

UNITED NATIONS CLIMATE CHANGE REGIME: EQUITY OR  
FAIRNESS FOR INDIGENOUS PEOPLE

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İSTANBUL BİLGİ ÜNİVERSİTESİ  
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BİRLEŞMİŞ MİLLETLER İKLİM DEĞİŞİMİ REJİMİ: YERLİ HALKLAR İÇİN  
EŞİTLİK YA DA HAKKANİYET

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- 3) Equity
- 4) Climate change
- 5) Indigenous people

## Özet

Adalet sorununun daha önemli hale geldiği ve iklim değişiminin yıkıcı etkilerinin artış gösterdiği bir dünyada iklim değişimi ve adalet ilişkisinden söz etmek kaçınılmazdır. Kırılgan bir grup olarak yerli halklar ise bu her iki sorunun da öznesidir.

Hem uluslararası insan hakları rejimi hem de iklim değişimi rejimi yerli halkların iklim değişimi ve adalet sorunlarını çözmek için bazı standartlar koymuştur. Ancak şu ikisinden hangisinin adaleti getireceği sorusu vardır: eşitlik ya da hakkaniyet. Arka planda bu soruyu tutarak, Amerikalı liberal düşünür John Rawls'un adalet teorisi bu çalışmaya yön veren teori olacaktır. Adalet teorisinin ışığını kullanarak ve Birleşmiş Milletler iklim değişimi rejimini inceleyerek şu iki soru cevaplanmaya çalışılacaktır: Birleşmiş Milletler iklim değişimi rejiminin arka planı hakkaniyet olarak adaleti içeriyor mu yoksa eşitlik düzeyinde mi kalıyor; bu rejimin bu konudaki hassasiyeti anlaşmalar düzeyinde mi kalıyor yoksa uygulama ve denetleme safhalarında da pratikler içerisinde uygulanıyor mu?

## **Abstract**

In a world where the question of justice has become more important and climate change has increased its catastrophic impacts, it is indispensable to talk about the relationship between climate change and justice. As a vulnerable group, indigenous peoples are subjects of this both of these problems.

Both international human rights regime and climate change regime put some standards for solving climate change and justice problems for indigenous peoples. However, there is a question that which will bring justice: equity or fairness. Around this background question, American liberal philosopher John Rawls' theory of justice will be the leading theory for this study. By using the light theory of justice and trying to analyze United Nations climate change regime, two questions are to be tried to reply: whether the background of equity in United Nations climate change regime includes justice as fairness or whether it remains at the level of equity; whether the mindfulness of these regimes are on the level of agreements and paperwork or whether they are applied in real life practices during implementation and monitoring.

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## ABBREVIATIONS

AIDA	:	Interamerican Association for Environmental Defense
CBD	:	Convention on Biological Diversity
CDM	:	Clean Development Mechanism
CER	:	Certified Emissions Reductions
CIEL	:	Center for International Environment Law
COP	:	Conference of Parties
ECOSOC	:	United Nations Economic and Social Council
IIPFCC	:	International Indigenous Peoples Forum on Climate Change
ILO	:	International Labour Organization
IPCC	:	United Nations International Panel on Climate Change
KP	:	Kyoto Protocol
LDC	:	Least Developed Countries
LDCF	:	Least Developed Countries Fund
MDG	:	Millennium Development Goals
NAPA	:	National Adaptation Programs of Actions
NGO	:	Non-governmental Organization
REDD	:	Reducing Emissions from Deforestation and Forest Degradation
SPFII	:	Secretariat of United Nations Permanent Forum on Indigenous Issues
UN	:	United Nations
UNDRIP	:	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	:	United Nations Framework Convention on Climate Change
UNHCR	:	United Nation High Commissioner for Human Rights
UNPFII	:	United Nations Permanent Forum on Indigenous Issues

WG8j	:	Ad Hoc Open-ended Intersessional Working Group on Article 8j and Related Provisions
WGABS	:	Ad Hoc Open-ended Working Group on Access and Benefit Sharing



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## **I. Introduction**

Climate change is a crucial problem for anyone on the globe, and it needs urgent action. Its impacts are not limited only to the vulnerable societies of the world but to everything in the whole ecological system. When no action is taken, it will be a disaster for the Earth. Such an important issue is not an isolated process, but impacts many other areas of concern and increases their effects. Justice is one of these problems and it has also been a long-standing discussion for years. As there has already been a justice problem among peoples, the impacts of climate change will bring greater burden, especially on vulnerable peoples who live in the global south, the south that exists not only in the developing countries but also in developed countries. Indigenous peoples, with a colonial history, are among these peoples and they might be more vulnerable to these impacts as they are land and resources dependent communities. Another reason for being more vulnerable is that their collective rights are not totally recognized and even the ones that are recognized are not guaranteed or protected enough, getting lost in the global world system. Furthermore, their demand for the right to self-determination is getting negative reactions from states which are firmly tied to national sovereignty. As a result of these, indigenous peoples, are subjects of injustice and climate change discussions.

As climate change does not have borders that it would obey, it is an international problem of which solution lies in the international regime and its implementations in the national level. Some decades ago, the United Nations laid the foundation of the international climate change regime and it has grown over the years, and has developed to include all related problems into the regime. Similar to climate change but quite different, indigenous rights and struggle also opened a place for themselves in the international human rights regime and struggled for more collaborative actions for the rights of indigenous peoples among UN bodies. One of the intersecting lines of these two regimes is the issue



of justice. As the justice problem has become more fragile in the context of climate change and indigenous peoples rights, it is more important to seek for a solution to the problem for true recognition, implementation and monitoring of rights in terms of justice.

The question of justice has its roots in question of equity and fairness. Mostly, equal distribution and equity of peoples are discussed around the justice question. However it is not exactly thought whether the equity is just enough or not. It is not every equal distribution or regulation is just; the distribution or the regulations should be done according to the needs of peoples. Adopting such a perspective, favors fairness rather than equity. As people are not equal by birth under all conditions, especially in our global world, they have different needs to meet. There is inequity in all areas of the life from access to food to participation in decision-making processes. In such a world, equal distribution will not be fair for people. Therefore distribution of inequities could help for a fairer world.

American liberal political philosopher John Rawls's important books *A Theory of Justice* and *The Law of Peoples* are chosen to discuss the equity and fairness in a liberal world order<sup>1</sup>. Rawls introduces and develops a theory of "justice as fairness" and extends this theory to the international relations arena. His two principles of justice establish a framework for justice as fairness in which persons have equal rights, economic inequalities are distributed to everyone's advantage, and all positions and offices are open to everyone. This vision of society expands to international relations of peoples who are not aggressive for economic growth and land expansion in the light of traditional and familiar principles of justice. Even though *The Law of Peoples* is the work he discusses

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<sup>1</sup> For Further reading:

Ed. Samuel Freeman. *John Rawls Collected Papers*. Harvard University Press. 2001.  
Lovett, Frank. *Rawls's A Theory of Justice A Reader's Guide*. Continuum International Publishing Group. 2011.

understanding and enlightening international relations with a perspective of justice as fairness, international regimes also should be structured by taking principles of justice of A Theory of Justice into consideration.

Taking all these into consideration, there will be a discussion around the United Nations human rights regime for indigenous peoples and the United Nations climate change regime regarding the rights of indigenous peoples. These regimes are mindful about the equity problems where the general construction of regimes is concerned, and they also seem to take these into consideration in processes of implementation and monitoring. The questions which are waiting to be answered, or at least to be discussed are: whether the background of equity in United Nations regimes includes justice as fairness or whether it remains at the level of equity; whether the mindfulness of these regimes are on the level of agreements and paperwork or whether they are applied in real life practices during implementation and monitoring.

## **II. Justice and Fairness as a Base for All**

Justice has been an important topic for years for people, regimes and law. While people struggle for justice for themselves, regimes has been constructed against or for justice, this relationship within the whole system has been regulated by law. Even though the struggles have been going on for years and there have been gains and losses, it is clear that we still have a justice problem all around the world, in all sections of our lives. Starting from unjust distribution of food to access to clean water, unjust distribution of wealth is making the injustice even bigger every moment.

In a world which is already designed and working in its unjust system, it is not enough to create equity; we also need to create fairness for all people as every human being was born into different life conditions. Therefore, it is important to note in justice discussion that justice is not only about equity but it is also about fairness. While talking about fairness, it is meant a distribution that is

not only equal but also need-based in a world where people from different places have different needs and necessities at least to survive in the established system. Another important thing to note down is that borders of injustice and unfairness problem is not limited to our generation but it is an intergenerational problem as all decisions we make now will affect the future generations. Thinking that we are not responsible only for ourselves but also for next generations is an important thing and heavy burden on our shoulders and another ethical question to be raised.

In today's world, people who live in global south are the victims of most severe inequity, injustice and unfairness. Injustice is not limited to people living in Kenya, in Bangladesh, in Amazon forests, but includes minorities in US, Māori people in New Zealand, other minorities and indigenous peoples and etc. As the problem is international or not limited to one country or population, the solution to the problem also should be put forward in international context where our ways are crossed with international law. International organizations are supposed to give a solution for the problem.

When it is time to look at the situation in which people live, the most powerful mechanism of rights of people is the international regime. In a world all these international regimes positioned according to liberal policies, to choose a liberal perspective glasses for analyzing international regime would give us more discrete and clear picture of the situation. This perspective is not the only true way to analyze the problems and suggest solutions, there is more than one way, but it is an analysis experience and intervention to system within the system. In this experience John Rawls will be the guide to analyze our topic. I will not go into details of argument and write a critique or elaborate on its critics but I will try to grasp the essence of the theory which could be carried out within my study, there are a lot of criticism on his theory of justice and ideas on law of peoples though.

### **A- Rawls's A Theory of Justice**

Taking all these into consideration, as the focus of my study is climate justice and indigenous peoples in a liberal system, John Rawls' theory of justice as fairness, which is for a liberal society, is the best fitted theory for my dissertation. American political philosopher John Rawls discusses a just liberal society in his theory of 'justice as fairness' and extends his theory to international relations area with the idea of 'law of peoples' combining justice as fairness his thoughts of political liberalism. His three important books, A Theory of Justice (1971), Political Liberalism (1993) and Law of Peoples (1999), show the evolution of his theory of justice as fairness.

In Rawls's justice as fairness the scheme of the social structure is important and the primary subject of principles of social justice is the basic structure of society<sup>2</sup>. Envisagement of justice as fairness for major political and social institutions of which arrangement construct the basic structure of the society is a just arrangement. This structure depends on "how fundamental rights and duties are assigned and the economic opportunities and social conditions in the various sectors of society"<sup>3</sup>. In this society, citizens are free and equal and society should be a fair system of cooperation. While the distribution of fundamental rights in this liberal society is to be equal, there is one justification for unequal distribution which is inequality will be an advantage for the least favored of the society. Structure of the society from constitution to application of rules should be designed for the advantage of the least favor of the society. The representative table below explains the attitude of Rawls on justice as fairness<sup>4</sup>:

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<sup>2</sup> John Rawls. A Theory of Justice. Original Edition, Harvard University Press. 2005 p. 54.

<sup>3</sup> Ibid p. 7.

<sup>4</sup> Leif Wenar. The Stanford Encyclopedia of Philosophy. Accessed May 11, 2014. <http://plato.stanford.edu/archives/win2013/entries/rawls/>. 2013

Economy	Least-Advantaged Group	Middle Group	Most-Advantaged Group
A	10,000	10,000	10,000
B	12,000	30,000	80,000
C	30,000	90,000	150,000
D	20,000	100,000	500,000

**Figure 1: Rawls Justice as Fairness Representation**

For example, when we take the numbers as the distribution of income in a society, C is the preferred distribution as the least advantaged group gets the highest possible when it is compared with other distributions.

