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OTHER MATTERS

THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLES IN STATES AND TERRITORIES THREATENED WITH EXTINCTION FOR ENVIRONMENTAL REASONS.

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Human Rights Implications, particularly for indigenous populations, of the disappearance of States for environmental reasons.

1. Following discussion of the issue at the meeting of the Working Group on Indigenous Populations and during the 55th session of the Sub-Commission, the Sub-Commission adopted resolution 2003/24.

2. The Commission, in decision 2004/122, adopted on 21 April 2004, decided, without a vote, “urgently to call upon the Sub-Commission on the Promotion and Protection of Human Rights to prepare a report on the legal implications of the disappearance of States for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous people.”

A. The problem

3. Certain States face the likelihood of the disappearance of the whole or a significant part of their surface area for environmental reasons. This report does not enquire into the cause of such disappearance but takes it as a fact.

4. Affected States come into three categories:

a. States which will totally disappear, mostly island-States;

b. States a significant proportion of whose territory will disappear, leaving only such territory as will be unable to support the existing population. This may arise where what will remain will not be of a size to support the existing population and/or where what remains is not of a nature to support the existing population;

c. States a significant proportion of whose territory will disappear, with serious implications for the existing population.

5. This report concerns only those States which will totally disappear. The Working Group on Indigenous Populations and the Sub-Commission may wish to consider whether the second category should also be included in a further report. It would appear that States in the second category may face similar difficulties to those in the first category, at least in relation to the need for the forced relocation of certain of their populations. Further, it should be recognised that some territories which are threatened by disappearance for environmental reasons may not be sovereign States. They may be colonies, some other form of non self-governing territory or States in free association with another State.¹ In the first two cases, the State responsible for administering the territory would appear to be responsible for determining what happens to the affected population. That population may, however, have rights as a separate population group, independent of their individual rights as citizens. Again, the Working Group and the Sub-Commission may wish to consider

¹ Note 14 *infra* and accompanying text

whether the rights of people in territories, as opposed to States, which are likely to disappear for environmental reasons should also be considered in any subsequent report.

6. Whilst members of the United Nations are used to addressing issues of State succession, it would appear that the extinction of a State, without there being a successor is unprecedented.² In the case of State succession, one State may become several or several States may become one. In addition, part of the territory may be detached from one State and joined to another State. Any form of State succession gives rise to a variety of legal questions. In some cases, populations have been forcibly transferred.³ In others, the population remains in place but experiences a change of citizenship or runs the risk of becoming stateless.⁴ In certain recent cases, people previously belonging to a majority population have found themselves new minorities in the newly-created State.⁵ In recent cases of State succession, citizenship and other status issues have been addressed by putting pressure on the successor State to make it possible, in practice, for long-term residents to acquire citizenship or equivalent rights.⁶

7. In the case of those States which are likely to disappear for environmental reasons, there would appear to be no successor State on whom obligations can be imposed and there will no longer be in existence the predecessor State.

B. Legal issues

8. The disappearance of States for environmental reasons will give rise to a variety of legal questions, not all of which relate specifically to human rights. The first difficulty is when does a State count as having disappeared: at the point when the population can only survive by leaving, even if parts of the territory remain above water, or only when the entire territory is submerged? Will the State simply cease to exist or will some form of recognition of non-existence, at least on the part of the United Nations, be required?⁷ Will the same principle apply in relation to all international organisations of which the State in question is a member? Who determines whether a territory should be considered as having

² The past fifteen years have focused an unusual degree of attention on the problem: Koskenniemi, *State Succession: Codification Tested Against the Facts*, Nijhoff, 2000

³ Most such transfers, not to be confused with “ethnic cleansing” have occurred after conflict: e.g. Treaty of Lausanne and the exchange of Greek and Turkish populations. More recently, they have attracted considerable criticism: e.g. expulsion of the Sudeten Germans from Czechoslovakia after the Second World War.

⁴ Whilst there is a Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, which entered into force Dec. 13, 1975, it has not received widespread attention. Problems of actual or potential statelessness arose in the Baltic States, following the dissolution of the Soviet Union, and following the dissolution of Czechoslovakia.

⁵ E.g. ethnic Russians in the Baltic States.

⁶ E.g. initiatives of the OSCE High Commissioner on National Minorities in the Baltic States.

