

## CHAPTER 2

### CIVIL AND ECONOMIC RIGHTS OF TRIBALS: THE INTERNATIONAL PERSPECTIVE

#### An Overview

The majority of world community has respected the rights of indigenous and tribals but at a very later stage. The first instance of such effective effort was shown in the representation of indigenous voice in the League of Nations in the year 1923 by Chief Deskaheh of the Cayuga Nation. However such voice was not recognized as it should have done. But this led the indigenous communities to follow the vision of this great activist and succeeded in carrying on the indigenous movement in the world stage in the years to come.

The first significant step towards the protection of the tribal and indigenous people from atrocities and to provide certain rights was the adoption by the General Assembly of the United Nations (UN) the International Labour Organization (ILO) Convention 107.<sup>1</sup> This convention was ratified by India.

It shall be relevant to mention in this regard that the ILO may be considered to be the only organ of the United Nations who has contributed to the highest extent for the protection of the rights of the indigenous and tribal peoples since its inception in the year 1919 as a part of the then League of Nations. It was through the ILO that the discriminatory labour practice has been addressed amongst the independent states relating to indigenous peoples. A significant research work led to the ILO Convention 29<sup>2</sup> which came up in 1930 on labour practice. This is because of the considerable number of labourers being the members of the indigenous communities across the world. A research work took place by the ILO thereafter on indigenous people and a comprehensive report was drafted in 1953 entitled “Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries”<sup>3</sup>. Then comes the ILO Convention 107 with the

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<sup>1</sup> C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)

Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959) Adoption: Geneva, 40th ILC session (26 Jun 1957) - Status: Outdated instrument (Technical Convention).

<sup>2</sup> C029 - Forced Labour Convention, 1930 (No. 29)

*Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932) Adoption: Geneva, 14th ILC session (28 Jun 1930) - Status: Up-to-date instrument (Fundamental Convention).*

<sup>3</sup> Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries, available at,

assimilationist approach with the objective to bring them (the indigenous and tribal peoples) with the larger community of the society with respectable right of self reservation of land resources etc of the indigenous and tribal peoples. However with the passage of time this approach was seen to be of an embarrassment to the UN prompting them to reconsider the ILO 107 to formulate a more updated and comprehensive Convention which led to the development of ILO 169<sup>4</sup>.

In the decade of 1970-1980 there has been significant development in the position of indigenous people because of the groundbreaking study of the United Nations Special Rapporteur Jose Martinez Cobo. He provided crucial information on the state of these communities across the world to the United Nations.

In the year 1982 the Working Group on Indigenous populations is formed. This is perhaps the most significant step so far taken by the world community for the protection of *inter alia* civil and economic rights of these communities. The work of this group was to develop international standards on indigenous people's rights.

As stated in the going discussion, there has been long standing criticism on the ILO Convention no. 107 as being assimilationist. There was a need for the necessary changes to the said convention and this led to the undated Convention Concerning Indigenous and Tribal Peoples in Independent Countries commonly known as ILO Convention 169 in the year 1989.

In the year 1993 the United Nations declared the year as the "International Year of the World's Indigenous People". This was done bearing in mind that one of the purposes of the United Nations, as set forth in the Charter, is the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language or religion.<sup>5</sup> The primary purpose of making this as the "International year of the World's Indigenous People" is to strengthen the international cooperation for the solution of various problems faced by indigenous communities in areas such as human rights, environment,

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<http://www.worldcat.org/title/indigenous-peoples-living-and-working-conditions-of-aboriginal-populations-in-independent-countries/oclc/869643>, (Accessed on December 4, 2015).

<sup>4</sup> Convention No. 169

Convention No.169 is a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal peoples. Today, it has been ratified by 20 countries. Once it ratifies the Convention, a country has one year to align legislation, policies and programmes to the Convention before it becomes legally binding. Countries that have ratified the Convention are subject to supervision with regards to its implementation. (<http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>) (Accessed on December 4, 2015)

<sup>5</sup> UN General Assembly, 85th Plenary Meeting; A/Res/47/75; 14th December 1992

development, education and health.<sup>6</sup> Recognizing the value and the diversity of the cultures and the forms of social organization of the world's indigenous people is also one of the primary objectives of this declaration. One of the primary objective of this declaration was to give recognition to the values and the cultural diversity of the indigenous peoples. It was also worth mentioning that the objectives also included the respect of the diversified forms of social organisation of these peoples.

On the decision of the United Nations General Assembly, the world celebrates 9<sup>th</sup> August every year as the International Day of the World's Indigenous People. The date marks the day of the first meeting, in 1982, of the UN Working Group on Indigenous Populations of the Sub commission on the Promotion and Protection of Human Rights.<sup>7</sup>

It must be stated in this regard that the indigenous movement was successful to secure their cultural integrity and status through this development and was in the right direction to meet the challenges to come in the twenty-first century. This achieved the much desired objective of initiating a new relationship based on mutual understanding between the States on one hand and the indigenous peoples on the other.<sup>8</sup>

A voluntary fund was created by the UN Secretary General. This fund was to be used for various educational and cultural events. Every member states were invited to contribute fund in this regard in furtherance of the celebrations of the said International Year for the World's Indigenous peoples.<sup>9</sup>

In order to address various issues of indigenous and tribal peoples, the UN Permanent Forum was demanded to be created. The creation of this permanent forum was the subject matter of discussion at Vienna, Austria at the world conference on Human Rights. It shall be prudent in this regard to mention in this regard that a similar recommendation was made by the Vienna Declaration. A proposal was given for its establishment within the Decade of the World's Indigenous Peoples. A working group was formed and various other meetings took place that led to the establishment of the permanent forum by the UN ECOSOC Resolution 2000/22 on 28 July 2000.

In furtherance of such recommendation as referred above, a Draft Declaration was formulated by the said Working Group on Indigenous Peoples.

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<sup>6</sup> Ibid

<sup>7</sup> Background, available at, <http://www.un.org/en/events/indigenousday/background.shtml> (Accessed on August 14, 2015)

<sup>8</sup> Who Are The World's Indigenous Peoples, available at, [http://www.ciesin.org/docs/010-000a/Year\\_Worlds\\_Indig.html](http://www.ciesin.org/docs/010-000a/Year_Worlds_Indig.html) (Accessed on August 14, 2015)

<sup>9</sup> UN General Assembly, 85th Plenary Meeting; A/RES/47/75; 14TH December 1992

The year 1994 can be remembered as the initiation of the First International Decade of the World's Indigenous People (1995-2004)

2002 was the year that will also remain in the pages of History as for the very first time indigenous peoples, as indigenous-nominated (or government nominated) experts, speak for themselves as full-fledged members of a United Nations body (at the inaugural Session). The primary reason for the establishment of the United Nations Permanent Forum on Indigenous Issues (UNPFII)<sup>10</sup> was to advise Economic and Social Council (ECOSOC)<sup>11</sup> on various aspects of indigenous and tribal population. The issues are mostly concerned with the social and economic development of these people with special reference to Human Rights. After the establishment of UNPFII, another interesting development may be stated to be the announcement in the year 2004, the second International Decade<sup>12</sup> of World's Indigenous People.

Ultimately, United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)<sup>13</sup> was adopted by the UN General Assembly. The adoption of UNDRIP reinstated the contention and reaffirmation of the commitment of the international community to protect various rights of the indigenous and tribal people across the world.

Much water has flown down the river since then and a tremendous development has been seen in the upliftment and preference of the rights and liberties of the indigenous communities across the continents. The international arena has worked together so far in collaboration with the member states to formulate a basic guideline as to the modes of the protection of *inter alia* civil and economic rights of the indigenous people of the world in whatever name so called.

### 2.1. The Concept of Indigenous and Tribal Peoples under International Law

The term "indigenous peoples" is a common denominator for more than 370 million people, spread across some 90 countries around the world (DESA, 2009: 1). Such diversity made it near impossible to have a unified definition of the term indigenous peoples however, there is also a consensus accepted internationally that a universal definition is neither necessary nor desirable. On the other hand the approach of self identification has been emphasised to identify indigenous

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<sup>10</sup> The United Nations Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the Economic and Social Council (ECOSOC), with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

<sup>11</sup> ECOSOC is the United Nations platform on economic and social issues.

<sup>12</sup> 2005-2015.

<sup>13</sup> UNDRIP (Adopted on 13th September 2007) was the outcome of a long struggle and debate on various levels. The outcome was however rewarding.

peoples and communities. This became the recommended approach accepted by most indigenous groups across the world. It has been identified that there are more than 5000 indigenous and tribal groups possessing unique distinctive features living on this planet at this day. Their presence can be felt across all geographical locations and all social systems from primitive to ultra modern cities.

Irrespective of the geographic positioning, they can easily be distinguished from another by their distinctive cultural presence with special attachment with their land.

With the advent of western dominance on the planet through the process of colonisation, slowly and steadily the indigenous culture and society started the process of evolution towards westernisation with the initiation of the process of traditional and cultural erosion.

Large scale displacement of tribals started in lieu of the process of developmental projects and industrialisation. With this started the process of resettlement in urban and semi urban areas by these uprooted population which became easy victims of discrimination and exploitation in the hand of non tribals. Lack of state initiative to protect this vulnerable class, instances of atrocities increased leading them to be marginalised amongst all the people of the world.

