

# LEGAL PLURALISM, INDIGENOUS PEOPLE AND SMALL ISLAND DEVELOPING STATES: ACHIEVING GOOD ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC<sup>1</sup>

Erika J. Techera

## Introduction

In the last two decades indigenous peoples have obtained a greater ‘voice’ at the international level whilst at the same time international laws have established the rights of indigenous peoples and drawn attention to their importance in environmental governance (Charters 2007). While a number of international legal instruments make specific reference to indigenous peoples, customary law and traditional knowledge they do not directly address the often complex issues involved in implementing law and policy in countries where multiple legal orders operate. In particular, conflicts between customary and state-based legal norms and governance regimes remain a significant issue. It is clear that international law plays an important part in establishing norms and standards that inform national law and policy; however, there has been a failure to effectively address many of

---

<sup>1</sup> This article builds upon a presentation given at the 17<sup>th</sup> Annual Conference of the Australian and New Zealand Society for International Law on ‘The Future of Multilateralism in a Plural World’, held in Wellington, New Zealand, 2-4 July 2009. The author is grateful for comments provided by an anonymous reviewer in relation to an earlier draft of this article.

the specific needs of legally pluralist nations in implementing such laws.

This problem can be readily seen in the context of international environmental law and sustainable development. The growth of this body of law has been exponential over the last thirty years. An abundance of treaties and soft law instruments now deal with environmental governance issues. Underlying much of this law is the near universal acceptance that development must be undertaken sustainably: in a way that meets the needs of the present without compromising the ability of future generations to meet their own needs (World Commission on Environment and Development 1987). The optimum legal mechanisms that will facilitate sustainable development and good environmental governance, however, remain unclear. Strategies and initiatives that have been developed have tended to take a broad-brush approach without addressing the specific needs of legally pluralist nations.<sup>2</sup>

The combination of the legally pluralist context and rapid development of international environmental law has indeed challenged the small island developing states (SIDS) of the South Pacific. The bulk of the states in the region have a long history of customary law and traditional governance mechanisms, as well as a western (in most cases common law) legal system established during colonial times. Although these nations are now independent the introduced legal system has not been abandoned. They also each have large indigenous populations which rely upon biodiversity for both sustenance and livelihoods. Whilst most of these countries have not yet suffered the worst environmental problems, they are facing many contemporary challenges including over-utilisation of land and natural resources, urbanisation and pollution. In this context, identifying how international law can be implemented effectively at the national level, in ways which do not conflict with deeply held customary norms, is a complex task. In many SIDS the majority of indigenous people continue to live at least a partially traditional lifestyle which fits uneasily with western legislative models. At the same time these countries are poorly resourced and often lack technical expertise to draft comprehensive legislation that implements international environmental obligations whilst addressing indigenous rights, local tradition and customary law. Therefore, appropriate legal strategies need to be identified which address both indigenous rights and environmental law outcomes.

---

<sup>2</sup> Although the principal of common but differentiated responsibilities has been utilised, all developing countries have tended to be grouped together with no specific recognition of the unique position of small island developing and post colonial states.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

Engaging with legal pluralism is essential to ensuring that international human (including indigenous) rights and environmental law obligations are met. It will also focus attention upon the socio-cultural needs in South Pacific SIDS. The development and implementation of culturally appropriate laws will improve their chances of success as they are more likely to have the support of indigenous people. In addition, SIDS have limited technical and financial resources to implement, monitor and enforce laws and utilising indigenous governance institutions and laws can therefore be economically beneficial.

It is clear, however, that not all indigenous customs and practices are environmentally beneficial and some can inhibit the realisation of human rights (Techera 2009). Overcoming tensions between indigenous customary law and state-based legislation is therefore essential. This is particularly important in relation to the domestic implementation of international environmental law because of the close cultural and spiritual connection indigenous people have with nature and the wealth of traditional ecological knowledge (TEK) and customary law that has developed. A further challenge is that many customary laws and governance institutions have become eroded over time and may require revitalising or may no longer be viable.

There are a number of reasons why international attention should be focused on this issue. Firstly, a number of the dominant states within the international community are responsible for the current legally pluralist situation which arose due to European exploration and colonization. Secondly, many environmental problems remain global and for international environmental law to achieve positive outcomes it must be implemented broadly and effectively involving harmonised approaches. Thirdly, the international community, through the work of agencies and programmes, can play a powerful role by assisting in the development of appropriate law, engaging in research, initiating action and facilitating projects and initiatives to overcome the challenges facing SIDS.

This paper will examine the greater role that the global community could play in assisting SIDS to implement international law in a legally pluralist context. The focus will be upon the South Pacific as this region is both culturally and biologically diverse and includes a number of post-colonial, legally pluralist nations. It is a region which is socially, environmentally and economically vulnerable, yet has received relatively little academic attention. Specific consideration is given to two areas of international law. Firstly, human rights law and the growing body of indigenous collective rights which is particularly relevant

where states have large indigenous populations. Second, environmental law and policy as the achievement of good environmental governance is critical for these nations which are so heavily dependent on natural resources for sustenance, livelihoods and sustainable development.

The paper commences with a consideration of the particular South Pacific context followed by an examination of the extent to which international human rights and environmental law support indigenous peoples' rights including the recognition of customary law. The dominance of the sustainable development paradigm will then be analysed, as well as efforts made to facilitate its achievement in the context of SIDS. The roles of relevant international actors and programmes is considered and the way forward explored, with recommendations being made as to how the international community, in terms of both law-making and agency work, could better address the needs of the South Pacific island nations.

### The South Pacific Context

While there is great diversity across the South Pacific it is also clear that there are many commonalities between the various SIDS in the region. For example, each has a long history of indigenous occupation with an interconnected pattern of settlement. The countries are themselves small, but are also composed of a number of small islands. In addition, they each lie in a similar position along the "spectrum of development" (Osofsky 2003: 95) in that they are all developing countries, although in differing economic positions. Their disadvantageous situation, in terms of opportunities for development, has been acknowledged as being due to their small size, lack of prospects for achieving economies of scale and narrow resource base (UN 1994a). Furthermore, each state is currently confronting similar social, economic and environmental concerns including large and rapidly growing indigenous populations (following a period of outward migration), urbanisation, limited land and financial resources, environmental fragility and the desire for economic development. They also each face similar specific environmental threats, although to differing degrees, including for example climate change, over-exploitation of land and natural resources, waste management issues and pollution from mining and agriculture (UN Economic and Social Commission for Asia and the Pacific 2004). The environmental issues are of particular concern to the international community as the region is biologically mega-diverse, being rich in both terrestrial and marine biodiversity, and of critical importance globally.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

Although the indigenous peoples of the region are anthropologically different some attributes are nevertheless shared. In particular the close relationship that they each have with the natural world is well-established (Johannes 1978; Ruddle 1994). In summary, over time the indigenous peoples have developed beliefs which place great value and trust in nature and wildlife resources. Their motivation in managing wildlife has come from a cultural and spiritual connection with nature which places stewardship obligations upon the people as well as the right to take and use those resources for subsistence needs. Over time the indigenous peoples developed TEK and practices as well as environmental governance mechanisms involving customary law and institutions. More recently most of the countries have had a period of colonial rule during which customary law was subordinated to an introduced western legal system. The majority of these states are now independent but in none has the western legal system been discarded, nor has the customary law been entirely abandoned.

