

## **Briefing Note**

### **Protected Areas and Indigenous Peoples' Rights: 'Applicable International Legal Obligations'**

In Decision VII/28, the 7<sup>th</sup> Conference of Parties ("COP") to the Convention on Biological Diversity ("CBD") decided that "the establishment, management and monitoring of protected areas should take place with the full and effective participation, and the full respect for the rights of, indigenous and local communities consistent with domestic law and applicable international obligations." This decision is legally binding on state parties to the CBD because it is an authoritative interpretation of the CBD itself. There is also a Programme of Work ("PoW") annexed to Decision VII/28 that sets out goals and actions for the parties to pursue.

Decision VII/28 unambiguously holds that states parties to the CBD must fully respect indigenous peoples' rights as set forth in domestic laws and applicable international legal obligations in relation to the establishment, management and monitoring of protected areas. **What are these applicable obligations, where can they be found and what do they require?** This short briefing note aims to provide some guidance on this question to indigenous peoples participating in CBD or other relevant international processes as well as those who are concerned about these issues at the local and national levels.

**What are 'applicable international obligations' and where can they be found?** In short, these are the obligations contained in international law that apply or pertain to the state parties to the CBD. For our purposes, sources of applicable obligation in international law include international instruments (treaties and, in some cases, declarations) and customary international law. Therefore, the primary reference points for determining which international obligations apply to the various parties to the CBD are: international treaties that are in force for each state party; declarations of intergovernmental organisations, such as the United Nations, to the extent that these declarations restate existing international law; and customary international law. Consequently, there may be different applicable international obligations for each state party depending on which treaties are in force for each state. For example, while states throughout the world may be party to United Nations human rights treaties, only African states may be parties to the African Charter of Human and Peoples' Rights and only states in the Americas can be party to the American Convention on Human Rights, both of which are regional international instruments.

**Is the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) a source of applicable international obligation?** The short answer is yes, to the extent that UNDRIP restates existing international law. UNDRIP restates existing law because it repeats what binding human rights treaties require or because it or parts of it reflect existing customary international law. While some states will certainly reject such interpretations, particularly the argument that UNDRIP represents customary international law, it is clear that large parts of the UNDRIP do restate existing international law. The right to self-determination, for instance, is affirmed in Article 1 of the International Human Rights Covenants and in almost identical language in Article 3 of the UNDRIP. Article 3 thus can be said to simply restate the binding obligations inherent in the right to self-determination as set forth elsewhere, obligations that are no less binding because they happen to also be affirmed in a declaration. Also, a cursory overview of existing international human rights law pertaining to indigenous peoples' rights to lands, territories and resources strongly indicates that UNDRIP's provisions on the same (Articles 25-32) are largely consistent with and restate existing state obligations. The same can be said about other provisions of UNDRIP.

**What are the most important 'applicable international obligations' in relation to protected areas?**

The **right to self-determination** affirms the right of all peoples to freely determine their economic, social and cultural development through their own institutions and the right to freely dispose of their natural wealth and resources. In no case, may a people be deprived of its means of subsistence. It also recognizes that indigenous peoples may exercise substantial control over internal affairs as well as the right to consent to external activities that may affect their rights. In general, 'consent' and 'control' are benchmarks against which all activities, including the establishment and management of protected areas, can and should be measured. For instance, to what extent are indigenous peoples effectively participating in and consenting to decision-making about protected areas where such areas are proposed in their territories and to what extent can indigenous peoples, assuming that they have not agreed otherwise, control the process of managing and monitoring such protected areas, and are they equitably sharing in any benefits? May indigenous peoples seek acknowledgment at the national level of their own forms of protected areas?

**Lands, Territories and Resources and FPIC:** Protected areas frequently encompass lands and territories traditionally owned by indigenous peoples and this includes marine and coastal areas. To be consistent with human rights norms, a series of substantive and procedural requirements must be satisfied if a protected area is to be established by the State within an indigenous territory. In the first place, indigenous peoples' rights to lands, territories and resources arise from their customary laws and tenure systems and are not dependent on national laws for their existence. This rule must be correctly applied to determine if a protected area in fact is within or affects a territory that is traditionally owned by indigenous peoples, including marine and coastal areas. Once it has been determined that the protected area does affect the territory, the State is required to ensure indigenous peoples effective participation and obtain their peoples free, prior and informed consent in relation to the establishment and management of the protected area and equitable benefit sharing mechanisms. Due consideration should also be given during initial discussions to whether an indigenous-owned protected area is an appropriate option.