Those who decided to fight the odds in or around their displaced habitat found their slow and inevitable death due to the absence of their economic system as that was directly related with the land and resources inherent in such land.<sup>14</sup> The one sided battle left the indigenous communities' strangers in their own land and marked as criminals and offenders against the state. Their struggle ended with the loss of lives of their leaders and forced assimilation of the rest in the lower strata of the urban and semi urban societies. There has been evidence of large scale increase in the unskilled labour market due to the continuous and never ending influx of indigenous and tribal peoples from their displaced habitat.

This large scale displacement followed with various instances of atrocities plagued indigenous life and their sustainable economy irretrievably and permanently changed their harmonious and peaceful life of isolation and dignity. In a very short of span of time indigenous peoples across the world became arguably the most vulnerable and disadvantageous group on this planet.

A brief study of such brutality portrays some interesting facts relating to these people.

1. Most of the indigenous and tribal peoples in the world are below the poverty line of their respective countries.

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<sup>14</sup> How Many Indigenous Peoples Are There, And Where Do They Live? Available at, [http:// www.NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu](http://www.NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu), (Accessed on August 16, 2015)

2. The mortality rates in comparison to the non tribals are lesser by more than 10% on an average with a low of 18% which is notices in Russia as of late.
3. Irrecoverable loss of indigenous knowledge and knowhow
4. Massive destruction of natural resources and reduction of forest land at an alarming rate.
5. Massive increase in unemployment across the world.

The process of forced assimilation has certain inherent limitations. Due to the large scale displacement in forest and hilly areas of the planet, there has been a massive increase in the demand of basic facilities in the semi urban and urban areas. This has consequently increased the demand for basic amenities like food, education and housing in these areas.

.It can be asserted in this regard that a number of indigenous groups has got extinct and along them their rich cultural heritage.

Under the said situation there has been a growing demand for justice for the indigenous peoples across the world. This ultimately led to the unification of the world community to pass one of the most significant conventions in the form of ILO Convention No. 169.

Convention No. 169 of the International Labour Organization (ILO) provides a set of subjective and objective criteria, which are jointly applied to guide the identification of indigenous peoples<sup>15</sup> in a given country. According to these criteria, indigenous peoples:

- a) Identify themselves as indigenous peoples in whatever name so called and to remain so.
- b) Indigenous peoples' rights to lands, territories, and resources.
- c) Having a special relationship with their land and natural resources.
- d) They were descent from populations who inhabited the geographical region at the time of conquest, colonization or establishment of current state boundaries.
- e) Have been a history of oppression and ongoing conditions of non-dominance.
- f) Retaining their social, economic, political, cultural and customary institutions.
- g) Distinguishing social, cultural and economic condition from the broader populace of the country.
- h) Having distinctive customs and laws to regulate themselves.

These characteristics immediately underline the importance of land, territories, and resources for indigenous peoples. The territories they have traditionally occupied, and which have shaped their distinct identities, livelihood practices, and knowledge systems, have been submerged into nation-

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<sup>15</sup> The Convention uses the inclusive terminology of “indigenous and tribal peoples” and ascribes the same set of rights to both groups. In Latin America, for example, the term “tribal” has been applied to some Afro- descendant communities.

states that often do not respect their customary tenure systems. Thus their history and, in many cases, their current situation is marked by continuous loss of control over lands, territories, and resources. It is this situation of discrimination that the international framework for the recognition of indigenous peoples' rights attempts to remedy.<sup>16</sup>

While the term "indigenous peoples" is the common denominator used in international instruments, these peoples are often known in national or local contexts by terms such as adivasis, aboriginals, hill tribes, hunter-gatherers, etc., or simply by the name of the specific people.

## 2.2. Indigenous Communities of the World

Such is the diversity of indigenous and tribal population across the planet that they can be noticed in almost all countries of the planet. It must be stated that many countries deny the existence of indigenous peoples in that country as they argue that due to the change and evolution these people have undergone, they have lost their tribal and indigenous characteristics which was there before. India, Bangladesh and even Russia stood on this standpoint for a long period of time till they lose their battle to the international acceptance, as if this argument is to be taken then there shall be no indigenous people on this planet. Amongst the 5000 strong indigenous and tribal groups consisting of more than 370 million people of this planet, most of them are habituated in over 70 countries.

The indigenous peoples are distinctly found inter alia in Australia, New Zealand, America, Canada, China, India and Myanmar. This vast population of the tribals and indigenous communities have great variations in their culture, economy and law but they tend to have very similar problems that needed to be addressed in a very practical legal framework.

The indigenous communities can be found in almost all continents of the world. Primarily they have their presence in Asia, Middle East, Africa, North America, Arctic, Latin America and Oceania/Pacific.

### 2.2.1. Latin America

Latin America is a multi-ethnic and multi-cultural region with over 650 indigenous peoples currently recognised by states, over half of whom are settled in tropical forest areas (ECLAC, 2006: 143) In total, they are estimated to number approximately 40 million people (IWGIA<sup>17</sup>, undated), constituting numerically small but highly diverse minorities in countries such as Brazil (over 200 distinct groups, totalling approximately 1% of the population) but majority populations in Bolivia and Guatemala. Territorially and demographically, "these peoples are highly diverse and their

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<sup>16</sup> Birgitte Feiring, "Indigenous Peoples' Rights to Lands, Territories and Resources" *ILC*, Rome 15 (2013)

<sup>17</sup> The International Work Group for Indigenous Affairs

socio-political status within the countries they inhabit varies widely. Their common denominator, however, is the structural discrimination they suffer in the form of marginalization, exclusion and poverty” (ECLAC, 2006: 143). According to World Bank figures, 12.76% of the entire American population and approximately 40% of the rural population is indigenous.<sup>18</sup>

Descendants of the populations that inhabited the region prior to the European colonisation form the majority of indigenous population in Latin America. These include, for example, the Quechua and Aymara peoples of the Andean highlands, the Guaraníes, the various Maya groups in the Meso-American region, the Naa in Mexico, and the Mapuche in the southern part of South America.<sup>19</sup> Further, building on the similarities in terms of cultural features (existence of distinct cultures, knowledge systems, customary law and institutions, attachment to territories) as well as socio-economic and political conditions (widespread poverty and marginalisation, including in terms of participation in decision-making), some Afro-descendant communities are recognised as collective rights-holders with the same rights as other indigenous peoples under national and international law. This, for example, is the case with the Garífuna in the Caribbean region.<sup>20</sup>

The International Work Group for Indigenous Affairs (IWGIA) estimates that there are approximately 200 indigenous groups in isolation in the Americas, numbering approximately 10,000 people<sup>21</sup>. These comprise “indigenous peoples or segments of indigenous peoples who do not maintain or have never had regular contacts with the population outside their own group, and who tend to refuse contact with such outside persons”<sup>22</sup>. As noted, “Unlike other rights-holders, indigenous peoples living in isolation by definition cannot advocate for their own rights before national or international fora. Therefore, the protection of their life and culture become particularly relevant for the Inter-American system of human rights”<sup>23</sup>.

In some parts of the Andean highlands and parts of Central America, indigenous peoples are categorised as campesinos<sup>24</sup>. While this has reference to the sedentary agriculture that is the main livelihood strategy of these communities, the denomination in occupational rather than ethnic terms is largely a result of land reforms that took place in the 1950s and 1960s. For example, in Peru, through the agrarian reform in 1969, the country’s semi-feudal system was abolished and large

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<sup>18</sup> Indigenous Peoples In Latin America - A General Overview, available at <http://www.iwgia.org/regions/latin-america/indigenous-peoples-in-latin-america> (Accessed on December 4, 2015)

<sup>19</sup> Supra note 9 at p.62

<sup>20</sup> Ibid.

<sup>21</sup> IWGIA; 2013: at p. 8

<sup>22</sup> Ibid.

<sup>23</sup> Ibid at p.9

<sup>24</sup> campesinos means peasants.

landholdings on the coast and in the highlands were divided up and handed over to indigenous labourers, resulting not only in land reforms but also in citizenship rights<sup>25</sup> While this was a “turning point for wider processes of democratization and recognition of citizenship rights for the deprived rural indigenous population”<sup>26</sup>, it also led to the individualisation of land rights and, to some extent, the hiding of ethnic and cultural identity. It is only in the past decade that the campesino communities in some parts of Bolivia and Peru have reframed their struggle with regards to the international instruments for recognition of indigenous peoples’ collective rights. Still, for example, the Ministry of Energy and Mines in Peru questions the identity of the Campesinos communities as indigenous, with an intention to limit these communities’ rights to consultation and consent (see e.g. CAOI, 2013).<sup>27</sup>

In contrast, most indigenous peoples of the lowlands and forested areas of Latin America are numerically smaller communities of hunters-gatherers and shifting cultivators. They had practically no recognised land rights until the 1980s. When they started making their claims heard, these were from the outset framed by the claim for collective rights to territories. These historical processes provide for highly diverse patterns and trends with regards to recognition of land, territories, and resources in the different countries and eco-regions of Latin America, ranging from individual titling to recognition of territories.<sup>28</sup>

Latin America is the region where most progress has been made with regards to constitutional and legal recognition of indigenous peoples’ rights. Fourteen countries in the region have ratified ILO Convention No. 169. Majority of the Latin American countries have enacted legislation to recognise various rights of the indigenous peoples inter alia lands, territories, and resources.

