

CONCLUSIONS AND RECOMMENDATIONS

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I. INTRODUCTION

Indigenous peoples are often described as the custodians of biodiversity; their unique cultures provide an insight into the world's history and heritage. Yet they are often faced with violence and aggression carried out under the guise of modernization, development, and progress. Many indigenous cultures are in danger of extinction, and, as described by UNESCO, the cultural resources of indigenous peoples are "a fragile treasure that is under threat from globalization."

Indigenous peoples face a common problem: the lack of recognition of their way of life, their cultures, and resource management systems as viable alternatives to sustainable development. Nationalism and assimilation are often endorsed as the only approach to a strong and viable state, whereas differences are perceived as threats that must be stamped out by any means, including force if necessary.

Culture is fundamental to indigenous peoples' survival as a distinct people, and is linked to their traditional modes of livelihood, which are land- and resource-based. The current onslaught of dispossession of indigenous lands and resources is wide-scale and the loss of their ancestral lands signals the end of not just their traditional way of life, but of their very existence as indigenous peoples. The case studies provide detailed accounts of this basic premise and argue for the continuation of indigenous culture as an essential prerequisite for peaceful reconstruction and equitable development.

The contributors – indigenous legal practitioners with extensive knowledge and experience in indigenous law – provide in-depth analyses of how indigenous peoples in different parts of the world retain their customs and traditions. They describe how indigenous peoples respond to the challenge of defending their culture and customary law when faced with globalization and industrialization. The case studies illustrate how creativity and persistence help to celebrate the vibrant integrity of indigenous peoples' culture, customs, and traditions while embracing the changing needs of indigenous societies. Each section provides an insight into key concepts to consider when seeking practical solutions that are inclusive rather than exclusionary.

The process from the first initialization of the concept through obtaining the financial and political support for the project, all the way to implementation, has been a rich and rewarding experience for the team and for the Saami Council. Study tours to learn from and experience firsthand how communities function in local settings have also been part of the process. The project helped us all better understand each other's culture and customs, to share our skills and setbacks, and to learn from these experiences how to better defend our cultural diversity.

II. PRESENTATION WORKSHOP

In January 2004, the Saami Council organized a workshop in Brussels for the team to discuss their findings and analyses with each other and with the European Commission. An interactive discussion facilitated deliberations on ways and means to learn from and build on this process, and to prioritize indigenous culture and customary law at the core of the development agenda.

During the workshop, a number of issues were discussed and recommendations were made on how to move the process forward. It is not possible to do full justice or to capture fully the enriching and stimulating debate. The following is a summary of the discourse, as well as key elements that serve as building blocks in the indigenous peoples' struggle to protect their customary law and practice.

A. Acknowledgement of Indigenous Peoples' Customary Law

There is a crucial need to recognize and acknowledge the legal systems of indigenous peoples. In many cases these legal systems are maps of society, and should be preserved as scientific, legal, and historical documentation.

- Constitutional recognition is an important building block in this process, and would provide the enabling framework for a legal regime that accommodated indigenous customary law and practice.
- Indigenous customary law should be given the legal and political space to survive and flourish. It should not be perceived as a threat to the national legal system, but rather given the space to coexist.

B. Development Cooperation

The main aim should be to place indigenous peoples' cultural rights and customary law at the center of development policies and programs.

- There should be regular consultations between donors, agencies, and indigenous peoples on development policies and programs.
- All development activities taking place on indigenous lands and territories should be implemented only in close cooperation and consultation with the concerned indigenous peoples.
- Development projects and programs should be culturally appropriate and sensitive to indigenous peoples' needs and

concerns.

- There should be direct interaction and cooperation between donor agencies and indigenous peoples, without intermediaries.

C. Collective Rights

There are differences in approach to individual and collective rights.