In the context of the legal governance of these post-colonial states, several different themes emerge from the literature: firstly, the idea and relevance of legal pluralism (von Benda-Beckmann 1984, 1997, 2001; Merry 1988, 1992, 2006; Davies 2005); secondly, the difficulties involved in defining customary law (Griffiths 1986; Powles 1997); and thirdly, the bases upon which customary law may be reconciled with the dominant legal system (Forsyth 2007).<sup>3</sup> The study of legal pluralism has gained increasing attention in the last 30 years, firstly from legal anthropologists and more recently from lawyers. A detailed consideration of this literature cannot be undertaken here and has been dealt with by a number of commentators (for example, von Benda-Beckmann 1984, 1997, 2001; Merry 1988, 1992, 2006; Davies 2005). In short, legal pluralism involves two ideas: firstly that more than one legal order exists within the same territory; and secondly that sources of law can derive otherwise than from the state (Hertogh 2007). There is little doubt that many of the countries in the South Pacific are legally pluralist in the sense that both customary and introduced laws operate. As this situation arose as a result of European exploration and settlement this is what is referred to as 'classic legal pluralism' being a dual system created as a consequence of colonial rule (Merry 1988). The result is that these countries face similar difficulties in developing law and policy that meets international obligations but also has the

---

<sup>3</sup> Of course there are other types of pluralism in these societies such as in the area of scientific knowledge (western science and traditional ecological knowledge), political and governance structures and their institutions. But in this paper the focus will be limited only to issues associated with legal pluralism.

acceptance of local communities and does not conflict with ingrained customary norms.

It is clear that there remain issues surrounding what is and is not customary law and the difficulties of proving it. In analysing the resultant tensions three possible positions have emerged in relation to the status of customary law: firstly, full recognition of pre-existing customary law with the support of the national government; secondly, no recognition and no status given to customary law; and thirdly, a hybrid whereby the constitutional framework provides the facility to incorporate customary law into the national legal system but it is not mandatory to do so, nor has it been done uniformly.<sup>4</sup> It has been said that in this region at the time of independence, true legal pluralism was envisaged, but the reality is that in the majority of these states there exists a form of “stratified dualism” (Brown 1999). Whilst customary law is a constitutional source of law in many cases (for example, Samoa and Vanuatu), there remains a tension between the dominant legal system and customary law. State-based legal systems have tended to marginalise customary law and in many cases continue to do so. At best, rather than support each other these laws are often in conflict or operate uneasily in tandem, with each operating semi-autonomously in their own fields.

Each of the SIDS of the South Pacific is to differing extents challenged by legal pluralism. Particularly for those with large indigenous populations, the implementation of international law at the domestic level must address international standards but not ignore traditional legal orders. International environmental law itself has offered little guidance to states in how this could be achieved. It is in the areas of human rights and collective indigenous rights that international law has provided greater assistance to indigenous peoples in terms of providing a firm legal foundation for self-governance and self-determination and the recognition of customary law. These areas are considered in further detail below.

### Indigenous Peoples in International Law

Historically, international law has been the domain of states, and indigenous

---

<sup>4</sup> Forsyth has conducted a detailed analysis across 20 states setting out the typologies of relationships between state and non-state legal systems in which she identified seven different models: Forsyth (2007).

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

peoples have had little or no voice at the global level. However, with the establishment of the United Nations Working Group on Indigenous Populations (WGIP) in the 1980s, the interest generated following the International Year of the World's Indigenous People in 1993 and the Decade of the World's Indigenous People,<sup>5</sup> increasing attention has been given to these non-state actors (Barsch 1994). In 2000 the UN Permanent Forum on Indigenous Issues (UN-PFII) was created by the UN Economic and Social Council (ECOSOC), and it has now become clear that indigenous peoples have an emerging legal personality in the international arena.<sup>6</sup> However, much of the terminology used throughout international law and policy documents in this area remains undefined and contentious (Daes 1996. For an excellent summary of these definitional issues, see Firestone et al. 2005; also Lehmann 2007). 'Indigenous peoples' is used here to mean a culturally distinct group of people, self-defined and traditionally regarded as descended from the original inhabitants of lands with which they maintain a strong bond (Wiessner 1999).

The starting point for any consideration of universal human rights which assist indigenous peoples is the *United Nations (UN) Charter* and its core concepts of equality and non-discrimination. Many other later conventions supported and elaborated upon these fundamental rights, including the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* which prohibit discrimination and provide that all people are equal before the law and entitled to its equal protection.<sup>7</sup> Much of the work in this area relates to indigenous peoples and land rights; for example, the *Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* provides for participation and ownership of property but does not specifically mention indigenous peoples.<sup>8</sup> In particular, the *Committee on the Elimination of*

---

<sup>5</sup> In 2005 we entered the Second Decade of the World's Indigenous People: <http://www.un.org/esa/socdev/unpfii/en/second.html> at 1 November 2010.

<sup>6</sup> This is evidenced by their 'direct access to aid programs' and their greater role in UN decision making, such as their participation in working group meetings and their recognition as a 'major group' at the Rio Summit (Barsch 1994: 33-4, 58).

<sup>7</sup> For example, *the Universal Declaration of Human Rights; International Convention on the Elimination of All Forms of Racial Discrimination; American Convention on Human Rights; African Charter on Human and Peoples' Rights*.

<sup>8</sup> ICERD Art. 5(e)(vi), which refers to the 'right to equal participation in cultural activities'; Art. 5(d)(v): 'The right to own property alone as well as in association

*Racial Discrimination* (CERD) continues to interpret the “fundamental human rights norm of non-discrimination in favor of indigenous peoples” (Anaya 2007: 257).

While most independent post-colonial societies now support equality and prohibit discrimination,<sup>9</sup> it is the right to self-determination which many indigenous people want: to become “‘subjects’ of international legal rights and duties rather than mere ‘objects’ of international concern” (Barsch 1994: 35) and “to live as they wish without outside interference” (Charters 2007: 25). Article 1(2) of the *UN Charter* provides that its purposes include development of relationships between nations based upon respect for the principle of “self-determination of peoples”. However, indigenous peoples are not specifically mentioned, and the issue of identification of indigenous communities as ‘peoples’ is contentious (Wiessner 1999: 116). The ICESCR in Article 1(1) provides that “[a]ll peoples have the right to self-determination” and freedom to “determine their political status and ... pursue economic, social and cultural development”. Furthermore, it has been suggested that “this right may not extend to indigenous people already forming part of a self governing non-colonial nation” (Northern Territory Law Reform Committee 2003: 7). In addition, ICESCR, Article 1(2), states that “[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources” and in “no case may a people be deprived of its own means of subsistence”. Article 1 of the ICCPR is in similar terms, but in addition the Covenant provides that minorities “shall not be denied” the right to “enjoy their own culture, to profess and practise their own religion, or to use their own language”. Further support for self-determination may be found in the *Declaration on the Right to Development* and the *Vienna Declaration and Programme of Action on Human Rights*. The *Convention on the Rights of the Child* (CROC) reiterates the right, but specifically refers to indigenous peoples in holding that a child belonging to “a minority or who is indigenous” shall not be denied “the right to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language” (CROC Art. 30. But again, no definition of ‘indigenous’ is given.) More recently the *Declaration on the Rights of Indigenous Peoples* (DRIP) includes the right to self-determination in the context of sustainable development (DRIP Art. 3; see also Arts. 20, 23, 32, which expand upon the right to development). Although this

---

with others’.

<sup>9</sup> There are notable exceptions to this. For example the Cook Islands has reserved the right not to apply the principles contained in the *Convention on the Elimination of All Forms of Discrimination Against Women* (Charters 2007: 37).