Contrary to the declarative and legal achievements of the indigenous social movement, the security of their territory and resources has been affected adversely in recent times. After the recent ratification on the part of Chile and Nicaragua few countries in the region have yet to ratify Convention 169 of the International Labour Organization (ILO). The effective application of some of the rights that emanate from its provisions is, however, postponed.<sup>29</sup> The struggle between the indigenous peoples and the governments regarding the right to be consulted and express their free, prior and informed consent, another manifestation of the right to self-determination, exhibits the

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<sup>25</sup> CEPES, 2009 at p. 21.

<sup>26</sup> Ibid.

<sup>27</sup> Supra note 9 at p.62

<sup>28</sup> Ibid.

<sup>29</sup> Supra Note 18.

gap between the recognition and enforcement of indigenous rights.<sup>30</sup> In Peru, Brazil, Colombia, Nicaragua, Guatemala and other countries, the lack of political will to carry out consultations before initiating large-scale projects with expected impacts has led to a series of conflicts not only with the indigenous peoples, but also with the international institutions in charge of monitoring compliance with human rights.<sup>31</sup>

### 2.2.2. Africa

The 50 million indigenous people living in Africa are mostly nomadic and semi-nomadic pastoralists and hunter/gatherers who live in situations of marginalization and discrimination.<sup>32</sup> The principles laid down in the ILO 107 and its assimilationist approach has been the general trend in Africa. Irrespective of these hindrances, various indigenous people's organization in Africa is trying to open up in their endeavor to make their voice reach the international stage.<sup>33</sup>

As per the conceptualization of the African Commission on Human and Peoples' Rights (ACHPR) and international mechanisms dealing with indigenous peoples' rights, indigenous peoples in Africa live in situations of marginalization and discrimination.<sup>34</sup>

On a report<sup>35</sup> on Indigenous Populations/Communities in Africa issued in 2005, a recommendation was made to make an approach to identify rather than define indigenous peoples. The said report emphasised the following characteristics for identification of African indigenous peoples:

1. Their cultures and ways of life differ considerably from those of the dominant society;
2. Their cultures are under threat, in some cases on the verge of extinction;
3. The survival of their particular way of life depends on access and rights to their traditional land and resources;
4. They often live in inaccessible, geographically isolated regions; and
5. They suffer from political and social marginalisation and are subject to domination and exploitation within national political and economic structures<sup>36</sup>.

Practically, in Africa the term "indigenous peoples" is applied mainly to pastoralists and hunter-gatherers. The majority of these communities are Maasai, Ogiek, Turkana, Sengwer, Endorois,

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<sup>30</sup> Ibid

<sup>31</sup> Indigenous Peoples in Latin America - a general overview, available at, <http://www.iwgia.org/regions/latin-america/indigenous-peoples-in-latin-america> (Accessed on August 15, 2015)

<sup>32</sup> Ibid

<sup>33</sup> Ibid

<sup>34</sup> "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities". 2005

<sup>35</sup> Working Group under the African Commission on Human and Peoples' Rights (ACHPR) 2005

<sup>36</sup> Ibid

Touareg, Samburu, Hadzabe, Mbororo, El Molo, etc. of West and East Africa, the San of Southern Africa, and the Pygmies of the Central African region. Both the pastoralists and hunter-gatherers are non-permanent use and occupation of lands, which have made their traditional lands and territories appear unoccupied to the outsider. This has resulted in a plethora of land related injustices upon them throughout history.

In spite of the contextualisation of the concept provided by the ACHPR, the issue of definition or identification is still ongoing in many African countries. Far from being an academic debate, this has grave consequences in terms of failure to address the desperate situation of many indigenous peoples in the region. On the positive side, there is growing recognition of African hunter-gatherer communities as “indigenous peoples”. For example, a survey undertaken by the OHCHR in seven countries in the Central African region shows that there is common acceptance of the existence of indigenous peoples in all the countries concerned (Burundi, Cameroon, Central African Republic, Chad, Gabon, Republic of Congo, Rwanda) (OHCHR, forthcoming).<sup>37</sup>

In contrast, the application of the concept to pastoral communities is still disputed by many governments and international agencies. For example, the World Bank remains reluctant to systematically apply its Operational Policy 4.10 to pastoralist communities in Africa. Also, there are differences with regards to the self-identification as “indigenous” of pastoralist peoples in Africa, depending on the situation and history of a given country and people. For example, while the Mbororo in Cameroon and the Maasai in Tanzania and Kenya identify themselves as indigenous, pastoralists in Benin have not come forward to do the same.<sup>38</sup>

The non-recognition of indigenous peoples in Africa also leads to a lack of specific data on their situation, which again hampers the possibility of devising adequate legislative and policy responses. According to IWGIA (undated) there are approximately 50 million indigenous people in Africa and where data is available, often through case studies, it provides a grim picture of their situation, which is frequently characterised by severe poverty, marginalisation, discrimination, and human rights violations (see, for example, ACHPR 2005; ILO and ACHPR, 2009).<sup>39</sup>

The condition of tribal peoples in Africa has gone from bad to worse in the last century. This extreme condition is basically due to bad governance, corruption, impunity, violent conflict and poverty. Because of these situations in the African continent, and indigenous peoples are among the groups suffering the most. It is quite astonishing that most of the African countries have denied

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<sup>37</sup> Supra note 9 at p.44

<sup>38</sup> *ibid*

<sup>39</sup> *Ibid* at p.45

recognizing the existence of indigenous peoples. In the last decade, however, this situation is gradually improving and several central African countries now recognize the existence of indigenous peoples in their countries. Countries such as Kenya and Namibia are also gradually become vocal towards the rights of the indigenous communities. However, widespread lack of recognition persists in all other parts of Africa.<sup>40</sup> Compared to other regions of the world, the indigenous movement is very weak in Africa, and the few indigenous organizations which do exist lack the teeth needed in this situation.<sup>41</sup>

Irrespective of international recognition of indigenous people's participation in decision making process concerning them, indigenous peoples in Africa are often poorly represented in decision-making bodies at both local and national level and their participation in decision-making processes is nearly negligible. Consequently, the lack of representation and participation doesn't allow indigenous peoples to advocate their cause and determine their own future development. The only existing pan African organization for indigenous peoples in Africa is the "Indigenous Peoples of African Coordinating Committee" (IPACC) which has its secretariat in South Africa and which has member organizations from all the regions of Africa.

Because of their colonial past, most African states follow European-oriented modernization and development strategies based on the policy of drainage of wealth and there has been complete disregard to the traditional African indigenous interest.<sup>42</sup>

The main problem faced by indigenous peoples in Africa like most of the other indigenous communities of the world is encroachment over tribal and indigenous land, for instances declaration of national parks and conservation areas, declaring a rich mineral area as reserved for extraction and the like. Consequently, the loss of land disturbs the entire socio economic condition of these communities leading to impoverishment and their existence.

The ways of protecting the indigenous people through law making has been very far and few. Even it has been notices that the laws have been flouted at will to encourage economic gains. Policies have been compromised and the indigenous peoples been thrown to the brink of extinction.<sup>43</sup> Indigenous peoples have been subjected to severe compromise by the state in many a cases. It has been a regular affair to grant lands and resources belonging to indigenous peoples to non indigenous forces by the state. This joint exploitation has led to violent conflicts. In eastern and western Africa there are numerous violent conflicts between nomadic pastoralists and sedentary farmers as well as

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<sup>40</sup> Supra note 30

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Ibid

inter-community conflicts between pastoralists themselves.<sup>44</sup> Continuing decrease in natural resources and the growth of population has increased the competition over natural resources. On the other hand the climate change has posed even a harder condition for the tribal communities over resources leading to mass displacements, leading to great suffering amongst all the sections of these communities.<sup>45</sup> Another important factor for the growing suffering of tribal peoples is the increase of armed militia groups in clusters causing great loss of ethnicity of these peoples. Another factor of mass violation of human rights of the indigenous peoples is the abuse of military in these areas.<sup>46</sup>

### 2.2.3. Australia (Oceania/Pacific)

Indigenous peoples have been considered by many as the first people to have been connected with the Australian landscape, including marine and coastal areas. Some estimates maintain that this relationship has endured for at least 40,000 years. There has been many scientific evidence of this in the vast landscape. It was estimated that during the time when the colonial settlers entered Australia, the number of indigenous population may have been up to 1.5 million people.<sup>47</sup>

In June 2011, Indigenous peoples were estimated to make up 3.0% of the Australian population, or 670,000 individuals.<sup>48</sup>

There has been evidence of the existence of human population involving Aboriginal people in all parts of Australia. However, the majority of modern aboriginal people live in regional centres (43%) or cities (32%), although some still live on traditional lands.<sup>49</sup>

The Australian Bureau of Statistics (ABS) Corrective Services report recently noted that the number of Aboriginal men in prison had risen by 8% and women by 12% in the past year, compared to a national prison population increase of 6%. Aboriginal and Torres Strait Islander peoples now comprise 30% of the prison population.<sup>50</sup>

One of the concerns of indigenous population in Australia is concerning their health. Despite recent minor improvements, the health status of Indigenous Australians remains significantly below that of other Australians. Rates of infant mortality among Indigenous Australians remain unacceptably

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<sup>44</sup> Supra note 18

<sup>45</sup> Ibid

<sup>46</sup> In countries such as Niger and Burkina Faso the situation is extreme involving organized massacres of entire villages.

