

EXPLORING THE NORMATIVE IMPLICATIONS OF THE DEVELOPMENT OF INDIGENOUS PEOPLES' RIGHTS IN INTERNATIONAL ENVIRONMENTAL LAW*

*Raymond Marvic C. Baguilat***

I. INTRODUCTION

The protection of Indigenous Peoples' rights under international law has dramatically developed in the past six decades. By utilizing International Human Rights Law, Indigenous Peoples have been able to underscore their oppression and call for the recognition of their distinctive identity and attendant rights. Much recently, however, a new engagement and characterization of Indigenous Peoples has emerged within the realm of International Environmental Law.

This development was recently manifested in the Conference of Parties for the UN Framework on Climate Change Convention ("UNFCCC")¹ in Paris ("COP 21"), where Indigenous Peoples were engaged to participate as constituencies and observers in the forum. This participation allowed them to assert principles recognizing and respecting Indigenous Peoples' rights in the Paris Agreement.² Furthermore, COP 21 paved the way for the establishment of the Climate Action Platform for Local Communities and Indigenous Peoples ("LCIPP"), which serves as a medium to further converse about experiences and best practices on climate change mitigation and adaptation.³

* Cite as Raymond Marvic Baguilat, *Exploring the Normative Implications of the Development of Indigenous Peoples' Rights in International Environmental Law*, 93 PHIL. L.J. 979, [page cited] (2020). Portions of the discussion are drawn from the author's final assessment for his class on Human Rights of Groups: Indigenous Rights in International and Domestic Law for the University of Melbourne; The author thanks Ms. Ysabelle Montenegro for her invaluable research assistance; All errors and opinions are the authors.

** Senior Legal Associate, Institute of Human Rights; Senior Lecturer, University of the Philippines College of Law; LL.M., University of Melbourne Law School (2016). J.D., University of the Philippines College of Law (2011); A.B. Psychology, De La Salle University (2006).

¹ United Nations Framework Convention on Climate Change [hereinafter "UNFCCC"], May 9, 1992, 1771 U.N.T.S. 10.

² Adoption of the Paris Agreement [hereinafter "Paris Agreement"], U.N. Doc. FCCC/CP/2015/L.9/REV.1 (Dec. 12, 2015).

³ Paris Agreement, ¶ 135.

Given this development, the author argues that the emergence of Indigenous Peoples within the realm of International Environmental Law presents significant normative implications. As States begin to embrace the identity of Indigenous Peoples as stewards of the land, the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)⁴ starts to crystallize into customary international law. Aside from this, the recognition of Indigenous Peoples’ role in addressing climate change also develops the cognitive image of Indigenous Peoples and provides an avenue to influence domestic policies.

Building on these arguments, this paper shall be divided into three parts. Part II clarifies the concept of Indigenous Peoples and provides the context of indigeneity by tracing its historical background. Following this, a brief narration is provided to highlight the progression of Indigenous Peoples’ rights under International Law. Part III presents the normative implications of the engagement and participation of Indigenous Peoples in international environmental law. The author will argue that, *first*, the involvement of Indigenous Peoples helps establish the UNDRIP as customary international law. *Second*, it will be argued that the participation of Indigenous Peoples in international lawmaking helps influence domestic policy-making. *Lastly*, the author explains that this development enhances the narrative surrounding Indigenous Peoples and promotes their welfare. To close this part, the limitation of the international legal system and how it affects Indigenous Peoples’ participation in international lawmaking are flagged. Part IV elucidates the overarching conclusions of the author.

II. THE CONCEPT OF INDIGENOUS PEOPLES

A. Who are Indigenous Peoples

The United Nations recognizes that there are more than 5,000 Indigenous Peoples groups found in over 90 countries around the world.⁵ Their population, projected at around 5% of the world's population,⁶ represents more than 370 million people.⁷ Curiously, despite the existence of this estimate, there is no fixed definition as to who “Indigenous Peoples” are.

⁴ United Nations Declaration on the Rights of Indigenous Peoples [hereinafter “UNDRIP”], U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁵ United Nations, *The World Conference on Indigenous Peoples*, UNITED NATIONS WEBSITE, available at <https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html>

⁶ *Id.*

⁷ *Id.*

Consequently, other similar yet vague terms are used to define them, depending on the most appropriate circumstance within their particular jurisdiction.⁸

This uncertainty resulted in vigorous opposition from several States, arguing that the absence of a fixed definition confuses Indigenous Peoples with other minorities.⁹ They claim that instruments drafted in the international forum provide for rights and obligations concerning Indigenous Peoples,¹⁰ and that such may not be enforced in the absence of a specific definition.

A comprehensive yet non-definitive definition¹¹ was then proposed to address concerns about the vagueness of the term “indigenous.” This “working definition” was provided by the Study on the Problem of Discrimination against Indigenous Populations,¹² otherwise known as the Cobo Study. The Study provides that:

Indigenous communities, peoples, and nations are those who, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹³

⁸ Examples include the terms “Native Americans” in the United States of America, “Aboriginals” and “Torres Strait Islanders” in Australia, “First Nations” in Canada, “Hill Tribe” in Thailand, and “Janijati/Adivasi” (generic term for a tribe that is outside of the Hindu Caste Hierarchy) in Nepal.

⁹ SEDFREY CANDELARIA, *COMPARATIVE ANALYSIS ON THE ILO INDIGENOUS AND TRIBAL PEOPLES CONVENTION NO. 169, UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP), AND THE INDIGENOUS PEOPLES’ RIGHTS ACT (IPRA) OF THE PHILIPPINES* 9 (2012).

⁹ Erica-Irene Daes, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People* [hereinafter “Working Paper”], ¶ 39, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996).

¹⁰ Working Paper, ¶ 40.

¹¹ Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT’L. L. 439, 443 (2008).

¹² Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations – Volume 5: Conclusions, Proposals and Recommendations* [hereinafter “Cobo Study”], U.N. Doc. E/CN.4/SUB.2/1986/7/ADD.4 (Mar. 1987).

¹³ *Id.*

Accordingly, the definition proposed that indigeneity may be identified through: *first*, priority in time, specifically concerning the occupation and use of a specific territory; *second*, the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws, and institutions; *third*, self-identification, as well as recognition by other groups or by State authorities as a distinct collectivity; and *lastly*, an experience of subjugation, marginalization, dispossession, exclusion, or discrimination, regardless of the persistence of such condition.¹⁴ While the definition remained to be non-exhaustive and flexible,¹⁵ it serves as the generally accepted definition to characterize Indigenous Peoples.¹⁶

The working definition helped distinguish indigeneity from the concepts of minority, race, and ethnicity. It clarified that while Indigenous Peoples may be considered a minority group—characterized by their relative powerlessness compared to the dominant group¹⁷—they are different from racial¹⁸ and ethnic¹⁹ minorities in that their cultural identity is centered on their relationship with the lands, territories, and resources that they have held since time immemorial or used to hold as original inhabitants. Given this, Indigenous Peoples may demand both minority rights and their distinct Indigenous Peoples' rights.

B. The History of Indigenous Peoples in International Law: The Trusteeship Doctrine and International Human Rights Law

The roots of Indigenous Peoples as subjects of International Law can be traced from the 16th century, during the rise of colonialism.²⁰ At this time, foreign civilizations entered territories held by natives and took their lands through conquest or cession. Indigenous Peoples were either known as

¹⁴ Working Paper, ¶ 39.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Milton Vickerman, SALEM PRESS ENCYCLOPEDIA *Minority and majority groups* (2019).

