fundamental principles of the United Nations. This norm was stipulated under Article 1(2) of the UN Charter with regard to Article 55. As a consequence of recognizing this principle, the populations of the dependent territories were granted the institutional and legal instruments as well as guarantees to develop their national sovereignty or independence: the right to choose.⁹ The second stage of implementing this right took place in the decade of independence, in the 1960s, by the beneficiaries of the collapse of the colonial system; although it took the form disregarding the national structures, and often infringing the rights of some nations. In this period, the states in civilisation terms belonging to the group of transatlantic colonizers witnessed the eruption of moral shame and disgust with colonialism and related practices. The consequence was refusal to approve of colonialism in any form as these were social demands. Such demands were relatively quickly and easily satisfied by the colonial powers due to the combination of the following factors: (i) economic unprofitability of colonialism (it is not a coincidence that Portugal, where the 'market' did not have impact on the policy, defended colonies the longest); (ii) the necessity to take up the gauntlet in the Cold War with the Eastern bloc; (iii) political, economic and social modernization of the West, which was accompanied by the change of power elites where groups/persons identifying themselves with colonialism were removed from their positions of power.

Decolonization proceeded as part of '[r]ecognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence'.¹⁰ The UN General Assembly in the Declaration of the Granting of Independence to Colonial Countries and Peoples of 1960 recognized an inalienable right of all nations to complete freedom and 'the increasingly powerful trends towards freedom in such territories which have not yet attained independence'. At the same time, the document did not ensure or even rejected the possibility of any attempt at determining the peoples entitled to the right to independence in any other way than by solidifying the *uti possidetis* principle and creating a norm, according to which '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'

⁹ See the UN Charter, Articles 73 and 76.

¹⁰ Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations GA Resolution 1514 (XV), 14 December 1960.

As a consequence of the denied choice, the process and value of decolonization were soon confronted with the conflict of values noticeable in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.¹¹

On the one hand, the Declaration of 1970 regarded the equal right of the peoples to self-determination as absolute, rejecting the ‘subjection of peoples to alien subjugation, domination and exploitation’, and on the other hand, for the *uti possidetis* principle the ‘disruption of the national unity and territorial integrity of a State or a country’ was found to be in contradiction to the Charter of the United Nations (Preamble of the Declaration). Interpreting ‘the principle of equal rights and self-determination of peoples’, it was recognized *expressis verbis* that the only form of its realization was ‘a speedy end to colonialism’ and the right of peoples to the freely expressed will with regard to deciding about their own future was the way to realize the right to self-determination.

Obviously, while working on the Resolution, the community of states approved of ‘stability’ achieved by protecting the territorial integrity or political unity of sovereign states. Thus, gaining sovereignty of a certain territory meant formal exercise of the right to self-determination by ‘the whole people’; at the same time, it was disinheritance, *de iure*, i.e., depriving other/some of peoples inhabiting this territory of the right to self-determination. There was a shady deal made between the old world (partially colonial powers) recognizing stability and balance of power as the desired state and the new world – states established on the ruins of colonial systems. Independent states (emerging nation states among them) formed in the postcolonial territories and recognizing themselves as exclusively entitled to the right to self-determination did not agree to share the entitlement to self-determination with co-residents. In many cases, decolonization was for other peoples (among others indigenous peoples) another conquest and colonization, which took place with the approval of part of the world and silence of the other.

Thus, indigenous peoples did not exercise of the right to self-determination in its full subjective scope (they did not even exercise the right to autonomy), despite the fact that they were indicated as the subject of these rights. This was influenced by factors of various, but always non-legal, nature:

- the mandate system – one of whose objectives was to prepare indigenous peoples (who were not nations and did not form states) to govern independently – was abolished before it could fulfil the aim for which it was established;
- the mandate system, in fact, lacked political ability and determination to accomplish this task.

¹¹ United Nations GA Resolution A/RES/2625 (XXV), 24 October 1970.

3. INDIGENOUS PEOPLES AT THE UNITED NATIONS

However, in the 1980s, during the ‘long journey’ towards human rights, indigenous peoples were noticed again. In 1977, during a debate on the minority rights at the UN, the existence of indigenous peoples was acknowledged, and the issue of their rights was raised. The international community maintained this interest and the problem of indigenous peoples became a regular point in the international agenda on human rights.

