The Rights of Indigenous Children[+]

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Abstract. This work explores the way in which International Human Rights Law provides specific standards and criteria for identifying and protecting the rights of indigenous children. Grounded on the steady evolution of norms, proceedings and institutions promoted by indigenous peoples within the United Nations, it explores the basic conceptual and practical implications of international human rights instruments for indigenous peoples and children. When confronted with available international and national reports, information suggests that there is a wide gap between the normative standards on the rights of indigenous children and the concrete conditions in which they generally live. This contrast seems to be all but circumstantial. Marked differences in the distribution of social goods and basic rights indicate that indigenous children suffer the consequences of structural inequality.

While human rights violations are a key feature in the daily lives of indigenous children, a progressive new conceptualization of the best interests of the indigenous child appears to be emerging: a conception where his or her individual rights are jointly protected along the collective rights to cultural identity and ethnic identity. Although not capable to overcome all the series of injustices and deprivations experienced by indigenous children, this new conceptualization of their best interests may open new avenues for advancing the effective protection of their rights.

Keywords. Indigenous children; human rights; structural inequality; best interests of the child

I. Introduction.

> *"We have come together because we want to know and respect one another as different peoples, to share our desire to participate in the building of a more just world (Declaration from the Indigenous Children and Adolescents of Latin America, 2005)*

Despite its essential importance for the lives of millions of children in the world, the rights of indigenous children have been widely neglected. While indigenous peoples make up around 370 million of the world's population – some 5 per cent – they constitute around one-third of the world's 900 million extremely poor rural people.[1] This affects dramatically the life of indigenous children. Widely abandoned within the walls of structural inequality, indigenous children suffer from a series of human rights violations. They range from a gross impairment in their right to life, survival and development to discriminatory access to education and health. Structural inequality also affects the way in which indigenous children experience several forms of violence, such as

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labour and sexual exploitation, trafficking, imprisonment and neglect from the protection they are entitled according to the UN Convention on the Rights of the Child (hereinafter the "CRC").

This chapter aims to provide a general overview of the rights of indigenous children in International Human Rights Law. To do so, the work is divided in two sections. The first section pays attention to some of the main normative standards applied to the rights of indigenous peoples. This general review of the highlights the importance of self-identification as key principle in determining who are indigenous. Consequently, self-identification plays a key role in defining who is an indigenous child. Something relevant in the face of the right of every child to be heard and to be taken into consideration in all matters affecting them. This section is complemented by a review of the main legal standards and institutions within International Human Rights Law for indigenous children. The analysis of International Human Rights Law provides a key account on the way in which the protection of indigenous peoples not only requires the recognition of some specific rights of them, such as self-determination, consulting process, right to their own land and resources, as well as over their cultural heritage and traditions. Based on the available information, this section ends with an appraisal on the way in which structural inequality –understood as a condition that arises out of attributing an unequal status to a category of people in relation to one or more other categories of people, a relationship that is perpetuated and reinforced by a confluence of unequal relations in roles, functions, decision rights, and opportunities- affects the rights of indigenous children in different settings. Among these, the right to life, survival and development, the right to health, to education and the right to be free from the fear of violence.

The second section of this chapter is devoted to the analysis and conceptualization of the best interests of the indigenous child. Departing from the definition provided by the Committee on the Rights of the Child, this section provided a presentation of a few landmark cases in the field of protection (custody, adoption, life & health) of indigenous children from the U.S., Colombia and Canada. The review is complemented by a particular sub-principle developed within Australian Law, in relation to the placement of aboriginal children. This section allows to have a general comprehension of the way in which, in this field, the best interests of the indigenous child constitutes both an extension of the basic component of the best interest principle and also, a specific form of recognising the interdependence and indivisibility between the individual and collective rights of the child.

II. The normative framework of the rights of indigenous children: Definitions and standards.

a. Who are indigenous children?

The international community has not provided a single legal definition of indigenous peoples. One commonly cited definition was provided in 1986 by Martinez-Cobo on his study on discrimination against indigenous peoples. They are defined as follows:

> *"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 basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Com- mon ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living un- der a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors.*
>
> *On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group)."* [2]

In part, due to the evolution of the normative debates on indigenous peoples, as well as the practical implications of no having a singular legal definition of them, International Law has advanced, instead, towards developing a series of criteria for "identifying" (instead of "defining") indigenous peoples and individuals. There are at least two reasons for preferring this approach. On the one hand, no formal universal definition of the term has been necessary for the UN's successes or failures in this matter, nor to the promotion, protection or monitoring of the rights recognized for these peoples.[3] On the other hand, the distinction between definition *vs* identification is based on the understanding that historically speaking, indigenous peoples have suffered from definitions imposed by others.[4]

Accordingly, the International Labour Organization's (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) distinguishes between tribal and indigenous peoples as follows:

> *1. […] (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*
>
> *(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*
>
> *2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. […]*[5]

As it is clear to see, self-identification plays a paramount role in defining a group of people as indigenous. Such principle it is particularly recognized in the most updated international instrument on indigenous peoples: The United Nations Declaration on the Rights of Indigenous, adopted by the General Assembly in 2007. In relation to belonging and self-identification, two articles play a key role in this matter:

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 33

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.[6]

Most recently, the American Declaration the Rights of Indigenous Peoples, adopted in 2016, makes an explicit recognition to the self-identification as key component in the process of identifying indigenous peoples:

Article I

1. The American Declaration on the Rights of Indigenous Peoples applies to the indigenous peoples of the Americas.

2. Self-identification as indigenous peoples will be a fundamental criteria for determining to whom this Declaration applies. The states shall respect the right to such self- identification as indigenous, individually or collectively, in keeping with the practices and institutions of each indigenous people.[7]

Along self-identification, which could be considered as a "subject" criteria, there are other criteria for identifying indigenous and tribal peoples. These ones, which could be considered as "objective" ones, are the following:

- Descent from populations, who inhabited the country or geographical region at the time of conquest, colonization or establishment of present state boundaries.
- They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.
- Their social, cultural and economic conditions distinguish them from other sections of the national community.
- Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.[8]

These criteria are similar to those highlighted by Working Group on Indigenous Populations in 1996, which identified some of the main factors which modern international organizations and legal experts (including indigenous legal experts and members of the academic family), have considered relevant to the understanding of the concept of "indigenous". As accurately suggested by the Working Group on Indigenous Populations, the foregoing factors do not, and cannot,

constitute an inclusive or comprehensive definition. Rather, they may provide some general guidance to reasonable decision-making in practice.[9] They include:

