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## Indigenous Communities: Analyzing their Right to Water under Different International Legal Regimes

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### 1. Introduction

Indigenous communities around the globe, totalling about 370 million people,<sup>1</sup> are faced with the challenge of protecting their access and traditional rights to ancestral lands and water resources.<sup>2</sup> This challenge has several causes. Climate change, increased pollution, contamination and depletion of freshwater and groundwater resources worldwide can be identified as causes.<sup>3</sup> In addition, the demand for water will become greater as consumption patterns lead to greater investment in the water-intensive industry and agriculture such as those resulting from the growing demand for biofuels; as well as demographic-related production and consumption patterns that lead to greater demand for freshwater.<sup>4</sup> These developments create challenges for overall water consumption by the general population. But in addition to these examples indigenous peoples' access to water is directly impacted by governments and corporations.<sup>5</sup>

Government policies impact on the rights of indigenous peoples through the establishment of national parks or construction of dams<sup>6</sup> on the territories of indigenous peoples who are subsequently disenfranchised, or when large-scale mining operations are undertaken by the Government, the private sector or in hybrid arrangements. As a result, indigenous communities lose access to water traditionally used by them as their access to land is restricted and/or if they are forced to relocate. Such a situation

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1 United Nations Secretariat of the Permanent Forum on Indigenous Issues, *State of The World's Indigenous Peoples*, 2009, p. 1.

2 The working definition of indigenous peoples as presented in the 'Study on the Problem of Discrimination Against Indigenous Populations' executed by Special Rapporteur Martinez Cobo has been formulated as follows: 'Indigenous communities, peoples and nations are those which, 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 on those territories, or parts of them. They form at present non-dominant 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 system.'

3 UNDP, Human Development Report 2006 'Beyond scarcity: Power, poverty and the global water crisis', 2006, p. 41, available on <<http://www.undp.org/content/dam/undp/library/corporate/HDR/2006%20Global%20HDR/HDR-2006-Beyond%20scarcity-Power-poverty-and-the-global-water-crisis.pdf>> (last visited 6 February 2014).

4 *Ibid.*, p. 2.

5 '[I]ndigenous peoples are experiencing increasing scarcity of fresh waters and the lack of access by indigenous communities and other life forms such as the land, forests, animals, birds, plants, marine life, and air have to waters, including oceans. In these times of scarcity, governments are creating commercial interests in water that lead to inequities in distribution and prevent access to the life giving nature of water.' UN Indigenous People's Discussion Paper on Water, Sanitation and Human Settlements, E/CN.17/2004/10/Add.4 (2004), Para. 26.

6 See for example: B.J. Cummings, *Dam the Rivers, Damn the People: Development and resistance in Amazonian Brazil*, 2013.

occurred when in 1984 the Government of Botswana came to the decision that the San people living in the Central Kalahari Game Reserve needed to relocate because their living arrangements were incompatible with the conservation purposes of the Reserve.<sup>7</sup> This measure eventually caused forced relocation for some of the San people as well as daily suffering caused by inadequate water access for those who stayed.<sup>8</sup>

Other examples of governments ignoring positive obligations are even found in the rich countries of North America. Safe and adequate water supply and wastewater disposal facilities are lacking in approximately 7.5 per cent of indigenous tribal homes in the United States, compared with 1 per cent of the homes for the United States general population.<sup>9</sup> 'One out of eight indigenous communities in Canada are threatened by unsafe water, which each year kills indigenous newborn and elderly.'<sup>10</sup> This is caused by inadequate infrastructure and a lack of programmes providing for basic sanitation and safe drinking water services.<sup>11</sup> Challenges like these underscore the importance of involving indigenous communities and recognizing their rights in decision-making<sup>12</sup> and their customary rights to water. But more importantly they underline the importance of the obligations of states to facilitate access to water and sanitation services. Indigenous people often inhabit areas rich in natural resources which they have protected over the centuries. Living as they often do in remote areas, they often do not have formal papers that recognize their access and/or ownership rights. This makes it easy for governments to become formalistic and not recognize the historical rights of these communities to their own lands and waters. This challenges their tenure security in both urban<sup>13</sup> and rural areas.

Many violations of access to freshwater are also connected to the behaviour of private-sector entities. These companies, mostly extraction companies, often contaminate and deplete water sources.<sup>14</sup> The extraction of minerals near areas inhabited by indigenous peoples results in loss of food systems and the destruction of ecological systems and cultural lands.<sup>15</sup> The interests of indigenous peoples and other marginalized groups are often ignored.<sup>16</sup>

These examples show the large variety of issues indigenous communities face concerning their access to and ownership of water resources. Although there is considerable literature on the human right to water in general<sup>17</sup> there has been limited research on how the human right to water may impact on the general rights of indigenous people to water. Therefore, this article takes indigenous peoples as the subject for investigating the human right to water. It addresses the following questions:

- What are the differences between the human right to water as applied to indigenous peoples and other provisions which are relevant to protecting and providing access to water for indigenous peoples?
- Is there an added value to the human right to water, and if so, what is this added value?

The body of international law relating to the situation of indigenous peoples has increased over the last decade.<sup>18</sup> Analyzing the current status of indigenous peoples' rights at international level and the place of the human right to water within this framework adds to the understanding of human rights in

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7 J. Taylor, 'Celebrating San victory too soon?', 2007 *Anthropology Today* 23, no. 5, pp. 3-5, available on <[http://www.chr.up.ac.za/chr\\_old/indigenous/documents/Botswana/Cases/Celebrating%20too%20soon%20CKGR%20Case.pdf](http://www.chr.up.ac.za/chr_old/indigenous/documents/Botswana/Cases/Celebrating%20too%20soon%20CKGR%20Case.pdf)> (last visited 6 February 2014).

8 The Government facilitated some relocations and the pump engine and water tank used to extract water from the borehole on the Reserve were removed. This increased pressure on the San people to relocate. However, certain communities remaining in the Reserve were confronted with daily suffering due to lack of water. Others were forcefully removed by government authorities but continued efforts to enter the reserve with the intention of meeting their water and other needs.