The success of the proponents to regulate the status of indigenous peoples was the establishment of the Working Group on Indigenous Populations in 1982 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, currently the UN Sub-Commission on the Promotion and Protection of Human Rights. The works of the Group resulted in a draft, dated 20 April 1994, of the Declaration on the Rights of Indigenous Peoples, preceded by twelve-year works, which involved, among others, seeking opinions and suggestions of hundreds of indigenous groups, NGOs, IGOs and governments.

In 1995, the Commission on Human Rights established the open-ended inter-sessional Working Group on the draft Declaration. The balance of actions taken at the institutions and organs of the UN System comprises international instruments and mechanisms protecting the rights of indigenous peoples, such as: the UNDRIP, the establishment of the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the UN Special Rapporteur on the Rights of Indigenous Peoples (UNSR). Mixed feelings are expressed about the stage of ratification of the ILO Indigenous and Tribal Peoples Convention No. 169 amounting to 23 ratifications after thirty years of its adoption.¹² The American Declaration on the Rights of Indigenous Peoples of 2016 is also of particular significance.

The organizational separation of the Working Group on Indigenous Peoples from the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities cannot be underestimated. Its importance is due to:

- formal recognition of the subjectively different category of those subject to the regulation: those covered by the regulation;
- the issue of indigenous peoples raised at the UN as a result of the institutional separation;
- using the expression ‘peoples’ instead of ‘minorities’, which has consequences for the axiology of the regulation.

Special importance should be attached to the last factor; the change of the nomenclature referring to the category of *peoples* and not minorities. Consequently, *indigenous peoples* gain the status equivalent to ‘peoples’ being the sub-

¹² Ch. Swartz, *After 30 Years, only 23 Countries Have Ratified Indigenous and Tribal Peoples Convention ILO 169*, ‘Cultural Survival’, 5 June 2019.

ject of Article 1(2) of the Charter of the United Nations, para. 1 of the Declaration on Granting of Independence to Colonial Countries and Peoples of 1960, paras 1 and 3 of the Declaration on Principles of International Law of 1970, Article 1(1), (2) and (3) of the International Covenant on Civil and Political Rights, Article 1(1), (2) and (3) of the International Covenant on Economic, Social and Cultural Rights of 1966.

It is visible that indigenous peoples are treated as a specific community having rights originating from both the list of rights of an individual (individual rights) as well as rights of minority groups and their members (collective rights).¹³

The international community realized that, within it, there were social groups regularly marginalized, groups that did not exercise the rights which had been granted to other social groups because they were not eligible for them. The international community acknowledged that the contemporary norms allowed tolerating discrimination of indigenous peoples, not recognizing them as holders of rights regarded as 'inherent natural rights' of other social groups.

Nevertheless, the fact that the United Nations addressed this issue three decades ago is good news, since it means that it will not be endlessly ignored, and shame will no longer be brushed aside.

It should also be emphasized that the United Nations was not the only forum that raised the issue of indigenous peoples. An example can be the Inter-American Commission on Human Rights which considered the rights of indigenous peoples. The Commission elaborated on and presented to the General Assembly of the Organization of American States (OAS) a draft widely regulating the rights of indigenous peoples. It is a particularly interesting case due to the fact that potential holders of these rights inhabit the region of competence conferred on the Commission.

4. RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES IN THE UNDRIP

The rights of indigenous peoples have eventually been enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.¹⁴ After a period of intense and simultaneously polarizing discussions and debates regarding the content of the draft declaration developed in 1985 and subsequent years, its final

¹³ R. Falk, *The Rights of Peoples (in Particular Indigenous Peoples)*, (in:) J. Crawford (ed.), *The Rights of Peoples*, Oxford 1988, pp. 17–18.

¹⁴ See A. Badger, *Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples*, 'American University International Law Review' 2011, Vol. 26(2), pp. 485–514, <http://www.corteidh.or.cr/tablas/r29305.pdf> (accessed 21.07.2020).

text was agreed on and the UNDRIP was eventually adopted in 2007 by the UN General Assembly by a vote of 143 in favour to only 4 against (like the Universal Declaration of Human Rights, it was adopted by majority vote rather than a consensus). However, all the four countries (Australia,¹⁵ Canada, New Zealand and the USA) that voted against have, later, expressed their support for the Declaration.