As the basic structure is established by the people, it is hard to assume that people who already live in prosperity would accept ‘justice as fairness’ as their share would lessen in this case. This is why Rawls starts to construct his theory in the “original position” where people are behind the “veil of ignorance”<sup>5</sup> where they do not have the knowledge about “race, ethnicity, gender, age, income, wealth, natural endowments, comprehensive doctrine, etc. of any of the citizens in society, or to which generation in the history of the society these citizens belong and also the political system of the society, its class structure, economic system, or level of economic development”. Hence, parties “do not know how the various alternatives will affect their own particular case and they are obliged to evaluate solely on the basis of general considerations”<sup>6</sup>. What they know is that “citizens are different with different interests but all interested in more primary goods, that there is enough resources around but not as many as

<sup>5</sup> Rawls, A Theory of Justice p. 60.

<sup>6</sup> Ibid. pp. 136-137

everyone want to have and also some information about social life, facts of common sense and some uncontroversial scientific knowledge”<sup>7</sup>. As people have limited information about themselves and others, they are in the similar positions and equally rational. People are aware that they could be another people’s shoes, so the choices in the name of justice will be on the ground of the idea that ‘I can be the worst off’. They cannot take advantage of their situation; hence the principles of justice are the result of a fair agreement.

To apply the principles of justice coming out of this process, Rawls suggests a four stage sequence<sup>8</sup>. The very first stage is the adoption of principles of justice in the original position. In the second stage, parties prepare a constitution realizing the two principle of justice with the given information about society’s political culture and economic development. Third stage is where the parties agree to laws and policies within the framework of decided constitution. At the fourth and last stage parties have full information about society and the application of rules to particular cases are done by judges and administrators. When four stages are complete, it gives a full and clear picture of the society's political situation.

Justice as fairness, which is the subject of this four stage sequence, raises on two principles of justice which are intended to guide the design of major social institutions and practices which constitute the basic structure of the society<sup>9</sup>.

“First Principle: each person is to have an equal right to the most extensive basic liberty<sup>10</sup> compatible with a similar liberty for others.

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<sup>7</sup> Wenar.

<sup>8</sup> Rawls, A Theory of Justice pp 196-200

<sup>9</sup> Ibid. p. 60.

<sup>10</sup> Basic liberties that Rawls states are ‘political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law’. Ibid. p. 61.

Second Principle: social and economic inequalities are to be arranged so that they are both a) reasonably expected to be to everyone's advantage and b) attached to positions and offices open to all.”

First principle of justice corresponds to the second stage of four stage sequence where the parties agree on the political constitution. It is supposed to secure all citizens have the same basic liberties in a just society. This principle is also known as ‘equity principle’. Second principle basically regulates the economic institutions and it is divided into two parts that are named as ‘difference principle’ and ‘fair equality of opportunity’ principle. Second principle is realized in third stage of four stage sequence where the parties agree to laws and policies within the framework of decided constitution.

As the first principle is about the forming a political constitution and constitution is the fundamental for all branches, first principle has priority over the second principle which is related with economic institutions. These principles are to be arranged in a serial order with the principle prior to the second<sup>11</sup>. Another way to put this priority is that “a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages”<sup>12</sup>. When wealth and income are distributed, the distribution has to be consistent with the liberties of equal citizenship and equality of opportunity<sup>13</sup>. While this first priority rule is called ‘The Priority of Liberty’, there is Second Priority Rule which puts fair opportunity in front of difference principle. Those principles manage the inequalities but not the equalities in line with the idea that inequalities are not always unjust.

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<sup>11</sup> Wenar.

<sup>12</sup> Rawls, A Theory of Justice p. 61

<sup>13</sup> Ibid. p. 61.

## B- The Law of Peoples

As climate justice which is the base for the questions of the dissertation is an international problem, a shift from justice as fairness in a society to an international perspective will be better to draw the international frame of the justice as fairness theory. Rawls discusses the international dimension of his theory in his book *The Law of Peoples*.

Rawls claims that after World War II, international law has become stricter. As the role of human rights became more important, governments' national sovereignty were also limited. In such an environment, Rawls extends his theory of justice to international relations ground where the subjects are peoples but not individuals like in internal society relations. Rawls defines peoples as "a group of individuals ruled by a common government, bound together by common sympathies, and firmly attached to a common conception of right and justice"<sup>14</sup>.

The conception of *The Law of Peoples* is similar to conception of *A Theory of Justice*. Similar to liberal societies, liberal peoples are free and politically independent for their decisions. They are recognized as equal and respected. Similar to justice as fairness, representatives of the peoples decide the basic structure and principles of the international structure and relations in the original position but this time in an international original position. The international original position gives answer to "What terms of cooperation would free and equal peoples (liberal and decent<sup>15</sup>) agree to under fair conditions?"<sup>16</sup>

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<sup>14</sup> John Rawls. *The Law of Peoples with "the Idea of Public Reason Revisited"*. Cambridge: Harvard University Press. 2002

<sup>15</sup> Cited from Wenar.

*Liberal peoples* satisfy the requirements of political liberalism: they have legitimate liberal constitutions, with governments that are under popular control and not driven by large concentration of private economic power.

*Decent peoples* are not internally just from a liberal perspective, since their basic institutions do not recognize reasonable pluralism or realize the liberal ideas of free and equal citizens cooperating fairly. The institutions of a decent society may be organized around a single comprehensive doctrine, such as a dominant religion. The political system may not be democratic,



Rawls chooses peoples but not states for international justice as fairness as peoples are not aggressive and eager to expand their territories and increase their economic interests. Also reasonable peoples are unwilling to try to impose their political or social ideals on other reasonable peoples. Their motivations are<sup>17</sup>:

- to protect their territory
- ensure security and safety of their citizens
- preserve their free political institutions and liberties and free culture of their civil society.

There are also principles defined by John Rawls which are familiar and traditional principles of justice among free and democratic peoples<sup>18</sup>:

- Peoples are free and independent, and their freedom and independence are to be respected by other peoples
- Peoples are to observe treaties and undertakings
- Peoples are equal and are parties to the agreements that bind them.
- Peoples are to observe a duty of non-intervention.
- Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
- Peoples are to honor human rights.
- Peoples are to observe certain specified restrictions in the conduct of war.
- Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.

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and women or members of minority religions may be excluded from public office. Nevertheless decent peoples are well-ordered enough, Rawls says, to merit equal membership in international society.

<sup>16</sup> Rawls. The Law of Peoples with "the Idea of Public Reason Revisited"

<sup>17</sup> Ibid.

<sup>18</sup> Ibid. p. 137

Rawls divides societies into different categories; outlaw states, decent or liberal societies and burdened societies. Outlaw states are out of our concern for the questions of the dissertation while decent societies and burdened societies are going to be taken into consideration for finding answers to my questions. In Rawls's theory of law of peoples, the aim is to make each people to reach the level of well-ordered society which have just, or at least decent domestic political institutions. Under his classification, burden societies struggle with social and economic conditions that make it difficult to maintain either liberal or decent institutions. A burdened society is not simply a poor society, but its defective "political traditions, law, and property and class structure with their underlying religious and moral beliefs and culture"<sup>19</sup> could be another kind of poverty for them or "they may lack sufficient material or social resources to support a scheme of social cooperation, perhaps having allowed population growth beyond their territory's current means"<sup>20</sup>.

On the contrary to Rawls's view about the root of this problem that "the problem is commonly the nature of the public political culture and great social evils in poorer societies are likely to be oppressive government and corrupt elites, which do not serve the interests of people and contribute to their poverty"<sup>21</sup>, Thomas Pogge thinks different about the topic. He believes that

"In a world with large international inequalities, the domestic institutions of the poorer societies are vulnerable to being corrupted by powerful political and economic interests abroad. This is something we see all around us: politicians and business people from rich nations self-servingly manipulating and interfering with the internal political, judicial and economic processes of third world societies."<sup>22</sup>

Principles of justice among free and democratic peoples give a duty to well-ordered peoples to assist burdened societies who try to overcome

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<sup>19</sup> Ibid. pp. 5-90-106.

<sup>20</sup> Wenar

<sup>21</sup> Thomas Pogge. "An Egalitarian Law of Peoples." *Philosophy and Public Affairs* 23. 1994 pp 195-224.

<sup>22</sup> Ibid.

unfavorable conditions in their societies. When duty of assistance of well-ordered peoples have achieved, burden societies will have the chance to overcome these unfavorable conditions, to rise to well-ordered peoples' society and also basically to meet their basic needs in their society.

After this brief discussion on John Rawls's theory, international human rights and climate change regimes regarding indigenous peoples and justice as fairness issue will be discussed in the coming sections.

### **III. Indigenous Peoples and United Nations Human Rights Regime**

With their own way of life, cultures, spiritual rituals, indigenous peoples live in a world that the 'northern' world has not disturbed totally yet. However, indigenous peoples' populations and their way of life and living areas are under threat of destruction and assimilation by 'northern world's ambitious development goals and economic interests. Throughout the history, indigenous peoples and communities have suffered from colonization from Americas to Asia. Today this active land invasion has turned something different than land invasion. Indigenous peoples now face with the consequences of capitalist policies of global north from human rights abuses, cultural and social oppression to environmental degradation. As the years have created a big gap of injustice, their access to justice and fairness is also affected heavily as a result of these policies.

However, indigenous peoples are not passive members of this world system, they strive to participate in decision making mechanisms which draw the way of the world system and to be seen as a subject of this system just like the other industrialized countries and wealth holders. They are aware that this issue is justice issue as well and they work for just and fair world for them, too.

## **A- Short History of Indigenous Justice and Fairness Struggle**

### **1- Short History**

“As far back as 1821, the original plan for the Guatemalan nation devised by the architects of independence suggested the necessity of eliminating racial and ethnic differences to make the country viable or feasible; later orthodox Marxism-Leninism demanded that ethnic dissent be minimized or ignored in order to make the revolution or class struggle viable or feasible; then the liberal philosophy taught that progress and material development could only be achieved through a mestizo or ladino culture (according to the liberals, in order to lift the indigenous people out of poverty, one first had to lift them out of the culture and language: “the Indian has to be killed to be saved”; or to put it another way, one had to take the Indian out of the Indian, i.e., to save the indigenous people from poverty their ethnic identity had to be wiped out.)”<sup>23</sup>

Demetrio Cojti Cuxil  
Maya Leader, 1996

Maya Leader Demetrio’s words give a summary for indigenous struggle on the Earth. They opened an area for themselves in the international human rights regime. It is possible to say that the history of colonization is the history of ruining indigenous peoples’ identities and cultures. Under colonization, these ‘barbaric, primitive’ people were ‘civilized’ by modern, civilized colonizers. Their economic, social, cultural and spiritual systems were destroyed by the colonizers who were (still are) hungry for more natural resources, more raw material for industry. After colonization, modern nation states served nothing different but reiterated these attempts to control over indigenous territories to centralize the power of nation state<sup>24</sup>. Globalization put more burdens on indigenous peoples as the oppression and plunder became global. Namely, names

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<sup>23</sup> Victoria Tauli-Corpuz. "Indigenous Peoples' Self-Determined Development: Challenges and Trajectories." In *Towards an Alternative Development Paradigm: Indigenous Peoples' Self-Determined Development*. Eds. Leah Enkiwe-Abayao, Raymond de Chavez, Victoria Tauli-Corpuz. Baguio City, Philippines: Valley Printing Specialist. 2010 pp 1-79

<sup>24</sup> Tauli-Corpuz. "Indigenous Peoples' Self-Determined Development: Challenges and Trajectories." In *Towards an Alternative Development Paradigm: Indigenous Peoples' Self-Determined Development*

of systems kept changing but the essence of oppression stayed same. While thousands of people were displaced during 1950s and 1960s because of construction of hydro power plants/dams in Philippines, Bangladesh<sup>25</sup>, the situation still has not changed as we see the examples from India, Amazon forests and etc. in our times.

