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Re-thinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation

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Abstract

Indigenous Peoples have classically been defined in terms of their situation of vulnerability and discrimination traceable back to colonialism. The first international legal instruments addressing indigenous peoples are based on such an understanding, and emphasize special protection for indigenous peoples in order to preserve their cultural identity. This article describes this approach a human rights-based one, even though, at the national level, the label "indigenous" is sometimes also interpreted as a synonym of political power. Meanwhile, international environmental law has introduced what this author calls a "functional approach" recognizing the participatory role of indigenous communities in supporting environmental conservation and use of biodiversity. From a functional perspective, it is a logical consequence to include other local communities, albeit not "indigenous" in the classical sense. Thirdly, in the sector of development cooperation, international financial institutions (IFIs) have designed policies with the aim of assuring indigenous peoples the opportunity to be consulted when IFI-funded projects could entail a negative impact on indigenous communities. At first glance, it could be said that those policies were inspired by a human rights-based approach. However, from a holistic perspective, the role of indigenous peoples becomes a more functional one. This paper contributes a critical analysis of the role of indigenous peoples from these two approaches: the human rights-based approach and the functional approach. The author argues that a definition of indigenous peoples based on a human-rights approach should be understood as encompassing also other groups living in similarly vulnerable situations. Even though a functional approach to indigenous peoples responds better to the principle of equality, this approach should be more respectful to the cultural and social values of indigenous or local communities, from whom a particular behavior is expected in order to achieve certain goals.

A. Introduction

"Indigenous peoples' issues have become more prominent on the international agenda than ever before"[1], said UN Secretary-General Ban Ki-

[1] UN Secretary-General Ban Ki-Moon, 'Message on the International Day of the World's Indigenous Peoples' (9 August 2010) http://www.un.org/sg/statements/index.asp?nid=4717 (last visited 02 May 2012).

moon on the occasion of the International Day of the World's Indigenous Peoples in 2010.

Certainly, indigenous peoples have gained considerable attention at the international level. Two international conventions and one UN-Declaration addressing the rights of indigenous peoples have been adopted over the last 60 years. The practices and traditional knowledge of indigenous peoples have been said to be pivotal for the achievement of sustainable development. Moreover, in 2004 the United Nations proclaimed, for the second time, the "International Decade of the World's Indigenous Peoples" with the aim of promoting indigenous peoples' full and effective participation in decisions that could affect their lifestyles directly or indirectly.[2] Notwithstanding this wave of international concern, there is still no agreement on a universal definition of indigenous peoples.[3] Therefore it is not clear who should be afforded special protection. A classical approach to indigenous peoples as the marginalized and uprooted society, reflected in two conventions of the International Labor Organization (ILO) and in the UN Declaration on the Rights of Indigenous Peoples, has shifted to a rather functional one in the field of international environmental law and the law of development cooperation.[4]

As will be explained throughout this paper, a classical definition of indigenous peoples is based on a human rights-based approach that situates indigenous peoples in need of special protection. The functional approach, reflected in international environmental law and – to certain degree – in the law of development cooperation, takes less account of the situation of marginalization attached to the classical definition of indigenous peoples.

2 GA Res. 59/174, 24 February 2005. The first World's Indigenous Peoples' Decade took place from 1994 to 2004, GA Res. 48/163, 18 February 1994.

3 This definitional problem was envisaged by Professor Rüdiger Wolfrum before the approval of the Declaration on the Rights of Indigenous Peoples in 2007 by the UN General Assembly: "The appropriate definition of the term indigenous peoples will remain one of the crucial problems waiting for solution." This problem remains unresolved until today. R. Wolfrum, 'The Protection of Indigenous Peoples in International Law', 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999), 369, 379.

4 Philipp Dann advocates the existence of a "Law of Development Cooperation" ("*Recht der Entwicklungszusammenarbeit"*) as an independent field of law that regulates the normative structure of the process of official development assistance (ODA) through States, supranational and international organisations. P. Dann, 'Grundfragen eines Entwicklungsverwaltungsrecht', in C. Möllers *et al.* (eds), *Internationales Verwaltungsrecht* (2007), 7.

From a functional perspective what matters is the role that indigenous peoples play in the sustainable use of biodiversity as well as in the legitimization of projects funded by international financial institutions (IFIs).

I will begin with a brief historical review of the main criteria used by international law to define indigenous peoples from colonialism through today. Second, I will explore some problems deriving from the use and abuse of the label "indigenous" – in the classical sense – by States and indigenous organizations at the national level. Third, I will focus on the role of indigenous peoples as active participants in the process of environmental protection and development cooperation. In doing so it will be argued that a human rights-based approach to indigenous peoples is being overtaken by a rather functional one.

B. Development of the Indigenous Peoples' Issues in International Law

Different criteria have been used by international law to define indigenous peoples. Even though those criteria do not reflect a universal position, we can refer to them in order to better understand both the agreed aspects and the controversial issues concerning the definition of indigenous peoples in international law.

I. From Colonialism to the League of Nations: Indigenous Peoples under the Label of "Backward Society"

The concept of indigenous peoples was originally shaped by the idea of colonization. "Indian"[5] was the term used during colonialism to differentiate European settlers from the aboriginals of the discovered

[5] In this chapter the terms aborigine, native and Indian are used as synonyms of indigenous. The word "indigenous" stems from the Latin form "*indigena*" (INDV + GENVS) which means "one born in a place, a native" or "born or produced in, or belonging to a particular place" (and not of external origin). Definition found in Oxford Latin Dictionary (1968). In modern international law the indistinct use of those terms involves the idea of priority in time. E. Daes, Working Paper by the Chairperson-Rapporteur on the concept of "indigenous people", UN Doc.E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, 5.

territories.[6] Francisco de Vitoria referred to Indians as "unfit to found or administer a lawful State".[7] Such an approach corresponded mainly to the Spanish and Portuguese mode of colonization which focused on the subjugation of the Indian to use them as a labor force.[8]

According to the classical Westphalian system of international law,[9] indigenous forms of organization did not fit into the concept of the modern nation-State. European political structure, which inspired the Westphalian notion of the nation-State was inspired, was based on exclusivity of territorial domain and the existence of hierarchical and centralized structures of power.[10] In contrast, indigenous peoples were organized by kinship-ties, decentralized political structures and shared overlapping spheres of territorial control.[11] Thus, Indians were "not recognized as members of the community of nations".[12]

Based on this understanding of aboriginal peoples as "backward society", the community of newly emerged nation-States assumed for the first time the duty to integrate African aboriginal populations into the "civilized world" at the Berlin Africa Conference (also called the *Kongokonferenz*) held in 1884-1885.[13] This international conference

6 F. de Vitoria, 'De Indis et de Ivre Belli Relectiones', in *Classics of International Law* (1917), 116.

7 *Id*., 160-161.

