

# INTERNATIONAL LAW AND INDIGENOUS PEOPLES

THE RAOUL WALLENBERG INSTITUTE  
HUMAN RIGHTS LIBRARY  
VOLUME 20

# INTERNATIONAL LAW AND INDIGENOUS PEOPLES

EDITED BY

JOSHUA CASTELLINO AND NIAMH WALSH

THE RAOUL WALLENBERG INSTITUTE HUMAN RIGHTS LIBRARY  
VOLUME 20

MARTINUS NIJHOFF PUBLISHERS  
LEIDEN/BOSTON

2005

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISBN 90-04-14336-X

© Copyright 2005 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill Academic Publishers, Martinus Nijhoff Publishers and VSP.

<http://www.brill.nl>

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher.

Authorization to photocopy items for internal or personal use is granted by Brill Academic Publishers provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers MA 01923, USA. Fees are subject to change.

Printed and bound in The Netherlands

# CONTENTS

<b>Tables of Treaties, Cases and Communications</b>	vii
<b>Affiliation of Contributors</b>	xv
<b>Introduction by Gudmundur Alfredsson</b>	xvii

## **Part I Human Rights Instruments & Indigenous Peoples**

<b>Martin Scheinin</b> <i>Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights</i>	3
<b>Patrick Thornberry</b> <i>The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination</i>	17
<b>Lee Swepston</b> <i>Indigenous Peoples in International Law and Organizations</i>	53
<b>Les Malezer</b> <i>Permanent Forum on Indigenous Issues: 'Welcome to the Family of the UN'</i>	67

## **Part II Specific Issues Affecting Indigenous Peoples**

<b>Joshua Castellino</b> <i>The 'Right' to Land, International Law &amp; Indigenous Peoples</i>	89
<b>William A. Schabas</b> <i>Cultural Genocide and the Protection of the Right of Existence of Aboriginal and Indigenous Groups</i>	117
<b>Mark Harris</b> <i>'... another box of tjuringas under the bed': The Appropriation of Aboriginal Cultural Property to Benefit Non-Indigenous Interests</i>	133

## **Part III Indigenous Peoples in Domestic Jurisdictions**

<b>Australia</b> <b>Steve Kinnane</b> <i>Indigenous Sustainability: Rights, Obligations, and a Collective Commitment to Country</i>	159
<b>Canada</b> <b>Alexis P. Kontos</b> <i>Aboriginal Self-Government in Canada: Reconciling Rights to Political Participation and Indigenous Cultural Integrity</i>	195

## TABLE OF CONTENTS

### **Mexico**

**Alejandro Anaya-Muñoz**

*Multicultural Legislation and Indigenous Autonomy in Oaxaca, Mexico* 225

### **Nicaragua**

**Christina Binder**

*The Case of the Atlantic Coast of Nicaragua: The Awas Tingni Case, or Realizing that a Good Legal System of Protection of Land Rights Is No Guarantee of Effective Implementation* 249

### **India**

**Jérémine Gilbert**

*The Blur of a Distinction: Adivasis Experience with Land Rights, Self-Rule and Autonomy* 269

### **Bangladesh**

**Faustina Pereira**

*The Chittagong Hill Tracts Peace Accord and the Long Road to Peace: A Case Study* 293

### **Nigeria**

**Kwadwo Appiagyei-Atua**

*Self-Determination v. State Sovereignty: A Critique of the African Commission's Decision in the Ogoni Case* 303

### **South Africa**

**Vinodh Jaichand**

*Self-Determination and Minority Rights in South Africa* 337

### **Kenya**

**Albert K. Barume**

*Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya* 365

## **Part IV Conclusion**

**Joshua Castellino and Niamh Walsh**

*Conclusion* 393

## TABLES OF TREATIES, CASES AND COMMUNICATIONS

### TABLE OF TREATIES

*Treaty of Ghent* (1814), signed after the War of 1812 between Great Britain and the United States of America

#### ILO CONVENTIONS

*Convention (No. 29) Concerning Forced or Compulsory Labour* (ILO 1930, entered into force May 1, 1932)

*Convention (No. 105) Concerning the Abolition of Forced Labour* (ILO 1957, entered into force January 17, 1959)

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

*Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation* (ILO 1958, entered into force June 15, 1960)

*Convention (No. 138) Concerning Minimum Age for Admission to Employment* (ILO 1973, entered into force June 19, 1976)

*Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 1989, entered into force September 5, 1991)

*Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ILO 1999, entered into force November 19, 2000)

#### UN CONVENTIONS

*UN Charter*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945

*Convention for the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, entered into force Jan. 12, 1951

*International Covenant on Civil and Political Rights* (ICCPR), (1976) 999 UNTS 171; G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976

*International Covenant on Economic, Social and Cultural Rights* (ICESCR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976

*International Convention on the Elimination of Racial Discrimination* (ICERD), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969

## TABLES OF TREATIES, CASES AND COMMUNICATIONS

- Convention on the Rights of the Child* (CRC), G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept.2 1990
- Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993)
- Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994
- Statute of the International Criminal Tribunal for the former Yugoslavia*, UN Doc. S/RES/827 (1993)
- Statute of the International Criminal Tribunal for Rwanda*, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994)
- Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 3, *entered into force* July 1, 2002
- The Declaration on Granting Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), 14 December 1960
- The Declaration on Principles of International Law Concerning the Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN*, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970)

### REGIONAL INSTRUMENTS

- Proposed American Declaration on the Rights of Indigenous Peoples* approved by the Inter-American Commission on Human Rights at its 133<sup>rd</sup> session, 26 Feb. 1997, OEA/Ser.L/V/II.9, doc.7, rev. 1997
- Framework Convention for the Protection of National Minorities*, opened for signature 1 Feb. 1995, *entered into force* 1 Feb. 1998, E.T.S. No. 157
- African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

## TABLE OF CASES AND COMMUNICATIONS

### COMMUNICATIONS BEFORE TREATY MONITORING BODIES

#### Human Rights Committee

- A. D. v. Canada* (Communication No. 78/1980) Views adopted 29 July 1984, U.N. Doc. CCPR/C/OP/1
- Anni Äärelä and Jouni Näkkäläjärvi v. Finland* (Communication No. 779/1997), Views adopted 24 October 2001, Report of the Human Rights Committee, Vol. II, UN doc. A/57/40 (Vol. II)



## TABLES OF TREATIES, CASES AND COMMUNICATIONS

- Apirana Mahuika et al. v. New Zealand* (Communication No. 547/1993), Views adopted 27 October 2000, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. II)
- Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)
- Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-eighth session, Suppl. No. 40 (A/38/40)
- Debreczeny v. The Netherlands* (Communication No. 500/1992), U.N. Doc. CCPR/C/53/D/500/1992 (1995)
- Ignatane v. Latvia* (Communication No. 884/1999), U.N. Doc. CCPR/C/72/D/884/1999 (25 July 2001)
- Ilmari Länsman et al. v. Finland* ('*Länsman No. 1*') (Communication 511/1992), Views adopted 26 October 1994, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40)
- Ivan Kitok v. Sweden* (Communication No. 197/1985), Views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third Session, Suppl. No. 40 (A/43/40)
- J.G.A. Diergaardt et al. v. Namibia* (Communication No. 760/1997), Views adopted 25 July 2000, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fifth Session, Suppl. No. 40 (A/55/40)
- Jouni E. Länsman et al. v. Finland* ('*Länsman No. 2*') (Communication No. 671/1995), Views adopted 30 October 1996, Report of the Human Rights Committee, Vol. II, UN doc. A/52/40 (Vol. II)
- L.S.N. v. Canada* (Communication No. 94/1981), Views adopted 30 March 1984, U.N. Doc. CCPR/C/OP/2 (1990)
- Lubicon Lake Band (Bernard Ominayak) v. Canada* (Communication No. 167/1984), UN Doc. CCPR/C/38/D/167/1984, U.N. Doc. A/45/40, Vol. II
- Marie-Hélène Gillot et al. v. France* (Communication No. 932/2000), Views adopted 15 July 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-seventh Session, Suppl. No. 40 (A/57/40)
- Marshall v. Canada* (Communication No. 205/1986), U.N. Doc. CCPR/C/43/D/205/1986 (4 Nov. 1991)
- Mikmaq tribal society v. Canada*, (Communication No. 78/1980) 30 September 1980, U.N. Doc. Supp. No. 40 (A/39/40) at 200 (1984).
- O. Sara et al. v. Finland* (No. 431/1990), (A/49/40) U.N. Doc. CCPR/C/50/D/431/1990 (1994)
- Sandra Lovelace v. Canada* (Communication No. 24/1977), Views adopted 30 July 1981, Report of the Human Rights Committee, GAOR, Thirty-sixth session, Suppl. No. 40 (A/36/40), U.N. Doc. CCPR/C/OP/1
- R.L. et al. v. Canada* (Communication No. 358/1989), U.N. Doc. CCPR/C/43/D/358/1989 (6 Nov. 1991)

## TABLES OF TREATIES, CASES AND COMMUNICATIONS

### **Committee on the Elimination of Racial Discrimination**

*B.M.S. v. Australia* (Communication No. 8/1996), U.N. Doc. CERD/C/54/D/8/1996 (1999)

*K.R.C. v. Denmark* (Communication No. 23/2002), U.N. Doc. A/57/18 at 134 (2002)

*LK v. Netherlands*, Communication No. 4/1991, A/48/18 (1993)

### **Permanent Court of International Justice**

*Minority Schools in Albania* Advisory Opinion, P.C.I.J. Series A/B, No. 64 (1935)

### **International Court of Justice**

*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1950-51)* Advisory Opinion of 28 May 1951

*Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)* Judgment of 20 June 1959

*Western Sahara (1974-75)*, Advisory Opinion of 16 October 1975

*Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* (1983-86), Judgment of 22 December 1986

*Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (1986-92) Judgment of 11 September 1992

*Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina/Yugoslavia (Serbia and Montenegro)), Further requests for the Indication of Provisional Measures*, Order of 13 September 1993

*Case Concerning the Territorial Dispute (Libyan Jamahiriya/Chad)* (1990-94) Judgment of 13 February 1994

*Legality of the Threat or Use of Nuclear Weapons* (1994-96) Advisory Opinion of 8 July 1996

### **International Criminal Tribunal for the former Yugoslavia**

*Prosecutor v. Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

*Prosecutor v. Jelusic* (Case no. IT-95-10-T), Judgment, 14 December 1999

*Prosecutor v. Jelusic* (Case no. IT-95-10-A), Judgment, 5 July 2001

*Prosecutor v. Krstic* (Case no. IT-98-33-T), Judgment, 2 August 2001

*Prosecutor v. Sikirica et al.* (Case no. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001

*Prosecutor v. Kunarac et al.* (Case no. IT-96-23 & IT-96-23/1-A), Judgment, 12 June 2002

### **European Court of Human Rights**

*Thlimennos v. Greece* Appl. No. 34369/97, Judgment of 6 April 2000

*X and Y v. Netherlands*, 91 ECHR (1985) (Ser. A)

## TABLES OF TREATIES, CASES AND COMMUNICATIONS

### **Inter-American Commission of Human Rights**

*Mary and Carrie Dann v. United States* (Case No. 11.140), Report No. 113/01, 15 October 2001, OEA/Ser.L/V/II.114 Doc.5 rev.

*Plan de Sanchez Massacre* (Case No. 11.763), Report No. 31/99, 11 March 1999, in *Annual Report of the Inter-American Commission on Human Rights*, O.A.S. Doc. OEA/Ser.L/V/II.102, Doc. 6

### **Inter-American Court of Human Rights**

*The Mayagna (Sumo) Indigenous Community of Awas Tingni v. The Republic of Nicaragua*, Judgment of 31 August 2001

*Velasquez Rodriguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 19 July 1988, Series C, No. 4

### **African Commission**

*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96

*Union des Jeunes Avocats/Chad*, Communication 74/92

## CASES UNDER DOMESTIC LAW

### **Australia**

*Berg v. Council of Museum of Victoria & Ors* [1984] VR 613

*Chapman v. Luminis Pty Ltd (No 5)* [2001] FCA 1106 (Aug. 21, 2001)

*Foster v. Mountford*, 14 ALR (1976) 71

*Kartinyeri v. The Commonwealth* [1998] HCA 22

*Kruger v. Commonwealth*, 190 CLR (1997)1

*Mabo v. Queensland*, 107 A.L.R. (1992)

*Mabo v. Queensland (No.2)*, 175 CLR 1 (1992)

*Noonkanbah Pastoral Co Pty Ltd v. Amax Iron Corporation* (unreported decision, Supreme Court Western Australia, per Brinsden J, 27 June 1979, No. 1558 of 1979)

*Nulyarimma v. Thompson*, FCA 1192, 165 ALR 62

*Onus v. Alcoa of Australia Ltd.* (1983), 149 CLR 27

*Pitjantjatjara Council Inc & Peter Nguningu v. Lowe & Bender*, [1982] Supreme Court of Victoria, Unreported Judgment

*Western Australia v. Bropho*, (1991) 5 WAR 75

### **Bangladesh**

*Ain O Salish Kendro (ASK) & Ors v. Government of Bangladesh & Ors*, Writ Petition No 3034 of 1999, 2 CHRLD (1999) 393

### **Canada**

*A.G. Canada v. A.G. Ontario*, [1937] A.C. 326

*Campbell, et al. v. British Columbia (Attorney General), et al.*, [2000] B.C.J. No. 1524, 4 C.N.L.R. 1 (British Columbia Supreme Court)

## TABLES OF TREATIES, CASES AND COMMUNICATIONS

*Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141  
*Chung Chi Cheung v. The King*, [1939] A.C. 160 (Judicial Committee Privy Council)  
*Corbiere v. Canada*, [1999] 2 S.C.R. 203  
*Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 (Supreme Court of Canada)  
*Ford v. Quebec*, [1988] 2 S.C.R. 712  
*R. v. Oakes*, [1986] 1 S.C.R. 103  
*R. v. The Ship 'North'* (1906), 37 S.C.R. 141  
*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] SCC 1  
*Sauvé v. Canada*, [2002] S.C.C. 68  
*Secession of Quebec*, [1998] 2 S.C.R. 217, paragraph 128  
*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R.

### Germany

*Kjuradj Kusljic, Bayerisches Oberstes Landesgericht*, 15 December 1999, 6 St 1/99, appeal dismissed: *Kjuradj Kusljic, Bundesgerichtshof* [Federal Court of Justice], 21 February 2001, BGH 3 Str 244/00  
*Nikolai Jorgic, Bundesverfassungsgericht* [Federal Constitutional Court, Fourth Chamber], Second Senate, 12 December 2000, 2 BvR 1290/99

### India

*Edwingson v. The State of Assam*, AIR (1966) SC 1220  
*District Council of U.K. & J.H. v. Sitimon*, AIR (1972) SC 787  
*Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191  
*State of Assam v. K.B. Kurkalang*, AIR (1972) SC 223

### Israel

*A.-G. Israel v. Eichmann*, 36 ILR (1968) 5 (District Court, Jerusalem), paragraphs 20–38; *A.-G. Israel v. Eichmann*, 36 ILR (1968) 277 (Israel Supreme Court)

### Kenya

*Joan Baptista Countinho v. Lands Officers*, 7 EALR 180  
*Tinet Ogiek (S/Western Mau) v. the Republic of Kenya*, Case HCCA No.228/99

### Malaysia

*Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors*, 2 MLJ (1998) 158, 2 CHRLD (1998) 281

### Nigeria

*Attorney-General of the Federation v. Attorney-General of Abia State and 35 ors*, SC28/2001

### Privy Council

*Adeyinka Oyekan v. Mussendiku Adele*, 1957, 1 WLR 876

TABLES OF TREATIES, CASES AND COMMUNICATIONS

*Amodu Tijani v. Secretary, Southern Nigeria*, 1921, 2A.C. 399

*Chetankumar Shantkal Parekh v. The People*, 1995/SCZ/Judgment No.11a of 1995

*Sobhuza II v. Muller and Others*, [1926] AC 518-19



## **AFFILIATION OF CONTRIBUTORS**

### **ALEJANDRO ANAYA-MUÑOZ**

Lecturer, Universidad Iberoamericana, Campus Santa Fe, Mexico City, Mexico

### **KWADWO APPIAGYEI-ATUA**

Senior Project Officer, International Cooperation Group, Montreal, Canada

### **ALBERT K. BARUME**

Deputy Director of the Forestry Law Enforcement Project of Global Witness, Cameroon

### **CHRISTINA BINDER**

Lecturer, Law faculty, University of Vienna, Austria

### **JOSHUA CASTELLINO**

Lecturer in Human Rights Law, Irish Centre for Human Rights, National University of Ireland, Galway, Ireland

### **JÉRÉMINE GILBERT**

Lecturer, Transitional Justice Centre, University of Ulster, UK

### **MARK HARRIS**

Chairperson, Aboriginal Studies, Senior Lecturer in Law, La Trobe University, Australia

### **VINODH JAICHAND**

Deputy Director, Irish Centre for Human Rights, National University of Ireland, Galway, Ireland

### **STEVE KINNANE**

Writer and Lecturer in Australian Indigenous Studies & Sustainable Development, Murdoch University, Western Australia, Australia

### **ALEXIS P. KONTOS**

Legal Counsel, Human Rights Law Section, Department of Justice, Canada

### **LES MALEZER**

Foundation for Aboriginal and Islander Research Action, Woolloongabba, Australia

### **FAUSTINA PEREIRA**

Advocate, Supreme Court of Bangladesh. Member and Deputy Director (Advocacy and Research) of *Ain-o-Salish Kendra* (ASK), Dhaka, Bangladesh

## AFFILIATION OF CONTRIBUTORS

### **WILLIAM A. SCHABAS**

Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights, Ireland

### **MARTIN SCHEININ**

Member, Human Rights Committee, Professor of Constitutional and International Law, Åbo Akademi University, Finland

### **LEE SWEPSTON**

Chief, Equality and Employment Branch, International Labour Office, Geneva, Switzerland

### **PATRICK THORNBERRY**

Member, Committee for the Elimination of Racial Discrimination, Professor of Law, School of Politics, International Relations & the Environment, Keele University, UK

### **NIAMH WALSH**

Project Officer, Irish Law Society, Ireland



## INTRODUCTION BY GUDMUNDUR ALFREDSSON\*

For the last few years, the Irish Centre for Human Rights at the National University of Ireland in Galway has organized a series of summer schools on the rights of indigenous peoples. The emphasis in these training courses has been on international human rights standards, both general and specialized ones, as they apply to indigenous peoples, on the implementation of these standards at national levels, and on the international monitoring of national performance.

The summer schools have been well attended, with representation by indigenous and non-indigenous academics and activists from all parts of the world. Some of them were lawyers, but many other professions were present, thus allowing for interdisciplinary approaches, for lively debates with questions and answers going back and forth, and for occasional disagreements which helped to clarify issues and identify pending problems. As many of the participants have been experienced in matters relating to the promotion and protection of indigenous rights, the discussions have consistently been anchored to realities on the ground.

The present book highlights those instances in the work of international organizations where advances have been made concerning indigenous rights. The jurisprudence of the Human Rights Committee under the *International Covenant on Civil and Political Rights*, in particular under Article 27, demonstrates an imaginative but logical interpretation of cultural rights. As a result of the case-law, this minority rights clause now covers the right of indigenous peoples to the material and economic base necessary for maintaining their cultures when they rely on close connections to the land on which the groups have traditionally lived. The *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169, from 1989) remains the chief human rights treaty with a focus on indigenous rights, with progressive provisions on ownership rights to land and natural resources and the indigenous role in managing them and with a slowly growing list of ratifying States.

Additional chapters in the book are devoted to the Permanent Forum on Indigenous Issues which reports to the Economic and Social Council (ECOSOC), to the Committee on the Elimination of Racial Discrimination, under the *International Convention for the Elimination of All Forms of Racial Discrimination*, and to a few thematic issues which are of special importance to indigenous rights. Looking to the future, the Permanent Forum is especially exciting, as indigenous persons constitute part of the official membership and are thus in a better position than ever before in terms of placing their desires and demands on high-level UN agendas.

The human rights situations facing indigenous peoples in a series of States are dealt with in separate chapters. The countries are

---

\* The author is Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Professor at the Law Faculty of Lund University in Sweden. From 2004 he is a member of the UN Sub-Commission on the Promotion and Protection of Human Rights and the UN Working Group on Minorities.