<sup>47</sup> Indigenous peoples in Australia, available at <http://www.iwgia.org/regions/oceaniapacific/australia> (Accessed on December 4, 2015)

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid

high at 10-15%, and life expectancy for Indigenous Australians (59 for males and 65 for females) is 17 years less than that of others. Recent suicide figures report 105 deaths per 100,000, for Indigenous males between the ages of 25 to 34 years, as compared to 22 deaths per 100,000 for their non-Aboriginal counterparts.<sup>51</sup>

According to the ABS, there were 996 suicides reported across Australia between 2001 and 2010 among Indigenous peoples.<sup>52</sup> 1.6% of all Australians die by suicide but, for Aboriginal peoples, this rate is more than 4.2%, or one in every 24 Aboriginals or Torres Strait Islanders.<sup>53</sup>

The 1975 Racial Discrimination Act has proved a key law for Aborigines but was overridden without demur by the Howard government in 2007 when introducing the Northern Territory Emergency Intervention (see *The Indigenous World*, 2008).<sup>54</sup>

States and Territories also have legislative power on rights issues, including Indigenous rights, where they choose to use them and where these do not conflict with national laws. Australia has not ratified ILO Convention 169 but, although it voted against the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, it went on to endorse it in 2009.<sup>55</sup>

#### 2.2.4. Hawaii (Oceania/Pacific)

Ka Pae Aina o Hawaii (the Hawaiian Archipelago) is made up of 137 islands, reefs and shoals, stretching 1,523 miles south-east to north-west and consisting of a total land area of approximately 6,425 square miles. Kanaka Maoli, the indigenous people of Ka Pae Aina o Hawaii, represent approximately 20% of the total population of 1.2 million.<sup>56</sup>

In 1893, the Government of Hawaii, led by Queen Liliuokalani, was illegally overthrown and a Provisional Government formed without the consent of Kanaka Maoli and in violation of treaties and international law. Since 1959, Hawaii has been a state of the US.<sup>57</sup>

Kanaka Maoli continues to struggle and suffer from the wrongs that were done in the past and continue today. In 2010, the US finally endorsed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The UNDRIP guides the actions and aspirations of the indigenous peoples of

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<sup>51</sup> Ibid

<sup>52</sup> Supra note 18

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Indigenous peoples in Hawaii, available at, <http://www.iwgia.org/regions/oceaniapacific/hawaii>, (Accessed on December 4, 2015)

<sup>57</sup> Ibid

Hawaii, together with local declarations such as the Palapala Paoakalani<sup>58</sup>. The U. S. Census Bureau report 2000 identified around 401,162 peoples who identified themselves as ‘Native Hawaiian’. Two-thirds of the said population live in the State of Hawaii while the other one-third is scattered among other states, with a high concentration in California.

#### 2.2.5. Bougainville (Oceania/Pacific)

The history of Bougainville dated back to 28,000 years back when people from New Ireland first settled there. Historians believe that about three to four thousand years ago the Austronesian peoples entered this landscape with domesticated dogs, chicken and pigs. Scientists also believe that it is during this time when obsidian tools first entered Bougainville.

In 1768 the French explorer arrived and later in 1899 the German claimed this island as their own. The English arrived in the island in 1902.

Under a League of Nations mandate, Australia occupied German New Guinea, including Bougainville, taking it over during World War I.

In 1942 during World War II, Japan invaded the island, but allied forces launched the Bougainville campaign to regain control of the island in 1943. Following the war, Bougainville returned to Australian control. Bougainville became part of an independent Papua New Guinea in 1975.

Civil war broke out, and the independence of Bougainville was declared twice, once in 1975 and once in 1990. Peace talks brokered by New Zealand began in 1997, leading to autonomy for the island.

The colonial history of Bougainville follows the histories of Papua New Guinea (PNG) and the Solomon Islands closely. Geographically and culturally, Bougainville is part of the Solomon Islands chain. Politically, it has been part of PNG, as “North Solomon Province”, since the country gained independence from Australia in 1975 and claimed Bougainville.

It has, since 2005, had separate status with an Autonomous Bougainville Government (ABG) although military, external and judicial powers have been reserved by PNG. The first government was established in June 2005 following elections in May 2005 that were overseen by international observers.<sup>59</sup>

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<sup>58</sup> Ibid

<sup>59</sup> Indigenous peoples in Bougainville, available at, <http://www.iwgia.org/regions/oceaniapacific/bougainville>, (Accessed on August 16, 2015)

The majority of the 175,000 inhabitants of Bougainville (approximately 85%) still survive on subsistence farming. Cocoa and copra are produced for cash cropping. The people live in numerous small, traditional societies and belong to about thirty language groups. Women play strong leadership roles and some degree of customary land rights still exists, supported by ABG policy.<sup>60</sup>

During the first year of Joseph Kabui's term as President of the ABG, several avenues for economic development have been explored, including cruise-line tourism and mining.<sup>61</sup>

#### 2.2.6. Arctic

The Arctic region is a vast area with approximately 13.4 million square kilometres of land within the AMAP boundary.<sup>62</sup> This extensive area is home to various groups of indigenous peoples that have a diverse set of cultural and historical background and basis of economy. The indigenous peoples of Alaska include the Inupiat, Yup'ik and the Aleut. The Inuit are considered as indigenous peoples in the Canadian Arctic and Greenland.<sup>63</sup> In Northern Russia there are dozens of indigenous peoples, including the Chukchi, Nivkhi, Saami, Even, Evenk and Nenets. The indigenous peoples in Fennoscandia are the Saami.<sup>64</sup> Out of the total population of 4 million people in the Arctic, only 10 percent are indigenous.<sup>65</sup> The majority of the Arctic peoples live in communities with more than 5,000 residents. Despite the fact that in most of the Arctic region indigenous peoples have been encouraged to live in fixed settlements, there are still some groups that lead a nomadic way of life (e.g. Nenets in Northern Russia).<sup>66</sup>

Indigenous communities throughout the Arctic face various social problems, a fact which needs to be taken into consideration when studying the impacts of climate change.

Generally speaking, newcomers to the Arctic, usually Europeans, have introduced new lifestyles, culture, educational systems, technology, food and diseases for centuries. Cultural changes, modern transport, western way of living and implementation of state policies have increasingly affected all features of indigenous peoples' lifestyles at least from the beginning of the 20th century.<sup>67</sup>

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<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> AMAP, A State of the Arctic Environment Report: *Arctic Pollution Issues* (1997)

<sup>63</sup> Nuttal, 2000, p. 377

<sup>64</sup> Ibid at p. 2

<sup>65</sup> AMAP, *Arctic Pollution Persistent Organic Pollutants, Heavy Metals, Radioactivity, Human Health, Changing Pathways*, (2002)

<sup>66</sup> Ibid; AHDR, 2004, pp. 30 - 31

<sup>67</sup> AHDR, 2004, p. 49; Nuttall, 2000, pp. 377-378, 405-406; Nuttall, 2002, pp. 53-54

Indigenous peoples of the Arctic have to live on ice and have adapted accordingly over centuries. Their history, traditions, economy and lifestyle is uniquely distinct and separate from all other indigenous people on the planet. These people are generally used to fishing, hunting, herding, and gathering wild plants. To protect themselves from the harshest of weather conditions they have developed and transmitted their knowhow and traditional knowledge from generations to generations. They learned the skill to hunt on ice and the knowhow to make clothes and travel on ice. Arctic peoples used to live in small, scattered communities. However with the change in their lifestyle in recent years, most communities are moving towards a modern and bigger settlement.

#### 2.2.7. Asia

It is estimated that approximately two-third of the worlds indigenous peoples live in Asia, with the majority in India(80-100 million), followed by China(60-80 million) and Indonesia (50-70 million).<sup>68</sup>

There are over 260 million indigenous peoples in Asia and most of them are culturally diverse. Along with this diversity there lies a plethora of problems. Denial of self-determination, loss of control over their land and forests, resources, discrimination, marginalization, heavy assimilation pressure and violent repression by state security forces are a few to note. In Asia they are found in the following countries:

1. Bangladesh
2. Burma now called Myanmar
3. Cambodia
4. China
5. Malaysia
6. Nagalim
7. Nepal
8. Philippines
9. Sri Lanka
10. Taiwan/China
11. Thailand
12. Tibet
13. India
14. Indonesia
15. Vietnam

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<sup>68</sup> Data presented by Asia Indigenous Peoples Pact, 2013

In India there are 461 ethnic groups which are recognized as Schedule Tribes. The estimated population of scheduled tribes in India is about 8.2 percent of the nation's population which is about 84.3 million.

The estimated tribal groups in India are more than 635 even when they are not officially recognized. The government of India has appreciated the importance of UNDRIP and has voted for it and made it applicable in the Indian territory. It shall be relevant in this regard to state that the Indian government has not acknowledged the concept of indigenous peoples and instead termed these communities as tribals or adivasis. However it shall be important to state that this deviation from the term indigenous by India in the international sphere is of recent practice. It all started in the year 1984 Working Group when the representative of India has protested the similarity between tribals and the indigenous communities in India. They contended India to be a Melting pot and that there has hardly been any community which still possess the pristine tribal culture and features. This statement was further uplifted by the Indian representative in the Working Group in the year 1992 when he removed his glasses to show the various traits he possesses in his physical appearances because of inter caste and inter sect marriages. However this opposition was never seen before in India as the word aboriginals were supported by India during the drafting of the ILO Convention 107 in 1957. At this point India had no problems in accepting the notion of tribals in the lines of aboriginals.