¹⁸ Race is defined as a social category or construction that is distinguished by a combination of physical characteristics and social and historical context; RESEARCH STARTERS *Race and ethnicity: Topic* (2018).

¹⁹ Ethnicity is the identification of population groups characterized by common ancestry, language, and customs; RESEARCH STARTERS *Race and ethnicity: Topic* (2018).

²⁰ Maria Victoria Cabrera Ormaza, *Re-thinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation*, 4 GOETTINGEN J. INT'L L. 263, 267 (2012).

aborigines, natives, or Indians. They were considered as backward societies²¹ because they do not follow the Westphalian system, where nation-states are required to have a centralized and hierarchical political structure that exercises its power over a fixed territory.²² Following Westphalian Eurocentrism, Colonial States applied the trusteeship doctrine.

The trusteeship doctrine provides that to “civilize” Indigenous populations, it was necessary to integrate them by prohibiting the practice of their culture and forcing them to adopt the ways of the colonizers.²³ Several instruments under international law reflect this doctrine, an example of which is the Covenant of the League of Nations, where colonies and territories that were unable to support themselves when they gained sovereignty after World War I were entrusted to advanced nations.²⁴

The doctrine found its way into the first binding international law on Indigenous Peoples. In 1957, the International Labour Organization (“ILO”) adopted ILO Convention No. 107, otherwise known as the Indigenous and Tribal Populations Convention, 1957 (“ILO 107”).²⁵ This treaty was ratified by 27 States,²⁶ mostly coming from South America and Africa.

The Convention used the terms “Indigenous and Tribal Populations,” characterized by the history of colonization and distinctive social, economic, and cultural situation²⁷ of the population. They are those considered to be “less advanced” compared to other sectors of the national community.²⁸ Given this depiction, ILO 107 sought to improve the lives of indigenous and tribal populations through their integration into mainstream society.²⁹ Hence, the obligations under ILO 107 meant that States should provide equal benefits

²¹ *Id.*, at 263, 268.

²² *Id.*

²³ JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 31-32 (2nd ed. 2004).

²⁴ Covenant of the League of Nations art. 22, June 28, 1919, U.K.T.S. 4. “Advanced” was determined by reason of their resources, their experience or their geographical position.

²⁵ International Labour Organization [hereinafter “ILO”] Indigenous and Tribal Populations Convention, C107 [hereinafter “ILO 107”], June 26, 1957, 328 U.N.T.S. 247.

²⁶ ILO, *Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)*, ILO, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312252. Ten States would subsequently denounce ILO 107 by virtue of their ratification of ILO 169

²⁷ Ormaza, *supra* note 20, at 263, 270.

²⁸ ILO 107, art. 1, ¶ a.

²⁹ Russell Lawrence Barsh, *Revision of ILO Convention No. 107*, 81(3) AM. J. INT’L L. 756, 757 (1987).

and opportunities,³⁰ such as education, vocational training, and employment, with the expectation that indigenous and tribal populations will learn the ways of mainstream society. While they may maintain their customs and institutions, these should be compatible with national legal systems and integration programs since the ultimate goal is the integration of these populations with “more advanced” sectors of the national community.³¹ Corollary to this was the recognition of their land rights, subject to the final say of the State, which may resettle them in the interest of national economic development.³²

Several criticisms were raised against the treaty due to the language of ILO 107. It was noted that the treaty reflects the subservience of Indigenous Peoples to the power of the State. Consequently, it was deemed as a tool to undermine the distinctiveness of Indigenous Peoples. Furthermore, the use of the term “populations” also highlighted that States do not recognize that these groups have the right to self-determination. Consequently, the ILO was urged to replace the treaty with one that recognizes the right to self-determination of indigenous and tribal populations.³³ It was demanded that the replacement treaty give Indigenous Peoples control over their economic, social, and cultural development.³⁴

Despite the criticism, ILO 107 served its purpose as a significant first step towards the introduction of Indigenous Peoples as subjects of international law.³⁵ It brought to light the vulnerability of Indigenous Peoples and their lack of access to government support and services. It also shattered the notion that their interests were principally domestic and forced States to apply the general principles of human rights espoused under International Law to Indigenous Peoples.³⁶ Coupled with the strength of the ILO as a tripartite United Nations agency that involves governments, employers, and workers representatives (Unions), there came extensive recognition of Indigenous “populations.”³⁷

³⁰ ILO 107, art. 2.

³¹ Art. 7.

³² Art. 12(1).

³³ Barsh, *supra* note 29, at 756.

³⁴ *Id.*

³⁵ Ormaza, *supra* note 20, at 263, 270.

³⁶ Claire Charters & Rodolfo Stavenhagen, *The UN Declaration on the Rights of Indigenous Peoples: How It Came To Be and What It Heralds*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 10* (Claire Charters & Rodolfo Stavenhagen eds., 2009).

³⁷ ILO, *INDIGENOUS AND TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169 173-74* (2009).

Succeeding ILO 107 was the Cobo Study. This milestone was attained in 1971 when José Martínez Cobo was appointed as a Special Rapporteur under the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and was tasked to study the problem of discrimination against indigenous populations.³⁸ The report, later coined as the Cobo Study, was meaningful in providing the oft-repeated working definition of Indigenous Peoples.³⁹

As explained earlier, the working definition reiterated that Indigenous Peoples had historically held their territories before they were conquered and colonized. It also echoed their distinct and non-dominant character compared to the rest of society, as well as their determination to preserve, develop, and transmit their ancestral territories and their ethnic identity to future generations.⁴⁰ These characterizations had since been followed as the guidepost in succeeding international instruments.

On the heels of the Cobo Study, the ILO recognized that pushing for the integration of Indigenous Peoples should be abandoned.⁴¹ Hence, ILO Indigenous and Tribal Peoples Convention, C169, otherwise known as ILO Convention No. 169 (“ILO 169”),⁴² was adopted to change the direction of ILO 107. By applying the principle of self-determination to Indigenous Peoples, ILO 169 shifted the integrationist approach into a “modern, non-paternalistic, non-assimilative approach.”⁴³

The new convention deliberately removed the word “integration” and explicitly mentioned that the aim of the law is to remove “the assimilationist orientation of the earlier standards” and the recognition of the “aspirations of these peoples to exercise control over their institutions, ways of life and economic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live.”⁴⁴ Anent this, the use of the term “peoples” instead of “populations” aligned the treaty with the principle of self-determination as embodied in the

³⁸ Ormaza, *supra* note 20, at 263, 271.

³⁹ *Id.* at 263, 270.

⁴⁰ Cobo Study, at 48, ¶ 379.

⁴¹ Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview*, 79 *NORDIC J. INT'L L.* 433, 448 (2010).

⁴² ILO Indigenous and Tribal Peoples Convention, C169 [hereinafter “ILO 169”], June 27, 1989, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

⁴³ Yupsanis, *supra* note 41, at 436.

⁴⁴ ILO 169, pmbl.

Charter of the United Nations,⁴⁵ the United Nations International Covenant on Civil and Political Rights,⁴⁶ and the United Nations International Covenant on Economic, Social and Cultural Rights.⁴⁷ This shift signaled that ILO 169 recognizes the right to self-determination of Indigenous and Tribal Peoples.