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

document remains soft law, it provides further and arguably stronger support in this context. In the global context it is not only international instruments that provide rights to self-determination; the International Court of Justice (ICJ) has also been supportive in holding that the right to self-determination is *erga omnes* and “one of the essential principles of contemporary international law”.<sup>10</sup>

Many states have resisted accepting the right to self-determination by indigenous peoples, as it would also grant the right to secession. But it has been argued that if an internally based interpretation is accepted, that encourages democratic processes without territorial and political disruption, then the aims of indigenous peoples might be achieved with the support of the majority of states (Barsch 1994: 36). Self-government would appear to include control over the legal regulation of indigenous people’s lives and therefore the recognition of customary law. Indeed, customary law has been considered one of the “fundamental features” of indigenous “culture and claims for sovereignty” (Benda-Beckmann 2001: 5705). Unfortunately, in order to strengthen claims for self-determination, the longstanding nature of indigenous traditions and legal systems is often emphasised, leading to the impression that customary laws are archaic and inflexible (Benda-Beckmann 2001). This has worked against indigenous peoples seeking to show the current relevance of customary law in the context of the domestic implementation of international environmental law.

The rights of indigenous peoples are continuing to develop under international law, and more recently a group of collective indigenous rights have emerged. These rights afford further bases for the recognition of traditional laws and practices. However, the argument that universal human rights support the recognition of customary law presents some difficulties in circumstances where they conflict. Customary laws can in some cases inhibit the realisation of human rights (New Zealand Law Commission 2006). In the context of the South Pacific this can be illustrated in relation to women’s and children’s rights. Most indigenous cultures in the South Pacific have historically been patriarchal. In many cases women do not have specific rights, for example, to own land or become tribal leaders. Therefore, fundamental human rights providing protections against discrimination in favour of equality may conflict with customary laws. This can also be seen in

---

<sup>10</sup> *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 1, para. 29; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 2, referred to in Charters 2007: 27 fn 39.

the area of marriage and the family (New Zealand Law Commission 2006). This is compounded by the fact that most indigenous law focuses upon communal rights at the expense of any individual ones. These issues result in increased tension between customary laws and state-based laws that seek to implement international human rights law.

These tensions have led to the emergence of a group of collective indigenous rights which, whilst including some universal human rights, also incorporate rights specific to indigenous communities. The first convention to deal exclusively with the rights of indigenous peoples was the *International Labour Organisation (ILO) Convention 107 Concerning Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO 107). While this convention is important for drawing attention to indigenous issues, it has been criticised for taking an assimilationist and integrationist approach (Charters 2007; Musisi 1994; both the title and Preamble of the convention refer to ‘integration’). Although it remains in force, it has largely been superseded by the *ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169). ILO 169 is significant as it refers to a wide range of rights including rights to protection and respect for indigenous peoples’ social, cultural, religious and spiritual values and practices (Art. 5), consultation and participation in decision-making (Art. 6), and control over development that affects them (Art. 7). It recognises the cultural and spiritual values indigenous peoples place on land (Art. 13), and the right to own and possess traditional lands (Art. 14). Of particular significance is the inclusion of rights in relation to customs and customary law. The Preamble to ILO 169 notes that in many parts of the world indigenous people’s “laws, values, customs and perspectives have often been eroded”. Art. 8(1) of ILO 169 provides that in “applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws”. Arts. 9 and 10 discuss specific customary laws that relate to penalties and punishments for offences. Furthermore, indigenous peoples have the right to retain their own customs and institutions (Art. 8(2), although this is qualified in that they must not be incompatible with national and fundamental human rights), and are to be provided with the means to protect their rights through legal proceedings (Art. 12). While it does not mention self-determination, self-government or autonomy, its drafting is perhaps reflective of a desire to gain maximum international support and ratifications (Craig 2005).

Although this convention has also received some criticism for its lack of reference to self-determination (Charters 2007), it has focused international attention and

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

arguably led to an emerging international consensus on the content of indigenous rights (Anaya 1991).<sup>11</sup> ILO 169 was drafted contemporaneously with the *Declaration on the Rights of Indigenous Peoples (DRIP)*.<sup>12</sup> As a declaration, the DRIP is non-binding and ultimately was not signed by key western nations with significant indigenous populations.<sup>13</sup> However, it has a significant standard-setting role and has achieved a certain level of international agreement which goes to the establishment of customary international law (Charters 2007: 34). Article 3 provides a clear right to indigenous self-determination which includes the right to pursue economic, social and cultural development. The DRIP goes beyond the right of self-determination in support of collective indigenous rights.<sup>14</sup> Article 11 provides that “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs” and to seek redress for “property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”. It is clear that some of these provisions are already incorporated into ‘hard law’ human rights treaties or have become international customary law and *jus cogens*. However, most significantly, the DRIP also specifically provides that due recognition shall be given to “indigenous peoples’ laws, traditions, customs and land tenure systems” (Art. 27).

---

<sup>11</sup> However ILO169 remains poorly ratified with Fiji being the only South Pacific SIDS that has adopted it.

<sup>12</sup> DRIP was developed over several decades. It was originally drafted by the WGIP, which is the longest-standing UN body that deals exclusively with Indigenous people. Thereafter, it was elaborated by an inter-governmental working group of the Commission on Human Rights. It was adopted by the Human Rights Council in June 2006 and finally by the UN General Assembly in September 2007.

<sup>13</sup> The USA, Canada, Australia and New Zealand did not sign the Declaration, but they “expressed a general acceptance of the core principles and values advanced by the Declaration” (Anaya 2008: 12). Subsequently, on 3 April 2009, the Australian government indicated formal support for DRIP and New Zealand did the same on 20 April 2010. Two of the original 11 abstaining states (Columbia and Samoa) have also since supported DRIP (UNGA 2010a).

<sup>14</sup> The Preamble specifically refers to collective rights and thereafter arts. 1, 3 and 40 make a distinction between individual and collective rights of indigenous peoples.

From the above analysis it can be seen that international law provides indigenous peoples with a framework for asserting collective and individual rights. In particular, collective indigenous rights are receiving greater attention and may provide an effective catalyst for further unification and integration of human rights and sustainable development considerations as they relate to indigenous peoples (Craig 2005: 4). However, this group of rights is not uncontroversial,<sup>15</sup> being described by some as having a “blurry boundary” (Firestone et al. 2005: 240), while others consider that “rights to land and natural resources, cultural integrity, environmental security, and control over their own development” are now part of customary international law (Barsch 1994: 43-4; Anaya 2005).

Whilst the above analysis examines the articulation of collective indigenous rights at the international level, it is clear that their application remains problematic. Debate still surrounds the legal status of the DRIP, although calls have been made to focus on the operation of the principles rather than whether they are legally binding (UNGA 2010a). The particular concern is that there has been little guidance on how to implement these provisions. This has become the subject of more recent attention with the UN Special Rapporteur on the Rights of Indigenous Peoples drawing attention to practical steps towards implementation (UNGA 2010a: 18). Many challenges remain, however, in operationalizing the Declaration in different domestic circumstances including legally pluralist states. In the context of this paper the specific challenges associated with the application of indigenous collective rights as they relate to environmental governance, will be considered further below.

## International Environmental Law and Sustainable Development

Beyond the specific treaties and declarations that include indigenous rights there are various other international law instruments which refer to the rights of indigenous peoples. Many relate to sustainable development and natural resource management. In addition to international human rights law and international law in

---

<sup>15</sup> Although Barsch states that a consensus had developed by 1989 that indigenous peoples did have collective rights. He notes the speech by the Secretary-General at the opening ceremony for the International Year of the World’s Indigenous People, referring to the need for ‘balancing of individual rights and community rights’: Barsch 1994: 43–4.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

general, international environmental law has also provided important rights and tools for indigenous peoples. While several early international environmental law instruments, such as the Polar Bear Agreement and the International Convention on the Regulation of Whaling, recognised indigenous traditional hunting and fishing rights, with the emergence of sustainable development there has been a greater focus on public participation and the particular role of indigenous peoples.