Moreover, there are also legal outcomes of the oppression through years. The international or domestic legal systems are developed totally out of indigenous context. Rules of the globalized world did not count indigenous peoples and their customs as players. Therefore, even these peoples are able to live on their own territory according to their social, cultural economic, spiritual way; in any case of violation or abuse, they could not search for their rights as there is no such recognized right.

Indigenous peoples' struggle for rights and justice against policies stated above first started locally for land and resource protection. They demand to live within their own territories, speaking their own language, maintaining their cultural/traditional activities and practicing their own religion together with other people living modern system in nation states. These local struggles spread around the world and to the international arena. The very first step of indigenous peoples into international regime was that Iroquois Confederacy Council speaker Chief Deskaheh tried to make League of Nations address the dispute between Iroquois and Canada in 1923<sup>26</sup>. After long years of struggle, United Nations recognized the rights of indigenous peoples<sup>27</sup> and now there is an international indigenous peoples' regime under United Nations (UN) human rights regime.

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<sup>25</sup> Ibid.

<sup>26</sup> Tauli-Corpuz. "Indigenous Peoples' Self-Determined Development: Challenges and Trajectories." In *Towards an Alternative Development Paradigm: Indigenous Peoples' Self-Determined Development*

<sup>27</sup> There are conflicts around these rights both among indigenous peoples and also between states and indigenous peoples, but at least there is a ground to discuss and negotiate.

Recognition and involvement in its full meaning started in 1957 with the adoption of Convention No. 107 concerning Indigenous and Tribal Populations by International Labor Organization (ILO)<sup>28</sup>. Afterwards with the push of increasing civil rights movement and indigenous rights movement, UN took the indigenous issues in its agenda in early 1970s. These movements created awareness about the systematic violations of human rights against indigenous peoples' rights and importance of creating a system for protection of indigenous peoples' rights as they have special needs. The launch of first report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities by José R. Martínez-Cobo<sup>29</sup> in 1972 and establishment of Working Group on Indigenous Populations in 1982 were important steps by UN. Then, ILO adopted Convention No. 169 concerning Indigenous and Tribal Peoples in Independent States by revising Convention No. 107 which was accused of being assimilationist.

The most critical milestone for indigenous issues was the establishment of the United Nations Permanent Forum on Indigenous Issues (UNPFII) as an advisory body to Economic and Social Council (ECOSOC) in 2000. It is also important to note that

'2005 World Summit on the implementation of the Millennium Declaration reaffirmed its commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them.'<sup>30</sup>

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<sup>28</sup> International Labour Organization. "C107 Indigenous and Tribal Populations Convention." [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312252](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312252) . 1957

<sup>29</sup> José R. Martínez Cobo. Study of the Problem of Discrimination Against Indigenous Populations. United Nations. <http://undesadspd.org/IndigenousPeoples/LibraryDocuments/Mart%C3%ADnezCoboStudy.aspx>. 1981

<sup>30</sup> Secretariat of the United Nations Permanent Forum on Indigenous Issues/DSPD/DESA. Resource Kit on Indigenous Peoples' Issues. New York: United Nations. 2008

In 2007, the main legally binding document for indigenous peoples' rights, Declaration on the Rights of Indigenous Peoples (UNDRIP) were adopted. It is a guide for member states' national policies to collective rights of indigenous peoples.

## **2- Definition or Identification**

Definitions help us to define parties of conventions/agreements and draw lines around the area of action, but sometimes to draw the defined side out of the game, sometimes put them in bold lines where they cannot move. In case of indigenous peoples, international regime accepts such a conception of indigenous peoples: "particularly vulnerable to exploitation, marginalization and oppression by nation states that may still be formed from the colonizing populations, or by politically dominant ethnic groups"<sup>31</sup> within the country or across borders. Although we can create a conception basically looking back in the history, it is hard to create a definition for 370 million individuals, representing more than 5,000 distinct peoples living in more than 70 countries<sup>32</sup> without being offensive, non-inclusive, totally wrong or not accepted by the indigenous peoples' themselves.

However, there have been efforts to create some definitions starting with José R. Martínez-Cobo's, Special Rapporteur on Discrimination against Indigenous Populations, study:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the

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<sup>31</sup> United Nations Permanent Forum on Indigenous Issues, "Indigenous Peoples Indigenous Voices Fact Sheet". [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

<sup>32</sup> UN. Resource Kit on Indigenous Peoples' Issues.

basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”<sup>33</sup>

There were controversies among countries to have a definition or not as they thought that not to have a definition will create a problem for international law as because it will create openness for everyone who defines themselves as indigenous. On the other hand, it would be exclusive to have definition as Cree Nation leader stated “Efforts to define who or what indigenous peoples are seen as further attempts to dispossess and take away our inherent right to be. Indeed to assume a right to define indigenous peoples is to further deny our right to self-determination.”<sup>34</sup> As a result of this difficulty, UNPFII created a conception instead of definition for indigenous peoples including<sup>35</sup>:

- Self- identification as indigenous peoples at the individual level and accepted by the community as their member.
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

Supporting the created conception, the idea of being as inclusive as possible and self-identification, UNDRIP reflected this supportive attitude in article 33 of the Declaration:

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<sup>33</sup> Study of the Problem of Discrimination Against Indigenous Populations by José R. Martínez Cobo Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities

<sup>34</sup> Jérémie Gilbert. "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples." *International Journal on Minority and Group Rights*. 2007 pp 207-230.

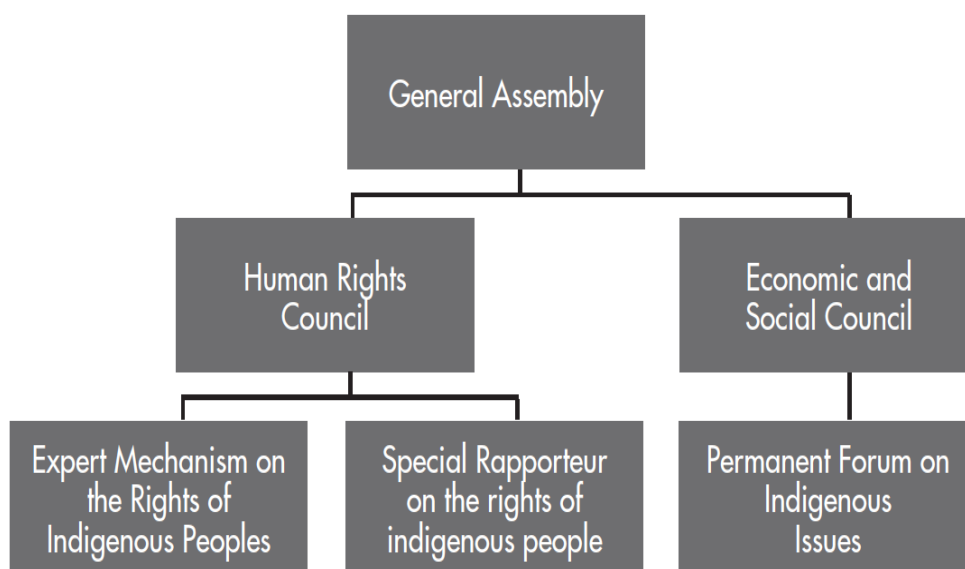
<sup>35</sup> *Indigenous Peoples and the United Nations Human Rights Regime*. United Nations Human Rights Office of the High Commissioner, New York and Geneva: United Nations. <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>. 2013.



1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

### **B- United Nations Bodies and Indigenous Peoples' Issues**

United Nations bodies are established under UN Charter or treaties. The focus of the study will be charter based bodies which are shown in the figure below:



**Figure 2: Bodies under the UN Charter and run by Office of the High Commissioner for Human Rights**

Firstly, Human Rights Council<sup>36</sup> focuses on indigenous peoples' issues via Special Rapporteur and Expert Mechanism missions. Indigenous organizations and communities are ensured to speak on agenda items of the

<sup>36</sup> UN. Indigenous Peoples and the United Nations Human Rights Regime. United Nations Human Rights Office of the High Commissioner, New York and Geneva: United Nations. <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>. 2013.

Council. They also may participate in informal negotiations on the text of annual Human Rights Council's resolution. Five experts from world's five geopolitical regions on rights of indigenous peoples, also a special rapporteur works on indigenous peoples' rights issues and can receive communications on allegations of specific human rights concerns. UN charter based mechanisms universal periodic review and complaint mechanism are also tools of the regime for indigenous issues.

One important mechanism to make the participation of indigenous peoples in the processes easier is Voluntary Fund for indigenous issues and it was established in 1985. It created finance for the participation of representatives of indigenous communities and organizations in deliberations of the Working Group on Indigenous Populations. After the establishment of the UNPFII, General Assembly decided that the Fund should also be used to assist representatives of indigenous communities and organizations to attend the sessions of the UNPFII as observers. Afterwards, mandate of the Fund also expanded to Expert Mechanism and Human Rights Council and treaty bodies' meetings<sup>37</sup>. The Fund is funded by means of voluntary contributions from governments, non-governmental organizations and other private or public entities. Voluntary Fund is a useful and supportive mechanism, but criteria that apply to selection and participation have high standards for indigenous communities. These criteria could lead to inappropriate selection of governmental people of states instead of indigenous representatives. It is better to establish local empowerment points for indigenous peoples who want to be a part of these mechanisms.

Another mechanism under UN Charter is Decades of World's Indigenous Peoples. After First Decade of the World's Indigenous People between 1994-2003, aiming to strengthen international cooperation for the solution of problems faced by indigenous people in areas like culture, education, health, human rights, the environment and social and economic development, by means of action-

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<sup>37</sup> Status of the United Nations Voluntary Fund for Indigenous Populations, A/67/221. 2/08/2012

oriented program and specific projects, increased technical assistance and relevant standard-setting activities. Establishment of the UNPFII happened during the first decade. The Second Decade started in 2005. It has five objectives for the empowerment of indigenous peoples. Those are the promotion of non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programs and projects; the promotion of the full and effective participation of indigenous peoples in decisions which directly or indirectly affect them; the redefinition of development policies that depart from a vision of equity and that are culturally appropriate; adoption of targeted policies, programs, projects and budgets for the development of indigenous peoples; and development of strong monitoring mechanisms and enhancing accountability for the protection of indigenous peoples and the improvement of their lives<sup>38</sup>. These objectives took us to the adoption of UNDRIP.

### **1- United Nations Permanent Forum on Indigenous Issues**

UN has been trying to improve the relationship between states and indigenous peoples. As one of the important step, UNPFII was established in 2000 as an advisory body to the ECOSOC with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights<sup>39</sup>. UNPFII will;

- provide expert advice and recommendations on indigenous issues to the Human Rights Council, as well as to programs, funds and agencies of the United Nations, through the Council
- raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system

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<sup>38</sup> United Nations Development Group. Guidelines on Indigenous Peoples' Issues . New York and Geneva: United Nations. 2009

<sup>39</sup> United Nations Permanent Forum on Indigenous Issues. <http://undesadspd.org/IndigenousPeoples/AboutUsMembers.aspx>.