ILO 169 also introduced the concept of self-identification. Under the convention, “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”⁴⁸ As a consequence, determining who is indigenous was not within the ambit of the State but of the peoples.⁴⁹

Finally, ILO 169 empowered Tribal and Indigenous Peoples by strengthening their right to consultation and participation. Hence, under the convention, governments should consult Indigenous Peoples in good faith whenever legislative or administrative measures affect them.⁵⁰ The aim is to seek an agreement or gather the consent of Indigenous Peoples.⁵¹ Therefore, ILO 169 ensured the active participation of Indigenous Peoples.⁵² Corollary to this, the ratification of ILO 169 entailed the revision of ILO 107 and its assimilationist orientation.

Undoubtedly, the ILO 169 provided a massive leap for Indigenous Peoples in international law recognition. Unfortunately, its limited ratification has severely restricted its influence. As of the moment, only 23 states out of the 187 member states have ratified ILO 169.⁵³ This figure is a sizable number that highlights either the apathy or opposition of member states to the convention. Moreover, ILO 169 is also criticized for reiterating State-centric

⁴⁵ Charter of the United Nations, June 26, 1945, 1 U.N.T.S. XVI. Note that this became a point of disagreement later during the negotiations for the adoption of the UN Declaration on the Rights of Indigenous Peoples because the terms are linked to the right of secession and independent statehood. It is also related to the rights provided under the United Nations International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which states that peoples have the right to “freely determine their political status and freely pursue their economic, social and cultural development.”

⁴⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁴⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁴⁸ ILO 169, art. 1.2.

⁴⁹ Ormaza, *supra* note 20, at 263, 272.

⁵⁰ ILO 169, art. 6, 15, 17, 22, 27 & 28.

⁵¹ ILO 169, art. 6, 15, 17, 22, 27 & 28.

⁵² Yupsanis, *supra* note 41, at 439.

⁵³ The Philippines has not ratified ILO Convention No. 169.

decision-making due to its failure to provide for a veto mechanism whenever Indigenous Peoples decide to prohibit the execution of a project that affects them.⁵⁴

Notwithstanding these limitations, ILO 169 provided significant steps towards the recognition of the problems facing Indigenous Peoples. More importantly, it was able to introduce essential concepts such as the self-determination of Indigenous Peoples and their distinctive contributions not only to cultural diversity but also to the social and ecological harmony of humankind. This acknowledgment would later serve as the cornerstone for the United Nations Declaration on the Rights of Indigenous Peoples that would be passed more than a decade later.

C. From International Human Rights to Environmental Law

Succeeding ILO 107 and ILO 169 were significant international legal instruments that recognized the contribution of Indigenous Peoples to environmental protection. These legal instruments include Agenda 21,⁵⁵ the Rio Declaration,⁵⁶ the Convention on Biological Diversity,⁵⁷ the declaration of the International Decade of the World's Indigenous People,⁵⁸ and the UNFCCC.⁵⁹

1. Agenda 21 and the Rio Declaration

In 1992, the UN Conference on Environment and Development (“UNCED”) held in Rio de Janeiro, Brazil, otherwise known as the “Earth Summit,” brought together heads of States and non-government organizations (“NGOs”) to discuss the need to reframe global approaches to economic development and the destruction of natural resources.⁶⁰ The Summit resulted in the drafting of important, albeit non-binding, international

⁵⁴ First Nations Studies Program, *ILO Convention 169*, FIRST NATIONS & INDIGENOUS STUDIES: THE UNIVERSITY OF BRITISH COLUMBIA, available at https://indigenousfoundations.arts.ubc.ca/ilo_convention_169

⁵⁵ UN Conference on Environment and Development Agenda 21 [hereinafter “Agenda 21”], U.N. Doc. A/CONF.151/26 (Apr. 23, 1992).

⁵⁶ 1992 Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/REV.1 (June 3-14, 1992).

⁵⁷ Convention on Biological Diversity, June 12, 1992, 1760 U.N.T.S. 143.

⁵⁸ International Decade of the World's Indigenous People [hereinafter “International Decade”], U.N. Doc. A/RES/48/163 (Dec. 21, 1993).

⁵⁹ UNFCCC, 1771 U.N.T.S. 10.

⁶⁰ United Nations, *UN Conference on Environment and Development*, UNITED NATIONS, (1997), available at <https://sustainabledevelopment.un.org/milestones/unced>

instruments—Agenda 21⁶¹ and the Rio Declaration.⁶² Agenda 21 provided the blueprint for policies in all levels (local, national, and international) surrounding sustainable development, while the Rio Declaration put forth principles (e.g. precautionary principle) that serve as guides for sustainable development. These documents underscored the importance of Indigenous Peoples to the environment.

Agenda 21⁶³ explicitly recognizes the role that Indigenous Peoples and their communities serve towards the achievement of sustainable development. As reflected in Chapter 26,⁶⁴ the instrument urged that Indigenous Peoples and their communities be empowered by creating stronger partnerships with them, not only through consultations but also by allowing them to participate in policy-making, resource management, and conservation efforts.

On the other hand, the Rio Declaration also expressed the same tenor concerning Indigenous Peoples. Under Principle 22 of the Declaration,⁶⁵ Indigenous Peoples are recognized to play a significant role in environmental management and development due to their knowledge and traditional practices. As such, States are urged to recognize and support their cultural distinctiveness, while allowing their active participation in pushing for sustainable development.

2. Convention on Biological Diversity

Following these instruments was the Convention on Biological Diversity (“CBD”). The CBD recognized the close relationship between Indigenous Peoples and the environment.⁶⁶ It explained that because of Indigenous Peoples’ traditional lifestyle, which in turn is dependent on the natural resources in the areas they live in,⁶⁷ they were able to adopt means to sustain the environment. Consequently, parties to the CBD were urged to “respect, preserve and maintain knowledge innovations and practices of indigenous and local communities,” consistent with the conservation and sustainable use of biological resources.⁶⁸ As a matter of equity, party States

⁶¹ Agenda 21, U.N. Doc. A/CONF.151/26.

⁶² 1992 Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/REV.1.

⁶³ Agenda 21, U.N. Doc. A/CONF.151/26.

⁶⁴ Agenda 21, ch. 26.

⁶⁵ 1992 Rio Declaration on Environment and Development, prin. 22.

⁶⁶ Convention on Biological Diversity, pmbl.

⁶⁷ Convention on Biological Diversity, pmbl.

⁶⁸ Convention on Biological Diversity, art. 8(j).

were also encouraged to share the benefits coming from natural resources to Indigenous peoples who conserve and sustainably use natural resources through their “traditional knowledge, innovations and practices.”⁶⁹

3. The International Decade of the World's Indigenous Peoples

Succeeding these international instruments was the UN General Assembly proclamation of the International Decade of the World's Indigenous People,⁷⁰ which commenced from 1995 to 2004. This proclamation paved the way for significant progress in mainstreaming Indigenous Peoples' Rights.

On the heels of mounting recommendations provided under the World Conference on Human Rights in 1993, and several workshops and Reports urging the creation of a permanent forum that would advise the UN Economic and Social Council on Indigenous Peoples matters, the UN Permanent Forum on Indigenous Issues (“UNPFII”)⁷¹ was established. Its mandates are to, *first*, serve as an advisory body to the UN Economic and Social Council (“ECOSOC”) with the specific obligation to provide expert advice and recommendation surrounding indigenous issues to the Human Rights Council and to the other programs, funds, and agencies of the United Nations.⁷² *Second*, it is tasked to raise awareness and promote the integration and coordination of activities relating to Indigenous Peoples with the United Nations system.⁷³ *Third*, it must prepare and disseminate information on indigenous issues.⁷⁴ Later on, it was also mandated to promote and apply the UNDRIP primarily.⁷⁵

The UNPFII is lauded for allowing open dialogue and cooperation among its participants.⁷⁶ This dialogue is characterized by the direct participation of not only governments and UN agencies, but also of

⁶⁹ Convention on Biological Diversity, pmb., art. 8(j).

