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**STRENGTHENING INTERNATIONAL LAW
TO ADDRESS THE NEEDS OF LEGALLY PLURALIST NATIONS**

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Strengthening international law to address the needs of legally pluralist nations

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There is little doubt that in recent decades Indigenous people have obtained a greater voice at the international level and the recognition of Indigenous rights in international treaties. In particular international law has provided the tools for Indigenous peoples to demand recognition of customary law. But it has not assisted legally pluralist nations in the challenging task of reconciling custom and state-based legislation. Greater engagement by the international community with the issue of legal pluralism is an essential step in facilitating the effective implementation of international environmental law at the domestic level. This paper will consider the greater role that the international community and inter-governmental organisations can play in assisting legally pluralist nations. The particular focus will be small island developing states of the South Pacific region in the context of the implementation of international environmental law.

I. INTRODUCTION

In the last two decades Indigenous peoples have obtained a greater 'voice' at the international level firstly through bodies such as the *Working Group on Indigenous People* and later the *UN Permanent Forum on Indigenous Issues* (UNPFII). At the same time, international laws have established the rights of Indigenous people and drawn attention to their importance in environmental governance. Most significant is the *Declaration on the Rights of Indigenous People* (DRIP) which achieved broad consensus when it was adopted in 2007. Whilst a number of these international law instruments make specific reference to 'custom' and 'customary law', this is often in the context of civil and political rights or the growing field of Indigenous collective rights. These

areas 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 human rights and many customary 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, it has failed to effectively address many of the specific needs of legally pluralist nations.

Turning to the development of environmental law, it can be seen that there has been a rapid expansion in international law in this area. A plethora of treaties, protocols and soft law instruments now deal with environmental issues. Furthermore, it has now been almost universally accepted 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 needs.¹ However, the optimum legal mechanisms that will facilitate sustainable development remain unclear. At the national level, in many post-colonial legally pluralist states, centralised approaches have been taken by various governments with limited success and it is in this context that new approaches have been sought. Attention has turned to local communities for a number of reasons: growing international recognition of human and Indigenous collective rights; key principles of sustainable development supporting localised approaches; growing awareness of traditional natural resource management mechanisms incorporating traditional knowledge and customary laws; and in the context of the South Pacific, the continued adherence to customary law by Indigenous peoples.

The combination of the legally pluralist context and rapid development of international environmental law has challenged the small island developing states (SIDS) of the South Pacific. For example, identifying how international norms can be implemented effectively at the domestic level in ways which

¹ World Commission on Environment and Development, *Our Common Future* (1987) 8.

do not conflict with deeply held customary norms. In many SIDS the majority of Indigenous People continue to live at least a partially traditional lifestyle that fits uneasily with western legislative models. At the same time these countries are poorly resourced and often lack technical expertise to draft complex legislation that implements international obligations as well as addressing local custom. This is particularly problematic in the context of the development of national and implementation of international environmental law. In developing legal frameworks to achieve enhanced and enduring environmental outcomes the issue of the functional recognition of customary law cannot be ignored. Good environmental governance indicates a role for both 'top-down' and 'bottom-up' regulatory approaches. This is true at the national level but equally so at the international level. The purpose and focus of this paper is to examine the greater role that international law could play in assisting SIDS to implement environmental regulations in a pluralist context.

This paper will consider the international law and international environmental law instruments that address the recognition of customary law and legal institutions in this context. The roles of relevant international actors and institutions will be examined in order to identify the strengths and weaknesses. The way forward will be explored and suggestions made as to how international law could better address the needs of the South Pacific island nations. In particular consideration will be given to the greater role an international or regional body could play in providing guidance and sharing best practice in relation to the recognition of customary law and the development of domestic environmental law.

II. CONTEXTUAL BACKGROUND

Before moving to a consideration of international law and Indigenous peoples the particular South Pacific context must be explored. The focus of this paper is the SIDS of the South Pacific. Although it is somewhat dangerous to make generalisations it is clear that there are many commonalities

between these countries. Each has a long history of Indigenous occupation. The pattern of settlement of the islands is interlinked and although the cultures are anthropologically diverse some attributes are shared. In addition, each of the countries lies in similar positions along the 'spectrum of development'² in that they are all developing countries, although in differing economic positions. These countries are themselves small, but are also composed of a number of small islands.³ And their disadvantageous position in terms of their opportunities for development has been acknowledged – again their small size, lack of prospects for achieving economies of scale and narrow resource base.⁴ Furthermore, each state currently faces 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 each face similar internal environmental threats, although to differing degrees. These include, for example, climate change, over exploitation of natural resources, pollution from mining and agriculture and urbanisation.⁵

Each of the South Pacific Island nations has a rich cultural history. The close cultural relationship that Indigenous people of the South Pacific have with nature and marine living resources is well established and will not be explored again here.⁶ In summary, over time the Indigenous peoples have developed beliefs which place much greater value and trust in, wildlife resources. Their motivation in managing wildlife has come from a cultural and spiritual connection with nature which places stewardship obligations upon the

² H M Osofsky, 'Defining Sustainable Development after Earth Summit 2002' (2003) 26 *Loyola of Los Angeles International and Comparative Law Review* 91, 95.

³ United Nations Economic and Social Commission for Asia and the Pacific, Development Papers No 25, 'Integrating Economic and Environmental Policies: The Case of Pacific Island Countries' (2004), 11.

⁴ Barbados Programme of Action for the Sustainable Development of Small Island Developing States, Preamble paras 4 and 8.

⁵ United Nations Economic and Social Commission for Asia and the Pacific, Development Papers No 25, 'Integrating Economic and Environmental Policies: The Case of Pacific Island Countries' (2004), 9–10.

⁶ For example, see R E Johannes, 'Traditional Marine Conservation Methods in Oceania and Their Demise' (1978) 9 *Annual Review of Ecological Systems* 349; K Ruddle, *A Guide to the Literature on Traditional Community-based Fishery Management in the Asia-Pacific Tropics* (1994).

people as well as the right to take and use those resources for subsistence needs. These Indigenous peoples developed traditional governance mechanisms and practices involving customary law and institutions. More recently the majority have had a period of colonial rule where the 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 abandoned. This has resulted in a situation of legal pluralism.

The study of legal pluralism⁷ has gained increasing attention in the last 30 years, firstly from legal anthropologists and more recently from lawyers.⁸ A detailed consideration of this literature cannot be undertaken here and has been dealt with by a number of commentators.⁹ In short, as stated by Hertogh, 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.¹⁰ There is little doubt that many of the countries in the South Pacific are legally pluralist in the sense that both customary and introduced law operate. This situation arose as a result of European exploration, settlement and colonisation when colonial governments brought with them their own legal systems. This is what Sally Engle Merry refers to as 'classic legal pluralism' being a dual system created as a consequence of colonial rule.¹¹ The result is that these countries face similar challenges in developing law and policy that meets international

⁷ 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 (TEK)), political and governance structures and their institutions. But in this paper the focus will be limited only to issues associated with legal pluralism.