- Priority in time, with respect to the occupation and use of a specific territory;
- The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[10]

Generally following these criteria, indigenous and tribal peoples are often known by national terms such as native peoples, aboriginal peoples, first nations, adivasi, janajati, hunter-gatherers, or hill tribes. Given the diversity of peoples it aims at protecting, the Convention 169 uses the inclusive terminology of "indigenous and tribal peoples" and ascribes the same set of rights to both groups. In Latin America, for example, the term "tribal" has been applied to certain afro-descendent communities.[11] In the case of Africa, it has been asserted that Limiting the term 'indigenous peoples' to those local peoples still subject to the political domination of the descendants of colonial settlers makes it very difficult to meaningfully employ the concept in Africa. Moreover, domination and colonization have not exclusively been practiced by white settlers and colonialists. In Africa, dominant groups have also repressed marginalized groups since independence, and it is this sort of present- day internal repression within African states that the contemporary African indigenous movement seeks to address.[12]

Based on these previous considerations, the identification of children as indigenous should follow the previous criteria and always paying attention to the self-identification of the child or children concerned. That is, every human being below the age of eighteen years[13], who identify himself as belonging to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.

If this definition is sound, then the process of identification of indigenous children has a direct relation with some fundamental rights recognised by the CRC. Along article 30 (which will be explained in more detailed later), the right to identity (Art. 8) and; the right of children to be heard (Art. 12), both individually and collectively.

The CRC explicitly protects the child's right to identity. In particular, Article 8(1) provides:

> *"States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without unlawful interference"*

The statement that identity "includ[es]" nationality, name, and family relations suggests that identity relates conceptually to these aspects, but not exclusively, and thus identity must have content beyond these three enumerated examples.[14] In other words, nationality, name and family relations are key manifestations of a child´s identity, but they do not exhaust all the central

elements of a child´s authentic personality. Culture belonging –among other key components of a person´s authenticity and relation to herself- it is also a key manifestation of a child´s identity.

At the same time, the CRC also grants a central value to the right of children to be heard. As the Committee on the Rights of the Child has expressed, Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision).[15] In other words, the CRC recognizes the child as a subject of rights, and expressing his/her views in essential matters for the development of his/her personality (such as cultural identity). When the right is applied to indigenous children as a group, the State party plays an important role in promoting their participation and should ensure that they are consulted on all matters affecting them.[16]

In the context of the predominance of a Western capitalist way of life, many young people have chosen to deny their indigenous origins and identity, creating tensions within indigenous communities and their older generations.[17] This is also complemented by other cultural transformations, such as family configurations between indigenous and non-indigenous partners, which provides more complexity to the dynamics of cultural identity for children. While the results of this dynamics are uncertain, the CRC might provide some valuable guarantees to support indigenous children and their communities, in the process of constructing their own individual and collective identity.

b. Applicable norms and institutions.

The rights of indigenous children are regulated in a wide range of international instruments. They range from universal human rights treaties, resolutions or declarations to specific norms and standards developed for indigenous peoples. As I will explain in more detail in the next section of this chapter, universal human rights treaties, such as the two UN covenants (on civil and political rights; and economic, social and cultural rights), recognize a series of rights directly applied to indigenous children.[18] These covenants are complemented by thematic treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination[19] or the International Convention on the Elimination of All Forms of Discrimination against Women[20] which contain several dispositions with a direct impact on the rights of the indigenous children. Lastly, and more directly related to this matter, the UN Convention on the Rights of the Child[21] recognizes a vast array of rights of the outmost importance for indigenous children.

These universal treaties run along other specific international instruments in the field of indigenous peoples, such as the United Nations Declaration on the Rights of Indigenous Peoples[22] adopted by the General Assembly on 13 September 2007. The Declaration affirms the basic rights of indigenous peoples in several areas of special concern for these peoples, under the framework of the general principle or right to self-determination, including the right to equality and non-discrimination; the right to cultural integrity; the rights over lands, territories, and natural resources; the right to self-government and autonomy; the right to free, prior, and informed consent, and others. At the same time, the ILO Convention No. 169 on the Rights of Indigenous and Tribal Peoples[23], adopted by the International Labour Conference on 27 June 1989, includes many provisions regarding, inter alia, administration of justice and indigenous customary law; the rights to consultation and to participation; the rights over lands, territories and natural resources; labor and social rights; bilingual education, and trans-border cooperation.

Alongside these legal instruments, in the international community there is an array of organs and mechanisms which may directly refer to the rights of indigenous children. They do it through studies, recommendations, general comments, thematic reports or decisions.

Within the UN human rights system, there are three key institutions specifically focused on the rights of indigenous peoples (including indigenous children). These are: a) *The United Nations Permanent Forum on Indigenous Issues (UNPFII)*, a high- level advisory body to the Economic and Social Council established in 2000, with the mandate to deal with indigenous issues related to economic and social development, culture, the environment, education, health and human rights;[24] b) *The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)*, established by the Human Rights Council in 2007, with the mission to provide the Council with thematic advice, in the form of studies and research, on the rights of Indigenous peoples, as directed by the latter, and;[25] c) *The Special Rapporteur on the rights of indigenous peoples*, appointed for the first time by the Human Rights Council in 2001 (as a thematic special procedure), with a specific mandate to promote good practices, elaborate overall and thematic reports and address specific cases in the field of the rights of indigenous peoples.[26]

These three specific bodies in the field of indigenous peoples are complemented in their work by the functions and competences of a series of UN treaty-bodies with a direct impact on the rights of indigenous children. The work of these bodies relates to the rights of indigenous children for the direct relevance of a series of rights recognized within the respective treaties. Accordingly, the *Committee on the Rights of the Child*, in interpreting the all the rights set forth in the Convention have provided specific guidance in the way in which those universal rights need to applied for indigenous children.[27] The *Human Rights Committee,* responsible for monitoring the implementation of International Covenant on Civil and Political Rights (ICCPR), has applied several of its provisions in the specific context of indigenous peoples, including the right to self-determination (article 1), and the rights of national, ethnic, and linguistic minorities (article 27).[28] The *Committee on Economic, Social and Cultural Rights,* responsible for monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has also applied several of its provisions in the specific context of indigenous peoples, including the right to adequate housing; the right to education; the right to take part in cultural life and; the right to health, among others.[29] The *Committee on the Elimination of Racial Discrimination (CERD),* responsible for the supervision of the International Convention on the Elimination of All Forms of Racial Discrimination, has also paid attention about the human rights of indigenous peoples.[30] Finally, the *Committee on the Elimination of Discrimination against Women (CEDAW),* has focused on the situation of indigenous women as particularly vulnerable and disadvantaged groups in the context of the Convention on the Elimination of All Forms of Discrimination against Women.[31]