International sustainable development instruments support not only decentralisation but specifically the involvement of indigenous peoples, tribal peoples and local communities (Charters 2007: 44-6). For example, the *Rio Declaration* (UN 1992a) draws direct attention to the involvement of indigenous peoples:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. (UN 1992a: Principle 22)

Similarly, *Agenda 21* (UN 1992b) includes a whole chapter devoted to indigenous peoples and the need to “accommodate, promote and strengthen the role of Indigenous peoples and their communities”. More recently, several key principles articulated in the *New Delhi Declaration* (International Law Association 2002) are particularly relevant to indigenous peoples seeking recognition of their customary laws and greater control over natural resources. Firstly, the duty of states to ensure sustainable use of natural resources makes specific reference to indigenous peoples:

States are under a duty to manage natural resources ... in a rational, sustainable and safe way...with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems. (International Law Association 2002: Para. 1)

A further key to the involvement of indigenous peoples is Principle 2, relating to equity. This principle establishes the rights of all people within the current generation to participate in decision-making, but also incorporates specific rights

including the right to development.

Public participation is also an essential element and this is referred to in Principles 5 and 6 of the *New Delhi Declaration* (International Law Association 2002). Although indigenous peoples are not specifically mentioned within the Principles, they are referred to in the explanatory notes in the context of the right to participation as expressed in other international instruments such as ILO 169 and DRIP. Furthermore, participation has been demonstrated to be essential to development itself, which is acknowledged as a key factor in poverty eradication and environmental improvement (Mullikin 2005: 432). In addition, public participation includes the involvement of other non-state actors such as non-governmental organizations (NGOs). This is also important for indigenous peoples as it is the NGOs who principally carry out community-based natural resource management work and implement sustainable development projects at the local level (Osofsky 2003: 100).

Linked to this is the element in Principle 3 of the *New Delhi Declaration* (International Law Association 2002) of cooperation to achieve global sustainable development. Although considerations of indigenous involvement tend to focus upon localised approaches it is clear that traditional societies have much to offer by way of experience and knowledge that could be of assistance more widely. By engaging with these communities best-practice approaches to sustainable development may be identified. Other elements of good governance are also relevant. The *Johannesburg Plan of Implementation* (UN Department of Economic and Social Affairs 2002) specifically noted the vital role of indigenous people in sustainable development and called for the “effective participation of indigenous and local communities in decision- and policy-making concerning the use of their traditional knowledge” (para. 44(1)).

Many international environmental treaties have also referred specifically to the participation of indigenous peoples. For example, the *Convention on Biological Diversity* (1992) (CBD) provides for the preservation and more widespread, authorised use of indigenous and local community knowledge and practices related to biodiversity conservation (art. 8(j)). The UN *Convention to Combat Desertification* (1994) similarly provides for protection, adaptation and use of traditional knowledge and technologies (arts. 16(g), 17(c), 18(2), 19(e)).

The role of indigenous peoples in sustainable development gains further specific support from international human rights law and environmental justice principles.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

The relationship between human rights and environmental issues is “widely recognised” (Ksentini 1996: 51). As early as 1972 it was acknowledged that there was an inextricable link between environmental, civil and political rights.<sup>16</sup> This is further supported by the *Draft Declaration of Principles on Human Rights and the Environment* (1994) which recognises in Principle 1 the interdependence and indivisibility of human rights, environmental quality, peace and sustainable development. The DRIP specifically recognises that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment” (Preamble).

As noted above, international human rights law includes the elements of equality, non-discrimination, self-determination and empowerment, which intersect with many of the principles of sustainable development. Whilst intra- and intergenerational equity are articulated in the *Rio Declaration* (UN 1992a) the broad principle of eradication of poverty emerged much earlier in the *Charter of the United Nations*.<sup>17</sup> Intra-generational equity in terms of equality and freedom from discrimination was also dealt with early in the various human rights treaties<sup>18</sup>

---

<sup>16</sup> The Preamble to the *Stockholm Declaration on the Human Environment* (UNEP 1972) states that ‘[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.’ Principle 1 states that

[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being...In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

<sup>17</sup> Article 55 provides:

... based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development....

Article 56 calls upon all members to take joint and separate action to achieve this.

<sup>18</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 29 ILM 1340 (entered into force 2 September 1990); *International Covenant on*

as well as within the environmental justice movement. It is the specific principle of ensuring that adequate resources are available to pass on to future generations that is more recent in origin. Principle 2 of the *Rio Declaration* (UN 1992a), relating to equity makes specific reference to the right to development. This human right has been defined as

an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. (Declaration on the Right to Development 1986: Art. 1)

This then leads to the issue of poverty, which is an impediment to both sustainable development and environmental health but which can also result in a breach of fundamental human rights. Principle 5 of the *Rio Declaration* (UN 1992a) involving public participation includes human rights elements of the right to hold and express an opinion, the right of access to information, freedom of association and issues of privacy. Access to justice is a further element of this principle and specifically mentioned in the commentary to the *New Delhi Declaration* (International Law Association 2002; see also Segger and Khalfan 2004: 101). Non-discrimination is also a recurring theme in the *Rio Declaration*: in Principle 1 in relation to the use of natural resources, in Principle 2 in relation to equity and benefit sharing and in Principle 5 in relation to public participation.

The foundation for these principles then lies not only in sustainable development law and policy but also in international human rights law. As sustainable development principles they form part of the toolbox of options that indigenous peoples may use to support their rights to broad involvement in environmental decision-making and governance. From an indigenous perspective sustainable development, environmental ethics and human rights are therefore all interlinked (Jeffery 2005: 112). This is internationally recognised in the *Draft Declaration of Principles on Human Rights and the Environment* (1994), which recognises the

---

*Civil and Political Rights*, opened for signature 16 December 1966, 6 ILM 368 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 6 ILM 360 (entered into force 3 January 1976); *Universal Declaration of Human Rights*, opened for signature 10 December 1948, GA Res 217 A, UN GAOR, 3<sup>rd</sup> Sess, UN Doc A/810.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

interdependence and indivisibility of human rights, environmental quality, peace and sustainable development (Principle 1). Read together, perhaps one of the strongest articulations of indigenous rights in relation to sustainable development is contained in the following Articles of the DRIP:

*Article 20.* Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their means of subsistence and development, and to engage freely in all their traditional and other economic activities.

*Article 21.* Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

*Article 23.* Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

*Article 32.* Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. (*Draft Declaration of Principles on Human Rights and the Environment: 1994*)

While the DRIP remains ‘soft law’, many of its elements are incorporated into human rights treaties, discussed above, and others are broadly accepted and have become, or are in the process of becoming, international customary law (UNGA 2010a). Environmental justice and sustainable development are also inextricably linked (Ruhl 1998: 162). Social equity and environmental quality are essential elements of environmental justice and are also key principles of sustainable development. Whilst it is the more adaptive concept of sustainable development

which has achieved widespread acceptance,<sup>19</sup> principles of environmental justice are important and continue to inform the sustainable development literature (Ruhl 1998: 185). They provide further support for indigenous peoples seeking greater autonomy, management of natural resources and recognition of cultural practices and customary law.

It is clear that international law provides a foundation for indigenous involvement in environmental and natural resource management. But it does not articulate how or what legal mechanisms should be utilised. In recent years a number of commentators have focused upon customary laws to provide such a foundation (Westerland 2007; Richardson 2000; Giraud-Kinley 1999; Orebech 2005). But rarely are customary laws continuing to operate in isolation of other legal systems. Therefore, the ways in which international law can be implemented in a legally pluralist context must be investigated.

### International Programme of Action

The reason for focussing so heavily on sustainable development is because it is in this context that the global community has engaged most effectively with the issues facing legally pluralist nations. *Agenda 21* (UN 1992b) called for a global conference on the sustainable development of SIDS, and the subsequent programmes that have developed provide for enhanced international support for these vulnerable nations, many of which are also challenged by legal pluralism.