8 Conversely, the purpose of the British and French colonialism, especially in North America, was the proper acquisition of the land by making land cession treaties with indigenous populations. K. Engle, *The Elusive Promise of Indigenous Development - Rights, Culture, Strategy* (2010), 22. Such a pattern of colonization responded to the necessity of a legal justification for the occupation of indigenous territories different than the mere fact of discovery. The theory of discovery was hardly criticized by Grotius, who denied the possibility to regard the territories occupied by Indians as *terra nullis*. C. Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime', *30 Queen´s Law Journal* (2004-2005) 348, 354.

9 J. Anaya, *Indigenous Peoples in International Law,* 2nd ed. (2004) 16, 19-20.

10 *Id*., 22; A. Cassese, *International Law in a divided World* (1986), 38; Olufemi Elias refers to the Westphalian legacy as the "Europeanisation of international law", O. Elias, 'Regionalism in International Law-Making and the Westphalian Legacy', in C. Harding & C. L. Lim (eds), *Renegotiating Westphalia* (1999), 25, 33.

11 Anaya, *supra* note 9, 22; Elias remarks: "Those not within the European system of civilisation, and who had not been admitted into it by constitutive recognition, were non-existent as subjects of the law." Elias, *supra* note 10, 36.

12 *Island of Palmas case (Netherlands v. USA)*, 2 Reports of International Arbitral Awards 829, 858 (4 April 1928).

13 Article 6 of the General Act of the Berlin Conference (26 February 1885), reprinted in: R. J. Gavin and J. A. Betley (eds), *The Scramble for Africa: Documents on the*

introduced the so called "trusteeship doctrine" as the legitimate yardstick used in the relationship between empowered nations of that time and indigenous populations. In other words, it was a kind of guardianship exercised by the former over the latter.[14] A similar approach was followed by the League of Nations in its Covenant of 1919.[15]

At this stage, we are able to distinguish two main aspects of the conception of indigenous peoples in international law before the advent of the United Nations System: Prior occupation of the territories conquered by European colonists, and the label of a "less advanced" society[16] unable to attain the status of nation-State.

II. The Definition of Indigenous Peoples within the United Nations System

1. ILO Convention No. 107 and the "Integrationist Approach"

The ILO became the first intergovernmental organization[17] to give specific attention to indigenous peoples with the adoption of the "*Convention (No.107) concerning the Protection and Integration of Indigenous and Tribal and Semi-Tribal populations in independent countries.*"[18] This convention constitutes the first international legal instrument providing for a definition of indigenous peoples – by that time

Berlin West African Conference and Related Subjects, 1884/1885 (1973), 288. A critical analysis on the trusteeship doctrine can be found in: Anaya, *supra* note 9, 33; R. Barsh, 'Indigenous North America and Contemporary International Law'*, 62 Oregon Law Review* (1983), 73, 74.

14 In the words of Alpheus Snow indigenous peoples were regarded as: "*wards and pupils of the society of nations*". A. Snow, *The Question of Aborigines in the Law and Practice of Nations,* (1929), 191; Anaya, *supra* note 9, 31-34.

15 Article 22 of the *Covenant of the League of Nations* (28 April 1919) available at http://www.unhcr.org/refworld/docid/3dd8b9854.html (last visited 2 May 2012)

16 In 1938 the Pan-American Union put forth the necessity to "*offset the deficiency*" in the intellectual and physical development of indigenous populations. Daes, *supra* note 5, 7, para. 15.

17 The problem of poverty and inequality suffered by indigenous peoples in new independent countries was included in the agenda of the International Labor Organization even before its institutionalization as an organ of the United Nation System. See e.g. *Convention concerning the Regulation of Certain Special Systems of Recruiting Workers*, 20 June 1936, 40 U.N.T.S. 109 [C 50 Recruiting of Indigenous Workers Convention].

18 328 U.N.T.S 247, 26 June 1957 [ILO Convention No.107].

called "populations". They were defined in terms of their history of colonization along with their social, economic and cultural distinctiveness.[19]

ILO Convention No. 107 sought to repair the situation of forced and underpaid labor suffered by indigenous peoples,[20] a situation which, as stated previously, occurred mainly in former Spanish and Portuguese colonies in Latin-America. Hence, the instrument could be seen as being confined to the Latin-American context. This could perhaps explain why the instrument did not receive support from the majority of the former British and French colonies.

ILO Convention No. 107 focused on the integration of indigenous populations into the societies of their respective nation-States[21] rather than on the protection of their indigenous identity and autonomy. This is unsurprising, considering that the main goal of the ILO at that time was to enable indigenous populations to "benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population."[22]

Not surprisingly, ILO Convention No. 107 was widely rejected by indigenous peoples, who saw it as a threat to the preservation of their cultural identity.[23] Still, it was the first international document which conferred upon indigenous peoples' rights over the territories traditionally occupied by them.[24] In the end, the convention was ratified by only 17 States, among them Bangladesh, India and Pakistan which have not ratified ILO Convention No. 169.

19 *Id.*, Art. 1.

20 *Id.*, Preamble; D. Sanders, 'The Re-Emergence of Indigenous Questions in International Law', 1 *Canadian Human Rights Yearbook* (1983) 3, 19.

21 ILO Convention No. 107, *supra* note 18, Art. 2.

22 *Id.*, Art. 2 para. 2 (a). As Balakrishnan Rajagopal argues: "The modernist desire to embrace the Other initiated during the early part of the century, coupled with the cosmopolitan desire to advance the uncivilized[…]. Important signals of the change could be detected by the work of the International Labour Organization (ILO) banning slavery and forced labor in the inter-war period." B. Rajagopal, *International Law from Below* (2003), 29.

23 Barsh refers to the ILO Convention No. 107 as a "restatement of the nineteenth century doctrine of being guardianship of tribal people." Barsh, *supra* note 13, 81; from the same author see also 'Revision of ILO Convention No. 107', 81 *American Journal of International Law* (1987) 3, 756, 758.

24 ILO Convention No. 107, *supra* note 18, Arts 11, 12.

2. ILO Convention No. 169 and the Martínez Cobo-Report: In Protection of the Indigenous Cultural Distinctiveness

The struggle against the "integrationist approach"[25] of ILO Convention No. 107 strengthened the action of pan-indigenous movements during the 1970s, albeit in different directions. In North America, indigenous peoples' claims focused mainly on territorial sovereignty and even on the recognition of statehood.[26] On the other hand, indigenous movements in Latin America put more emphasis on respecting indigenous peoples' right to culture, which included the right to preserve their cultural distinctiveness and to live in accordance with their own customs and traditions.[27] Notwithstanding these different perspectives, indigenous peoples were able to gain access to international intergovernmental institutions and spark discussions concerning their claims of self-determination albeit subjected to nation-States boundaries.[28] In other words, indigenous peoples demanded what scholars define as internal self-determination.[29]

In 1971 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed José Martinez Cobo as a Special Rapporteur for a study of the problem of discrimination against indigenous populations.[30] In his study, Martinez Cobo proposed a definition of indigenous peoples based mostly on an element that he called "historical continuance"[31] manifested in three ways: A line of ancestry of the community reaching back to the time of colonization, occupation of ancestral lands and the continuance of their ancestral institutions that come

25 See http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm (last visited 3 April 2012).

26 Under the name of "Fourth World" indigenous representatives of North America blamed developing nations of the South for the denial of their right to self-determination. Engle, *supra* note 8, 49-53.