⁷⁰ International Decade, U.N. Doc. A/RES/48/163.

⁷¹ Economic and Social Council Establishment of a Permanent Forum on Indigenous Issues: Economic and Social Council Resolution 2000/22 [hereinafter “Permanent Forum”], U.N. Doc. E/2000/22 (July 28, 2000).

⁷² Permanent Forum, ¶ 2(a).

⁷³ Permanent Forum, ¶ 2(b).

⁷⁴ Permanent Forum, ¶ 2(c).

⁷⁵ UNDRIP, art. 42.

⁷⁶ SECRETARIAT OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, PARTNERING WITH INDIGENOUS PEOPLES: EXPERIENCES AND PRACTICE 8 (2015), available at <http://www.un.org/esa/socdev/unpfi/documents/LibraryDocuments/partnering-with-ips.pdf>

representatives of Indigenous Peoples,⁷⁷ whose participation is funded through the UN Voluntary Fund for Indigenous Peoples.⁷⁸ Aside from the sessions, dialogues between the participants are also supported through parallel events. These parallel events allow the establishment of networks among the participants.⁷⁹ The UNPFII is often criticized for its operational limitations and the constraints on the period for Indigenous Peoples to raise their concerns while privileging States.⁸⁰ However, its significance is undeniable. Hence, participation in the forum is greatly encouraged.

A year after the creation of the UNPFII, the UN Commission on Human Rights moved to appoint a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples.⁸¹ Later on renamed as the Special Rapporteur on the Rights of Indigenous Peoples (“SRRIP”), the SRRIP is appointed to serve for a three-year term.⁸² Its mandate is, *first*, to communicate, collect, and provide information from various sources, including governments, Indigenous Peoples, and their organizations, on matters involving the violation of human rights and fundamental freedoms of Indigenous Peoples.⁸³ *Second*, it is tasked to draft recommendations and proposals covering measures and activities that will prevent or remedy human rights violations committed against Indigenous Peoples.⁸⁴ *Lastly*, it is tasked to work hand-in-hand with other Special Rapporteurs, Special Representatives, Working Groups, and independent experts of the Commission on Human Rights’ Sub-Commission on the Promotion and Protection of Human Rights.⁸⁵

While the International Decade of the World’s Indigenous Peoples was remarkable, it failed to translate to momentous changes in UN policies and operation.⁸⁶ Chief among the failures during this period was the inability

⁷⁷ *Id.*

⁷⁸ *UN Voluntary Fund*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, available at <http://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/IPeoplesFundIndex.aspx>

⁷⁹ Secretariat, *supra* note 76.

⁸⁰ Aimee Ferguson, *Reflections on the 2012 UN Permanent Forum on Indigenous Issues*, 8 INDIGENOUS L. BULL. 24, 25 (2012).

⁸¹ Office of the High Commissioner for Human Rights, Human Rights and Indigenous Issues [hereinafter “SRRIP”], U.N. Doc. E/CN.4/RES/2001/57 (Apr. 24, 2001).

⁸² SRRIP, ¶ 1.

⁸³ SRRIP, ¶ 1.

⁸⁴ SRRIP, ¶ 1.

⁸⁵ SRRIP, ¶ 1.

⁸⁶ IWGIA, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, FIRST INTERNATIONAL DECADE OF THE WORLD’S INDIGENOUS PEOPLES (1995-2004) (2015),

of the Working Group on the Draft Declaration on the Rights of Indigenous Peoples to complete the Declaration on the Rights of Indigenous Peoples.⁸⁷

Fortunately, the General Assembly subsequently adopted a new resolution calling for the Second International Decade of the World's Indigenous Peoples⁸⁸ to build on the achievements of the first international decade and resolve unfinished business during the first decade. While undeniable achievements were attained from 1995 to 2004, grave violations against indigenous human rights persisted as the Declaration on the Rights of Indigenous Peoples remained incomplete.⁸⁹ The succeeding resolution proved integral for Indigenous Peoples, as it paved the way for the creation of various task forces in various UN agencies⁹⁰ and, more importantly, the adoption of the UNDRIP.⁹¹

Progress in the participation of Indigenous Peoples in environmental law showed that issues affecting them cut across both human rights and environmental law. This recognition, resulting from Agenda 21, the Rio Declaration, the CBD, and the UNDRIP, alongside the United Nations mechanisms on Indigenous Peoples affairs, ushered more robust engagements under the Paris Agreement through the establishment of the Climate Action Platform for LCIPP.

4. The UN Framework Convention on Climate Change ("UNFCCC")

Greenhouse gases—such as carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and tropospheric ozone (O₃)—warm the global temperature.⁹² There exists a positive correlation, whereby larger emissions of greenhouse gases entail a warmer climate. This is a natural phenomenon. However, global warming has significantly intensified, as human activities—

available at <http://www.iwgia.org/human-rights/un-mechanisms-and-processes/2nd-un-decade-on-indigenous-peoples/1st-un-decade-on-indigenous-peoples>

⁸⁷ *Id.*

⁸⁸ Second International Decade of the World's Indigenous People [hereinafter "Second International Decade"], U.N. Doc. A/RES/59/174 (Feb. 24, 2005).

⁸⁹ Second International Decade, U.N. Doc. A/RES/59/174.

⁹⁰ United Nations General Assembly, A Midterm assessment of the Progress made in the Achievement of the Goal and Objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary General, ¶ 57, U.N. Doc. A/65/166 (July 23, 2010).

⁹¹ UNDRIP, U.N. Doc. A/RES/61/295.

⁹² PHILIPPE SANDS & JACQUELINE PEEL (WITH ADRIANA FABRO AND RUTH MACKENZIE), *PRINCIPLES OF INTERNATIONAL LAW* 274 (3rd ed. 2012).

particularly the incineration of fossil fuels, the production of cement, and deforestation—accelerated.⁹³

Recognizing the risk posed by climate change, the UN Environment Programme (“UNEP”) and the World Meteorological Organization (“WMO”) established the Intergovernmental Panel on Climate Change (“IPCC”) in 1988 to provide scientific guidance concerning climate change.⁹⁴ The UN General Assembly (“UNGA”) also raised this concern and opened the door for the creation of a framework convention on climate change.⁹⁵

Negotiations for a framework on climate change came into fruition in 1990, when the UNGA, with the help of the UNEP and WMO, convened the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change.⁹⁶ By 1992, the UNFCCC⁹⁷ was finalized with the participation of 143 States and was signed by 155 States in the Earth Summit in Rio de Janeiro, Brazil.⁹⁸ The UNFCCC’s primary aim is to stabilize the concentration of greenhouse gases caught up in the atmosphere in a level that would not lead to “dangerous anthropogenic interference with the climate system.”⁹⁹

Despite the immense exposure of Indigenous Peoples to the harms of climate change, their inclusion in the discussion table was belated. Direct engagement with them only occurred after the Cancún Conference (“COP 16”) in 2011, nearly a decade after the passage of the UNFCCC. At this juncture, the COP was already discussing strengthening the program known as Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (“REDD/REDD+”), which provides compensation to developing countries for their efforts to limit deforestation.¹⁰⁰

The inclusion of Indigenous Peoples in the UNFCCC preceded the adoption of the United Nations Declaration on the Rights of Indigenous Peoples¹⁰¹ in 2007, the subsequent establishment of the Indigenous Peoples

⁹³ *Id.* at 274-75.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ UNFCCC, 1771 U.N.T.S. 10.