The Declaration demonstrates the ability of the United Nations to accommodate the distinct status of indigenous peoples, providing a significant framework for the implementation of indigenous peoples' human rights and simultaneously a reference point for the states' accountability with regard to their specific obligations. The Declaration transparently and explicitly lays down the individual and collective rights of indigenous peoples¹⁶ all over the world as distinct peoples, striking an important balance between compliance with these rights and valid interests/concerns of state governments.

Although the significance of the entire Declaration for the indigenous peoples cannot be overestimated, there are a number of notable articles that deserve a special mention. Article 3 embraces the right to self-determination, and when read in the context of other relevant paragraphs, it maintains the necessary balance between exercising of this right by indigenous peoples and the international obligations of national governments. A significant aspect of the right to self-determination is definitely the issue of free, prior and informed consent included most specifically in Article 19, which secures the 'participatory' role of indigenous peoples in matters affecting them.¹⁷ The distinct rights of the indigenous peoples to their environment are affirmed in the articles addressing lands, territories and resources.¹⁸ The provisions of these articles refer to states' obligations to recognize and safeguard the indigenous land rights. The linkage between lands, territories and resources and human rights compliance, particularly the human right to development is embodied in the Article 23 of the Declaration.

¹⁵ In 2009, the Australian government officially endorsed the Declaration changing the official stance of the previous government and fulfilling a key election promise. The Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, expressed her support for the Declaration at Parliament House claiming that this move was a step forward to revise the relationship between Indigenous and non-Indigenous Australians. See J. Macklin, MP, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra, 3 April 2009, https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf (accessed 17.06.2020).

¹⁶ Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples, United Nations GA Resolution A/RES/61/295, 13 September 2007.

¹⁷ *State of the World's Indigenous Peoples*, Department of Economic and Social Affairs, United Nations, New York 2009, https://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf (accessed 17.06.2020), p. 198.

¹⁸ For example, Articles 10 and 25–29 of the UNDRIP.

The Declaration is, beside the OAS's *acquis* and the ILO Conventions, a relevant human rights instrument concerning specifically indigenous peoples, but it is also the first instrument formally recognizing the existence of indigenous peoples, their rights to their own identity, the right to self-determination, their cultures and heritage, and their rights as peoples, communities and collectives. Moreover, the Declaration provides the framework for newly modified relations between states (and other actors) and indigenous peoples and sets out guidelines (which were previously absent) on how to effectively respond to the needs and demands of indigenous peoples.

Overall, the Declaration, owing to the fact that its provisions are consistent with international law and, even more importantly, with the principles of the UN Charter, may play a significant and lasting role in the future relations between indigenous peoples and states as well as generally in international law.

5. NORMATIVE CONTENT OF THE UNDRIP – THE LEGAL STATUS OF INDIGENOUS PEOPLES

The rights recognized as the fundamental rights of indigenous peoples are:

- the right to their own different cultural identity;
- the right of access to international institutions;
- and, among others, the right to be the subject of the right to autonomy or self-determination.

As a consequence, the listing of specific rights has been formulated:

- Indigenous peoples have the right to self-determination, to freely determine their legal status and pursue their economic, social and cultural development.
- Indigenous peoples have the right to maintain and strengthen their political, social and cultural distinctiveness and own legal system, while retaining their right to participate fully, if they so choose, in the political, social, economic and cultural life of the state.
- States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination, promote tolerance, understanding and good relations among indigenous peoples and all groups of the society.
- Indigenous peoples, based on a free choice, have the right to fully participate in decision-making in all matters that could affect their rights, lives and future, through representatives chosen in accordance with their own procedures, as well as to maintain and develop their own local decision-making institutions.