27 *Id.*, 56.

28 R. Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?', 7 Harvard Human Rights Journal (1994) 33, 40-42.

29 A. Cassese, *Self-determination of Peoples* (1995), 101.

30 A. Willemsen-Díaz, 'How Indigenous Peoples' Rights Reached the UN', in C. Charters & R. Stavenhagen (eds), Making the Declaration work – The United Nations Declaration on the Rights of Indigenous Peoples (2009), 16, 23.

31 J. R. Martínez Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, 30 September 1983, paras 379, 380.

with a cultural distinction from the rest of the society. So the definition was again closely linked to the experience of colonialism as it appeared in ILO Convention No. 107.

Against this background, a second and slightly more successful convention was adopted in 1989 by the ILO called the "*Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*"[32]. ILO Convention No. 169 largely refers to the definition[33] laid down in ILO Convention No. 107. However, it incorporates a new important but controversial aspect: The subjective criterion of self-identification as indigenous.[34] So the question of who may be labeled as "indigenous" ceases to be determined solely by States. If we look at the States that failed to ratify ILO Convention No. 169, it seems that Asian and African countries disagree with this innovation, probably because of the risk that some communities, until now treated as "tribe" or "minority", could attain recognition as "indigenous" under the criterion of self-identification.

A second difference between ILO Convention No. 107 and ILO Convention No. 169 lies in the new goals of the latter. The document reflects a new approach by explicitly supporting the cultural distinctiveness and autonomy of indigenous and tribal groups. In doing so, ILO Convention No. 169 replaces the term "population" by the term "peoples".[35] So this new ILO Convention supports the respect of the traditions, customs and way of life of indigenous peoples[36] rather than the integration of these communities into the rest of society. In this way, ILO Convention No. 169 better satisfies the expectations of indigenous groups.

A last important aspect of ILO Convention No. 169 is a stronger recognition of the right of indigenous peoples over their traditional lands, only roughly mentioned in ILO Convention No. 107, as well as over the natural resources pertaining to those lands.[37] In order to endorse the effectiveness of those rights, ratifying States assumed the obligation to

32 1650 U.N.T.S. 383, 27 June 1989 [ILO Convention No. 169].
33 ILO Convention No. 169, Art.1 para. 1(b).
34 *Id.*, Art.1 para. 2.
35 The use of the term "peoples" cannot be understood as granting indigenous and tribal populations further rights than those expressly established in ILO Convention No. 169. *Id.*, Art. 1 para. 3.
36 *Id.*, Art.2 para. 2(b).
37 *Id.*, Arts 14 and 15.

consult indigenous peoples before the implementation of administrative and legislative measures that could affect their rights directly or indirectly.[38]

In spite of these new advances with regard to the rights of indigenous peoples, ILO Convention No. 169 has failed to attract broad international acceptance, as had its predecessor. More than twenty years after its adoption, ILO Convention No. 169 has only been ratified by 22 States, the majority of them Latin-American countries. With the exception of Nepal and the Central African Republic, any other African and Asian country appears in the list of ratifying States. In Europe, the situation has not changed a lot. Denmark, the Netherlands, Norway and Spain are still the only European backers of ILO Convention No. 169.[39]

3. The long-awaited UN Declaration on the Rights of Indigenous Peoples

As early as 1982 the UN Working Group on Indigenous Populations was established as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.[40] This organ was in charge of the elaboration of the Draft Declaration on the Rights of Indigenous Peoples. Indigenous peoples' organizations and other non-governmental organizations (NGOs) established an international advocacy network including indigenous activists from Asia, Africa and Europe which actively participated in discussions on the Draft[41], which was completed in 1994.[42] In subsequent years the participation of indigenous organizations at the United Nations continued to be endorsed by the creation of the United

38 *Id.*, Art.6 para. 1(a).

39 In Germany, members of the Social Democratic Party (*Sozialdemokratische Partei Deutschlands*) and the Green Party (*Bündnis 90/Die Grünen)* call for the ratification of ILO Convention No. 169. Furthermore, they suggest that the German international developmental policy should be inspired in the purposes laid down in ILO Convention No. 169. See 'Antrag: Rechte indigener Völker stärken – ILO-Konvention 169 ratifizieren.' (BT Drucksache 17/5915, 25 May 2011) available at http://dipbt.bundestag.de/dip21/btd/17/059/1705915.pdf (last visited 2 May 2012).

40 ECOSOC Res. 1982/34, 7 May 1982.

41 A. Erueti, 'The International Labor Organization and the Internationalisation of the Concept of Indigenous Peoples', in Stephen Allen (ed.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011), 93, 108.

42 Draft Declaration on the Rights of Indigenous Peoples as Agreed Upon by the Members of the Working Group at its Eleventh Session, E/CN.4/Sub.2/1994/2/Add.1.

Nations Voluntary Fund for Indigenous Peoples[43] and the United Nations Permanent Forum on Indigenous Issues.[44]

In particular, the ILO and NGOs prompted discussions at the working group concerning commonalities between indigenous peoples in Latin-America and tribal peoples in Southeast Asia, in spite of the insistence of Asian States that the issue of indigenous peoples be kept out of their borders.[45] During the debates on the Draft Declaration some indigenous peoples' representatives were reluctant to set forth any definition of indigenous peoples that could exclude certain groups from protection.[46]

After more than ten years of discussions, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[47] was finally approved by the General Assembly in 2007. The Declaration constitutes a very important step in the internationalization of indigenous rights. It is the first international document that set forth indigenous peoples' right to self-determination.[48] It is necessary to mention that in its preamble, the UNDRIP recognizes the existence of a variety of historical and cultural backgrounds surrounding indigenous peoples and the necessity of taking these differences into consideration.[49] This is, indeed, an important step forward towards a more flexible application of the category "indigenous". Moreover, States agreed to obtain the "free, prior and informed consent" of indigenous peoples before the implementation of any measure that could imply a possible displacement of indigenous peoples from their traditional lands.[50]

A similar approach is not found in the Declaration on Minorities' rights,[51] which essentially aims for stronger protection of minorities' freedom of cultural and religious expressions as well as their integration into

43 GA Res. 40/131, 13 December 1985.

44 ECOSOC Res. 2000/22, 28 July 2000.

45 Erueti, *supra* note 41, 104, 105

46 M. Cole, *Das Selbstbestimmungsrecht indigener Völker: eine völkerrechtliche Bestandsaufnahme am Beispiel der Native Americans in den USA* (2009), 194.