## INTRODUCTION

Australia, Bangladesh, Canada, India, Kenya, Mexico, Nicaragua, Nigeria and South Africa. These surveys show a range of reactions to the multiple problems of discrimination, or the lack of proper responses, as far as domestic legislation, national implementation of the laws, and national compliance with the applicable international standards are concerned. In a concluding chapter, Dr. Joshua Castellino ties all the strings together and underlines the inevitable interaction of the international and national law issues and institutions.

The author of these introductory lines has had the privilege of attending two of the summer schools in Galway. He can thus testify that many of the issues brought up in the present book, not least the interaction between international standards and national implementation, have been dealt with thoroughly and that the debates and exchanges of information and ideas have certainly resulted in motivating participants in their endeavours on behalf of indigenous rights.

The main organizers of the summer schools in indigenous rights in Galway are Professor William Schabas, Dr. Joshua Castellino and Dr. Niamh Walsh. They deserve praise for having created a forum that has served, and hopefully will continue to serve, as a useful and constructive tool for furthering the just cause of indigenous peoples who continue to suffer from massive discrimination and other human rights violations in all parts of the world. The Raoul Wallenberg Institute is grateful to the organizers for entrusting the Institute with the publication of this book in our Human Rights Library.

PART I

HUMAN RIGHTS INSTRUMENTS &  
INDIGENOUS PEOPLES



# INDIGENOUS PEOPLES' RIGHTS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

*Martin Scheinin*

## 1. INTRODUCTION

This chapter presents the evolving understanding of indigenous peoples' rights under the International Covenant on Civil and Political Rights<sup>1</sup> ('ICCPR' or the 'Covenant'), as reflected in the practice of the Human Rights Committee ('HRC' or the 'Committee'), the monitoring body established under the ICCPR. The discussion is based on cases decided under the Optional Protocol to the Covenant, on the Committee's general comments and on the Committee's consideration of periodic reports by States parties. As to the substance of the discussion, particular attention will be given to the right of self-determination and the protection afforded, under the notion of 'culture', to indigenous peoples' rights related to lands and resources.

The relevant provisions of the ICCPR read as follows:

### *Article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

### *Article 27*

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own

---

<sup>1</sup> International Covenant on Civil and Political Rights ('ICCPR').

## MARTIN SCHEININ

culture, to profess and practise their own religion, or to use their own language.

As is noted, neither one of these provisions includes the notion of indigenoussness, which raises the question whether indigenous groups constitute ‘minorities’ under Article 27 or ‘peoples’ under Article 1. On the basis of the practice of the HRC the answer can be summarized as follows: Groups identifying themselves as indigenous peoples generally fall under the protection of Article 27 as ‘minorities’. In addition, at least some of them constitute ‘peoples’ for the purposes of Article 1 and are beneficiaries of the right of self-determination. Hence, the ICCPR does *not* give support to a position according to which indigenous peoples are a specific category between minorities and groups, not entitled to the right of self-determination.

### 2. INDIGENOUS PEOPLES AS MINORITIES

The ICCPR is the only universally applicable human rights treaty that includes a specific provision on the rights of minorities, or to be more exact, on the rights of *members* of minorities.<sup>2</sup> Here the Covenant also differs from the Universal Declaration of Human Rights which does not include a clause on minorities, due to its emphasis on the universality of human rights and also the partly negative experiences of the minority protection arrangements under the League of Nations.

Article 27 is a rather modest provision in that it primarily addresses the negative obligation of states not to *deny* members of minorities the right to enjoy their culture, to profess and practice their religion or to use their own language. In legal scholarship and in the practice of the HRC, however, positive obligations have also been derived from the provision. For instance, the Committee’s General Comment No. 23,<sup>3</sup> adopted in 1994, explicitly refers to such a dimension in its paragraph 6.1:

Although Article 27 is expressed in negative terms, that Article, nevertheless, does recognize the existence of a ‘right’ and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

Already the wording of Article 27 implies that although protection is afforded to the individual members of minorities, the substance of minority rights entails a collective dimension: they are to be enjoyed ‘in community with other members of the group’. In its general comment the Committee uses this collective dimension as the starting-point for its reasoning in favour of positive or affirmative measures of

---

<sup>2</sup> However, *see* Article 30 of the International Convention of the Rights of the Child.

<sup>3</sup> HRC General Comment No. 23 (50), reproduced in UN doc. HRI/GEN/1/Rev.5, pp. 147–150.

## INDIGENOUS PEOPLES' RIGHTS UNDER THE ICCPR

protection: 'as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria'.<sup>4</sup>

Article 27 of the Covenant represents a broad understanding of minorities and minority rights, when compared to some other instruments that use the notion of 'national minorities' and may limit themselves to protecting well-established groups that have a long history in the country concerned and whose members must be citizens of the state. The Covenant speaks of 'ethnic, religious or linguistic minorities' and applies even to groups that have recently arrived or are temporarily based in the country in question.<sup>5</sup> The Committee has also emphasized that the protection of Article 27 does not depend on any formal recognition by the state of the existence of a minority but is, rather, an objective fact.<sup>6</sup>

Although Article 27 does not employ the notion of 'indigenous peoples', much of the case law developed under the provision has been related to claims by such groups. In General Comment No. 23 the Committee emphasized the applicability of Article 27 in respect of indigenous peoples.<sup>7</sup> In particular, the notion of 'culture' has been interpreted as affording protection to the nature-based way of life and economy of indigenous peoples. In the terms of paragraph 7 of the general comment:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

Turning now to the case law by the HRC under the Optional Protocol, the case of *Lovelace v. Canada*<sup>8</sup> focuses on an individual dimension of Article 27, namely, the right of the individual not to be denied membership in an indigenous group with which she wishes to identify herself, and into which she belongs according to some objective criteria of, for example, ethnicity. In the particular case, the Committee found a violation of Article 27 due to the permanent exclusion of the female author from her aboriginal community after marrying an outsider, resulting from a rule enacted by the State party in the form of federal legislation and not applicable to male persons who marry an outsider. In the specific circumstances of the case the Committee's conclusion was formulated as follows:

---

<sup>4</sup> ICCPR, *supra* note 1, at paragraph 6.2.

<sup>5</sup> *Ibid.*, paragraphs 5.1 and 5.2.

<sup>6</sup> *Ibid.*, paragraph 5.2.

<sup>7</sup> *Ibid.*, paragraphs 3.2 and 7.

<sup>8</sup> *Sandra Lovelace v. Canada* (Communication No. 24/1977), Views adopted 30 July 1981, Report of the Human Rights Committee, GAOR, Thirty-sixth session, Suppl. No. 40 (A/36/40), pp. 166–175.

## MARTIN SCHEININ

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under Article 27 of the Covenant, read in the context of the other provisions referred to.

Another case related to the same dimension of Article 27 is *Kitok v. Sweden*.<sup>9</sup> Although Mr. Kitok had, because of his absence from his local community, lost full membership in the Sami village and consequently full reindeer herding rights, he was not prevented from moving back to the community and from participating in the reindeer herding activities which are constitutive for the Sami culture. Under these circumstances, the Committee considered that there was no violation of Article 27. However, the Committee expressed its concern over the operation of Swedish legislation, emphasizing the need to apply (also) objective criteria in the determination of whether an individual who wishes to identify himself with the group is recognized as a member.<sup>10</sup>

Through its reference to reindeer herding as an important element of the indigenous culture of the Sami, the *Kitok* case illustrates another important dimension of Article 27, the recognition of traditional or otherwise typical economic activities as ‘culture’, particularly in regard to indigenous peoples.<sup>11</sup> This dimension was developed in the case of *Lubicon Lake Band v. Canada*,<sup>12</sup> in which a violation of Article 27 was established because ‘historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band’.<sup>13</sup> The factual background of the case related to the exploitation of oil, gas and timber resources in areas traditionally used by the Band for hunting and fishing. Over a long period of time the cumulative effect of these forms of competing use of land and resources had effectively destroyed the resource basis of traditional hunting and fishing for the Lubicon Lake Band.

Much of the Committee’s subsequent case law under Article 27 has been related to this dimension of Article 27, the link between the notion of ‘culture’ in the treaty

---

<sup>9</sup> *Ivan Kitok v. Sweden* (Communication No. 197/1985), Views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third Session, Suppl. No. 40 (A/43/40), pp. 221–230.

<sup>10</sup> See paragraph 9.7 of the Committee’s Views.

<sup>11</sup> See paragraphs 4.3 and 9.2.

<sup>12</sup> *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-eighth session, Suppl. No. 40 (A/38/40), pp. 1–30.

<sup>13</sup> See paragraph 33 of the Committee’s Views.



## INDIGENOUS PEOPLES' RIGHTS UNDER THE ICCPR

provision and traditional forms of indigenous peoples' economic life. The case of *Länsman v. Finland No. 1*<sup>14</sup> ('*Länsman No. 1*') was related to the harmful effects of a stone quarry in relation to reindeer herding activities of the indigenous Sami. Although no violation of Article 27 was found, the Committee established several general principles for the interpretation of Article 27. It emphasized that Article 27 does not only protect traditional means of livelihood but even their adaptation to modern times.<sup>15</sup> As to what kind of interference with a minority culture constitutes 'denial' in the sense of Article 27, the Committee developed the combined test of meaningful consultation (or participation) of the group<sup>16</sup> and the sustainability of the indigenous or minority economy.<sup>17</sup>

The Committee's views in the cases of *Länsman v. Finland No. 2*<sup>18</sup> ('*Länsman No. 2*') related to governmental logging activities in the reindeer herding lands of the same Sami community and *Apirana Mahuika et al. v. New Zealand*<sup>19</sup> builds on and develops the same principles.

The two *Länsman* cases highlight a problem related to the burden of proof in cases submitted to the Optional Protocol procedure under Article 27. Although the Committee has emphasized that it does not apply a margin of appreciation doctrine when addressing whether interference with the lifestyle of indigenous groups constitutes a 'denial' of the right to culture under Article 27,<sup>20</sup> the Committee, nevertheless, leaves it primarily to domestic courts to apply the combined test of

---

<sup>14</sup> *Ilmari Länsman et al. v. Finland* ('*Länsman No. 1*') (Communication 511/1992), Views adopted 26 October 1994, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40), pp. 66–76.

<sup>15</sup> Paragraph 9.3 of the Committee's Views:

The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that Article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking Article 27 of the Covenant.

<sup>16</sup> See *ibid.*, at paragraph 9.6 of the Committee's Views.

<sup>17</sup> See *ibid.*, at paragraph 9.8 of the Committee's Views ('With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with Article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry').

<sup>18</sup> *Jouni E. Länsman et al. v. Finland* ('*Länsman No. 2*') (Communication No. 671/1995), Views adopted 30 October 1996, Report of the Human Rights Committee, Vol. II, UN doc. A/52/40 (Vol. II), pp. 191–204. See, in particular, paragraphs 10.4 to 10.7.

<sup>19</sup> *Apirana Mahuika et al. v. New Zealand* (Communication No. 547/1993), Views adopted 27 October 2000, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. II), pp. 11–29. See, in particular, paragraphs 9.4 to 9.9.

<sup>20</sup> *Länsman No. 1*, *supra* note 14, paragraph 9.4 ('A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27.' This statement was reiterated in *Mahuika*, *ibid.*, at paragraph 9.4.).

## MARTIN SCHEININ

participation and sustainability. Hence, if national courts address the concerns of the indigenous groups under Article 27 or similar provisions of domestic law, it is quite difficult for the Committee as an international body to question their assessment – even in cases where the group feels that it was not treated in a fair way by the national courts. In *Länsman No. 2* the Committee expressed this problem in the following terms:

The domestic courts considered specifically whether the proposed activities constituted a denial of Article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied Article 27 of the Covenant in the light of the facts before it.<sup>21</sup>

Still today, the *Lubicon Band* case remains the sole one where the Committee has found a violation of Article 27 because of competing use of land and resources interfering with the economy and life of an indigenous community. The case of *Äärelä and Näkkäläjärvi v. Finland*<sup>22</sup> can be seen as a response to this problem and as a shift in the litigation strategy of the Finnish Sami. The case itself was very similar to *Länsman No. 2*, relating to government logging in the reindeer herding lands of the herdsmen's cooperative in which the two authors were members. Although the authors based their case before domestic courts on ICCPR Article 27 and comparable provisions of domestic law, they also addressed the Supreme Court of Finland and later the Committee with their misgivings of how they had been treated by the Finnish courts, claiming a violation of the fair trial clause in ICCPR Article 14.

After establishing a violation of Article 14 in two respects, the Committee then stated that it did not have sufficient information in order to be able to draw independent conclusions on the factual importance of the lands in question to reindeer husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under Article 27 of the Covenant. Hence, the Committee was 'unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant'.<sup>23</sup> However, when addressing the authors' right to an effective remedy for the violations of fair trial they had suffered, the Committee called for a reconsideration of the Article 27 claim on the domestic level: '[T]he Committee considers that, as the decision of the Court

---

<sup>21</sup> *Länsman No. 2*, *supra* note 18, at paragraph 10.5.

<sup>22</sup> *Anni Äärelä and Jouni Näkkäläjärvi v. Finland* (Communication No. 779/1997), Views adopted 24 October 2001, Report of the Human Rights Committee, Vol. II, UN doc. A/57/40 (Vol. II), pp. 117–130.

<sup>23</sup> *Ibid.*, paragraph 7.6.

## INDIGENOUS PEOPLES' RIGHTS UNDER THE ICCPR

of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims.<sup>24</sup>

### 3. INDIGENOUS PEOPLES AS BENEFICIARIES OF THE RIGHT OF SELF-DETERMINATION

The *Mahuika* case mentioned in the previous section is important in that it recognizes a link between Article 27 and Article 1 through the interpretive effect of the right of self-determination when addressing the application of Article 27 in a case brought by indigenous authors.<sup>25</sup> This dimension of interdependence between Articles 1 and 27 was present already in the *Lubicon Lake Band* case and in the combined test of sustainability and participation developed in *Länsman No. 1*. But it was only in *Mahuika* that the Committee formally recognized the relevance of Article 1 in addressing Article 27 claims. This course of development is why a presentation of the position and substance of the right of self-determination in the Covenant needs to be addressed from an historical perspective in order to understand to what extent indigenous peoples are entitled to that right.

In addition to a wide range of individual human rights, the ICCPR affords protection to the right of 'all peoples' to self-determination.<sup>26</sup> The provision, which is identical to Article 1 in the Covenant on Economic, Social and Cultural Rights, is comprised of three paragraphs that relate to the various dimensions of self-determination. Paragraph 1 proclaims the right of self-determination and its main dimensions: all peoples' right 'to freely determine their political status' (*political dimension*) and to pursue their 'economic, social and cultural development' (*resource dimension*). The political dimension, in turn, includes an external aspect of sovereignty and an internal aspect of governance that can be linked to Article 25 which requires *democratic* governance. This link has on occasion been emphasized by the HRC in its concluding observations.<sup>27</sup>

Under international law, a people's right to self-determination does not automatically entail a right of secession (statehood) for every group that qualifies as a distinct people. The right of secession is recognized only under specific conditions, for instance, those explicated by the Supreme Court of Canada in the *Quebec Secession Case*:

---

<sup>24</sup> *Ibid.*, paragraph 8.2.

<sup>25</sup> *Mahuika*, *supra* note 19, paragraph 9.2 ('Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.').

<sup>26</sup> ICCPR, *supra* note 1, at Art. 1.

<sup>27</sup> For example:

20. The Committee notes with concern that the Congolese people have been unable, owing to the postponement of general elections, to exercise their right to self-determination in accordance with article 1 of the Covenant and that Congolese citizens have been deprived of the opportunity to take part in the conduct of public affairs in accordance with article 25 of the Covenant. Concluding Observations on the Republic of the Congo (2000), UN doc. CCPR/C/79/Add.118.

## MARTIN SCHEININ

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.<sup>28</sup>

In the context of the case it is clear that by ‘external self-determination’ the Supreme Court of Canada was referring to the possible unilateral secession by the province of Quebec from the union of Canada. It should, however, be emphasized that there might be other ‘external’ forms of self-determination that are not subject to the very demanding conditions international law attaches to secession, for instance the right to represent internationally an indigenous people in relevant international negotiations or conferences.<sup>29</sup>

Paragraph 2 of ICCPR Article 1 elaborates further the resource dimension of self-determination through proclaiming the right of all peoples to dispose of their natural wealth and resources. This clause and especially its last sentence according to which a people may not be deprived of its own means of subsistence has been relied upon by many groups that proclaim themselves as distinctive indigenous peoples in countries where other ethnic groups, typically of European descent, are in a dominant position.

Paragraph 3 of Article 1 relates to a further dimension of self-determination, namely, the collective responsibility of States parties to promote the realization of self-determination elsewhere, other than within their own territories. The HRC has relied on this *solidarity dimension* of the right of self-determination in the reporting procedure under Article 40, through questions on the States parties’ measures to promote the self-determination of the Palestinian people and in South Africa.<sup>30</sup>

In 1984, the HRC adopted a general comment on Article 1.<sup>31</sup> Due to its date of adoption, the general comment does not reflect later developments in the Committee’s approach to Article 1 under the reporting procedure and the Optional Protocol.

The word ‘people’ is not defined in Article 1 or elsewhere in the Covenant. Hence, the Covenant leaves room for different interpretations as to whether the whole population of a state party constitutes ‘a people’ in the meaning of Article 1,

---

<sup>28</sup> *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, paragraph 128.

<sup>29</sup> For instance, section 6 of the Sami Parliament Act of Finland (Act No. 974 of 1995) recognizes this external form of self-determination to the Sami, to be exercised by the elected Sami Parliament.

<sup>30</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel, Kehl am Rhein, 1993) p. 23.

<sup>31</sup> HRC General Comment No. 12 (21), reproduced in UN doc. HRI/GEN/1/Rev.5, pp. 121–122.

## INDIGENOUS PEOPLES' RIGHTS UNDER THE ICCPR

or whether several distinct peoples exist in at least some of the States parties to the ICCPR. The Committee's pronouncements in relatively recent concluding observations on reports by countries with indigenous peoples reflect an understanding that at least certain indigenous groups qualify as 'peoples' under Article 1. As this approach was first made explicit in the Committee's concluding observations on Canada, a quotation is justified:

The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains 'the most pressing human rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources, institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, paragraph 2).<sup>32</sup>

The Committee recommended that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommended that 'the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant'.<sup>33</sup>

It is to be noted that the recognition of the existence of more than one 'people' within the territory of the country and the enjoyment by them of the right of self-determination (albeit not of its extreme manifestation, secession), had been expressed by the highest judicial authority of the country concerned, in the *Quebec Secession Case* decided in 1998. The Supreme Court of Canada stated, *inter alia*:

It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.<sup>34</sup>

---

<sup>32</sup> See ICCPR, *supra* note 1, at Art. 1, paragraph 2.

<sup>33</sup> Concluding Observations on Canada, UN doc. CCPR/C/79/Add.105 (1999), paragraph 8.

<sup>34</sup> *Reference re: Secession of Quebec*, *supra* note 28, at paragraph 124. In paragraph 139 of the opinion, the Court refers to the importance of the rights and concerns of aboriginal peoples in the event of a unilateral secession by the province of Quebec, with an explicit reference to the issue of 'defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples.' However, as the Court came to

## MARTIN SCHEININ

Although the applicability of Article 1 on self-determination to indigenous peoples was first recognized by the Committee when dealing with the report by Canada after the country's own Supreme Court had first affirmed that several 'peoples' may exist within one state, the Committee has followed the same approach also in respect of other countries with distinct indigenous peoples within their boundaries. Explicit references to either Article 1 or to the notion of self-determination have been made in the Committee's concluding observations on Mexico,<sup>35</sup> Norway,<sup>36</sup> Australia,<sup>37</sup> Denmark<sup>38</sup> and Sweden.<sup>39</sup> As in the case of Canada, paragraph 2 of Article 1, *i.e.* the resource dimension of self-determination, has received particular emphasis in the context of indigenous peoples. For instance, in its concluding observations on Australia, the Committee stressed that the State party 'should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources'.