Secondly the contention of the Indian representative cannot be taken to the fullest extent as if this demarcation is to be taken into consideration to distinguish indigenous and tribals then there would hardly be any indigenous communities of the world as almost all of these groups have gone through the process of adaptation and there can hardly be any community which has upheld all the features and ethnicity that their ancestors have upheld thousands of years ago.

In July 1992, ILO representatives attended the round table in New Delhi in the presence of the central, state governments, the governmental and nongovernmental organizations. The objective was the utilization of the technical assistance provided by the ILO for various projects in some states of India like Bihar, Orissa etc.<sup>69</sup>

India was able to participate at the ILO Convention 169 because it dealt with both indigenous and tribal populations.<sup>70</sup>

In India the decolonization has two vivid reflections. First, the India that was colonized was never the same after de colonization because of the partition. And secondly, the princely states which

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<sup>69</sup> Sanders Douglas, "Indigenous Peoples on the International Stage" 43 *Social Action* 6 (1993)

<sup>70</sup> Ibid

have been recognised by the British merged with the rest of India. They were never given an opportunity or a choice to decolonize as an Independent jurisdiction. Thus the minority indigenous population never got any recognition.

### 2.3. Categories of International Movements

The entire international movements relating to the indigenous communities may be analyzed in the following categories:

1. Directly related to indigenous communities and
2. Other Human Rights instrument of great importance which upholds the rights of these communities.
3. Other conventions affecting the indigenous people.

There are primarily three conventions which are directly related to the indigenous people:

1. The United Nation Declaration on the Right of Indigenous People which was adopted in 2007
2. ILO Convention No. 169 on Indigenous People adopted in 1989 and
3. ILO Convention No. 107 of 1957 concerning Indigenous and Tribal Populations

There are primarily seven conventions relating indirectly to Indigenous people and is of significant importance to the tribals.

1. International Covenant on Civil and Political Rights which came up in the year 1966
2. International Covenant on Economic, Social and Cultural Rights of 1966
3. International Convention on the Elimination of all forms of Racial Discrimination 1963
4. Convention on the Rights of the Child 1989
5. Convention on the elimination of all Forms of discrimination against Women, 1979
6. Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, 1984
7. Convention on the prevention and Punishment of the Crime of Genocide, 1948

There are another two conventions which affects the tribals and indigenous communities to a considerable extent.

1. Convention on Biological Diversity 1992 and
2. Convention on International Trade in Endangered species of Wild Flora and Fauna, 1975

There is a set of UN Resolutions concerning indigenous and tribal peoples. They are as follows:

1. International Convention on the Elimination of All Forms of Racial Discrimination Committee (ICERD)
2. Committee for economic, Social and Cultural Rights (CESCR)
3. Committee for Civil and Political Rights
4. Permanent Forum on Indigenous Issues

Twelve indigenous peoples' organizations have consultative status with the United Nations Economic and Social Council (ECOSOC).<sup>71</sup> These are: Four Directions Council, Grand Council of the Crees (Quebec), Indian Council of South America, Indian Law Resource Center, Indigenous World Association, International Indian Treaty Council, International Organization of Indigenous Resources Development, Inuit Circumpolar Conference, National Aboriginal and Islander Legal Services Secretariat, National Indian Youth Council, Nordic Saami Council and World Council of Indigenous Peoples.<sup>72</sup>

The United Nations plays a pivotal role in the protection of indigenous and tribal communities across the world. The United Nations Working Group on Indigenous Populations is the centre of indigenous rights activities within the United Nations system. The Working Group:

- a) reviews Government policies covering the protection of the human rights of indigenous peoples;
- b) makes recommendations to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and to the United Nations Commission on Human Rights, which promote action on issues related to indigenous peoples; and is drafting, as part of its mandate to develop international standards concerning the rights of indigenous peoples, a Universal Declaration on the Rights of Indigenous Peoples, which is expected to be completed in 1993.<sup>73</sup>

In Latin America and Africa, regional human rights mechanisms have been instrumental in addressing indigenous peoples' rights, particularly to lands and territories. In South-East Asia, the recently adopted Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN) is noted to fall "below international standards on human rights particularly on the duties and responsibilities of states in upholding the universality and non-derogability of and the enjoyment and exercise of human rights by citizens" (AIPP, 2012).

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<sup>71</sup> Who are World's Indigenous People? Available at, <http://Race.Eserver.Org/Indigenous.Html> (Accessed on December 3, 2015)

<sup>72</sup> Ibid.

<sup>73</sup> Supra note 14.

Further, it does not include recognition of indigenous peoples as “distinct from the majority and systematically discriminated and exploited through the non-recognition and violation of [their] collective rights” (AIPP, 2012). Fortunately, while there is no immediate prospect of addressing indigenous peoples’ rights through regional mechanisms in Asia, national human rights institutions are increasingly addressing their situation. In Malaysia, for example, the national human rights institution (SUHAKAM) has undertaken a comprehensive national inquiry into the land situation of indigenous peoples.<sup>74</sup>

#### 2.4. Rights of Indigenous and Tribal Peoples

There has been growing disparity between the indigenous and other communities across the globe in the last few decades. The primary issues that concern indigenous peoples are:

1. land and resources
2. human rights
3. internal colonization
4. self-government
5. self-development
6. environment
7. discrimination
8. health
9. education
10. language
11. cultural survival
12. intellectual property rights
13. social and economic conditions

In all parts of the world, there is growing recognition of the importance of protecting indigenous peoples’ rights, as an integral element of the promotion of human rights, democracy, good governance, sustainable development, and environmental protection. This global commitment was

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<sup>74</sup> Supra note 9 at pg. 31

clearly expressed in 2007, when 144 governments voted in favour of the adoption of the UN Declaration on the Rights of Indigenous People (UNDRIP)<sup>75</sup>. The African Commission on Human and Peoples' Rights (ACHPR) has also undertaken groundbreaking work to contextualise the concept of indigenous peoples to the African region (see ACHPR, 2005). However, some governments, particularly in parts of Africa and Asia, are still reluctant to acknowledge the existence of indigenous peoples within their states, in yet another denial of these peoples' human rights.

Most indigenous peoples have highly specialised land use practices and livelihood strategies, developed over generations and embedded in knowledge and belief systems that are often undocumented and governed by customary institutions that often remain unrecognised. In the midst of the financial, environmental, and climatic crisis facing many countries, there is growing recognition of the contribution of indigenous peoples' traditional knowledge to sustainable development and ecosystem management, biodiversity conservation, and climate change adaptation.<sup>76</sup>

The rights of the indigenous and tribal people have been a continuous development rather than recognition by the outside world to these minority sections of the world population. The ever growing struggle of these peoples has made a dramatic change in the outlook of the way world have recognized them.

A comparative study between the ILO Convention No. 107 and No. 169 depicts the achievement of the indigenous movement. The UNDRIPS and its acceptance by various countries have even strengthen the position of these communities in their respective countries. However there has been shortfall in the protection of the rights of these peoples in a number of cases. Even the language in which the ILO Convention No. 169 has been written has the capacity of dual interpretation.

In the light of such vulnerability, some of the rights of the indigenous peoples may be discussed and analyzed in some details for a better understanding of the position of tribals and indigenous peoples of the world. These rights are needed for the basic sustenance of tribal life. Various international agreements have been drawn in this regard both formally and informally. These rights have been the integral part of tribal and indigenous peoples life.

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<sup>75</sup> The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on 13 September 2007 with 144 votes in favour, 11 abstentions and four States against (Australia, Canada, New Zealand and the United States of America). Later, other states including the four who opposed it endorsed the said Declaration.

<sup>76</sup> Supra note 9 at p.15.

#### 2.4.1. Land and Resources

Indigenous peoples see themselves as the legitimate claimants to their territories and natural resources, and consider control over local economy, social planning, land use and taxation essential to their existence.<sup>77</sup> Thus they are seeking greater degrees of autonomy and self-rule.<sup>78</sup> The lives of the 50 million indigenous people who inhabit the world's tropical rainforests are threatened by deforestation.<sup>79</sup> But while indigenous people are on the frontlines of environmental degradation, they also have a vital role to play in environmental protection. For centuries, they have engaged in sustainable land management and land-use in the areas in which they live.<sup>80</sup>

Various international conventions have acknowledged the role of land in the life and sustenance of indigenous communities of the world and how such communities have eroded, their sustainability have been destroyed due to encroaching of their land by the state and non state entities for various so called developmental projects etc. Land has been the heart of every indigenous community and has been the sole provider of tribal welfare in terms of their economy and social solidarity. The entire resources arising of the land has been the backbone of tribal and indigenous economy and sustenance. A study of various international instruments also indicates the acceptance of this right in more way than one. The ILO while drafting the Convention No. 107 in 1957 addressed the land right of the indigenous people in Part II of the said Convention vide Articles 11 to 14. Article 11 uplifts the right of ownership of the members of the population concerned either individual or collective, which these populations traditionally occupy.<sup>81</sup> Article 12 of the said Convention states the right of these people from being removed without their free consent from their habitual territories except for certain specified reasons. In such specified exceptional circumstances where removal of these people are made, just and equitable compensation has been recommended in terms of land or in some cases money.<sup>82</sup> Prohibitions and restrictions have been made in case of transfer of such land to other members of non tribal communities.<sup>83</sup> Article 14 of the Convention seeks for

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<sup>77</sup> Supra note 71.