- Indigenous peoples have the right to fully participate, on the basis of a free choice and in accordance with procedures established by them, in developing legislative or administrative measures that may affect them. Before adopting and implementing such measures, states shall obtain free, prior and informed consent of the peoples concerned.
- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with the lands, territories, waters and coastal seas and other resources they traditionally owned, occupied or used, and to uphold their responsibilities for their maintenance for future generations.
- Indigenous peoples have the right to own, use, develop and control the lands and territories together with the whole fauna and flora of the land, air and waters as well as other resources, which they traditionally used. This also comprises the full recognition of their rights, customs and traditions, the right to land tenure, and development of institutions and resource management, as well as the right to effective protection by the state and defence against interference, transfer of ownership or infringement of these rights.
- Indigenous peoples have the right to restitution of the lands, territories or resources they traditionally owned, occupied or used, which have been confiscated, occupied or used without their free, prior and informed consent. If the restitution is not possible, they have the right to fair and equitable compensation. Unless otherwise freely agreed upon, compensation shall take the form of lands, territories or resources equal in size and legal status.
- Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, together with the right to claim that the state obtains their free and informed consent prior to the approval of any projects affecting their lands, territories or resources, particularly mineral, water or other resources, in connection with their development, utilization or exploitation. On the basis of agreements with the peoples concerned, for any such activities, fair compensation shall be provided, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- Indigenous peoples, when exercising their right to determine their identity, have the right to autonomy and self-determination in matters concerning internal and local affairs, including culture, religion, education, information, health, accommodation, employment, social welfare, economic activity, management of land and resources, environment, entrance of other peoples across borders, as well as means and measures of financing these autonomous functions.
- Indigenous peoples have the collective right to determine their own citizenship in accordance with their own traditions and customs. The indigenous

citizenship does not exclude the right of particular persons to acquire citizenship of the state where they live. Indigenous peoples have the right to determine the composition and choice of members of their own institutions in accordance with their own procedures.

- Indigenous peoples have the collective right to determine the responsibilities of members of their own community.
- Indigenous peoples have the collective right to the recognition, observance and enforcement of treaties, agreements and other constructive agreements concluded by the state. Conflicts and disputes, which cannot be resolved otherwise, will be directed to the appropriate international bodies approved by all parties concerned.

6. IMPLEMENTATION OF THE UNDRIP AT THE NATIONAL LEVEL

The United Nations is mainstreaming the application of the Declaration on the Rights of Indigenous Peoples; in particular Article 41 stipulates that '[t]he organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance.' Moreover, Article 42 reads that '[t]he United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies (...) shall promote respect for and full application of the provisions of the Declaration and follow up the effectiveness of this Declaration.' In order to mainstream and integrate the issues of indigenous peoples into processes and programmes, in February 2008 the United Nations Development Group adopted the Guidelines on Indigenous Peoples' Issues.¹⁹ Moreover, numerous specialized agencies and other organizations of the United Nations have developed policies, programmes and/or guidelines on engagement with the issue of indigenous peoples within the UN system, such as:

- Food and Agriculture Organization of the United Nations (FAO) – Policy on Indigenous and Tribal Peoples (2010);
- International Fund for Agricultural Development (IFAD) – Policy on Engagement with Indigenous Peoples (2009, 2022);²⁰

¹⁹ *State of the World's Indigenous Peoples*, Department of Economic and Social Affairs, United Nations, 2009, *op. cit.*, p. 222.

²⁰ International Fund for Agricultural Development, IFAD Policy on Engagement with Indigenous Peoples, 2022, <https://www.ifad.org/en/-/document/ifad-policy-on-engagement-with-indigenous-peoples> (accessed 05.04.2023).

- UN-REDD Programme – Operational Guidance: Engagement of Indigenous Peoples and other Forest-Dependent Communities (2009) followed by Harmonized Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and other Forest-Dependent Communities (2012) and Guidelines on Free, Prior and Informed Consent (2013);
- UNEP and Indigenous Peoples: A Partnership in Caring for the Environment Policy Guidance (2012);
- UNDP – Guidance Note: UNDP Social and Environmental Standards – Standard 6: Indigenous Peoples (updated 2017);
- World Bank Operational Policy 4.10 – Indigenous Peoples (2005; revised 2013);
- World Bank Environmental and Social Framework including a specific environmental and social safeguard, ESS7, on Indigenous Peoples/ Sub-Saharan African Historically Underserved Traditional Local Communities (2017);²¹
- United Nations Educational, Scientific and Cultural Organization (UNESCO) – Policy on Engaging with Indigenous Peoples (2018).²²

Furthermore, the World Intellectual Property Organization (WIPO) is engaged in cultural protection of the ingenious peoples; negotiations have been conducted to secure an agreement on international legal instruments designed to protect traditional knowledge, traditional cultural expression, and genetic resources.²³ Last but not least, in 2014 the *Handbook for Parliamentarians* was published as the outcome of the collaboration between the United Nations Department for Economic and Social Affairs, the Office of the High Commissioner for Human Rights (OHCHR), IFAD, UNDP, and the Inter-Parliamentary Union (IPU). It is a practical document that facilitates the national governments' understanding of the issues related to the rights of indigenous peoples and provides guidelines on the implementation of the Declaration, defining the minimum standards for ensuring the survival of indigenous peoples and well-being around the world.