- The rights of indigenous individuals should not be perceived as a threat to national integrity, therefore making indigenous personal laws easier to accommodate.
- Situations differ and national legal regimes are not as receptive to those rights which are seen as more political or “hard law,” such as customary rights over land and natural resources.
- These rights are collective rights, and as such are more difficult to have acknowledged and recognized. Most indigenous peoples’ struggles are over collective rights and extend to international fora, such as the ongoing discussions at the United Nations (U.N.) on a declaration on the rights of indigenous peoples. However, there is a consensus on general principles, although there remain divergent views on precise wordings.
- U.N. treaty committees and other monitoring bodies have compiled a considerable body of international law that recognizes indigenous customary law, including land and natural resources. An example is the significant standard-setting work of the International Labor Organization (ILO) committee of experts in their work on supervising the implementation of ILO Convention No. 169 and the U.N. Human Rights Committee and the Committee on the Elimination of Racial Discrimination in this regard.
- Collective rights represent an issue that often emerges when indigenous peoples’ rights are under consideration, and should be discussed and resolved. It is of vital importance that the collective rights of indigenous peoples to their identity and culture and their right to self-determination are acknowledged.

D. Multi-culturalism

The current trend is toward a multi-cultural state – a direct response to the practical realities of the ethnically diverse populations of most, if not

all, modern states. It is a move away from aggressive nationalism, which nonetheless continues to direct policy and practice in some countries.

- This has to be viewed within the context of the discourse on the right to self-determination (often misinterpreted as the rhetoric of separation) and the terminology of sovereignty.
- The demand of indigenous peoples to a separate existence as distinct peoples, with their own customary law and practices, should not be confused with demands for secession.
- Indigenous peoples' demands for recognition as distinct peoples – legitimate expressions for equality and justice – should not be allowed to overshadow oppressive measures to prevent them from enjoying basic human rights and fundamental freedoms.
- The strength in diversity perspective and the right to be different should be given greater emphasis in constructing national identities in modern nation-states.

E. Juridical Pluralism

The issue of juridical pluralism and conflict of laws is an important element to consider in this process.

- In actual practice, in some countries there is some measure of juridical pluralism whereby indigenous familial laws (regarding marriage, divorce, child custody, etc.) are recognized.
- There may be some conflicts of law, as happens in any juridical regime. Efforts should be made to find solutions to conflicts problems.
- Caution must be exercised when applying different juridical regimes simultaneously. Based on practical experience, cases should be adjudicated using one legal system only. The "theory of coordination," which is applied in some countries in Latin America, does not really coordinate; rather, it subordinates indigenous law to the national jurisdiction.

F. Dynamic Nature of Indigenous Peoples' Culture, Customs, and Traditions

Indigenous culture and customary law is not static or time-bound. It is dynamic in nature and changes and adapts to circumstances and the situation of the indigenous society.

- This is apparent when considering the use and adaptation of modern innovations and technology in indigenous livelihoods and lifestyles. Examples include the use of mechanized tools for traditional agriculture, snow scooters to herd reindeer, and power engines in canoes and kayaks.
- It is important that the motivation and impetus to change come from within the society/peoples and are not external factors. However, in some situations outside influences can serve as catalysts for change.

G. Discrimination

Discrimination against indigenous peoples is a common occurrence and indigenous peoples often face it in their daily lives.

- There is a need for awareness-raising campaigns for the general public to learn about and respect indigenous peoples. The media and press have important roles to play in this process.
- Inclusion of indigenous peoples in educational curricula and training materials, which depict indigenous peoples accurately, rather than being based on folkloric versions, can also serve as a building block.
- Tolerance for different peoples and cultures, built on mutual respect, is essential to prevent discrimination and promote harmonious co-existence.
- Positive measures that give indigenous peoples the same access and opportunities as the rest of the population can serve to eliminate discrimination against indigenous peoples and reduce gaps in socioeconomic situations. This may include affirmative action programs, reservations of seats or quotas for political and educational institutions, etc.
- Indigenous women face double discrimination on the basis of both race and gender. Racially motivated violence against indigenous women is seldom reported or punished, although there are many cases from around the world of rape and other such crimes.

H. Gender

Most indigenous communities are male-dominated, and indigenous women often must struggle against discrimination both within and outside of the community.

- This is of particular relevance in terms of marriage, custody, and inheritance, which have traditionally been male-oriented, with the exception of matriarchal and matrilineal societies.
- Many indigenous peoples are in the process of adopting more gender-sensitive rules and regulations in the fields of marriage, divorce, child custody, and inheritance laws, so as to bring them into greater conformity with principles of equality and nondiscrimination.
- In some ways, indigenous communities are more progressive than their national counterparts in terms of women's rights. This is especially so in societies which are matrilineal/matriarchal and female-oriented.

