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Remarks

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The third area will be the various topics occurring on the ground that have occupied their attention. Again, the subject matter is wide-ranging, from land rights to issues of violence against particular populations or subpopulations—women in particular—in various countries around the world, conflicts regarding extractive resource industries, and so on. Jim and Dinah will both share with you some thoughts about these topical events that occupy a great deal of their time.

Finally, the last area we are going to get into is a look forward. Where are things going? What are the issues going forward? And, as Jim said this morning, how do we make our way toward moving from the filing of complaints to orienting our thinking and training toward the actual resolution of cases? So with that broad backdrop, we will start with a general overview of the development of international law as it relates to indigenous people's rights. We'll start with Jim.

REMARKS BY JAMES ANAYA *

Good morning. It's a pleasure to be here. Thank you, Bruce, for chairing this and for the organizers for inviting us to participate in this.

I'd like to talk briefly about my mandate for those of you who are not that familiar with the UN system of Special Rapporteurs or "special procedures," as they are called. I am appointed by the UN Human Rights Council, which is the major entity of the UN that looks at human rights issues. The Council is an intergovernmental body made up of 47 member states, the U.S. among them now, and it has a number of these so-called special procedures, mandate holders. Most of us are denominated Special Rapporteurs. Others are called "independent experts" and so forth, but we are all appointed independently to look at a particular item or country situation. In my case, the theme is the rights of indigenous peoples, and there are several others. I think right now there are 33 thematic rapporteurs or special procedures, and among these are violence against women, the right to food, housing, torture, and counterterrorism.

As Special Rapporteur on the Rights of Indigenous Peoples, my function is to monitor the conditions of indigenous peoples worldwide through various methods. I do evaluations of country situations, so I go to a country and look at how that country's policies and laws relate to indigenous peoples, and what are the major issues. That usually involves a country visit, and in fact, I'll be doing a country visit to the United States from April 23rd through May 4th.

I've done a range of these. I think that since I was appointed in 2008, I've done about 18 country assessments, which involve country visits. The most recent ones were Argentina, Australia, Congo, Botswana, really most countries now in Latin America, and Russia. In addition to these country assessments, I receive information and respond to allegations of human rights abuses or situations of human rights problems. These can involve natural resource extraction on indigenous lands and a range of human rights issues connected with that, or they can involve issues of violence against women, and so on. There is a range of issues that have to do with indigenous peoples as such, as communities.

Promoting good practices is also something I do, and it's one that the Human Rights Council has specifically emphasized. I have worked on constitutional reforms in other countries, and

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one of my first engagements of this kind was with the government of Ecuador, really the Constituent Assembly of Ecuador. I was involved in discussions on how to include recognition of indigenous group rights in the Ecuadoran constitution, and that eventually was achieved.

Recently, I was in Brazil working with both the government or government agencies and indigenous peoples on new regulations or laws on consultations with indigenous peoples. That's a huge and recurring issue—how do companies and governments consult with indigenous peoples, as they are required to under contemporary standards, with regard to decisions affecting them? Countries are finding that they have to establish specific procedures for that. So I was involved in conversations with Brazil and the indigenous peoples there on that just a couple of weeks ago.

In responding to specific violations of human rights, which can involve a country visit and an effort to build good practices and build models, I was recently in Costa Rica looking at how to construct a consultation procedure around a particular issue—the construction of a dam that would be on or that would affect indigenous territories. When I first became involved in that particular issue, it was a very contentious situation. What I found when I went to Costa Rica with the consent of the government and at the invitation of indigenous peoples as well, was that people were basically talking past each other. Indigenous peoples had a series of problems they were concerned with, but they were not necessarily opposed to the dam itself. Rather, they viewed the presence of the dam close to them as an affront to their rights, because of the history that they have suffered, and the particular issues that continue to be unresolved having to do with land, social services, and so forth. It seemed when I first visited there that there was a willingness to engage in a consultation about the dam, and how the dam could go forward. I made a series of recommendations. The government agreed to them. The indigenous peoples' representatives essentially agreed to them. So we are moving forward on the construction of a consultation mechanism procedure that would be monitored by the UN system and that would involve an effort to achieve agreement on whether or not the dam will go forward.

Finally, another work area has to do with thematic studies—looking at cost-cutting issues of concern to indigenous peoples—and now I'm engaged in a study on extractive issues on indigenous territories. Again, this is one of the main concerns of indigenous peoples worldwide; that is, how can oil and gas development, or other mega-projects like dams on indigenous territories, move forward with full respect for indigenous peoples' rights? That's a significant challenge that indigenous peoples are confronted with. Governments are confronted with it as they try to develop the resources in their territories. There are a lot of misunderstandings going on, and there is a deep need for creative solutions to these problems. I am doing a study on that, which is being coordinated with the work of the Inter-American Commission on Human Rights and other international organizations or institutions.

As far as the development of international law in this area goes, the creation of these mechanisms focused on indigenous peoples, is, I think, fairly subject to highlight the increasing concern that Bruce referred to by the international system on indigenous peoples' demands and the issues that they face. Of course, there has been greater institutional focus, but there has been development of new norms and new standards that are now included in international instruments regarding indigenous peoples and affirming their rights.

Principal among these instruments is the UN Declaration of Rights of Indigenous Peoples, which was adopted in 2007 by the UN General Assembly and which I regard as the same normative frame of reference for my work. While engaging with governments, engaging in

situations, I refer to the declaration as the normative guide for what I do, as well as other relevant instruments, treaties that a country has ratified in particular.