At regional level, both the African and the Inter-American systems of human rights contemplate normative standards and bodies which play a role in the respect of the rights of the child. On the one hand, the Inter-American System of Human Rights has produced the American Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the Organization of American States in June 2016. Along this declaration, charter and treaty-based organs like the *Inter-American Court of Human Rights* and the *Inter-American Commission on Human Rights* have extensively interpreted the American Convention on Human Rights in relation to the rights

of indigenous peoples, including indigenous children.[32] The Inter-American System, at the same time, provides for two Special Rapporteurs directly related to this matter. The Special *Rapporteur on the Rights of Indigenous Peoples*[33] and the *Special Rapporteur on the Rights of the Child*.[34]

Finally, the African System of Human Rights stipulates a Commission and a Court for interpreting its core legal instrument, in this case, the African Charter on Human and Peoples´ Rights. The African Commission has played a key role in drafting reports and decisions directly related to key issues for indigenous peoples: their right to land and to the use of their natural resources.[35] Along these two organs, the African Charter on the Rights and Welfare of the Child specifies the creation of a specific Committee on the Rights and Welfare of the Child, which has wide competences, including receiving individual or collective communications.[36]

III. Basic rights and principles applied to indigenous children: Towards a comprehensive approach.

Even if all the rights set forth in the CRC are applicable to indigenous children, article 30 specifically address their position in a more structural way. The articles states:

> *Article 30*
>
> *In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.*

As we can see, the importance of this article is paramount. As in the case of Article 27 of the International Covenant on Civil and Political Rights,[37] Article 30 of the CRC recognizes a legal right to exercise the basic dimensions of cultural belonging for indigenous children. The Committee on the Rights of the Child has interpreted this right as being both individual and collective and establishing negative and positive obligations for states.[38] Critically, the Committee has also declared that this right must be exercised "in accordance with other provisions of the Convention and under no circumstances may be justified if deemed prejudicial to the child's dignity, health and development".[39]

While article 30 does not make explicit the important relationship between indigenous culture and the natural environment, the enjoyment of their identity, culture and religion are closely linked to their land, sacred sites and the natural environment that preserving them. Consequently, the exercise of the cultural rights of indigenous children will require, in many cases, the effective use of traditional territory and the use of its resources, as a prerequisite for the realization of the child's right to "enjoy his or her own culture, to profess and practice his or her own religion".[40]

Recognizing this fundamental relationship, the Inter-American Court of Human Rights has indicated that "within the general obligation of the States to promote and protect cultural diversity, a special obligation can be inferred to guarantee the right to a cultural life of indigenous children."[41] Therefore, the Court has considered that "the loss of traditional practices, such as male and female initiation rites and the Community's languages, as well as the harm arising from the lack of territory, particularly affect the cultural identity and development of the children of the

Community, who will not be able to develop that special way of life unique to their culture if the necessary measures are not implemented to guarantee the enjoyment of these rights."[42]

Along article 30, the CRC contains other rights and principles which play a fundamental role in this field. The Committee on the Rights of the Child has provided a systematic review of a series of principles of principles and rights applied to indigenous children. These range from the principles of non-discrimination and best interest of the child, to a set of specific rights such as the right to life; survival and development; the right to be heard; access to information, birth registration, nationality and identity; family life and alternative care; basic health and welfare; education; special protection measures; economic and sexual exploitation and trafficking and; juvenile justice.[43]

While all these principles and rights are relevant (and maybe others not developed in the work of the Committee), in the next lines I will focus my analysis on what I consider as two fundamental aspects in relation to the rights of indigenous children: a) the right to life, survival and development in a context of structural inequality and; b) the principle of the best interest of indigenous children, particularly in the field of family life and protection measures.

a. The right to life, survival and development: Structural inequality.

The right to life, survival and development is particularly recognized in article 6 of the CRC. This article establishes:

Article 6

1. *States Parties recognize that every child has the inherent right to life.*

2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

The right to life, survival and development is multifaceted and closely linked to other rights of the child, such as the rights to education, the highest attainable standard of health and the access to and use of their land and to the quality of the environment in which they live.[44] In other words, this right implies a series of positive measures for states, which go well beyond the classical negative duties associated to the right to life. The Inter-American Court of Human Rights has highlighted this positive conception of the right, precisely in case related to indigenous peoples:

> *"One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority."*[45]

Despite of this normative conception of the right to life, survival and development, one of the most striking findings by international human rights bodies and other agencies, is the disproportionate high numbers of indigenous children living in extreme poverty, including the high infant and child mortality rates as well as malnutrition and diseases among them.[46] Available data points out to one

of the main challenges faced by indigenous children: structural inequality or discrimination. As defined by Dani and de Haan, structural inequality is a condition that arises out of attributing an unequal status to a category of people in relation to one or more other categories of people, a relationship that is perpetuated and reinforced by a confluence of unequal relations in roles, functions, decision rights, and opportunities.[47] In the case of indigenous children, not only poverty, but also the negative impact of a series of economic activities, denial of access to basic social and political rights, as well as persistent forms of violence, are normally perpetuated and reinforced by social structures and institutions against indigenous children.