⁸ For example, F von Benda-Beckmann, J Griffiths, A Griffiths, S E Merry, M Davies and M Forsyth.

⁹ F von Benda-Beckmann, 'Law Out of Context: A Comment on the Creation of Customary Law Discussion' (1984) 28 *Journal of African Studies* 28. F von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 47 *Journal of Legal Pluralism* 37; F von Benda-Beckmann and K von Benda-Beckmann, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 53–54 *Journal of Legal Pluralism* 1; S E Merry, 'Anthropology and International Law' (2006) 35 *Annual Review of Anthropology* 99; S E Merry, 'Anthropology, Law and Transnational Processes' (1992) 21 *Annual Review of Anthropology* 357; S E Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869; M Davies, 'Race and Colonialism: Legal Theory as "White Mythology"', *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed, 2005) ; M Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87; M Forsyth, *How to 'Do' Legal Pluralism* <<http://ssrn.com/abstract=993617>> at 22 August 2007.

¹⁰ M Hertogh 'What is Non-State Law? Mapping the Other Hemisphere of the Legal World' (2007). SSRN

¹¹ Merry, 'Legal Pluralism', above n 9, 872

obligations but also has the acceptance of local communities and does not conflict with ingrained customary norms. In analysing these tensions three possible positions have emerged in relation to customary law: firstly, full recognition of pre-existing customary law with incorporation into the legal system at the national level and 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. It has been said that 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’.¹² Whilst customary law is a constitutional source of law in many cases¹³ there remains a tension between the dominant legal system and customary law. 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. State-based dominant legal systems have tended to marginalise customary law and in many cases continue to do so.

In the context of these post-colonial states, several different themes have emerged from the literature: firstly, the idea and relevance of legal pluralism;¹⁴ secondly, the difficulties involved in defining customary law;¹⁵ and thirdly, the bases upon which customary law may be reconciled with the dominant legal system.¹⁶

¹² K Brown, ‘Customary Law in the Pacific: An Endangered Species’ (1999) 3 *Journal of South Pacific Law* 1, 1 <http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Brown1.htm> at 5 January 2008.

¹³ For example, Samoa and Vanuatu.

¹⁴ F von Benda-Beckmann, ‘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* (1997) vol 9 *Law & Anthropology Yearbook* 1; F von Benda-Beckmann, ‘Folk, Indigenous and Customary Law’ *International Encyclopaedia of the Social & Behavioral Sciences* (2001); F von Benda-Beckmann, ‘Law Out of Context: A Comment on the Creation of Customary Law Discussion’ (1984) 28 *Journal of African Studies* 28; Forsyth, above n 9; Merry, ‘Anthropology and International Law’ (2006) above n 9; Merry, ‘Legal Pluralism’ (1988) above n 9.

¹⁵ J Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1; G Powles, ‘Common Law at Bay’ (1997) 2 *Journal of Pacific Studies* 61.

¹⁶ Forsyth, above n 9.

Just as legal pluralism cannot be considered in detail here, this is not the place for a debate about what is and is not customary law and the difficulties of proving it. However, it is acknowledged these issues remain problematic. In this paper it has been assumed that the SIDS of the South Pacific are, since independence, all legally pluralist with the majority of the Indigenous population leading at least a partially traditional lifestyle. Nonetheless each of these countries is challenged by legal pluralism and particularly for those with large Indigenous populations, new law that is introduced is unlikely to be successful where it conflicts with deeply ingrained customary norms. Furthermore, to ignore traditional legal orders is contrary to existing international human rights law and collective Indigenous rights. These latter two areas are considered in detail below.

III. INDIGENOUS PEOPLE IN INTERNATIONAL LAW

Historically, international law has been the domain of states, and Indigenous 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,¹⁷ increasing attention has been given to these non-state actors.¹⁸ In 2000 the UN Permanent Forum on Indigenous Issues (UN-PFII) was created by the UN Economic and Social Council (ECOSOC),¹⁹ and it has now become apparent that Indigenous peoples have an emerging legal personality in the international arena.²⁰

¹⁷ Since 2005 we are now in the Second Decade of the World's Indigenous People: <<http://www.un.org/esa/socdev/unpfii/en/second.html>> at 13 February 2008.

¹⁸ R L Barsch, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law' (1994) 7 *Harvard Human Rights Journal* 33, 33.

¹⁹ For full details of the establishment of the UNPFII see <<http://www.un.org/esa/socdev/unpfii/>> at 13 February 2008.

²⁰ 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, above n 18, 33–4, 58.

Much of the terminology used throughout international law and policy documents remains undefined and contentious. For example, there is no agreed definition of 'Indigenous peoples', and alternatives used in various international law instruments include 'aborigines', 'tribal peoples' and 'Indigenous populations'. In some circumstances, 'indigenous' is contrasted with 'minorities'; in other cases, with 'local' or 'traditional'.²¹ Further controversy surrounds the use of the word 'peoples' as opposed to 'people'. An in-depth discussion of the problematic debate over terminology is beyond the scope of this paper, and the issue has been dealt with extensively in the literature.²² However, it is clear that there are no agreed international law definitions.²³ '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.²⁴

At the international level, some early attention was given to Indigenous peoples following incidents of genocide, appropriation of land and other atrocities committed against them.²⁵ But it was the rise of legal positivism in the late 19th century that resulted in the focus upon state sovereignty and the 'subjugation of Indigenous people'.²⁶ However, increasingly attention has again turned to non-state actors. This can most readily be seen in human rights conventions, in the context of the rights of individuals as against the state.

²¹ Ibid 227.

²² E-I Daes, *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 (1996). For an excellent summary of these definitional issues, see J Firestone, J Lilley and I Torres de Noronha, 'Cultural Diversity, Human Rights and the Emergence of Indigenous Peoples in International and Comparative Environmental Law' (2005) 20 *American University International Law Review* 219; see also K Lehmann, 'To Define or Not to Define — The Definitional Debate Revisited' (2007) 31(2) *American Indian Law Review* 509.

²³ Firestone, Lilley and Torres de Noronha, above n 22, 226.

²⁴ This definition is utilised by Siegfried Wiessner in S Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 58, 115. It is referred to in Firestone, Lilley and Torres de Noronha, above n 22, 231.

²⁵ There has been much written about the conquest of and atrocities committed against Indigenous people in the context of international law, for example S J Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8(2) *Arizona Journal of International and Comparative Law* 1; see also Wiessner, above n 24. For a short summary, see C Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18 *Public Law Review* 22, 23.

²⁶ Anaya, 'Indigenous Rights Norms in Contemporary International' above n 25; Charters, above n 25, 23.