Although it is now established that many indigenous peoples qualify as beneficiaries of the right of self-determination under ICCPR Article 1, there still exists some confusion in the matter, due to the fact that Article 1 is *procedurally* in a different position than other human rights affirmed in the Covenant. While Article 1 is covered by the mandatory reporting obligation of all States parties under Article 40, as well as under the (never utilized) inter-State complaint procedure under Article 41, the Optional Protocol to the ICCPR, allowing for individual complaints, excludes cases directly under Article 1 of the Covenant due to the narrow formulation of the so-called victim requirement in Article 1 of the Optional Protocol. According to that provision, the Committee may consider 'communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'. While the right of self-determination contained in ICCPR Article 1 falls under the notion of 'any of the rights set forth in the Covenant', it is a truly collective right proclaimed to 'all peoples', and individuals cannot, in the interpretation of the Committee, claim to be individually affected as victims of a violation of that right.

This approach was taken in the *Lubicon Lake Band* case under which the Band's original claim under Article 1 was declared inadmissible with the following reasoning in 1987:

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because 'the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged

---

the conclusion that the hypothetical right of self-determination of Quebec could not carry as far as to unilateral secession, it was 'unnecessary to explore further the concerns of the aboriginal peoples'.

<sup>35</sup> Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999).

<sup>36</sup> Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999).

<sup>37</sup> Concluding Observations on Australia, UN doc. CCPR/CO/69/AUS (2000).

<sup>38</sup> Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000).

<sup>39</sup> Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002).

## INDIGENOUS PEOPLES' RIGHTS UNDER THE ICCPR

violation concerns a collective right', the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in Article 1 of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including Article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of Article 27 or other articles of the Covenant.<sup>40</sup>

The Committee's Views in the same case, adopted in 1990, follow this approach as it is visible that Article 1 was of relevance in the Committee's argumentation on other alleged violations of the Covenant. Before reaching its conclusion that Article 27 had been violated the Committee stated: 'Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27'.<sup>41</sup>

Between the 1987 admissibility decisions in *Lubicon* and *Kitok*<sup>42</sup> and the Committee's 2000 Views in *Mahuika* there have been cases in which the Committee's approach of Article 1 not being subject to the Optional Protocol procedure was expressed in more straightforward terms. However, in its recent case law, the Committee has returned to the approach reflected in *Lubicon* and *Kitok*, now even explicitly recognizing that although Article 1 cannot itself be the basis for a claim by an individual the right of self-determination may affect the interpretation of other provisions of the Covenant, including the right of members of a minority to

---

<sup>40</sup> *Lubicon Lake Band v. Canada*, *supra* note 12.

<sup>41</sup> *Ibid.*, paragraph 32.2 of the Committee's Views.

<sup>42</sup> *Kitok v. Swede*, *supra* note 9, at paragraph 6.3:

With regard to the State party's submission that the communication should be declared inadmissible as incompatible with article 3 of the Optional Protocol or as 'manifestly ill-founded', the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such. However, with regard to article 27 of the Covenant, the Committee observed that the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. Therefore, it decided that the issues before it, in particular the scope of article 27, should be examined with the merits of the case.

## MARTIN SCHEININ

enjoy their own culture found in Article 27. The same approach as in *Mahuika* was followed in the case of *Diergaardt et al. v. Namibia*.<sup>43</sup>

Further light on the issue of interdependence between the right of self-determination and other provisions of the Covenant is shed by the case of *Gillot et al. v. France*, decided in 2002.<sup>44</sup> The complaint was related to restrictions in the right to participate in referendums in New Caledonia, allegedly in violation of Article 25 of the Covenant providing the right of public participation. Interpreting Article 25 in the light of Article 1, the Committee considered that in the context of referendums arranged in a process of decolonization and self-determination, it was legitimate to limit participation to persons with sufficiently close ties with the territory whose future was being decided. As the residence requirements for participation in the referendums in question were neither disproportionate nor discriminatory, the Committee concluded that there was no violation of Article 25.

The novelty in the interpretive effect of Article 1 in *Gillot* was that the complaint was not brought by the indigenous or minority group but by certain citizens of the State party who considered their rights violated by their exclusion from the self-determination process. Hence, the right of self-determination was invoked by the State party<sup>45</sup> and then applied by the Committee as justification for an exclusion of newcomers from referendums. The key passages in the Committee's disposition of the case read:

13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in Article 1 of the Covenant, it may interpret Article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take Article 1 into account in interpretation of Article 25 of the Covenant.

13.16 The Committee recalls that, in the present case, Article 25 of the Covenant must be considered in conjunction with Article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of 'peoples' as referred to in article 1, the Committee considers that, in the present case, it would

---

<sup>43</sup> 'Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.' *J.G.A. Diergaardt et al. v. Namibia* (Communication No. 760/1997), Views adopted 25 July 2000, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fifth Session, Suppl. No. 40 (A/55/40), pp. 140–160, paragraph 10.3.

<sup>44</sup> *Marie-Hélène Gillot et al. v. France* (Communication No. 932/2000), Views adopted 15 July 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-seventh Session, Suppl. No. 40 (A/57/40), pp. 270–293.

<sup>45</sup> See, in particular, paragraphs 8.3, 8.9 and 8.31 of the Committee's Views.



## INDIGENOUS PEOPLES' RIGHTS UNDER THE ICCPR

not be unreasonable to limit participation in local referendums to persons 'concerned' by the future of New Caledonia who have proven, sufficiently strong ties to that territory.

The *Gillot* case is a logical continuation of the Committee's approach built through the reporting procedure under Article 40 of the ICCPR and the recognition of the interpretive effect of Article 1 also in cases under the Optional Protocol. Many of the indigenous peoples of the world qualify as 'peoples' for the purposes of ICCPR Article 1 and are, hence, entitled to the right of self-determination. As is reflected in the practice of the Committee, the resource dimension is of particular relevance for indigenous peoples' claims under the right of self-determination. This does not mean that they could not have other valid claims under ICCPR Article 1.



# THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

*Patrick Thornberry*

*What makes human beings alike is the fact that every human being carries within him the figure of the other. The likeness that they have in common follows from the difference of each from each.<sup>1</sup>*

## INTRODUCTION

We witnessed a modest amplification of community-oriented rights in the body of international norms in the last decades of the twentieth century, reflecting a sharper understanding of the importance of community in the construction of personal and social identity, and of community membership as a focus for oppression. Indigenous peoples claim recognition as distinctive human groups with a right to take their own decisions in matters affecting them, and resist the depredations of others. An important tendency of indigenous politics has been to search for adaptations of human rights principles that relate to their circumstances – reflected in their interventions into ongoing deliberations towards a UN Declaration, and an American Declaration, on the Rights of Indigenous Peoples.<sup>2</sup> While a considerable amount has been achieved in the elaboration of instruments specifically dealing with indigenous rights, what is sometimes characterized as a form of human rights ‘exceptionalism’ for these groups remains precarious. Whatever recognition they have achieved thus far, a swing of the pendulum against the recognition or welcoming of difference is always possible, particularly in times of felt scarcity, globalizing pressures and the ‘securitization’ of politics and law. Indigenous peoples are ideal-type endogamous groups: self-defining, rooted historically, eco-religious, and self-organized – though the groups are also, as with all human groups, in part the product of interaction with others, and of non-ideal categorization by racial supremacists, colonists and the like.

So-called caste groups<sup>3</sup> may be recognised in many countries where particular customary and religious systems are prevalent, notably in Africa and Asia, and

---

<sup>1</sup> J.-F. Lyotard, ‘The Other’s Rights’, in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books, New York, 1993) p. 135, p. 136.

<sup>2</sup> P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002).

<sup>3</sup> Buraku in particular may object to the use of the term ‘caste’ to describe their situation. The reader should bear in mind that the generalized use of ‘caste’ in the present chapter is only a shorthand term used for purposes of exposition, and is without prejudice to the self-descriptions of those who belong to particular communities.

## PATRICK THORNBERRY

paradigmatically in Hindu societies. Dalits, Buraku and others point to ingrained discriminatory patterns of behaviour against them, and strive to lift the burden of the suffering caused by discrimination. The conceptualisation of indigenous and caste/descent groups as separate constituencies sketches only a partial truth. While caste groups, unlike the indigenous, may be uninterested in propagating their 'difference', some aspire to stand outside religious or customary systems that oppress them, and seek to construct or reconstruct specific cosmologies such as 'Dalitism'.<sup>4</sup> Contestation of the case of the Dalits may come from many quarters, notably from majoritarian religious or social groups, who seek to grip them in the embrace of the religion or society, holding them in their 'assigned place', or from the politics of governments constrained to appease dominant religious constituencies. Some governments reject international scrutiny of the issue; others are more complaisant. In some instances, indigenous and caste activism come together, witness Dalit presentations before the UN Working Group on Indigenous Populations, where the claim was that they represented indigenous cultures overrun by colonisers, just like other indigenous peoples. The approach has not been consistent; their identification with indigenous peoples might detract from their distinctive and powerful human rights case as 'caste people'. Although complementarity of approach is a positive value in human rights strategies, pursuing an indigenous peoples strategy might be rejected by some caste activists as an inappropriate move towards a 'recognition' pole at the expense of a simpler strategy of struggle against discrimination.<sup>5</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD' or the 'Convention') might seem a particularly unpromising instrument for the vindication of indigenous rights. The text is dedicated to eliminating discrimination rather than positively recognizing diversity; the language is largely the language of individual rights and required or recommended action by States. The present paper reflects on conceptual puzzles inherent in the utilization of ICERD by indigenous and descent-based/caste groups, commencing with an account of general elements characterizing the Convention. This is followed by brief exegeses of general recommendations of the Committee on the Elimination of Racial Discrimination ('CERD' or the 'Committee'): XXIII on indigenous peoples, and XXIX on descent-based discrimination. An account is also offered of the CERD approach to self-determination, as expressed in General Recommendation XXI. While the Convention, which refers itself to discrimination on grounds of 'race, colour, descent, or national or ethnic origin', does not specify indigenous or caste groups in this formula, CERD has devoted attention to their

---

<sup>4</sup> M.C. Raj, *From Periphery to Centre: Analysis of the Paradigm of Globalization, Casteism, Dalitism* (Ambedkar Resource Centre, Rural Education for Development, Tumkur, 1998).

<sup>5</sup> There is an analogous tension in contemporary Roma (Gypsy) activism: whether to pursue a non-discrimination strategy, or move towards self-determination or the recognition of a Roma 'nation'; see, e.g., *Roma and the Question of Self-determination: Fiction and Reality* (Project on Ethnic Relations, Princeton, 2002).

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

claims. The paper does not give an explicit account of the CERD procedures; references are made to them throughout the text.<sup>6</sup>

### ‘RACE’ AND RELATED DESCRIPTORS

It is clear that the scope of the Convention is broader than folkloric or scientific notions of race. ‘Race’ as such is not defined in the Convention, while the term ‘racial discrimination’ is defined as:

...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>7</sup>

From this, it is an obvious point – but easily missed – that the umbrella term of the Convention is ‘racial discrimination’, not ‘race’. Thus, ‘racial discrimination’ is given a stipulative meaning by the Convention: as precisely the five terms set out in Article 1, which mentions ‘race’ but four other terms as well. It is thus clear that the scope of the Convention is broader than most folkloric or ‘scientific’ notions of race, which in any case may express many usages. ‘Race’ has been the subject of regular intellectual and political deconstruction and attack, particularly in the era of the United Nations. UNESCO laid foundations for the basic critique of ‘race’, a critique echoed in this recent statement by the representative of Belgium on behalf of the EU to the Durban World Conference against Racism. Having cited Article 1 of ICERD, the representative continued:

Our work here is to further the elimination of racial discrimination. The concept of race may, for the purpose of applying the Convention, be helpful in identifying the basis for such discrimination. The member States of the European Union consider that the acceptance of any formulation implying the existence of separate human ‘races’ could be interpreted as a retrograde step as it risks denying the unity of humanity. Nor is acceptance of such a formulation necessary in order to identify or combat racial discrimination . . . This does not imply the denial of ‘race’

---

<sup>6</sup> See further A. Tanaka and Y. Nagamine, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs* (IMADR and Minority Rights Group International, Tokyo and London, 2001). The present author has drafted a general paper on the Convention and CERD for the second edition of ‘The United Nations and Human Rights’ under the editorship of Philip Alston.

<sup>7</sup> *Ibid.*, Article 1.1.

PATRICK THORNBERRY

as a ground for discrimination and the denial of manifestations of racism and racial discrimination.<sup>8</sup>

Thus, we are not compelled to believe in ‘races’ or accept a horizontal narrative of separation, or vertical narrative of hierarchy, to be against racism, and the hard problem of deploying the contested notion of ‘race’ is softened in the Convention by the elaboration of other terms in Article 1.<sup>9</sup>

In practice, CERD continues to devote attention to a wide range of human groups, including indigenous peoples.<sup>10</sup> The peoples are within the scope of the Convention as exemplars of ‘race’, ‘colour’, ‘ethnic origin’ and, doubtless, ‘descent’, or any and all of these. In General Recommendation XXIII, the Committee observes that ‘the situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention’.<sup>11</sup> In terms of Article 1, the essence of the CERD approach to caste groups is to call up ‘descent’ rather than ‘race’, though there have been, as noted, ‘race’ inflections in presentations of Dalit issues before the UN, and a slippage of

---

<sup>8</sup> Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/CONF.189/12, pp. 104–105. For a synopsis of the work of UNESCO in deconstructing ‘race’, see K. Boyle and A. Baldaccini, ‘A Critical Evaluation of International Human Rights Approaches to Racism’, in S. Fredman (ed.), *Discrimination and Human Rights* (Oxford University Press, Oxford, 2001) pp. 135–191, p. 152, n. 77. For an extended account of the problematique of ‘race’ see M. Banton, *Racial Theories* (Cambridge University Press, Cambridge, 2d ed., 1998); and ‘The Historical Context of Racial Classification’, *1984 UNESCO Yearbook of Peace and Conflict Studies* (Greenwood Press, Westport, Conn., 1986) pp. 79–127. The UNESCO Declaration on Race and Racial Prejudice 1978 is discussed in P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991), ch. 33.

<sup>9</sup> The elision of the category of ‘race’ is strongly opposed by CERD member J. Lindgren Alves. Commenting on the rejection of ‘race’ by European delegations, he writes that ‘if extended to the limits, such rejection might *ad absurdum* void the very *rationale* of the [Durban] Conference. For out of sheer logic, the non-existence of races might signify that racism does not exist, thereby nullifying the need to combat it – a position that no one advocated’. J. Lindgren Alves, ‘The Durban Conference against Racism and Everyone’s Responsibilities’ (on file with author).

<sup>10</sup> Discussed at length in P. Thornberry, *Indigenous Peoples and Human Rights*, ch. 8. In only the 2001 and 2002 sessions, as well as in March 2003, CERD adopted concluding observations on indigenous peoples on the reports of Argentina, Botswana, Costa Rica, Denmark, Ecuador, Fiji, Japan, New Zealand, the Russian Federation, Uganda, the United States of America, and Vietnam. Other cases dealt with, such as the Amazigh populations referred to in the observations on Morocco and Tunisia but not specifically as indigenous peoples, have defined themselves as indigenous before UN bodies. CERD does not operate according to a specific definition of ‘indigenous’, but is guided to particular cases by a sometimes circumspect appreciation of ‘standard usage’ for the term.

<sup>11</sup> A/52/18, pp. 122–123, p.122.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

categories in much historical and contemporary writing on caste.<sup>12</sup> Besides race and history narratives, and the processes of self-identification and self-description they imply, the exogamous ascription or fixing of caste attributes on to populations recalls ascriptive processes attaching to ‘race’, ‘colour’ or ‘ethnicity’ based allegedly on immutable characteristics or incorrigible ‘otherness’.<sup>13</sup> In other words, caste or analogous forms of social stratification may have a race-like quality on a par with the other descriptors in Article 1 and are appropriately brought within its frame, even if the safest of the specific descriptors therein remains that of ‘descent’. Further, at least some of the less contentious uses of ‘race’ amount to no more than ‘descent, ancestry or lineage’, those senses which characterised its use in English and Romance languages until the end of the eighteenth century.<sup>14</sup> In other words, the archaeology of ‘race’ reveals a substratum of ‘descent’. In the history of the notion of ‘race’, simpler notions of genealogy were overlaid with a patina of intra-species physical, intellectual, evolutionary and moral differences, in a confusion of narratives that led Williams to conclude: ‘The prejudice and cruelty that then often follow, or that are rationalized by the confusions, are not only evil in themselves; they have also profoundly complicated, and in certain areas placed under threat, the necessary language of the (non-prejudicial) recognition of human diversity and its actual communities.’<sup>15</sup>

### DISCRIMINATION

On the core notion of discrimination, General Recommendation XIV (42)<sup>16</sup> observed that ‘differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate’.<sup>17</sup> The Committee observes further that discrimination is invidious, while differentiation may be acceptable.<sup>18</sup> The incorporation of an element of intention (purpose) in the definition of discrimination has provoked speculation on whether unintentional discrimination is caught by the Convention.<sup>19</sup> It appears to be

---

<sup>12</sup> See the multiple references to the intersection of ‘race’ and ‘caste’ in S. Bayly, *Caste, Society and Politics in India* (Cambridge University Press, 1999).

<sup>13</sup> K. Booth, ‘Three Tyrannies’, in T. Dunne and N.J. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge University Press, 1999) p. 31.

<sup>14</sup> The author is indebted for this point to a note from former Chairman of CERD, Michael Banton, on ‘The Meanings of Race’ (April 2003, on file with author).

<sup>15</sup> R. Williams, *Keywords* (Fontana Press, London, 1998) p. 250.

<sup>16</sup> Adopted on 17 March 1993.

<sup>17</sup> Text in *Manual on Human Rights Reporting* (Geneva, United Nations, 1977) pp. 272–273.

<sup>18</sup> See comment in M. O’Flaherty, ‘substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination’, in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (London, Zed Books, 1998) pp. 162–183.

<sup>19</sup> For example, M. Banton, *International Action against Racial Discrimination* (Clarendon Press, Oxford, 1996) pp. 192–193.

PATRICK THORNBERRY

so in view of the term ‘effect’<sup>20</sup> – this is also the view of CERD, which will ‘critique State practices, however socially significant and well intended’,<sup>21</sup> which unintentionally discriminate. The Convention addresses discrimination in ‘public life’, a term left undefined in the Convention but which must take its colour from the full range of activities implicated in Convention prohibitions, and is not, for example, confined to discrimination in the sphere of public administration.<sup>22</sup> It is clear that, taking into account the reference to ‘public life’,<sup>23</sup> the Convention obliges States to intervene in cases of discrimination by non-State actors – by, for example, prohibiting and bringing to an end ‘racial discrimination by any persons, group or organization’;<sup>24</sup> public spaces are explicitly referred to in Article 5(f) prohibiting discrimination in ‘[t]he right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks’. Boyle and Baldaccini emphasize the relevance of the Convention’s reach into private spaces in the light of contemporary phenomena of ‘shrinking government’.<sup>25</sup> It may be observed that Article 1.2. of the Convention provides that it ‘shall not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens’. However, distinguishing between various groups of non-citizens on racial grounds will engage the prohibitions of the Convention.<sup>26</sup> The Committee has also been concerned with double or multiple discrimination, particularly as affects women – including women belonging to descent-based communities – and adopted

---

<sup>20</sup> For a critique of basic concepts, see K. Frostell, ‘Gender difference and the non-discrimination principle in the CCPR and the CEDAW’, in L. Hanikainen and E. Nykanen (eds.), *New Trends in Discrimination Law – International Perspectives* (Turku Law School, Turku, 1999) pp. 29-57.

<sup>21</sup> O’Flaherty, *supra* note 19, p. 166.

<sup>22</sup> Compare the approach of the Committee of Experts under the Council of Europe’s Charter for Regional or Minority Languages: in their report on Hungary, the Committee observed that the term “‘public life” is fairly wide and could include the use of the language in education, justice, administration, economic and social life and cultural life as well as in trans-frontier exchanges’. ECRML (2001) 4. The categories of public life referred to by the Committee of Experts are the categories dealt with by the Charter; a similar interpretative manoeuvre may be applied to ICERD. *Ibid.*, paragraph 24.

<sup>23</sup> See the reservation of the United States stating that under the Convention, the USA does not propose to regulate private conduct to any greater extent than under its Constitution and laws. ST/LEG/SER.E/14, p. 102.

<sup>24</sup> Article 2(d). See also Article 4(a). In General Recommendation XX, the Committee states: ‘To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.’ A/51/18, Annex VIII, paragraph 4.