The framework provided by structural inequality or discrimination has been progressively incorporated in the analysis of both international human organs and domestic courts. For example, in its observation to Brazil (2015), the Committee on the Rights of the Child expressed its concerns about the rights of indigenous children in the following way:

> *"79. The Committee is deeply concerned about the structural discrimination against children belonging to indigenous groups, including as regards their access to education, health and an adequate standard of living. It is particularly concerned about:*
>
> *(a) The high levels of violence against indigenous children and communities, including murder and sexual and physical violence, perpetrated by, among others, local ranchers and illegal loggers, and the lack of protection from these attacks and widespread impunity for these crimes;*
>
> *(b) Indigenous communities' forced eviction from their land as a result of land grabbing by ranchers, the development of extractive industries, illegal logging or other industrial projects, which severely undermines indigenous children's right to an adequate standard of living, health and a healthy environment;*
>
> *(c) The high rate of suicide among indigenous children, particularly Guaraní children;*
>
> *(d) The delay in the demarcation of indigenous peoples' lands, notwithstanding the constitutional rights to property and self-determination, as well as the enactment of legislation to facilitate the demarcation of land, which has negatively impacted indigenous children;*
>
> *(e) Pending legislation, among other measures, that is aimed at subjecting indigenous territories to mining, industrial projects, and the construction of dams and military bases."*[48]

A similar approach has been recently applied by the Canadian Humans Rights Tribunal, in favour of First Nations children and their families. The case concerned children, and specifically, how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. In order to reach a decision, proceedings included extensive evidence on the history of Indian Residential Schools and the experiences of those who attended or were affected by them.

In a highly relevant decision for approaching the rights of indigenous children, the Tribunal established that First Nations children and families living on reserve and in the Yukon were denied

equal child and family services and/or differentiated adversely in the provision of child and family services. Following a well-established interpretation developed in previous judicial precedents on *substantive equality*, the Tribunal held that, in determining whether there has been discrimination against First Nations children and their families in a substantive sense, the analysis must also be undertaken in a purposive manner "...taking into account the full social, political and legal context of the claim".[49]

Accordingly, after weighing the arguments, the Court concluded that, in providing the benefit of the First Nations on-reserve and in the Yukon by First Nations Child and Family Services (FNCFS) Program and the other related provincial/territorial agreements, the Aboriginal Affairs and Northern Development Canada (AANDC) was obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples. For the Court, if AANDC's conduct "widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory".[50]

Poverty

Several studies have shown that the Millennium Development Goals (now replaced by the Social Development Goals or 2030 Agenda) failed ethnic minorities and indigenous peoples by most indicators.[51] The benefits of the last decade were unevenly distributed, a trend aggravated by the enduring effects of economic globalization, rising demand for natural resources, and insufficient protection of indigenous peoples' rights.[52] In fact, indigenous peoples account for 5 per cent of the world's population, while representing 15 per cent of those living in poverty. As many as 33 per cent of all people living in extreme rural poverty globally are from indigenous communities.[53] Only in Latin America, about 63% of children suffer some kind of poverty, a situation that is more pressing in indigenous children, with 88%.[54] Just three recent examples from different regions of the world give us an idea of the unequal distribution of poverty between indigenous and non-indigenous children.

A recent study in *Canada*, established that indigenous children are more than twice as likely to live in poverty than non-Aboriginal kids. The study, which delves into poverty rates on reserves and in the territories as measured by income, documents the dire conditions being experienced by status First Nations children, including 60 per cent of those who live on reserves.[55]

Analysis of data from the 2014 Household, Income and Labour Dynamics in *Australia* (HILDA) Survey found that Aboriginal and Torres Strait Islander people were more likely to experience poverty and less likely to "exit welfare" than other Australians. In fact, while Aboriginal and Torres Strait Islander peoples comprise approximately 3% of the population in Australia, they represent 9.6% of those currently receiving the Newstart Allowance, 14.3% of those currently in receipt of the Parenting Payment (lone parent) and 18.9% of people accessing Youth Allowance (other). These payments have been shown to fall below the poverty line.[56]

Finally, in *Chile*, 8.7% of the population under 18 years old is indigenous, a group that concentrates the highest levels of vulnerability. 29.5% of indigenous children are below the poverty line, a higher figure compared to the percentage of non-indigenous children, to 22.5%. This gap is also reflected in various dimensions of their living conditions such as education, income, housing and others that affect their opportunities for social inclusion.[57]

These figures express not a grave violation of indigenous children´s right to life, survival and development, but also involves a high cost to society, in terms of human capital and social inclusion. Indigenous children are more affected by poverty than non-indigenous children and this affects the development of their basic capabilities and their contribution to their communities and the society in general.

Education

The right to education plays a paramount role in the protection of all other fundamental rights of indigenous children. As the Committee on the Rights of the Child has pointed out:

> *"The education of indigenous children contributes both to their individual and community development as well as to their participation in the wider society. Quality education enables indigenous children to exercise and enjoy economic, social and cultural rights for their personal benefit as well as for the benefit of their community. Furthermore, it strengthens children's ability to exercise their civil rights in order to influence political policy processes for improved protection of human rights. Thus, the implementation of the right to education of indigenous children is an essential means of achieving individual empowerment and self-determination of indigenous peoples."*[58]

Against this normative background, there is well-established evidence of a systematic non-compliance with this right by states, particularly when compared with non-indigenous children. For example, in Nunavut, the northernmost territory in Canada, Inuit high-school graduation rates are well below average, and only 40 per cent of all school-age indigenous children are attending school full time. In Australia, participation of indigenous between 15-19 year of age in higher education stood at 60 per cent in 2013, well below the 80 per cent participation for all Australians in the same age group. In the Latin America and Caribbean region, on average, 85 per cent of indigenous children attend secondary education, but only 40 per cent complete that level of education.[59]

ILO Convention No. 169 highlights that Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.[60] At the same time, Article 14 of the UNDRIP provides that:

> *'indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning'.*[61]

In a sharp contrast with these legal obligations, stigmatization is a great source of marginalization that indigenous children bring with them to the classroom, when they have access to it. Per UNESCO, from Aboriginals in Australia to the indigenous people of Latin America, failure to provide home language instruction has often been part of a wider process of cultural subordination

and social discrimination.[62] In part, this happens because of some basic barriers faced distinctively by indigenous children.