The starting point for any consideration of universal human rights which assist Indigenous peoples is the *United Nations (UN) Charter*²⁷ and its core concepts of equality and non-discrimination.²⁸ Many other later conventions supported and elaborated upon these fundamental rights, including the *International Covenant on Civil and Political Rights* (ICCPR)²⁹ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³⁰ which prohibit discrimination and provide that all people are equal before the law and entitled to its equal protection.³¹ 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)³² provides for participation and ownership of property but does not specifically mention Indigenous peoples.³³ In particular, the *Committee on the Elimination of Racial Discrimination* (CERD) continues to interpret the 'fundamental human rights norm of non discrimination in favor of indigenous peoples'.³⁴

However, whilst most independent post-colonial societies and, indeed, western countries too may now prohibit discrimination³⁵ and support equality, it is the right to self-determination which many Indigenous people want: to

²⁷ *Charter of the United Nations*, opened for signature 26 June 1945, UNTS 993 (entered into force 24 October 1945).

²⁸ S J Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' (2004) 21(1) *Arizona Journal of International and Comparative Law* 13, 16.

²⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 6 ILM 368 (entered into force 23 March 1976).

³⁰ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 6 ILM 360 (entered into force 3 January 1976).

³¹ For example, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *American Convention on Human Rights*, opened for signature 22 November 1969, 9 ILM 673 (entered into force 18 July 1978); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 59 (entered into force 21 October 1986); *Universal Declaration of Human Rights*, opened for signature 10 December 1948, GA Res 217 A, UN GAOR, 3rd Sess, UN Doc A/810.

³² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

³³ Ibid 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 with others'.

³⁴ S J Anaya, 'Keynote Address: Indigenous Peoples and Their Mark on the International Legal System' (2007) 31(2) *American Indian Law Review* 257, 257.

³⁵ There are notable exceptions to this, for example the Cook Islands, which has reserved the right not to apply the principles contained in the *Convention on the Elimination of Discrimination Against Women*: Charters, above n 25, 37.

become ‘“subjects” of international legal rights and duties rather than mere “objects” of international concern’³⁶ and ‘to live as they wish without outside interference’.³⁷ 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 a contentious one.³⁸ The ICESCR 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’.³⁹ Furthermore, it has been suggested that ‘this right may not extend to indigenous people already forming part of a self governing non-colonial nation’.⁴⁰ In addition, ICESCR 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’.⁴¹ 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’.⁴² Further support for self-determination may be found in the *Declaration on the Right to Development*⁴³ and the *Vienna Declaration and Programme of Action on Human Rights*.⁴⁴ The *Convention on the Rights of the Child* (CROC)⁴⁵ reiterates the right, but specifically refers to Indigenous peoples in holding that a child belonging to ‘a minority or who is Indigenous’

³⁶ Barsch, above n 18, 35.

³⁷ Charters, above n 25, 25.

³⁸ Wiessner, above n 24, 116.

³⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 6 ILM 360, art 1(1) (entered into force 3 January 1976).

⁴⁰ Northern Territory Law Reform Committee, *Background Paper 4: International Law, Human Rights and Aboriginal Customary Law* (Prepared for Committee of Inquiry into Aboriginal Customary Law, 2003) 7.

⁴¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 6 ILM 360, art 1(2) (entered into force 3 January 1976).

⁴² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 6 ILM 368, art 27 (entered into force 23 March 1976).

⁴³ *Declaration on the Right to Development*, UNGA Res 41/128, UN GAOR, 53rd Supp, 186, UN Doc A/41/53.

⁴⁴ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993).

⁴⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 29 ILM 1340 (entered into force 2 September 1990)

shall not be denied the right to 'enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language'.⁴⁶ More recently the *Declaration on the Rights of Indigenous Peoples*⁴⁷ includes the right to self-determination in the context of sustainable development.⁴⁸ Although this document remains soft law, it provides further and arguably stronger support in this context. However, 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'.⁴⁹

Precisely what self-determination encompasses is a further matter of controversy. The literature on this topic refers both to external and internal self-determination. The former includes the rights to determination of international status, political independence and secession.⁵⁰ The latter involves the right of Indigenous peoples to determine their own destinies, including the right to self-government, and to pursue development without interference.⁵¹ This also includes self-management in relation to local matters and the right to participate in national governmental decision making.⁵² Many states have resisted an acceptance of the right to self-determination by Indigenous peoples, as it would also grant the right to secession. But Barsch argues 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.⁵³ Self-government would appear to include control

⁴⁶ Ibid art 30. But again, no definition of 'indigenous' is given.

⁴⁷ *Declaration on the Rights of Indigenous Peoples*, UN GA Resolution A/61/L.67 (2007).

⁴⁸ Ibid art 3. See also arts 20, 23, 32, which expand upon the right to development.

⁴⁹ *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 at footnote 39 in Charters, above n 25, 27.

⁵⁰ Wiessner, above n 24, 116.

⁵¹ Charters, above n 25, 25, 40.

⁵² Wiessner, above n 24, 116.

⁵³ Barsch, above n 18, 36.

over the legal regulation of Indigenous people's lives⁵⁴ 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'.⁵⁵ 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.⁵⁶

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 inhibit the realisation of human rights.⁵⁷ 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. Women do not have specific rights to, for example, own land or become tribal leaders. Therefore, fundamental human rights providing protections against discrimination in favour of equality conflict with customary laws. This can also be seen in the area of marriage and the family.⁵⁸ This is compounded by the fact that most Indigenous law focuses upon communal rights at the expense of any individual ones.⁵⁹ These issues result in increased tension between customary laws and state-based laws that seek to implement international human rights law.

⁵⁴ NSW Law Reform Commission, 'Aboriginal Customary Law' (2000) *Sentencing: Aboriginal Offenders, Report No 96* <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp3>> at 9 February 2008.

⁵⁵ Benda-Beckmann, 'Folk, Indigenous and Customary Law', above n 30, 5705.

⁵⁶ *Ibid.*

⁵⁷ New Zealand Law Commission, 'Converging Currents: Custom and Human Rights in the Pacific' (2006), 21.

⁵⁸ *Ibid* 86.

⁵⁹ *Ibid* 22.

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 traditional communities.⁶⁰ 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).⁶¹ Whilst this convention is important for drawing attention to Indigenous issues, it has been criticised for taking an assimilation and integrationist approach.⁶² Although it remains in force, it has largely been superseded by the *ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*⁶³ (ILO 169). ILO 169 is significant as it is binding law that specifically provides for collective Indigenous rights. It refers to a wide range of rights including protection and respect for Indigenous peoples' social, cultural, religious and spiritual values and practices,⁶⁴ consultation and participation in decision making⁶⁵ and control over development that affects them.⁶⁶ It recognises the cultural and spiritual values Indigenous peoples place on land,⁶⁷ and the right to own and possess traditional lands.⁶⁸ Of particular significance is the inclusion of rights in relation to customs and customary law.⁶⁹ Article 8(1) provides that in 'applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws'.⁷⁰ Furthermore, Indigenous peoples

⁶⁰ For an excellent overview of Indigenous rights in international law, see 'International Law Standards' in G Netheim, G D Meyers and D Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (2002).