But the declaration really should be seen as simply representative of a series of broader developments. We can go back to the ILO Convention 169 on Indigenous and Tribal Peoples, a multilateral treaty adopted by the international organization in 1989, which was a revision of an earlier treaty that was adopted by the ILO in 1957. The contemporary era of indigenous activity at the international level began in the 1970s, with increasing demands made at the international level to institutions within the UN by indigenous representatives who were literally arriving at the doorstep of the UN offices in Geneva, presenting their cases and demanding attention to their situations.

And this generated a shift in attitudes toward indigenous peoples. Before this, the international system regarded indigenous peoples as simply in need of being assimilated into larger societies and making sure that their rights as citizens were equal to all others. But the indigenous peoples were saying, “No, we see a different model, in which we are part of the larger society, but at the same time we remain a distinct people, and our rights as such must be recognized—we must be recognized as distinct sovereigns, as having the capacity of self-governance, within the framework of the states within which we reside.”

That, of course, generated a lot of debate, but I think it is fair to say that the debate was resolved in favor of indigenous peoples’ claims to maintain that cultural integrity, that identity as distinct peoples, albeit within the framework of larger societies. So really what indigenous peoples have done is to promote the model of a multicultural state, a country that recognizes these distinct indigenous identities. If that not has taken hold in many domestic settings—and I think that there is still a lot of debate here in this country about things like multiculturalism—it certainly has taken hold internationally, and what we see represented in ILO Convention 169 adopts that model. It recognized the rights of indigenous peoples as such and not just indigenous individuals within the larger state. That is the response to the demands of indigenous peoples, whereas the older convention of 1957 really was an assimilation document. That convention saw indigenous peoples as in need of special attention, but that attention was to assimilate them. So ILO 169 moves in the direction of this model of affirmation of group rights. Eventually, the Declaration of the Rights of Indigenous Peoples pursues that model a step further and recognizes somewhat more robust rights, group rights including rights of self-determination explicitly recognizing the right of indigenous peoples to self-determination, explicitly recognizing collective rights over lands and resources. So we see these instruments, these two principles among them, that specifically address indigenous peoples within this newer model of affirmation of indigenous group rights.

At the same time and parallel to it, we see the interpretation of existing human rights instruments, of general applicability, like the American Convention on Human Rights, going along the same lines. For example, in a case I litigated before the Inter-American Court of Human Rights that was decided in 2001, the Court interpreted the general right to property as affirming indigenous peoples’ collective land rights. At the UN level, we see the Convention on the Elimination of All Forms of Racial Discrimination, which generally affirms rights to equality, being interpreted in favor of indigenous peoples’ group rights, so that equality does not just mean recognition of the equality of the individual, but equality of the individual in his or her cultural setting. Hence, according to the Committee on the Elimination of Racial Discrimination, which monitors compliance with that convention, it requires states to recognize and protect indigenous peoples’ group rights along the same lines of the declaration. Interpretations of the International Covenant on Civil and Political Rights—particularly

interpretations of its Article 27, which is the minority rights provisions, and Article 1, the provision on self-determination—go in the same direction. These are just a few examples of where we see the UN treaty-monitoring bodies interpreting the UN treaties, which are not specifically addressed to indigenous peoples but interpret them to affirm indigenous peoples' rights consistent with the ILO Convention 169 and the Declaration on the Rights of Indigenous Peoples.

The ILO Convention 169 has near-universal coverage throughout Latin America. It is often said, "Oh, not many countries have ratified," which is true if you look at the world globally. But in Latin America, starting in Mexico all the way down to Chile, it has been widely ratified. What exceptions are there? Suriname and Panama, and Panama ratified the earlier one. All the other countries have ratified it, and in most of these countries, because of their domestic constitutional systems, ILO Convention 169 becomes part of domestic law. So we see a very rich body of jurisprudence at the domestic level—court decisions in Brazil, Chile, Colombia, Costa Rica, Mexico, Peru, and Venezuela on ILO Convention 169 and indigenous rights. We are seeing the domestication of these international standards within the domestic court systems, a very important development.

One of the projects on which we are working at the University of Arizona is to translate many of these important decisions into English, so that they are available to the English-speaking world, because we do not have that dialogue going on yet about these different court systems and their treatment of indigenous issues across linguistic divides.

The Declaration of the Rights of Indigenous Peoples, of course, is a declaration, so in and of itself it is not legally bonding, as governments especially are quick to point out. Yet it would be inaccurate to say that it has no legal significance, in my view, for a number of reasons. We are all familiar with the way that declarations can build on existing international legal operation, so I will incorporate by reference all those arguments to say that the Declaration of the Rights of Indigenous Peoples does have some legal significance. As a political document it has significant weight, if only by virtue of the overwhelming majority of the world's states that voted in favor of it—143 versus four against and 11 abstentions, and all of the four that voted against it have since reversed their positions in public statements (including the U.S.) and now endorse the declaration. So there is no longer any government, at least in a formal sense, that opposes the declaration. This is significant, which I see in my work when I sit down with government representatives who might say, "Well, it's not legal binding." I can now say, "Well, but you voted in favor of it, didn't you?" Then we get to the discussion about how to move forward with some kind of implementation. So that's my take on the development of international law, without getting into the Inter-American stuff.

[Laughter]

N. BRUCE DUTHU

I'll turn to Dinah for that piece of it. Thanks, Jim.

REMARKS BY DINAH SHELTON*

I wanted Jim to start this discussion precisely because there are UN instruments, and we do not have a specific instrument in the Inter-American system as yet on the rights of

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