The first of barriers to education for indigenous children is *lack of access*. For children to receive an education there must be a school within safe travelling distance, with teachers and pedagogical materials.[63] Nonetheless, in many countries, this is often not the case, especially for indigenous peoples who tend to live in remote areas or who move around. The second barrier is the *poor quality* of the education provided. The provision of a quality education demands attention to the content of the curriculum, the nature of the teaching and the quality of the learning environment. It implies a need for the creation of flexible, effective and respectful learning environments that are responsive to the needs of all children.[64] Children from the poorest communities often have inferior educational institutions than those from richer communities. Indigenous children from ethnic minorities may be denied the opportunity to learn in their own language and their curricula and educational materials may be grounded in an alien culture. As suggest by the before mentioned study conducted by UNESCO, they may even be faced with social stigmatization. The third barrier is *relatively poor outcomes*. Indigenous children and children from ethnic minorities do not enjoy the same benefits from education as other children. They find it harder to get jobs, and their education often does not lead to significant contributions to life in their community.[65]

Although considered as "national minorities", the case of Roma children is also illustrative of the way in States might create additional barriers for accessing "equal education" for children belonging to ethno-cultural minorities. In *D.H. and Others v. The Czech Republic*, the European Court of Human Rights determined that the schooling arrangements for Roma children designed by the Czech Republic for many years were not attended by safeguards that would ensure that the State took into account their special needs as members of a disadvantaged class. Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.[66]

Health

In accordance to Article 24 of the CRC States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.[67] At the same time, the CRC establishes that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.[68]

The right to health has been interpreted by the Committee on the Rights of the Child as implying the obligation to provide health services that are sensitive to the needs and human rights of all adolescents, including their availability, accessibility, acceptability and quality. These characteristics include, among others, the necessity to provide health services which are sensitive to the needs of children and adolescents, as well as personnel trained to care for them, adequate facilities and scientifically accepted methods.[69] In the specific case of indigenous children, the

right to health implies, among others, culturally-sensitive and community-based services, planned and administered in cooperation with the peoples concerned, ensuring access to health care for indigenous peoples who reside in rural and remote areas or in areas of armed conflict or who are migrant workers, refugees, displaced or with disabilities.[70]

As in the analysis of the right to education, persisting inequities in health status is a commonality for all the world's indigenous peoples, with gaps not only in health status, but also in many determinants of health. As indicated by the UN Special Rapporteur on the Rights of Indigenous Peoples, "women and children face additional vulnerabilities. These are rooted in situations of extreme poverty, lack of access to education and social services, destruction of indigenous economies and sociopolitical structures, forced displacement, armed conflict and loss and degradation of customary lands and resources, all of which are further compounded by structural racism and discrimination."[71] At the same time, environmental degradation and contamination arising from business activities can compromise children's rights to health, food security and unique to their culture if the necessary measures are not implemented to guarantee the enjoyment of these access to safe drinking water and sanitation.[72]

Contemporary indigenous health issues in Asia are strikingly similar in many aspects to problems of indigenous peoples worldwide. Although the gap is gradually being narrowed in health status of indigenous and non-indigenous populations substantially over the last few decades in the region, there is a significant burden of disease for the indigenous population as compared to general population. The studies show that indigenous peoples in Asia "bear a triple burden of persisting infectious diseases, increasing chronic conditions, and a growing recognition of injuries and violence".[73] The available data reveal that several Asian countries have shown improvement in child nutrition over the last two decades. Nonetheless, changes in the nutritional status of the children in indigenous communities are much slower in pace than their non-indigenous counterparts.[74]

In Africa, indigenous peoples often occupy hard-to-reach areas with poor infrastructure and harsh terrain. This physical obstacle is increased by the lack of formal recognition of indigenous peoples by many African states. This means that disaggregated data on indigenous peoples' health status are hard to find. As suggested by the UN Permanent Forum on Indigenous Issues, because indigenous peoples are essentially invisible in the data collection of many international agencies and in most national censuses, the disparities in their health situation as compared to other groups continues to be obscured.[75]

In Australia, Aboriginal and Torres Strait Islander children face great disparities in nearly every measured health outcome – including birthweight, mortality rate for children aged 0-4 years, ear and eye disease, dental health and general nutrition. Updated data indicates that these children are not only more likely to be afflicted with a range of health-related conditions as children, but are also less likely to have access to resources and services that reduce the risk of health issues later in life.[76] Indigenous children and adolescents in Guatemala are the hardest hit by poverty and lack of food, and have the highest levels of malnutrition. Furthermore, there are multiple and serious health issues related to insufficient food, including stunted growth, fatigue, weakened immune systems, and so on.[77]

Violence

Health deficits in indigenous children are strongly related to the various forms of violence. As we know, the CRC establishes the right of the child to freedom from all forms of violence in the following terms:

> ***Article 19***
>
> 1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
>
> 2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

Violence hits indigenous children in many ways. Some of these forms of violence are common to all children, while others have specific impacts on indigenous children. In addition to the general discrimination against indigenous peoples in employment and occupations, they are particularly vulnerable to the most extreme forms of *labour exploitation*, such as hazardous labour conditions, child labour and forced labour. As identified by the UN Special Rapporteur on the Rights of Indigenous Peoples, the latter includes: "the bonded labour of indigenous peoples in several countries in South Asia; slavery-like practices in parts of Africa; and debt-bondage in parts of Latin America. Indigenous women and children face additional risks related to trafficking and sexual exploitation, as well as exploitation in the context of domestic work."[78]

Indigenous children are also particularly exposed to the negative impacts of economic activities within their territories, such as *extractive and development activities*. For example, the Inter-American Commission on Human Rights has documented many reported allegations of adverse effects on the personal integrity of indigenous peoples due to the mining, such as dermatological and respiratory diseases, mainly affect children.[79] Many reports have also called to attention on the lack of birth registration or citizenship documentation afforded to indigenous individuals in some countries. This situation reportedly contributes to an increased vulnerability of women and children to *trafficking*.[80]

The trafficking of indigenous children and girls may be the result of some root causes, such as, legacies of the residential schools and their inter-generational effects, family violence, childhood abuse, poverty, homelessness, lack of basic survival necessities, race and gender-based discrimination, lack of education, migration, and substance addictions. These root causes are coupled with rural/remote living conditions creates a complex environment that contributes to an increased risk among women and girls in being sexually exploited and trafficked. In the Canadian context, factors such as isolation, poverty, lack of support networks, lack of education and cultural activities further enhance the vulnerabilities of indigenous women and girls when they migrate to cities.[81]

At the same time, several forms of abuse or violence may emerge in the context plural legal systems (formal or informal). While the protection of culture is a fundamental component of the protection of indigenous children, it is also essential to address the negative impact of some *harmful practices* that might be justified within. Harmful practices range from lesser-known practices such as uvulectomy, milk teeth extraction, breast ironing, forced feeding and nutritional taboos, and the mutilation and sacrifice of children un witchcraft rituals, female genital mutilation/cutting, forced and child marriage, honour killings, acid attacks, son preference, female infanticide and prenatal sex-selection as well as virginity testing. These practices often inflict many forms of violence against children, such as physical, sexual, mental and emotional.[82]