I. Codification

In most cases, indigenous peoples' customary law was not codified, although there were some exceptions (e.g., Greenland). This has both advantages and disadvantages.

- Putting indigenous customary law into legal codes facilitated its use in courts and tribunals, which in turn ensured its continuation.
- Codification makes indigenous customary law more accessible to legal practitioners, students, researchers, and others, and could increase awareness of customary law.
- The disadvantage is that codification slows down amendments and response to the changing needs of the society.
- Codification should be decided by the indigenous peoples, depending on the merits of their specific situation. However, this publication was a first step in this process.

J. Rights to Land and Natural Resources

Land rights are crucial to indigenous peoples' survival. Their cultures and identity are land- and resource-based and the loss of their lands and territories accelerates their extinction as distinct peoples.

- The lack of recognition and acknowledgement of indigenous peoples' rights over their ancestral lands and territories is the foundation of most indigenous peoples' struggle to retain their identity and culture.
- This is a common problem for most, if not all, indigenous

peoples regardless of where they may live. The case studies all address this issue.

There is limited recognition of land and resource rights in some countries. However, states are reluctant to acknowledge indigenous land rights and often resort to political and legal maneuvers to designate indigenous peoples' lands and territories as belonging to the state.

This is a major area of conflict between indigenous peoples and states, and it is linked to the question of self-determination and collective rights. Many states continue to address this issue from the perspective of traditional decolonization, which is applicable in some countries, but does not hold true when considering current geopolitics and shifting boundaries. Indigenous peoples see this from a rights-based approach and take the view that they have owned, used, and managed their ancestral lands for centuries. Thus, to not recognize these lands as theirs is discriminatory and biased.

The issue of environmental degradation and indiscriminate exploitation of natural resources by commercial enterprises (including multinational companies with concessions and licenses granted by the state authorities, without the consent of or consultation with the indigenous peoples concerned) aggravates the erosion of indigenous land and resource rights.

Another major concern is the constraints placed on indigenous peoples in accessing their lands and territories by designating them as state forests and national parks. The result is to further impoverish and marginalize indigenous peoples, and in many cases, to effectively criminalize their traditional subsistence activities.

K. Tourism

The use of indigenous peoples' culture and customs as tourist attractions is a common occurrence in many countries.

- The depiction of indigenous peoples in this respect is generally derogatory and folkloric.
- There are intellectual property right implications when the symbols and emblems of indigenous peoples are used for commercial purposes, especially when they are franchised or trademarked without the knowledge or consent of the peoples concerned.
- This type of tourism is often encouraged and endorsed by governments in order to generate foreign currency. However, the benefits seldom trickle down to the indigenous communities.
- Such tourism practice should be prohibited. Culturally sensitive

ecotourism, where indigenous peoples are partners and not objects, should be promoted as an alternative model.

L. Compendium of Indigenous Customary Law

This publication was a first step toward compiling indigenous customary law in a systematic manner, with the participation of indigenous peoples themselves.

- It is important that this first step is built upon and developed further. A continuation of this process is essential.
- This publication highlights the need to focus on legal aspects and not just social and anthropological aspects, as was done in the past.
- A compendium of indigenous customary law will help increase awareness of the issue and enable others to learn from and share their experiences.

M. Short-Term Recommendations

These include the following:

- To disseminate the publication as widely as possible.
- To publicize its use as an advocacy tool.
- To encourage its use as an educational source book.
- To endorse its use in human rights training for and about indigenous peoples.
- To build on and share this experience.
- For the donors to engage in regular consultations with indigenous peoples on the implementation of development policies and projects.
- For the Saami Council and the donors to continue the process and to build on the valuable experience gained.

III. CONCLUSION

This project has helped bridge a gap and provides insight into customary law from the perspective of indigenous peoples themselves. The fact that the team is composed of indigenous lawyers who work actively to

promote and protect indigenous rights has given an added value to the outcome of the project. It has provided an interactive platform for discussion on the issue and is the beginning of a process, not an end.

It is hoped this will help to dispel some myths surrounding indigenous customary law and practices, that it will thereby create greater understanding and acceptance of the issue, and by doing so, inspire and encourage more work in this field.