It is important to note that Article 10(c) of the CBD provides that state parties shall "protect and encourage [indigenous peoples'] customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements." Because of the inextricable links between customary resource use and other relationships with land, Article 10(c) should be interpreted to include protection for rights to lands and resources and to require recognition and protection of indigenous institutions and customary laws relating to ownership, use and management of biological resources. The Secretariat of the CBD has reached the same conclusion as have indigenous peoples in their own research on the measures needed to implement and give effect to Article 10(c). Conducted in five countries around the world, this research demonstrates that secure land tenure rights and control over traditional territory and resources are critical elements of the sound conservation, use and management of biological diversity. The studies also show that indigenous peoples' institutions and customary laws are fundamentally connected to biodiversity and ecosystem protection and management.

**Involuntary Resettlement:** Due to the importance attached to indigenous peoples' cultural, spiritual and economic relationships to land and resources, international law treats resettlement or relocation as a serious human rights concern. In international instruments and jurisprudence, indigenous peoples' free and informed consent must be obtained and resettlement may only be considered as an exceptional measure in extreme and extraordinary cases. In this light, it is difficult to see how non-consensual physical resettlement can be permissible in relation to protected areas. This is to a certain extent reflected in the (non-binding) PoW annexed to Decision VII/28 which specifies that "any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations." It is unclear, however, whether the PoW also applies to non-physical resettlement that applies when indigenous peoples are restricted from using certain zones of protected areas or traditional or other resources located therein.

**Restitution:** Is there a right to restitution in cases where indigenous peoples' lands and territories have been incorporated into protected areas without their effective participation and consent? Yes, both as a function of indigenous peoples' internationally protected cultural and property rights and as a general remedial measure for rights violations. The UN Committee on the Elimination of Racial Discrimination has recognized that indigenous peoples have a right to restitution of their traditional territories and resources that in principle also applies to nature reserves. The UN Human Rights Committee has also addressed this issue, explaining in July 2000 that Article 27 of the International Covenant on Civil and Political Rights requires that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ..." and; "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27..."

Although it has not yet addressed the issue of protected areas, the Inter-American Court of Human Rights has developed detailed jurisprudence on indigenous peoples' right to restitution. In the 2006 *Sawhoyamaxa Indigenous Community Case*, the Court explained that its jurisprudence holds that indigenous peoples maintain their property rights even where they have been forced to leave or have otherwise lost possession of their traditional lands, including where their lands have been expropriated or transferred to third parties, unless this was done in good faith and consensually. According to the Court, "This means that title is not a pre-requisite that conditions the existence of the right to restitution of indigenous lands."

The Court also examined the temporal scope of indigenous peoples' right to restitution in *Sawhoyamaxa*. Observing that "the spiritual and material base of the identity of indigenous communities is sustained primarily through their unique relationship with their traditional territory," it held that the right to restitution continues as long as indigenous peoples maintain some degree of spiritual and material connection with their traditional territory. Evidence of the requisite connection may be found in "traditional spiritual or ceremonial use or presence; settlement or sporadic cultivation; seasonal or nomadic hunting, fishing or harvesting; use of natural resources in accordance with customary practices; or any other factor characteristic of the culture of the group." The Court further held that if indigenous peoples are

prevented by others from maintaining their traditional relationships with their territories, the right to recovery nonetheless continues “until such impediments disappear.”

The preceding issues are not new to the conservation community. Indigenous peoples’ rights and the right to restitution of lands incorporated in protected areas were extensively discussed at the 2003 World Parks Congress and the *Durban Accord: Action Plan* adopted at that meeting acknowledges that there is “an urgent need to re-evaluate the wisdom and effectiveness of policies affecting indigenous peoples and local communities.” Its ‘key targets’ include full respect for the rights of indigenous peoples in relation to all existing and future protected areas; the incorporation of freely chosen indigenous representatives in protected areas management boards; and, by 2010, the establishment of “participatory mechanisms for the restitution of indigenous peoples’ traditional lands and territories that were incorporated in protected areas without their free and informed consent...”

**Conclusion:** This short briefing note has explained some of the more important rights (or potentially applicable international obligations) that pertain to the establishment and management of protected areas as they affect indigenous peoples. It is not a comprehensive treatment of this issue and many more rights could be mentioned, particularly in relation to management regimes in protected areas. It has been developed in this form partly to assist further strategic discussion by the indigenous caucus engaged with the CBD working group on protected areas, and further elaboration is possible once key strategic decisions have been taken.