⁷ There have been cases where one authority replaced another as the recognised accredited representative to the United Nations but there does not seem to be a precedent for a State ceasing to be represented and being replaced by no other authority.

disappeared for environmental reasons?⁸ The following examples merely illustrate the issues which may arise:

- who, if anyone, will assume responsibility for any national debt?
- what will be the status of what were internal or territorial waters or an exclusive economic zone?
- Who will assume responsibility for marking hazards to navigation in a barely submerged State?
- What will be the status of citizens and of legal persons registered or incorporated in such territories?
- What will be the status of diplomatic representatives of the State outside the territory of the State at the time of its disappearance?

9. In addition, there are a variety of concerns affecting the populations of such States, including citizenship rights, rights relating to forced relocation and rights in the admitting State.

a. citizenship rights

10. It is difficult to see how citizenship can retain any meaning when the State itself has ceased to exist. Is citizenship simply an issue of individual right or does it have a collective dimension? Does it include, for example, a right to live together with other citizens? Does the population of a State have a right to remain a collectivity? If so, what are the implications for a State willing to admit at least some members of the group? If the citizens of a State which has ceased to exist are relocated to one State, do they become a national minority? Where they formed an indigenous group in the State of origin, can they still be regarded as an indigenous group in the receiving State, even though they are anything but indigenous to it? Can they remain citizens of their State of origin? Are they entitled to some form of government-in-exile? Could such governments exist indefinitely or only for so long as there were citizens whom they could, in some sense, represent? Would they have to be prohibited from allowing transmission of such "citizenship"?

Does such a population group have any claim to a territory of its own to replace the territory it has lost? Presumably any such claim would be against the international community as a whole, rather than against a particular State. States at risk of disappearing for environmental reasons tend to be geographically closest to States which cannot reasonably be held solely responsible for the environmental factors giving rise to the disappearance of the State.⁹ There would appear to be no moral or legal reason for assuming that the closest State should assume the entirety of the burden of resettlement.

⁸ This may be controversial; see footnote 11 *infra*.

⁹ The majority of States at risk of disappearing are in the south pacific, the Indian ocean or the Caribbean; see further below.

How, if at all, are any of these questions affected by the possibly indigenous character of some of the affected populations?

11. If the possibly indigenous character of some of the affected populations is thought to make a difference to their entitlements, it may become necessary to define "indigenous".¹⁰ In certain contexts, the term has historically been used to identify populations which were there first, in contrast to those who came later. If such a limited definition were used, many of the affected populations would probably not be regarded as indigenous. They have been on their threatened islands for a long time but there is no more newly arrived group with which to compare them. They may be able to rely on self-identification as indigenous peoples.

b. rights relating to forced relocation

12. What *rights*, if any, do the affected populations have vis-à-vis other States? A status analogous to refugee status would not appear to be adequate. The people affected need more than a right to *claim* environmental asylum. They need a right to be *granted* it. Any State that might be willing to admit hundreds or even a few thousands may well be reluctant to accept entry entitlement as of right or to accept the entitlement of some, if that is thought to imply the entitlement of all. The attitude of States to admitting such people may be affected

c. rights in the receiving State

13. What rights will such people have within the receiving State? Will they be entitled to insist on living in community? Do they have any claim to land on which to live in community? Can those individuals who do not wish to live in community claim freedom of movement within the receiving State, even whilst others claim the right to live in community? Are they entitled to receive the same support, in kind and in services, as are provided to refugees? Are they entitled to claim citizenship? There may be a need for a fast-track procedure to claim citizenship. If not, is the receiving State at least required to issue such people with documentation, including travel documents? Some of the issues identified at paragraph 10 *supra* involve claims against receiving States.

¹⁰ See generally, ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent countries, adopted on 27 June 1989 by the General Conference of the ILO at its 76th session, Article 1; Working Paper on the concept of "indigenous people" by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, E/CN.4/Sub.2/AC.4/1996/2; Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples by Ms. Erika-Irene Daes and Mr. Asbjørn Eide, E/CN.4/Sub.2/2000/10. In the case of colonies, the concept of the indigenous population is relatively easy to apply. In the case of former colonies which have become independent and which are inhabited principally by the "original" inhabitants of the territory, it may be necessary to rely on self-identification. Self-identification is recognised in both regional and international documents on indigenous populations. I should like to thank Claire Morclette for research on the concept of an indigenous population.