<sup>25</sup> Boyle and Baldaccini, *supra* note 9, p. 159.

<sup>26</sup> *B.M.S. v. Australia*, A/54/18, pp. 78–86 (Although the complaint alleging bias in examinations for a license to practice medicine for overseas-trained doctors did not disclose a violation of the Convention, the Committee assumed that a distinction targeted at or which had an adverse impact on a particular group of non-citizens would be condemned.); see also *K.R.C. v. Denmark*, A/57/18, pp. 134–140.



## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

a General Recommendation on gender-related dimensions of racial discrimination in 2000.<sup>27</sup>

The concept of discrimination in Article 1 may touch indigenous and caste groups in different ways. Three points may be made. The first is that, as CERD observed, not all distinctions amount to discrimination, a perspective that may be lost in casual use of the term ‘discrimination’. The principle of equality demands equality for equals; those who are in an unequal situation are entitled to be treated according to the extent of that inequality. Differential treatment is to that extent not a violation of the equality principle but its vindication. The point goes back at least to the Advisory Opinion of the Permanent Court of International Justice in the case of the *Minority Schools in Albania*.<sup>28</sup> A useful contemporary referent is *Thlimennos v. Greece*,<sup>29</sup> where, in a case concerning discrimination against a Jehovah’s Witness, the European Court of Human Rights observed that it had:

so far considered that the right . . . not to be discriminated against . . . is violated when states treat differently persons in analogous situations without providing an objective and reasonable justification . . . However the Court considers that this is not the only facet of prohibition of discrimination . . . *The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*<sup>30</sup>

The statement is of significance for rights that are differentiated to address the claims of specific groups.<sup>31</sup> A second point is that the concept of discrimination in effect may be used by indigenous and caste groups to critique – for example – formally egalitarian legislation, which has clear, disparate impact on their rights. The third point is that to extend the reach of the Convention into private spaces, as opposed to confining it to ‘public life’, highlights the potential for indigenous and caste groups to argue that the State should rein in private actors who discriminate. A further implication is that whether it is regarded as ‘public life’ or the work of ‘private actors’, the reach of the Convention extends to the customary practices of a community; customary law is not inviolate, though whether or not it is contrary to the Convention will depend on its content.<sup>32</sup> Indigenous groups paradigmatically

---

<sup>27</sup> General Recommendation XXV, A/55/18, Annex V; *see also* the section on this aspect of discrimination in General Recommendation XXIX, included in the annex to the present paper.

<sup>28</sup> Advisory Opinion, P.C.I.J. Series A/B, No. 64 (1935).

<sup>29</sup> Appl. No. 34369/97, Judgment of 6 April 2000.

<sup>30</sup> *Ibid.*, paragraph 44; emphasis added.

<sup>31</sup> For a detailed treatment, *see* A.H.E. Morawa, ‘The Evolving Human Right to Equality’ 1 *European Yearbook of Minority Issues* (2001/2)157.

<sup>32</sup> The following extract illustrates the current line of CERD on these issues:

The Committee appreciates the approach adopted by the State party to respect customs and traditions of various ethnic groups on its territory,

## PATRICK THORNBERRY

argue for the retention of their ‘customs’; caste groups paradigmatically argue for the repeal of ‘custom’ – the felt source of their oppression.<sup>33</sup>

### GROUPS AND THEIR MEMBERS

The Committee is sceptical of claims that there are no minorities in the State concerned, or that there is no discrimination. States are required to provide demographic information, a point emphasized by the reporting guidelines and by the Committee’s practice. General Recommendation XXIV on Article 1 (1999) is clear: the Committee insists that, for determining the groups existing on a State’s territory, ‘[c]ertain criteria should be uniformly applied to all groups’ in case the State is tempted to be selective. The Committee’s argument is that selectivity can lead to discrimination: ‘the application of different and non-objective criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups’. The Committee does not indicate what are these ‘objective criteria’ – a line also followed in General Comment No. 23 of the Human Rights Committee<sup>34</sup> – but the inference must be that the reading of the Convention should pay attention to developments in ethnic and indigenous rights in the wider world of human rights. CERD has also addressed the question of individual identification with groups. As with most other instruments on human rights, the question of membership of the various intimated groups is not further elaborated,<sup>35</sup> though in General Recommendation VIII on ‘identification with a particular racial or ethnic group’<sup>36</sup> CERD made the normative statement that membership of a group ‘*shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned*’.<sup>37</sup> This statement echoes that contained in ILO Convention No. 169 on Indigenous and Tribal Peoples,<sup>38</sup> that self-identification shall be ‘a fundamental criterion’ for assessing indigenous and tribal group membership. In the ILO formula,

---

while at the same time enhancing the enjoyment of human rights for all. It further notes that . . . whereas cultural rights are protected, customary practices which dehumanize or are injurious to the physical or mental well-being of a person are prohibited.

Concluding Observations on the sixteenth and seventeenth periodic reports of Ghana, CERD/C/62/CO/6, 21 March 2003.

<sup>33</sup> In Concluding Observations on Nepal, caste was referred to by the Committee as an aspect of ‘traditional customs’. A/55/18, paras. 289–306, para. 294.

<sup>34</sup> See Article 27 of the ICCPR, A/49/40, pp. 107–110.

<sup>35</sup> In practice, as Banton notes, linking the prohibition of discrimination to ‘origin’ has proved simpler than attempting to relate it to an ethnic group – with attendant problems of assessing group membership. *International Action*, pp. 194–195.

<sup>36</sup> UN Doc. A/45/18.

<sup>37</sup> See the reminder (Concluding Observations) to Greece on the principle of self-identification in respect of its eighth, ninth, tenth and eleventh periodic reports at the forty-first session of the Committee. A/47/18, paragraph 91.

<sup>38</sup> On Indigenous and Tribal Peoples 1989.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

this subjective criterion is set in the context of other parameters for ‘indigenous’ and ‘tribal’. The CERD formula proposes self-identification as the stem principle from which derogations must be justified, placing the onus on those who contest the self-description of individuals.<sup>39</sup> Apart from challenging State laws directly limiting apurtenance to groups on poorly argued grounds,<sup>40</sup> this prioritization of the individual could also challenge the right of groups to limit membership.

### SPECIAL MEASURES

The definition of racial discrimination allows space for special measures:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure . . . equal enjoyment in the exercise of human rights . . . shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of special rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>41</sup>

The Convention goes beyond this exemption of special measures from the prohibition of discrimination. In the context of the general undertaking of States to ‘pursue by all appropriate means and without delay a policy of eliminating racial discrimination’,<sup>42</sup> Article 2.2 makes *obligatory*<sup>43</sup> the taking of ‘special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them’, ‘when the circumstances so warrant’. The formula in Article 1.4 is adapted to ensure that such measures ‘shall in no case entail . . . the maintenance of unequal or separate rights for different racial groups after the

---

<sup>39</sup> In discussions on CERD’s draft General Recommendation on Demographic Information of 1999, the Chairman (Aboul-Nasr) ‘questioned the novel idea of self-identification with a particular group or minority’. CERD/C/SR.1363/Add.1 (1 September 1999), paragraph 9. CERD member Diaconu, on the other hand, ‘stressed the recognized importance of personal choice in determining membership of a group or community’. *Ibid.*, paragraph 10. *Cf.* paragraph 94, where Diaconu argued that the principle of individual decision on membership of a group was consistent with the UN Declaration on Minorities.

<sup>40</sup> O’Flaherty, *supra* note 19, p. 166 (‘From the debate in CERD it is clear that the bare denial by a State that an individual is a member of a group would not constitute a ‘justification to the contrary.’).

<sup>41</sup> ICERD, *supra* note 7, Article 1.4.

<sup>42</sup> *Ibid.*, Article 2.1. There is also a Convention requirement to promote interracial understanding. CERD has observed that, towards the ends of eliminating discrimination and promoting understanding ‘states must be prepared to use both coercion and persuasion – utilizing the power of the law to prohibit and punish, as well as the power of education and information to enlighten and persuade’. General Recommendation XIV (42).

<sup>43</sup> Emphasis added.

## PATRICK THORNBERRY

objectives for which they were taken have been achieved'. In the drafting of the Convention, a number of States expressed reservations concerning the inclusion of special measures – claiming, *inter alia*, that they would perpetuate separation from the wider community,<sup>44</sup> would open the door to all sorts of 'legal manoeuvring to justify various kinds of racial discrimination',<sup>45</sup> etc. The notion of special measures now sits more comfortably in the general discourse of human rights. The integrationist thrust of Convention provisions<sup>46</sup> is mitigated by recognition in CERD practice of the legitimate interests and rights of ethnic groups of many varieties,<sup>47</sup> in line with contemporary thinking. Myntti observes that there is a difference between groups with ethnic, religious and linguistic characteristics, and groups who do not share such characteristics: the former are entitled to enjoy minority and indigenous rights; the latter may require special measures principally in the social and economic field.<sup>48</sup> Indigenous groups and minorities enjoy their own rights in international law which stand independently of any case for special measures, though some State policies for such groups may be brought within this framework. The Committee does not necessarily distinguish cases of 'recognition of specific minority/indigenous rights' from 'special measures', but recommendations to States Parties concerning indigenous groups may be made within and without the special measures paradigm.<sup>49</sup> In some cases the Committee's call for special measures links indigenous and other groups in a common recommendation.<sup>50</sup> Concluding observations concerning caste generally have a stronger flavour of special measures or affirmative action.<sup>51</sup>

### SEGREGATION

According to CERD, Article 3 of the Convention extends to conditions of partial segregation arising in cities, etc., as perhaps the unintended consequence of actions of private persons.<sup>52</sup> States are invited to 'work for the eradication of any negative

---

<sup>44</sup> Chile, E/CN.4/Sub.2/SR.416, paragraph 13.

<sup>45</sup> Ivory Coast, A/C.3/SR.1306, paragraph 23.

<sup>46</sup> See also Article 2.1(e) in integrationist multi-racial organizations and movements.

<sup>47</sup> See, e.g., General Recommendation XXI on self-determination, and XXVII on the Roma.

<sup>48</sup> K. Myntti, 'The prevention of Discrimination v. Protection of Minorities – With Particular Reference to "Special Measures"', in 2 *Baltic Yearbook of International Law* (2002) pp. 199–226.

<sup>49</sup> See, e.g., Concluding Observations on Bangladesh on Special Measures, A/56/18, paragraph 66. For a more wide-ranging set of recommendations, including many not confined to a 'special measures' or 'affirmative action' framework, see Concluding Observations on Canada, A/57/18, paragraphs 315–343.

<sup>50</sup> See Concluding Observations on Ecuador, CERD/C/62/CO/4, 21 March 2003.

<sup>51</sup> See, e.g., Concluding Observations on India, A/51/18, paragraphs 339–373; Concluding Observations on Nepal, A/55/18, paragraphs 289–306.

<sup>52</sup> 'In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race . . . [etc.] . . . so that inhabitants can be

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

consequences which may ensue'. In the reporting procedure, CERD has expressed its concern about both formal<sup>53</sup> and informal<sup>54</sup> segregation, including segregation in education.<sup>55</sup> Of course, the essence of segregation policies or practices is that they are essentially driven by the activities of those who are not within the target groups; this tendency applies whether the segregation is legally or socially sanctioned. On the other hand, the Chinatowns of this world may be in part the product of the choices of those who inhabit them.<sup>56</sup> It is noted that the thrust of General Recommendation XIX is on the negative consequences of informal segregation, which is perhaps the key, including stigmatization, etc., which does not incorporate the self-descriptions of those who 'choose' their neighbourhoods.<sup>57</sup> The Roma are a particular case in point – General Recommendation XVIII<sup>58</sup> urges, *inter alia*, that States 'develop and implement policies aimed at avoiding segregation of Roma communities in housing',<sup>59</sup> and 'act firmly against any discriminatory practices affecting Roma by local authorities and by private owners, with regard to taking residence and access to housing'.<sup>60</sup> There is sometimes a fine line between such phenomena and the often defensive choices of groups anxious to preserve their

---

stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds': General Recommendation XIX, paragraph 3.

<sup>53</sup> In the case of Bangladesh, the Committee had information that 'there were cluster camps in areas inhabited by indigenous peoples, and that people in those camps were subject to various restrictions, being unable to travel without permission'. A/47/18, paragraph 120.

<sup>54</sup> Examples include France, where such concern is related to 'social trends which result in segregation in areas of residence and in the school system'. A/49/18, paragraph 149. CERD drew the attention of the Netherlands to General Recommendation XIX (47) in the light of evidence of 'increasing racial segregation in society, mainly in the big towns, with so-called "white" schools and neighbourhoods'. A/53/18, paragraph 103. In Concluding Observations on Sweden, the Committee expressed concern about 'increasing residential *de facto* segregation', recommending that the state party 'ensure compliance with the law against discrimination in the allocation of housing' and supply information on *de facto* segregation in its next report. A/55/18, paragraph 338.

<sup>55</sup> In Concluding Observations on Slovakia, the Committee noted that 'a disproportionately large number of Roma children . . . are segregated or placed in schools for mentally disabled children', recommending that the Government 'expand strategies to facilitate the integration of children of minority pupils into mainstream education'. A/55/18, paragraph 262.

<sup>56</sup> See Banton *International Action*, on self-segregation and related phenomena, discussed in relation to the FRG, Sweden, France and the Netherlands. *Supra* note 20, p. 200–202. The segregation issue has been raised in connection with Germany. CERD/C/SR.1449, paragraph 49.

<sup>57</sup> Cf. the segregation created by the parallel existence of public and private schools. Concluding Observations on the Second, Third and Fourth Periodic Reports of Zimbabwe, A/55/18, paragraph 196.

<sup>58</sup> Adopted at the fifty-seventh session, 31 July–25 August 2000.

<sup>59</sup> Paragraph 30.

<sup>60</sup> Paragraph 31.

## PATRICK THORNBERRY

distinctiveness – including the territorial component, especially relevant to indigenous peoples.<sup>61</sup>

### SUBSTANTIVE ARTICLES

Other articles of the Convention permit only brief description in the present context. Article 4 sets up a potential conflict between the elimination of racial discrimination and freedom of expression by requiring that States Parties ‘condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin’. However, obligations are to be exercised with due regard to ‘the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention’.<sup>62</sup> Article 4 of the Convention is the subject of the largest number of reservations to the Convention. Members of CERD have regarded Article 4 as requiring comprehensive legislation and practical action on the part of states to prohibit hate speech and racist organizations, whereas some governments may prefer a less draconian approach.<sup>63</sup> Hate speech issues have been intensified by the growth of the Internet, which enjoys constitutional free speech protection in the USA.<sup>64</sup> In general, it may be observed that indigenous groups suffer from hate speech as much as others;<sup>65</sup> in the case of caste groups, the proscription of theories of superiority is a pernicious and obvious component of the hate speech specified and prohibited by Article 4.

Article 5 is a primary focus of reports as it guarantees equality before the law ‘notably in the enjoyment of the following rights’ – a long list follows, including

---

<sup>61</sup> For further reflections on informal segregation, see M. Banton, ‘The causes of, and remedies for, racial discrimination’, background paper for the World Conference Against Racism, etc., E/CN.4/1999/WG.1/BP.6, 26 February 1999, paragraphs 25–30.

<sup>62</sup> See General Recommendation XV(42), HRI/GEN/1/Rev.3, 108–109; *LK v. Netherlands*, Communication No. 4/1991, A/48/18 (1993).

<sup>63</sup> CERD members have debated the relationship between freedom of speech and the implementation of the Convention. Boyle and Baldaccini evidence the Committee’s approach to the prosecution and conviction of the television journalist Jersild in Denmark. *Supra* note 9. The Committee adopted General Recommendation XV on Article 4 in 1993. See Concluding Observations of the Committee in 2001 on the Report of the USA, A/56/18, paragraphs 391–392.

<sup>64</sup> M. L. Fernandez Esteban, ‘The Internet: A New Horizon for Hatred?’, in Fredman, *supra*, note 9, pp. 77–109. The Durban Declaration of the World Conference against Racism also addresses Internet issues. Paragraphs 90, 91 and 92 of the Declaration, and paragraphs 140–147 of the Programme of Action. The Programme of Action opts for a mix of voluntary self-regulation and legal sanctions to address hate speech, etc., on the internet, urging states to apply the provisions of ICERD. Paragraph 145.

<sup>65</sup> See Concluding Observations on Botswana (hate speech against the Basarwa/San people), A57/18, paragraph 302. For a rare case of a self-defined indigenous population as the reported source of hate speech, see Concluding Observations on Fiji, CERD/C/62/CO5, 21 March 2003, paragraph 21.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

civil and political, economic and social rights.<sup>66</sup> The list is regarded by CERD as indicative rather than exhaustive, a view supported clearly by the text.<sup>67</sup> However, if the list in Article 5 is only indicative, the source of ‘other rights’ is not equally indicated. O’Flaherty refers in individual CERD opinions that it extends to ‘all rights recognised by the State regardless of source’.<sup>68</sup> CERD General Recommendation XX on non-discriminatory implementation of rights and freedoms (Article 5) recalls only the UN Charter, the UDHR and the International Covenants. Perhaps it might be better to say that Article 5 extends to all rights obligating the State<sup>69</sup> by virtue of hard or soft human rights law, having regard to the general evolution of standards rather than particular instruments. On the other hand, the view cited by O’Flaherty suggests that even a right that is not obligatory under international law must be accorded on non-discriminatory principles.<sup>70</sup> Diaconu agrees, adding that the definition contained in Article 1.1 directs the prohibition of discrimination against discrimination in any field of public life as opposed to any particular category of rights. This makes it clear ‘that the scope of the rights to be protected [is] against discrimination in general . . . not limited to the categories of rights enshrined in . . . international instruments’,<sup>71</sup> but extends to ‘any field regulated and protected by public authorities’.<sup>72</sup> The practical importance of the openness of Article 5 for indigenous groups in particular is that the provision encourages the Committee to reach out to the world of human rights norms outside the Convention, and to translate their findings into readings of the text. The openness of the Article results not only from the unfinished nature of the list of rights, but also from the fact that it names the rights, without attempting to elaborate or define them. In practice, the concerns of indigenous peoples have been recognized by CERD in connection with civil and political as well as economic and social rights. The Committee has also demonstrated, when the occasion demands, a solicitude for collective rights such as those relating to indigenous lands and resources, including the economic and social effects of dispossession of traditional

---

<sup>66</sup> See W.F. Felice, ‘The UN Committee on the Elimination of Racial Discrimination: Race, and Economic and Social Rights’ 24 *Human Rights Quarterly* (2002) 205.

<sup>67</sup> General Recommendation XX(48), HRI/GEN/1/Rev.3, 112–113, paragraph 1.

<sup>68</sup> M. O’Flaherty, *supra* note 19, p. 179.

<sup>69</sup> General Recommendation XX states that Article 5 does not of itself create rights ‘but assumes the existence and recognition of . . . rights’. *Supra* note 68, paragraph 1.

<sup>70</sup> Article 2 is relevant in view of the very broad ambition to eliminate all forms of racial discrimination. The O’Flaherty interpretation is supported by General Recommendation XX.

<sup>71</sup> Diaconu, ‘The definitions of racial discrimination’, E/CN.4/1999/WG.1/BR.10, paragraph 24.

<sup>72</sup> *Ibid.*

PATRICK THORNBERRY

lands.<sup>73</sup> The concern for collective rights can spill over into a critique of the roles of private actors and individual titles in cases of marginalization and dispossession.<sup>74</sup>

Article 6 contains important principles on remedies for racial discrimination: states parties are required to provide effective protection against racial discrimination, and ‘the right to seek . . . just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination’. In General Recommendation XXVI on Article 6, the Committee emphasized the negative implications for the self-esteem of victims of racial discrimination, and took the view that ‘just and adequate reparation’, etc., ‘is not necessarily secured solely by the punishment of the perpetrator . . . at the same time the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim whenever appropriate’. A specific elaboration of the ‘right to a remedy’ appears in General Recommendation XXIII (*infra*) on the rights of indigenous peoples, in cases of deprivation of traditional lands. In the case of caste discrimination, CERD has placed emphasis on reparation or satisfaction for damage caused, and on the need to investigate acts of discrimination and bring perpetrators to justice – addressing questions of potential impunity for perpetrators of caste-related crimes.<sup>75</sup>

Article 7 on education completes the substantive articles: the States Parties undertake to adopt ‘immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups’. The provision, which includes a concept of intercultural education, may be taken to complement ‘the right to education and training’ in Article 5(e)(v). The question of anti-racist education is addressed in General Recommendation V (1977), and General Recommendation XIII (1993) on the training of law enforcement officials. In the case of Roma, General Recommendation XXVII (2000) devotes a complete section of ten points to measures to be taken in the field of education – some relating to the Roma themselves, but also recommendations directed to the larger community among which the Roma live. In general, the real thrust of Article 7 is towards precisely this general education of the public in order to ameliorate the suffering of victim communities.<sup>76</sup> The importance of Article 7 may have been underplayed in CERD

---

<sup>73</sup> For recent examples, see Concluding Observations on Botswana, *supra* note 66, paragraphs 303, 304; Canada, *supra* note 50, paragraph 331; Concluding Observations on the USA, *supra* note 64, paragraph 400; Vietnam, A/56/18, paragraph 421.