9 UN Discussion Paper, supra note 5, p. 22.

10 Ibid, p. 21.

11 Ibid.

12 Ibid.

13 For examples of urbanization and indigenous peoples see 'UN Factsheet on Urban Indigenous Peoples and Migration: Challenges and Opportunities', available on <[http://www.un.org/esa/socdev/unpfiu/documents/6\\_session\\_factsheet2.pdf](http://www.un.org/esa/socdev/unpfiu/documents/6_session_factsheet2.pdf)> (last visited 6 February 2014).

14 UN Discussion Paper, supra note 5, p. 6.

15 Ibid., p. 25.

16 See for example the Indian case, No. 34292 of 2003, *Perumatty Grama Panchayat v State of Kerala* (Coca-Cola groundwater exploitation case), available on <<https://www.elaw.org/node/1410>> (last visited 7 February 2014).

17 See I. Winkler, *The Human Right to Water. Significance, Legal Status and Implications for Water Allocation*, 2012 and C. Fernández-Jáuregui, *The human right to water: current situation and future challenge*, 2008.

18 See L. Westra, *Environmental Justice and the Rights of Indigenous Peoples*, 2008, Chapter 1 for an overview of the developments concerning indigenous peoples in international law.

general and indigenous peoples rights in particular, and to the discussion of the individual and possible collective character of human rights.

This article is structured as follows: Section 2 discusses the provisions relevant to protecting indigenous peoples' right to water as part of their rights to natural resources; Section 3 focuses on the human right to water and in particular General Comment No. 15 as it pertains to indigenous peoples; the following Section 4 focuses on answering the two questions, which is followed by the conclusion in Section 5.

## 2. Indigenous peoples' right to water as part of their broader indigenous peoples' rights

Indigenous peoples' rights have developed over the last few decades. Several provisions in international law provide protection for indigenous peoples' access to and ownership of water. The provisions either mention indigenous peoples specifically or refer to other provisions which are relevant to the water situation of indigenous peoples. These rights together can support and reinforce the right to water and the width of its interpretation.

What is relevant to note is the legal status and the obligations attached to the instruments. While some instruments are legally binding requiring implementation, others which are part of soft law provide guidance on the future development of international law. For indigenous peoples the instruments which provide the strongest legal entitlements are most relevant when seeking legal redress in the situation of deprivation or pollution. The following table shows an overview of the relevant provisions in the hard-law and soft-law provisions relevant for them.

*Table 1 Relevant provisions on the right to and ownership of water of indigenous peoples*

<b>International instrument</b>	<b>Protection of indigenous peoples rights to water</b>	<b>Complaint mechanism</b>
<b>ICESCR, 1966*</b>	Right to water implicitly protected through: <ul style="list-style-type: none"> <li>- right to adequate standard of living;</li> <li>- right to enjoyment of highest attainable standard of physical and mental health;</li> <li>- peoples' right to freely dispose of their own natural resources (wherein no case can 'a people be deprived of its own means of subsistence').</li> </ul>	Individual / group communications to CESCR
<b>ICCPR, 1966*</b>	<ul style="list-style-type: none"> <li>- 'ethnic, religious or linguistic minorities' should not be denied 'the right, in community with the other members of their group, to enjoy their own culture';</li> <li>- peoples' right to freely dispose of their own natural resources (where in no case can 'a people be deprived of its own means of subsistence');</li> <li>- the right to life ('no one shall be arbitrarily deprived of his life').</li> </ul>	Individual communications to Human Rights Committee
<b>UN Declaration on the Rights of Indigenous Peoples (2007)</b>	<ul style="list-style-type: none"> <li>- indigenous access, conservation and economic development of water;</li> <li>- a right to preserve the distinctive indigenous relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas';</li> <li>- the right to conservation and protection of indigenous lands;</li> <li>- the right to development for all indigenous lands and resources including water.</li> </ul>	None

International instrument	Protection of indigenous peoples rights to water	Complaint mechanism
<b>International Convention on the Elimination of All Forms of Racial Discrimination (1966)*</b>	<ul style="list-style-type: none"> <li>- appropriate measures should be taken by states to eliminate racial discrimination which prohibit the enjoyment of human rights;</li> <li>- equal treatment before courts;</li> <li>- the enjoyment of civil and political rights and economic, social and cultural rights should take place without any distinction on the basis of race etc.</li> </ul>	Individual petitions to Committee on the Elimination of Racial Discrimination
<b>Agenda 21 (1992)</b>	<p>Aims to protect and manage freshwater resources recognizing the effects that climate change will have on water and indigenous peoples. Identifies the need to:</p> <ul style="list-style-type: none"> <li>- engage indigenous peoples in water management policy-making and decision-making;</li> <li>- improve indigenous technologies to fully utilize limited water resources and to safeguard those resources against pollution.</li> </ul>	None
<b>ILO Convention no. 169 (1989)*</b>	<ul style="list-style-type: none"> <li>- consultation with indigenous peoples using appropriate procedures and through representative institutions of indigenous peoples themselves;</li> <li>- recognition of the cultural and other specificities of indigenous and tribal peoples;</li> <li>- indigenous peoples have the right to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination;</li> <li>- the right to self-determination and to decide priorities for their process of development and the lands they occupy or otherwise use.</li> </ul>	Only for Member States

\* legally binding

### 2.1. International Covenant on Civil and Political Rights

The ICCPR has the most far-reaching obligations as states must not limit any of the rights and freedoms recognized in the Covenant.<sup>19</sup> It has been widely ratified and therefore receives wide support.<sup>20</sup> The ICCPR includes an individual complaint procedure.<sup>21</sup> However, groups, including indigenous peoples as a group, do not have access to the complaint procedure under the ICCPR.<sup>22</sup>

The ICCPR includes the right to self-determination formulated in Article 1. The right to self-determination as relevant to indigenous peoples has several elements. Specifically, the rights of peoples to freely dispose of natural wealth and the right not to be deprived of their own means of subsistence are relevant to indigenous peoples' access to water.<sup>23</sup> These rights are considered collective rights of peoples. In the *Ángela Poma Poma v Peru* communication<sup>24</sup> the Human Rights Committee decided that the diversion of water causing the drying out and degradation of indigenous lands led to the death of livestock and deprivation of livelihood; this was seen as a violation of the right not to be deprived of livelihood under Article 1(2). However, the Committee 'recalls its jurisprudence whereby the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been

19 Art. 5 ICCPR.

20 As of 7 February 2014, 167 states are party to the ICCPR.

21 The Human Rights Committee may consider individual communications concerning infringements on the rights mentioned in the International Covenant on Civil and Political Rights by States Parties to its First Optional Protocol. Art. 1 of the Optional Protocol states: 'A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol'.