⁹⁸ Sands & Peel, *supra* note 92, at 274-76.

⁹⁹ *Id.* at 274, 277.

¹⁰⁰ *Id.* at 274, 295.

¹⁰¹ UNDRIP, U.N. Doc. A/RES/61/295.

Forum on Climate Change (“IIPFCC”) in 2008,¹⁰² and later, the Anchorage Declaration in the Indigenous Peoples’ Global Summit on Climate Change in 2009, which firmly pushed for the full participation of Indigenous Peoples in the UNFCCC, their funding, and recognition of indigenous knowledge.¹⁰³

The participation of Indigenous Peoples in the discussion is critical, given the urgent and devastating consequence of climate change. While climate change presents a global problem against all of humanity, Indigenous Peoples are more vulnerable. Among the reasons is the geographical location of Indigenous Peoples’ ancestral lands, which are commonly situated in vulnerable areas.¹⁰⁴ This resulted from colonizers and dominant assimilated societies pushing Indigenous Peoples to “less desirable” lands.¹⁰⁵

Indigenous Peoples are also more vulnerable to climate change because of their dependence on forests, which are greatly affected by climate change. Climate variability leads to a significant drop in plant productivity because of the droughts, severe storms, fires, and insect infestations it entails.¹⁰⁶ These in turn lead to the extinction of various animal species in the forests.¹⁰⁷ Indigenous Peoples will be devastated by this loss because of their dependence on forests. Studies show that over 60 million indigenous people are “completely dependent on forests.”¹⁰⁸ Given this figure, it is projected that they will constitute a good percentage of the over 150 million estimated environmental refugees who will suffer due to the inability to address carbon pollution and climate change.¹⁰⁹

¹⁰² *About the International Indigenous Peoples' Forum on Climate Change*, INTERNATIONAL INDIGENOUS PEOPLES’ FORUM ON CLIMATE CHANGE, available at <http://www.iipfcc.org/who-are-we>

¹⁰³ Indigenous Peoples’ Global Summit on Climate Change, The Anchorage Declaration (Apr. 24, 2009) available at <https://unfccc.int/resource/docs/2009/smsn/ngo/168.pdf>

¹⁰⁴ Randall Abate & Elizabeth Ann Kronk, *Commonality among Unique Indigenous Communities: An Introduction to Climate Change and its Impacts on Indigenous Peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES’ THE SEARCH FOR LEGAL REMEDIES 3, 5 (Randall Abate & Elizabeth Ann Kronk eds., 2013).

¹⁰⁵ *Id.* at 12.

¹⁰⁶ *Climate Change and Its Impact on Forests – Will Forests Migrate?*, in VITAL FOREST GRAPHICS: STOPPING THE DOWNSWING? 34-35 (Christian Lambrechts, Mette Løyche, Ieva Rucevska, & Mita Sen eds., 2009)

¹⁰⁷ *Id.* at 34.

¹⁰⁸ Jay Williams, *The Impact of Climate Change on Indigenous People – The Implications for the Cultural, Spiritual, Economic and Legal Rights of Indigenous People*, 16(4) INT’L J. OF HUM. RTS. 648, 650 (2012).

¹⁰⁹ *Id.*

The vulnerability of Indigenous Peoples is significantly compounded by the widespread discrimination committed against Indigenous Peoples.¹¹⁰ Even as they plead for support, Indigenous Peoples are deprived of access to essential services and government protection. They are also largely ignored in the various stages of policy-making. As a consequence, in times of disaster, they are not given proper attention and, consequently, suffer significant casualties. A recent example of this is the disproportionate Coronavirus (COVID-19) infection in the Navajo Nation affecting Native Americans, spurred by the existing structural inequalities in the United States of America.¹¹¹

The heightened vulnerability resulting from climate change also threatens the cultural identity of Indigenous Peoples that is deeply ingrained in their native lands. These lands are not mere sources of sustenance for Indigenous Peoples. It also reflects their cultural, spiritual, and social identity.¹¹² And as climate change destroys their ancestral land, it likewise threatens not only their physical survival, but also their cultural and spiritual identity. Lamentably, these are matters that may never be replaced.

Beyond vulnerability, Indigenous Peoples also have traditional knowledge brought about by their intimate relationship with the land and the environment. Examples of these measures include those of Aboriginal Peoples in Australia, who use a unique traditional calendar to assist their adaptation to changing climates.¹¹³ The calendar provides cues to determine when to settle and migrate in a particular area.¹¹⁴ In India, the *Tangkhul Naga* have adopted methods to shift the cultivation from rain-fed terrace paddy fields to un-burnt shifting cultivation to adjust to the changing climate.¹¹⁵ In

¹¹⁰ ASIA INDIGENOUS PEOPLES PACT, DEVELOPMENT AGGRESSION AS ECONOMIC GROWTH: A REPORT BY THE ASIA INDIGENOUS PEOPLES PACT 2 (2012).

¹¹¹ Melissa Godin, 'We Know What Is Best for Us.' *Indigenous Groups Around the World Are Taking COVID-19 Responses Into Their Own Hands*, TIME, May 29, 2020, available at <https://time.com/5808257/indigenous-communities-coronavirus-impact>

¹¹² ASIA INDIGENOUS PEOPLES PACT, OVERVIEW OF THE STATE OF INDIGENOUS PEOPLES IN ASIA 6 (2014).

¹¹³ Philip Roös, *Indigenous Knowledge and Climate Change: Settlement Patterns of the Past to Adaptation of the Future*, 7 INT'L J. OF CLIMATE CHANGE: IMPACTS & RESPONSES 13, 22. (2014).

¹¹⁴ *Id.*

¹¹⁵ ASIA INDIGENOUS PEOPLES PACT, INDIGENOUS PEOPLES AND CLIMATE CHANGE ADAPTATION IN ASIA 8-9 (2012). Traditionally, the *Tangkhul Naga* depended on the rain to fill their paddies with water, however, due to climate change they may not do the usual plantation. Instead, they have adopted an agricultural method known as un-burnt shifting cultivation where they bury biomass in shrub lands and cover it with soil. This is different from the mainstream practice of swidden farming where land is cleared by burning through the land.

Africa, the *Kalanga* peoples of Zimbabwe follow several practices to manage the environment sustainably by establishing sacred places, taboos, and totems.¹¹⁶ In the Philippines, the *Ifugaos* in the Cordilleran mountains¹¹⁷ also developed the *myong* system,¹¹⁸ a forest management mechanism that ensures forest preservation and sustainability. These examples are but a few of the various traditional knowledge and practices that may be adopted to address climate change.

5. Paris Climate Conference (“COP 21”)

In December 2015, during the Paris Climate Conference, a universal draft agreement was agreed upon by State Parties. Under the agreement, States are urged to reduce their greenhouse gas emissions at the soonest possible time to prevent the rise of global temperature 1.5 C° to 2 C° higher than pre-industrial levels.¹¹⁹ This agreement was coined as “historic” because of its universal application as 196 parties came together.¹²⁰ Indigenous Peoples have then been acknowledged in the UNFCCC Conference of Parties (“COP”) as an observer constituency, creating renewed momentum to push for their effective participation in environmental policy-making.