<sup>74</sup> Concluding Observations on Argentina, A/56/18, paragraph 51; Concluding Observations on the USA, *ibid.*, (concerning Western Shoshone ancestral land); Concluding Observations on Costa Rica, A/57/18, paragraph 74.

<sup>75</sup> Concluding Observations on India, A/51/18, paragraphs 339–373, paragraphs 361, 363, 365, 366, and 370.

<sup>76</sup> Consult G. Tenekides, Study on the Implementation of Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, A/CONF.119/11 (1983). See also the comments of Boyle and Baldaccini, *supra* note 19, pp. 165–166.



## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

practice, but this tendency is changing, as there is a generally greater appreciation of the role to be played by education in addressing human rights issues, including racial discrimination. Boyle and Baldaccini suggest that:

Article 7 deserves deeper attention both from governments and from CERD. The duties it requires of States reflect the thesis that racist ideas are not innate, but are transmitted to the young through others: peers, teachers, politicians, and other opinion leaders. Unless such ideas are tackled at their source, they will continue to be handed down from generation to generation.<sup>77</sup>

The Committee regularly requests, *inter alia*, that the Convention be publicized within States Parties and that the concluding observations of CERD be given similar publicity, including among minority populations.

References to education in CERD Concluding Observations are many and various, including references on the context of indigenous and minority groups. CERD observations may relate back to the right to education and training set out in Article 5(e)(v), or to Article 7. There has been a fairly consistent emphasis in recent observations on the need for bilingual teaching and teachers for minority and indigenous groups – on the need to combat illiteracy among the populations<sup>78</sup> and on the need to avoid the relegation of minority pupils to inferior education facilities.<sup>79</sup> The Committee adopted a wide-ranging observation on the Basarwa/San people in Botswana which may be taken to express a current approach, combining elements of Articles 5 and 7:

The Committee notes that the cultural and linguistic rights of the Basarwa/San are not fully respected, especially in educational curricula and in terms of access to the media. The Committee recommends that the State party fully recognize and respect the culture, history, languages and way of life of its various ethnic groups as an enrichment of the State's cultural identity and adopt measures to protect and support minority languages, in particular within education.<sup>80</sup>

In terms of a philosophy applied to indigenous education, such an observation sits comfortably with contemporary instruments such as ILO Convention 169 and the UN Declaration on the Rights of Persons Belonging to Minorities. Caste discrimination operates in the educational as in other fields, and CERD has highlighted problems of access to education as well as the difficult issue of 'mentality', recommending in the case of India a campaign to educate the population

---

<sup>77</sup> Boyle and Baldaccini, *supra* note 19, p. 165.

<sup>78</sup> Concluding Observations on Ecuador, CERD/C/62/CO4, 21 March 2003, paragraph 14.

<sup>79</sup> Concluding Observations on Poland, CERD/C/62/CO/10, 21 March 2003, paragraph 13; Concluding Observations on Slovenia, CERD/C/62/CO/13, paragraph 11.

<sup>80</sup> Concluding Observations on Botswana, *supra* note 66, paragraph 305.

PATRICK THORNBERRY

in human rights, with the aim, *inter alia*, of ‘eliminating the institutionalized thinking of the high-caste and low-caste mentality’.<sup>81</sup>

**INDIGENOUS PEOPLES**

*General Recommendation XXI on Self-Determination*

A great deal has been written by a multitude of authors (including the present author) concerning the right of indigenous peoples to self-determination, and the arguments will not be rehearsed here, though we may note that many indigenous groups place self-determination at the centre of their human rights case. Suffice it to say that self-determination is not listed among the rights *explicitly* mentioned in Article 5 of the Convention, though the preamble does contain a reference to the so-called Colonial Declaration contained in General Assembly Resolution 1514(XV) of 1960. General Recommendation XXI draws on a variety of international instruments but omits reference to Resolution 1514, preferring to mention two other UN General Assembly Resolutions: 2625 (XXV) of 1970, and 47/135 of 1992 – respectively, the Declaration on Friendly Relations, and the Declaration on the Rights of Persons Belonging to Minorities. The Recommendation also draws on the UN Covenants and the UN Secretary-General’s *Agenda for Peace*. Three elements may be highlighted here. The first is the distinction made between internal and external self-determination – the former is described as the right of peoples to pursue their development without outside interference; the latter has to do with free determination of political status and the right of peoples to a place in the international community. The second element is the great sensitivity demonstrated by the Recommendation to ‘the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitable in the fruits of national growth and to play their part in the government of the country of which they are citizens’. ‘Persons belonging to ethnic groups’ clearly includes indigenous peoples as well as ethnic, etc., minorities. The third element is the disavowal of unilateral secession as a legal right – ‘international law has not recognized a general right of peoples unilaterally to declare secession from a State . . . [as] fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not however, exclude the possibility of arrangements reached by free agreement of all parties concerned.’ From an indigenous perspective, the linkage between the norms of the Convention and the concept of internal self-determination is potentially useful, while the guarded attitude to a right of secession chimes in with indigenous concepts of self-determination which, despite dramatic wording on Article 3 of the draft UN

---

<sup>81</sup> Concluding Observations on India, *supra* note 52, paragraph 369.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

Declaration on the Rights of Indigenous Peoples, are not generally focused on secession as aspiration or asserted right.<sup>82</sup>

### *General Recommendation XXIII on Indigenous Peoples*

The developing awareness of indigenous issues in the Convention prompted the Committee to issue a specific recommendation, General Recommendation XXIII, on the question. One of the drafters of the recommendation – CERD member Wolfrum – remarked that he had consulted relevant General Assembly resolutions and the latest draft of the proposed UN Declaration on the Rights of Indigenous Peoples, as well as legislation from Argentina;<sup>83</sup> reference was also made in the discussions to ILO Convention 169 on Indigenous and Tribal Peoples.<sup>84</sup> As noted, the Committee recalled its abiding concern with indigenous peoples, who were within the scope of the Convention. CERD proceeds to relate the forms of discrimination suffered by the indigenous, observing in particular that ‘they have lost their land and resources to colonists, commercial companies and state enterprises’, and that ‘consequently the preservation of their culture and their historical identity has been and still is jeopardized’. The Committee calls in particular upon states parties to ‘recognize and respect indigenous culture, history, language and way of life as an enrichment of the State’s cultural identity and . . . promote its preservation’. States are also urged to ensure freedom from discrimination, to provide conditions ‘allowing for a sustainable economic and social development compatible with [indigenous peoples’] cultural characteristics’, to ensure participation in public life and ‘that no decisions directly relating to [indigenous] rights and interests are taken without their informed consent’. The point on ‘consent’ occasioned considerable discussion of the terms ‘participation’, ‘consultation’ and ‘consent’, with argument focusing on the danger of giving a right of veto to indigenous peoples: ‘there were many . . . cases where a small community could hinder the taking of decisions that would be of benefit to all citizens. The Committee should be careful not to innovate’.<sup>85</sup> The consensus formula distinguishes between the general right of effective participation in public life, and the narrower issue of decisions directly affecting indigenous groups. In the latter case, the sense of the Committee’s deliberations appears to be that the peoples do have a right of veto.<sup>86</sup> The linguistic form of the Recommendation is in part

---

<sup>82</sup> Among many contributions to the debate on self-determination and indigenous peoples, see P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Abo Akademi University, Turku/Abo, 2000).

<sup>83</sup> CERD/C.SR.1235, paragraph 93.

<sup>84</sup> CERD/C/SR.1235, paragraphs 60–96.

<sup>85</sup> CERD member Diaconu, CERD/C/SR.1235, paragraph 69.

<sup>86</sup> ‘In the recommendation there needed to be a distinction between two situations: one concerning all the citizens of a country and another concerning indigenous persons directly. In the latter case, they should have the right of veto and the text, as drafted, dealt adequately with the issue’. CERD member Aboul-Nasr, CERD/C/SR.1235, paragraph 72. CERD member Diaconu stated that he ‘could foresee complaints from states parties if the Committee

PATRICK THORNBERRY

collective – referring to the rights of indigenous peoples and of indigenous communities: States are called to ensure that ‘indigenous communities can exercise their rights’. In other cases, the reference is to ‘members of indigenous peoples’ – in relation to equality and non-discrimination, and to effective participation. Bearing in mind the limited text of the Convention, the Recommendation as a whole is a significant elaboration of norms, including the denouement, which outlines a variety of *desiderata* without formal reference points in the text of the treaty:

The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only where this is for factual reasons not possible, [should] the right to restitution . . . be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

The Committee calls upon States to include full information in their reports on the situation of indigenous peoples. Given that the provisions of the Convention apply to indigenous peoples, it is axiomatic that all other General Recommendations apply to the indigenous as they do to other groups suffering discrimination.

*Urgent Action*

In addition to the regular procedures under the Convention, the Committee devised a procedure to deal with urgent cases following the adoption of a working paper in 1993.<sup>87</sup> Efforts to prevent serious violations would include the following:

---

appeared to be advocating a right of veto for indigenous peoples over the central government’s decisions’. *Ibid.*, paragraph 78. The Recommendation thus appears to go beyond ILO Convention 169, Article 7 of which is interpreted by the authors of the Guide to the ILO Convention in response to ‘the veto question’ as requiring ‘that there be actual consultation in which these peoples have a right to express their point of view and a right to influence the decision. This means that governments have to supply the enabling environment and conditions to permit indigenous and tribal peoples to make a meaningful contribution’. M. Tomei and L. Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (International Labour Office, Geneva, 1996) pp. 8–9, p. 9. This is not the logical equivalent of a right of veto, but it suggests important practical constraints on action over the heads of the indigenous groups. One reason for the stronger pro-indigenous language in the CERD recommendation is that, as its Chairman (Banton) explained, ‘the whole of paragraph 4 was phrased as a recommendation to States parties’.

<sup>87</sup> UN Doc. A/48/18, Annex III, Section A. *See, generally*, T. Van Boven, ‘Prevention, early-warning and urgent procedures: a new approach by the Committee on the Elimination of Racial Discrimination’, in E. Denters and N. Schrijver (eds.), *Reflections on International Law from the Low Countries* (Kluwer, The Hague, 1998) p. 165.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

*Early-warning measures:* these would be aimed at addressing existing problems so as to prevent them from escalating into conflicts and would also include confidence-building measures to identify and support structures of racial tolerance . . . criteria for early warning would include . . . the lack of an adequate legislative basis for defining and criminalizing all forms of racial discrimination . . . inadequate implementation of enforcement mechanisms . . . the presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations, notably by elected or other officials; a significant pattern of racial discrimination evidenced in social and economic indicators; and significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities;

*Urgent procedures:* these would aim at responding to problems requiring immediate attention to prevent or limit the scale or number of serious violations . . . Possible criteria for initiating an urgent procedure could include the presence of a serious, massive or persistent pattern of racial discrimination; or that the situation is serious and there is a risk of further racial discrimination.

Amendment to the rules of procedure in order to respond to the working paper were discussed and rejected in 1994,<sup>88</sup> so that the procedure is activated and carried through on a case-by-case basis. Under this agenda item, CERD has considered situations in Algeria, Australia, Bosnia and Herzegovina, Burundi, Croatia, Cyprus, the Democratic Republic of the Congo, Israel, Liberia, Mexico, Papua New Guinea, the Russian Federation, Rwanda, Sudan, the Former Yugoslav republic of Macedonia and Yugoslavia,<sup>89</sup> as well as adopting statements on Africa and the Kurdish people.<sup>90</sup> Outcomes have included formal decisions expressing the views of

---

<sup>88</sup> 1028<sup>th</sup> and 1029<sup>th</sup> meetings.

<sup>89</sup> 'The drama in Yugoslavia was a decisive factor for the Committee to embark upon the early-warning and urgent procedures'. Van Boven, *A New Approach*, 173. At the 58<sup>th</sup> session of the Committee, the situation of Cote D'Ivoire was removed from the review procedure and placed under the early warning procedure. However, consideration of the situation was postponed at the request of the state party and its undertaking to submit overdue reports – A/56/18, p.15. Decision 1 (60) of March 2002 on Papua New Guinea was also made under the early warning procedure, though it is not entirely clear where 'urgency' or 'timeliness' resides in such a long-running dispute; the Decision stated the Committee's intention to examine the situation of Papua New Guinea in March 2003 – A/57/18, p.104.

<sup>90</sup> List in A/56/18, paragraph 21; and see *ibid.*, for the situation of Cote d'Ivoire. For a view that in the matter of early warning, etc., CERD stretches its mandate 'in a creative manner', see T. Van Boven, 'United Nations strategies to combat racism and racial discrimination: past experiences and present perspectives', background paper for the World Conference on Racism, etc., E/CN.4/1999/WG.1/BP.7, paragraph 5(a).

PATRICK THORNBERRY

the Committee and requests for immediate submission of a report,<sup>91</sup> calling the attention of the High Commissioner for Human Rights, the Secretary-General of the UN,<sup>92</sup> the General Assembly and the Security Council,<sup>93</sup> and the undertaking with the consent of the government concerned of visits to the country concerned.

The various actions of the Committee in respect of Australia are an outstanding case of this machinery in operation. In the case of *Mabo v Queensland*,<sup>94</sup> the High Court of Australia rejected of the application of *terra nullius* to Australia, and affirmed that pre-existing land rights of the aboriginal peoples survived the extension of British sovereignty over the country. The Committee regarded the *Mabo* case as 'a very significant development', noting 'with satisfaction' the rejection of *terra nullius* doctrine.<sup>95</sup> The CERD reading of the Native Title Act 1993 ('NTA') which gave effect to *Mabo* was also favourable.<sup>96</sup> On the immediate post-*Mabo* situation, CERD was critical of the protracted legal proceedings for the recognition of native title, the stringent conditions on proof of connection with land, and the position of those who identified as aboriginal but all of whose ancestors were not.<sup>97</sup> The Committee recommended, *inter alia*, that Australia 'pursue an energetic policy of recognizing aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past'.<sup>98</sup> Proposed changes to the native title legislation prompted CERD to act under its early warning procedures.<sup>99</sup> In a decision adopted at its fifty-third session, the Committee requested the Government of Australia to provide it with information on changes projected or introduced to the NTA as well as any changes in State policy on aboriginal land rights and in the functions of the Aboriginal and Torres Strait Social Justice Commissioner.<sup>100</sup> The issues were considered at the fifty-fourth session of the Committee,<sup>101</sup> following receipt of an explanatory document from the Australian Government.<sup>102</sup> In a later decision,<sup>103</sup> the Committee expressed concern 'over the

---

<sup>91</sup> T. Van Boven observes that the initial action of CERD is usually a request for early information in accordance with Article 9.1. of the Convention; he also advances a tentative typology of typical situations under the procedure and typical actions.

<sup>92</sup> In 1995 this action was undertaken for the situations on the Russian Federation, Rwanda, Bosnia and Herzegovina and Papua New Guinea.

<sup>93</sup> In 1995 the cases of Burundi and Bosnia Herzegovina were thus referred.

<sup>94</sup> *Mabo v Queensland (No.2)*, 175 CLR 1 (1992).

<sup>95</sup> CERD Report, A/49/18, paragraph 540.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, paragraph 544.

<sup>98</sup> *Ibid.*, paragraph 547.

<sup>99</sup> G. Triggs, 'Australia's indigenous peoples and international law: validity of the Native Title Amendment Act 1998' 23/2 *Melbourne University Law Review* (1999) pp. 372-415.

<sup>100</sup> Decision 1(53), A/53/18, paragraph 22.

<sup>101</sup> Discussed with the state party at the 1323rd and 1324th meetings of CERD.

<sup>102</sup> UN Doc. CERD/C/347.

<sup>103</sup> Decision 2(54), CERD/C/54/Misc.40/Rev.2. In Decision 2(55) of August 1999, the Committee reaffirmed its position and decided to continue consideration of the matter together with the state party's twelfth report.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

compatibility of the Native Title Act, as currently amended, with the State party's international obligations under the Convention'.<sup>104</sup> The Committee called upon Australia to address these concerns as a matter of the utmost urgency and to suspend implementation of the 1998 amendments and open discussions with aboriginal representatives.<sup>105</sup> CERD decided to keep the issue on its agenda under early warning and urgent action procedures.<sup>106</sup> The rest of the story need not be told here, but the case highlights the potential uses of this procedure in the case of vulnerable peoples. The various procedures of CERD are under regular discussion in an internal working group, and it is probable that the urgent procedures will be clarified further. There are dangers for the Committee in adopting too freewheeling an approach to such issues, but in general CERD has taken a cautious line. The situation of some indigenous groups may be so dire that irreparable damage may be wrought while the Committee waits for a regular report – bearing in mind that some parties to the Convention have never reported, and that many reports are overdue.

### 'DESCENT-BASED' GROUPS AND CASTE

The basic Article 1 description of 'racial discrimination' incorporates the notion of 'descent' – a term which suggests a wide span of possibilities, including the possibility that the Convention encompasses caste-based discrimination. 'Descent',<sup>107</sup> was suggested by India in the Third Committee<sup>108</sup> and approved

---

<sup>104</sup> *Ibid.*, paragraph 6.

<sup>105</sup> *Ibid.*, paragraph 11.

<sup>106</sup> *Ibid.*, paragraph 12.

<sup>107</sup> The term is not referred to in the Universal Declaration of Human Rights. *See*, however, the discussion in the Third Committee of the General Assembly, third session, 100<sup>th</sup> meeting, where India proposed to insert the word 'caste' (Mr. Habib) into the text of Article 2 – but only because (Mr. Appadorai) 'it objected to the word "birth". The words "other status" and "social origin" were sufficiently broad to cover the whole field; the delegation of India would not, therefore, insist on its proposal'. According to Article 2 of the Universal Declaration, human rights and freedoms are to be accorded 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Other instruments with 'generous' lists of grounds of non-discrimination include ILO Convention 111 on Discrimination in Employment and occupation ('race, colour, sex, religion, political opinion, national extraction or social origin'), and the UNESCO Convention against Discrimination in Education (including 'national or social origin, economic condition or birth'). All three instruments are referred to in the preamble to the Convention, lending weight to wider readings of the ambit of the prohibition of discrimination. 'Descent' is not unique in the canon of human rights; Article 1.1(b) of ILO Convention 169 on Indigenous and Tribal Peoples covers indigenous status on the grounds, *inter alia*, of 'descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization' (emphasis added).

PATRICK THORNBERRY

without much debate – the drafting record does not clarify relevant distinctions, though it appears that ‘descent’ was in part intended to cover confusions over ‘national origin’ – ‘nationality’ was another contested term.<sup>109</sup> While coverage of caste was implicit in the drafting of Article 1, a clearer affirmation that caste was within the purview of the Convention results from the Indian intervention in the drafting of what became Articles 1.4 and 2.2. The representative of India pointed out that 1.4 ‘had been included in the draft Convention in order to provide for special and temporary measures to help certain groups of people . . . who, though of the same racial stock and ethnic origin as their fellow citizens, had for centuries been relegated by the caste system to a miserable and downtrodden condition’.<sup>110</sup> We may observe that ‘descent’ was omitted from the list of prohibited grounds in Article 5: the not-always-illuminating *travaux* reveal that the representative of Czechoslovakia proposed to insert the term into Article 5 to promote consistency with Article 1, but was almost immediately persuaded by the representative of Austria to withdraw the proposal; no further explanation appears from the summary records.<sup>111</sup>

In the context of examination of reports by India, CERD has affirmed that descent ‘does not solely refer to “race”’,<sup>112</sup> concluding that the situation of India’s Scheduled Castes and Scheduled Tribes falls within the purview of the

---

<sup>108</sup> Thornberry, *International Law and the Rights of Minorities*, *supra* note 9, pp. 261–262. The key interventions of India were made in meetings 1299 and 1306 of the Third Committee of the General Assembly. A/C.3/SR.1299; A/C.3/SR.1306.