22 The Optional Protocol to the International Covenant on Civil and Political Rights explains in Art. 2 that only individuals may submit a written communication.

23 Art. 1(2) ICCPR.

24 UN Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D/1457/2006, 27 March 2009.

violated, but that these rights do not include those set out in Article 1 of the Covenant.<sup>25</sup> This means that Article 1 is a group right. However, this group right cannot be the subject of a complaint before the Committee. Therefore neither individuals nor groups may complain about a possible violation of the right not to be deprived of subsistence and the right to freely dispose of their natural resources.

The principle of self-determination for indigenous peoples on the basis of international law also requires self-government, self-management, participation in public life, recognition of traditional customs and the control over basic services such as education and health services. When it comes to the right to water, states are called to consult with indigenous peoples to obtain their free and informed consent prior to approval of projects that affect their water resources.<sup>26</sup>

Article 6 of the ICCPR states that the right to life also provides a possibility to protect the right to water. The life expectancy of indigenous peoples is shorter than that of the general population in the different countries.<sup>27</sup> The case of the San people in Botswana shows that Article 7 of the ICCPR, which prohibits cruel, inhuman or degrading treatment or punishment, can also be applied to protect the rights of indigenous peoples to water. The national court decided that the San people have a right to re-commission the borehole at their own expense and sink other boreholes at the site.<sup>28</sup> The water used from this and other boreholes may only be used for domestic purposes. The court found support for its judgment by qualifying the handling of the San people, their forceful relocation and deprivation of water, as degrading treatment which is contrary to the provisions of the ICCPR.<sup>29</sup>

Protection of indigenous peoples' water under Article 6 of the ICCPR<sup>30</sup> is very limited; if the violation of the right to water is not life threatening, Article 6 does not provide protection. States are only obliged to refrain from actions which are threats to life. Polluting existing sources of water may affect the right to life. Nevertheless, such an infringement can be compensated by providing other sources of drinking water. Article 6 does not necessarily link access to water to the access to clean water resources that the indigenous peoples already have available; in other words, it does not prohibit the pollution of these resources.

Another provision of the ICCPR which could provide for protection and elaboration of the right to water under ICCPR is Article 27 which protects the rights of individuals as members of minorities in relation to their culture. While it is not possible to universalize all indigenous cultural water values into one perspective, as indigenous peoples' values are regionally diverse and complex, there are some commonalities between indigenous peoples worldwide.<sup>31</sup> Article 27 of the ICCPR provides protections for indigenous peoples; however, the protection under this Article is restricted for three reasons. First, the use of water should qualify as a traditional cultural activity. Second, the impact on the cultural practices should be consistent and significant. And last, the right is considered as an individual right; therefore it would prohibit a claim by a community.<sup>32</sup> Article 27 can be appropriately applied when individuals claim water for cultural activities which they enjoy in community with others. However, when indigenous peoples want to claim water for drinking purposes it falls outside of the scope of this provision.

Violations of the right to water for cultural uses by indigenous peoples by states have been brought under Article 27 ICCPR. In 2004, a member of an indigenous community in Peru brought a complaint to the Human Rights Committee concerning the withdrawal of water from indigenous lands by government

25 Para. 6.3. See, among others, the Committee's Views in Communications Nos. 167/1984, *Lubicon Lake Band v Canada*, 26 March 1990, Para. 32.1; 547/1993, *Mahuika et al. v New Zealand*, 27 October 2000, Para. 9.2; and 932/2000, *Gillot v France*, adopted on 15 July 2002, Para. 13.4.

26 Follows from the right to self-determination under the ICCPR in relation to natural resources.

27 United Nations Secretariat of the Permanent Forum on Indigenous Issues, *supra* note 1, p. 1.

28 Taylor, *supra* note 7, p. 3.

29 *Matsipane Moseithanyane, Gakentyatsiwe Matsipane and Botswana*, 27 January 2011, available on <<http://assets.survivalinternational.org/documents/545/bushmen-water-appeal-judgement-jan-2011.pdf>> (last visited 7 February 2014).

30 Art. 6(1) ICCPR: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

31 Australian Human Rights Commission Native Title Report (2008), available on <<http://www.humanrights.gov.au/publications/native-title-report-2008-chapter-6>> (last visited 7 February 2014).

32 '(...) the rights enshrined in article 27 are conferred to individuals -persons belonging to minority groups- and contained in part III of the Covenant, they are cognizable under the OP to ICCPR. This constitutes a gateway through which the Committee has examined claims relating to some issues affecting indigenous communities.' Available on <<http://www.unpo.org/downloads/AnnaBatalla.pdf>> (last visited 7 February 2014).



authorities.<sup>33</sup> Several wells were drilled for the extraction of groundwater and water flows were diverted. These actions caused the degradation of 10,000 hectares of indigenous pastures causing the death of large quantities of livestock. The State argued that the measures were carried out to meet domestic and agricultural water requirements.<sup>34</sup> The Committee concluded

‘(...) that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells. Moreover, the State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State’s action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violates the right of the author to enjoy her own culture together with the other members of her group, in accordance with Article 27 of the Covenant.’<sup>35</sup>

Article 27’s approach to the right to water is problematic in that the infringement of the right is highly dependent on the circumstances and that the violation needs to entail a substantial compromise of the right to culture. What is interesting about Article 27 is that it not only protects the traditional means of livelihood of minorities, but it also allows for adaptation of these means to the modern way of life and ensuring the use of new technologies.<sup>36</sup> In relation to access to drinking water and sanitation services, what could fall under the Article 27 is transforming a traditional source into an improved water source.