<sup>78</sup> Supra note 14.

<sup>79</sup> Supra note 71.

<sup>80</sup> Ibid

<sup>81</sup> Article 11 of the Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (No. 107) (Entered into force: 02:06:1959; Date of adoption: 26:06:1957)

<sup>82</sup> Ibid. at Article. 12.

<sup>83</sup> Ibid. at Article. 13.

National Agrarian programmes which shall secure these peoples treatment equivalent to that accorded to other sections of the national community.<sup>84</sup>

Article 13 to 19 of the ILO Convention No. 169 provides the right to land and resources to the indigenous and tribal communities. Article 13 has been divided into two clauses. Clause 1 states that in applying the provisions of this Part of the Convention that is Part II which deals with land, the governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationships with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Clause 2 of the article interprets the term land used in Articles 15 and 16 to include the concept of territories, which covers the total environment of the areas which the peoples concerned, occupy or otherwise use.

Article 14 is divided into three clauses. Clause 1 declares that the right to ownership and possession of the peoples concerned over the land which they traditionally occupy shall be recognized. Additionally, measures must be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. The provision further states that particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Clause 2 of the article directs the concerned Governments to take necessary steps to identify such lands which these people traditionally occupy and also to guarantee effective protection of their rights of ownership and possession.

Clause 3 directs the governments to take adequate steps to incorporate the procedures in this regard in their respective national legal system in furtherance of resolving land claims by the peoples concerned.

Article 15 is divided into two clauses. Clause 1 states that the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. The participation of the indigenous peoples in these activities was unprecedented and this article may be considered to be a very significant step in furtherance of providing significant rights relating to land and resources to these peoples.

Clause 2 states that in those cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain

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<sup>84</sup> Ibid at Article. 14

procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Right not to be removed from the land which they occupy have been provided in Article 16 of the Convention. The provision also provides the right to relocation with appropriate representation in the decision making process. The right to return is also very much there in the said provision in case of secession of the ground for relocation.<sup>85</sup> In case where such return is not possible the said Article provides monetary compensation to the community thus relocated.<sup>86</sup> In case of any loss or injury occasioned due to relocation, the indigenous and tribal peoples are also entitled to compensation.<sup>87</sup>

UNDRIPS has been the next step in the movement of indigenous rights globally. In the year 2007, the UNDRIPS laid down the right of indigenous and tribal people in respect of their land. Article 10 states that Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. This provision is to be read with the right to remedy in case of violation of this specific right which has been also provided in the said Declaration. The mechanism set out in the Convention No. 169 for effective redress can also be taken into consideration.

Nature and scope of indigenous peoples' right to land, territories, and resources UNDRIP and ILO Convention No. 169 enshrine a series of fundamental principles to determine the scope of indigenous peoples' rights to lands, territories, and natural resources, as follows.

The concept of territories<sup>88</sup>:

Indigenous peoples do not have rights only to the land they directly cultivate or inhabit, but to the broader territory, encompassing the total environments of the areas which they occupy or otherwise use, inclusive of natural resources, rivers, lakes, and coasts. Their rights to land and natural resources require special attention, as these are fundamental to securing the broader set of rights related to self-management and the right to determine their own priorities for development.

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<sup>85</sup> Article 16 clause 2 and 3 of ILO 169.

<sup>86</sup> Ibid at clause 4.

<sup>87</sup> Ibid at clause 5.

<sup>88</sup> UNDRIP art. 26; C169 art. 13.2.

## Collective rights<sup>89</sup>

The rights of indigenous and tribal peoples are both individual and collective in nature. In other words they have rights to enjoy the land and resources individually as well as jointly with other members of the community. The ways by which these people enjoy their land is customary in nature. This includes certain collective aspects like the right to self determination, right against discrimination etc. These collective rights reflect cultural integrity and development as distinct peoples.

## Traditional occupation, ownership, or use<sup>90</sup>

Indigenous peoples are considered to be the traditional owner, occupier and user of their land and resources and thus “the traditional occupation and use which is the basis for establishing indigenous peoples’ land rights, and not the eventual official recognition or registration of that ownership”<sup>91</sup>.

## Natural resources pertaining to their lands<sup>92</sup>

Indigenous peoples have rights to the natural resources of their territories, including the right to own, use, develop, and control these resources. As a basic principle, “these resources comprise both renewable and non-renewable resources such as timber, fish, water, sand and minerals”<sup>93</sup>. In cases where states retain ownership over mineral and sub-surface resources, Convention No. 169 (article 15.2) stipulates that indigenous peoples have rights regarding consultation, consent, and participation in the benefits of resource exploitation, as well as compensation for damages resulting from such exploitation.

Lands not exclusively occupied by indigenous peoples<sup>94</sup> Many indigenous peoples have traditionally had access to and used lands, territories, or resources that are also used by other communities or population groups. The ILO elaborates: “This is especially the case with grazing lands, hunting, fishing and gathering areas and forests, which may be used by nomadic pastoralists, hunters or shifting cultivators on a rotational or seasonal basis. In other cases, certain communities may have rights to certain types of resources within a shared territory, as they have developed complementary livelihood strategies. Also such non-exclusive land rights are established on the basis of traditional occupation” (ILO, 2009: 95).

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<sup>89</sup> UNDRIP preamble, art. 25; C169 art. 13.1; C107, Art. 11.

<sup>90</sup> UNDRIP art. 25, 26.1, 26.2; C169 art. 14.1; C107 art. 11.

<sup>91</sup> ILO, 2013: 21

<sup>92</sup> UNDRIP art. 26; C169 art. 15.1.

<sup>93</sup> ILO, 2009: 107

<sup>94</sup> C169 art. 14.

Cross-border contacts and co-operation<sup>95</sup> Due to processes of conquest, colonisation, or establishment of state boundaries, many indigenous peoples have been involuntarily separated by state borders that run across their territories and hamper contact. States should engage in international agreements to facilitate contact and cooperation.

#### 2.4.2. Culture, Religion and Language

Indigenous peoples are identified through their culture. Every aspect of their life is guided by their unique culture. Various aspect of their life is controlled and guided by their customs and cultural diversity. Their art, dresses, lifestyle reflects their culture which they have been carried on through ages. Various artefacts symbolises the distinct indigenous traits. The high quality of indigenous artworks and cultural artefacts generates great demand for them. However, theft and unauthorized sale of indigenous items robs the creators of both money and their cultural patrimony. Thus indigenous peoples are looking to secure the right to their cultural property.<sup>96</sup>

Without a doubt, UNDRIP is a milestone of indigenous empowerment.<sup>97</sup> Still, legally speaking, United Nations declarations, like almost any other resolution by the General Assembly, are of a mere hortatory nature: they are characterized as ‘recommendations’ without legally binding character.<sup>98</sup> Even when ‘declarations’ are not binding upon the member states, greater authority of declarations have been the subject matter of demand in the international forum. In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that ‘[i]n United Nations practice, a “declaration” is a formal and solemn instrument . . . resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected’.<sup>99</sup>

To the outside world, and oftentimes also within indigenous communities, indigenous peoples’ cultural distinctiveness is considered to be one of their defining features.<sup>100</sup> Giving expression to the right to cultural equality, the Declaration contains numerous provisions to protect against discriminatory and adverse treatment on cultural grounds as well as positive measures to support indigenous peoples’ cultures.<sup>101</sup> These include their right not to be subjected to assimilation or

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<sup>95</sup> UNDRIP art. 36; C169 art. 32

<sup>96</sup> NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu

<sup>97</sup> Anaya and Wiessner, *supra* note 1

<sup>98</sup> UN Charter, Arts 10, 11. The one formal exception, referring to budget allocations to member states (Art. 17(2) UN Charter) does not apply here

<sup>99</sup> Economic and Social Council, Report of the Commission on Human Rights (E/3616/Rev. 1), (Mar-Apr. 1962)

<sup>100</sup> <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf> at pg 7

<sup>101</sup> *Ibid*

destruction of their culture; the right to practise and revitalize their cultural traditions and customs, to teach their cultural mores, and to the repatriation of human remains; and the right to “maintain, control, protect and develop” their cultural heritage, traditional knowledge and traditional cultural expressions.<sup>102</sup> Given the centrality of culture to many indigenous peoples’ identity, the Declaration also recognizes the right of indigenous individuals to belong to an indigenous community or nation in accordance with their community or nation’s traditions and customs.<sup>103</sup>

The most important aspect of every tribal population is their distinct culture. Their unique religious belief and their mode of communication make them one of their kinds. The UNDRIPS has recognised this and provides a set of provisions to protect the rights of these people. Part II and III of the UNDRIPS which comprises of Articles 8 to 10 and 11 to 17 respectively dedicates themselves to provide the necessary rights to indigenous and tribal peoples.