47 GA Res. 61/295, 13 September 2007.

48 UNDRIP, Art. 3.

49 See UNDRIP, Preamble para. 21. Furthermore, if we look at the paragraph 4 of the preamble of the Declaration we can understand that the use of the words "inter alia" reflects an attempt to encompass other ethnic groups, which were also victims of dispossession, but not necessarily linked with a history of colonialism.

50 UNDRIP, Art. 10.

51 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992 [Declaration on the Rights of Minorities].

the States where they are living.[52] This declaration does not even offer a definition of minority as other international documents do with respect to indigenous peoples. Even though a right to participation in national decision-making is granted to minority groups, such recognition is not as strong as it is in the case of indigenous peoples. Whereas indigenous peoples can exercise this right to participation in accordance with their own procedures and own indigenous decision-making institutions,[53] minority groups are required to participate in a manner "not incompatible with the national legislation".[54] Thus, the minority regime clearly seems to favor individual rights over collective rights. If it is said that within international law collective rights do not find support,[55] the UNDRIP is undoubtedly the exception to this rule.

The UNDRIP was adopted with the approval of 143 countries and the opposition of four (Australia, Canada, New Zealand and the United States). Even though it does not generate international obligations for the States, it is undoubtedly an important example of universal recognition of indigenous peoples' rights.

C. When the Label "Indigenous" Generates Conflicts

With this background in mind, being identified as "indigenous" has become for some marginalized groups – including groups regarded as minorities by their national States – the most effective way to capture international attention and to gain recognition of certain collective rights.[56] Thus, potential conflicts have arisen not only in Asian and African countries where the existence of indigenous peoples is denied, but also in the Latin-American context where other groups, who do not entirely fit into the definition of indigenous peoples given by international law instruments, find themselves in a disadvantaged position.

52 *Id.*, Preamble and Art. 2 (1).

53 UNDRIP, Art. 18.

54 Declaration on the Rights of Minorities, Art. 2 (3).

55 Y. Jabareen, 'Towards Participatory Equality; Protecting Minority Rights Under International Law', 41 *Israel Law Review* (2008), 635, 657.

56 Barsh warned at the time of the negotiation of the Draft Declaration on the Rights of Indigenous Peoples: "Definitions will become important if being "indigenous" means having fewer rights than other peoples or having more rights than a minority." Barsh *supra* note 28, 82.

I. Contentious Aspects of the Application of the Definition of "Indigenous Peoples" beyond America and Australasia: Nobody is Indigenous or Everyone is!

After the statement of the criteria of self-identification in ILO Convention No. 169, some African and Asian communities increased their participation at the meetings of the Working Group of Indigenous Peoples.[57] Even in Europe, debates took place regarding the existence of indigenous peoples there.[58] Many of the arguments used to justify the applicability of the "indigenous peoples" concept to Africa and Asia based on the criterion of vulnerability, in other words on a "human rights approach", were also used in the European context.[59] Nevertheless, the application of a concept of "indigenous" into Europe based on the idea of "first inhabitants" could certainly lead to serious difficulties.[60]

Indigenous Peoples' organizations from Asia follow, in general terms, a fundamental human rights approach, similar to the one used by Latin American indigenous peoples' organizations during the 1970s, with an emphasis on the right to life, right to security and right to culture.[61] Nevertheless, countries like India, Indonesia, China and Bangladesh, for which the issue of self-determination is still a sensitive issue, have taken a radical position rejecting the existence of "indigenous peoples" within their boundaries. They argue that the concept of "indigenous" has been shaped in societies which experienced European colonial settlement; a situation, they

57 Erueti, *supra* note 41, 103.

58 Before the adoption of the first ILO Convention, Belgium contended that indigenous peoples could be found living in independent States from all regions of the world and not only in overseas colonies. See Daes, *supra* note 5, 8 para. 20. In 1977, the Swedish parliament recognized the status of "indigenous" of the Sami Peoples living in their territories. See Paul Hunt, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum: Mission to Sweden', A/HRC/4/28/Add.2, 28 February 2007; Oguamanam, *supra* note 8, 384.

59 An example of a Central/East European self-identified indigenous group is the case of the Nenets Peoples in Russia, who, as explained by Aukerman, attended the sessions of the Working Group of Indigenous Peoples denouncing the exploitation of oil and gas companies in territories used by their community for subsistence fishing and hunting. M.J. Aukerman, 'Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context', *22 Human Rights Quarterly* (2000), 4, 1022.

60 *Id*.

61 Erueti, *supra* note 41, 109.

said, which did not occur in most parts of Asia, and therefore such a distinction is, in their opinion, inapplicable within their societies.[62] The delegations of Indonesia and India, for instance, voted in favor of the Declaration but clearly pointed out that they understand indigenous peoples according to the definition provided in ILO Convention No. 169.[63] So, put differently, their main argument is that their whole population is "indigenous". This position taken by Asian States demonstrates the inconsistency in how those countries have been handling the question of indigenous peoples: on the one hand, refusing to ratify ILO Convention No. 169; but on the other hand explicitly referring to it in order to avoid any recognition of the existence of indigenous peoples within their territories.

In Africa, the landscape is to some extent different from that of many Asian countries.[64] Indigenous movements in Africa, like those representing the Batwa and San peoples in South Africa and Botswana (identified as hunter-gathers and nomadic pastoralist), have underscored this element of cultural distinctiveness as the basis for their recognition as indigenous both at the national and international level.[65] African countries fear however that precisely this emphasis on cultural distinction[66] could lead to new

62 B. Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy', *92 American Journal of International Law* (1998) 3, 414, 433. K. Ahmed, 'Defining "Indigenous" in Bangladesh: International Law in Domestic Context', *17 International Journal on Minority and Group Rights* (2010) 1, 47, 50. Erueti, *supra* note 41, 103.

63 See statement of the Delegation of Indonesia and India at the General Assembly in the day of the adoption of the UN Declaration on the Rights of Indigenous Peoples (13 September 2007) available at http://www.un.org/News/Press/docs/2007/ga10612.doc.htm (last visited 2 May 2012).

64 Justin Kenrick & Jerome Lewis explain the situation of indigenous peoples in Africa from an anthropological point of view: "In Africa the term "indigenous" is best understood relationally. Africans view themselves as indigenous relative to colonial and post-colonial powers. Additionally, Africans who live in the same region as African hunter-gatherers and former hunter-gatherers recognize these groups as being indigenous relative to themselves." J. Kenrick & J. Lewis, "Indigenous Peoples' Rights and the Politics of the Term "Indigenous"', 20 *Anthropology Today* (2004) 2, 6.

65 Eruerti, *supra* note 41, 112. R. Sylvain, '"Land, Water, and Truth": San Identity and Global Indigenism', *104 American Anthropologist* (2002) 4, 1074-1075.