## **2.2. International Covenant on Economic, Social and Cultural Rights**

The ICESCR includes the human right to water as explained by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 15, which will be discussed in Section 3. However, this Covenant also includes other provisions which could provide indigenous peoples with access to and/or protection of their water resources. Article 1 is identical to Article 1 of the ICCPR, and this has been discussed above.

Article 15 states that everyone has the right to take part in cultural activities and for some cultural activities water forms an important part of their cultural life. This is especially so when water bodies are sacred sites which form a significant part of the cultural experience of the indigenous peoples.<sup>37</sup> Claims of a right to water under Article 15 ICESCR are, however, less well founded. A right to water for cultural practices would still be subordinate to the right to use water for domestic and personal uses.<sup>38</sup> Some argue the following: ‘Considering the diversity of occupational and cultural practices around the world, the realization of these rights simply does not *per se* require access to water.’<sup>39</sup> Justiciability is a challenge for the right to water under this provision, as developing an international standard for diverse cultural practices in relation to water will be very difficult.<sup>40</sup>

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33 Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D/1457/2006, available on <[http://www.uio.no/studier/emner/jus/jus/JUR5710/h10/undervisningsmateriale/Poma%20Poma%20v.%20Peru\\_22okt.pdf](http://www.uio.no/studier/emner/jus/jus/JUR5710/h10/undervisningsmateriale/Poma%20Poma%20v.%20Peru_22okt.pdf)> (last visited 7 February 2014).

34 Ibid, Para. 4.3.

35 Ibid., Para. 7.7.

36 *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993; New Zealand, of 15 November 2000: Doc. CCPR/C/70/D/547/1992, Para. 9.4.

37 V. Tauli Corpuz, ‘Indigenous Peoples and International Debates on Water: Reflections and Challenges’, in R. Boelens et al., *Water and Indigenous Peoples*, 2006, p. 29.

38 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water (2002), UN Doc. E/C.12/2002/11, Para. 6.

39 T. Kiefer et. al., *The human right to safe drinking water and sanitation in law and policy – a sourcebook*, 2012, p. 198.

40 Ibid.

### 2.3. International Labour Organization Convention No. 169

ILO Convention No. 169 confirms different rights concerning the decision-making process in relation to natural resources. It should be noted that there are different levels of participation and consultation. Article 6(2) requires that consultation take place ‘in good faith’ and ‘in a form appropriate to the circumstances, with the objective of achieving agreement or consent’. This does not require consent, but does require objective consultations. This is often overlooked, including by the ILO when examining complaints filed by indigenous peoples, but it is an important requirement of the Convention that establishes, at a minimum, a moral obligation to seek and obtain consent.<sup>41</sup>

According to the legally binding ILO Convention No. 169, 1989, indigenous peoples’ lands should be legally recognized, demarcated and protected. States should also recognize the traditional water management systems. And indigenous peoples have the right to use their lands and waters in their own traditional manners. If lands have been taken for developmental purposes, restitution or redress should be provided.<sup>42</sup> The universal support for these provisions is limited because the ILO Convention<sup>43</sup> has only been ratified by 20 states. However, these provisions find more support at regional level.

A well-known case is that of the Awas Tingni community in Nicaragua.<sup>44</sup> This case was addressed under the Inter-American human rights system. The *Awas Tingni* case concerns a dispute between the indigenous community in the Mayagna traditional territory in Nicaragua and the Government. The Government had granted a logging concession to a private company without consulting with the community living in this territory. The indigenous community complained and requested demarcation of their territories. The Court decided that the State had violated their right to judicial protection and their right to property as formulated under the American Convention on Human Rights.<sup>45</sup> The State was obliged to recognize, demarcate and issue titles to land for the lands belonging to the indigenous community. Cases like these have emerged in state courts more often. Demarcation of land allows for claims to restitution.<sup>46</sup> The progress of mapping and demarcating of indigenous peoples’ land is slowly leading to security of land tenure.<sup>47</sup> A reason for the slowness of this process is the existence of conflicting laws and policies. Also economic interests are often priorities in land allocation.<sup>48</sup> Demarcation is an important part of the protection of indigenous peoples’ rights especially when others compete over water and other resources. If demarcation is lacking, conflicts may arise and economic interests can prevent the full recognition of indigenous rights by governments and other parties.<sup>49</sup>

### 2.4. UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples<sup>50</sup> (UNDRIP) went through a long process before being adopted in 2007.<sup>51</sup> The rights as mentioned in the Declaration are meant as a minimum

41 F. MacKay, ‘Indigenous Peoples’ Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review’, Forest Peoples Programme, 2004, available on <[http://pdf.wri.org/ref/mackay\\_04\\_indigenous\\_ppl.pdf](http://pdf.wri.org/ref/mackay_04_indigenous_ppl.pdf)> (last visited 7 February 2014).

42 Art. 16(4) ILO Convention No. 169.

43 20 states have ratified ILO Convention No. 169. For more information about ratification see: <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::~](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::)> (last visited 7 February 2014).

44 ‘(...) decides that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and, until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities, the above in accordance with what was set forth in paragraphs 153 and 164 of this Judgment.’ *The Mayagna (Sumo) Indigenous Community of Awas Tingni v The Republic of Nicaragua*, Judgment Summary and Order of the Inter-American Court of Human Rights, 31 August 2001.

45 Art. 23 of the American Declaration of the Rights and Duties of Man and Art. 21 of the American Convention on Human Rights includes the right of indigenous people to delimitation and demarcation of their territory by the State.