C. Which are the affected States?

14. There does not appear to be any agreed list of the affected States. An examination of sources such as the World Factbook does not resolve the question. Whilst the entry for each territory gives the maximum elevation, that cannot determine the question. First, just because the maximum elevation is low does not necessarily mean that the territory is at risk of being submerged by rising water levels. The experience of rising water levels does not appear to be being experienced evenly, all over the globe.^{11 12} Second, just because the territory contains high ground does not mean that it will be capable of sustaining its population, should it lose what is at present a coastal area in which the population lives.¹³ It is nevertheless a starting point. In order to obtain more accurate and comprehensive information, it would be necessary, first, to determine the criteria for inclusion. In particular, is the study to include States whose population is likely to have to leave if the sea levels rise by a defined number of metres, even if inhospitable terrain would remain above sea level? It would then be necessary to contact all States *potentially* in such a category, in order to request information as to the degree of vulnerability.¹⁴

15. A certain number of territories with a maximum elevation of below 100 metres appear to be territories with no indigenous population, on which there are small military garrisons and/or meteorological observers and/or scientists¹⁵. A larger number of such territories appear to be in free association with a sovereign State or non self-governing territories.¹⁶ Whilst the primary responsibility may be thought to attach to that State, at least in the case

¹¹ Rising sea levels are not the only cause of islands becoming uninhabitable for environmental reasons. In some cases, rising sea levels are causing salt water to get into fresh water aquifers.

¹² E.g. there is no sign that rising sea levels are causing a problem for the operation of the US base on Diego Garcia in the British Indian Ocean Territory, whose high point is 15 metres. That calls into question any claim that rising sea levels would prevent the resettlement of the islands by the indigenous population, who were forcibly removed to Mauritius over 30 years ago.

¹³ This is likely to be a problem both in the case of single island territories and also island groups. The Federated States of Micronesia, for example, include mountainous islands and low coral atolls.

¹⁴ The degree of vulnerability is a product of the scale of the risk (proportion of population-sustaining land or proportion of the population affected) and the imminence of the risk.

¹⁵ E.g. Johnston Atoll; Europa island; Glorioso islands. In order to ensure consistency of the information, the source used for information about highest points and populations was World Factbook, published by the CIA (<http://www.cia.gov/cia/publications/factbook/geos/io.html>).

¹⁶ E.g. Cook Islands, free association with New Zealand – there may be a problem in the northern group; the Marshall Islands, free association with USA, highest point 10 ms; population 57,738; Tokelau, self-administering territory of New Zealand, high point 5ms, population 1,405; Niue, free association with New Zealand, high point 68ms, population 2,156; Cocos (Keeling) Islands, dependency of Australia, high point 5 ms, population 629; Bermuda, British overseas territory, high point 76 ms, population 64,935; Turks and Caicos islands, British overseas territory, high point 49ms, population 19,956; Cayman islands, British overseas territory, high point 43 ms, population 43,103.

of non self-governing territories, particular issues may arise which may be distinct from individual citizenship rights, as noted at paragraph 5 above.

16. The States most likely to be affected would seem to be:

Tuvalu: highest point 5 ms; population 11,468

Nauru: highest point 61 ms; population 12,809

Kiribati: highest point 81 ms; population 100,798

The Maldiv Islands: highest point 2.4 ms; population 339,330

The Bahamas: highest point 63 ms; population 299,697

17. The States most likely to be affected are principally in the Pacific Ocean but also include ones in the Indian Ocean and the Caribbean. The States listed in paragraph 16 are all islands or groups of islands. One State which will not disappear but which risks losing a significant proportion of its surface area for environmental reasons is Bangladesh.

18. The total population of the States identified in paragraph 16 is under half a million. For reasons indicated in paragraph 10, there would seem to be no reason, in law or morality, why the closest States should shoulder the whole of the burden. It should also be borne in mind that one such State, New Zealand, already has responsibilities for the populations of territories in free association with it, which territories are likely to disappear for environmental reasons.¹⁷

D. What is currently being done about the problem?

19. The issue of sustainable development is being addressed. The Declaration of Barbados was adopted in 1994, in the context of the UN Global Conference on the Sustainable Development of Small Island Developing States.¹⁸ The Conference does not, however, appear to be addressing the problem of States which will completely disappear for environmental reasons and does not seem to be addressing the rights of affected populations. There is a reference to the possibility of small island developing States potentially becoming uninhabitable¹⁹ but the provisions of the declaration are all directed at promoting sustainability.

20. UNEP has developed UNEP's Assistance in the Implementation of the

¹⁷ Note 16 *supra*.