66 Erueti, *supra* note 41, 113.

ethnically-based conflicts, from which several parts of the continent are still suffering or struggling to recover.[67]

The aforementioned problem concerning the application of a universal definition of indigenous peoples has been summarized by Benedict Kingsbury in the following words: "Any strict definition [of indigenous peoples] is likely to incorporate justifications and referents that make sense in some societies but not in others".[68]

II. The Situation of "Non-Indigenous" Groups in Latin America: What about Equality?

Most of the ratifying countries of ILO Convention No.169 have already recognized in their constitutions the existence of, and special protection for, indigenous communities in their territories.[69] In the case of the constitutions of Paraguay,[70] Mexico[71] and Bolivia,[72] by way of example, indigenous peoples are defined according to criteria similar to those established by ILO Convention No. 169. Some Latin American States have granted indigenous peoples the series of rights established in the Convention, such as property rights over traditional lands and the right to participation and consultation. It is interesting to note that in some cases the level of political representation given to indigenous peoples is not extended to other groups in similar situations, despite the fact that they are in a vulnerable situation alike to indigenous groups. This is the case of non-indigenous peasants (*campesinos*) and Afro-American communities, which

67 Andrew Erueti explains: "[t]he central role of cultural difference in (recent) African indigenist discourse threatens to limit the scope of their rights and lock out groups that fail to conform to the local image of indigenous peoples." *Id*., 115.

68 Kingsbury, *supra* note 62, 414.

69 G. Aguilar *et al*. 'Análisis comparado del reconocimiento constitucional de los pueblos indígenas en América Latina', available at http://www.ssrc.org/workspace/uploads/docs/Ana%CC%81lisis_Comparado_del_Reconocimiento_Constitucional_de_los_Pueblos_Indigenas_en_Ame%CC%81rica_Latina%20_Dec%202010_CPPF_Briefing_Paper_f.pdf (last visited 2 May 2012).

70 Art. 62 of the Constitution of Paraguay, available at http://www.wipo.int/wipolex/es/details.jsp?id=9579 (last visited 2 May 2012).

71 Art. 2 of the Constitution of the United Mexican States, available at http://www.wipo.int/wipolex/es/details.jsp?id=8010 (last visited 2 May 2012).

72 Art. 2 of the Constitution of the Plurinational State of Bolivia, available at http://www.wipo.int/wipolex/en/details.jsp?id=5430 (last visited 2 May 2012).

demonstrates that the human rights approach is not being wholly implemented at the national level in Latin- America.

Indigenous movements in Ecuador and Colombia aligned with peasant and worker's unions during the 1970s in the class struggle against capitalism. This alliance contributed to the strengthening of the cause in defense of indigenous identity, language and customs.[73] This was the case for the *Colombia's Consejo Regional Indígena del Cauca* which described itself as "an organization managed by indigenous campesinos" representing not only the interests of indigenous peasants groups, but of all exploited peasants in Colombia.[74] In Ecuador a similar organization was the *Movimiento de Campesinos del Ecuador (Ecuarunari)*, founded in the early 1970s with the strong support of the most progressive sector of the Catholic Church, and composed of indigenous and non-indigenous peasants groups seeking to recover their traditional and agriculturally productive lands.[75] Years later, indigenous peoples started to adopt an independent political position which has become more successful than the other non-indigenous political movements.[76]

Particularly in Bolivia, indigenous leaders rejected any assimilation of their people as "*campesinos*".[77] In a country where indigenous peoples have been said to constitute a majority, being identified as "indigenous" or even as "original" seems for some Bolivian farmers' political organizations to be more important than being considered "*campesino*". This is the case for the CSUTCB (*Confederación Sindical Única de Trabajadores Capesinos de Bolivia*) and for *Bartolina Sisas*, a rural women´s organization.[78] Moreover, since the adoption of Bolivia´s new Constitution (which granted greater rights to indigenous peoples) and the attempt of the current government to transform Bolivia into an indigenous State,[79] being identified as indigenous could allow for these organizations to gain access to power. However, within a context of a highly fragmented indigenous sector, only those whose

73 Engle, *supra* note 8, 60.
74 *Id*., 62.
75 M. Carlosama, 'Movimiento Indígena Ecuatoriano: historia y consciencia politica', 2 *Publicacion mensual del Instituto Científico de Culturas Indígenas* (2000), 17.
76 Engle, *supra* note 8, 62; See also history of the ECUARUNARI, available at http://www.llacta.org/organiz/ecuarunari/ (last visited 2 May 2012).
77 Engle *supra* note 8, 61.
78 A. Schilling-Vacaflor, *Recht als umkämpftes Terrain – Die neue Verfassung und indigene Völker in Bolivien* (2010), 86-88.
79 *Id*., 249, 250

interests coincide with the interests of the government are heard.[80] Thus, the human rights approach to indigenous peoples in Bolivia is vanishing.

Some African-American communities in Latin America, despite greater vulnerability, are unable to capture the attention of governments as the self-identified indigenous peoples of Asia did. For instance, some Afro-American groups located on the Pacific coast of South America depend on the use of rivers, seas and forests for subsistence purposes, and keep equivalent cultural and spiritual ties to the territory occupied by them, just as many indigenous peoples do.[81] As a consequence of their detrimental treatment, some Pacific coast black leaders have been started to associate themselves politically with indigenous groups "in an implicit effort to create an "indian-like" identity in the eyes of the State".[82]

We should think about whether under the principle of equality,[83] anthropological or historical criteria attached to the idea of colonialism can still be used as justification to confer special treatment exclusively to indigenous peoples within societies that are undergoing an ongoing process of racial and cultural mixture. As Jabareen brings into question: Does the weight of the claim increase if the minority is indigenous to the land on which the nation now exists?[84]

According to a human rights approach, special protection should be conferred to those who suffer from poverty and discrimination and are vulnerable to lose their cultural identity, regardless of the label "indigenous". This approach is not only fairer but also conforms with the principle of equality which was initially the source of inspiration to grant protection only to indigenous peoples. Otherwise, some Latin America

80 *Id*., 170 -172.

81 R. Roldán, *Territorios colectivos de Indígenas y Afroamericanos en América del Sur y Central. Su incidencia en el dessarrollo,* a Study presented in the Conference 'Desarrollo de las Economías Rurales de América Latina y el Caribe: Manejo sostenible de los Recursos Naturales, Acceso a Tierras y Finanzas Rurales' Fortaleza, Brasil, with the Sponsor of the Interamerican Bank of Development and The German Government (March 2002) available at http://www.pueblosaltomayo.com/articulos/tierras-y-territorios/territorios%20colectivos_BID.pdf (last visited 2 May 2012).

82 P. Wades, 'The Cultural Politics of Blackness in Colombia', *22 American Ethnologist* (1995) 2, 341, 346.

83 Jabareen, *supra* note 55, 652, Jabareen explains that the basis of participatory equality is that "all citizens share appropriately in the resources, decisions, and progress of the State, and therefore have appropriate influence over their shared futures".