⁶¹ *ILO Convention No 107 Concerning Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

⁶² Charters, above n 25; J A S Musisi, 'Overview' in L Watters (ed), *Indigenous Peoples, the Environment and Law* (1994) 3, 7. Both the title and Preamble of the convention refer to integration.

⁶³ *ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

⁶⁴ *Ibid* art 5.

⁶⁵ *Ibid* art 6.

⁶⁶ *Ibid* art 7.

⁶⁷ *Ibid* art 13.

⁶⁸ *Ibid* art 14.

⁶⁹ 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'.

⁷⁰ *Ibid* arts 9, 10, which discuss specific customary laws that relate to penalties and punishments for offences.

have the right to retain their own customs and institutions⁷¹ and are to be provided with the means to protect their rights through legal proceedings.⁷² Whilst 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.⁷³

Although this convention has also received some criticism for its lack of reference to self-determination,⁷⁴ it has focused international attention and arguably led to an emerging international consensus on the content of Indigenous rights.⁷⁵ ILO 169 was drafted contemporaneously with the *Declaration on the Rights of Indigenous Peoples*⁷⁶ (DRIP). As a declaration, the DRIP is non-binding and ultimately was not signed by key western nations with significant Indigenous populations.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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

⁷¹ Ibid art 8(2), although this is qualified in that they must not be incompatible with national and fundamental human rights.

⁷² Ibid 12.

⁷³ D Craig, *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), 7.

⁷⁴ Charters, above n 25, 29.

⁷⁵ Anaya, 'Indigenous Rights Norms in Contemporary International Law', above n 25, 13.

⁷⁶ Articles 5, 11, 27, 34, adopted 13 September 2007. DRIP was drafted by the Working Group on Indigenous Populations (WGIP), which is the longest-standing UN body that deals exclusively with Indigenous people. The other key UN body is the Permanent Forum on Indigenous Issues (UNPFII), which was established in 2000 by the UN Economic and Social Council. The UNPFII is significant in that it includes non-state actor representatives, including Indigenous people.

⁷⁷ The USA, Canada, Australia and New Zealand did not sign the Declaration. Although on 3 April 2009 the Australian government indicated formal support for DRIP.

⁷⁸ Charters, above n 25, 34.

⁷⁹ 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: *Declaration on the Rights of Indigenous Peoples*, UN GA Resolution 61/295 U.N. Doc. A/RES/47/1 (2007).

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'.⁸⁰

It has been shown 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 greater unification and integration of human rights and sustainable development considerations as they relate to Indigenous peoples.⁸¹ However, this group of rights remains contentious and arguably without international consensus,⁸² being described by some as having a 'blurry boundary'.⁸³ Nevertheless, other commentators believe that at least some Indigenous peoples' rights are now part of customary international law.⁸⁴ Barsch considers that 'rights to land and natural resources, cultural integrity, environmental security, and control over their own development' form part of this group.⁸⁵ Rights in relation to customary law are notably absent from this list. Of particular concern, in the context of this paper, is that there are no specific references to the different domestic circumstances in which these rights might be asserted nor are the challenges faced by legally pluralist states dealt with.

IV. INTERNATIONAL ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT

⁸⁰ Ibid art 27.

⁸¹ Craig, above n 73, 4.

⁸² 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, above n 18, 43–4.

⁸³ Firestone, Lilley and Torres de Noronha, above n 22, 240.

⁸⁴ Charters, above n 25, 27 quoting S J Anaya, 'The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples' (2005) 12 *Law and Anthropology* 127.

⁸⁵ Barsch, above n 18, 43–4.

Beyond the specific treaties and international instruments that purport to confer 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 general, international environmental law (IEL) has also provided important rights and tools for Indigenous peoples. Of course several early international environmental law instruments recognised Indigenous traditional hunting and fishing rights.⁸⁶ But with the emergence of the sustainable development (SD) paradigm there has been a greater focus on public participation and the particular role of Indigenous peoples.

An analysis of the interaction between Indigenous peoples and SD commences at the definitional stage. Clearly western concepts of what SD means are largely irrelevant to Indigenous peoples who have a much closer relationship with nature.⁸⁷ Their definition of SD reflects this relationship and is deeply rooted in culture.⁸⁸

International SD instruments support not only decentralisation but specifically the involvement of Indigenous peoples, tribal peoples and local communities.⁸⁹ It has also been noted that Indigenous peoples were disappointed with UNCED and 'felt like bystanders in a global negotiation over the future of their resources'.⁹⁰ Nonetheless the *Rio Declaration* draws direct attention to the involvement of Indigenous peoples:

⁸⁶ For example, the Polar Bear Agreement and the International Convention on the Regulation of Whaling.

⁸⁷ See L A R Osorio, M O Lobato and X A D Castillo, 'Debates on Sustainable Development: Towards a Holistic View of Reality' (2005) 7 *Environment, Development and Sustainability* 501, 504.

⁸⁸ Ibid 505, in which reference is made to the ease with which Indigenous peoples understand the concept: needs being met by resources or production within their geographical domain.

⁸⁹ For a summary of the key instruments see Charters, above n 25, 44–6.

⁹⁰ J Kimerling, 'Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia' (2002) 27(2) *Columbia Journal of Environmental Law* 523, 529, also referring to the refusal to acknowledge their collective identities as peoples. Kimerling discusses the parallel World Conference at Kari-Oca held nearby, which provided Indigenous peoples with great opportunities for participation: 528.

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.⁹¹

Similarly, *Agenda 21* devotes a whole chapter to Indigenous peoples and the need to 'accommodate, promote and strengthen the role of Indigenous peoples and their communities'.⁹² Several key principles articulated in the *New Delhi Declaration* 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.⁹³

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*.⁹⁴ 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 the *International Labour Organisation Convention No 169*⁹⁵ and the *Declaration on the Rights of*

⁹¹ *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development*, Principle 22, UN Doc A/CONF.151/6/Rev.1 (1992).

⁹² *Agenda 21, Report of the UNCED, I*, ch 26, UN Doc A/CONF.151/26/Rev.1 (1992).

⁹³ International Law Association, *New Delhi Declaration on Principles of International Law Relating to Sustainable Development* (2002) para 1.