Rights not to be subjected to forced assimilation or destruction of their culture has been recognised and has been incorporated in Article 8 of the Declaration. Apart from providing this right the Declaration provides direction to the concerned States to take effective action to prevent such deprivation or to harm their integrity as distinct peoples.<sup>104</sup>

Right to belong to a distinct community is yet another basic rights that makes the tribal life more fulfilling has been recognised in UNDRIPS in Article 9. The said Article also provides the right to exercise their traditions and customs in furtherance of their right to belong to such indigenous community or nation.<sup>105</sup> Land rights are yet another integral part to enjoy and exercise cultural rights which have been continuing for ages. Thus rights not to be removed from their ancestral lands have been incorporated in Article 10 of the Declaration.<sup>106</sup> The tribals have their own and

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<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> UNDRIPS Article 8. 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

<sup>105</sup> Ibid at Article 9 Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

<sup>106</sup> Article 10 Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

unique right to maintain, protect and develop their cultures. They must have the right to practice and revitalize their cultural traditions and customs.<sup>107</sup>

Right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains are some of the basic cultural rights required for a simple tribal life.<sup>108</sup> The right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons are some very important rights of the tribals and indigenous peoples which has got its due recognition.<sup>109</sup>

Education has been one of the significant rights of the tribals that too in their own language. In order to provide this right to the indigenous and tribal peoples ILO Convention No. 107<sup>110</sup> and 169 as well as the UNDRIPS has made relevant provisions. The ILO Convention No 107 was assimilate in nature and was subsequently replaced by ILO 169. Part VI of the Convention deals with the educational rights of the indigenous and tribal peoples. Education of these communities must be in furtherance of their own history, culture their traditional knowledge, their techniques their value systems and their future goals in furtherance of their social, economic and cultural aspirations.<sup>111</sup>

Children must be taught the language of the ancestors for continuation of the distinct mode of communication exclusive to the community. This will help them to carry on the unique war of developing their medium of communication and plays a very significant role in their community.<sup>112</sup> The UNDRIPS has in explicit language upheld this right of these peoples in Article 14. It states that Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of

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<sup>107</sup> Ibid at Article 11 1 Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

<sup>108</sup> Ibid at Article 12 clause 1

<sup>109</sup> Ibid at Article 13 clause 1

<sup>110</sup> Article 21 of ILO Convention No. 107 states that measures shall be taken to ensure that members of the populations concerned have the opportunity to acquire education at all levels on an equal footing with the rest of the national community

<sup>111</sup> ILO 169 at Article 27 clause 1

<sup>112</sup> Ibid at Article 28 clause 1

teaching and learning. It further states that, Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities,<sup>113</sup> to have access, when possible, to an education in their own culture and provided in their own language.<sup>114</sup> Importance of mother tongue as the means of imparting education to children of these communities has been one of the significant rights provided by ILO Convention No 107.<sup>115</sup> The imparting of general knowledge and skill that is necessary for proper participation in their own community shall be the objective of education of tribal children.<sup>116</sup> It shall be relevant in this regard that the government must adopt measures appropriate to the traditions and cultures of the peoples concerned. Also to make known to them their rights and duties amongst other things.<sup>117</sup>

Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations. These attributes must be reflected in education and public information.<sup>118</sup> Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.<sup>119</sup> States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.<sup>120</sup>

### 2.4.3. Citizenship

Citizenship rights reflect the status of a person recognized by law as being a member of a state. This vesting of citizenship rights imposes a plethora of responsibilities upon the granting states upon the citizen. The concept of citizenship is of recent origin if compared to the existence of indigenous and tribal communities present in various parts of the world. The modern division of state is more of politics than of any other thing. And the problem that many indigenous and tribal communities face is that they are in a position of multiple or dual statehood. At times they are even in the position of enclaves. At times the indigenous and tribes find themselves in a stateless position bereft of any citizenship. Access to state protection in the time of need becomes a subject of debate and deprivation.

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<sup>113</sup> <http://www.zulunation.com/all-laws/> (Accessed on December 3, 2015)

<sup>114</sup> UNDRIPS Article 14 clause 2 and 3

<sup>115</sup> ILO 107 at Article 23

<sup>116</sup> ILO 169 at Article 29

<sup>117</sup> Ibid at Article 30

<sup>118</sup> UNDRIPS at Article 15 clause 1

<sup>119</sup> Ibid at Article 16 clause 1

<sup>120</sup> Ibid at clause 2

Gross human rights violation of these vulnerable sections of the society follows. Indigenous and tribal people must not be in a position of subalterns. Every indigenous and tribal people must have all the basic rights that are conferred upon a citizen of a country. Certain special measures in terms of providing certain rights must also be provided to them for their survival. However, conferring such special measures taken by the state must not in any way prejudices the citizenship rights of these peoples. Thus discrimination must not be exercised against these communities as they are also equally entitled to all the other benefits that are available to another non tribal or indigenous person.<sup>121</sup> The incorporation of certain measures to protect these peoples shall also not lead to any hindrance to their enjoying any right of a common citizen.<sup>122</sup> The UNDRIP also in Part I of the Declaration clearly provides the right to be free of discrimination. In other words, the state governments must ensure that indigenous peoples are treated the same way as others, irrespective of any variation.<sup>123</sup> Indigenous peoples have a right to be citizens of the country in which they live.<sup>124</sup> Irrespective of such international instruments recognizing the citizenship rights of these communities, a major section of these vulnerable people suffer various discrimination by the non tribal communities. Even at times the domestic laws fail to provide certain basic rights to these peoples. It has been a matter of disgrace that states at times intentionally does not accept the basic rights of the indigenous peoples.

#### 2.4.4. Self Determination

Self identification as indigenous or tribal is one of the fundamental criteria for determining the group he belongs.<sup>125</sup> The self identification process is however not very simple and it has been a matter of debate for its political use. In certain countries, these communities have not come forward to bring them under certain conventions. Again in some countries, the government has not recognised some of these communities as indigenous or tribals. For example Russia has not recognised a large part of their indigenous community neither did India and Bangladesh amongst many others.

The United Nations General Assembly has affirmed that indigenous peoples have the right to self-determination. Consequent to the adoption of the Declaration, the indigenous and tribal peoples have the right to freely determine their political status and freely pursue their economic, social and

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<sup>121</sup> ILO 169 at Article 4 clause 3

<sup>122</sup> ILO 107 at Article 3 clause 3

<sup>123</sup> UNDRIP at Article 4

<sup>124</sup> Ibid at Article 33

<sup>125</sup> ILO 169 at Article 1 clause 2

cultural development.<sup>126</sup> Self-determination is considered by the indigenous peoples as a central right recognized at the international level. The right to self determination actually brings with it a host of other rights with it which is equally important for these communities. As the rights conferred by the Declaration is interrelated and interwoven, the right of self determination also gets a parallel status to other rights. Thus the interpretation of the rights of indigenous and tribal people should also be made from the perspective of self determination of these communities. In relation to indigenous people right to autonomy or self-government, the declaration states: “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>127</sup> As far as the right to autonomy, indigenous peoples have the right, to “promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs ....”<sup>128</sup>

There is a close nexus between the right to self-determination and the political rights of the Indigenous and tribal peoples. These include their right to participate in decision-making in matters that would affect their rights. It also creates the duties on the States to consult and cooperate with them to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. The right that comes with the right of self determination is the right to participate through their own respective institutions.<sup>129</sup>

The United Nations Expert Mechanism on the Rights of Indigenous Peoples undertook a detailed study of indigenous peoples and the right to participate in decision-making from 2009 to 2011 and the Special Rapporteur on the rights of indigenous peoples has focused on indigenous peoples’ participation rights in reports on both thematic issues and country issues. The work of the Expert Mechanism and the Special Rapporteur reinforces the growing jurisprudence on the topic by, for example, the Human Rights Committee and the Inter-American Court and Commission on Human Rights. Consistent themes in this evolving understanding of indigenous peoples’ participation rights are that their consent must be sought for activities that have a significant impact on them and their lands, territories and resources.<sup>130</sup>

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<sup>126</sup> Article 3 of UNDRIP and Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>127</sup> UNDRIP at Article 4.

<sup>128</sup> UNDRIP at Article 34

<sup>129</sup> UNDRIP at Article 18

<sup>130</sup> Expert Mechanism on the Rights of Indigenous Peoples, advice No. 2: indigenous peoples and the right to participate

#### 2.4.5. Human Rights

Rights inherent to human life is called human rights. These rights are essential for enjoying the full measure of human life. Various international instruments have accepted the need of conferring the indigenous and tribal peoples these basic human rights and fundamental freedom without hindrance and discrimination.<sup>131</sup>

Every indigenous person is born with the right to life, liberty and security. This right also extends to them as a group apart from an individualist right.<sup>132</sup>

#### 2.4.6. Consultation and Participation

While doing anything with or upon an indigenous community, it is essential that their participation and consultation is must. Such consultation must be undertaken however in good faith with the objective of achieving consent or agreement.<sup>133</sup> This right to be consulted and participate in their own affairs has also been recognized in international instruments.<sup>134</sup> It shall also be relevant to consult with the members of these communities in formulating legislation upon them or while taking any administrative measures that may affect them directly.<sup>135</sup> Participation in decision making process affecting them shall be considered a specific right of these people and which shall include the right to select who would represent them.<sup>136</sup>

#### 2.4.7. Health

Tribal peoples have their own traditional knowhow to treat themselves in cases of health issues. They have the right to use traditional medicines and health practices that they find suitable.<sup>137</sup> It shall also be up to them to access any other form of modern health care practices without any hindrance. State shall take appropriate measures that these peoples have the same right to health as anyone else.<sup>138</sup> It shall be the responsibility of the government for providing adequate health services for the indigenous and tribal peoples.<sup>139</sup>

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in decision-making (A/HRC/18/42, annex).