<sup>109</sup> A/C.3/SR.1299, paragraph 29. The basic document containing the drafting suggestion of India is A/C.3/L.1216. In A/C.3/SR.1306, the representative of Ghana commented on the draft Article 1 that ‘notions of ancestry and previous nationality . . . seemed to him adequately represented by “descent” and “place of origin” in the Indian proposal’. Paragraph 12.

<sup>110</sup> A/C.3/SR.1306, paragraph 25; *see also* A/C.3/SR.1303, paragraph 20. According to Bayly, the term ‘caste’ derives from the Latin *castus* (chaste), mutated to *casta* in Spanish and Portuguese with a usage applied to zoology and botany, later used to describe Amerindian clans and lineages – that is, by ‘bloodline-conscious Iberian settlers to people of mixed white and non-white descent’. Portuguese usage in India applied it also to religion; subsequently ‘Dutch and English writing on India . . . adopted these usages from the Portuguese, employing them with equal ambiguity and in conjunction with other imprecise terms, including, race, class, nation, sect, and tribe.’ *Caste, Society and Politics in India*, pp. 105–106.

<sup>111</sup> UN Doc. A/C.3/SR.1309, paragraph 3 (Czech proposal); *ibid.*, paragraph 4 (Austrian suggestion); *ibid.*, paragraph 5 (Czech agreement to withdraw the proposal). End of story!

<sup>112</sup> UN Doc. A/51/18, paragraph 352. The position was forcefully expressed by many individual members of the Committee. Wolfrum, CERD/C/SR.1161, paragraph 20 (‘If “descent” were the equivalent of “race”, it would not have been necessary to include both concepts in the Convention.’); Van Boven, CERD/C/SR.1162, paragraph 14 (‘The Committee’s conceptions of “race” and “descent” clearly differed from those of the Government of India.’); Chigovera, *ibid.*, paragraph 22 (‘The fact that castes and tribes were based on descent brought them strictly within the Convention.’); *see also* remarks of Mr Aboul-Nasr, SR. 1162, paragraph 27; de Gouttes, SR. 1161, paragraph 32; Rechetov, SR. 1161, paragraph 11; and Yutzis, SR. 1163, paragraph 9, who suggested that tribal and caste distinctions were ‘not only of a social, but also of a socio-ethnic nature’.



## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

Convention.<sup>113</sup> This conclusion has been challenged by India through linking ‘descent’ to ‘race’ and arguing that “‘race’ in India is distinct from ‘caste’”.<sup>114</sup> Bearing in mind its contribution to drafting, the position of India has demonstrated a degree of mutability.<sup>115</sup> India has indicated its willingness to provide information on these groups.<sup>116</sup> Questions of caste and analogous systems of social stratification have been raised by reports of Bangladesh,<sup>117</sup> Japan,<sup>118</sup> Nepal,<sup>119</sup> and other cases.<sup>120</sup> In the case of Japan, the Committee observed that it considered ‘contrary to the State party, that the term “descent” has its own meaning and is not to be confused with race or ethnic or national origin’, recommending that the State ensure the protection

---

<sup>113</sup> UN Doc. A/51/18, paragraph 352.

<sup>114</sup> Consolidated tenth to fourteenth periodic reports of India, CERD/C/299/Add.3, paragraph 7. ([B]oth castes and tribes are systems based on “descent”. . . It is obvious, however, that the use of the term “descent” in the Convention clearly refers to “race”. . . the policies of the Indian Government relating to Scheduled Castes and Scheduled Tribes do not come under the purview of Article 1 of the Convention.’) See also UN Doc. CERD/C/SR.1161, paragraph 4; UN Doc. CERD/C/SR.1162, paragraph 36.

<sup>115</sup> One CERD member (Van Boven), recalling the contribution of India to the drafting of the Convention, observed that there ‘seemed to be some discrepancy between that historical contribution and the attitude that was being taken in the report’. UN Doc. CERD/C/SR.1162, paragraph 15.

<sup>116</sup> Preliminary comments of the Government of India on the concluding observations adopted by [CERD] on the tenth to fourteenth periodic reports of India presented during the forty-ninth session of the Committee, A/51/18, p. 128, paragraph 3(a). One of the representatives of India offered a nuanced view in stating that the ‘notion of “race” was not entirely foreign to that of “caste”; but . . . racial differences were secondary to cultural ones . . . race had never really been determinant for caste’. UN Doc. CERD/C/SR.1163, paragraph 3; see also *ibid.*, paragraph 4; S. Ghose, ‘Untouchability and the law’, (2001) *13 Interights Bulletin*, No. 3, pp. 98–100; and P. Thornberry, ‘CERD and indigenous peoples, with remarks on caste-based discrimination’, *ibid.*, pp. 96–98.

<sup>117</sup> Concluding observations of the Committee, A/56/18, paragraph 73.

<sup>118</sup> The report of Japan made no reference to the issue of the Buraku. CERD/C/350/Add.2, 26 September 2000.

<sup>119</sup> Concluding Observations of the Committee, A/55/18, paragraph 299 (‘The Committee remains concerned at the existence of caste-based discrimination and the denial which this system imposes on some segments of the population of the enjoyment of the rights contained in the Convention.’) There is no reference to ‘caste-based’ discrimination in the final documents of the World Conference against Racism; strenuous lobbying by the Government of India prevailed over determined efforts by Dalit groups in particular to insert a specific provision. The report of the Asian Preparatory Meeting for the World Conference also omits specific reference. A/CONF.189/PC.2/9.

<sup>120</sup> Conflicts in Somalia were regarded by the Committee as based on descent, thus bringing them within the purview of the Convention. UN Doc. A/47/18, paragraphs 225–226; see also CERD Concluding Observations on Burkina Faso, A/52/18, paragraph 624; Concluding Observations on Mauritius, A/51/18, paragraph 548; Concluding Observations on Mali, A/57/18, paragraph 406; Concluding Observations on Senegal, A/57/18, paragraph 445.

PATRICK THORNBERRY

of the rights ‘of all groups, including the Burakumin community’;<sup>121</sup> Japan, however, continues to maintain the position implied in its report.<sup>122</sup>

*General Recommendation XXIX (2002)*

In 2001, members of the Committee proposed the holding of a thematic debate on ‘descent’ preceded by a general exchange of views.<sup>123</sup> An extensive thematic discussion on ‘descent-based discrimination’ was held in August 2002, preceded by an afternoon of interventions by NGOs, experts of the UN Sub-Commission on the Promotion and Protection of Human Rights, and governments.<sup>124</sup> CERD then proceeded to elaborate General Recommendation XXIX on Article 1, paragraph 1 of the Convention (Descent).<sup>125</sup> The preamble to the recommendation recites its confirmation ‘of the consistent view of the Committee that the term “descent” in Article 1, paragraph 1 . . . does not solely refer to “race” and has a meaning and application which complement the other prohibited grounds of discrimination’, and strongly reaffirms ‘that discrimination based on descent includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal

---

<sup>121</sup> Concluding Observations of the Committee, A/56/18, paragraph 166. Extensive submissions were made to the Committee by NGOs before and during consideration of the report of Japan, including a report by the Japan Federation of Bar Associations. A number of submissions highlighted the plight of Burakumin – a community historically identified with work in certain ‘unclean’ trades. Appraisals of an effective methodology for NGOs anticipating a state report are made in Tanaka and Nagamine, *supra* note 6, which also includes the text of the Convention and all general recommendations up to General Recommendation XXVII. The Buraku Liberation and Human Rights Research Institute (Osaka) and the Buraku Liberation League have contributed to CERD understanding of the Buraku issue, through the Bulletin of Buraku Liberation and other writings. *See also* E. A. Sulan Reber, ‘Buraku Mondai in Japan: historical and modern perspectives and directions for the future’ 12 *Harvard Human Rights Journal* (1999) p. 299.

<sup>122</sup> Comments of States Parties on the Concluding Observations adopted by the Committee, A/56/18, p. 158, paragraph 2 (‘With regard to the meaning of “descent”. . . the Government does not share the Committee’s interpretation of “descent”.’) The comment goes on to outline measures taken ‘with the aim of resolving the problem of discrimination against the Burakumin’, adding: ‘We also believe that education and enlightenment for relieving the sense of discrimination have been promoted based on various plans, and the sense of discrimination among the people has certainly been lessened.’ *Ibid.*, paragraph 3.

<sup>123</sup> UN Doc. CERD/C/SR.1493, paragraphs 38–44.

<sup>124</sup> The thematic discussion took place on 9 August. UN Doc. CERD/C/SR.1531. There are no summary records for the proceedings on the previous day, on which twenty-three separate interventions (including five from African groups) were made by NGOs, one of which was a joint statement of thirty-two international NGOs, as well as interventions from four members of the Sub-Commission, and two governments – India and Nepal. *See also* UN Doc. CERD/C/SR.1545, and UN Doc. CERD/C/SR.1547 for discussion of the draft General Recommendation.

<sup>125</sup> UN Doc. A/57/18, p. 111–117.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

enjoyment of human rights'. The Recommendation does not offer a full definition of 'descent-based discrimination', the forms of which must be as various as humanity,<sup>126</sup> but encourages governments to adopt measures, including taking steps:

...to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors, including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations of degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality.<sup>127</sup>

The emphasis in the above is on discrimination against individuals locked into a system from which they aspire to escape and which they find degrading, a system which involves 'a total lack of social mobility, for the status of an individual was determined by birth or social origin and could never change, regardless of personal merit'.<sup>128</sup> The description consists of a series of indicators or a kind of 'cluster concept': perhaps no one element is a perfect indicator of the existence of such discrimination, but cumulatively the indicators work together to assist governments to identify the presence of discriminatory structures.

The preamble constructs a link between the narrower conceptions of descent-based discrimination in the Recommendation and wider meanings by referring to persons of Asian and African descent, and indigenous and other forms of descent adverted to in the Durban Declaration and Programme of Action. The specific conception of descent-based discrimination in the Recommendation is also clearly wider than caste, but includes it – the point is made in the preamble, and was individually endorsed by members of the Committee.<sup>129</sup> This is important lest the Committee be seen to be picking on a particular State or States, a limiting approach which the Recommendation is clearly designed to avoid, also bearing in mind the wide geographical and cultural range of submissions made to the Committee by

---

<sup>126</sup> CERD member Valencia Rodriguez, UN Doc. *supra* note 125, paragraph 18 ('The term "descent" implied one generation inheriting from another specific characteristics that were positively or negatively evaluated by society. The resulting stratification of some societies had led to the emergence of groups of people who were excluded from the rest of society and regarded as "untouchable".').

<sup>127</sup> The full text of the Recommendation is set out as an appendix to this chapter.

<sup>128</sup> Remarks of CERD member de Gouttes, UN Doc. *supra* note 125, paragraph 40.

<sup>129</sup> See remarks of CERD member Pillai, *ibid.*, paragraphs 4–10; see also Aboul-Nasr, *ibid.*, paragraphs 2–3; Thornberry, *ibid.*, paragraph 13; Lindgren Alves, *ibid.*, paragraph 29; Yutzis, *ibid.*, paragraph 36; Diaconu, *ibid.*, paragraph 45.

PATRICK THORNBERRY

NGOs, as well as the range of information available through other sources.<sup>130</sup> The language of invitation to states to recognise the operation of descent-based discrimination on their territory is further underlined by the preamble which commends the efforts of those states which have taken measures against it, and strongly encourages states which have not yet done so, to do so.<sup>131</sup> As befits a recommendation, the overall tone is hortatory rather than critical, and this note is carried through to the last preambular paragraph which does not demand that all the measures in the Recommendation are applied *instanter* everywhere, but recommends ‘that the States parties, as appropriate to their particular circumstances, adopt some or all of the following measures’. Following the lengthy identification paragraph (above), the operative paragraphs of the Recommendation address: measures of a general nature; multiple discrimination against women members of descent-based communities; segregation; dissemination of hate speech through the Internet; administration of justice; civil and political rights; economic and social rights; and right to education. The sequence of sections/parts broadly follows the shape of the Convention, and the style of the Recommendation recalls the earlier Recommendation XXVII on the Roma. The list of paragraphs was built up largely on the basis of the great variety of NGO submissions, detailing sometimes horrifying illustrations, the manner in which this form of discrimination blights the lives of whole communities. The contents of the Recommendation as a whole are not intended to be exhaustive, but, as CERD Chairman Diaconu averred, ‘constitute a step in the right direction’.<sup>132</sup>

It should be emphasised that, formally speaking, the thrust of the Recommendation is not against the caste or any other cultural system as such; the Committee, including in the case of indigenous peoples, continues to stress the value of cultural diversity in its readings of the Convention. Rather, the emphasis in the Recommendation is on *discrimination* (emphasis supplied) on the basis of descent, and the term ‘discrimination’ carries its usual meaning as expressed in Article 1. Nevertheless, the Recommendation goes some way in the direction of a severe critique of that particular form of social and religious organization. The point about cultural intrusion troubled the author as a member of the Committee, only to be addressed in the light of the evidence presented:

If it was asked whether the Committee was not intruding into historical, cultural or religious systems, it might equally be asked whose culture was involved, and who spoke for that culture. The sense of belonging and meaning provided by a caste was greatly weakened when caste members contested the validity of their condition.<sup>133</sup>

---

<sup>130</sup> See remarks of CERD members Amir and Lindgren Alves, *ibid.*, paragraphs 34 and 29.

<sup>131</sup> Remarks of the author as a member of CERD, UN Doc. CERD/C/SR.1545, paragraph 43.

<sup>132</sup> UN Doc. *supra* note 125, paragraph 46.

<sup>133</sup> *Ibid.*, paragraph 12.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

The massive contestation of caste systems by Dalits and others, and the overwhelming evidence of inhuman oppression suffered by those made subject to it, could hardly escape the attention of CERD in the light of its duty to be true to the norms of the Convention. While the Committee demonstrates a high level of respect for cultures, there are always limits – there are always practices which are open to a human rights critique, even if the human rights brought to bear on the practice may themselves possess a degree of openness to cultural context. Any ‘cultural’ arguments in defence of the system under scrutiny were not seriously addressed by the Committee. A principal objective of the Recommendation was to re-assert that the Convention covered descent-based discrimination in the face of objections; another was to reach out to victims, to an all-too-human profile of suffering. Some members of the Committee were apparently less troubled by the possibility of cultural intrusion and might have gone further than the Recommendation on the basis of universalist principles.<sup>134</sup>

### CONCLUDING REMARKS

*World is crazier and more of it than we think,  
Incorrigibly plural.*<sup>135</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination was drafted in an era obsessed by the twin evils of colonialism and Apartheid. The momentum for the Convention and the Declaration preceding it was largely generated by the notion that racial discrimination was an evil associated with an imperialist governing system whose days were numbered – hence, the persistent claims by governments that racial discrimination was unknown ‘at home’, and the ebullience of the title of the Convention in suggesting that the phenomenon would be eliminated. By a slow process over three decades, States have gradually been persuaded that racial discrimination is a widespread and enduring phenomenon that exhibits remarkable powers of persistence. The application of the Convention has gradually adjusted to this persistence. CERD has continued to insist, in the face of continuing denials of discrimination by reporting States, that they are not communities of saints, that discrimination exists and that governments must have legislation in place to guard against any outbreak of discriminatory practices.

In tandem with ‘the politics of recognition’, CERD has also been engaged in a process of persuading states that they are complex polities and not utterly homogeneous entities, that diversity and group choice are to be respected, and that identity is a complex issue of many layers and that loyalty to one’s ethnic or other group is not incompatible with wider loyalties. The relationship between eliminating racial discrimination and the recognition of indigenous rights has been elaborated within the praxis of the Convention. Under influences of assimilationism and sundry

---

<sup>134</sup> Remarks of CERD member Lindgren Alves, *ibid.*, paragraphs 30–31.

<sup>135</sup> ‘snow’, Louis MacNeice.

## PATRICK THORNBERRY

intellectual appurtenances of modernity, the development of that praxis has been punctuated by arguments about the true policy or meaning of the Convention in approaching an ‘incurably plural’ world – is the Convention ‘for’ difference or ‘for’ homogeneity or is it just an open book? Where culture, land, territory or other indigenous issues are not the primary focus, but straightforward discrimination is – which is (subject to the remarks above) the case with most caste groups – the Convention has clearer, more obvious purchase than for indigenous rights, though its application to caste is obscured by perplexities concerning what we mean by descent-based discrimination within the context of an instrument on racial discrimination. The grain of Committee work goes against any superficial assumption that CERD is against difference as being incompatible with integration. On the other hand, while CERD is relatively comfortable with diversity, this is not so where diversity is a device to mask inferior treatment of a particular group. The interpretation of the Convention negotiates the borderland between difference on the one hand and inferiority and arbitrary treatment on the other, and cases may be examined for their specifics. Much of this respect for difference works for the benefit of indigenous groups, but equality also imposes its demands. For indigenous groups, denial of equal access to the goods of society is a vital part of their case. Equality may also be at issue if there is evidence that self-defined indigenous groups are weighing the scales towards self-privilege. Thus in the case of Fiji, a party to ILO Convention 169 and a strong supporter of indigenous rights in international fora, the limits of promoting the rights of the Fijian indigenous group were adverted to by the Committee:

The Committee welcomes the commitment of the State party to ensure the social and economic development as well as the right to cultural identity of the indigenous Fijian community. None of these programmes, however, should abrogate or diminish the enjoyment of human rights for all, which can be limited solely in accordance with the rules and criteria established under international human rights law. In this regard, the Committee strongly urges the State party to ensure that the affirmative action programmes it adopts to pursue the above objectives are necessary in a democratic society, respect the principle of fairness, and are grounded on a realistic appraisal of the situation of indigenous Fijians as well as other communities.<sup>136</sup>

In the case of descent groups, CERD has played a role in explaining their existence and plight to the world community. It has not generally done this through attempts at scientific elaboration of key terms of the Convention, but has chipped away at State practice using Article 1 as the case demanded; though it may now be said that, if not defined, descent-based discrimination has at least been conceptualized in General Recommendation XXIX. As indicated through much of this paper, the relevance of defending diversity in the case of caste groups is a matter of greater ambivalence than for the indigenous; the stronger emphasis is on equality, and towards a more

---

<sup>136</sup> UN Doc. CERD/C/62/CO/5, paragraph 15.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

intrusive posture regarding any claims of culture. On present configurations, caste groups argue for the elimination of discrimination against them, governments agree even if they do not agree that this is racial discrimination within the compass of the Committee, and the Committee takes this relatively favourable conjunction to press harder for action against such a specimen of discrimination. Within the formal structures of international human rights law, there is no perceptible constituency pressing for the retention of caste customs. The horizons of meaning such systems may have for their adherents are lost to the Committee, which sees only images of unjustified privilege, hears only the voices of victims, and glimpses the ugliness of inherited inequality. Human rights in this case reach a kind of apotheosis, shrinking from the sight of this Other, from a social system which deserves neither to be understood nor forgiven. This, it must be stressed, is only a specific result of the contemporary balance of evidence and argument in relation to a particular socio-religious system, and should not be taken as a metaphor of general rejection of all customary law and traditional cosmologies, especially in the light of the Committee's broader, welcoming approach to the reality of cultural diversity. Culture loses its shape, its power to compel and sense of fit, when the mass of those 'subject' to it aspires only to 'exit', to break away.

As the principal body set up under the Convention, CERD was handed the unenviable responsibility of elaborating a programme based on the contested notion of 'race'. The challenge of discourse development is an ongoing challenge for any human rights body, and CERD has made its distinctive contribution in this respect. The third of a century in addressing the difficult issue of racial discrimination demonstrates a degree of responsiveness to currents of opinion that transcends a narrow reading of an apparently limiting mandate, even if the responses have sometimes been halting. Perhaps the most important issue for the future is that of continuous reflection and adjustment of practice and procedure to the best developments of the present era. To achieve this objective, the Committee needs to persevere in sharpening its awareness of the world beyond the boundaries of the treaty, of the philosophy, politics and morality of human rights, and keep its appointments with the victims of discrimination. The Committee is 'of the company' of human rights, not a solo performer, but is well-placed through its investigation of the shadows and vagaries of racial discrimination to sensitize further the international community to the complexities of otherness, to patterns and aetiologies of discrimination, to the Janus-faces of culture and the changing configurations of societies, nations and states.