The first *UN Global Conference on the Sustainable Development of Small Island Developing States* was held in 1994. The Conference resulted in the *Declaration of Barbados* (UN 1994a) and the *Programme of Action for the Sustainable Development of Small Island Developing States* (Barbados Programme of Action, BPOA, UN 1994b). The Declaration acknowledges that the “international community has a responsibility to facilitate the efforts of small island developing states to minimize the stress on their fragile ecosystems, including through cooperative action and partnership” (BPOA, UN 1994b: Article III(2)). Furthermore, it was acknowledged in Article II that “the efforts of small island

---

<sup>19</sup> Ruhl provides evidence of this by drawing attention to the lack of an individual indicator of environmental justice: Ruhl 1998: 181. Although arguably the *Millennium Development Goals* have done so.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

developing states to conserve, protect and restore their ecosystems deserve international cooperation and partnership.” The *Declaration of Barbados* specifically noted that SIDS

institutional and administrative capacity to implement the programme of action must be strengthened at all levels by supportive partnerships and cooperation, including technical assistance, the further development of legislation and mechanisms for information sharing. (UN 1994a: Article V)

The BPOA identified 14 priority areas<sup>20</sup> and set out actions under each, divided into those to be undertaken at each level by a tripartite partnership involving the international community, regional bodies and the state. In addition the special role of NGOs and major groups was also acknowledged. Of particular significance, in terms of regional action is paragraph 52B(v) which refers to the preparation of

[d]raft model environmental provisions as a guide for countries, leaving to each small island developing State the incorporation of country-specific provisions to reflect the variety and diversity of national and customary laws and procedures, and encourage, where appropriate, the harmonization of environmental legislation and policies within and among small island developing States with a view to ensuring a high degree of environmental protection. (UN 1994b: para. 52B(v).)

And at the regional level, attention is drawn to the need to harmonise environmental law amongst the SIDS (BPOA, UN 1994b: para. 87). In addition, reference is made to the preparation of environmental law training manuals (BPOA, UN 1994b: para. 52B(vi)), workshops on environmental law subjects (BPOA, UN 1994b: para. 52B(vii)) and dissemination of legal information about international environmental instruments (BPOA, UN 1994b: para. 52B(xviii)). At the international level it was stated that support should be given to “environmental

---

<sup>20</sup> Climate change and sea level rise; Natural and environmental disasters; Management of wastes; Coastal and marine resources; Freshwater resources; Land resources; Energy resources; Tourism resources, Biodiversity resources, National institutions and administrative capacity; Regional institutions and technical cooperation; Transport and communication; Science and technology; Human resource development; as well as Implementation, monitoring and review.

law offices, within regional and sub-regional organizations to implement regional approaches” (BPOA, UN 1994b: para. 52C(i)) as well as strengthening regional bodies (BPOA UN 1994b: para. 52C(iv)) and improving coordination with regional/sub-regional bodies (BPOA, UN 1994b: para. 52C(iii)). Furthermore, the BPOA provides:

New legislation should be developed and existing legislation revised, where appropriate, to support sustainable development, incorporating customary and traditional legal principles where appropriate, backed up with training and adequate resources for enforcement. (BPOA, UN 1994b: para. 79)

At the international level the focus is upon the importance of global and regional programmes to develop and implement national environmental legislation and upon strengthening capacity to participate in the development of new agreements, training in all aspects of environmental law and initiating implementation of international agreements (BPOA, UN 1994b: para. 112).

In terms of implementing the BPOA, reviews and progress reports<sup>21</sup> in each of the key priority areas indicate that significant action has been taken including within the South Pacific region.<sup>22</sup> At the subsequent *International Meeting to Review the*

---

<sup>21</sup> See for example *Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States* (1997), *Progress Report on Regional Institutions and Technological Development for the sustainable development of small island developing States* (1998) and the comprehensive review undertaken at the 22nd Special Session of the UN General Assembly (1999).

<sup>22</sup> For example, it was reported that

Pacific island countries have developed a well organized structure of eight regional intergovernmental organizations, each with a particular focus funded by member contributions: the Forum Fisheries Agency, the Forum Secretariat, the Pacific Islands Development Programme, the South Pacific Commission, the South Pacific Regional Environment Programme, the South Pacific Geoscience Commission, the Tourism Commission of the South Pacific and the University of the South Pacific. In order to avoid duplication and harmonize their activities, the above organizations have established the South Pacific Organizations

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

*Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, further commitment was given to the programme with the adoption of the *Mauritius Declaration* (UN 2005a) and *Mauritius Strategy for Implementation* (MSI, UN 2005b). The *Mauritius Declaration* largely reaffirms the *Declaration of Barbados* (UN 1994). The MSI follows a similar format to the BPOA by identifying priority areas. However, it adds to the earlier document by including new categories such as ‘culture’ and ‘knowledge management’. No additional references were made to customary law although the Preamble refers generally to the importance of culture including custom.

Subsequently, the UN General Assembly adopted Resolution 59/311 setting out the role of UN bodies in the implementation of the MSI: including strengthening the SIDS Unit of the Department of Economic and Social Affairs and calling for UN agencies to mainstream the MSI in their work programmes and establish a focal point for SIDS within their secretariats. In September 2010 the MSI+5 review meeting was held during which it was noted that some progress had been achieved but much work remained to be done (UNGA 2010b). Calls were also made for the creation of a formal SIDS category within the UN system, strengthened institutional support and a scaling up of assistance by the international community (UNGA 2010b).

These initiatives indicate a willingness on the part of the international community to assist SIDS in achieving sustainable development. However, as with the DRIP and other international human rights and environmental law instruments the real challenge is to operationalize the provisions and programmes and achieve action on the ground. Therefore, it is necessary to identify approaches and opportunities to overcome barriers. The next section focuses upon the role that the international community could play in this regard focusing specifically on challenges associated with the implementation of international law in legally pluralist states.

---

Coordinating Committee (SPOCC), a key function of which is to coordinate regional programmes. In 1995, an agreement was reached to establish the South Pacific Regional Environment Programme (SPREP), which was formerly part of the South Pacific Forum as an independent intergovernmental organization providing cooperation and assistance for the protection and improvement of the environment in the South Pacific. (UN 1998: para. 3.)

## Addressing the Challenges

As can be seen from the above analysis, there is little doubt that international human rights law has provided a legal foundation for the recognition of indigenous collective rights. Specific international treaties (such as ILO 169) have also acknowledged the importance of recognising customary law and this has been strengthened with the adoption of the DRIP. Particular environmental law treaties (such as the CBD) have identified a role for traditional knowledge, practices and laws. But there has been a failure to meaningfully engage with the issue of legal pluralism which hampers implementation of culturally appropriate laws in many states in the Pacific region. The BPOA stands out as an exception to this as it acknowledges a role for international and regional bodies in developing model legislation and the importance of incorporating customary law and traditional legal principles where appropriate. But after more than fifteen years since its adoption, there is a need to scale up current activities and strengthen institutional support at the international level.

The Second International Decade of the World's Indigenous People 2006-2015 perhaps signifies a missed opportunity for a renewed international agenda in this area. The five objectives of the Decade included promoting non-discrimination and the participation of Indigenous people in decision-making; redefining equitable and culturally appropriate development policies; adopting policies, programmes and budgets for the development of Indigenous peoples and developing strong monitoring mechanisms. However, the associated Programme of Action included no reference to legal pluralism. Under the heading 'Human Rights' there was a recommendation that national governments "should consider integrating traditional systems of justice into national legislations in conformity with international human rights law and international standards of justice" (UN 2005c: para. 52). But no part of the programme addressed the issue of how this could be done. The Addendum did include one recommendation by the Office of the UN High Commissioner for Human Rights – the holding of "at least one annual action-oriented expert seminar on issues which adversely affect or may adversely affect the situation of indigenous peoples in plural societies" (UN 2005d: a(6)). However, it is unclear whether this has been done and whether further international action is planned.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

In identifying ways to address the needs of legally pluralist nations three substantive recommendations are made where action at the international level could be taken. These include a greater role for international agencies in facilitating indigenous participation at the global level, a new research agenda to identify options for legally pluralist nations and the scaling up of global programmes to aid implementation of international law and policy.