84 *Id*., 639.

countries could shift from barely criticized Euro-centrism to a not necessarily better "indigenous-centrism" without even questioning how many of those who label themselves "indigenous" are really in need of special protection.

D. A New Functional Approach to Indigenous Peoples?

Notwithstanding the debate surrounding the definition of indigenous peoples as described so far, some other international legal instruments in the field of international environmental law and the law of development cooperation allude to indigenous peoples with a stronger focus of participation. In this way they seem to leave aside the classical understanding on indigenous peoples as the only exploited or discriminated society needed of special protection, referred to above as a limited approach to human rights. Instead, they put forward a functional approach, according to which groups are granted special protection based on their environmental input. In this context, a new category of local community appears on the scene.

I. Indigenous Peoples as Stewards of the Environment

In the international environmental law context, both the Rio Declaration on Environment and Development[85] and the Convention on Biological Diversity (CBD)[86] stress the role of indigenous peoples as "fundamental" for the conservation and sustainable use of biodiversity. This recognition is, however, not exclusive to indigenous communities but is shared by other local communities.[87] Similarly, the Nagoya Protocol[88]

85 Rio Declaration on Environment and Development (3-14 June 1992) available at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 (last visited 2 May 2012).

86 1760 U.N.T.S 79 (5 June 1992).

87 Rio Declaration on Environment and Development, *supra* note 85, Principle 22; C BD, Preamble (para. 12).

88 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits from their Utilization to the Convention on Biological Diversity (29 October 2010) available at http://www.cbd.int/abs/text/ (last visited 2 May 2012) [Nagoya Protocol]. It was adopted in Nagoya, Japan in 2010 and establishes the legal framework for the implementation of one of the three objective of the CBD: The fair and Equitable Sharing of Benefits from the utilization of genetic resources. The protocol is opened for ratification since February 2011.

acknowledges both indigenous peoples and local communities as holders of traditional knowledge.[89] Furthermore, the UN Collaborative Programs on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (better known as UN-REDD programs)[90] encompass, besides indigenous peoples, forest-dwelling and local communities as "active participants" in the design and implementation of REDD plans. In light of all these examples, we can conclude that the label "indigenous", in the classical sense, is not of special relevance.[91]

One explanation might be what I call a "functional" or "instrumental" approach to indigenous peoples, which also applies with respect to other local communities. The Rio Declaration and the CBD refer to indigenous peoples not primarily in terms of their vulnerability and cultural distinctiveness, but rather in terms of their contribution to environmental conservation. The same is true for other non-indigenous groups labeled as "local communities". At this point, one could contend that, in the environmental context, indigenous peoples are protected inasmuch as they adopt their livelihood to the "green stereotype". Escobar argues that indigenous peoples are recognized as owners of their territories "only to the extent they accept to treat it – and themselves – as reservoirs of capital."[92] On the other hand, some scholars argue that indigenous peoples use the environmental frame as a platform to obtain wider recognition of the right to self-determination.[93] Irrespective of what the purpose behind the environmental discourse may be, this functional approach has at least the advantage of boosting participation of indigenous peoples in decision-making procedures without discriminating against other non-indigenous groups, who may be also entitled to it.

At first glance, it seems that the Nagoya Protocol is based on a human rights approach to protection of indigenous peoples 'cultural and property

89 *Id.*, Preamble, para. 23.

90 REDD is a joint initiative of the FAO, UNDP and UNEP attempting to reduce emissions in tropical countries by preventing activities that cause degradation and deforestation such as poor forest management practices, forest fires, overgrazing, etc. See *e.g.* UN-REDD Programme Framework Document, available at http://www.un-redd.org (last visited 2 May 2012).

91 Kingsbury, *supra* note 62, 451.

92 A. Escobar, *Encountering Development. The Making and Unmaking of the Third World* (2012), 203.

93 R. Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and its Impact on the Normative Development of International Law', 13 *Social and Legal Studies* (2004) 4, 481, 491.

rights. Based on this approach the Nagoya protocol states that access to traditional knowledge must be subject to the free, prior and informed consent of the indigenous or local community concerned.[94] However, in a scenario in which the world's eyes focus mainly on time-saving and cost-effective procedures for accessing genetic resources and traditional knowledge, indigenous peoples are rather treated as trade partners. From this point of view, a functional approach to indigenous peoples seems to be present again.

II. Indigenous Peoples in the Context of Development Cooperation

The role of indigenous peoples has also gained some importance in the law of development cooperation, both at the State level with regard to development assistance projects and programs and at the international level, i.e. within the provisions of international financial institutions (IFIs). Even though in the field of development cooperation a human rights –based approach to indigenous peoples still prevails, it seems to be slowly replaced by the functional one.

With respect to official development assistance, both Germany and Denmark, which serve as examples, run development programs exclusively targeted to indigenous peoples. In the case of Denmark, the indigenous development policy focuses mainly on the democratization of indigenous communities, the establishment of mechanism for the implementation of consultation and assistance with the conservation and sustainable use of indigenous lands and natural resources.[95] In the case of Germany, the cooperation with indigenous peoples is concentrated in Latin America. The programs are intended to strengthen indigenous political organizations and include capacity building and the conservation and transmission of indigenous knowledge.[96] With regard to the definition of indigenous

94 Nagoya Protocol, *supra* note 88, Art. 7.

95 See "Strategy for Danish support to Indigenous Peoples", Danish Ministry of Foreign Affairs, 10-14, available at http://amg.um.dk/en (last visited 2 May 2012).

96 Since 2006 the German Agency for International Cooperation has furthered a regional project: "Strengthening of Indigenous Organizations in Latin-America". The project comprises countries from the Andean Region, the Amazon basin and the Caribbean, Information at http://www.gtz.de/en/praxis/18698.htm (last visited 4 April 2012). The "Indigenous Intercultural University" is also a regional project started in 2005 which provides technical, organizational and financial support for the establishment in some Latin American Universities of postgraduate courses aimed at the teaching of

peoples, both Denmark and Germany refer to the criteria established in ILO Convention No. 169, such as historical continuity with pre-colonial societies, cultural distinctiveness, and a situation of marginalization; but in a more flexible way.[97] The way these development cooperation policies are designed can be seen as the most appropriate application of a human rights approach.

At the international level, international financial institutions such as the World Bank or regional development banks have also started to bring indigenous peoples into the development agenda. During the 1980s, the World Bank fostered the implementation of integrated rural development (IRD) programs. The purpose of this initiative was to introduce "development" in poor rural areas by stimulating the agricultural productivity of small-scale farmers, tenants and the landless, among them indigenous communities.[98] One of these projects took place in the State of Oaxaca in Mexico, a State where 56% of the population is considered to be indigenous.[99] An analysis of the implementation of IRD in Oaxaca observes that "[r]ural Development in Marginal Areas appeared to be systematically either excluding or bypassing the most consolidated indigenous producer organizations in its areas of operation."[100] As can be seen in this case, both indigenous and non-indigenous communities seem to be encompassed under the sole category of peasants and the functional approach prevails; this time, however, for the purpose of "development".