As both, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have pointed out:

> *"Harmful practices are […] grounded in discrimination based on sex, gender and age, among other things, and have often been justified by invoking sociocultural and religious customs and values, in addition to misconceptions relating to some disadvantaged groups of women and children. Overall, harmful practices are often associated with serious forms of violence or are themselves a form of violence against women and children."*[83]

The preservation of religious and cultural values and traditions is an important component of the right to identity of children. However, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child's best interests. In other words, cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention.[84]

Finally, indigenous children and youth are *disproportionately represented within criminal justice systems*.[85] For example, available research in Canada suggests that Aboriginal youth over-incarceration is one of the most well-documented features of the criminal justice system (CJS). While Canada's overall youth incarceration rate has fallen by 35 percent under the *Youth Criminal Justice Act (YCJA)*, Aboriginal youth have only seen a 23 percent decrease in incarceration rates, they are increasingly being held in remand custody and for longer periods of time than non-Aboriginal youth and, they are disproportionately sentenced to probation.[86] Official data from the Australian Government illustrates that although only a 5 percent of all the 10-17 years olds in Australia are Indigenous, in an average day in 2012-2013, 40 percent of young people under youth justice supervision were Indigenous. Additionally, this proportion rose to 50 percent for young people in detention.[87]

b. Developing the Best Interests of the Indigenous Child: Protection cases.

The principle of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.[88] As the Committee on the Rights of the Child has clarified, the best interest of the child (hereinafter "BIC") is a three-fold concept: a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general; b) A fundamental, interpretative legal principle: If a legal provision is open

to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen and; c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.[89]

The conceptualization of the BIC is fundamental for the case of indigenous children for two main reasons. First, because despite of its apparent objectivity the absence of standardised guidelines for its application may reduce it to "little more than a rationalization that justifies a particular decision maker's judgments".[90] Second, because the application of this principle to indigenous children implies a consideration of the role that both collective and individual play in assessing the child's welfare.[91] In particular, when we take into account how the psychological development of a child is tied to his right to a cultural identity, which is jeopardized by removal from his/her family and community.

A few cases from different domestic jurisdictions in the area of protection may provide an account on the way the individual and collective dimensions of the BIC enter play.

A first case is *Mississippi Band of Choctaw Indians v. Holyfield* (1989). This case, decided by the U.S. Supreme Court, involves the status of twin illegitimate babies, whose parents were enrolled members of appellant Tribe and residents and domiciliaries of its reservation in Neshoba County, Mississippi. After the twins' births in Harrison County, some 200 miles from the reservation, and their parents' execution of consent-to-adoption forms, they were adopted by a non-Indian couple (Holyfield). Mississippi courts overruled appellant's motion to vacate the adoption decree, which was based on the assertion that, under the Child Welfare Act of 1978 (ICWA) exclusive jurisdiction was vested in appellant's tribal court. The Supreme Court of Mississippi affirmed, holding, among other things, that the twins were not "domiciled" on the reservation under state law, in light of the Chancery Court's findings (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents, who went to some efforts to see that they were born outside the reservation and promptly arranged for their adoption. Therefore, the court said, the twins' domicile was in Harrison County, and the Chancery Court properly exercised jurisdiction over the adoption proceedings. After hearing the case, the U.S. Supreme Court decided that he twins were "domiciled" on the Tribe's reservation within the meaning of the ICWA's exclusive tribal jurisdiction provision, and the Chancery Court was, accordingly, without jurisdiction to enter the adoption decree.

In considering the relationships among the children and their families and indigenous communities, the Court affirmed that:

> *"Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."*[92]

The Indian Child Welfare Act of 1978 was the product of rising concern in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. [93] This extensive removal of Indian children from their homes prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children.[94]

A second, and related case, refers to custody decision adopted by the Constitutional Court of Colombia. The case deals with an indigenous mother´s request to obtain her daughter´s custody, after this had been taken away by a decision adopted by the indigenous jurisdiction of the Yuri Community (belonging to the "*Puinave Peoples*"). After born outside the indigenous community, the daughter had been taken away by the father into the Yuri Community. Later, the Chief of the Yuri and community and the social services decided the custody of the child was for her grandparents within the community. The mother, who lived outside the community, was granted 7 days of visits per month by these authorities, but only if she would pay traveling expenses for the grandparents and the child (community-city-community). The mother applied before the Constitutional Court claiming a violation of her right to family life. She also claimed that was in no economic position to sustain the costs of those trips.

The Constitutional Court of Colombia decided in favour of the mother, explaining the role that the BIC plays in allowing limited and justifiable interventions into indigenous legal jurisdictions in plural legal systems. The Court stated:

> *[...] the pro-infans principle has been recognized and protected so that the prevalence of the best interests of the child is established considering the specifics and differential approach of minors belonging to an indigenous community. This special prevalence reconciles the rights of children and their superior interest with the principles of ethnic and cultural identity and membership of a specific community."*[95]

The Colombian Constitutional Court complemented this general conception of the BIC for the concrete case, in the following way:

> *"[...] there are a series of international, legal, and administrative rules, as well as case law, which indicate that in the case of jurisdictional or administrative proceedings involving an indigenous child, his or her individual rights should be jointly protected along the collective rights to cultural identity and ethnic identity. In principle, the competence to resolve conflicts related to indigenous children lies within the community to which they belong and must be resolved by their authorities according to their customs. In this area, the pro-infans (pro-child) principle must be observed, which consists in the prevalence of children's rights over the rights of others. However, when the indigenous jurisdiction or the community itself violates the essential contents that are part of the restrictions of indigenous jurisdiction, the rights of indigenous children can be protected by national jurisdiction, as they retain their individual rights which cannot be denied by the community."*[96]

The case seems particularly interesting for various reasons. First, because the Court recognizes the indivisibility and interdependence between the individual and collective rights of the indigenous child. Second, the Court follows a rule of preference in favour of the indigenous jurisdiction to adopt decisions with a direct impact on their cultural viability. Third, while showing cultural

deference in favour of the community, the Court sustains the role of the BIC as a paramount principle, even within the indigenous jurisdiction. Lastly, the decision strikes a balance between the constitutionally relevant interests in respecting the legal autonomy of the indigenous community and the also mandatory role of the BIC in justifying reasonable restrictions into that autonomy: in this case, protecting the rights of the indigenous child.