*A greater role for international institutions and agencies*

First and foremost, it is essential to ensure that indigenous people themselves fully participate at the international level. Only then will indigenous perspectives become better understood at the global level and be considered 'within' rather than outside of the international arena. This approach would also ensure that indigenous issues are canvassed and addressed at the time new international law and policy is developed and that indigenous peoples influence the development of emerging international legal norms. Indigenous people would also have the chance to participate directly at the global level and then have greater opportunities to put into practice domestically what they have learnt in the international forum. Ensuring this approach would then lead to the diffusion and transformation of international norms and ensure the continued development of ways to implement them.

At present there are three key UN bodies that deal specifically with indigenous peoples' issues: the Permanent Forum on Indigenous Issues (UNPFII); the Expert Mechanism on the Rights of Indigenous Peoples; and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. The UNPFII is significant as it includes non-state actor representatives, including indigenous people. It is, however, an advisory body with a mandate to discuss indigenous issues and has no formal role to develop new law or assist governments in the implementation of existing international law. In terms of other international institutions working to assist SIDS, it is clear that there is a multitude of relevant programmes and agencies at the international level. These include UNEP,<sup>23</sup> UNDP, AOSIS and UNESCO. In addition, the UN Division for Sustainable Development has a number of relevant areas of work including the University

---

<sup>23</sup> Including the UNEP SIDS Unit set up in 1995  
[http://www.un.org/esa/dsd/dsd\\_aofw\\_sids/sids\\_aboutunit.shtml](http://www.un.org/esa/dsd/dsd_aofw_sids/sids_aboutunit.shtml) at 1 September 2010.

Consortium of Small Island States<sup>24</sup> which works to build the capacity of graduate education institutions and SIDSNet.<sup>25</sup> But these bodies do not necessarily include representatives of indigenous peoples.

Two inferences can be drawn from this: Firstly, the sheer number of agencies and institutions undertaking relevant work has led, or is likely to lead, to fragmentation and duplication of effort. While SPREP has, to a certain extent, undertaken a coordinating role in the South Pacific region, it is clear that this is a monumental task. Secondly, the work undertaken at the international and regional level has not directly engaged with the issue of legal pluralism. International institutions could play an important part in developing a framework to guide law and policy-makers on the implementation of international law in pluralist nations. Which agency or body would take on this role is unclear. In one sense the UNPFII is best placed to engage with specific Indigenous issues but would need a specific mandate to do so. Alternatively those doing the work ‘on the ground’, such as the UNDP, would have important insights into customary law ‘in action’ (see for example the UNDP funded *Capacity 21* Project). In terms of the South Pacific, SPREP clearly has particular regional environmental expertise and already undertakes coordination work.<sup>26</sup> If such a role were to be taken on by SPREP, however, it would need to be much better resourced and given increased impetus to address the issue of legal pluralism. On the other hand it is evident that SIDS in the South Pacific share some common socio-cultural, legal and environmental concerns with those countries, for example, in the Caribbean which would favour the establishment of a global body. Furthermore, any such institution would be unlikely to have the resources to undertake all the work itself. Another important issue is the composition of any such body. While the *Declaration of Barbados* recognised the

---

<sup>24</sup> Involving the University of Malta; the University of Mauritius; the University of South Pacific; the University of Virgin Islands; and the University of West Indies.

<sup>25</sup> The Small Islands Developing States Network (SIDSNet) was first established in 1997 as a direct follow-up to the BPOA. The mission of SIDS Net was to support the sustainable development of SIDS through enhanced information and communication technology.

<sup>26</sup> In addition SIDSNet is an important repository of information which is readily available to all stakeholders. SIDSNET was proposed as the portal to and home for the University Consortium of the Small Island States (UC-SIS), which was endorsed at the 2005 Mauritius International Meeting to Review the Programme of Action for the Sustainable Development of SIDS.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

need to strengthen national institutional and administrative capacity (UN 1994: Part 1, Art. V) it also acknowledged “the importance of a partnership between governments, intergovernmental organizations and agencies, non-governmental organizations and other major groups” (UN 94: Part 1, Art. VII). Therefore, the body should be participatory and involve all relevant stakeholders including government, NGOs, private industry, academics, indigenous and local community representatives.

In this context, rather than create an entirely new entity, it may be more appropriate to create an inter-agency task force (perhaps on a network basis) which could coordinate programmes, identify and share best practice and undertake research including the development of model laws. Such a body could facilitate exchange of information at the international and regional levels and disseminate pooled data to stakeholders. Such a task force would be particularly advantageous in undertaking research into the practical ways in which the legal pluralism conundrum might be addressed, the identification of options for reconciling customary law and state-based legislation and the development of ‘model’ legislative provisions.

*A New Research Agenda*

As noted above while there has been an acknowledgement that “customary law and legal pluralism are vital means of protecting” traditional knowledge<sup>27</sup> there has been a failure to specifically address how they might be utilised in terms of environmental governance. It is clear that at the international level this was envisaged in the BPOA. But there appears to have been little research undertaken that has directly engaged with the issue of implementing international environmental law in legally pluralist countries where customary law is a source of law or operates as one. Both the BPOA and the *Programme of Action for the Second International Decade of the World’s Indigenous People* refer to incorporating customary law into national legislation. There are, however, other alternatives explored in the legal pluralism literature, involving the functional recognition of customary law, strengthening indigenous governance institutions

---

<sup>27</sup> See for example the ‘Expert Meeting on Traditional Forest Related Knowledge and the Implementation of Related International Commitments’ Chairperson’s Report, San Jose, Costa Rica, December 6th – 10th 2004 [http://www.un.org/esa/forests/pdf/cli/cli\\_tfrk-sanjose1204.pdf](http://www.un.org/esa/forests/pdf/cli/cli_tfrk-sanjose1204.pdf) at 14 June 2009.

and facilitating the development of indigenous law-making and jurisprudence.<sup>28</sup> These alternatives need to be canvassed providing further support for more research to be undertaken in this area.

Some relevant research has recently been carried out in relation to legal pluralism and human rights. The International Council on Human Rights Policy (ICHRP) has undertaken a research project looking at this very issue. The report is an attempt to move towards a human rights framework for plural legal orders by investigating human rights impacts and dilemmas associated with legally pluralist states and challenges to incorporating human rights in state-based legislation (ICHRP 2009). It focuses on three key policy areas: the recognition of non-state legal orders; recognising cultural particularities in law; and donor-funded justice reform programs (ICHRP 2009: vii). The report also includes guiding principles for a human rights engagement with plural legal orders.

A similar research project could be undertaken in relation to legal pluralism and environmental law. It would be important for such research to involve a broad spectrum of participants both indigenous and non-indigenous, from a range of disciplines including for example, law, anthropology and environmental science as well as government and NGOs. Such a project would need to explore the practical issues which challenge the reconciliation of customary law and environmental regulation including conflicts between custom and state-based legislation, tensions involving different customary laws, tenure and traditional institutional issues. Such research could also extend to the investigation of international environmental law principles that might be utilised at the international level to assist pluralist states. For example, it may be that some international law principles are directly relevant, including those dealing with transboundary harm and common but differentiated responsibilities, and could be utilised in drafting international environmental law to further engage with this issue.<sup>29</sup> Furthermore particular legislative provisions and concepts may also be relevant – for example, from international freshwater law,

---

<sup>28</sup> See in particular the typology of different systems of law and how customary law can be utilised in the law reform process (Forsythe 2007; see also the summary in Techera 2009).