- prepare and disseminate information on indigenous issues<sup>40</sup>

The UNPFII holds annual two-week sessions in New York. Indigenous peoples can make oral or written interventions during these sessions. They also can contribute directly via members of the UNPFII. UNPFII defines seven indigenous regions: Africa, Asia, Central and South America and the Caribbean, Arctic, Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia, North America and Pacific.

## **2- The United Nations Declaration on the Rights of Indigenous Peoples**

After seven years of the establishment of UNPFII, UN General Assembly adopted The UNDRIP on 13 September 2007 with 143 state votes in favor, 11 abstentions and 4 votes against (USA, Canada, Australia and New Zealand). Although UN has different documents including rights of indigenous peoples, UNDRIP is a tool which can create a systematic approach to rights of indigenous people and can be a basic step to empower and support their rights.

Even though it is not a legally binding document as it is declaration, it puts standards that are to be followed in in the spirit of partnership and mutual respect. The Declaration gives a voice to “equality, concern with the impact of colonization and dispossession on indigenous peoples, and recognition of indigenous peoples’ inherent, treaty and cultural rights”<sup>41</sup>. Very high number of countries voted ‘yes’ for the Declaration (143 countries), only 4 countries said no to the Declaration<sup>42</sup>. These countries are Unites States of America, Canada, Australia and New Zealand. It is possible to say that these countries are where the indigenous communities live in developed countries. They also have similar

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<sup>40</sup> Ibid.

<sup>41</sup> Claire Charters. "The rights of indigenous peoples, Claire Charters, Victoria University of Wellington discusses the Declaration and responds to New Zealand's objections." New Zealand Law Journal. 2006 pp 335-337.

<sup>42</sup> United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, voting rates. A/RES/61/295.

colonial histories. Their argument against the UNDRIP is that the autonomy which the UNDRIP provided to indigenous peoples is a threat to state sovereignty, especially when the subject is land disputes and natural resource extraction<sup>43</sup>.

### **3- ILO Mechanisms for Indigenous Peoples' Rights**

ILO monitor mechanisms are the very first international steps for indigenous people. ILO bodies for Conventions No. 107 and No. 169 follow the process of state reports and complaints from states or other delegates. These set a separate and important mechanism for indigenous peoples, but Convention No. 107 was criticized for being assimilationist<sup>44</sup> (because it adopts integration and inclusion of indigenous peoples rather than self-determination) and Convention number 169 has been ratified by 20 countries so far. Even though it is the very first binding document and tool for the recognition of indigenous peoples' rights, it is not successful creating a powerful international regime in terms of ratified countries.

### **C- Key Issues Regarding Indigenous Peoples**

Indigenous peoples have distinctive features when they are compared with industrialized, so called developed countries. As indigenous peoples are land dependent communities, their economic, social, cultural and spiritual system are shaped accordingly. For example, while these lands are source of food for them, it is also source of wisdom for old people. Their tie with the environment is an intrinsic one rather than the demand-supply relation of the industrialized communities. Therefore, impacts of climate change and discussions around climate justice have a critical importance for indigenous people.

For the justice and fairness discussion around climate justice and indigenous peoples, there are basic rights that we need to take for granted. Very

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<sup>43</sup> UN Declaration on the Rights of Indigenous Peoples. A/61/L.67 and Add.1.

<sup>44</sup> Gilbert. Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples.

first of these rights is collective rights of indigenous peoples. Collective rights are the rights of organizations and peoples who live together, bound to the communal life practices and have roots in the history of these organizations and peoples. These rights are meaningless without the existence of other members of the organization or peoples<sup>45</sup>. Different from individual rights and groups rights, organizations or communities fighting for collective rights have a continuous feature as they do not end. Because, these groups are the constant victims of state policies and look for survival and development.

In this study on indigenous peoples' collective rights is a key issue for indigenous peoples as collective rights key for the protection of cultural diversity and the ways of living of indigenous peoples. They are groups who have ancestral ties with their lands and cultural and spiritual traditions. The very first thing that they ask for is to get their rights as a whole group. This is the reason why they ask to get access to social welfare system, but also ask for their cultural and spiritual traditions<sup>46</sup>.

When the wording comes to the traditional human rights regime, it was constructed on "the vulnerability of individuals"<sup>47</sup> and aims at protecting rights of individuals against the state who abuses or violates these rights. States perceive collective rights as a threat to state sovereignty as collective rights provide autonomy especially with right to self-determination. They also advocate that collective rights conflict with individual rights as they "can be and often is construed to limit the exercise of that right (since only a group can invoke it), and thus may open the door to the denial of the right to the individual"<sup>48</sup>. One thing to note here down is that even though individuals perform independently in their

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<sup>45</sup> Douglas Sanders. "Collective Rights." *Human Rights Quarterly* (The John Hopkins University Press). 1991 pp 368-386.

<sup>46</sup> Dieter Kugelmann. "The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity." *Max Planck Yearbook of United Nations Law*. 2007 pp 233-263.

<sup>47</sup> Siegfried Wiessner. "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges." *The European Journal of International Law*. 2011

<sup>48</sup> Quotation taken from Alexandra Xanthaki. *Collective rights: the case of indigenous peoples*. *Amicus Curias* 25. 2000 p. 7

life, they also affected by the communities where they are born in and live in<sup>49</sup>. As related to this fact, it is important to recognize collective rights for self-realization of individuals.

International regime is not consistent with the traditional perspective. It has broader scope which recognizes sub-national groups as entities like minorities and indigenous peoples in our case. Just like vulnerability of individuals, vulnerability of groups is recognized and understood the need for protection<sup>50</sup>. As an international agreement dependent upon international law, UNDRIP includes collective rights. In preamble, it recognizes and reaffirms that “that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples”<sup>51</sup>. It is also stated together with individual rights in article 40 for effective remedies in case of conflicts and disputes. This is a very good and important step as it is the main document for the rights of indigenous peoples. As collective rights are included in UNDRIP, implementation of all kinds of projects and reports have to take into consideration collective rights of indigenous peoples. All the coming issues are directly related with recognition of collective rights as this is a basic need for indigenous peoples whose economic, social, cultural and spiritual systems are directly shaped around collectivity.

Looking from climate change and climate justice perspective there are two important rights which are critically important. The first is the right to self-determination which is a controversial issue in sovereign states world but highly critical as it is directly related to participation in decision making procedures and right to lands, territories and natural resources. The other one is right to development which is directly related to climate change if we think that it is the result of fierce development and growth politics.

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<sup>49</sup> Xanthaki p. 8

<sup>50</sup> Wiessner. *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*.

<sup>51</sup> UN, A/61/L.67, Add.1

### **1- The right to self-determination**

Starting with the following years of World War I, right to self-determination discussions started and made itself accepted in international law. UN Charter embodied right to self-determination in its first article and it is also recognized by twin covenants (The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) in their first article. By definition it is basically “that human beings, individually and as groups, are equally entitled to be in control of their own destinies and to live within governing institutional orders that are devised accordingly”<sup>52</sup>. Right to self-determination is crucial as it is also a symbol for transition from assimilation to recognition of identity, as integrationist policies were trying to make peoples lose their own identity. Besides other international agreements recognizing right to self-determination, indigenous peoples right to self-determination is recognized and ensured in UNDRIP. Article 3 of the Declaration clearly states:

“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>53</sup>

However, the recognition process was not easy for indigenous peoples and the supporters of right to self-determination. During the negotiations Australia, New Zealand and U.S put reservations against the right to self-determination by stating it “could be misrepresented as conferring a unilateral right to self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the

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<sup>52</sup> S. James Anaya. "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era." In *Making the Declaration Work United Nations Declaration on Rights of Indigenous Peoples*, Eds. Claire Charters, Rodolfo Stavenhagen Charters, Denmark: IWGIA. 2009 pp 184-200.

<sup>53</sup> UN, A/61/L.67, Add.1



stability of existing UN member states”<sup>54</sup>. However, it is clear in the agreements that right to self-determination does not mean any threat to territory integrity of the states.

Right to self-determination is crucial for indigenous peoples because they are dependent on their lands, territories and natural resources as their economic, social, cultural and spiritual systems are closely related with all these. They have created a life depending on land, territories and natural resources on which the colonial, industrial and capitalist age were constructed, but this construction is different than indigenous way as it is on destruction and wiping out. Taking these into consideration, “this is why protection of their collective right to lands, territories and natural resources has always been a key demand of the international indigenous peoples’ movement and of indigenous peoples and organizations everywhere and this is why it is an issue that must be given priority when dealing with indigenous people<sup>55</sup>”.

As indigenous lands, territories and resources are important not only for peoples’ themselves but for the international actors from states to corporations, an international regime for the recognition of the right, protection and monitoring are highly crucial. When we get into the reality of international regime, ILO Convention No. 169 (article 14) recognizes the right of indigenous peoples to own and control their lands and, to differing degrees, their right to own, use and manage the natural resources on those lands<sup>56</sup>. While UNDRIP states the concern about the colonization and dispossession of lands, territories and natural resources of indigenous peoples, it also acknowledges that it is important to

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<sup>54</sup> Gilbert. *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*.

<sup>55</sup> UN. *Resource Kit on Indigenous Peoples’ Issues*.

<sup>56</sup> International Labour Organization. "C169 Indigenous and Tribal Peoples Convention." [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169#A14](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A14) . 1989

recognize collective rights and to commit to preservation these rights by international regime<sup>57</sup>. It is recognized in article 25:

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

World Bank also states that “the bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend”<sup>58</sup> in its operational manual 4.10. Although UN agencies and the World Bank state their commitment on these rights of indigenous peoples, the operational policies and guidelines do not have the same clear commitment to the recognition of these rights. Instead of direct commitment in their operations, they prefer to use statements like “special considerations apply if the project affects such ties<sup>59</sup>” in the operational papers which makes the commitment unclear and insecure. These unclear and insecure commitments result in land loss, resource depletion and destruction. UNDP Human Development Report 2007 states that “although 2001 Land Law recognizes the collective land rights of indigenous peoples, they have already lost 30 percent of their traditional forest lands”<sup>60</sup>.

As the results of these vague and unconsented practices of the institutions proved, not only the recognition of rights but also participation and free, prior and informed consent of indigenous peoples in decision making processes important for healthy decision for the life of indigenous peoples. Its importance also comes from that participation and free, prior and informed consent is a

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<sup>57</sup> UN, A/61/L.67, Add.1

<sup>58</sup> World Bank, 2005. Operational Paper 4.10 - Indigenous Peoples. July. <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

<sup>59</sup> Ibid.

<sup>60</sup> Jennifer Donato. Human Development Reports and Indigenous Peoples A Desk Review. United Nations. 2009.

crucial element for democracy and justice. As indigenous peoples have an inherent relationship with their land, territories and resources, they have a legitimate authority to have right to say and third parties are required to respect and accord this authority<sup>61</sup>.

The UNDRIP acknowledges this right in article 18 and 19, also gives a duty to states to rule this in their lands for the issues related to indigenous issues. ILO Convention No: 169, article 6 also states that “consultation with the peoples concerned” to be “carried out in good faith and in a form appropriate to the circumstances ... with the objective of achieving agreement and consent to the proposed measures<sup>62</sup>”.