ANNEX

**GENERAL RECOMMENDATION XXIX**

*GENERAL RECOMMENDATION ON DESCENT-BASED DISCRIMINATION*<sup>137</sup>

*The Committee on the Elimination of Racial Discrimination,*

*Recalling* the terms of the Universal Declaration of Human Rights according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms therein without distinction of any kind, including ‘race, colour, sex, language, religion, social origin, birth or other status’;

*Recalling also* the terms of the Vienna Declaration of the World Conference on Human Rights according to which it is the duty of States, regardless of political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms;

*Reaffirming* General Recommendation XXVIII of the Committee which expresses wholehearted support for the Declaration and Programme of Action of the Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance;

*Reaffirming also* the condemnation of discrimination against persons of Asian and African descent, and indigenous and other forms of descent in the Durban Declaration and Programme of Action;

*Basing its action on* the provisions of the Convention on the Elimination of All Forms of Racial Discrimination which seeks to eliminate discrimination based on ‘race, colour, descent, or national or ethnic origin’;

*Confirming* the consistent view of the Committee that the term ‘descent’ in Article 1, paragraph 1 the Convention does not solely refer to ‘race’ and has a meaning and application which complements the other prohibited grounds of discrimination;

*Strongly reaffirming* that discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights;

---

<sup>137</sup> The format – numbered paragraphs – in this version of the General Recommendation differs from the version set out in A/57/18, pp. 111–117, and reproduces the original format adopted by the Committee.



## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

*Noting* that the existence of such discrimination has become evident from the Committee's examination of reports from a number of States Parties to the Convention;

*Having organized* a thematic discussion on descent-based discrimination and received the contributions of members of the Committee, as well as contributions from some governments and members of other United Nations bodies, notably experts of the Sub-Commission for the Promotion and Protection of Human Rights;

*Having also received* the contributions of a great number of concerned non-governmental organisations and individuals orally and through written information, providing the Committee with further evidence of the extent and persistence of descent-based discrimination in different regions of the world;

*Concluding that* fresh efforts, as well as the intensification of existing efforts, need to be made at the level of domestic law and practice to eliminate the scourge of descent-based discrimination and empower communities affected by it;

*Commending* the efforts of those States which have taken measures to eliminate descent-based discrimination and remedy its consequences;

*Strongly Encouraging* those affected states who have yet to recognize and address this phenomenon to take steps to do so;

*Recalling* the positive spirit in which the dialogues between the Committee and governments have been conducted on the question of descent-based discrimination and anticipating further such constructive dialogues;

*Attaching* the highest importance to its ongoing work in combating all forms of descent-based discrimination;

*Strongly condemning* descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention;

Recommends that the States Parties, as appropriate for their particular circumstances, adopt some or all of the following measures:

### *1. Measures of a General Nature*

1. To take steps to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of

## PATRICK THORNBERRY

various factors including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses of pollution or untouchability; and generalized lack of respect for their human dignity and equality.

2. To consider the incorporation of an explicit prohibition of descent-based discrimination in the national constitution.

3. To review and enact or amend legislation in order to outlaw all forms of discrimination based on descent in accordance with the Convention.

4. To resolutely implement legislation and other measures already in force.

5. To formulate and put into action a comprehensive national strategy with the participation of members of affected communities, including special measures in accordance with Articles 1 and 2 of the Convention, in order to eliminate discrimination against members of descent-based groups.

6. To adopt special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education.

7. To establish statutory mechanisms, through the strengthening of existing institutions or the creation of specialised institutions, to promote respect for the equal human rights of members of descent-based communities.

8. To educate the general public on the importance of affirmative action programmes to address the situation of victims of descent-based discrimination.

9. To encourage dialogue between members of descent-based communities and members of other social groups.

10. To conduct periodic surveys on the reality of descent-based discrimination, and to provide disaggregated information in their reports to the Committee on the geographical distribution and economic and social conditions of descent-based communities, including a gender perspective.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

### *2. Multiple Discrimination Against Women Members of Descent-Based Communities*

11. To take into account, in all programmes and projects planned and implemented, and in measures adopted, the situation of women members of the communities, as victims of multiple discrimination, sexual exploitation and forced prostitution.

12. To take all measures necessary in order to eliminate multiple discrimination including descent-based discrimination against women, particularly in the areas of personal security, employment and education.

13. To provide disaggregated data for the situation of women affected by descent-based discrimination.

### *3. Segregation*

14. To monitor and report on trends which give rise to the segregation of descent-based communities and to work for the eradication of the negative consequences resulting from such segregation.

15. To undertake to prevent, prohibit and eliminate practices of segregation directed against members of descent-based communities including in housing, education and employment.

16. To secure for everyone the right of access on an equal and non-discriminatory basis to any place or service intended for use by the general public.

17. To take steps to promote mixed communities in which members of affected communities are integrated with other elements of society and ensure that services to such settlements are accessible on an equal basis with other members of society.

### *4. Dissemination of Hate Speech Including Through the Mass Media and The Internet*

18. To take measures against any dissemination of ideas of caste superiority and inferiority or which attempt to justify violence, hatred or discrimination against descent-based communities.

19. To take strict measures against any incitement to discrimination or violence against the communities, including through the Internet.

20. To take measures to raise awareness among media professionals of the nature and incidence of descent-based discrimination.

## PATRICK THORNBERRY

### *5. Administration of Justice*

21. To take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by provision of legal aid, facilitation of group claims, and encouragement of non-governmental organisations to defend community rights.

22. To ensure where relevant that judicial decisions and official actions take the prohibition of descent-based discrimination fully into account.

23. To ensure the prosecution of persons who commit crimes against members of the communities and the provision of adequate compensation for the victims of such crimes.

24. To encourage the recruitment of members of descent-based communities into the police and other law enforcement agencies.

25. To organise training programmes for public officials and law-enforcement agencies with a view to preventing injustices based on prejudice against descent-based communities;

26. To encourage and facilitate constructive dialogue between the police and other law enforcement agencies and members of the communities.

### *6. Civil and Political Rights*

27. To ensure that authorities at all levels in the country concerned involve members of descent-based communities in decisions which affect them.

28. To take special and concrete measures to guarantee to members of descent-based communities the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage, and to have due representation in government and legislative bodies.

29. To promote awareness among members of the communities of the importance of their active participation in public and political life, and eliminate obstacles to such participation.

30. To organise training programmes to improve the political policy-making and public administration skills of public officials and political representatives who belong to descent-based communities.

31. To take steps to identify areas prone to descent-based violence in order to prevent the recurrence of such violence.

## CERD, INDIGENOUS PEOPLES AND CASTE/DESCENT-BASED DISCRIMINATION

32. To take resolute measures to secure rights of marriage for members of descent-based communities who wish to marry outside the community.

### *7. Economic and Social Rights*

33. To elaborate, adopt and implement plans and programmes of economic and social development on an equal and non-discriminatory basis;

34. To take substantial and effective measures to eradicate poverty among descent-based communities and combat their social exclusion or marginalization;

35. To work with intergovernmental organizations, including international financial institutions, to ensure that development or assistance projects which they support, take into account the economic and social situation of members of descent-based communities.

36. To take special measures to promote the employment of members of affected communities in the public and private sectors.

37. To develop or refine legislation and practice specifically prohibiting all discriminatory practices based on descent in employment and the labour market.

38. To take measures against public bodies, private companies, and other associations who investigate the descent background of applicants for employment.

39. To take measures against discriminatory practices of local authorities or private owners with regard to residence and access to adequate housing for members of affected communities.

40. To ensure equal access to health care and social security services for members of descent-based communities.

41. To involve affected communities in designing and implementing health programmes and projects.

42. To take measures to address the special vulnerability of children of descent-based communities to exploitative child labour.

43. To take resolute measures to eliminate debt bondage and degrading conditions of labour associated with descent-based discrimination.

PATRICK THORNBERRY

*8. Right to Education*

44. To ensure that public and private education systems include children of all communities and do not exclude any children on the basis of descent.

45. To reduce school dropout rates for children of all communities, in particular for children of affected communities with special attention to the situation of girls.

46. To combat discrimination by public or private bodies and any harassment of students who are members of descent-based communities.

47. To take necessary measures in co-operation with civil society to educate the population as a whole in a spirit of non-discrimination and respect for the communities subject to descent-based discrimination.

48. To review all language in textbooks which convey stereotyped or demeaning images, language, names or opinions concerning descent-based communities and replace them by images, language, names and opinions which convey the message of the inherent dignity of all human beings and their equality in human rights.

## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

*Lee Swepston*<sup>1</sup>

Indigenous peoples represent a virtually unique subject in modern international law, in that the groups directly concerned have staged a campaign since the early 1970s to make their situation a subject of international law and international programmes – and have done so successfully. At the end of World War II there were no international instruments on indigenous peoples and no international concern with them. They were considered in many countries at that time to be an obstacle to development – and this attitude persists in some parts of the world. The first international action in this area, from the early 1950s to the early 1970s, reflected the ‘top-down’ development approach of the time, with the international community deciding what was best for indigenous peoples without consulting those directly concerned.

The International Labour Organization (ILO), however, started working directly on their situation in 1952, and by the time the United Nations began its first discussions on the subject in 1972, the indigenous peoples of the world had begun to mobilise themselves. Today they are one of the most active lobbying interests in international organizations and have managed to force the adoption or adaptation of several international Conventions, and ‘operational directives’ by international financial institutions, as well as to force the creation of two specially dedicated United Nations bodies dealing directly and exclusively with their situation. Due in a large part to their influence, the accepted development model in the international community is now much more inclusive and consultative. The situation now is very different from what it was when the UN system was born.

Two international Conventions have been adopted that are dedicated specifically to the rights of indigenous peoples, and they have been adopted by the ILO with the close involvement of the rest of the international community. The 1989 ILO Convention, examined in more detail below, overcame the integrationist approach of the UN system’s early efforts, and is based on inclusiveness, participation and consultation. The situation of indigenous peoples is of course also covered in generally applicable international human rights law, and the seminal 1990 UN Convention on the Rights of the Child actually includes specific references to indigenous rights.

Attempts are under way at the United Nations and in the Organization of American States to adopt declarations setting out a policy concerning indigenous people, but at time of this writing both efforts have become bogged down after more than 10 years of work.

Nevertheless the recognition of indigenous rights continues and accelerates in other ways as well. The development banks are adopting specific rules for dealing

---

<sup>1</sup> Chief, Equality and Employment Branch, International Labour Office, Geneva.

with indigenous rights, and the recent creation of the Permanent Forum on Indigenous Issues signals a change in the world body's attitude to indigenous peoples.

## A. INTERNATIONAL INSTRUMENTS

### *1. The International Labour Organization*

The only international Conventions directly applicable to indigenous peoples are Conventions No. 107 of 1957 and No. 169 of 1989, adopted by the ILO.

***ILO Background and Convention No. 107.*** The International Labour Organization was by far the first intergovernmental organization to address indigenous rights. Its involvement is in fact a natural outgrowth of its work on labour and social policy, and this relevance continues to this day. As early as 1921, the ILO began work on the situation of 'native workers' in the colonies of European powers. This was a motivating factor in the adoption of the first of ILO's fundamental human rights instruments, the Forced Labour Convention, 1930 (No. 29), which gave a more labour-oriented expression to the Slavery Convention of 1926. It was also the beginning of ILO's long-standing task of adopting international law concerning the situation of dependent peoples faced with pressure and even assimilation from external cultures. Before the Second World War, the ILO adopted several conventions (now considered outdated) relating to indigenous workers, all of them essentially focussed on problems related to labour contracting, or with issues synonymous to conditions of work on plantations.

The United Nations did not seriously tackle the subject of indigenous rights for more than 25 years after its creation. When the ILO took up this concern within the new UN system after the War, its vast experience was a valuable reference. Thus the 'Andean Indian Programme' was born: an integrated programme for regional development ultimately involving several countries and the indigenous peoples living there, as well as much of the UN system. The ILO functioned as the 'lead agency' in this effort from 1952 until 1972 when the Programme ended.<sup>2</sup>

Carrying out the Andean Indian Programme led the ILO to look at the situation of indigenous peoples worldwide, beginning with a detailed study published in 1953 cataloguing the living and working conditions of indigenous peoples around the world.<sup>3</sup> It was at this stage that the ILO began using the terms 'indigenous and tribal peoples' or 'populations' – terms, which at that time were used interchangeably and had not yet acquired the major significance they would later have.

---

<sup>2</sup> See Rens, *Le programme andin*, Brussels: Bruylant, 1987; and Lee Swepston, 'Indigenous and Tribal Peoples and International Organizations: New Perspectives' in *Transnational Perspectives*, vol. 13, no. 1, 1987, pp. 15–18.

<sup>3</sup> *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries*, Geneva: ILO, 1953 (long out of print). The Andean Indian Programme is the only time the UN system ever attempted such an approach on this scale.



## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

Once the Andean Indian Programme was under way, a consensus emerged among the other UN system organizations that the ILO should develop an international convention on the subject on behalf of the entire UN system. The ILO had been adopting conventions on working conditions and on basic human rights well before the United Nations came into being, and it was during this post-war period that the ILO did its most pioneering work on human rights, adopting standards on freedom of association, forced labour, and non-discrimination that became the basis for the relevant parts of the two human rights Covenants when they were adopted in 1966. During this flurry of human rights activity, the ILO began work on what would become the Indigenous and Tribal Populations Convention, 1957 (No. 107), with the active participation of the rest of the UN system.

This seminal Convention remained unique in international law until the adoption of its replacement Convention by the ILO in 1989, and the two together are the only comprehensive international binding instruments of the rights of indigenous peoples and of States' obligations towards them. Convention No. 107 covers basic policy and administration, protects customary laws, contains vital protections for the land rights of these peoples, and provides for special measures in matters concerning labour, social security, health, vocational training and general education in order to achieve equal treatment. Considering that it was adopted in 1957, it went very far in recognizing the rights of minorities to maintain distinct identities within the States in which they lived. Before the entry into force of Convention No. 169 (which closed the door to further ratifications of Convention No. 107<sup>4</sup>), it had been ratified by 27 States. Its lifetime in guiding national and international policy was limited, although it remains in force for some countries which have not yet ratified the revising Convention.<sup>5</sup> In later years, changing international perceptions prevented ratification by some more progressive countries that might otherwise have wished to apply its protective provisions.

Convention No. 107 contained a fundamental flaw, however, which became increasingly evident as the United Nations belatedly began work on this subject. It took a patronizing attitude towards indigenous and tribal peoples – for instance, referring to them as 'less advanced' – and it promoted eventual integration as a solution to all the problems associated by some countries with their continued existence. It presumed that they would eventually disappear as separate groups once they had the opportunity to participate fully in national society, and to benefit from economic development. This assumption began to fade as indigenous peoples

---

<sup>4</sup> In accordance with general ILO practice and article 38(2) of Convention No. 169, States that ratify C. 169 thereby automatically denounce C. 107, which now is no longer open to ratification.

<sup>5</sup> At the time of this writing, early in 2003, C. 107 is still binding on 18 countries: Angola, *Bangladesh*, Belgium, Cuba, *Dominican Republic*, Egypt, *El Salvador*, Ghana, Guinea-Bissau, Haiti, *India*, Iraq, Malawi, *Pakistan*, *Panama*, Portugal, Syrian Arab Republic and Tunisia. Of these, only those countries indicated by italics admit to having populations covered by the Convention, and take part in ILO supervision.

LEE SWEPSTON

organized themselves and manifested their intention to maintain their unique identity.

In spite of its integrationist approach, Convention No. 107 exercised a very positive influence in many countries. The supervisory machinery of the ILO helped focus attention on serious abuses against indigenous peoples. In some cases it was a major factor in the redress of abuses; in others, an additional element of creating international attention and pressure aimed at their continued survival and well-being. It also provided direction for a number of ILO technical assistance activities, particularly in Latin America, setting the stage for the much more active programmes now in place. It remains the only international convention protecting indigenous and tribal populations in a number of countries including India. Without Convention No. 107, there would never have been any international Convention on the subject, and Convention No. 169 would probably never have been adopted.

**Convention No. 169.** Since the middle of the 1970s when the UN debate began (see below), there was growing criticism of Convention No. 107 by academics, by other international organizations, by non-governmental organizations and not least by the emerging organizations of the indigenous peoples themselves, for the reasons cited above.<sup>6</sup> The ILO Governing Body responded by convening a Meeting of Experts in Geneva in September 1986, to advise on whether and how Convention No. 107 should be revised. The participants were unanimous in saying that the Convention had to be revised, and agreed without dissent that its integrationist and patronizing language had to be removed and replaced with an attitude of dignity and respect. Significant agreement was reached in many other respects as well, by identifying a number of fundamental principles that eventually found their way into the revised Convention. Where it failed to agree was in relation to the solutions to some of the problems.

These solutions were fought out in lively debates at the ILO Conference in 1988 and 1989, during the formal drafting process leading to the adoption of the Convention No. 169. This was by no means easy, and many of the same battles continue in the working group of the UN Commission on Human Rights on the UN draft Declaration (see below). Convention No. 169 has critics at both ends of the spectrum of views, who consider that the Convention either goes much too far in providing for autonomy and for the rights of a defined group within the national context, or that it does not go nearly far enough because it does not grant full decision-making power and the right of self-determination to indigenous and tribal peoples.<sup>7</sup>

---

<sup>6</sup> See, for example, the ILO document 'Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)', International Labour Conference, 1988, Report VI(1), p. 18.

<sup>7</sup> As concerns autonomy in the ILO Convention No. 169, although the text does not expressly use the term, see Gudmundur Alfredsson, 'Autonomy and Indigenous Peoples' in Markku Suksi (ed.), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague, 1998) pp. 125-137.

## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

In fact, the Convention takes a broad approach to the rights of indigenous and tribal peoples. Its central provisions refer to the need to respect the continued existence and ways of life of indigenous and tribal peoples, and to involve them fully in taking decisions that concern them. It provides that indigenous peoples have rights to lands traditionally occupied by them, and for the first time in international law states that they also have rights to the natural resources connected with those lands. It also covers a range of other situations, and is intended to guarantee the greatest degree of autonomy and self-government attainable for indigenous peoples in the situations in which they live.

As this Convention was adopted on behalf of the entire UN system, like C. 107 it covers a wide range of subjects and is not a 'labour' Convention like other ILO instruments. Its first part (Article 1 to 10) lays down basic requirements for States dealing with indigenous peoples, including the requirement to fully involve indigenous and tribal peoples in decision-making relating to them. There is no definition of indigenous or tribal in the Convention as such, but rather a statement that the Convention covers both *indigenous* peoples (those who have a precedence in time over later settlers) and *tribal* peoples (those who live in certain conditions defined by their own traditions and customs). This distinction avoids the argument by governments of some countries in discussions now taking place in the United Nations, that there are no indigenous peoples in their continents. This section provides for respect of customary law, and for treatment of indigenous persons accused of crimes in a culturally appropriate way. The Convention then lays down land rights, protecting areas owned or traditionally occupied by indigenous peoples and accords them special rights in both renewable and non-renewable resources associated with their lands. One article accords them protection equal to that of other workers in labour rights,<sup>8</sup> and there are additional provisions on health, education, traditional occupations, social security and contacts across borders.

The international discussion on indigenous peoples has remained active since the Convention was adopted in 1989. One gap in Convention No. 169 is explicit protection of intellectual property rights, as this important subject had not yet begun to be discussed when the Convention was adopted. Another gap, in the eyes of some, is the absence of an explicit mention of the right to self-determination, this, however, was consciously left by the drafters for a wider discussion in the context of the United Nations.<sup>9</sup>

As of early 2003, 17 countries had ratified Convention No. 169<sup>10</sup> with a number of others contemplating its ratification. Interestingly, the Convention has fuelled

---

<sup>8</sup> Article 20, which also includes the only provision in an international convention explicitly protecting against sexual harassment.

<sup>9</sup> In this context, one may refer to Article 1, paragraph 3, of ILO Convention No. 169, which stipulates that 'The use of the term "peoples" in this Convention shall not be construed as having any implication as regards the rights which may attach to the term under international law'.