⁹⁴ *Ibid.*

⁹⁵ *ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

Indigenous Peoples (DRIP).⁹⁶ Furthermore, participation has been demonstrated to be essential to development itself, which is acknowledged as a key factor in poverty eradication and environmental improvement.⁹⁷ In addition, public participation includes the involvement of other non-state actors such as 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 SD projects.⁹⁸

Linked to this is the element in Principle 3 of the *New Delhi Declaration*, of cooperation to achieve global SD. 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 SD may be identified.

Other elements of good governance are also relevant. The *Johannesburg Plan of Implementation* specifically noted the vital role of Indigenous people in SD and called for the 'effective participation of indigenous and local communities in decision and policy-making concerning the use of their traditional knowledge'.⁹⁹

Many international environmental treaties have also referred specifically to the involvement of Indigenous peoples. For example, the *Convention on Biological Diversity* (CBD) provides quite clearly for the preservation and more widespread approved use of Indigenous and local community knowledge and practices related to biodiversity conservation.¹⁰⁰ The UN *Convention to*

⁹⁶ *Declaration on the Rights of Indigenous Peoples*, 14 September 2007, UNGA Res A/61/L.67 (2007).

⁹⁷ Mullikin, Smith and Champion, above n 345, 432.

⁹⁸ Osofsky, above n 2, 100.

⁹⁹ *Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development*, 4 September 2002, para 44(l), UN Doc A/CONF.199/20 (2002).

¹⁰⁰ *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79, art 8(j) (entered into force 29 December 1993).

Combat Desertification (UNCCD) similarly provides for protection, adaptation and use of traditional knowledge and technologies.¹⁰¹

The role of Indigenous peoples in SD gains further support from international human rights law and environmental justice principles. The relationship between human rights and environmental issues is 'widely recognised'.¹⁰² As early as 1972 it was acknowledged that there was an inextricable link between environmental and civil and political rights.¹⁰³ This gains further international support from the *Draft Declaration of Principles on Human Rights and the Environment*,¹⁰⁴ which recognises the interdependence and indivisibility of human rights, environmental quality, peace and SD.¹⁰⁵ The *Declaration on the Rights of Indigenous People* (DRIP) specifically recognises that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'.¹⁰⁶

International human rights law includes the elements of equality, non-discrimination, self-determination and empowerment, which intersect with many of the principles of SD. Whilst intra- and intergenerational equity are articulated in the *Rio Declaration*, the broad principle of eradication of

¹⁰¹ *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, opened for signature 17 June 1994, 33 ILM 1328, arts 16(g), 17(c), 18(2), 19(e) (entered into force 26 December 1996),.

¹⁰² F Ksentini, '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.

¹⁰³ *Stockholm Declaration on the Human Environment*, 16 June 1972, UN Doc A/CONF.48/14 (1972). The Preamble 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.'

¹⁰⁴ *Draft Declaration of Principles on Human Rights and the Environment* (1994)
<<http://fletcher.tufts.edu/multi/www/1994-decl.html>> at 4 April 2008.

¹⁰⁵ Ibid Principle 1; see also M I Jeffery, 'Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights' (2005) 2(1) *Macquarie Journal of International and Comparative Environmental Law* 105, 117.

¹⁰⁶ *Declaration on the Rights of Indigenous Peoples*, 14 September 2007, Preamble, UN GA Resolution A/61/L.67 (2007).

poverty emerged much earlier in the *Charter of the United Nations*.¹⁰⁷ Intra-generational equity in terms of equality and freedom from discrimination was also dealt with early in the various human rights treaties¹⁰⁸ 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*, 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.¹⁰⁹

This leads on to the issue of poverty, which is an impediment to both SD and environmental health but which can also lead to a breach of fundamental human rights. Principle 5 of the *Rio Declaration* 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*.¹¹⁰ 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.

¹⁰⁷ *Charter of the United Nations*, opened for signature 26 June 1945, UNTS 993 (entered into force 24 October, 1945). Article 55 provides that ‘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.

¹⁰⁸ *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 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, 3rd Sess, UN Doc A/810.

¹⁰⁹ For example, the *Declaration on the Right to Development*, UNGA Res 41/128, UN GAOR, 53rd Supp, 186, art 1, UN Doc A/41/53 (1986).

¹¹⁰ International Law Association, *New Delhi Declaration on Principles of International Law Relating to Sustainable Development* (2002) para 5.3; M-C C Segger and A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (2004), 101.

The foundation for these principles then lies not only in SD law and theory but also in international human rights law. As SD principles they form part of the 'toolbox' that Indigenous peoples may use to support their rights to broad involvement in environmental decision making and governance. From an Indigenous perspective SD, environmental ethics and human rights are therefore all interlinked.¹¹¹ This gains further international support from the *Draft Declaration of Principles on Human Rights and the Environment*,¹¹² which recognises the interdependence and indivisibility of human rights, environmental quality, peace and SD.¹¹³ The *Declaration on the Rights of Indigenous People* (DRIP) specifically recognises that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'.¹¹⁴ The right to self-determination is confirmed, which includes Indigenous peoples' right to autonomy 'in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.¹¹⁵ This would clearly include the right to develop sustainably. The right to participate in decision making is specifically articulated in Article 18.¹¹⁶ Read together, perhaps one of the strongest articulations of Indigenous rights in relation to SD is contained in the following Articles:

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

¹¹¹ Jeffery, above n 105, 112.

¹¹² *Draft Declaration of Principles on Human Rights and the Environment* (1994) <<http://fletcher.tufts.edu/multi/www/1994-decl.html>> at 4 April 2008.

¹¹³ *Ibid* Principle 1; see also Jeffery, above n 105, 117.

¹¹⁴ *Declaration on the Rights of Indigenous Peoples*, 14 September 2007, Preamble, UN GA Resolution A/61/L.67 (2007).

¹¹⁵ *Ibid* art 4.

¹¹⁶ 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.'

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.

Whilst 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. Environmental justice and SD are also inextricably linked.¹¹⁷ Social equity and environmental quality are essential elements of environmental justice and are also key principles of SD. However, as noted by Ruhl, environmental justice is a narrower concept than SD,¹¹⁸ requiring that these two issues dominate all others,¹¹⁹ whereas SD requires the balancing of triple bottom line goals. However, critics of SD take issue with the emphasis on development and argue that it is not a panacea for poverty and environmental degradation.¹²⁰ Nonetheless, it is the more adaptive concept of SD which has achieved widespread acceptance and therefore has overtaken environmental justice as the paradigm of choice.¹²¹ Yet principles of environmental justice are important and continue to inform the SD literature.¹²² They provide further support for Indigenous peoples seeking

¹¹⁷ J B Ruhl, 'The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict' (1998) 9 *Duke Environmental Law & Policy Forum* 161, 162.

¹¹⁸ *Ibid* 163.

¹¹⁹ *Ibid* 178.

¹²⁰ J Byrne and L Glover, 'A Common Future or Towards a Future Commons: Globalization and Sustainable Development since UNCED' (2002) 3(1) *International Review for Environmental Strategies* 5, 13.