Recognition of this right necessitates states and international regime to apply three underlying principles of free, prior and informed consent “which are (i) information about and consultation on any proposed initiative and its likely impacts; (ii) meaningful participation of indigenous peoples; and, (iii) representative institutions<sup>63</sup>”. When these principles are applied, there will be a fairer regime than centered-decision making procedures.

## **2- Right to development**

On January 20, 1949 US President Harry Truman put a line between developed and underdeveloped countries, that day two billion people became underdeveloped without any consultation to them, without any identification of ‘development’. The US and other industrialized north countries had a dream, their own dream based on “control of nature through science and technology,

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<sup>61</sup> Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation. E/CN.4/Sub.2/AC.4/2004/4. 8/7/2004. 8/7/2004. pp 5.

<sup>62</sup> UN. C169.

<sup>63</sup> Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples. E/C.19/2005/3. 17-19/01/2005.

individualism and consumerism, free and unfettered markets<sup>64</sup>”. While this speech drew a line between developed and undeveloped peoples, it also put these industrialized countries “on top of the evolutionary social ladder<sup>65</sup>”.

Declaration on the Right to Development which was adopted in 1986 defines right to development as “inalienable human right” and attributes this right to every single human being<sup>66</sup> and sees the development not just as an economical but also as a social, cultural and political process. Right to development, also closely related to right to self-determination, is acknowledged in UNDRIP in article 23 saying, “indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development”<sup>67</sup>. It is, of course, possible to question that in a world that the definition of development created by industrialized states decades ago, if the actions taken by international organizations for indigenous peoples for right to development are meaningful and functional.

As a matter of fact, the answer to this question seems quite negative. Annual desk reviews of Millennium Development Goals’ (MDG) reports from 40 governments which are done to understand if indigenous peoples’ issues are included and promoted by these countries done by Secretariat of United Nations Permanent Forum on Indigenous Issues (SPFII) shows that even we do not have efficient and sufficient disaggregated data about the indigenous issues in order to monitor the process of inclusion of indigenous peoples in achieving MDG.<sup>68</sup> A Desk Review 2010 clearly states in the conclusions and recommendations part of

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<sup>64</sup> Tauli-Corpuz. "Indigenous Peoples' Self-Determined Development: Challenges and Trajectories." In *Towards an Alternative Development Paradigm: Indigenous Peoples' Self-Determined Development*

<sup>65</sup> Ibid.

<sup>66</sup> UN, A/61/L.67, Add.1 article 1.1

<sup>67</sup> UN, A/61/L.67, Add.1 article 23

<sup>68</sup> Donato. Human Development Reports and Indigenous Peoples A Desk Review.

the report: “the disparate level of attention to indigenous peoples and indigenous issues continues to be a gap.”<sup>69</sup>

As it is hard to report something which is not there, it is not unjust to say that right to development of indigenous people still cannot be realized due to lack of commitment to their rights, non-inclusive decision making processes, lack of capacity and lack of legal and institutional barriers. Furthermore, most of the time interests of indigenous peoples and corporations do not overlap. In this case, corporations’ economic interests are always higher ranking than the cultural or political interests of indigenous people.

#### **IV. Indigenous Peoples, Justice and Climate Change**

##### **A- Climate Change and Climate Justice**

Climate change is the most urgent action needed problem of our world. It is scientifically proven that it happening because of greenhouse gas emissions and it is happening now. United Nations Intergovernmental Panel on Climate Change (IPCC) has revealed its 5<sup>th</sup> Assessment Report’s Working Groups’ reports very recently. IPCC is the leading international organization for assessment of global climate change. There are two basic and important numbers for climate change that came out of the reports of IPCC: 2 °C and 350 ppm (parts per million). 2 °C is the maximum increase of temperature that we can reach and 350 ppm is the amount of CO<sub>2</sub> in the atmosphere. If 2 °C limit is exceeded and if 350 ppm threshold cannot be caught, the future will be darker and harder than we could ever imagined, especially for the one who already suffer from the impacts of climate change.

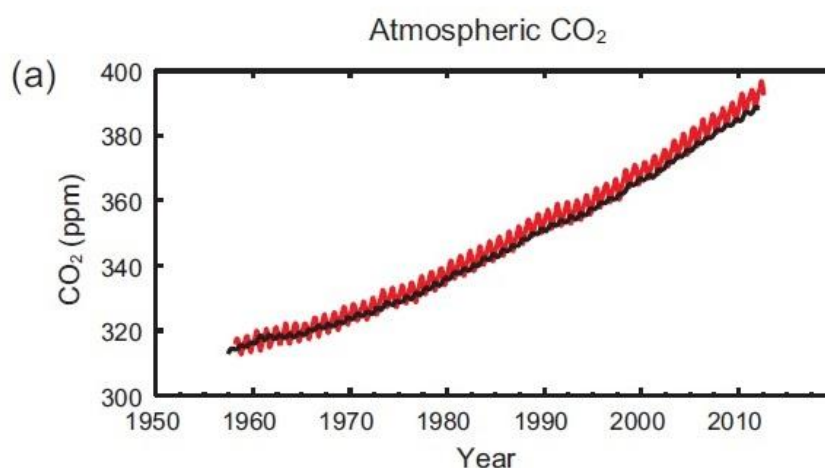
Similar to previous information, it is once more proved that climate system is unequivocally warming. Concentration of greenhouse gases has increased in the atmosphere and the atmosphere and oceans have become

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<sup>69</sup> Christopher Foley. MDG Reports, CCAs, UNDAFs and Indigenous Peoples: A Desk Review 2010. United Nations. 2010.

warmer. The amounts of snow and ice have decreased, sea level has risen. The most important truth is that anthropogenic effect on climate change is clear, neither planet's itself nor the radiation from the sun is responsible but humankind. This is clear from that

“The atmospheric concentrations of the greenhouse gases carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O) have all increased since 1750 due to human activity. In 2011 the concentrations of these greenhouse gases were 391 ppm, 1803 ppb, and 324 ppb, and exceeded the pre-industrial levels by about 40%, 150%, and 20%, respectively”<sup>70</sup>.



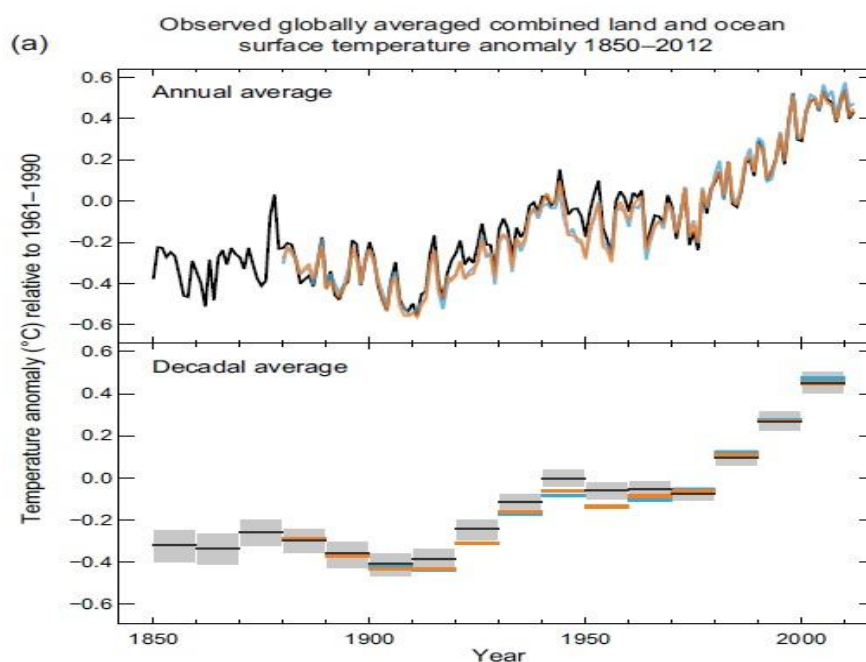
**Figure 3: Atmospheric CO<sub>2</sub>**<sup>71</sup>

Report also proves that the world got 0.85 °C warmer between 1880 and 2012 as a result of these increase in greenhouse gas concentrations. Extreme weather and climate events have increased. While in some parts precipitation gets catastrophically lower, it gets catastrophically higher in the other parts. Warming trend is very similar for oceans, too. The upper 75 m of oceans on the global scale warmed by 0.11 °C between 1971 and 2010. While in places where the

<sup>70</sup> IPCC: Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. 2013

<sup>71</sup> Ibid pp 12.

precipitation increased, oceans have become fresher, in places where evaporation increased, they have become more saline. We are also losing glaciers all around the world, the loss has reached 226 [91 to 361] Gt yr<sup>-1</sup> between 1971 and 2009. Loss of glaciers is accompanied by global sea level rise which was 2.0 mm yr<sup>-1</sup> between 1971 and 2010 and 3.2 mm yr<sup>-1</sup> between 1993 and 2010.



**Figure 4: Observed globally averaged combined land and ocean<sup>72</sup>**

These numbers turn into vulnerability and adaptation problems for peoples living all around the world, but most violently for global south. Precipitation regime is changing all around the world differently, glaciers and snow are melting. These affect the water resources and changing hydrological system of the Earth. Climate change also has negative impact on species in terms of extinction, migration and seasonal activities. Crop yields are also affected negatively especially for maize and wheat, two most important nutrition source for people. Extreme climate-related extremes like heat waves, droughts, floods,

<sup>72</sup> Ibid pp 6.

cyclones and wildfires increase the vulnerability of people to changing climate as it is effective on alteration of ecosystems, food and water shortages, health issues and general well-being of peoples<sup>73</sup>. All these results which are shortly mentioned here and will be exemplified in coming sections become severe problems for poor, marginalized communities which also includes indigenous peoples all around the world.

It is useful to add that even I state that the reason for climate change is anthropogenic greenhouse gas emissions, it is important to understand that there are even deeper reasons behind greenhouse gas emissions. These reasons are not rooted in individuals and their consumption habit only but they “are social and historical, rooted in the productive relations, technological imperatives, and historically conditioned demographic trends that characterize the dominant social”<sup>74</sup> and economic system.

This very same system which is the reason for climate change is also reason for social and environmental injustice. System’s itself is based on economic growth which sees social and environmental costs as externalities and these externalities become burden on the communities like minorities whose voice are always lower than everyone else in the system<sup>75</sup>. As a result of this, first generation of environmental injustice discussions shaped around racism as the racial minority communities have always seen as easy targets to put the burden of all ‘environmental bads’<sup>76</sup> on. Even it started in the US as a struggle against toxic and hazardous waste in minority groups’ neighborhoods, the problem has globalized, so as the struggle’s itself. Second generation of environmental justice

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<sup>73</sup> IPCC: Summary for Policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. 2013

<sup>74</sup> John Bellamy Foster. *The Vulnerable Planet, a short economic history of environment* . New York: Monthly Review Press. 1999.

<sup>75</sup> Citation by David Schlosberg: Mohai, P., Pellow, D., and Timmons Roberts, J., 2009. Environmental justice. *Annual Review of Environment and Resources*, 34, 405-430

<sup>76</sup> David Schlosberg. "Theorising environmental justice: the expanding sphere of a discourse." *Environmental Politics* 78. 2013 pp 37-55



discussion is now on climate change, because it effects minorities and poor communities and in our case indigenous peoples<sup>77</sup> not only in one state but in global scale drastically.