Decision VII/28 Protected Areas, at para. 22. See, also, Decision VII/28, Annex, Programme of Work on Protected Areas, Goal 2.2 . In: *Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting*. UNEP/BDP/COP/7/21, pps. 343-64. Available at: HYPERLINK "<http://www.cbd.int/decisions/?dec=VII/28>" <http://www.cbd.int/decisions/?dec=VII/28>

Article 38(1) of the Statute of the International Court of Justice.

Customary international law is defined in Article 38(1)(b) of the Statute of the International Court of Justice as “evidence of a general practice accepted by law.” It is comprised of binding norms of law that have developed over time on the basis of widespread and consistent state practice where such practice is followed out of a belief of legal obligation. See, more generally, A. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. of Int’l Law 757 (2001). Available at: HYPERLINK "<http://www.asil.org/ajil/roberts.pdf>" <http://www.asil.org/ajil/roberts.pdf>.

Some states will argue that there is insufficient evidence of widespread and consistent state practice as well as a lack of evidence that states are acting under a belief of legal obligation that could convert the non-binding and aspirational statements contained in UNDRIP into, or otherwise be said to reflect existing, customary international law, at least not at this point in time. For arguments to the contrary, see, S.J. Anaya & S. Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, *Jurist Legal News and Research*, October 2007. Available at: HYPERLINK "<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>" <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>. See, also, R. Davis, *A Summary of the UN Declaration on the Rights of Indigenous Peoples*, University of Technology Sydney, September 2007. Available at: HYPERLINK "[http://www.jumbunna.uts.edu.au/research/pdf/JIHLBP8\\_11\\_07.pdf](http://www.jumbunna.uts.edu.au/research/pdf/JIHLBP8_11_07.pdf)" [http://www.jumbunna.uts.edu.au/research/pdf/JIHLBP8\\_11\\_07.pdf](http://www.jumbunna.uts.edu.au/research/pdf/JIHLBP8_11_07.pdf)

See, also, Inter-Am. Court of Human Rights, *Saramaka People v. Suriname*. Judgment of 28 November 2007. Series C No. 172, para. 93. Available at: HYPERLINK "[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)" [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf) (affirming that the right to self-determination is held by indigenous and tribal peoples and that interpretations of the right to property recognised in the American Convention cannot restrict the exercise of that right).

See, for instance, the consistent jurisprudence of the Committee on the Elimination of Racial Discrimination pursuant to Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination and the Human Rights Committee pursuant to Articles 1, 26 and 27 of the International Covenant on Civil and Political Rights. At the regional level, see, the consistent jurisprudence of the Inter-American Commission on and Court of Human Rights upholding indigenous peoples’ property and other rights, including the right to consent to activities that may affect their rights, the views of the African Commission on Human and Peoples’ Rights and the opinions of the Advisory Committee on the European Framework Convention for the Protection of National Minorities. This jurisprudence is discussed at length in S.J. Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2<sup>nd</sup> Ed.), Oxford/New York: Oxford University Press 2004; P. Thornberry, *INDIGENOUS PEOPLES AND HUMAN RIGHTS*, Manchester: Manchester University Press 2002; and J. Gilbert, *INDIGENOUS PEOPLES’ LAND RIGHTS UNDER INTERNATIONAL LAW. FROM VICTIMS TO ACTORS*, Transnational Pubs./New York 2006.

See, *Indigenous Peoples and United Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence 1993-2004*. Available at: HYPERLINK "[http://www.forestpeoples.org/documents/law\\_hr/un\\_jurisprudence\\_comp\\_sept05\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_sept05_eng.pdf)" [http://www.forestpeoples.org/documents/law\\_hr/un\\_jurisprudence\\_comp\\_sept05\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_sept05_eng.pdf) and; *Indigenous Peoples and United*

*Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence 2005-2006*. Available at: HYPERLINK "[http://www.forestpeoples.org/documents/law\\_hr/un\\_jurisprudence\\_comp\\_vol2\\_06\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_vol2_06_eng.pdf)" [http://www.forestpeoples.org/documents/law\\_hr/un\\_jurisprudence\\_comp\\_vol2\\_06\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_vol2_06_eng.pdf).

See, *inter alia*, Inter-Am. Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No 79, at para. 151; and *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 5 (calling on state parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources...”).

*Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana*. 23/08/2002. UN Doc. A/57/18, paras.292-314, at 304; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka*. 14/09/2001. UN Doc. A/56/18, paras.321-342, at 335; *Concluding Observations of the Human Rights Committee: Canada*. UN Doc. FILLIN "Symbol" \\* MERGEFORMAT CCPR/C/CAN/CO/5, FILLIN "Date" \\* MERGEFORMAT 20 April 2006, at para. 22 (“stress[ing] the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them...”); Inter-Am. Court of Human Rights, *Saramaka People v. Suriname*. Judgment of 28 November 2007. Series C No. 172, para. 134-37; Inter-Am. Com. Human Rights, *Report No. 40/04, Maya Indigenous Communities of the Toledo District*, Case 12.053 (Belize), 12 October 2004, para. 142.

This is acknowledged in the *Adis Ababa Principles and Guidelines on Sustainable Use of Biodiversity*, adopted in 2004 by the VIIIth Conference of Parties to the CBD, especially in Principles 1 and 2. Principle 2 provides that “sustainability is generally enhanced if Governments recognize and respect the ‘rights’ or ‘stewardship’ authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities...” The first principle of the ‘Ecosystem Approach’, adopted by the COP in Decision V/6 and considered to be one of the main tools for the implementation of the Convention, states that “Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other local communities living on the land are important stakeholders and their rights and interests should be recognized. ...”

*Traditional Knowledge and Biological Diversity*, UNEP/CBD/TKBD/1/2, 18 October 1997 (stating that “In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government”).

The results of these studies are summarized in M. Colchester, *Forest Peoples, Customary Use and State Forests: the case for reform*. Draft paper presented to the 11th Biennial Congress of the International Association for the Study of Common Property (IASCP) Bali, Indonesia, 19-23 June 2006. Available at: HYPERLINK "[http://www.forestpeoples.org/documents/conservation/10c\\_overview\\_iascp\\_jun06\\_eng.pdf](http://www.forestpeoples.org/documents/conservation/10c_overview_iascp_jun06_eng.pdf)" [http://www.forestpeoples.org/documents/conservation/10c\\_overview\\_iascp\\_jun06\\_eng.pdf](http://www.forestpeoples.org/documents/conservation/10c_overview_iascp_jun06_eng.pdf).

UNDRIP, art. 10; ILO 169, art. 16; Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII; Concluding observations of the Human Rights Committee: Chile*. 30/03/99. CCPR/C/79/Add.104. (*Concluding Observations/Comments*) CCPR/C/79/Add.104, 30 March 1999, at para. 22; Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The Right to Adequate Housing (Art. 11(1) of the Covenant)*, 1991; Inter-Am. Com. Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, 1984, p.120 (stating that “[t]he preponderant doctrine” holds that the principle of consent is of general application to cases involving relocation of indigenous peoples”) and; Inter-Am. Court of Human Rights, *Moiwana Village v. Suriname*. Judgment of 15 June 2005. Series C No. 124, para. 111.

Decision VII/28, Annex, Programme of Work on Protected Areas, para. 2.2.5.

Writing as the UN Special Rapporteur on the right to restitution, compensation and rehabilitation, Theo van Boven explains that, “Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property.” *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/1993/8, at p. 57.

See, generally, F. MacKay, *Indigenous Peoples and the Right to Restitution: Implications of Inter-American Human Rights Jurisprudence for Conservation Practice*, 15 *IUCN Journal of Conservation Matters* 209-22, 2007. Available at: HYPERLINK "<http://www.iucn.org/themes/ceesp/Publications/newsletter/PM15.pdf>" <http://www.iucn.org/themes/ceesp/Publications/newsletter/PM15.pdf>. See, also, UNDRIP, Article 28 (stating that “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the

lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”); and, using similar language, *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 5.

*Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala, 15/05/06*. UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 17 (stating, in language that is broadly consistent with UNDRIP, that “where [indigenous peoples] have been deprived of their lands and territories traditionally owned, or such lands and territories have been otherwise used without their free and informed consent, the Committee recommends that the State party take steps to return those lands and territories”).

*Concluding observations of the Human Rights Committee: Australia 28/07/2000*. UN Doc. CCPR/CO/69/AUS, at paras. 10 and 11.

*Sawhoyamaxa Indigenous Community v. Paraguay*. Judgment of 29 March 2006. Series C No. 146, at para. 128. See, also, *Yakye Axa Indigenous Community v. Paraguay*. Judgment of 17 June 2005. Series C No. 125; and *Moiwana Village v. Suriname*. Judgment of 15 June 2005. Series C No. 124.

*Id.*

*Id.* at para. 131.

*Id.*

*Id.* at 132.

*Durban Accord: Action Plan*, adopted at the Vth IUCN World Parks Congress, Durban South Africa (2003), at p. 25.

*Id.* at p. 26.

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