<sup>131</sup> ILO 169 at Article 3 clause 1.

<sup>132</sup> UNDRIP at Article 7

<sup>133</sup> Ibid at Article 6 clause 1 sub clause a.

<sup>134</sup> Ibid at Article 2 clause 1.

<sup>135</sup> Ibid at Article 6 clause 1.

<sup>136</sup> UNDRIP at Article 18

<sup>137</sup> Ibid at Article 24

<sup>138</sup> Ibid.

<sup>139</sup> ILO 169 at Article 20 clause 1.

Minoo Parabia, in his paper presented at the Centre for Social Studies, Surat, and the Centre for the History of Medicine, University of Warwick, UK, in March 2007, argued that there are more than 2000 species of medicinal plants. He further estimated that in India tribes use about 6000 species of plants and its products in their healing. He even stated that a rich resource that is being underutilized specially as there is evidence that some of these plants can treat conditions that are considered incurable in allopathic medicine. As it is modern development is leading to a rapid deterioration in the tribal environment, with a resulting destruction and loss of many of these plants. He himself is working on the scheme and grants them plots of land where these plants may be grown, processed and practices from a special centre at Ahwa in the Dangs.<sup>140</sup>

#### 2.4.8. Economy, Education and Intellectual Property Rights

Tribal economy is based on land and its resources they live upon. The economy is generally self sustaining. The process of storing is generally absent in tribal economic setup except in certain cases. Their education, knowhow and transformation of skills are the basis of their economic setup. However, with the encroachment on their land, their economy has faced serious challenges forcing the current generation to seek other modes of sustenance.

Vocational training and other training programs must be provided to protect these communities. These training programs should have traditional values and interest of these communities.<sup>141</sup>

Indigenous peoples want to maintain their distinct cultures and transmit their cultural heritage to subsequent generations. Thus they are demanding the right to educate their children in their own languages, with their own textbooks and school material.<sup>142</sup>

The annual market value of drugs derived from medicinal plants discovered, developed and passed from generation to generation by indigenous peoples exceeds \$43 billion.<sup>143</sup> Drug companies tap into this indigenous knowledge basis but rarely share the profits with indigenous peoples. Thus indigenous peoples are attempting to gain greater protection for their intellectual property.<sup>144</sup>

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<sup>140</sup> David Hardiman, 'Healing, Medical Power and the Poor: Contests in Tribal India', *Economic and Political Weekly*, April 21, 2007, pp 1404-1408 at p.1405

<sup>141</sup> ILO 107 at Article 17

<sup>142</sup> *Supra* Note 71

<sup>143</sup> *Ibid*

<sup>144</sup> *Ibid*

## A Sum Up

In the last few decades, there has been a significant improvement amongst the indigenous and tribal peoples across the world. Even when it is not at par with the other non indigenous communities but still the situation has improved to a great extent. Many countries have accepted the existence of tribal and indigenous people in their territories which they have denied for long in the international stage. This acceptance leads them to have a legal status. However, there is need of further improvement in the areas of enforcement and implementation. Thus to sum up a set of recommendation may be provided.

Indigenous peoples will be nowhere in the absence of their ancestral lands. Thus, the first thing that the international regulating body should do is to provide a substantive along with a procedural or implementation system to protect the indigenous and tribal peoples from being displaced from their land. The international movement must also be tuned in the way of returning the lands to these poor people at the earliest in consultation with these groups.

The goal of international movements should be in furtherance of protecting the culture and language of these people. There should be international cooperation to allow groups of similar communities to develop relationship with each other. The best way to protect these groups would be to protect and safeguard their cultural identities beyond political divisions of statehood. There is need to provide special status to identify the most vulnerable groups in the verge of extinction and there should be proper international guidelines of cooperation between various segments of these peoples. It must be understood that the culture and language of these peoples are inextricably linked with their traditional way of life. It must also be prioritised that their language be used to provide their wards their way of education and proper care be given in furtherance of the same.

Indigenous communities include both individuals and a collective whole. To provide welfare to indigenous peoples means welfare to both of them. Indigenous philosophy is based on group ownership and this must be respected by modern international movements. As individual cannot live without the community, a community cannot survive without its members, both influence each other. Legal framework is essential by keeping this in mind.

Misunderstandings have arisen regarding the claims of indigenous peoples, particularly those to land and natural resources as well as those to self-determination. These claims can be properly understood only by linking them to their *raison d'être*, i.e., the cultural survival and flourishing of indigenous peoples. Cultural rights thus include not only rights to culture narrowly conceived, i.e.,

protection of language, customs, and traditions, but also the culturally bounded right to property and the culturally grounded right to self-determination.<sup>145</sup>

As their traditional lands are critical to the survival of the culture of indigenous peoples, the legal status of these properties ought to reflect this essential purpose. As the purpose of individual property law protections has been redefined from the maximization of economic benefits to the flourishing of humans beyond the accumulation of wealth, the protection of indigenous cultures through collective property rights has to be guided by similar criteria of the blossoming of peoples. The management of indigenous property rights, properly understood, would thus be guided by the culture of the people holding them, dynamic as this concept is. This would, in some cases, as in the US in the absence of formal ownership rights which are often held by the federal government, mean a right to use coupled with an obligation of stewardship toward the resource, for the benefit of future generations of the community and for the planet. In other cases, as Saramaka taught, full ownership might be the solution.<sup>146</sup> Even then, the Court trusts in the use of this collectively held land to the benefit of the community long-term.<sup>147</sup>

Indigenous self-determination also is best understood from its cultural foundation. As Vine Deloria Jr. said, the purpose of the sovereignty of an indigenous people is to protect its cultural integrity. The indigenous community should govern itself, in order to continue the life of its culture and its members and have it flourish. This would inform the exercise of its authority and control. The structures of decision making also could be tied to the culture, as they would sanction the authority and control of, say, traditional elders without the need of periodic democratic reaffirmation, by ballot, of their leadership role. As part of a global community, though, indigenous self-government would still be bound, as to the substance of their decisions, by the outer limits any sovereign experiences, i.e., universal standards of human rights.<sup>148</sup>

The international movement for the protection of indigenous rights must understand that it is up to these communities to decide their fate. It is up to them to decide whether they wish to continue their life the indigenous way or otherwise. The condition in some parts of the world has led to the formation of living museums and a place of tourist attraction. Governments should not indulge in this practice.

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<sup>145</sup> Siegfried Wiessner 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' 22 *EJIL* 140 (2011)

<sup>146</sup> *Ibid*

<sup>147</sup> *Ibid*

<sup>148</sup> *Ibid*

This chapter deals with various international instruments creating various international obligations on the part of the member states. This chapter is the outcome of the study made by the researcher to understand the position of indigenous and tribal peoples across the globe including that of India.

It has been observed that the various international instruments have been the outcome of long struggle and sacrifice by many members of indigenous communities.

These international movements have gained momentum with the passage of time mostly in the 21<sup>st</sup> century with a host of international and regional instruments taking place which related directly and in some instruments indirectly the indigenous and tribal communities of the world.

Credit must also go to the UN for its contribution for the protection of various socio economic rights of the tribal and indigenous peoples amidst a plethora of criticisms faces by them.

India being a signatory of the UN, must also respect and implement the promises made by them in the international forums as far as possible. However, it has been identified that India is still following the principles and rules as formulated by the UN in ILO Convention No. 107, even when it has been scrapped by the UN as being assimilate in nature.

A new Convention came up in the form of ILO No. 169 which replaced the ILO No. 107.

India has not been up to date with the international obligations towards indigenous and tribal peoples in India. The study reveals the persisting problems of such outdated policy and how irretrievable the position would be if this outdated policy is continued.

India has not adhered to UNDRIPS which contains the current guidelines for the protection of civil and economic rights of the indigenous and tribal peoples.

India has avoided the acceptance of the tribes in its territory to be indigenous even when in the initial period of its dealing with the international community, India have used terms like aboriginal etc.

The United Nations Organisation has made the submission of Universal Periodic Review compulsory for all member states which are to be submitted every four years. In the previous two reports submitted by India in the year 2008 and 2011 respectively, India has mostly avoided its obligation to the indigenous communities of the country. The third report is due for submission in the first quarter of 2016, and India should not like the earlier reports avoid its obligations towards the protection of rights of the tribal peoples of the country whose human rights have been violated by various acts of the non tribals and governmental policies. The government of India must take this matter very seriously and must adhere to the international standards that has been developing with

time in the international sphere. The right of indigenous and tribal people must be acknowledged in furtherance of the ILO 169 rather than ILO 107. As the pursuance of the earlier convention has been outdated and has been rejected by the UN itself. All the activities going on in India in furtherance of tribal welfare and protection are in tune with ILO 107 and will be redundant once the new convention becomes enforceable in India. Thus the earlier, the better for the policy makers to welcome the principles laid down in ILO 169.