This development paved the way for the creation of a Climate Action Platform for LCIPP, which allows Indigenous Peoples to “exchange experience and share best practices”¹²¹ in their efforts to address climate change. This platform provided an excellent venue for coalition building and generated greater momentum towards the recognition and acceptance of the positive contributions of Indigenous Peoples.

¹¹⁶ Joshua Risiro, Doreen Tshuma & Alphious Basikiti, *Indigenous Knowledge Systems and Environmental Management: A Case Study of Zaka District, Masvingo Province, Zimbabwe*, 2 INT’L J. OF ACADEMIC RES. IN PROGRESSIVE EDUC. & DEV. 19, 35 (2013).

¹¹⁷ Moises Butic & Robert Ngidlo, *Myong Forest of Ifugao*, in ASSISTED NATURAL REGENERATION IN ASIA AND THE PACIFIC 23 (Patrick Dugan, Patrick Durst, David Ganz & Philip McKenzie eds., 2003).

¹¹⁸ Gary Pekas, Bakun Ancestral Domain Sustainable Development and Protection Plan, at 33 (2004).

¹¹⁹ Justin Worland, *What to Know About the Historic ‘Paris Agreement’ on Climate Change*, TIME, Dec. 12, 2015. available at <http://time.com/4146764/paris-agreement-climate-cop-21/>

¹²⁰ *The Paris Agreement and NDCs*, UNFCCC WEBSITE, available at <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs>

¹²¹ The First Meeting of the Facilitative Working Group of the Local Communities and Indigenous Peoples Platform: Report by the Secretariat, 13, U.N. Doc. FCCC/SBSTA/2019/4 (Sept. 18, 2019).

D. United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)

The UNGA adopted the UNDRIP in 2007¹²² as a primary human rights instrument that distinguishes the unique rights of Indigenous Peoples. The declaration provides a collection of individual and collective human rights of Indigenous Peoples¹²³ and is deemed as the most significant accomplishment towards the “recognition and protection of the basic rights and fundamental freedoms” of all Indigenous Peoples.¹²⁴ This is despite the fact that it is soft law and therefore non-binding on States.

The UNDRIP enumerates the rights of Indigenous Peoples to self-determination and self-governance,¹²⁵ nationality,¹²⁶ civil rights,¹²⁷ free, prior, and informed consent,¹²⁸ education,¹²⁹ development, land and natural resource,¹³⁰ intellectual property,¹³¹ labor,¹³² redress and/or just and fair compensation,¹³³ practice cultural tradition and customs,¹³⁴ and cultural protection.¹³⁵ The most significant of these provisions are the most controversial, and these involve the right to self-determination and the need for free, prior, and informed consent.¹³⁶

The right to self-determination, as provided under the UNDRIP, recognizes that Indigenous Peoples have the right to determine their political status freely and pursue their economic, social, and cultural development.¹³⁷

¹²² Davis, *supra* note 11, at 439-40.

¹²³ Duane Champagne, *UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples) Human, Civil, and Indigenous Rights*, 28 WICAZO SA REV. 9, 15 (2013)

¹²⁴ Erica-Irene Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous People*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 48, 73-74 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

¹²⁵ UNDRIP, art. 3, 4.

¹²⁶ UNDRIP, art. 6.

¹²⁷ UNDRIP, art. 7.

¹²⁸ UNDRIP, art. 19.

¹²⁹ UNDRIP, art. 14.

¹³⁰ UNDRIP, art. 10, 26.

¹³¹ UNDRIP, art. 11.

¹³² UNDRIP, art. 17.

¹³³ UNDRIP, art. 28.

¹³⁴ UNDRIP, art. 11, 12.

¹³⁵ UNDRIP, art. 8.

¹³⁶ Asbjørn Eide, *The Indigenous Peoples, The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 48, 73-74 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

¹³⁷ UNDRIP, art. 3.

It also allows Indigenous Peoples to have the right to autonomy or self-government when dealing with internal and local affairs.¹³⁸ Indigenous Peoples also have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the State.¹³⁹

Initially, States opposed the grant of self-determination under the Declaration on the Rights of Indigenous Peoples because of their fear that Indigenous Peoples may interpret this as a right to secede and seek independence.¹⁴⁰ To prevent the deadlock, Article 46(1) was included in the Declaration¹⁴¹ as a compromise. This provision stipulates that nothing in the Declaration may be interpreted or construed to authorize or encourage any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.¹⁴² This proviso arguably limited the right to self-determination of Indigenous Peoples; however, such right remains robust and effective because of the sufficient autonomy granted to Indigenous Peoples and the right and directive to seek free, prior, and informed consent.

The FPIC is one of the most significant obligations and rights imposed under the Declaration. It provides for the active participation of Indigenous Peoples when dealing with a range of activities affecting their rights. An FPIC is characterized as both a right and a process, where the consent, or the approval or acceptance of the Indigenous Peoples, is either withheld or provided after good faith consultations with project proponents. It is qualified as free, prior, and informed.¹⁴³ “Free” entails that the Indigenous Peoples concerned are not coerced, intimidated, manipulated, unduly influenced, or pressured into giving their consent.¹⁴⁴ It is “prior” since it is sought to precede the execution of the proposed activity. Consequently, Indigenous Peoples are given a considerable period before they provide their consent.¹⁴⁵ The timetable should also be consistent with the concerned Indigenous Peoples’ decision-making processes.¹⁴⁶ Finally, the information

¹³⁸ UNDRIP, art. 4.

¹³⁹ UNDRIP, art. 5.

¹⁴⁰ Eide, *supra* note 136, at 32, 42.

¹⁴¹ *Id.*

¹⁴² UNDRIP, art. 46(1).

¹⁴³ UNITED NATIONS GLOBAL COMPACT OFFICE, A BUSINESS REFERENCE GUIDE: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 28 (2013).

¹⁴⁴ *Id.* at 26.

¹⁴⁵ *Id.* at 27.

¹⁴⁶ *Id.* at 26.

should also reflect a complete and comprehensive presentation of the proposed policy or activity.¹⁴⁷

III. THE NORMATIVE IMPLICATIONS OF THE RECOGNITION OF INDIGENOUS PEOPLES

A. Crystallizing UNDRIP as Customary International Law

Allowing Indigenous Peoples to participate in the realm of International Environmental Law led to a number of normative implications. It is then argued that the recognition of Indigenous Peoples Rights under environmental law evidences the emergence of the UNDRIP as a customary international law (“CIL”).

CIL is defined under Article 38 (1)(b) of the Statute of the International Court of Justice¹⁴⁸ as “a general practice accepted as law.” It has two elements: *first*, the existence of a widespread and consistent state practice; and *second*, the existence of a belief of legal obligation otherwise known as *opinio juris sive necessitatis* (*opinio juris*).¹⁴⁹

Traditionally, the UNDRIP is juxtaposed alongside international human rights instruments. Hence, it takes stock of the existing and emerging normative developments under human rights law and fuses similar principles and norms to invoke the existence of State obligation.¹⁵⁰ Towards this end, its invocation may be useful as a restatement of prior human rights law. However, according to Barnabas,¹⁵¹ it may be “too hasty” to deem the whole of the UNDRIP as CIL because of the diverging circumstances faced by Indigenous Peoples. He notes for example that the land rights of Indigenous Peoples, where only some States offer protection or provide some form of recognition, show the existence of variance, which ultimately points to the lack of widespread practice on the subject matter. Furthermore, Barnabas points out that, since the UNDRIP was unable to gather a unanimous vote in

¹⁴⁷ *Id.*

¹⁴⁸ STATUTE OF THE I.C.J., (Apr. 18, 1946).