Concerning other IFI's policies the situation is even more complex. Not only the World Bank but also regional finance institutions such as the

indigenous knowledge. See http://www.gtz.de/en/praxis/14065.htm (last visited 4 April 2012).

97 See "Strategy for Danish support to Indigenous Peoples", *supra* note 95, 9-10; "Development Cooperation with Indigenous Peoples in Latin America and the Caribbean", Federal Ministry for Economic Cooperation and Development, Germany (July 2006), 5, available at http://www.bmz.de/en/publications/topics/human_rights/konzept141.pdf (last visited 2 May 2012).

98 Escobar, *supra* note 93, 161.

99 Information provided by the Office of the High Commisioner for Human Rights in its report "Advancing Indigenous Peoples' rights in Mexico" (July 2011) available at http://www.ohchr.org/EN/NewsEvents/Pages//IndigenousPeoplesRightsInMexico.aspx (last visited 2 May 2012).

100 J. Fox & J. Gersham, 'The World Bank and Social Capital: Lessons from ten Rural Development Projects in the Philippines and Mexico', 33 *Policy Science* (2000), 399, 409.

Asian Development Bank,[101] the European Bank for Reconstruction and Development[102] and the Inter-American Development Bank[103] have designed operational policies towards participation of indigenous peoples in IFIs- financed projects affecting them. We will concentrate on the policies of the World Bank.

In 1982 the World Bank adopted the Operational Manual Statement[104] 2.34 Tribal People in Bank-Financed Projects, referred to as OMS 2.34. The policy addressed for the first time the situation of tribal communities in Bank-financed development projects, which responded to the internal and external condemnation of the consequences some projects had had for indigenous communities in the Amazon region.[105] The policy required recipient States to provide safeguards for the protection of the integrity and well-being of tribal peoples who could be affected by the implementation of a World-Bank funded project.[106] NGOs and indigenous peoples' organizations criticized OMS 2.34, since it did not expressly preclude the Bank from supporting projects involving encroachment onto tribal peoples´

101 See 'Safeguard Policy Statement', Asian Development Bank (June 2009) available at http://www.adb.org/documents/safeguard-policy-statement (last visited 2 May 2012).

102 See "Environmental and Social Policy", European Bank for Reconstruction and Development (EBRD) (May 2008) available at http://www.ebrd.com/downloads/research/policies/2008policy.pdf (last visited 2 May 2012).

103 See 'Operational Policy on Indigenous Peoples and Strategy for Indigenous Development', Inter-American Development Bank (IADB) (July 2006) available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35773490 (last visited 2 May 2012).

104 "Operational Manual Statement (OMS): These are Bank instructions to staff, the policy substance of which might have been approved by the Bank. OMSs contain a mixture of policy, procedure and guidance materials." See The World Bank, 'Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review', Glossary (10 January 2003) available at http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/472DE0AEA1BA73A085256CAD005CF102/$file/IP_evaluation.pdf [World Bank Report] (last visited 2 May 2012).

105 B. Kingsbury, 'Operational Policies of International Institutions as Part of the Lawmaking Process: The World Bank and Indigenous Peoples', in G. Goodwin-Gill & S. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 323, 324, available at: http://iilj.org/aboutus/documents/OperationalPoliciesofInternationalInstitutions_000.pdf (last visited 2 May 2012).

106 S. Davis, 'The World Bank and Indigenous Peoples', The World Bank (1993), 5, available at: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/11/14/000012009_20031114144132/Rendered/PDF/272050WB0and0Indigenous0Peoples01public1.pdf (last visited 2 May 2012).

territories.[107] Moreover, it was argued that this policy focused primarily on isolated tribal societies, forgetting those who had already been more integrated in the society, the so-called "indigenous peasant populations".[108]

Due to OMS 2.34's deficiencies and the growing protest against World Bank projects,[109] the Bank, in 1992, adopted a second policy in the form of Operational Directive 4.20 (OD 4.20), aimed specifically at indigenous peoples.[110] OD 4.20 responded to prior World Bank policies' failure to include isolated groups undergoing acculturation in addition to isolated groups or tribes.[111]

According to OD 4.20, borrowers should prepare an Indigenous Peoples Development Plan (IPDP), including a strategy for indigenous participation in projects affecting them.[112] The task of identification of an affected indigenous community was under the responsibility of the World Bank. For this purpose a group of "Task Managers" was in charge of examining the recipient States' law, policies and procedures, and to make anthropological and sociological studies where necessary.[113] OD 4.20 stated that social groups to be covered "can be identified in particular geographical areas by the presence in varying degrees of the following characteristics: (a) close attachment to ancestral territories and to the natural resources in these areas; (b) self-identification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) presence of customary social and political institutions; and (e) primarily subsistence-oriented production."[114]

Critics of the application of the policy suggested that only indigenous groups in the strict sense were covered by the OD; however, the Bank's position was that the OD applied to all "social groups who meet the five

107 F. MacKay, 'Indigenous Peoples and International Financial Institutions', in D. Hunter (ed.) *International Financial Institutions and International Law* (2010), 287, 288.

108 Davis, *supra* note 106, 3.

109 MacKay, *supra* note 107, 289.

110 'Operational Directive (OD): A Bank Directive that contains a mixture of policies, procedures, and guidance, gradually being replaced by Operational Policy, Bank Procedure, and Good Practice.' See The World Bank Report, *supra* note 104, Glossary.

111 *Id*., *supra* note 104, 1, para. 1.4.

112 *Id*., 2, para. 1.5.

113 *Id*., 2, para. 1.5.

114 *Id*., 3, para. 1.9.

characteristics"[115] named above, although to varying degrees. In spite of the progress that OD 4.20 made in extending the application of the policy to non-isolated indigenous communities, the policy was still criticized as being incompatible with indigenous rights and ineffective as a safeguard mechanism. Here it is important to note the progressive approach of this policy by including under the label "indigenous" other project-affected groups regardless of ethnic criteria.

After two failed attempts to satisfy the demands of indigenous peoples´ advocates, in 2005 the World Bank adopted Operational Policy (OP)[116] 4.10 on Indigenous Peoples, currently in force, which was supposed to mark "the beginning of a wholesale reevaluation and revision by the IFIs of their "safeguard" policy instruments pertaining to indigenous peoples".[117] From a legal point of view, operational policies can be defined as World Bank internal norms which are binding on the Bank staff.[118] This new policy provides that "[f]or all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation."[119] Even though the wording is similar, the World Bank does not use the term "consent" – as does the UNDIPR – but the word "consultation". Even though OP 4.10 was adopted before the approval of the UNDIP in 2007, four years have passed without any attempt to adopt the wording of the Declaration into the World Bank`s Operational Policy. It seems that the Bank is unwilling to go any further and is afraid of giving the equivalent of a veto right to parties other than those specified in the countries´ legal framework.[120]

As it did in OD 4.20, the World Bank relies on a group of experts who decide on the existence of indigenous peoples in the light of the World

115 *Id*., 3, para.1.10.