People living in Arctic, in Amazon, in arid and semi-arid regions of the world, small state islands; they are already listed in poor or developing countries where the peoples face with serious problems from health issues to food and water related problems. Inuit people of Arctic region depend on traditional way of life, depending on the land and natural resources they had. However, they are threatened by the melting ice shields and permafrost. Their activities for survival which are hunting and fishing and living areas where they built houses totally depend on stable ice, frozen grounds and permafrost<sup>78</sup>. Their whole knowledge of life shaped on this culture. As the temperature is rising, they are losing not only their life in Arctic but a whole culture of Inuit is vanishing. Peoples living in tropical forest are also at stake as their habitat which is the richest habitat type of the world is losing its diversity due to fall in precipitation rate and deforestation. These ecosystems are home for 1400 distinct indigenous and traditional peoples which means that hundreds of distinct social, economic, cultural and spiritual systems<sup>79</sup>. Another example is coral reefs on which estimated 100 million of people are dependent. Small island states are highly dependent on the biodiversity in coral reefs as they catch their food in fisheries located in there. Coral reefs are also a protection against the waves, tsunamis and coastal erosion<sup>80</sup>. When coral reefs all die related to climate change, peoples who are already vulnerable and already under threat of climate change will have to take more burdens on their shoulder. Besides these communities are vulnerable to

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<sup>77</sup> Rebecca Tsosi. "Indigenous Peoples and Environmental Justice: The Impact of Climate Change." *University of Colorado Law Review* 78: 2007 p 1625.

<sup>78</sup> Eds. Jan Salick, Anja Byg. *Indigenous Peoples and Climate Change*. Tyndall Centre for Climate Change Research, Oxford: Tyndall Centre. 2007

<sup>79</sup> Lead author. Mirjam Macchi, Co-authors. Gonzalo Oviedo, Sarah Gotheil, Katharine Cross, Agni Boedhiartono, Caterina Wolfangel, Matthew Howell. "Indigenous and Traditional Peoples and Climate Change Issues Paper." IUCN. 2008

<sup>80</sup> Ibid.

climate change, they also do not have adaptive capacity both financially and institutionally to drastic impacts of climate change.

In a nutshell, climate justice issue is a problem of responsibility and impacts inequity. Because, for example, while US is responsible for 20 percent of all greenhouse gas emissions, 136 developing countries together are responsible for 24 percent of overall emissions<sup>81</sup>. Hence, the problem of climate justice has both distributive and procedural perspectives. While the first one is related to the distribution of benefits and adverse effects, the other side refers to how and by whom the decisions on adaptive responses made<sup>82</sup>. Moreover, as the problem is global, the solution to the problem also need to be global and a part of international law and regime regarding these distributive and procedural perspectives.

### **B- Environmental Regime under United Nations Regarding Indigenous Peoples**

As globalization increases its speed, it globalizes the problems, too. Climate change is one of these examples, but it is possible to see that environmental problems have been globalized from pollution problem to biodiversity. Therefore, international regime has established bodies to interfere with these global environmental problems. As the land and resources dependent indigenous peoples are one of the most vulnerable group to environmental disasters like climate change, it is important their rights to be recognized, implemented and protected. It is also important for these environmental problems bear justice and fairness issue which are not only about “vulnerable are treated fairly” but also about “decision-making processes- who decides, who responds; frameworks for taking and facilitating actions; relationships between the

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<sup>81</sup> J. Timmons Roberts, Bradley C. Parks. "Ecologically Unequal Exchange, Ecological Debt, and Climate Justice: The History and Implications of Three Related Ideas for a New Social Movement." *International Journal of Comparative Sociology*. 2009 pp 50: 385.

<sup>82</sup> S.G Thomas David, Chasca Twyman. "Equity and justice in climate change adaptation amongst natural-resource-dependent societies." *Global Environmental Change*. 2005 pp 115-124

developed and developing world; and also to relationships between climate change impacts and other factors that affect and disturb livelihoods”<sup>83</sup>.

When we look to international regime for the further discussion of the topic regarding indigenous side, it is possible to make it start with UNDRIP which clearly states in article 29.1 that “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programs for indigenous peoples for such conservation and protection, without discrimination.”<sup>84</sup> Same article also guarantees the recognition and preservation of this right by the states. ILO Convention No. 169 articles 7 and 15, Convention on Biological Diversity (CBD) article 8j also recognize this right and calls for preservation by states. It is also clearly stated in UNDRIP’s articles 41 and 42 that “the UN regime with all bodies and specialized agencies shall promote respect for indigenous peoples rights, shall establish means of ensuring participation, and contribute to the full realization of the provisions of the declaration through the mobilization of financial cooperation and technical assistance.”<sup>85</sup>

### **1- Normative Framework for Environment Perspective**

As it is defined as the most urgent action needed problem and critical justice issue climate change and climate justice, I will focus on the international climate change regime. As the problem is not only about to equity in vulnerability, international organizations are also important for peoples to participate in the decision making, implementation and monitoring as well.

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<sup>83</sup> S.G Thomas David, Chasca Twyman. "Equity and justice in climate change adaptation amongst natural-resource-dependent societies."

<sup>84</sup> UN, A/61/L.67, Add.1 article 29

<sup>85</sup> Michelle Maillet, James D. Ford. Climate Change Adaptation, Indigenous Peoples and the United Nations Framework Convention on Climate Change (UNFCCC). Health Democracy Monitor 4 (2). 2013

For drawing a clearer picture, it is good to look at the past and the way led us to current situation and discussions. The first step for the integration of indigenous peoples into environmental regime of the United Nations is the Earth Summit<sup>86</sup> in Rio de Janeiro in 1992. The Earth Summit is a very important milestone also for the discussions on environmental issues like climate change. Topics raised by indigenous peoples in the Summit were environment, climate change, cultural diversity and the protection of traditional knowledge<sup>87</sup> and they also emphasized the importance of participation in decision making processes.

First important step for environment under UN regime was Declaration of the United Nations Conference on the Human Environment or Stockholm Declaration with most common name in 1972. It was the first time that international environmental law recognized the right to a healthy environment. Stockholm Declaration does not refer to any indigenous or tribal community but speaks to developed and developing countries and call developed countries to help developing countries in environmental protection. However, it is stated in the 1<sup>st</sup> principle<sup>88</sup>:

“Man 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, and he bears a solemn responsibility to protect and improve the environment for present and future generations. 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.”

This first principle could be a sparkle for recognition of rights of indigenous peoples in environmental protection area, but UN human rights regime needed more time to establish relation between indigenous peoples and environmental problems. After two decades, UN Conference on Environment and Development in 1992 was held in Rio de Janeiro. As a result of this conference

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<sup>86</sup> United Nations Rio Declaration on Environment and Development. A/CONF.151/26 (Vol. I). 12/08/1992

<sup>87</sup> UN. Resource Kit on Indigenous Peoples' Issues.

<sup>88</sup> Declaration of the United Nations Conference on the Human Environment A/CONF.48/14/Rev.1. 1973

two legally binding very important documents were revealed: The United Nations Framework Convention on Climate Change (UNFCCC) and The Convention on Biological Diversity. Action programs of the Conference also reveal the reality that the objectives are difficult ones and need partnership and collaborative action with “women, trade unions, farmers, children and young people, indigenous peoples, the scientific community, local authorities, business, industry and non-governmental organizations (NGOs)”<sup>89</sup>. The Declaration expresses the special situation of most vulnerable countries and their priority in taking action, also the ‘common but differentiated responsibility’ principle<sup>90</sup>. For the first time, the role of indigenous peoples is also reflected in the Declaration, article 22<sup>91</sup>:

“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.”

**a) The United Nations Framework Convention on Climate Change (UNFCCC)**

UNFCCC was an outcome of UN Conference on Environment and Development. Countries who understood that global warming has been becoming more and more important subject for the earth and people in terms of its destructive effects. They also acknowledged that the reason is the industrial practices and unsustainable development. Kyoto Protocol (KP), in 1995, also is one outcome of this Convention aiming reduction of carbon emissions. The Convention is ratified by 194 countries + the EU and sets a powerful and extensive regime.

Not the Convention itself but the bodies and mechanisms under the Convention deal with the indigenous peoples issues especially in the area of

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<sup>89</sup> Earth Summit Background. 23.05.1997. Accessed May 10, 2014. <http://www.un.org/geninfo/bp/envirp2.html>.

<sup>90</sup> A/CONF.151/26 (Vol. I). 12/08/1992 article articles 6-7

<sup>91</sup> A/CONF.151/26 (Vol. I). 12/08/1992 article 22

adaptation. Also, indigenous peoples and organizations participate in Conference of Parties (COP) annually not directly but as an observer or by sending documents, comments etc. via International Indigenous Peoples Forum on Climate Change (IIPFCC), UN like the Permanent Forum on Indigenous Issues (UNPFII) and the UN High Commissioner for Human Rights (UNHCR). However, all these mechanisms and observer statuses does not guarantee that indigenous peoples' voices will be heard in high level meetings and decision making processes. Moreover, even though developing countries are emphasized and prioritized in the Convention documents, there is no specific or direct reflection about indigenous peoples. This is important, because not all the indigenous peoples live in the developing countries. This is why the expression 'global south' gain importance once more in human and environmental rights issues.

#### **b) Convention on Biological Diversity**

The Convention on Biological Diversity aims the conservation of biological diversity, the sustainable use of the components of biological diversity and the fair and equitable sharing of the benefits arising out of the utilization of genetic resource. CBD article 8j emphasizes traditional knowledge of indigenous peoples and recognizes their right to preserve and maintain their traditional knowledge in article 8j<sup>92</sup>:

“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;”

Program of Work on the Implementation of Article 8 (J) and Related Provisions of the Convention on Biological Diversity has been developed by the

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<sup>92</sup> Article 8. In-situ Conservation. <https://www.cbd.int/convention/articles/default.shtml?a=cbd-08>

Convention. There is Advisory Group/Steering Committee in which indigenous peoples and communities are represented. Also, article 26 of the Convention present their implementation of the Convention via national reports. 2014 is the year for the Submission of the fifth national report.

Even it seems that CBD establishes a participatory mechanism indigenous peoples themselves do not agree with this process even though they carry the same objects with the Declaration. In Opening Statement by the IV International Indigenous Forum on Biodiversity, they stated that the Convention does not recognize the rights of indigenous peoples and even recognize them not as ‘peoples’ but as communities and populations. Basic rights like self-determination, land and territory rights, collective right to traditional knowledge and right to free and prior informed consent are not recognized by the document. They also object to the perspective of the Declaration that sees only commercial value of the nature<sup>93</sup>.

Indigenous peoples have the same evaluation for The Ad Hoc Open-ended Working Group on Access and Benefit Sharing (WGABS), too. Even though they are actively involved in both processes (Ad Hoc Open-Ended Intersessional Working Group on Article 8(j) and Related Provisions (WG8j) and The Ad Hoc Open-ended Working Group on Access and Benefit Sharing (WGABS)), they commented that “the parties have not adequately facilitated this necessary participation”<sup>94</sup>. Technical experts groups for the WGABS also include only one indigenous representative, though it is important for indigenous peoples to be in the group as it is directly related to traditional knowledge and relation to genetic resources. Furthermore, some parties focused on the “subject to national

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<sup>93</sup> Indigenous Participation in the Convention on Biological Diversity Process. First Meeting of the Working Group on Article 8j) And Related Provisions 27 – 31 march 2000 Seville, Spain. Opening Statement by the IV International Indigenous Forum on Biodiversity Inaugural Plenary. 27/03/2000. [http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122182.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122182.pdf)

<sup>94</sup> Potential Threats to Indigenous Peoples’ Rights by The Convention on Biological Diversity’s Proposed International Regime on Access and Benefit Sharing. International Expert Group Meeting on the Convention on Biological Diversity’s International Regime on Access And Benefit-Sharing and Indigenous Peoples’ Human Rights. PFII/2007/WS.4/9. 17-19/01/2007.

legislation” part in article 8j, which limits the indigenous ownership of knowledge within the borders of nation state again<sup>95</sup>. What is more important about being aware of indigenous knowledge is:

“Rather our rights include rights over genetic resources, both those that are associated with our Indigenous knowledge, and more broadly to all genetic resources that originate in our territories, lands and waters whether or not associated directly with Indigenous knowledge.”<sup>96</sup>

Therefore not only the ones who already titled as indigenous knowledge but all genetic resources in indigenous lands, territories should be recognized among the rights of indigenous peoples.