¹²¹ Ruhl, above n 117, 165–6. Ruhl provides evidence of this by drawing attention to the lack of an individual indicator of environmental justice: 181. Although arguably the Millennium Development Goals have done so.

¹²² *Ibid* 185.

greater autonomy, management of natural resources and recognition of cultural practices and customary law.

Practically speaking, Indigenous communities have much to offer in the achievement of SD. Maragia has extended the call for localised approaches by arguing that community participation combined with use of traditional knowledge could contribute to SD.¹²³ Richardson greatly supports this approach in post-colonial rural communities with strong traditional institutions and laws.¹²⁴ The commentators argue for re-empowerment of local communities¹²⁵ and cooperation at the international, national and local levels.¹²⁶

Jaksa identifies colonialist norms as one of the main causes of many environmental problems and calls for greater recognition of Indigenous rights, particularly property rights, as crucial to the achievement of SD.¹²⁷ He sees multiple benefits of such an approach: effective Indigenous property rights would ensure large land areas and natural resources are isolated from appropriation by others; they would also promote Indigenous stewardship of land involving a diversity of cultural ecological expertise; in addition, they would assist more broadly in the maintenance of Indigenous cultures.¹²⁸ Furthermore, 'a healthy indigenous land base is crucial to the survival of indigenous peoples themselves'.¹²⁹ It is well known that Indigenous peoples have a strong connection with land and that this relationship is both spiritual and practical in circumstances where many rely heavily upon that land for subsistence needs. Whilst existing human rights might assist Indigenous

¹²³ B Maragia, 'The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That Is Needed?' (2006) 18 *Georgetown International Environmental Law Review* 197. Albeit with the proviso that such knowledge should be de-romanticised and must be accompanied by 'gender-equalizing mechanisms': *ibid* 20.

¹²⁴ B J Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local–Global Institutional Spectrum' (2000) 11 *Colorado Journal of International Environmental Law and Policy* 1.

¹²⁵ *Ibid*.

¹²⁶ Osofsky, above n 2, 100.

¹²⁷ Jaksa, above n 4, 162.

¹²⁸ *Ibid* 162.

¹²⁹ *Ibid* 192.

peoples in obtaining ownership of traditional lands, there is a need to ensure that ownership is based upon traditional Indigenous land laws (generally communal) and not western conceptions of private property rights.¹³⁰

Localised approaches to SD also require community-based economic development strategies, tools and methodologies to be developed that rely less upon centralised infrastructure and investment.¹³¹ In the context of Indigenous communities, these include identifying sustainable livelihood options such as the development of small enterprises, microfinance schemes and provision of other financial incentives.¹³² Equally important is the need to identify legal mechanisms to support localised approaches to SD to facilitate their resourcing, longevity and legitimacy. In recent years a number of commentators have focused upon customary laws to provide such a foundation.¹³³ These decentralised approaches to SD, embraced by the small island developing states (SIDS) of the South Pacific, must be analysed in the context of specific strategies for sustainable management and use of marine resources.

V INTERNATIONAL PROGRAMMES OF ACTION

The reason for focussing so heavily on sustainable development is that it is in this context that the international community has engaged the most with the issues facing legally pluralist states. However as will be shown, this has only been to a limited extent.

¹³⁰ Ibid. Jaksa calls for the adoption of binding international agreements directly addressing Indigenous property rights: 163.

¹³¹ A Rodriguez-Pose, 'The Role of the ILO in Implementing Local Economic Development Strategies in a Globalized World' (Working Paper, Department of Geography and Environment, LSE, London, 2001), 12.

¹³² Ibid, in which the role of the ILO is considered in this context. The specific tools and methodologies will be considered further in Chapter 4 in relation to community-based environmental management and conservation.

¹³³ K Westerland, 'Nepal's Community Forestry Program: Another Example of the Tragedy of the Commons or a Realistic Means of Balancing Indigenous Needs with Forestry Conservation' (2007) 18 *Colorado Journal of International Environmental Law and Policy* 189; Richardson, above n 124; C Giraud-Kinley, 'The Effectiveness of International Law: Sustainable Development in the South Pacific Region' (1999) 12 *Georgetown International Environmental Law Review* 125; P Orebech et al (eds), *The Role of Customary Law in Sustainable Development* (2005).

The first Global Conference on the Sustainable Development of Small Island Developing States was held in 1994. The Conference resulted in the *Declaration of Barbados* and the *Programme of Action for the Sustainable Development of Small Island Developing States* (BPOA).¹³⁴ 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.'¹³⁵ Furthermore, it was acknowledged that 'the efforts of small island developing states to conserve, protect and restore their ecosystems **deserve international cooperation and partnership**.'¹³⁶ 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.¹³⁷

The BPOA identified 14 priority areas¹³⁸ 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 non-governmental organisations (NGOs) and major groups was also acknowledged. Of particular significance, in terms of regional action is paragraph 52 (B) (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.

¹³⁴ Barbados Programme of Action <http://www.sidsnet.org/docshare/other/BPOA.pdf> at 15 June 2009.

¹³⁵ Declaration of Barbados Part Two Article III(2).

¹³⁶ Declaration of Barbados Part One Article II. Emphasis added.

¹³⁷ Declaration of Barbados Part One Article V.

¹³⁸ 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.

And at the regional level efforts should be made to harmonise environmental law amongst the SIDS.¹³⁹ In addition reference is made to the preparation of environmental law training manuals,¹⁴⁰ workshops on environmental law subjects¹⁴¹ and dissemination of legal information about international environmental instruments.¹⁴² At the international level it was stated that support should be given to 'environmental law offices, within regional and sub-regional organizations to implement regional approaches'¹⁴³ as well as strengthening regional bodies¹⁴⁴ and improving coordination with regional/sub-regional bodies.¹⁴⁵ Furthermore, the BPOA provides that

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.¹⁴⁶

At the international level the focus is upon the importance of international and regional programmes to develop and implement national environmental legislation¹⁴⁷ 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.¹⁴⁸

Various Progress Reports were submitted (BPOA+5) in each of the key priority areas and it was clear that significant work had been done including action in the South Pacific by SPREP and other bodies.¹⁴⁹ Later at the International Meeting to Review the Implementation of the Programme of Action for the

¹³⁹ BPOA paragraph 87.

¹⁴⁰ BPOA paragraph 52 B(vi).

¹⁴¹ BPOA paragraph 52 B(vii).

¹⁴² BPOA paragraph 52 B(xviii).

¹⁴³ BPOA paragraph 52 C(i).

¹⁴⁴ BPOA paragraph 52 C(iv).

¹⁴⁵ BPOA paragraph 52 C(iii).

¹⁴⁶ BPOA paragraph 79.