46 This instrument is legally binding for the states that have ratified it. G. Pentassuglia, ‘Reforming the UN Human Rights Machinery: What Does the Future Hold for the Protection of Minorities and Indigenous Peoples?’, 2007 *International Journal on Minority and Group Rights* 14, p. 134.

47 UN Discussion Paper, supra note 5, p. 10.

48 Ibid., p. 11.

49 D. Getches, ‘Indigenous Peoples’ Rights to Water Under International Norms’, 2005 *Colorado Journal of International Environmental Law and Policy* 16, no. 2, p. 277.

50 The UNDRIP also includes the right to self-determination. This right has already been discussed in Section 2.1.

51 O. Mazel, ‘The Evolution of Rights: Indigenous Peoples and International Law’, 2009 *Australian Indigenous Law Review* 13, no. 1, p. 9.



standard for their 'survival, dignity and well-being'.<sup>52</sup> Even though the Declaration is not legally binding it has contributed to the development of customary international law and it creates a moral argument in the defence of indigenous rights.<sup>53</sup> So far, it could be considered the most comprehensive statement on the rights of indigenous peoples and underlines new developments of incorporating collective rights in international law.<sup>54</sup> The Declaration does not create any new rights.<sup>55</sup> 'Contained in the UNDRIP is an array of tailor-made collective rights, recognizing general principles and rights to nationality, self-determination, equality and freedom from adverse discrimination; rights to culture, spirituality, education and language; as well as participatory rights in development and other economic and social rights.'<sup>56</sup> The UNDRIP guarantees rights relating to land, territories and resources.<sup>57</sup> Nevertheless it lacks a specific obligation of states to demarcate and title the lands occupied by indigenous communities.

In relation to water the UNDRIP aims to underline the traditional ownership of indigenous peoples to the waters they have used which are connected to the land they occupy. Article 26(2) specifies that: 'Indigenous people have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.' Also, a connection is made between access to water and development which is relevant in the situation of dam construction for instance.<sup>58</sup> Article 32(2) states that: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'

### ***2.5. International Convention on the Elimination of All Forms of Racial Discrimination***

The Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination in the realization of the human right to water. Preventing and hindering access to natural resources such as water can be seen as a form of racial discrimination.<sup>59</sup> Interestingly, the Committee on the Elimination of Racial Discrimination (CERD) also stressed the importance of access to water for indigenous peoples. It did so in 'concluding observations' concerning Canada in February 2012.<sup>60</sup> Every State Party to the Convention is obliged to submit a report to the Committee on the implementation of the rights mentioned in the Convention.<sup>61</sup> The Committee considers each report and formulates recommendations on improving the concerns the Committee identifies. These recommendations are not binding but do set norms.

The list of themes under the Convention includes legislation and remedies in cases of racial discrimination and the situation of aboriginal people.<sup>62</sup> Several shadow reports were presented to the CERD providing examples of the situation of indigenous peoples in several parts of Canada. The Tsilhqot'in wrote in their shadow report that a proposed project by extraction company Prosperity Gold-Copper Mine will result in the Tsilhqot'in being alienated from their land and water.<sup>63</sup> Their report claimed that their homes, sacred sites and water resources will become inaccessible.<sup>64</sup> The presence of

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52 Art. 43UNDRIP.

53 E. Desmet, *Indigenous Rights Entwined with Nature Conservation*, 2011, p. 176.

54 F. Sindico et. al, 'Contours of an Indigenous Peoples' Right to Water in Latin America under International Law', 2010 *International Human Rights Law Review* 1, no. 2, p. 127.

55 Desmet, supra note 53, p. 147.

56 Ibid.

57 Ibid.

58 Cummings, supra note 6.

59 Ibid., p. 287.

60 Committee on the Elimination of Racial Discrimination, 'Consideration of reports submitted by States parties under article 9 of the convention', CERD/C/CAN/CO/19-20, 9 March 2012, Para. 19, available on <<http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf>> (last visited 7 February 2014).

61 Art. 9 International Convention on the Elimination of All Forms of Racial Discrimination.

62 International Convention on the Elimination of All Forms of Racial Discrimination, 'Report submitted under Article 9 of the Convention, 19th and 20th Periodic Reports of Canada', CERD/C/CAN/CO/19-20, 28 January 2011.

63 Report by the Tsilhqot'in Nation, January 2012. Submission to Canada's 19th and 20th Periodic Reports: 'Shadow Report by the Tsilhqot'in Nation on the denial of Indigenous peoples' rights in Canada with a focus on the Extractive Sector Operating within Canada', Para. 40.

64 Ibid., Para. 41.

extraction companies is not the only reason for the lack of access to water for indigenous people. Some communities lack basic services, such as the Pikangikum which the Nishnawbe Aski Nation illustrated in their shadow report. 'Pikangikum is an impoverished, isolated First Nations community where basic necessities of life are absent. Running water and indoor plumbing do not exist for most residents. Poverty, crowded substandard housing, gainful employment, food and water security are daily challenges.'<sup>65</sup>

The CERD found that it remains concerned about the persistent levels of poverty among Aboriginal peoples, and the persistent marginalization and difficulties faced by them in respect of employment, housing, drinking water, health and education, as a result of structural discrimination whose consequences are still present (Art. 5).<sup>66</sup> For this reason the Committee recommended 'speeding up the provision of safe drinking water to communities on reserves.'<sup>67</sup> This example shows that the CERD is active in addressing issues of access to water for indigenous peoples. However, it does not state that it is a human right. Instead it seems to classify it more as a service that should be provided by the Government. A positive development is that indigenous communities can use other UN bodies in the pursuit of protecting their access to water. This is especially so because the CERD supports the legal standing of groups.