<sup>29</sup> Reference is made to common but differentiated responsibilities in this context (UN in the BPOA, UN 1994b: Preamble para. 14, where reference is made to the special position of SIDS as acknowledged in *Agenda 21*, UN 1992b: chapter 17 section G).

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

provisions which deal with potentially conflicting claims such as 'community of interests' and 'equitable utilisation' may well be transferable from the international to the local level. A new research agenda, undertaken by an inter-agency task force, would allow these possibilities to be explored further.

*Strengthening the implementation of existing Programmes*

Regardless of whether a new research agenda is adopted, it is necessary to strengthen existing programmes to achieve the previously identified outcomes. Although *Agenda 21* (UN 1992b) engaged with the issue of action to achieve sustainable development, it referred only broadly to the issues faced by developing countries. Again the recent call for a special UN SIDS category appears to be aimed, at least in part, at overcoming the perception that a one-size-fits-all approach is viable. While the specific difficulties faced by SIDS were identified in the BPOA little appears to have been done in terms of the development of guidelines or model provisions that would assist them or projects to record and share what action has been taken by these countries to date. For example, no mention is made of this issue in the progress reports and the MSI does not take the matter any further. However, it is clear that in other legal areas, the international community has facilitated similar work to be undertaken. For example, UNESCO has recently published a report in which reference is made to the issue of mapping of approaches to sustainable development in the South Pacific (UNESCO 2009). UNESCO has already facilitated this type of mapping exercise in relation to intangible cultural heritage legislation and national copyright laws.<sup>30</sup> NGOs have also been involved in related reporting projects; for example, the International Union for the Conservation of Nature (IUCN) through its *Strategic Direction on Governance, Communities, Equity, and Livelihoods in Relation to Protected Areas* (TILCEPA) has produced a survey of legislation supporting Indigenous community conserved areas (TILCEPA 2008). These initiatives help to build capacity at the national level by providing access to possible legislative options utilised in other states.

In terms of the development of model rules, the way forward is less clear as it is unlikely that the development of a prescriptive set of regulations would be beneficial. It is essential that flexibility be maintained for different states,

---

<sup>30</sup> See <http://www.unesco.org/culture/natlaws/index.php?&lng=en> and <http://www.accu.or.jp/ich/en/policies/policies1.html>.

indigenous peoples and governance institutions, to choose the approaches that best suit their purposes. On the other hand, model provisions as a ‘toolbox of options’ could again be useful in terms of building capacity. It can be seen that this approach has been taken in the South Pacific region in another legal area: a draft Model Law has been prepared for the protection of traditional knowledge and Expressions of Culture and is currently the subject of a pilot project in the Pacific.<sup>31</sup>

In summary, there does not appear to be any inherent obstacles to an international project involving the identification and recording of ways in which legal pluralism has been dealt with at the national level and thereafter the development of a toolbox of model provisions. By strengthening current action under the BPOA and then moving beyond the programme such an initiative would assist independent states as well as external territories experiencing similar challenges associated with legal pluralism.

## Conclusion

The implementation of international environmental law in legally pluralist states poses a number of issues and challenges. But the SIDS of the South Pacific region should not face this challenge alone and there is ample justification for international attention being given to this issue. It has been said that legal pluralism is at once a puzzle, an opportunity and a problem (Kennedy 2006). It is clear that it must be embraced if international law, policy and programmes are to fulfil their goal of addressing global environmental concerns. The ‘puzzle’ can only be solved by devoting more resources to identifying and dealing with the complexities involved. This is an issue which deserves greater attention and would benefit from global consideration and further action by the international community. A global task force, with a focused agenda, could be a driver for addressing the issues involved in implementing environmental law in legally pluralist contexts. In this way international action could be taken which harmonises approaches, strengthens capacity building and facilitates the development of a “common normative framework” (La Torre 1999) to guide legally pluralist nations

---

<sup>31</sup> The Model Law was developed in 2002 by the Secretariat of the Pacific Community and more recently is being trialled in a pilot program in six states under the Pacific Island Forum Secretariat ‘Traditional Knowledge Action Plan’ (2009).

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

in dealing with this challenge. There has recently been broad consensus within the international community on indigenous collective rights as articulated in the DRIP. There has also been a global acknowledgment of the need to promote the inclusion of indigenous peoples in decision-making and the design, implementation and evaluation of law and policy through the *Second International Decade of the World's Indigenous People*. Further international action is now needed to identify legal strategies to assist legally pluralist nations in implementing international law and policy and in particular the ways in which environmental law might be operationalized in these countries.

It is not suggested that action should only be undertaken at the international level. There is little doubt about the importance of bottom-up approaches to environmental governance and the need to create legal space for local communities to flexibly design their own approaches to environmental regulation. Furthermore, there is clearly a need to go beyond simply the provision of legal resources in assisting legally pluralist states. But the risk is that if a global approach is not taken, the law, policy and programmes in this area will either continue to develop in a piecemeal fashion, with the risk of fragmentation and duplication of effort, or not progress at all. In particular, if international environmental law is to be effective in addressing global problems then these challenges must be overcome. What the international community must do now is to become much more engaged with the issue of legal pluralism. It has been said that "legal pluralism is a doorway" (Kennedy 2006: 4) - if so it is one through which the international community needs to step.

## References

ANAYA, S J

- 1991 'Indigenous Rights Norms in Contemporary International Law' *Arizona Journal of International and Comparative Law* 8(2): 1.
- 2007 'Keynote Address: Indigenous Peoples and Their Mark on the International Legal System' *American Indian Law Review* 31(2): 257.
- 2008 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Human Rights Council, A/HRC/9/9, 11 August 2008.
- 2005 'The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples' *Law and Anthropology* 12: 127.

BARSCHE, R L

1994 'Indigenous Peoples in the 1990s: From Object to Subject of International Law.' *Harvard Human Rights Journal* 7: 33.

BENDA-BECKMANN, Franz von

1997 'Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism' in F von Benda-Beckmann, K von Benda-Beckmann and A Hoekema (eds), *Natural Resources, Environment and Legal Pluralism Law & Anthropology Yearbook* 9: 1.

2001 'Folk, Indigenous and Customary Law' *International Encyclopaedia of the Social & Behavioral Sciences*.

1984 'Law Out of Context: A Comment on the Creation of Customary Law Discussion' *Journal of African Studies* 28.

2002 'Who's Afraid of Legal Pluralism?' *Journal of Legal Pluralism* 47: 37.

BENDA-BECKMANN, Franz von and Keebet von BENDA-BECKMANN

2006 'The Dynamics of Change and Continuity in Plural Legal Orders' *Journal of Legal Pluralism* 53-54: 1.

BROWN, K

1999 'Customary Law in the Pacific: An Endangered Species.' *Journal of South Pacific Law* 3: 1.

CHARTERS, Claire

2007 'Indigenous Peoples and International Law and Policy.' *Public Law Review* 18: 22.

CRAIG, D.

2005 *Interconnectedness between Human Rights, the Environment and Indigenous Peoples* (Materials prepared for the Diplomacy Training Course, University of NSW, held at Batchelor College, Batchelor, Northern Territory, June 2005).

DAES, E-I

1996 *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, UN ESCOR, UN Doc E/CN.4/Sub.2/AC.4/1996/2.

DAVIES, M

2005 'Race and Colonialism: Legal Theory as "White Mythology"', *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed).

2005 'The Ethos of Pluralism' *Sydney Law Review* 27: 87.

FIRESTONE, J, J LILLEY and I TORRES DE NORONHA,

2005 'Cultural Diversity, Human Rights and the Emergence of Indigenous Peoples in International and Comparative Environmental Law' *American University International Law Review* 20: 219.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC

Erika J. Techera

---

FORSYTH, M

2007 'A Typology of Relationships between State and non-State Justice Systems' *Journal of Legal Pluralism* 56: 67-112.