In the implementation of the rights of indigenous peoples, three indigenous mechanisms of the United Nations play a significant role: the Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights of Indigenous Peoples as well as the Expert Mechanism on the Rights of Indigenous Peoples. The aim of the Permanent Forum on Indigenous Issues, established in 2000, is to promote

²¹ <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf> (accessed 05.04.2023).

²² <https://unesdoc.unesco.org/ark:/48223/pf0000262748> (accessed 05.04.2023).

²³ For more information on the work of the WIPO Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore, see <https://www.wipo.int/tk/en/igc> (accessed 17.06.2020).

the implementation of the Declaration.²⁴ Whereas the task of the Special Rapporteur is to promote best practices, report on compliance with the human rights of indigenous people addressing possible areas of violations, and to conduct ‘thematic studies on topics of special importance’.²⁵ Finally, the Expert Mechanism, established in 2007, consisting of seven independent experts ‘disseminates and promotes good practices and lessons learned regarding the efforts to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples’.²⁶

The UNDRIP has obliged the UN treaty bodies to specifically consider, in their monitoring of human rights treaties, the current situation of indigenous peoples. For example, the Human Rights Committee has given careful consideration to ‘access to social services, representation in public offices, negative stereotypes, hate speech, domestic violence, police violence, disappearance, overrepresentation in prison and many other such issues as they relate to indigenous peoples’ and has also embraced the rights of indigenous peoples put in a wider context of human rights violations relating to human trafficking, birth registration, personal security, protection of activists.²⁷

Whereas the treaty bodies deal with civil, political, economic and cultural rights regarding indigenous peoples, in recent years, a special priority has been to persuade national governments to ensure: that companies respect the rights of indigenous peoples, even when acting outside the state;²⁸ the self-determination of indigenous peoples;²⁹ and the ‘review of indigenous institutions for compatibility with human rights norms’.³⁰

²⁴ Article 42 of the UNDRIP refers directly to this mechanism: ‘The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.’

²⁵ For more on the mandate of the Special Rapporteur, see <https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Mandate.aspx> (accessed 17.06.2020).

²⁶ For more on the mandate of the Expert Mechanism, see <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Reviewofthemandate.aspx> (accessed 17.06.2020).

²⁷ *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned, 2007–2017*, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/36/56, United Nations HRC 2017, para. 14.

²⁸ See: International Convention on the Elimination of All Forms of Racial Discrimination, Concluding observations on the combined twenty-first and twenty-second periodic reports of Norway, CERD/C/NOR/CO/21-22, United Nations 2015, para. 24; and *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie, A/HRC/17/31, United Nations HRC 2011.

²⁹ See International Covenant on Civil and Political Rights, Concluding observations on the seventh periodic report of Sweden, CCPR/C/SWE/CO/7, United Nations HRC 2016, para. 38.

³⁰ See International Covenant on Civil and Political Rights, Concluding observations on the sixth periodic report of Ecuador, CCPR/C/ECU/CO/6, United Nations HRC 2016, paras 37–38; *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned, 2007–2017*, UN HRC 2017, *op. cit.*, para. 17.

7. RECENT ACTION TO ENSURE THE RIGHTS OF INDIGENOUS PEOPLES AT THE UN

Although many indigenous peoples still remain unprotected and unrecognized, face forced assimilation, exclusion and systemic discrimination, and their culture and knowledge are in danger of becoming extinct, their long-lasting, tireless and courageous struggle for their rights has led to certain visible signs of progress.