¹⁴⁹ See North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

¹⁵⁰ Sylvanus Gbendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 INT'L HUM. RTS. REV. 242, 255-56 (2017).

¹⁵¹ *Id.* at 251-52.

the General Assembly and provides a mere standard of achievement, the declaration or a substantial portion of it may not be deemed as CIL.¹⁵²

Indeed, the UNDRIP as a whole may not be deemed as CIL simply because of the emergence of environmental instruments that recognize the participation and contribution of Indigenous Peoples towards environmental protection, conservation, and biodiversity. Nevertheless, in the same manner that the UNDRIP echoes human rights law, it is argued that recognition under environmental law affirms specific Indigenous Peoples' rights, such as their land rights, right to self-determination, and intergenerational rights.

Allowing Indigenous Peoples to participate in various international environmental fora implies that States recognize the distinct character of Indigenous Peoples as ecosystem peoples, equipped with traditional knowledge honed from their long relationship as stewards of both the land and its flora and fauna.¹⁵³ It acknowledges the individual, collective, and intergenerational rights of Indigenous Peoples as embodied in the UNDRIP.¹⁵⁴

This acknowledgment is manifested in various treaties such as the UNFCCC¹⁵⁵ and the Convention on Biological Diversity,¹⁵⁶ where States concede the intimate spiritual relationship between Indigenous Peoples and their traditional lands and their right to self-determination. This recognition, coupled with consistent and collective action by State, helps crystallize specific tenets of the UNDRIP as CIL.

By agreeing with the participation of Indigenous Peoples and seeking their concerns and suggestions, States provide both the objective and subjective elements of CIL. Evidence of this state practice may include consenting and voting for Indigenous Peoples to be a part of the discussion on the UNFCCC. On the other hand, the same affirmation of the views and interest of Indigenous Peoples may serve as evidence of *opinio juris*.

¹⁵² *Id.*

¹⁵³ See Conference of Parties under Decision 2/CP.23, U.N. Doc. FCCC/CP/2017/11/ADD.1 (Nov. 17, 2017); Asia Indigenous Peoples Pact, *supra* note 115, at 3.

¹⁵⁴ Note that COP Decision 2/CP.23 recalls the rights embodied in the UNDRIP; Articles 1, 13, and 15 of the UNDRIP provide for the collective and individual nature of Indigenous Peoples rights and their inter-generational rights.

¹⁵⁵ The COP of the UNFCCC operationalized the Climate Action Platform for Local Communities and Indigenous Peoples (LCIPP).

¹⁵⁶ See Convention on Biological Diversity, pmbl., art. 8(j). The CBD established an ad-hoc working group on Article 8 (j) that encourages the effective participation of Indigenous Peoples.

The collective nature of the Conference of Parties of the UNFCCC also provides evidence of widespread affirmation of the recognition of the rights of Indigenous Peoples. It proves that the rights afforded under the UNDRIP have emerged, or at least are emerging, as a global CIL.

Furthermore, even with the possibility of opposition from a few States, it should be noted that the emergence is still significant as specific tenets of the UNDRIP may become a regional or bilateral CIL.¹⁵⁷ Hence, it may still be invoked by Indigenous Peoples or States as against other States that share a common interest or are in a similar geographical location.

Lastly, echoing Barnabas,¹⁵⁸ it is opined that, even if the UNDRIP is not a CIL, it may nonetheless apply as a general principle of law. Noting the developments under International Environmental Law, it then becomes even more defensible to express that there is near-universal acceptance of several rights as embodied under the UNDRIP.

B. Influencing Domestic Politics and Legislation

The participation of Indigenous Peoples within the realm of international environmental law also helps strengthen their efforts to push for their rights within the domestic sphere. As they interact with other communities and NGOs in various international fora, they can share notes about the challenges that they face and the means to overcome it. They may also take note of best practices that will help them avoid similar domestic legal or social obstacles.

Also, Indigenous Peoples may use platforms, such as the Climate Action Platform for LCIPP, to raise the alarm on problematic domestic practices that affect their rights. Threatened Indigenous Peoples may then gather support in the international sphere and coalesce with other communities, NGOs, and sympathetic States to pressure their governments to respect and protect their rights. International coalition building helps intensify social uproar that potentially creates critical mass to affect the domestic policy of a State.

Furthermore, Indigenous Peoples may also indirectly change their domestic policies and legislation by rallying international support towards the passage or implementation of international law covering their rights. Due to

¹⁵⁷ *Asylum Case (Colum. v. Peru)*, 1950 I.C.J. 6 (Nov. 20).

¹⁵⁸ Barnabas, *supra* note 150, at 257.

international pressure. these treaties or legal instruments may be ratified or adopted by their State. Ultimately, these international laws may be transformed into domestic laws that will benefit them.

Likewise, the protection of Indigenous Peoples rights may also permeate domestically through judicial recognition. As specific tenets of the UNDRIP take the form of general principles of law,¹⁵⁹ Indigenous Peoples may invoke these rights to assist the judiciary in interpreting policies and legislation. Consequently, some rights under the UNDRIP may be used to assist judicial decision-making within the national sphere and provide guidance on matters affecting Indigenous Peoples' rights.¹⁶⁰

Finally, by immersing in matters covering Indigenous Peoples, States are forced to make their own determination as to the existence of Indigenous Peoples within their own population. It provokes them to address questions on the recognition and protection of the rights of Indigenous Peoples within their jurisdiction. This situation provides an entry point for domestic discourse and opens debates where Indigenous Peoples may assert their existence and concomitant rights. While there is no clear recognition or protection yet, the debate already places Indigenous Peoples within the radar of policymakers and starts the process of policy-making.

C. Breaking the Narrative

Another important normative implication of the recognition of Indigenous Peoples in International Environmental Law is its capacity to break the cognitive distortions that prevent the effective provision of welfare to Indigenous Peoples.

Estimates from the United Nations Permanent Forum on Indigenous Issues show that up to 15% of the world's poor come from a population of more than 350 million Indigenous Peoples.¹⁶¹ A third of this figure comprises the world's rural poor.¹⁶² These numbers lead to the prevalent notion that Indigenous Peoples "are the poorest of the poor in terms of income."¹⁶³

¹⁵⁹ *Id.* at 259; For example, by invoking the general principle of non-discrimination under the UNDRIP, policies that provide for forced assimilation may be nullified for being contrary to the generally accepted principle of non-discrimination.

¹⁶⁰ *Id.* at 258.

¹⁶¹ Gillette H. Hall & Harry Anthony Patrinos, *Introduction, in* INDIGENOUS PEOPLES, POVERTY, AND DEVELOPMENT 1, 10 (Gillette H. Hall & Harry Anthony Patrinos eds., 2012).

¹⁶² *Id.*

¹⁶³ *Id.* at 2.