GIRAUD-KINLEY, C

1999 'The Effectiveness of International Law: Sustainable Development in the South Pacific Region.' *Georgetown International Environmental Law Review* 12: 125.

GRIFFITHS, J

1986 'What is Legal Pluralism?' *Journal of Legal Pluralism* 24:1-55.

HERTOGH, M

2007 'What is Non-State Law? Mapping the Other Hemisphere of the Legal World'. <http://ssrn.com/abstract=1008451> at 1 September 2009.

ICHRP (INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY)

2009 *When Legal Worlds Overlap: Human Rights, State and Non-State Law*. Geneva: ICHR.

INTERNATIONAL LAW ASSOCIATION

2002 *New Delhi Declaration on Principles of International Law Relating to Sustainable Development*.

JEFFERY, M.I.

2005 'Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights.' *Macquarie Journal of International and Comparative Environmental Law* 2(1):105.

JOHANNES, R.E

1978 'Traditional Marine Conservation Methods in Oceania and Their Demise.' *Annual Review of Ecological Systems* 9: 349.

KENNEDY, David

2006 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' delivered at the International Law Association, British Branch, University College London and School of Oriental and African Studies, 4 March 2006.

KSENTINI, F

1996 'Human Rights, Environment and Development' in S Lin and L Kurukulasuriya (eds), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (1996) 51, 51.

LA TORRE, M

1999 'Legal Pluralism as Evolutionary Achievement of Community Law' *Ratio Juris* 12(2): 182-95.

LEHMANN, K

2007 'To Define or Not to Define - The Definitional Debate Revisited.' *American Indian Law Review* 31(2): 509.

MERRY, S.E.

2006 'Anthropology and International Law.' *Annual Review of Anthropology* 35: 99.

1992 'Anthropology, Law and Transnational Processes.' *Annual Review of Anthropology* 21: 357.

1988 'Legal Pluralism.' *Law & Society Review* 22(5): 869.

MULLIKIN, T S, N S SMITH and M T CHAMPION

2005 'Inextricably Intertwined - Environmental Management and the Public.' *Georgetown International Environmental Law Review* 17: 393.

NEW SOUTH WALES LAW REFORM COMMISSION

2000 *Aboriginal Customary Law. Sentencing: Aboriginal Offenders, Report No 96.* Sydney: NSW Law Reform Commission.

NEW ZEALAND LAW COMMISSION

2006 *Converging Currents: Custom and Human Rights in the Pacific*, Study Paper 17. Wellington: Law Commission.

NORTHERN TERRITORY LAW REFORM COMMITTEE

2003 *Background Paper 4: International Law, Human Rights and Aboriginal Customary Law* (Prepared for Committee of Inquiry into Aboriginal Customary Law).

MUSISI, J.A.S.

1994 'Overview.' In L Watters (ed), *Indigenous Peoples, the Environment and Law*.

OREBECH, Peter, Fred BOSSELMAN, Jes BJARUP, David CALLIES, Martin CHANOCK, Hanne PETERSEN (eds)

2005 *The Role of Customary Law in Sustainable Development*.

OSOFSKY, H M

2003 'Defining Sustainable Development after Earth Summit 2002' *Loyola of Los Angeles International and Comparative Law Review* 26: 91.

POWLES, G

1997 'Common Law at Bay.' *Journal of Pacific Studies* 2: 61.

RICHARDSON, B J

2000 'Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum' *Colorado Journal of International Environmental Law and Policy* 11:1.

RUDDLE, K

1994 *A Guide to the Literature on Traditional Community-based Fishery Management in the Asia-Pacific Tropics*. Rome: FAO.

RUHL, J.B.

1998 'The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict.' *Duke Environmental Law & Policy Forum* 9: 161.

ENVIRONMENTAL GOVERNANCE IN THE SOUTH PACIFIC  
Erika J. Techera

---

SEGGER, M-C C and A KHALFAN

2004 *Sustainable Development Law: Principles, Practices and Prospects.*

TECHERA, E. J.

2009 'Legal Foundations for the Recognition of Customary law in the Post-Colonial South Pacific.' in M. Freeman (ed) *Law and Anthropology - Current Legal Issues.*

TILCEPA

2009 ICCA Regional Reviews. Accessed on 14 September 2009, at [http://www.iucn.org/about/union/commissions/ceesp/topics/governance/icca/regional\\_reviews/](http://www.iucn.org/about/union/commissions/ceesp/topics/governance/icca/regional_reviews/).

UNESCO

2009 *Islands in a Sea of Change - UNESCO's Intersectoral Platform for SIDS.*

UN (UNITED NATIONS)

1992a *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/6/Rev.1 (1992).*

1992b *Agenda 21, Report of the UNCED, I, UN Doc. A/CONF.151/26/Rev.1.*

1994a *Declaration of Barbados, 1994. A/CONF.167/9,I, Annex I.* Accessed on 1 November 2010 at <http://islands.unep.ch/dbardecl.htm>.

1994b *Programme of Action for the Sustainable Development of Small Island Developing States (Barbados Programme of Action). A/CONF.167/9,I, Annex II.* <http://islands.unep.ch/dsidspoa.htm>.

1998 *Progress in the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States: Report of the Secretary-General. Addendum. E/CN.17/1998/7/Add.7.* <http://www.un.org/esa/documents/ecosoc/cn17/1998/ecn171998-7add7.htm>.

2005a *Mauritius Declaration (2005) A/CONF.207/L.6.* Accessed on 1 November 2010 at <<http://www.un.org/special-rep/ohrlls/sid/MIM/A-conf.207-L.6-Mauritius%20Declaration.pdf>> .

2005b *Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States (2005) A/CONF.207/11.* Accessed on 1 November 2010 at <[http://www.un.int/mauritius/Documents/AOSIS/Prepcom%20Reports/Mauritius\\_Strategy\\_latest\\_version.pdf](http://www.un.int/mauritius/Documents/AOSIS/Prepcom%20Reports/Mauritius_Strategy_latest_version.pdf)> .

2005c *Draft Programme of Action for the Second International Decade of the World's Indigenous People.* Report of the Secretary General. A/60/270. Accessed on 1 November 2010 at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/464/96/PDF/N0546496.pdf?OpenElement>> .

2005d *Draft Programme of Action for the Second International Decade of the World's Indigenous People*. Report of the Secretary General. Addendum. A/60/270/Add.1. Accessed on 1 November 2010 at <[http://www.iom.int/jahia/webdav/shared/shared/mainsite/policy\\_and\\_research/un/60/A\\_60\\_270\\_add1\\_en.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/60/A_60_270_add1_en.pdf)>.

UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS  
2002 *Johannesburg Plan of Implementation*. United Nations Department of Economic and Social Affairs Division for Sustainable Development. [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)

UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC

2004 'Integrating Economic and Environmental Policies: The Case of Pacific Island Countries.' Development Papers No 25.

UNEP (UNITED NATIONS ENVIRONMENT PROGRAMME)

1972 *Stockholm Declaration on the Human Environment*. <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

UNGA (UNITED NATIONS GENERAL ASSEMBLY)

2010a *Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, 65th session of the General Assembly. 9 August 2010 .A/65/264.

2010b *Report of the Secretary-General, Five-year review of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*. 6 July 2010. A/65/115.

WESTERLAND, K.

2007 'Nepal's Community Forestry Program: Another Example of the Tragedy of the Commons or a Realistic Means of Balancing Indigenous Needs with Forestry Conservation.' *Colorado Journal of International Environmental Law and Policy* 18:189.

WIESSNER, S.

1999 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' *Harvard Human Rights Journal* 12: 58.

WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT

1987 *Our Common Future*.