¹⁸ Declaration of Barbados, A/CONF.167/9,I, Annex I, (<http://islands.unep.ch/dbardecl.htm>). The preamble refers to the "Rio Declaration on Environment and Development, Agenda 21, and the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, which were adopted by the nations of the world at the United Nations Conference on Environment and Development on 14 June 1992, as well as in the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity" (footnotes omitted).

¹⁹ Part I, III.2

Barbados Programme of Action For the Sustainable Development of Small Island Developing States (SIDS).²⁰ Again, the focus is on sustainability and not on what happens when it is determined that the situation of a particular State is unsustainable. In August 2004, there is to be a follow-up meeting to the Barbados Declaration (Barbados + 10) in Mauritius.

21. There are also regional and sub-regional groupings, such as the Pacific Islands Forum. That particular body deals with a wider range of issues, encompassing good governance and regional cooperation. Its vision statement makes express reference to the quality of people's lives and respect for indigenous and other values, customs and traditions.²¹ There is no specific reference, however, to the situation of member States which disappear for environmental reasons.

22. It is striking that such representations as have already been made appear to have been made bilaterally, rather than through a regional or international framework. The government of Tuvalu has warned that it may need to evacuate the islands within the coming decades. New Zealand has agreed to admit an annual quota. Australia is reported as having refused to do so.²² It is reported that the government of Tuvalu has sought to institute legal proceedings against the USA and Australia for failing to control global warming.²³

23. Other States are making arrangements within the territory available to them and planning on relocating people from islands which may disappear to other islands. It is not clear that such relocation is sustainable in very vulnerable environments.²⁴

24. Many of the territories and States likely to disappear for environmental reasons are members of the Commonwealth. Over half of the members of the Commonwealth are small States. Whilst the Commonwealth has undertaken a variety of initiatives with regard to small States, including ones relating to their vulnerabilities, nothing on its web site suggests that it has, at the level of the organisation, addressed the problem of the relocation of citizens of States which disappear for environmental reasons.

²⁰ www.gpa.unep.org/sids/documents/UNEP-SIDS2004.pdf, September 2003

²¹ Pacific Islands Forum Secretariat Vision Statement, (<http://www.forumsec.org.fj/Home.htm>)

²² <http://www.wordiq.com/definition/Tuvalu#Geography>;
http://www.tai.org.au/MediaReleases_Files/MediaReleases/MRShunTuvalu101001.htm

²³ http://www.janeresture.com/oceania_warming1/

<http://ourworld.compuserve.com/homepages/tvchoice/tvc99x.htm>

²⁴ http://www.janeresture.com/oceania_warming1/

E. What needs to be done?

a. scope of the study

25. Does the Working Group and the Sub-Commission consider that the study should be expanded to cover not only States which risk disappearing for environmental reasons but also other territories? If so, what are the implications?

26. Whatever the answer to that question, is there the implied authority to submit a questionnaire to potentially affected States/territories and to regional or international organisations of which they may be members? The object would be to identify which States/territories are in fact affected by the risk of effective disappearance for environmental reasons and the scale and imminence of the threat. In the case of regional or international organisations, the object would be to identify whether the organisation in question has addressed the problem of the complete disappearance of States/territories for environmental reasons, as opposed to the question of sustainability.

27. Given that the issues involved include human rights matters but also many other issues of broader concern, should the assistance of some other United Nations body be sought? If so, which? Possible sources of assistance would appear to include the UN legal office and the International Law Commission.

b. basis of analysis

28. Human rights law generally concerns the rights that may be claimed from States by those within their jurisdiction. In this context, the problem is rather what claims affected individuals and States may make as against other States and the international community as a whole. Is this a matter of *law* at all? Is this not rather, at least with regard to the affected individuals, an exceptional situation in which a practical global solution needs to be found? Would there not be more likelihood of delivering more for the affected communities if the problem were seen as a global responsibility, even if only a limited number of States undertook to admit them? So, for example, if a trust fund were created into which States paid in proportion to their United Nations contributions, or on some other agreed basis, would it not be more likely that a State in the region would make available suitable land for the relocation of the affected population group, knowing that some financial contribution would be forthcoming from the international community as a whole?

29. The question of whether the humanitarian concerns are issues of human rights and/or of law at all has an effect on the most appropriate body for dealing with the problem.

30. Those aspects of the issue identified in paragraph 8 are definitely legal questions or include legal questions. That does not mean that all aspects of the problem are legal questions. It may be possible to split the problem into its legal and its humanitarian components.

31. The situation is, at least in the case of Tuvalu, urgent. That would appear to suggest that an official or body needs to be given the authority to make comprehensive proposals of a legal or practical character.