### **C- Key Issues Regarding Indigenous Peoples and Climate Justice**

Even though indigenous peoples represent 4 percent of the world’s population and their territories cover only 22% of the world’s land surface; 80% of world’s biodiversity is held by them and they practice a carbon-neutral or carbon-negative lifestyle<sup>97</sup> which means no contribution to the climate change that threatens them.

However, the situation is not the same on the other side of the world with factories, coal power plants, extractions all around the world and etc. Therefore, we need mechanisms that will reduce the greenhouse gas emissions, mitigation, and facilitate the adaptation to the changing climate. They both need capacity and knowledge to develop and implement projects. While developed countries have enough capacity and technology, developing countries and communities do not have the same facilities. Therefore they need support from the international regime for mitigation and adaptation. However, the subject is not limited to transferring knowledge and technology but it is about the right usage of all these in related areas.

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid

<sup>97</sup> Rebecca Tsosi. "Indigenous Peoples and Environmental Justice: The Impact of Climate Change."



In these aspects, UN climate regime has two basic institutions for climate change work. One of them is UNFCCC that I discussed above and the other is the Kyoto Protocol which “provides specific measures and corresponding commitments of Parties”<sup>98</sup>. KP has three market-based mechanisms: emissions trading, joint implementation and Clean Development Mechanism (CDM). Emissions trading and joint implementation projects are done among Annex I (developed countries), while CDM includes also non-Annex I countries.

### 1- Right to Self-Determination

“When the government took our land . . . they wanted to give us another place . . . But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where our God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.”<sup>99</sup>

Ailton Krenak, The leader of the Indian Nations Union in the Amazon

Right to self-determination has crucial importance for indigenous peoples. Climate change is a great danger for right to self-determination in several aspects. First of all, its impacts on their lands, territories and natural resources are critical for indigenous peoples. Most of indigenous peoples established their economic, social, cultural and spiritual systems on their lands and natural resources. The impacts of climate change and mitigation and adaptation measures also are forcing them to leave their lands and give up their tradition.

Therefore, for a really just and fair climate regime, it is important to recognize, protect and monitor the right to self-determination which is closely

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<sup>98</sup> Deepa Badrinarayana. "Introduction to international and domestic climate change regulation." In *Climate Change and Indigenous Peoples Search for Legal Remedies*, Eds. Elizabeth Ann Kronk, Randall S. Abate. Edward Elgar Publishing. 2013 pp 19-38

<sup>99</sup> Wiessner. *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*.

related to right to participation, free, informed and prior consent. All international agreements recognize the right to self-determination as a prominent right for the indigenous culture. For years, they have been protectors of forests, polar regions, deserts etc. They have a good knowledge of their own environment and they have some capacity and knowledge to deal with climate change impacts. Their traditional knowledge, sustainable land and resource management can contribute to mitigation and adaptation efforts internationally.

However, current mechanisms are threatening right to self-determination of indigenous peoples as they do not implement right to participation and free, prior, informed consent in mitigation and adaptation processes. For mitigation, clean energies like solar, wind, biofuels; carbon offsets and other carbon reduction measures are encouraged and supported. Emissions trading and joint implementation projects in developed Annex-I countries and projects related to CDM in non-Annex-I countries are mostly related to indigenous lands and territories. Projects are held without any true consent or participation of indigenous peoples. Furthermore, global market developed new projects based on climate change mitigation and adaptation processes and its demands like new renewable energy projects creates big stress on indigenous lands, territories and natural resources, too<sup>100</sup>.

Hydroelectric power plants in developing countries are approved as CDM project, assuming that they carry out all necessary precautions which meet all demands of international agreements. However, they are highly destructive for native forests. They both cause deforestation, forcible replacement of indigenous

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<sup>100</sup> Andy White, Jeffrey Hatcher, Arvind Khare, Megan Liddle, Augusta Molnar, William D. Sunderlin. "Seeing People through the Trees and the Carbon: Mitigating and Adapting to Climate Change without Undermining Rights and Livelihood." Eds. Robin Mearns, Andrew Norton. *Social Dimensions of Climate Change. Equity and Vulnerability in a Warming World.* World Bank. 2010 pp 277-303

peoples and destruction of food and water resources in these areas<sup>101</sup>. For example, Ngöbe people in Panama are victims of CDM registered Barro Blanco dam project which will displace approximately 270 indigenous people. The right to participation and free, prior, informed consent was not carried out. People are evicted from their livelihood which also means violation of right to adequate housing, property, food, water. Moreover, as these people are dependent on land and natural resources, their economic, social, cultural and spiritual systems are disturbed.<sup>102</sup> Ngöbe organization Movimiento 10 de Abril para la Defensa del Rio Tabasará (M10) and three international NGOs, the Interamerican Association for Environmental Defense (AIDA), the Center for International Environmental Law (CIEL), and Earthjustice, have an urgent appeal to Special Rapporteurs asking them to call upon the State of Panama to suspend the eviction process and dam construction until it complies with its obligations under international law<sup>103</sup>.

Biofuels which are seen as alternative source of energy and promoted as climate change mitigation implementation are estimated to displace 60 million indigenous peoples due to expansion<sup>104</sup>. Zainab Kamara, a farmer from Sierra Leone, says “Now I don’t have a farm. Starvation is killing people. We have to buy rice to survive because we don’t grow our own now.”<sup>105</sup> Situation is not different in other parts of global south. Sime Darby Company from Malaysia, which is the world’s largest palm oil producer, is planting 220,000 ha of palm

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<sup>101</sup> Global Justice Ecology Project. "The devastating effects of tsunamis, big hydroelectric dams and other “clean” energies." Climate Connections. Accessed 05 27, 2014. <http://climate-connections.org/2011/04/01/6690/>.

<sup>102</sup> Appeal for Forced Eviction Barro Blanco Dam. Accessed 05. 05. 2014 <http://earthjustice.org/sites/default/files/files/AppealForcedEvictionBarroBlancoDam14-02-18.pdf>

News about the appeal also can be read online: <http://climate-connections.org/2014/02/22/panama-groups-appeal-to-un-to-halt-imminent-forced-evictions-of-indigenous-ngobe-community/>

<sup>103</sup> Ibid.

<sup>104</sup> Randall S. Abate and Elizabeth Ann Kronk. Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples.

<sup>105</sup> Grain. "Land Grabbing For Biofuels Must Stop: EU biofuel policies are displacing communities and starving the planet." 2013.

trees in Liberia which will displace thousands of people and break off their ties with their traditions, culture and food and water resources<sup>106</sup>.

Forests are another livelihood for indigenous peoples, but it is also under stress due to deforestation measure and mitigation initiatives. Forest conservation and carbon offsets contribute to deforestation in another way and destruct indigenous peoples' livelihoods again without participation and free, prior, informed consent. Another effort by UNFCCC is Reducing Emissions from Deforestation and Forest Degradation (REDD)<sup>107</sup>. It is an "effort to create a financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development"<sup>108</sup>. After REDD got negative reactions, REDD+ were introduced by UNFCCC and it is said that it "goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks"<sup>109</sup>. However, indigenous peoples do not think same with the people negotiating in COP meetings. In COP17 meeting in Durban, Global Alliance of Indigenous Peoples and Local Communities against REDD and for Life called for a moratorium on REDD+. They clearly wrote in their statement that:

"Indigenous Peoples are being subjected to violations of their rights as a result of the implementation of REDD+-type policies and programs, including: the right to life of objectors to REDD+, forced displacements and involuntary resettlement, the loss of lands, territories and resources, means of subsistence, food sovereignty and security, and the imposition of so-called "alternative livelihoods" that lead to separation of our people from their communities, cultures y traditional knowledge. Similarly, our rights to free, prior and informed consent, self-

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<sup>106</sup> Ibid.

<sup>107</sup> Randall S. Abate and Elizabeth Ann Kronk. Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples.

<sup>108</sup> About REDD+. Accessed 05. 05. 2014. <http://www.unredd.org/AboutREDD/tabid/102614/Default.aspx>.

<sup>109</sup> Ibid.

determination and autonomy consecrated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPs) are also violated.”<sup>110</sup>

One recent example is from Kenya’s hunter gatherer Sengwer indigenous people. They are being evicted from their ancestral lands in Kenya’s Cherangany Hills and being relocated. Sengwers who have a strict dependency and attribute a spiritual meaning to their lands are accused of encroaching on and destroying the forest<sup>111</sup>. All these projects and implementations are seen as mitigation initiatives of global north and encouraged by UN climate regime under Kyoto Protocol mechanisms.

Besides mitigation initiatives, adaptation initiatives are crucial for indigenous peoples because of their vulnerability to climate change impacts. From livelihoods to health issues, they need support for adaptation to climate change. Adaptation through UNFCCC is done through voluntary contributions of Annex-I countries and taxation of Clean Development Mechanism. There are two points here: First one is that finance for adaptation depends on voluntary contributions and flexible mechanisms of CDM<sup>112</sup>. For example, National Adaptation Programs of Actions (NAPA) are a way for financial support from the Least Developed Countries Fund (LDCF) and technical support from Least Developed Countries (LDC) Work Program. However, this is also only prepared by LDCs. Even this could be a help for indigenous peoples in developing countries, other indigenous groups in developed countries like Inuits of Canada, aboriginals of Australia and Maori of New Zealand are out of this frame. Furthermore, even for the ones in developing countries are not guaranteed to get finance or assistance for adaptation.

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<sup>110</sup> The Global Alliance of Indigenous Peoples and Local Communities against REDD. Accessed March 21, 2014. <http://www.iucn.org/about/union/commissions/ceesp/?8786/The-Global-Alliance-of-Indigenous-Peoples-and-Local-Communities-against-REDD>.

<sup>111</sup> Forced Relocation of Sengwer People proves urgency of canceling REDD. 03.12. 2014. Accessed May 13, 2014. <http://no-redd-africa.org/index.php/declarations/97-forced-relocation-of-sengwer-people-proves-urgency-of-canceling-redd>.

<sup>112</sup> Michelle Maillet, James D. Ford. Climate Change Adaptation, Indigenous Peoples and the United Nations Framework Convention on Climate Change (UNFCCC).

Fund	Scope	Recipients
Special Climate Change Fund (SCCF)	Mitigation and adaptation	Developing Countries
Least Developed Countries Fund (LDCF)	NAPAs	Least Developed Countries
Green Climate Fund (GCF)	Mitigation and adaptation	Developing Countries
Adaptation Fund (AF)	Adaptation	Developing Countries
Fast-start finance (FSF)	Mitigation and adaptation	Developing Countries

**Figure 5: Operational adaptation financing mechanisms under the UNFCCC**

Secondly, even though it is emphasized in National Communications of several countries, traditional knowledge of indigenous peoples for adaptation to climate change is not taken into consideration in adaptation plans. For example, the Makushi of Guyana moves from savannah to forest during droughts and plant cassava which is their main staple crop<sup>113</sup>. They know how to deal with the impacts, but this time the impacts are more severe and unpredictable, so they need support for quick and powerful adaptation. However, as it is seen for mitigation measures which are also part of adaptation strategies, initiatives without consultation with indigenous peoples only harms to the right to self-determination of indigenous peoples as it harms to their strict connection with their land, territories and natural resources without their participation and free, prior, informed consent.

