

Introductory Remarks
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Item 7 -- Human Rights
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I am pleased to moderate this session on Agenda Item 7 concerning Human Rights as the member of the Forum responsible for this portfolio. Yet another year has gone by wherein the status and conditions of Indigenous peoples has not markedly improved. In fact, many have witnessed heightened conditions of political violence being perpetrated against Indigenous peoples. In fact recent comments of the Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya, whom we will hear from this afternoon, has made expressions of concern about violent incidents in the Gambella region of Ethiopia, which was triggered by the forced displacement or forced removal of the Indigenous peoples from their traditional territories in order to make way for agro business enterprises that have been supported by the Government.

In addition, Indigenous women in Canada as well as the Special Rapporteur have brought attention the alarming patter of violence against Indigenous women throughout Canada and the inadequacy of response by the Government of Canada and police representatives. Furthermore, there are ongoing acts of violence against Indigenous communities and individuals in the state of Mato Grosso do Sul in Brazil in the context of Indigenous peoples attempting to recover lands they were dispossessed of in favor of non-Indigenous farmers.

These are only a few examples of the troubling treatment of Indigenous peoples despite the 2007 adoption of the UN Declaration on the Rights of Indigenous peoples by nation states across the globe in the General Assembly hall just next door. There is no doubt in my mind that numerous other examples of violence against Indigenous peoples abound in all regions of the world but are unreported due to lack of access to for a such as this UN mechanism. Less

startling than physical violence against Indigenous peoples but no less important, are the myriad of violations or denials of all other human rights of Indigenous peoples, which the UN Declaration was intended to curb and ultimately end, allowing Indigenous peoples to actually exercise and enjoy their basic human rights and fundamental freedoms.

I raise the matter of human rights violations in order to provide a reminder about the crucial need for states to uphold their solemn obligations in the specific context of Indigenous peoples and to implement, with Indigenous peoples, the UN Declaration. In this regard, it may be constructive to recall the articulation of the concept of *erga omnes* in relation to state obligations to promote and protect the human rights of Indigenous peoples.

The classic understanding of this principle was articulated in the International Court of Justice judgment in the Barcelona Traction Case of February 1970:

“ an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.”

Again, the meaning of obligations *erga omnes* is that the International Court of Justice affirmed is the identification of a category of international obligations owed by states to the international community as a whole, intended to protect and promote the basic values and common interests of all. Not only do state members of the United Nations pledge to take collective action to promote and encourage respect for human rights and fundamental freedoms

for all without distinction but they have obligations that have been “conferred by international instruments of a universal or quasi-universal character.”

In this context it is important to underscore the fact that the *UN Declaration* does not create new rights and the rights in the *Declaration* are inherent (PP 7). In addition, in my view, a positive obligation exists for States to act due to the vulnerability of Indigenous peoples (e.g. arising from colonialism, racial discrimination, genocide, etc.) which gives rise to a duty of States to take special measures or protections.

It is difficult to highlight all of the elements required for an *erga omnes* obligation to exist. However, the International Court of Justice, treaty bodies and international legal scholars have done some important work in making linkages between obligations *erga omnes* and international human rights instruments.

For example, in the *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90 at 102, para. 29, per Judge Weeramantry:

“... In the Court’s view, Portugal’s assertion that the **right of peoples to self-determination** as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ... ; it is one of the essential principles of contemporary international law....”

The Human Rights Committee in a general comments has addressed the matter as well and in particular in General Comment they stated:

'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.

In relation to the right of self-determination in the context of the Covenant, the Human Rights Committee, *General Comment No. 12*, [Article 1, 21st sess., A/39/40 (1984), reprinted in (1987) 9 Eur. H.R. Rep. 181, para. 6] stated:

It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law

Finally, Dinah Shelton, in a 2002 law review article addressing *erga omnes* and *jus cogens*, highlighted that:

***Erga omnes* doctrine does not establish a new source of law capable of creating norms but rather is itself a norm that identifies legal consequences to breaches of certain kinds of other norms created by treaty and custom. In particular, obligations *erga omnes* are norms that impose duties opposable to the entire international community.**

When applied to the distinct status and human rights of Indigenous peoples one must recognize that the UN Declaration on the Rights of Indigenous Peoples was adopted by an overwhelming majority of nation-state members of the United Nations. Though not all of the provisions of the UN Declaration are of a customary international legal character, a number of them have achieved this status by virtue of state practice, recognition, and consistent behavior toward promoting the important collective human rights of Indigenous peoples and in particular, the rights to self-determination, land rights, participation in matters that effect them, and redress or reparations.

Therefore, the nation-state member of the UN must reflect upon these solemn legal obligations and begin to proactively determine, on an urgent basis, how it is that they intend to behave consistent with their obligations *erga omnes* as well as to begin systematic initiatives to fully and effectively implement the inter-related, inter-dependent, indivisible, and inter-connected human rights of Indigenous peoples in their respective countries as well as internationally. Indigenous peoples must be a “concern of all states.” Implementation of the UN Declaration is not an easy enterprise but it is one that will certainly be for the good of all and in particular, Indigenous peoples.