In 2014, the UN General Assembly held a high-level plenary meeting, known as the World Conference on Indigenous Peoples, to draw attention and mobilize action towards the implementation of the rights of indigenous peoples. The outcome document of the Conference called for a UN system-wide action plan (SWAP)³¹ to ‘ensure a coherent approach to achieving the ends of the Declaration (...) raising awareness of the rights of indigenous peoples at the highest possible level and increasing the coherence of the activities of the system in this regard.’³²

The SWAP covers six action areas:³³

- raising awareness of the UNDRIP and indigenous issues;
- promoting the implementation of the UNDRIP, particularly at the country level;
- supporting the realization of the rights of indigenous peoples in the implementation and review of the 2030 Agenda for Sustainable Development;
- mapping of existing policies, standards, guidelines, activities, resources and capacities within the UN and multilateral system to identify opportunities and gaps;
- developing capacities of states, indigenous peoples, civil society and UN personnel at all levels;
- supporting the participation of indigenous peoples in processes that affect them.

The action plan builds upon the UN system’s work on the issues of indigenous peoples guided by five UN Common Programming Principles,³⁴ namely: the human rights-based approach; gender equality; environmental sustaina-

³¹ The action plan was developed by the Inter-Agency Support Group on Indigenous Issues (IASG) and finalized at the annual meeting of the IASG in 2015.

³² *Outcome Document of the High-Level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples*, United Nations GA Resolution A/RES/69/2, 2014, para. 31.

³³ *System-Wide Action Plan on the Rights of Indigenous Peoples*, United Nations, 26–27 October 2015, p. 5, https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/SWAP_Indigenous_Peoples_WEB.pdf (accessed 27.06.2020).

³⁴ UNDAF Companion Guidance: Programming Principles, United Nations Development Group, June 2017, <https://unsdg.un.org/sites/default/files/UNDG-UNDAF-Companion-Pieces-1-Programming-Principles.pdf> (accessed 17.06.2020).

bility; results-based management; and capacity development. Under a human rights-based approach to programming, plans of action, policies and processes of development are embedded in the system of rights and corresponding obligations established by international law, ensuring that human rights standards and principles, including equality and non-discrimination, participation and accountability,³⁵ guide all phases of the programming process.

Referring to the action plan, the above-mentioned principle of gender equality ensures that the diverse impact of policies and programmes on women and men is taken into account and that multiple forms of gender discrimination among indigenous peoples are properly addressed. The principle of environmental sustainability ensures that the activities set out by the action plan recognize the close link of environmental factors to the implementation of the rights of indigenous peoples, including the contribution of indigenous peoples' traditional knowledge to sustainable development.³⁶

Another substantial achievement in safeguarding the rights of indigenous peoples at the United Nations is the 2030 Agenda for Sustainable Development,³⁷ adopted by the UN Member States in 2015, which advances the empowerment of indigenous peoples, and calls for their full inclusion in the realization of the Sustainable Development Goals. The 2030 Agenda refers to indigenous peoples six times: three times in the political declaration, twice in the targets under Goal 2 on end to hunger (target 2.3) and Goal 4 on education (target 4.5), and one in the section on follow-up and review that calls for indigenous peoples' participation. Apart from the above-quoted direct references, numerous Sustainable Development Goals and associated targets are also relevant for indigenous peoples. Furthermore, the overall framework of the 2030 Agenda includes a number of items that advance the development concerns of indigenous peoples. It should be emphasized that human rights standards and principles are strongly reflected there.³⁸ Additionally, its focus on reducing inequalities is particularly relevant to the issue of indigenous peoples, who have inherently been in an unprivileged position in comparison to other population groups.

Whereas the primary responsibility of the 2030 Agenda lies at the national level, the High Level Political Forum (HLPF) – the main UN platform for supervising its follow-up and review³⁹ – has been established at the global level. It meets once a year under the auspices of the Economic and Social Council and

³⁵ *Ibid.*, p. 4.

³⁶ *System-Wide Action Plan on the Rights of Indigenous Peoples*, United Nations, 2015, *op. cit.*, p. 13.

³⁷ *Transforming our World: The 2030 Agenda for Sustainable Development*, United Nations GA Resolution A/RES/70/1, 25 September 2015.

³⁸ *Ibid.*, para. 10.

³⁹ Detailed decisions on the follow-up and review to the 2030 Agenda are reflected in the resolution on follow-up and review (*Follow-up and Review of the 2030 Agenda for Sustainable Development at the Global Level*, United Nations GA Resolution A/RES/70/299, 2016).

every fourth year under the auspices of the General Assembly with the participation of indigenous peoples to ensure that indigenous voices, priorities and concerns are taken into consideration.