<sup>113</sup> Eds. Jan Salick, Anja Byg. *Indigenous Peoples and Climate Change*

## 2- Right to Development

“We must realize that when basic needs have been met, human development is primarily about being more, not having more.”<sup>114</sup>

From time of colonization to our new world of globalization, development is based on economic growth which is dependent on exploitation of natural resources for the sake of developed countries to grow and develop more. It is only and directly related to economy terms. However, for indigenous peoples who have sorrow rooted in the time of colonization, global north style economic development means dispossession of their land, territories and natural resources, loss of their own economic, social, cultural and spiritual systems. As this kind of development disregards to rights-based approach, indigenous peoples refer this as “development aggression” which means<sup>115</sup>:

- “1) Philosophies and perspectives that ignore their world views and visions;
- 2) Process and policies imposed on them without meaningful consultation and in the absence of consent;
- 3) Pervasiveness and profoundness of impacts that result from these.”

Indigenous way of development is not separate from their lands, territories and resources or from their collective life style. As it is said in the Earth Charter, development is not having more for indigenous peoples but being more together with nature as the they believe that they are not individuals only but parts of something bigger and meaningful. Hence, their understanding of development is not only like the one in Amartya Sen’s Development as Freedom “process that expands real freedoms that people enjoy<sup>116</sup>” or like sustainable

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<sup>114</sup> The Earth Charter. Accessed 12 25, 2013. [http://www.unesco.org/education/tlsf/mods/theme\\_a/img/02\\_earthcharter.pdf](http://www.unesco.org/education/tlsf/mods/theme_a/img/02_earthcharter.pdf).

<sup>115</sup> Cathal Doyle, Jérémie Gilbert. "Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"." European Year Book of Minority Issues 7. 2008.

<sup>116</sup> Cited in Cathal Doyle, Jérémie Gilbert. "Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development".

development as bridge between human and nature or like human development<sup>117</sup> as all these are human-centered approaches. Indigenous people have an intrinsic relationship with nature. So our definitions for development or discussions on which elements of the indigenous society should be preserved are not compatible with both indigenous understanding of development as it has a holistic approach and their right to self-determination.

Therefore very first thing to do while talking about right to development is respect to indigenous peoples' collective rights, right to self-determination and right to participation and free, prior, informed consent. In compliance with indigenous priorities, collective and self-determined development would a good way for development of indigenous peoples. This means to let indigenous peoples determine their own development priorities and to exercise control over their implementation. One more step to achieve this is to accept indigenous peoples' dissension on proposed development projects not as an obstacle but as an intrinsic part of development<sup>118</sup>. At the very end, it is important to note down that they will be the best subjects who know the best for their own culture and development. They can develop alternative development projects which also be solution for mitigation and adaptation to climate change<sup>119</sup>.

However, even though rights of indigenous peoples are recognized in many declaration, operational documents like UNDRIP, World Bank, UNFCCC and Millennium Development goals, and we take into consideration the discussion above when it comes to projects on their lands and territories, natural resources, they again fail to respect these rights. Climate change adaptation and mitigation initiatives are always disputable among indigenous peoples. All the mitigation and adaptation projects under UNFCCC agreements and institutions

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Indigenous Peoples of Turtle Island has already plans for climate change adaptation: Tribal nations are early climate adaptation planners. <http://climate-connections.org/2013/10/29/tribal-nations-early-climate-adaptation-planners/>



are to contribute to sustainable development of developing countries including vulnerable groups.

Developed countries use certified emission reductions (CER) generated by implementation of mitigation projects in developing countries to meet their own emission reduction commitments in Kyoto Protocol. However, indigenous peoples are defensive about these projects that cause mostly displacement, exploitation of resources, deforestation, reforestation and etc. Therefore, they criticize these policies which are guaranteed by international agreements but in practice they do not respect their right. In the Declaration of the International Alliance of Indigenous and Tribal Peoples of Tropical Forests (2005) to the COP 11 and MOP 1 of the UNFCCC in Canada in 2005, they criticized that<sup>120</sup>:

“The modalities and procedures for activities under the Clean Development Mechanisms (CDM) do not respect and guarantee our right to lands, territories, and self-determination. CDM and Sinks projects do not contribute to climate change mitigation and sustainable development”

Implementation of these projects certified by CDM or REDD, especially to meet the demand for biofuels, causes economic development of the developing countries they live in, but for indigenous peoples in border of these countries they are only destruction of their own economic, social, cultural and spiritual systems. In Guatemala biofuel enterprises are said to “benefit from multi-million dollar international climate change reduction payouts” but indigenous Mayan Q’eqchi’ of the Polochic Valley were evicted from their ancestral lands and lost their resources for life.<sup>121</sup>

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<sup>120</sup> Lead author. Mirjam Macchi, Co-authors. Gonzalo Oviedo, Sarah Gotheil, Katharine Cross, Agni Boedihartono, Caterina Wolfangel, Matthew Howell. "Indigenous and Traditional Peoples and Climate Change Issues Paper."

<sup>121</sup> Maurice Bryan. "Americas." In State of the World's Minorities and Indigenous Peoples 2012 Event of 2011, Ed. Beth Walker. United Kingdom : Minority Rights Group International. 2012 pp 88-118

## **V. Conclusion**

It is tried to go through Rawls's justice as fairness, international human rights and climate change regimes regarding indigenous peoples to find answers for questions which are whether the background of equity in United Nations regimes includes justice as fairness or whether it remains at the level of equity and whether the mindfulness of these regimes are on the level of agreements and paperwork or whether they are applied in real life practices during implementation and monitoring.

The very basic thing that can be drawn from the study is that this liberal international rights and climate regime are a battle ground for both states and peoples over issues of rights. Furthermore, it is not easy to say that this is a fair battle ground. There are many other variables that peoples need to fight against other than regime's itself. However, as it can be understood from the examples and background information that indigenous peoples are not silent subservient people but they raise their voice and they do not only fight for rights within the regime but also fight for changing rules of established regimes which do not take their history and interests into consideration.

When summarizing what we have at the end of the day, it is important to say that John Rawls's justice as fairness term, principles of justice and extension of his theory to international arena are important gains for improving the idea of fairness and especially for brief analysis of climate regime and fairness issue in a liberal system. Rawls draws an ideal path to reach fairness and defines some categories and responsibilities. While doing all these, he sets an original position where people are behind the veil of ignorance and have very limited knowledge of everything. Similar to this, international regimes also try to create a starting point where people are seen as equal. Related to this, the essence of the covenants, conventions and agreements are built on equal pillars as it is showed in the text. With reference to analysis and examples, the problem starts where we try to create equity without taking differences into consideration. These

differences and problems related to these differences are all rooted in the past. Therefore, to draw a white line between past of these people in the international regimes and now does not serve to solve problems but could deepen them as we sweep them under the carpet.

To add this end of the discussion, it is crucial to mention the problem of definitions. It is for sure that regimes' definitions of terms and concept are not identical with the respondents of these regimes. Especially right to development, right to self-determination, collective rights and right to land, resources are understood and defined differently by different parties. While development is much related with freedom and social issues for one end, for the other end it is almost a pure economic term. While the nature has an intrinsic value -it is valuable in itself and source of life- for one end, its value comes from its economic value for the other end. Under these circumstances it is not easy to create an equal system without even being on the same level of understanding.

These points and discussions around these topics are very important for indigenous peoples who lived under colonial regimes which claimed to civilize these communities by assimilating them. They have a very heavy and tragic history which seems that it is not possible to draw a white line between their tragic past and now. What makes them important and real is their struggle with these systems to exist. We cannot ignore their past while creating an equal human rights or climate change regime. Even we find a way to do that it is not easy to say that indigenous peoples are not included in the adoption of principles of justice as fairness at the very beginning, in the first stage of four stage sequence of Rawls. Hence there is a gap between understanding of current regime and the understanding of indigenous peoples, especially some terms like self-determination and development.

For the situation of indigenous peoples, it is more important to have a fair understanding of self-determination and development which mean totally different meanings to the current human rights and climate change regime and

indigenous people. They have collective understanding of self-determination and development and meaning of these terms are more about life itself instead of pure economic references. It is especially possible to see this in right to land, territories and resources and collective rights. Devastating effects of climate change are destroying living areas of indigenous peoples' and their culture based on their environment. It is true that climate change regime has developed mechanisms to include indigenous peoples in decision making procedures which will affect the faith of these places, but in Rawlsian terms all offices in decision making procedures are not open to everyone as even the participation to meetings is a matter of economic ability. As it is seen in the example of Voluntary Fund and other observations states, inequities stay unjustly distributed.

While two important concepts, mitigation and adaptation, in terms of climate change need to be discussed by taking unfavorable conditions of indigenous peoples into consideration, policies and projects related to these two are possible to be nightmares of indigenous peoples as it is seen in the example of Kenya's hunter gatherer Sengwer people. It is possible to say that this is the result of laws and policies which are not arranged according to the charters and treaties, or these regulations are vague and do not include certain enforcement for inclusion of indigenous people in decision making procedures.

The situation in which they live and struggle and heavy burden which the world system put on them draws indigenous people near to conception of burdened societies who need help from decent societies to develop their conditions. However, indigenous peoples are not passive in this struggle or they do not seeking only for help but they look for that their values, traditions, wisdom are to be recognized by regime's itself. However, it seems difficult in such a system where even state sovereignty is a non-issuable or hard to touch subject in spite of globalization. However, this interpretation cannot underestimate the duty of assistance of well-ordered societies in such situations. Therefore, indigenous peoples should get help for the adaptation measures to climate change but also

their knowledge should be included in this process. Otherwise, their involvement will not be possible and fairness will not be possible to realize.

When all points which are explained here considered, it is deduced that there is a system which have to be established or change into more equity based-system. However, when it is the application of all these rules and theoretical conventions and projects to apply these conventions; it does not go around the same principles. When it is appealed to law which can find answers to our problems, there is this gap between international and local rules. Furthermore, states starts law with their history and this gives a chance to ignore what happened before their history and to draw a white and clean picture.

Taking every point into consideration both in the whole text and the conclusion's itself; it could end up at the same point with the saying of Ailton Krenak, the leader of the Indian Nations Union in the Amazon:

“...But the State, the government, will never understand that we do not have another place to go...”

Leaning towards this idea, international climate change regime is partially good at establishing the ground rules for indigenous peoples' rights. However, when the time of application and integration, rights are lost or ignored as they are against the interests of established economic system. Instead of taking interests of indigenous peoples into consideration, interests of economic system are prioritized. Indigenous peoples' collective rights, right to participation and free, prior informed consent are ignored during the implementation of climate change regime's regulations for adaptation and mitigation. Actually, it is not understood what all these concepts mean to indigenous peoples. In such a situation, both looking through two principle of justice which realize justice as fairness and the standing point of this study show that this system is equal and fair in terms of regime's fundamental bodies but does not show the same features for application and local level.

Besides the truth that climate change is a global problem which needs global solution, all these points that have been made take me to the point that local solutions could be more powerful and easy to apply and these local regimes could be monitored by an international regime that will empower these local solutions. It is possible to say that this gives more chance for understanding, participation and fairness.