## 2.6. Agenda 21<sup>68</sup>

The United Nations Conference on Environment and Development (UNCED) resulted in the adoption of the non-legally binding Agenda 21 which includes Chapter 26<sup>69</sup> on the position of indigenous populations as important players in environmental protection and has been adopted by 174 states.<sup>70</sup> Chapter 26 urges for the protection of indigenous lands against unsound environmental practices and other activities that indigenous peoples would find culturally or socially inappropriate. The document calls on governments to engage in full partnership with indigenous peoples in order to reach the following objectives which are relevant to protecting the rights of water of indigenous peoples:

- 'iii. Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
- 'iv. Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;'<sup>71</sup>

Agenda 21's Chapter 26 does not explicitly mention water. It looks at water as part of natural resources and does not mention different water uses. In this manner, this document creates access to water as a resource but does not set any requirements and is mostly aimed at conservation. It does, however, aim to include indigenous peoples in the process of protecting water sources and has them participate actively.

## 3. General Comment No. 15 and indigenous peoples

We now move from the discussion of the rights of indigenous peoples as it flows from international soft and hard law, to a discussion of what the implications of the human right to water are for indigenous peoples. The human right to water has been recognized in international human rights instruments, first implicitly and then explicitly, and has now emerged as an independent right as adopted in the UN

65 'Coroner's Inquest into the Death of Selena Sakanee (November/December 1999)' and 'Death Review of the Youth Suicides at the Pikangikum First Nation (June 2011, for the period covering 2006-2008)', available on <<http://www.mcscs.jus.gov.on.ca/stellent/groups/public/@mcscs/@www/@com/documents/webasset/ec093490.pdf>> (last visited 7 February 2014). Nishnawbe Aski Nation, 'Response to the 19th and 20th Periodic Reports of Canada: Alternative Report on Canada's Actions on *Housing & Infrastructure Crisis, Youth Suicide & Non-Medical Prescription Opioid Epidemics and Inequality in First Nations Policing*', January 2012.

66 Para. 19 International Convention on the Elimination of All Forms of Racial Discrimination.

67 Ibid., Para. 19 under (a).

68 'Chapter 26, Recognizing & Strengthening the Role of Indigenous People & Their Communities', available on <<http://www.un-documents.net/a21-26.htm>> (last visited 7 February 2014).

69 Ibid.

70 All states in attendance were in agreement. See: General Assembly, 'Report of the United Nations Conference on Environment and Development', A/CONF.151/26 (Vol. IV).

71 Ibid., Para. 26.1.S. Jentoft et al. (eds.), *Indigenous Peoples: Resource Management and Global Rights*, 2003, p. 56.

General Assembly Resolution of 2010.<sup>72</sup> However, in order to interpret the right in relation to indigenous peoples, it makes sense to refer to General Comment No. 15, which actually discussed the implications.

This General Comment was adopted in 2002 by the CESCR and is a non-legally binding document which ‘extrapolates existing obligations from the nature of the Covenant.’ It argues that the human right to water is implicitly included in the framework of the International Covenant on Economic, Social and Cultural Rights under Article 11(1) on the right to an adequate standard of living, and Article 12 on the enjoyment of the highest attainable standard of physical and mental health. The human right to water is not based on a specific separate article within the Covenant which makes defining the content challenging. The Committee, however, saw this right as falling within the scope of the Covenant and therefore did not create any new rights by formulating this Comment. General Comment No. 15 is currently the most authoritative exploration on the content of the right and the Human Rights Council Resolution of 2010<sup>73</sup> recognizes the legally binding status of the human right to water and sanitation services.

General Comment No. 15 has, at its core, the following statement: ‘The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.’<sup>74</sup> General Comment No. 15 explains that the right to water includes freedoms and entitlements. It includes elements which apply at all times, in all circumstances, referred to as the minimum core,<sup>75</sup> which are explained as follows:

- Safe and acceptable water is water that is clean, free from harmful substances like micro-organisms and chemicals, and suitable for domestic and personal use.<sup>76</sup> The element of acceptable also refers to the cultural appropriateness, gender sensitivity<sup>77</sup> and privacy requirements. It means that, for instance, the location of water points needs to be decided keeping these requirements in mind. Water is often a matter of cultural and religious rules.
- Facilities must be accessible to everyone, without discrimination, within the jurisdiction of the state. Accessibility refers to the physical and economic accessibility of safe water on a non-discriminatory basis and the access to information related to it. In all spheres of life, water should be accessible to all. This includes vulnerable groups such as children, the elderly, the disabled but also the homeless and those living in institutions such as prisons or psychiatric hospitals.<sup>78</sup>
- States are obliged to adopt regulatory frameworks that make water progressively available, accessible and affordable to all.
- General Comment No. 15 submits that the human right to water only covers water for personal and domestic uses. Every other use falls outside and is not protected by this right.
- A major factor in dealing with water scarcity is the participation of citizens, especially marginalized groups such as the poor and minorities. These groups are often under-represented and should have the opportunity to participate in the decision-making process which influences their access to water.<sup>79</sup>

General Comment No. 15 helps to define the right to water in relation to its quantity, quality and accessibility. In doing so it has contributed to the attention paid to this right in the UN General Assembly and the UN Human Rights Council.

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72 Resolution on Human Right to Water and Sanitation (UN General Assembly Resolution A/64/292, 28 July 2010), available on <<http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>> (last visited 7 February 2014).

73 UN Human Rights Council, Resolution on Human Rights and Access to Safe Drinking Water and Sanitation (A/HRC/15/L.14, 24 September 2010), United Nations, New York. UN Human Rights Council, Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (A/HRC/RES/15/22, 6 October 2010). United Nations, New York.

74 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water (2002), UN Doc. E/C.12/2002/11, Para. 2.

75 *Ibid.*, Paras. 37-38.

76 *Ibid.*, Para. 6.

77 See on examples of gender sensitivity in relation to access to water and sanitation: L. Harris, ‘Water Rich, Resource Poor: Intersections of Gender, Poverty, and Vulnerability in Newly Irrigated Areas of Southeastern Turkey’, 2008 *World Development* 36, no. 12, p. 2643-2662.