One of the most interesting aspects of this decision by the Colombian Constitutional Court resides in the way in which the tribunal, even when retaining its power to review the reasonability of cultural restrictions into the individual rights of the indigenous child, upholds the competence of the community to resolve conflicts related to indigenous children, according to their customs and authorities. This is a fundamental consideration which finds its reason not in an abstract and general defence of the rights of indigenous peoples, but in the BIC of the indigenous child in particular.

As highlighted by Park in the Canadian context, Aboriginal child-rearing practices differs in ways that are diametrically opposed to those of non-Aboriginal perspectives. These differences include the way in which indigenous societies generally tend to respect their children's individuality and allow them to develop naturally, whereas non-Aboriginal parents prefer more direct control; how children are socialized to only display feelings at appropriate times and in private; how they are cared for by an extended and not a nuclear family; how they are disciplined through shame and humour; and how Aboriginals believe that education extends beyond the schoolroom, such as lesson from elders. All of these different approaches are not irrelevant: They clash with those of mainstream society and can be mistaken for indifference, neglect, psychological abuse, or truancy.[97] Hence the importance of allowing communities to exercise qualitative assessments of the welfare of the child which, in turn, based heavily on culturally-based criteria.

A third, and related example, is provided by the way in which Australian legislation has attempted to protect the integrity of indigenous families, particularly in relation to forced removal of indigenous children. The *Aboriginal Child Placement Principle (ACPP)* is a national principle first articulated in the 1980s. It was driven by Aboriginal community-controlled organizations who advocated strongly for the best interests of Aboriginal children and families, and for the abolishment and redress of past practices and policies of forced removal of Aboriginal children. All Australian states and territories have endorsed the ACPP and each jurisdiction has adopted its own legislative and policy approaches to shape practice. [98]

One illustrative example of the ACPP is provided by the Children, Youth and Families Act (2005) from Victoria.[99] The Act establishes:

13. Aboriginal Child Placement Principle

> *(1) For the purposes of this Act the Aboriginal Child Placement Principle is that if it is in the best interests of an Aboriginal child to be placed in out of home care, in making that placement, regard must be had—*
>
> 1. *(a) to the advice of the relevant Aboriginal agency; and*
> 2. *(b) to the criteria in sub-section (2); and*
> 3. *(c) to the principles in section 14.*
>
> *(2) The criteria are—*

(a) as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives;
(b) if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with—
(i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family;
(ii) an Aboriginal family from another Aboriginal community;
(iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family;
(c) any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.

14. Further principles for placement of Aboriginal child

Self-identification and expressed wishes of child

(1) In determining where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child.

Child with parents from different Aboriginal communities

(2) If a child has parents from different Aboriginal communities, the order of placement set out in sections 13(2)(b)(i) and 13(2)(b)(ii) applies but consideration should also be given to the child's own sense of belonging.
(3) If a child with parents from different Aboriginal communities is placed with one parent's family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her other parent's family, community and culture.

Child with one Aboriginal parent and one non-Aboriginal parent

(4) If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed.

As we can see, the ACPP provides useful guidance for the specific determination of the BIC in concrete cases. Following a progressive trend in comparative Family Law, the ACPP guides the interpreter with a set of concrete rules that aim at reducing the high levels of subjectivity generally exhibited in applying the BIC. As proposed in the Children, Youth and Families Act from Victoria, the ACPP is also interesting because considers the protection of both, the integrity of indigenous families and communities, on the one hand, and the best interests of the indigenous child, on the other. In particular, in avoiding the separation of the indigenous children from their families and communities and in considering the opinion of the communities involved. Furthermore, the ACPP also considers the voice and self-identification of the individual child, as well as traditional criteria on contact and welfare assessment in the concrete case.

Finally, a recent a dramatic case from Canada provides a rich comprehension of the BIC for indigenous children in highly sensitive issues, such as their right to life and to health. *Hamilton Health Sciences Corp v D, H,* which involved J.J., an 11-year old girl from The Six Nations of the Grand River, who had been diagnosed in August 2014 with acute lymphoblastic leukaemia, a form

of cancer in the bone marrow. J.J. began the induction phase of chemotherapy treatment. On 27 August 2014, J.J.'s mother DH withdrew consent for the continuation of the chemotherapy treatment. The hospital applied to "protect the child" pursuant to the Child and Family Services Act[100], justified based on enforcing conventional understandings of "modern law."

Edward J of the Ontario Court of Justice dismissed the hospital's action and much debate and controversy followed. Edward J held:

> *"[81] It is this court's conclusion, therefore, that D.H.'s decision to pursue traditional medicine for her daughter J.J. is her aboriginal right. Further, such a right cannot be qualified as a right only if it is proven to work by employing the western medical paradigm. To do so would be to leave open the opportunity to perpetually erode aboriginal rights.*
>
> *[83] In applying the foregoing reasons to the applicant's subsection 40(4) [of the Child and Family Services Act] application, I cannot find that J.J. is a child in need of protection when her substitute decision-maker has chosen to exercise her constitutionally protected right to pursue their traditional medicine over the applicant's stated course of treatment of chemotherapy.*[101]

The decision caused great social impact in Canada, as seemed to restrict the traditional role granted to the BIC in medical cases involving children. The Hospital, however, did offer traditional Aboriginal medicine in conjunction with chemotherapy. Accordingly, the judge later amended his original decision to emphasize the best interest of the child remains paramount, while reasserting the right to use traditional medicine is part of the child's best interest. The amended decision established:

> *[83a] But, implicit in this decision is that recognition and implementation of the right to use traditional medicines must remain consistent with the principle that the best interests of the child remain paramount. The aboriginal right to use traditional medicine must be respected, and must be considered, among other factors, in any analysis of the best interests of the child, and whether the child is in need of protection. Taking into account the aboriginal right, and the constitutional objective of reconciliation and considering carefully the facts of this case, I concluded that this child was not in need of protection.*
>
> *[83b] In law as well as in practice, then, the Haudenosaunee have both an aboriginal right to use their own traditional medicines and health practices, and the same right as other people in Ontario to use the medicines and health practices available to those people. This provides Haudenosaunee culture and knowledge with protection, but it also gives the people unique access to the best we have to offer. Facing an unrelenting enemy, such as cancer, we all hope for and need the very best, especially for our children. For the Haudenosaunee, the two sets of rights mentioned above fulfil the aspirations of the United Nations Declaration on the Rights of Indigenous Peoples, which states in article 24, that "Indigenous peoples have the right to their traditional medicines and to maintain their health practices . . . Indigenous individuals also have the right to access, without any discrimination, to all social and health services."*[102]

The amended decision provides an improved doctrine of the case. Particularly, since the legal reasoning of the case is not any more about J.J.´ substitute decision-maker decision to exercise her constitutionally protected right to pursue their traditional medicine. Instead, the second judicial decision evolves around the correct interpretation of the best interests of J.J. (as a paramount consideration) in the concrete case, including the role, opinion and rights of her parents and

community.