¹⁴⁷ BPOA paragraph 112.

¹⁴⁸ Ibid.

¹⁴⁹ See for example Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States. (1997). E/CN.17/1997/14.

Sustainable Development of Small Island Developing States, the *Mauritius Declaration*¹⁵⁰ and *Mauritius Strategy* (MSI) were adopted.¹⁵¹ The *Mauritius Declaration* largely reaffirms the *Barbados Declaration*. 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 59/311¹⁵² setting out the role of UN agencies in the implementation of the MSI. It remains to be seen what further progress has been achieved.¹⁵³

The Second International Decade of the World's Indigenous People 2006-2015¹⁵⁴ perhaps also signifies a missed opportunity for a renewed international agenda in this area. The five objectives of the Decade included promoting non-discrimination; promoting the participation of Indigenous people in decision making; redefining development policies that are inequitable or culturally inappropriate; 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. Although under the heading of 'Education' it was recommended that organisations of Indigenous peoples should create 'documentation centres, archives, in situ museums and schools of living traditions concerning indigenous peoples, their cultures, laws, beliefs and values, with material that could be used to inform and educate non-indigenous people on those matters.'¹⁵⁵ Furthermore, under 'Human Rights' there was a recommendation that national governments 'should consider integrating traditional systems of justice into national legislations in conformity

¹⁵⁰ Mauritius Declaration (2005) A/CONF.207/L.6.

¹⁵¹ Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States A/CONF.207/11

¹⁵² http://portal.unesco.org/en/file_download.php/3c928c116bffee3af5a46574bab4edf1UN-Res59_SIDS.pdf

1 September 2009.

¹⁵³ The MSI+5 conference will be held in 2010.

¹⁵⁴ General Assembly Resolution A/RES/59/174

¹⁵⁵ See para 32.

with international human rights law and international standards of justice.’¹⁵⁶ 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 United Nations 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.’¹⁵⁷ However, it is unclear whether this has been done.

VI. ADDRESSING THE CHALLENGES

As can be seen from the above analysis, international law has largely failed to engage with the issue of legal pluralism and the means by which customary law could be reconciled with state-based environmental legislation. There is no doubt that international law has established human rights regimes that facilitate the recognition of Indigenous collective rights. Specific international treaties (such as ILO 169) have also acknowledged the importance of recognising customary law. And particular treaties (such as the CBD) have identified a role for traditional knowledge, practices and laws. But there has been little further international action engaging with what is a significant issue for many states in the South Pacific region.

The question is then why should the international community engage with this issue? Arguably for several reasons. Firstly, many of the dominant states within the international arena are the ones that are responsible for the current legally pluralist situation which arose due to European exploration and colonization. Secondly, many environmental problems remain global with environmental damage often caused by dominant nations and transnational corporations cutting across national boundaries. Thirdly, international law and institutions have been recognised as being able to play powerful initiating and facilitative roles. And finally because in the current globalised world it is

¹⁵⁶ See para 52

¹⁵⁷ See a(6)

necessary to put in place mechanisms to harmonise law and avoid fragmentation wherever possible.

So what is the way forward? Three substantive suggestions are made in relation to areas where international action can be focused upon better addressing the needs of legally pluralist nations. These include a greater role for international agencies, a new research agenda and the scaling up of international programmes.

It is clear that many international institutions are already undertaking important work in assisting Indigenous peoples, SIDS and localised approaches to conservation. However, 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 international level and be considered 'within' rather than outside of the international arena. This would also ensure that Indigenous issues are canvassed and addressed at the time new law and policy is developed and that Indigenous peoples influence the development of emerging international environmental law norms; Indigenous people would also have the opportunity 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, it is clear that there are a multitude of agencies working at the international and regional level. IGOs include UNEP,¹⁵⁸ UNDP, AOSIS and UNESCO. The UN Division for Sustainable Development (DSD) has a number of

¹⁵⁸ Including UNEP SIDS Unit SIDS Unit set up in 1995
http://www.un.org/esa/dsd/dsd_aofw_sids/sids_abouunit.shtml at 1 September 2009

areas of work: University Consortium of Small Island States¹⁵⁹ which works to build the capacity of graduate education institutions; and SIDSNet.¹⁶⁰ It is also clear that a great deal of work has been done to implement the BPOA¹⁶¹ at the regional level.¹⁶² Of particular significance it was also reported that SPREP had commenced 'an assessment of environmental legislation in several Pacific Island countries, in collaboration with UNEP.'¹⁶³

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. Whilst 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 law 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

¹⁵⁹ 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.

¹⁶⁰ 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.

¹⁶¹ 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 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.

See Progress Report on Regional Institutions and Technological Development for the sustainable development of small island developing States (1998) E/CN.17/1998/7/Add.7. Para 3.

¹⁶² ESCAP held a ministerial conference in 1995 on environment and development and in collaboration with SPREP, it developed a mechanism for the effective monitoring of the implementation of the Programme of Action. In addition SPREP developed a new plan for the period 1997-2000 which identified five broad priority areas: biodiversity and natural resource conservation; climate change and integrated coastal management; waste management, pollution prevention and emergencies; environmental management planning and institutional strengthening; and environmental education, information and training.: Ibid paragraphs 6-9.

¹⁶³ Ibid paragraph 18.

Indigenous issues. However, those doing the work on the ground – such as the UNDP – would have important insights into customary law ‘in action’.¹⁶⁴ In terms of the South Pacific region, SPREP clearly has particular South Pacific environmental expertise and already undertakes coordination work.¹⁶⁵ On the other hand it is clear that SIDS in the South Pacific share some common socio-culture, legal and environmental concerns with those, for example, in the Caribbean.

Furthermore, any such institution would be unlikely to have the resources to undertake all the work themselves. Rather the approach could involve building an inter-agency agenda (perhaps on a network basis as we heard mentioned on Monday). An inter agency agenda could, for example, be established through a task force on legal pluralism which could investigate approaches and models for the incorporation of customary law into environmental state-based legislation. If such a role were to be taken on by SPREP it would need to be better resourced and given increased impetus to address the issue of legal pluralism. However, it would also need to have a central body, in order to avoid fragmentation, which can coordinate programmes, share practices and undertake research. Such a body could facilitate exchange of information at international and regional levels and disseminate pooled data.

Another important issue is the composition of any such task force. Whilst the *Declaration of Barbados* recognised the need to strengthen national institutional and administrative capacity¹⁶⁶ it also acknowledged ‘the importance of a partnership between governments, intergovernmental

¹⁶⁴ See for example the UNDP funded Capacity 21 Project.

¹⁶⁵ 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.

¹⁶⁶ Declaration of Barbados Part One, Article V.

organizations and agencies, non-governmental organizations and other major groups.’¹⁶⁷

Two specific areas where such a task force would be advantageous are in the areas of greater research into legal pluralism and environmental regulation; and identification of options for reconciling customary law and state-based legislation and development of model legislative provisions.