78 General Comment No. 15, *supra* note 74, Para. 16.

79 *Ibid.*

In relation to indigenous peoples the Committee mentions these groups specifically in several instances and also mentions specific requirements. First, the CESCR finds that special attention should be given by states to ensuring that individuals have adequate access to water for their subsistence needs. The CESCR refers to Article 1, Paragraph 2<sup>80</sup> ICCPR, which states that no peoples may be deprived of their means of subsistence. The Committee recognizes indigenous peoples as falling under the definition of ‘peoples’ as mentioned in Article 1 and points out that ‘States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.’<sup>81</sup> The recognition of indigenous peoples as ‘peoples’ by the Committee helped with the overall recognition of indigenous peoples’ rights, especially the right to self-determination. Second, this recognition goes beyond simply accepting the need for water for drinking, sanitation and hygiene purposes but also includes water use for subsistence farming, specifically for this group. Third, by referring to Article 1 the Committee also includes a collective element to the right to water. Fourth, the Committee emphasized that the right to water applies to everyone and that special attention should be given to groups who have traditionally had difficulties in exercising the right to water such as women and prisoners.<sup>82</sup> Concerning indigenous peoples the Committee affirms that State Parties should take steps to ensure that everyone enjoys the right to water without discrimination,<sup>83</sup> as is also confirmed in Article 2(2) ICESCR. States should identify the vulnerable groups and individuals within their jurisdiction. These groups should not be adversely affected in any manner, directly or indirectly.<sup>84</sup> Fifth, one of the other requirements pointed out by the Committee is that all water facilities and services should be culturally appropriate.<sup>85</sup> The Committee does not explain what can be seen as culturally appropriate. Allowing for groups to identify for themselves what they see as culturally appropriate can be the benchmark. Under these circumstances indigenous peoples could incorporate their perspective on the cultural significance of water. Sixth, states are obliged to involve indigenous peoples in the decision-making process, in the event that the related decisions could impact on their right to water.<sup>86</sup> The Committee acknowledged that:

‘The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people’s participation. The right of individuals and groups to participate in decision-making processes<sup>87</sup> that may affect their exercise of the right to water must be an integral part of any policy, program or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.’<sup>88</sup>

Seventh, the Committee also stated that ‘Indigenous Peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for Indigenous Peoples to design, deliver and control their access to water.’<sup>89</sup> Also ‘States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water.’<sup>90</sup> These interpretations

80 ICCPR and ICESCR.

81 General Comment No. 15, supra note 74, Para. 7.

82 Ibid, Para. 16.

83 Ibid.

84 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, UN Doc. E/1991/23, Paras. 9, 12 available on <<http://www.unhcr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664>>.

85 General Comment No. 15, supra note 74, Para. 12.

86 Ibid., Para. 12.

87 The right to participation is also stressed in the ILO Convention (Arts. 2, 5, 7 ILO Convention No. 169). The Human Rights Council, in addition to the requirements of states, has recently initiated efforts to call attention to the right of indigenous peoples to participate in decision-making processes with a focus on extractive industries. See: Human Rights Council Resolution on Human rights and Indigenous Peoples, UN Doc. A/HRC/RES/18/8, available on <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.2.pdf>> (last visited 7 February 2014).

88 General Comment No. 15, supra note 74, Para. 48.

89 Ibid., Para. 16(d).

90 Ibid., Para. 14.

of the Committee illustrate seven elements of the human right to water that are specifically relevant for indigenous peoples.

#### **4. Differences, similarities and the added values**

The above sections allow for an overview of the provisions relevant for the protection of indigenous peoples' rights to water. The ICCPR includes several provisions which can be applied to the water situation of indigenous peoples. The Human Rights Committee that monitors implementations of these provisions may deal with individual communications<sup>91</sup> related to States Parties that are party to the First Optional Protocol to the International Covenant on Civil and Political Rights. We can conclude that the articles under the ICCPR provide indigenous peoples with the most far-reaching protection, although it only allows individuals to complain. This, however, is not always problematic for indigenous peoples as the interests of the collective are often taken into account by the Human Rights Committee.<sup>92</sup> Nevertheless, one of the central rights of indigenous peoples, that of self-determination and the right not to be deprived of subsistence is not open to individual complaints. Even so, the Human Rights Committee does shy away from mentioning the significance of this right in its considerations.<sup>93</sup>

In relation to the right to water, Article 27 ICCPR has proven itself appropriate for the protection of indigenous peoples' rights to water, as the Peruvian case shows. However, indigenous peoples must prove a connection between the water and their expression of culture, making the right to water subordinate to the overarching right to enjoy culture. Hence the complainant must prove the significant interruption of the enjoyment of their culture. In addition this article does not set any standards for the quality of the water and does not obligate states to actively ensure the implementation of the right to water.

Article 6 of the ICCPR on the right to life provides limited protection for the right to water of indigenous peoples and limits the range of water uses because the obligations it creates are mostly negative. This article contributes to halting the life-threatening behaviour of the state and goes as far as to motivate states to take measures to combat malnutrition and epidemics.

The CERD<sup>94</sup> may consider individual communications related to acts of states that have signed the necessary declaration under Article 14 of the Convention. The CERD also provides a basis for indigenous peoples to pursue the protection of their human right to water. The provisions of this Convention includes positive obligations as the CERD finds limited access to basic and natural resources such as water a possible form of racial discrimination. The considerations of the Committee concerning individual complaints are not legally binding. Nevertheless, they form an authoritative interpretation. Again these provisions are also limited. The right to water is mostly seen as part of the natural resources that indigenous communities are entitled to.

The International Convention on the Elimination of All Forms of Racial Discrimination provides protection for a range of water uses on the condition that there is a link with racial discrimination. This Convention contributes to creating a system free from discrimination in which indigenous peoples and other minorities can enjoy their rights.

The ILO Convention provides protection of water as a natural resource for indigenous peoples. It also contributes to creating an environment where the rights of indigenous peoples are protected. Unfortunately, the provisions within the Convention do not provide legal redress at an international level, since indigenous individuals and communities do not have access by way of a complaint mechanism. This Convention only provides protection through the national implementation of the provisions by states themselves. This has proven effective in a limited number of cases as national courts take the ILO Convention into account.<sup>95</sup>

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91 These communications are non-binding.