8. BARRIERS TO IMPLEMENTATION

The axiological basis of the discussion is the recognition that the current legal status of indigenous peoples is highly unjust and inferior, and this opinion is, as it seems, commonly shared. Thus, a fundamental question should be raised: If the current state is considered bad, why are not efficient actions taken in order to change it? The answer to this question, essential for the considerations, is relatively simple. Indigenous peoples fall victim to the inability to reconcile responsibilities resulting from two opposite (?) values approved by the international community and adopted legal norms and instruments. There is a conflict between values and norms. Thus, we have to deal with a clash between:

- stability, as realized by the *uti possidetis* principle, and
- equality, i.e. the value derived from identifying justice with distributive justice and rejecting all actions whose consequence is, *a priori* unjust, inequality of rights.

Therefore, in this dispute, the prevailing value is not a ‘commonly’ promoted (and in fact voiced) superior value: equality and justice, but stability shamefully treated as ‘the lesser evil’. We face an unnamed axiological dispute over values; and even if the international community’s right to choose among the indicated values were recognized (though it is not obvious), this choice should be made clearly indicating which value is chosen to be realized and what price for this choice will be paid by those who, as a result of the choice of the value, will be prevented from exercising the rights that others have.

Therefore, one should explicitly articulate what is the repeated first world mantra: stability, the equivalent of which in the third world is the mantra of unchangeability of borders,⁴⁰ and how this corresponds to the values declared by the international community.

It is also impossible to accept stability (in the *uti possidetis* principle) recognized as the *sine qua non* condition for the lasting international peace and justice, considering the explicit, affirmed in treaties, will of states to establish this desired state based on various normative and axiological grounds.

The argument against the so understood stability with reference to indigenous peoples is the radical departure from principles and norms of equality with respect to this social group, which practically means rejection of equality as a value and

⁴⁰ It is, among others, the principle of the Charter of the Organization of African Unity.

treating it, at most, instrumentally. This is clearly a breach of the rules of equality, the observance of which is indispensable for the international order provided for in the principles of the Charter of the United Nations.

9. CONCLUSION

The first steps that aimed at developing regulations protecting the rights of indigenous peoples were taken at the UN in the second half of the twentieth century. These were followed by the adoption of the ILO Convention No. 107 (1957),⁴¹ initiated work on the United Nations GA Resolution on the UNDRIP and established (or broadened the competences of) the existing UN bodies and organs, which should have resulted in developing a complex set of instruments protecting the rights of indigenous peoples.⁴²

On the one hand, one can observe the effects of recognizing the challenge which was the systematic and systemic violation of the rights of indigenous peoples and persons belonging to them. In many states, norms and institutions protecting the rights of indigenous peoples have been established and attempts of coming to terms with the past have been made. The results of international cooperation are tangible.⁴³ On the other hand, the process has proceeded slowly, both considering justified expectations and similar action taken in order to protect collective rights. There are various reasons for such slowness and discovering them is beyond legal consideration; however, dramatic differences in the attitudes of particular states to the rights of indigenous peoples are easily noticeable. Nevertheless, a snowball effect can hopefully be expected for the process of developing and implementing norms protecting the rights of indigenous peoples, and it will not only accelerate but even start an avalanche.

⁴¹ It did not stop the works of the ILO on conventions protecting the rights of indigenous peoples, the next one being the Convention No. 169 of 1989. However, the ILO has taken an active interest in indigenous peoples since the beginning of the Organization's operations, and it undertook the work on protecting the rights of indigenous peoples as early as in the Convention No. 29 (1930). In doing so, the ILO dramatically departed from bad practices of the League of Nations manifested in refusal to provide a voice to the leaders of indigenous peoples (in 1923 and 1925), <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (accessed 21.07.2020).

⁴² Different institutions and bodies of the UN system participate in the work, see e.g. *Indigenous Peoples*, World Bank, <https://www.worldbank.org/en/topic/indigenouspeoples#2> (accessed 21.07.2020) or *Indigenous Peoples*, UNESCO, <https://en.unesco.org/indigenous-peoples> (accessed 21.07.2020).

⁴³ Besides IGOs, NGOs participate in it, see e.g. *Indigenous Peoples*, Amnesty International, <https://www.amnesty.org/en/what-we-do/indigenous-peoples> (accessed 21.07.2020).

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