The amended decision in *Hamilton Health Sciences Corp v D, H* provides an acute account on the way in which the BIC needs to be carefully crafted in each concrete situation. In fact, the amendments made by Edward J. to his original decision –although with no effect in the resolution of the case- represent a fine illustration of the need to avoid a "zero-sum game" approach to between the collective and individual dimensions within the rights of indigenous peoples in general and indigenous children.

As it has been indicated before, the determination of the bests interests of the indigenous child in a concrete case is a complex process which requires considering several factors that become relevant for the welfare of the child. In doing so, the interpreter need to consider the role that both collective and individual rights play in assessing the child's welfare and the community´s interpretation about fundamental aspects of life, as well as the child´s opinion. As the decision points out, the aboriginal right to use traditional medicine must be respected, and must be considered, among other factors, in any analysis of the best interests of the child, and whether the child is in need of protection. By incorporating the value and use of traditional medicine as one fundamental factor in weighing the bests interests of J.J., the case allows to strike a balance –a difficult one- between the cultural and individual rights of the child.

IV. Conclusion.

The life, survival and development of indigenous children is closely linked to structural conditions of inequality and discrimination with a dire impact on their education, health and security and integrity. In fact, one of the most striking findings by international human rights bodies and other agencies is the disproportionate high numbers of indigenous children living in extreme poverty, suffering from lack of access to health services and programs and to an education in their own language. These circumstances are generally aggravated by the persistence of various forms of violence experienced by indigenous children. Among them, labour exploitation, sexual abuse and trafficking, pollution derived from extractive and development activities, harmful practices and over-representation within criminal justice systems, among many others.

Despite this critical scenario, there are a series of advancements and conquests in the development of normative standards within the United Nations and regional human rights systems for the protection of the rights of indigenous peoples in general and indigenous children. The CRC contains various principles and rights with a direct impact for the indigenous child, particularly the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language. The large catalogue of rights set forth in the CRC is complemented by specific standards developed in law and practice, by other UN agencies, inter-agency groups, bodies and human rights mechanisms. Chiefly, those established in the UN Declaration on the Rights of Indigenous Peoples and the interpretations provided by human rights organs and procedures (both at UN and regional levels).

While all human rights and principles are key for an effective promotion and protection of the rights of indigenous children, the principle of the best interests of the indigenous child plays a paramount role. As the cases reviewed here suggest, this is so because the application of this

principle to indigenous children implies a consideration of how it relates to collective cultural rights. The evolution of this matter in both International Human Rights Law and the case law of some countries with pluralist legal systems indicate that in cases involving an indigenous child, his or her individual rights should be jointly protected along the collective rights to cultural identity and ethnic identity. This assertion, nonetheless, does not excludes the assessment of the welfare of the child in each individual case, which also my require an analysis on the ways in which cultural practices might compromise -beyond a reasonable defence- the fundamental rights of the child such as the right to life, liberty and non-discrimination.

While striking a right balance among all the key considerations for determining the best interests of the indigenous child in a concrete case might be particularly hard, some judicial decisions and laws might be open opportunities for achieving that purpose. This trend includes not only a general recognition of the role of culture within the welfare of the indigenous child, but also deference to the assessment of the specific cultural practices associated to child-rearing, diligence and education, by indigenous communities themselves.

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[3] Secretariat of the Permanent Forum on Indigenous Issues, 2004. *The Concept of Indigenous Peoples. Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues for the Workshop on Data Collection and Disaggregation for Indigenous Peoples* (New York, 19-21 January 2004). New York: Department of Economic and Social Affairs. Available online at: http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc

[4] Working Group on Indigenous Populations, 1995. 'Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples.' [Presented in the context of: Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People - New Developments and General Discussion of Future Action, 21 June 1005. E/CN.4/ Sub.2/AC.4/1995/3, p. 3]. New York: Economic and Social Council. Available online at: http://daccess-dds-ny.un.org/doc/UNDOC/ GEN/G95/128/02/PDF/G9512802.pdf?OpenElement

[5] ILO, *Indigenous and Tribal Peoples Convention, 1989 (No. 169), Convention concerning Indigenous and Tribal Peoples in Independent Countries* (Entry into force: 05 Sep 1991); Adoption: Geneva, 76th ILC session (27 Jun 1989). Article 1, subsections 1 & 2, respectively.

[6] *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution adopted by the General Assembly on 13 September 2007, A/RES/61/295, articles 3 & 44.

[7] OAS, American Declaration on the Rights of Indigenous Peoples (Adopted at the third plenary session, held on June 15, 2016), AG/RES. 2888 (XLVI-O/16).

[8] ILO, *Who are the indigenous and tribal peoples?*, in: http://www.ilo.org/global/topics/indigenous-tribal/WCMS_503321/lang--en/index.htm. See, for a similar list of criteria, World Bank. No date. 'Still Among the Poorest of the Poor,' *Indigenous Peoples Policy Brief*. Available online at: http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801127186030165 6/HDNEN_indigenous_clean_0421.pdf

[9] *Ibid.*, Par. 70.

[10] *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people*", Working Group on Indigenous Populations, E/CN.4/Sub.2/AC.4/1996/2, Par. 69.

[11] ILO, *Convention No. 169*, Op. Cit., note 5.

[12] *Indigenous Peoples in Africa: The forgotten peoples?*, African Commission on Human and Peoples´ Rights (CHPR) and International Work Group for International Affairs (IWGIA), Eks/Skolens Trykkeri, Copenhagen, Denmark, 2006, p.10.
[13] *UN Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Art.1.
[14] Douglas Hodgson, The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness, 7 INT'L J. L. & FAM. 255, 265.
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