A New Research Agenda

As noted above whilst there has been an acknowledgement that ‘customary law and legal pluralism are vital means of protecting’ traditional knowledge¹⁶⁸ there has been a failure to specifically address how they might be utilised in terms of environmental legislation. It is clear that at the international level this was envisaged in the BPOA. But there appears to have been no work done 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. Therefore, much more research needs to be undertaken in this area.

Such research could investigate legal pluralism and environmental law. Similar work has recently been undertaken in relation to legal pluralism and human rights. The International Council on Human Rights Policy has recently undertaken a research project looking at this very issue. The draft report – *Plural Legal Orders and Human Rights* – is an attempt to move towards a human rights framework for plural legal orders¹⁶⁹ by looking at

¹⁶⁷ Declaration of Barbados Part One, Article VII.

¹⁶⁸ ‘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 > at 14 June 2009.

¹⁶⁹ International Council on Human Rights ‘Legal Pluralism and Human Rights’
< <http://www.ichrp.org/en/projects/135?theme=10> > at 14 June 2009. Two draft documents are currently available: The International Council on Human Rights Policy Research Project on Plural Legal Orders and Human Rights, ‘An Approach Paper’, June 2008
< http://www.ichrp.org/files/papers/152/135_approach_paper_2008.pdf > at 14 June 2009; and The International Council on Human Rights ‘Plural Legal Orders and Human Rights’ Consultation Paper May 2009
< http://www.ichrp.org/files/drafts/9/135_draft_en.pdf > at 14 June 2009.

1. Human rights impacts and dilemmas associated with plural legal states;
and
2. Challenges to incorporating human rights in state based legislation

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, but also from a range of disciplines including lawyers, anthropologists, environmental scientists and others. It would need to consider the practical issues which challenge the reconciliation of customary law and environmental regulation including those discussed over the last three days including conflicts between custom and state based legislation; conflict between 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 transboundary harm and common but differentiated responsibilities which could be utilised in drafting international environmental law to further engage with this issue.¹⁷⁰ Furthermore particular legislative provisions and concepts may be relevant – for example, from international freshwater law, conflict provisions such as a community of interests and equitable utilisation may well be transferable from the international to the local level.

Strengthening the implementation of existing Programmes

This leads onto the last issue. Although Agenda 21 engaged with the issue of action to achieve sustainable development, it referred broadly to the issues faced by developing countries. Whilst, the specific difficulties faced by SIDS were identified in the BPOA¹⁷¹ much less appears to have been done in terms

¹⁷⁰ Reference is made to common but differentiated responsibilities in this context in the BPOA Preamble para 14 where reference is made to the special position of SIDS as acknowledged in Agenda 21 chapter 17 section G.

¹⁷¹ Programme of Action for the Sustainable Development of Small Island Developing States A/CONF.167/9, part I, Annex I (1994).

of the development of model provisions. For example, no mention is made in the progress reports and the MSI does not take the matter any further.

However, it is clear that in other areas, legislative mapping tasks have been undertaken. For example, most recently UNESCO has published a report in which reference is made to the mapping of approaches to sustainable development in the South Pacific.¹⁷² UNESCO has undertaken similar work in relation to intangible cultural heritage legislation and national copyright laws.¹⁷³ NGOs have also been involved in related mapping tasks; for example, the IUCN through TILCEPA have produced a survey of legislation supporting Indigenous conserved areas.¹⁷⁴

In terms of the development of model rules, the way forward is less clear as the development of prescriptive rules would not be beneficial. It is necessary for flexibility to be maintained for different states and indeed local communities to choose the approaches that suit their purposes. On the other hand, model provisions in terms of a toolbox of options could be useful. It can be seen that this approach has been taken before in this region. For example the draft Model Law for the protection of traditional knowledge, innovations, products and practices which establishes traditional cultural rights and provides a framework for exploiting traditional knowledge through contract.¹⁷⁵

In summary therefore, 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 then developing a toolbox of model provisions. By moving beyond the BPOA such

¹⁷² UNESCO *Islands in a Sea of Change - UNESCO's Intersectoral Platform for SIDS* (2009)

¹⁷³ See UNESCO www.unesco.org/culture/copyrightlaws at 14 September 2009.

¹⁷⁴ TILCEPA ICCA Regional Reviews, http://www.iucn.org/about/union/commissions/ceesp/topics/governance/icca/regional_reviews/ at 14 September 2009.

¹⁷⁵ Pacific Model Law for the Protection of Traditional Ecological Knowledge, Innovations & Practices (2002), http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf at 14 September 2009.

an initiative would assist independent states as well as external territories experiencing similar challenges associated with legal pluralism.

VI CONCLUSION

The integration of customary laws in environmental legislation poses a number of issues and challenges. But the legally pluralist nations of the South Pacific region should not face this challenge alone. It has been said that legal pluralism is at once a puzzle, an opportunity and a problem in international society¹⁷⁶ and one that must be embraced if international environmental law is to fulfil the goal of addressing global environmental concerns. The 'puzzle' can only be solved by devoting more resources to identifying and dealing with the complexities involved. It is an issue which deserves greater attention and would benefit from global action. International environmental law must reconcile national self interest with broader public goals and common purposes.¹⁷⁷ The key is to maintain flexibility but also to avoid fragmentation of approaches to legal pluralism amongst the post-colonial societies of the South Pacific. An international normative agenda can be a driver for solving the issues involved in the recognition of customary law in environmental regulation. International law could play a much greater standard setting role and provide a 'common normative framework'¹⁷⁸ to guide legally pluralist nations in dealing with this challenge. There has recently been broad consensus within the international community on Indigenous collective rights as articulated in the DRIP and the need to promote the inclusion of Indigenous peoples in decision-making and the design, implementation and evaluation of law and policy, in the Second International Decade of the World's Indigenous People. A firm foundation is needed to assist legally pluralist nations in implementing international law and policy and in particular the ways in which customary law can be reconciled

¹⁷⁶ David Kennedy, "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.

¹⁷⁷ D Hunter, J Salzman and D Zaelke, *International Environmental Law and Policy* (3rd ed, 2007) 273.

¹⁷⁸ La Torre 'Legal Pluralism as Evolutionary Achievement of Community Law' (1999) 12(2) *Ratio Juris* 182-95.

with state based legislation. 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 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 the law in assisting legally pluralist states. But the risk is that if international normative action is not taken, the law in this area will remain fragmented and primarily focused upon human rights. What the international community can do is to become much more fully engaged with the specific issue of environmental law and legal pluralism. It has been said that 'legal pluralism is a doorway'¹⁷⁹ – if so it is one through which the international community needs to step.

¹⁷⁹ Kennedy above n 176, 4.