116 "Operational Policy (OP): A short, focused statement that follows from the Bank's articles of agreement, the general conditions, and policies approved by the Board of Executive Directors", *Id*., Glossary.

117 MacKay, *supra* note 107, 289.

118 P. Dann, *Entwicklungsverwaltungsrecht: Theorie und Dogmatik des Rechts der Entwicklungszusammenarbeit, untersucht am Beispiel der Weltbank, der EU und der Bundesrepublik Deutschland* (2012), 180.

119 'World Bank Operational Directive 4.10 on Indigenous Peoples' (July 2005) para. 1, available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (last visited 2 May 2012) [World Bank Directive 4.10].

120 MacKay, *supra* note 107, 316.

Bank´s own list of flexible criteria. Those criteria are practically identical to the former policy.[121] The only difference is that the OP does not include the criterion of "primarily subsistence-oriented production". In the application of the policy, it could be said that the World Bank is following a broad version of the human rights-based approach but with a more flexible definition of indigenous peoples. This suggestion can be confirmed by the last report on the implementation of the World Bank´s policy on indigenous peoples. According to that report, even poor minority communities in India have been regarded as "indigenous", despite India´s refusal to accept the existence of indigenous communities within their territory.[122] So it is vulnerability that matters.

However, this conclusion seems more doubtful from a holistic perspective. One of the reasons why the World Bank applies operational policies and imposes certain duties on recipient States is the huge backlash against many of its policies and programs. The World Bank became one of the favorite targets of the anti-globalization movements, and instead of celebrating its 50th birthday; campaigners started the "Fifty-years-is-enough" campaign.[123] A reform of the policy was probably necessary to improve its reputation and ensure that its projects and programs were accepted. The argument is that development projects or programs must be supported by the affected population in order to be effective.[124] This is also legally supported by the IDA[125] Articles of Agreement, which state that "*the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations.*" Arguing that the consultation of indigenous communities allows for more efficient development cooperation is thus in line with the Articles of Agreement.

121 World Bank Directive 4.10, *supra* note 119, para. 4.

122 Implementation of the World Bank's Indigenous Peoples Policy – A Learning Review (FY 2006-2008); prepared by the Quality Assurance and Compliance Unit of the Operations Policy and Country Services Vice Presidency (OPCS, August 2011), 23, available at http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf (last visited 2 May 2012).

123 This also became the title of a book with a preface written by Muhammed Yunis, cf. K. Danaher (ed.), *Fifty Years is Enough. The Case Against the World Bank and the International Monetary Fund* (1994).

124 World Bank Directive 4.10, *supra* note 119, para. 1.

125 IDA is the abbreviation for International Development Association which is the section of the World Bank in charge to help world's poorest countries.

From this point of view, indigenous peoples are seen as potential backers of World Bank-funded projects. This suggests that we are dealing again with a functional approach to indigenous peoples. Even though there is extensive academic debate about the extent to which the World Bank is bound by human rights and should implement some human rights in its policy,[126] it seems that the World Bank is not yet willing to adopt an explicitly human-rights based strategy into its development programs and projects.

E. Final Analysis and Conclusions

The first conclusion to be drawn is that international law has focused more on indigenous peoples than on minorities or other vulnerable groups in society. The role of the ILO has been crucial in the internationalization of indigenous rights. Without its action, indigenous peoples might have continued to be regarded as the "underdeveloped" part of society, and States might have more easily dispossessed indigenous peoples from their territories under the name of "national development". ILO Convention No. 107 proposed a definition of indigenous peoples with limited application. ILO Convention No. 169 keeps this definition but adds the criterion of self-identification in order to extend its scope of application to those who are not recognized as indigenous by their national States. However, ILO Convention No. 169 has not attained wide support outside the Latin-American context. The UNDRIP opted for a flexible interpretation of the definition of indigenous peoples based on a human rights approach. What matters is the protection of people who have lived for a long time in a situation of marginalization, the preservation of their cultural distinctiveness as well as the spiritual ties between these people and their territory.

However, the lack of a universally accepted definition of indigenous peoples has brought about some problems at the national level. Some Latin America countries still refer to indigenous peoples as descendants of the early settlers of the country, privileging traditional indigenous groups over peasants and Afro-American communities. Unfortunately, many of the latter still suffer discrimination and might even be more vulnerable than some indigenous communities. On the other hand, many governments in Asia and Africa refer to the same argument to deny any form of special protection

[126] G. Brodnig, 'The World Bank and Human Rights: Mission Impossible?', in *Carr Center for Human Rights Policy, Working Paper T-01-05*, 8, available at http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf (last visited 2 May 2012).

under the "indigenous" label to certain communities. In this context we find a limited human rights approach to indigenous peoples.

In the field of environmental law, the Rio Declaration and the Convention on Biological Diversity refers to indigenous peoples in terms of their potential contribution to sustainable development. The same is true for the Nagoya Protocol, which points to the traditional knowledge of indigenous peoples. Important to note is the contribution of environmental instruments to solve the problem of differentiation between indigenous and non-indigenous groups by including the category of local communities. Here arises a new functional approach to indigenous peoples.

Concerning development cooperation, it seems that the World Bank in particular, due to its limited mandate, follows a functional approach to indigenous peoples. In doing so, the Bank includes non-indigenous communities in the implementation of its assistance programs and operational policies, whereas the German and Danish Development Cooperation support specific programs targeted at indigenous groups based on their vulnerability.

One aspect should be mentioned. If it is argued that no *distinction* between certain groups, say indigenous and Afro-American communities, should be made based on ethnicity, but that rather all "vulnerable" groups require protection, this does, however, not imply that any kind of cultural *consideration* should be avoided. For instance, questions such as the cultural relationship of a specific community with their territory or traditional decision-making systems are crucial in the design of national policies. This rule should apply not only with respect to indigenous communities but also with regard to every community whose culture and ways of life differ considerably from the dominant society.

In sum, to create special systems of protection for each group that is not in line with the classical definition of indigenous peoples seems an impractical and undesirable option. Rather, it is necessary to redefine indigenous peoples without overstating the colonial and anthropological arguments. We should focus more on elements such as vulnerability to dispossession, cultural and economic connections with a specific territory, and the exercise of specific practices intrinsically connected with the land and natural resources. Even though a functional approach seems to be the closest one to this suggestion, we must question ourselves to what extent indigenous peoples and local communities are willing and able to assume the role that international environmental law and the law of development cooperation have designed for them.