92 See Section 2.

93 See: Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 12 (1994).

94 The CERD monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.

95 For examples see ILO, Application of ILO Convention No. 169 by Domestic and International Courts in Latin America, available on <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_123946.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf)> (last visited 7 February 2014).



The provisions mentioned above provide a basis for the protection of the human right to water for indigenous peoples, and provide legal redress for individuals. So far, Article 27 of the ICCPR is to be considered the most effective in protecting the right to water of indigenous communities. However, most of the provisions include the right to water as a subordinate element of an overarching right and do not approach the right as a self-standing right. In this respect the human right to water under the ICESCR contributes significant additional elements to the human right to water for indigenous peoples.

1. The human right to water contributes to the overall coverage of all aspects of the indigenous experience with water. As the culture, survival of the group and environmental aspects were already covered, what remained was the use of water for domestic purposes.
2. The CESCR makes a connection between the resources indigenous peoples already have available and the realization of the human right for them. It seems that for the enjoyment of the human right, indigenous peoples are allowed to make use of their natural resources. This prevents states from aiming to realize the human right to water for indigenous peoples through other resources than the ones already used by them, for instance by providing water tanks while using the water on their lands for other purposes.
3. While other instruments do cover water as a general resource, the ICESCR provides standards for the quality of water: providing indigenous peoples with safe drinking water.
4. With the entry into force of the First Optional Protocol in 2013, indigenous peoples as a group and individually may bring forward their concerns, which is not possible under the ICCPR. The ICESCR could then be used to further develop indigenous peoples' rights in general as the Protocol is not only relevant for the human right to water but for all rights under the ICESCR.

The inclusion of an individual complaint mechanism for the right to water adds to the specification of the human right to water. The decisions made by the CESCR would explain the precise meaning of the human right to water under different circumstances, aiding the conceptualization of the right. In addition to an individual complaint procedure there will be a possibility for individuals to file a group complaint. This would prevent national authorities from undermining the process by satisfying access to water for the single individual who files an individual complaint.<sup>96</sup> By allowing group complaints a path will be opened for the claims of indigenous peoples as a collective. This possibility would not only be useful to indigenous communities but in all situations where communities face threats to their access to water.

What still remains an issue, however, is that even though both Covenants have complaint procedures there is another problem. 'A major deficit within the current set of institutions lies in the fragmented competence of the respective Committees. Every committee supervises the treaty it was appointed to. A consequence of these split supervisory responsibilities is that the CESCR based the human right to water on the ICESCR.'<sup>97</sup> As a result, the CESCR is not allowed to take the articles of the ICCPR into account; while especially Article 6 on the right to life and Article 27 on the rights of minorities can contribute by providing support for the human right to water.

The approach taken in developing the human right to water so far has been that separation and distinction between different water uses is possible and can be done through implementation. This is, however, not the reality in which indigenous communities live. This is illustrated by the example of the Nari Nari Tribal Council in Australia. This Council was provided with a cultural access license for water. The Council, 'in an attempt to rehabilitate their wetlands, have used their purchased cultural water allocation, for environmental purposes.' This illustrates that indigenous groups will find ways to use the system to their advantage in order to meet their needs. If they find that the right to water for cultural uses is better protected and also easier to claim, they will prefer using that provision even if they eventually mean to use the water not for cultural purposes but for drinking purposes. Therefore, focusing on different water uses is not useful and all relevant aspects such as safety should be taken into account when it comes to water, underlining the indivisibility of human rights.

<sup>96</sup> K. Bourquain, *Freshwater Access from a Human Rights Perspective*, 2008, p. 213.

<sup>97</sup> *Ibid.*, p. 222.



## 5. Conclusion

This paper has focused on the right to water of indigenous peoples, a global minority community of people. It comes to the following conclusions:

First, the human right to water applies to indigenous peoples, but more as individuals than as a group. Second, the human right to water is just one part of a larger bundle of water rights that includes the right to use water for cultural reasons, for subsistence agriculture and livelihoods, for environmental reasons, general land rights and that includes a prohibition of pollution of their water resources.<sup>98</sup> Third, this bundle of rights (a) includes diverse types of rights – e.g. human rights, usufructuary rights or ownership rights, (b) is sometimes legally binding, sometimes it is not, and is sometimes contested, (c) has a diversity of associated institutional authorities and complaint mechanisms, and (d) sometimes applies to individuals and sometimes to groups. Fourth, the confusion regarding the extent of the right to water, and the diversity of rules, agencies and whether the rights are legal binding or not makes it difficult for this minority and marginalized community to actually assert these rights. Fifth, nevertheless, indigenous peoples have started invoking claims under international law when the opportunity presents itself. If indigenous peoples wish to successfully bring a claim concerning their right to water before a UN body they have to take several obstacles into account. The lack of complaint mechanisms available to indigenous peoples constitutes a challenge. However, with the entry into force of the First Optional Protocol to the ICESCR, indigenous peoples will be able to claim their economic and social rights as both individual members of a group as well as a collective. So far, it seems that the provision which provides the best protection for the more comprehensive right to water of indigenous peoples is Article 27 ICCPR. Indigenous peoples do, however, need to specify how their culture has been seriously undermined by a lack of access to water. The human right to water under ICESCR is highly relevant, however, because of the standards it creates for, among other elements, the quality of water. Sixth, for effective protection of the rights of indigenous peoples, it is necessary to create a comprehensive and consistent system of rights for these peoples. It is essential that the human right to water does not abrogate from their larger set of rights of access to water as part of their natural resources. At the same time, the human right to water should guarantee them access to potable water of good quality. Where such access cannot be guaranteed through supply systems, this should imply an obligation on the state to ensure that the natural water resources of these communities are not polluted by other actors. In conclusion, the human right to water does have additional value applied to the situation of indigenous peoples, although it may not be the most appropriate norm to protect indigenous peoples' access to water as part of their broader right to their natural resources. ¶

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98 See Section 4 for more details.