To address the over-representation of Indigenous Peoples among the world's poor, some States adopt efforts to redistribute resources to Indigenous Peoples and enhance their access to all social and health services¹⁶⁴—including all levels and forms of education¹⁶⁵—consistent with the UNDRIP. However, despite this, support for Indigenous Peoples have been hampered because of the attribution of blame against them.¹⁶⁶

A significant hurdle faced by Indigenous Peoples is the persistent prejudice by dominant groups, who consciously or otherwise, dampen support for these welfare policies.¹⁶⁷ This cognitive bias is explained by the attribution theory—where poor people are often judged as blameworthy for their own situation.¹⁶⁸ Under this theory, since they are deemed to cause or contribute to their poverty, they do not deserve government welfare programs. This cognitive distortion masks underlying prejudice and resource insecurity of a dominant group against an underclass.¹⁶⁹

This narrative is common: Dominant groups blame Indigenous Peoples for their status¹⁷⁰ because they reject integration into mainstream society. Unfortunately, this reflects the assimilationist policies of the past and anchors itself on the belief that Indigenous Peoples have to embrace a “civilized” lifestyle to grow out of poverty. This notion is discriminatory and ill-informed because it discounts the fact that Indigenous Peoples have their traditional structures, practices, and knowledge. However, because of colonization, historical and persistent discrimination, and development aggression, their culture has been lost and caused significant systemic challenges.

Despite the existence of normative policies such as anti-discrimination statutes, it is ineffective in dealing with prejudice because such laws only deal with overt acts. Prejudice is a latent perception that will remain undisturbed unless society is made aware and acknowledges the systemic challenges faced by Indigenous Peoples. This situation forces governments to

¹⁶⁴ UNDRIP, art. 24.

¹⁶⁵ UNDRIP, art. 14.

¹⁶⁶ See Lloy Wylie & Stephanie McConkey, *Insiders' Insight: Discrimination against Indigenous Peoples through the Eyes of Health Care Professionals*, 6 J. OF RACIAL & ETHNIC DISPARITIES 37, 42 (2019); Allison Harell, Stuart Soroka & Kiera Ladner, *Public opinion, prejudice and the racialization of welfare in Canada*, 37 ETHNIC & RACIAL STUD. 2580, 2590 (2014).

¹⁶⁷ *Id.*

¹⁶⁸ Lauren Appelbaum, *The Influence of Perceived Deservingness on Policy Decisions regarding Aid to the Poor*, 22 POL. PSYCHOL. 419, 424 (2001).

¹⁶⁹ See Harell et al., *supra* note 166, at 2580.

¹⁷⁰ Being poor or lacking good health and education.

adopt a human rights lens in legislating social policies to highlight the vulnerabilities of Indigenous Peoples.

Unfortunately, even by highlighting vulnerabilities, governments still fail to gather support from the dominant society because the depiction of Indigenous Peoples' victimization triggers a negative emotion. This in turn leads to the cognitive suppression of support towards the welfare of Indigenous Peoples.

In this regard, highlighting the participation of Indigenous Peoples within the realm of environmental law may help lift this undue moral judgment. Widespread interactions and educational efforts should always mention that there is international consensus that Indigenous Peoples are resilient groups who—despite their limited population¹⁷¹ and ownership of the land¹⁷²—manage over 50% of the world's total land mass¹⁷³ and protect 80% of the planet's biodiversity.¹⁷⁴ Moreover, it should also be mentioned that various treaties, subscribed to by a considerable number of States, provide the narrative that Indigenous Peoples serve as environmental guardians who, since time immemorial, have shown their capability as stewards of the land and its ecosystem.¹⁷⁵ Indigenous Peoples are therefore integral partners towards environmental protection, food security, biodiversity, and climate change response.

This image serves as positive stimuli that change negative perceptions and lifts the pervasive veil of ignorance. Consequently, this makes it easier to pass legislation and policies on Indigenous Peoples, particularly concerning their welfare and protection.

D. Limitations

While various environmental treaties have provided a significant venue for Indigenous Peoples to participate in international lawmaking, this participation is limited. Treaty mechanisms remain to be State-centric. Hence, Indigenous Peoples are at most only allowed to share their concerns and suggestions. They do not have a vote in the adoption of treaties or binding legal instruments.

¹⁷¹ Dwayne Mamo, *Editorial*, in *THE INDIGENOUS WORLD 2020* 6 (Dwayne Mamo ed., 2020). Estimated at 5% of the world's 2020 Population that is currently pegged at 7.8 billion.

¹⁷² *Id.* at 7. Estimated at 10% of the world's landmass.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 6.

¹⁷⁵ *Id.*

For example, in the UNFCCC, Indigenous Peoples are only allowed to join the COP as observers. Their inputs depend on their capacity to influence delegates of national governments of the member States. Consequently, even with platforms such as the LCIPP, their voices may be silenced in the primary decision-making body. As an extreme, the State-centric nature of these treaties also opens the possibility for the denial of one's indigeneity. Similar to the claims raised across Southeast Asia, where various states hold that there are no indigenous peoples in the region because "all citizens in Asian countries are "equally indigenous."¹⁷⁶

A recent manifestation of this critique could be gleaned from the recently concluded COP 25 in Madrid, where State Parties failed to adopt any reference to human rights or the rights of Indigenous Peoples under Article 6 of the Paris Climate Agreement.¹⁷⁷ Despite pleas from Indigenous Peoples and aligned NGOs, there were no safeguards for Article 6 to limit the approach that may be adopted by States in their effort to achieve its nationally-determined contributions and the proposed emissions trading system. Mention of "Indigenous Peoples" in the Paris Agreement, therefore, remains to be merely couched in aspirational and non-committal language.

Despite this limitation, the participation of Indigenous Peoples within the realm of environmental law should still be celebrated because it moved Indigenous Peoples beyond token recognition. It opened opportunities for positive normative implications that have the massive potential to secure Indigenous Peoples' rights.

IV. CONCLUSION

The development in International Environment Law is significant as it fosters the promotion and protection of Indigenous Peoples. Steadily, the world is waking up to the immense contribution of Indigenous Peoples towards environmental protection, food security, conservation, and biodiversity. As Indigenous Peoples participate and contribute to international lawmaking, their cognitive shells as victims begin to shed before the eyes of a global audience. The movement of Indigenous Peoples from the realm of human rights law to environmental law makes it apparent that the guarantee of Indigenous Peoples' rights allowed them to have a more active role in international lawmaking by providing platforms and memberships in various working groups.

¹⁷⁶ ASIA INDIGENOUS PEOPLES' PACT, ASEAN'S INDIGENOUS PEOPLES 6 (2010).

¹⁷⁷ Mamo, *supra* note 171, at 740.

This development is also remarkable because of its normative implications. The recognition of Indigenous Peoples under International Environmental Law adds credence to the argument that the UNDRIP—or at least several rights under it—have emerged, or are crystallizing, as CIL. The potential for domestic policies to be influenced by participating in international lawmaking has also been explored. As participation spurs awareness, their consciousness is aroused, giving them knowledge that fuels their push for greater rights and recognition. This then strengthens their capacity to push for the domestication of international obligations. Finally, the cognitive recasting of Indigenous Peoples has also been explored. Highlighting the psychological impact of a negative narrative and its effect on the population, the narrative may now be reframed to highlight the recognition of Indigenous Peoples as partners in international lawmaking, as well, paving the way for better welfare legislation for Indigenous Peoples.

In closing, the limitation under a State-centric international legal system has been flagged as it makes Indigenous Peoples continuously reliant on States for support and affirmation. However, despite this significant caveat, the article takes stock of the status of Indigenous Peoples to celebrate their wins—big and small. For as Indigenous Peoples overcome their vulnerabilities and remain steadfast in protecting the environment, the rest of humanity benefits.