<sup>10</sup> Argentina, Brazil, Bolivia, Colombia, Costa Rica, Denmark, *Dominica*, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru and *Venezuela*. The

## LEE SWEPSTON

study of the situation of indigenous peoples in countries that previously denied their existence – for instance, in Cambodia, the Central African Republic, Laos, Thailand and most recently Vietnam. ILO supervision has also helped to keep attention on indigenous rights and to provide another source of protection, for instance in Colombia where a long series of court judgements relying directly on the Convention has helped define indigenous rights in national law.

Beyond the text of the Convention itself, ILO supervision of its implementation has been detailed and vigorous, and the situation of indigenous and tribal peoples in more than 20 countries is regularly reviewed by the ILO's Committee of Experts on the Application of Conventions and Recommendations. Many questions have been put forward by the ILO, and many changes in national law and practice have been made to accommodate the Convention's requirements. These comments can be consulted on the ILO's web site, and are contributing to a rapidly-growing international jurisprudence on indigenous rights.<sup>11</sup>

In addition to regular supervision, the Convention has been resorted to by indigenous organizations from a number of countries<sup>12</sup> using the ILO's *representation* procedure under article 24 of the Constitution.<sup>13</sup> These complaints have mostly concentrated on the lack of consultation by governments in appropriating lands occupied or owned by indigenous peoples, when granting oil and mineral exploitation and mining licenses, or when designing and implementing other 'development' projects affecting the regions where they live. The ILO bodies examining these complaints have systematically found that consultations procedures were lacking, misused and inadequate, and have asked governments to give real effect to the Convention's principles in this respect. In another series of representations now pending, the recent legislative and constitutional changes by Mexico, affecting indigenous rights, are being challenged under the Convention, but these are still being examined.

***Other ILO Conventions.*** Those using ILO standards to protect the rights of indigenous and tribal peoples often forget that many other ILO Conventions can be used to protect indigenous people in their capacity as workers. This is particularly true of the human rights standards such as those protecting against forced labour (ILO Conventions Nos. 29 and 105), discrimination in employment and occupation (No. 111) and child labour (Nos. 138 and 182) – indigenous people are always among the most vulnerable in any country in which they live, and thus are subject to exploitation and abuse as are all other disadvantaged workers. Moreover, this does not only concern 'human rights' protections, as the interests of indigenous workers

---

three countries listed in italics ratified during 2002, and the Convention is to enter into force for them in the course of 2003.

<sup>11</sup> See the ILOLEX database at <[www.ilo.org](http://www.ilo.org)>.

<sup>12</sup> Bolivia, Colombia, Denmark, Ecuador, Mexico and Peru.

<sup>13</sup> ILO procedures do not allow non-governmental organizations such as indigenous communities to file complaints, but in all such instances the indigenous communities have enlisted the assistance of trade union organizations to make representations for them.

## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

can also be protected through invoking other ILO standards on such matters as safety and health, protection of wages, or labour inspection.<sup>14</sup>

### 2. *United Nations instruments – treaty law*

Indigenous peoples, like all persons, enjoy the human rights laid down in the United Nations' human rights instruments. Professor Patrick Thornberry has detailed these protections in a new book<sup>15</sup> that merits close study.

*The International Covenant on Civil and Political Rights* contains no specific articles on indigenous rights, but does have provisions on two particularly important subjects for indigenous peoples – collective rights (self-determination) and minority rights (Article 27). The Human Rights Committee, which supervises the implementation of the Covenant, frequently deals with the rights of indigenous peoples in ratifying States, and these rights have also been examined in complaints under the Optional Protocol allowing individual complaints on the application of the Covenant.

As concerns self-determination, the Covenant provides in Article 1 (as does the Covenant on Economic, Social and Cultural Rights, in identical terms) that all peoples have the right of self-determination, by virtue of which they 'freely determine their political status and freely pursue their economic, social and cultural development'. At the risk of over-simplifying what is a very complex debate, there is no general agreement on how this provision applies to indigenous peoples, or on the meaning of self-determination. One thing is clear: these words have made the adoption of the word 'peoples' in international instruments referring to the indigenous a very problematic affair, as governments express the fear that they may inadvertently be recognizing a right to secession by their indigenous citizens if they describe them as peoples.<sup>16</sup> Generally speaking, international law is unsettled on whether indigenous communities can be defined as peoples, and if so what would be the content and the extent of their right of self-determination – with views ranging from local autonomy to political independence. Some States that are happy to use the term in their internal legislation to refer to varying degrees of autonomy within the national community, are far more reserved about allowing it to be included in international documents where it might carry other meanings. This is why indigenous representatives do not usually find a welcoming response when they advocate in international resolutions and legal instruments for the use of the term

---

<sup>14</sup> The more substantive rights covered in ILO Conventions on conditions of work can be considered human rights because they are covered general in the International Covenant on Economic, Social and Cultural Rights, even if they are not commonly thought of in this way.

<sup>15</sup> P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002), see especially pp. 116–243 (Global instruments on human rights), pp. 244–319 (Regional instruments on human rights).

<sup>16</sup> The ILO was able to use the terms only by specifying in Article 1(3) of Convention No. 169 that its use of "peoples" did not pre-empt the need for the United Nations to decide what that term means.

‘peoples’, with its implications of recognition of their collective rights; and why many governments continue to prefer ‘people’ in the singular, indicating that they are willing to recognize only individual rights.

Article 27 of the Covenant provides that ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’. Although indigenous representatives have mainly preferred to argue that they are covered by provisions and instruments on indigenous rights rather than being considered under minority rights provisions, they do of course also fall under these provisions. And indeed, the active use of these provisions by indigenous groups has contributed greatly to the development of understanding of minority rights in the international community.<sup>17</sup>

*The International Covenant on Economic, Social and Cultural Rights* is the other main UN instrument on human rights. While it contains the same Article on self-determination as the Civil and Political Rights Covenant, it does not have a provision on minority rights. Nevertheless, as it applies to all persons, and as indigenous peoples are often those most in need of economic, social and cultural rights, it is a particularly valuable tool for them. The situation of indigenous peoples is regularly referred to by ratifying States in their reports, and by the Committee on Economic, Social and Cultural Rights in examining its application.

The *International Convention on the Elimination of all Forms of Racial Discrimination* should also be considered. As Thornberry states, ‘The broad range of human groups included under the rubric of racial discrimination clearly includes indigenous peoples, even if they are not specifically mentioned’.<sup>18</sup> In 1997 the Committee on the Elimination of Racial Discrimination, which supervises the Convention’s implementation, issued its General Recommendation XXIII,<sup>19</sup> noting that discrimination against indigenous peoples falls under the Convention, and that discrimination against them is a matter of concern to it. It calls on States parties to the Convention to take a number of measures to combat racism.

*The UN Convention on the Rights of the Child* is the only general human rights convention that contains a specific provision on indigenous rights, in addition to being applicable to indigenous peoples generally. Article 30 states that ‘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 practice his or her own religion, or to use his or her own language’. The Committee on the Rights of the Child also scheduled a day of discussion on indigenous children for 19 September 2003.

---

<sup>17</sup> See General Comment 23 of the Human Rights Committee, 1994, on the rights of minorities.

<sup>18</sup> Thornberry, *supra* note 15, p. 209.

<sup>19</sup> HRI/GEN/1/Rev.5, 18 August 1997.

## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

Outside the specific human rights field, Article 8(j) of the *Convention on Biological Diversity*, adopted in 1992, addresses the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. This article embodies the recognition of the contribution that traditional knowledge can make to both the conservation and the sustainable use of biodiversity. This recognition of indigenous knowledge is in large part at the origin of contemporary discussions of the intellectual property rights of indigenous peoples over their traditional knowledge.

### *3. United Nations and regional instruments – declarations and drafts*

In addition to the human rights treaties, there are other instruments directly related to indigenous peoples. The 1992 *UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* has a close relationship with indigenous rights, and was commented on extensively in the framing of the draft Indigenous declaration (below). It should be kept in mind that generally, the UN has preferred to distinguish between indigenous and minority rights, and the UN Working Group on Minorities (of the Sub-Commission on the Promotion and Protection of Human Rights) reviews its promotional and practical realization – but generally leaves the discussion of the situation of indigenous peoples to other fora.

The UN Draft Declaration on the Rights of Indigenous Peoples is the most significant text now circulating, though it still has to be adopted. It was drafted by the Working Group on Indigenous Populations under the leadership of Mme Daes and benefited from intense consultations with indigenous representatives. The Working Group began working on it in 1985 and forwarded the completed text to the Sub-Commission in 1993. In 1994 the Sub-Commission adopted it rapidly and forwarded it to the UN Commission of Human Rights for further consideration. The Commission then referred it in 1995 to an ‘open-ended inter-sessional working group’ to elaborate a final draft before submitting it to the General Assembly, but at the time of this writing its adoption has been blocked by deep disagreements among the members – all government representatives – on what the Declaration should contain. Indigenous representatives have continued to lobby hard for their vision of what the declaration should contain, and some movement was discernible at the December 2002 session of the Working Group. It remains theoretically possible that a text will be adopted within the time mandated by the Sub-Commission – during the International Decade of the World’s Indigenous People (1994-2004). The draft builds on the ground already broken by ILO Convention No. 169, but goes considerably further in many respects to attempt to implant recognition of indigenous rights and self-determination firmly in international law and international organizations. The influence it has exercised is significant in keeping the discussion alive and moving it forward, but even when it is eventually adopted it will not have binding force.

## LEE SWEPSTON

At the regional level the Organization of America States (OAS) has been working for some years on a draft American Declaration on the Rights of Indigenous People, which remains under discussion. It takes up many of the same approaches as other recent texts, and its adoption is proving as difficult as that of the UN draft Declaration. In May 2002, the OAS established the 'Specific Fund to support the preparation of the Draft American Declaration on the Rights of Indigenous Peoples', the purpose of which is to defray expenses for representatives of indigenous peoples or organizations, enabling them to participate in the special meetings of the Working Group.

Indigenous rights and priorities have also been dealt with in several of the major international conferences in recent years. The United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, adopted *Agenda 21*, of which chapter 26 grants a central place to indigenous populations who must be included in an environmental agenda. The 1993 *World Conference on Human Rights* adopted the Vienna Declaration and Programme of Action including paragraph 20 of Part I, dedicated to indigenous peoples. Its recommendations were at the origin of the recent creation of the Permanent Forum on Indigenous Issues, discussed elsewhere in this paper. The 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance dealt with indigenous rights within the framework of racism and racial discrimination, and the Declaration and Programme of Action reaffirm indigenous rights in extensive references and sections. However, as indicated by the UN Special Rapporteur on indigenous issues in para. 21 of his first report (2001), 'Indigenous representatives feel that the Durban Declaration and Programme of Action fall short of expectations on indigenous rights and could actually be considered a step backwards as far as human rights standards are concerned'.

#### *4. Operational directives and policies of development agencies*

Most legally oriented writing on this subject does not take into account the internal instructions adopted by international financial institutions and development agencies, but they can have a profound effect on the way international aid is attributed and conditioned. They are legal texts, in a different context, and thus a few lines are given to them here.

The World Bank's work in this area is guided by the *Indigenous Peoples Policy (Operational Directive 4.20)*, henceforth OD 4.2, adopted in 1991. Given the economic power of the World Bank, and the profound influence it has long exercised on priorities and capacities for development among developing countries, its policies carry more weight in practical terms than most international law. Large-scale development projects financed by the Bank often have an impact on indigenous peoples, and that impact is very often a negative one. It often seems that there has hardly ever been a major hydroelectric project in the last 30 years that has not displaced indigenous and tribal peoples from their lands.



## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

OD 4.20 ‘describes Bank policies and processing procedures for projects that affect indigenous peoples. It sets out basic definitions, policy objectives, guidelines for the design and implementation of project provisions or components for indigenous peoples, and processing and documentation requirements’. It ‘provides policy guidance to (a) ensure that indigenous people benefit from development projects, and (b) avoid or mitigate potentially adverse effects on indigenous people caused by Bank-assisted activities. Special action is required where Bank investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources’.

At the time of this writing, the World Bank is completing a revision of this policy, based on extensive consultations among most Bank ‘Stakeholders’, and should shortly adopt a new indigenous policy: *Operational Policies/Bank Procedures, OP/BP 4.10*. The draft that can now be found on the World Bank’s web site has still to be approved by the Board of Executive Directors. The extensive consultations the Bank carried out have been well documented, and a number of both positive and negative comments can be found on the web pages devoted to this. The new draft would increase indigenous involvement and participation in planning and implementation of World Bank-financed projects, but of course even increased involvement leaves a great deal of room for harmful effects.

Among UN-system organizations, the United Nations Development Programme is the only one to have adopted an explicit policy, entitled: ‘UNDP and Indigenous Peoples: a Policy of Engagement’. It was adopted in 2001, but little information is yet available on its implementation. It does, however, indicate an increased awareness by the UNDP that development projects have to be carried out in a way that recognizes the cultural specificity of the people affected by them, and can only be regarded as a positive development.

The ILO carries out a great deal of technical assistance directed at, or affecting, indigenous and tribal peoples, but does not have a policy document beyond Convention No. 169. There is a dedication to ensuring that the ILO does not give policy advice or assistance that deviates from the provisions of its standards in this area, as in others.

Among the regional development banks, the Asian Development Bank adopted a policy on indigenous peoples in 1998. As its web site indicates:

This policy works to ensure the equality of opportunity for indigenous peoples, and that interventions affecting indigenous peoples are consistent with the needs and aspirations of affected peoples; compatible in substance and structure with affected peoples’ cultural, social, and economic institutions; and conceived, planned, and implemented with the informed participation of affected communities. This policy was developed in close consultation with representatives of indigenous peoples’ communities in ADB’s developing member countries.

The Inter-American Development Bank also carries out development activities for indigenous peoples, but has not adopted a policy as such. It does have an Indigenous Peoples and Community Development Unit, and has institutional links to the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean.

## B. INTERNATIONAL ORGANIZATIONS AND BODIES

The *International Labour Organization* has been working on this subject longer than any of the other international bodies. Its action is based on Convention No. 169, and it provides a considerable amount of technical assistance to promote its policies and to assist countries, and indigenous organizations, to implement the Convention. No special bodies have been established to promote or supervise the Convention, as supervision of these Conventions is carried out by the Committee of Experts on the Application of Conventions and Recommendations. The ILO regularly submits accounts of its activities to the United Nations, and it is expected shortly to have a web page on the general ILO web site devoted to this subject.

*The United Nations* began working actively on this subject when a study on discrimination against indigenous peoples was commissioned by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>20</sup> in 1971, and completed in 1982. The findings of this massive report were unambiguous, and they are still very valid: discrimination against indigenous peoples is rampant, and urgent action is needed to address the situation.<sup>21</sup>

As the major outcome of the study, the *Working Group on Indigenous Populations (WGIP)* was established in 1982. The Working Group still exists, though it is now considered to be under threat because of the establishment of the Permanent Forum on Indigenous Issues (see below). Under the leadership of Asbjørn Eide of Norway in its earliest years, and then of Erica Daes until she stepped down in 2000, it has provided an open and active forum for promoting indigenous rights, and has been the primary focus for indigenous activism in international bodies ever since it was established. As many as 1,000 indigenous representatives and other NGOs gather annually in Geneva for its sessions held each July. In addition to drawing attention to indigenous issues, the WGIP also produced the vitally important draft United Nations declaration on the rights of indigenous peoples discussed above.

*The Permanent Forum on Indigenous Issues* met for the first time in 2002, a long-delayed result of the World Conference on Human Rights that took place in 1993 and recommended its establishment. It was established by UN Economic and Social Council Resolution 2000/22, to serve as an advisory body to the Council, with a mandate to discuss indigenous issues relating to economic and social

---

<sup>20</sup> Now the Sub-Commission for the Promotion and Protection of Human Rights.

<sup>21</sup> *Study of the Problem of Discrimination against Indigenous Populations* in UN Document E/CN.4/Sub.2/1986/7 and Addenda 14. Volume V of the Study, entitled *Conclusions, Proposals and Recommendations*, was issued separately with UN sales number E.86.XIV.3.

## INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ORGANIZATIONS

development, culture, the environment, education, health and human rights. The Forum is specifically expected to:

- a) provide advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the UN through the Council,
- b) raise awareness and promote the integration and coordination of activities relating to indigenous issues within the UN system; and
- c) prepare and disseminate information on indigenous issues.

The Forum has a unique structure, and will be comprised of 16 independent experts, 8 of whom are nominated by governments and 8 individuals appointed by the President of the Council following formal consultations with governments on the basis of consultations with indigenous organizations. It is authorized to meet for 10 days each year. The first session in May 2002 was focused on learning about the work being done on indigenous issues in the rest of the UN system.

In Resolution 57 in 2001, the Commission on Human Rights decided to appoint a *Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* for a period of three years, and Mr. Rodolfo Stavenhagen of Mexico was appointed to this post. The mandate of the Special Rapporteur is to gather information, and ‘to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people’. His first report can be found on the United Nations human rights web site.<sup>22</sup>

The *World Health Organization* has only recently become involved in this area, but in 1999 the International Consultation on the Health of Indigenous Peoples adopted the Geneva Declaration on the Health and Survival of Indigenous Peoples. *UNESCO* also has continued to organize meetings and consultations concerning indigenous peoples’ cultural and educational rights.

### CONCLUDING REMARKS

This article has attempted to provide an overview of the present law and practice concerning indigenous peoples in international organizations. It has mentioned the international human rights instruments, but has blended in the institutional arrangements and the accelerating discussions in policy bodies as well – in this field more than all others, international human rights is only part of the story. *Development* is the major influence on the 300 million indigenous peoples around the world, almost always to their detriment. There has been a great deal of progress at the international level, in adopting conventions and appointing bodies and rapporteurs – but at the grass roots level indigenous peoples continue to suffer from the pressure of encroaching dominant cultures. In every continent, and in every

---

<sup>22</sup> E/CN.4/2002/97 (February 2002).

LEE SWEPSTON

country where they live, they are at the bottom of all social indicators, suffer the highest incarceration rate, and have the highest infant mortality.

It is time to think in very practical terms how to convert this body of international law into practical protection on the ground. How do we help indigenous peoples to make their voices heard? How do we put into practice the principles in international law, on a very practical level in all these countries? The challenge remains. The different international organizations mentioned here are supporting, and often pushing, national action. Sometimes that action is well intentioned and helps to protect indigenous peoples. Sometimes it is well intentioned and harms them, operating on paternalistic assumptions that are formulated without indigenous peoples' involvement. And sometimes governments, and other cultures, still consider that indigenous people are an obstacle to development – or are simply in the way of mineral exploitation or someone else's property development.

There are unifying forces. The international indigenous movement is still growing, but as it grows it becomes as diversified as any other such movement. International instruments – particularly ILO Convention No. 169 and the UN draft Declaration – reflect a common vision. The UN's new Permanent Forum on Indigenous Issues is a potential source of unified and concentrated action by the UN system, but it still has a long way to go before it becomes practically useful. In the meantime, indigenous peoples continue to suffer discrimination and exclusion in most places, though they also have triumphs and manage to hold their own in others. A great deal of work remains, for all those interested in their cause.

## **PERMANENT FORUM ON INDIGENOUS ISSUES: 'WELCOME TO THE FAMILY OF THE UN'**

*Les Malezer*

You have a home at the United Nations . . . you will make an immense contribution to the Organization's mission of peace and governance.

This message was delivered on 24 May 2002, by the UN Secretary General, to delegates of indigenous peoples in New York, at the first session of the Permanent Forum on Indigenous Issues (Permanent Forum). The Secretary General's speech, delivered at the closing ceremony on the last day of the two-week session, reflected our own expectations that the inaugural gathering of the new UN body, the Permanent Forum on indigenous Issues, will be remembered as a milestone in modern international history.

To understand the significance of the Permanent Forum it is important to first examine the existence of indigenous peoples and the nature of relationships between indigenous peoples and the modern nation states of the world. It is estimated that there are between 300 million and 500 million indigenous people living in every geographical and climatic region of the world. For example, there are the Inuit peoples of the frozen Arctic, and the Sami peoples in Scandinavia. There are the San or the Bushmen of Southern Africa, the Maasai and Samburu of East Africa and the Imazighen (Berbers) of arid North Africa. In South Asia there are many tribal peoples such as the Jummas and the Jarawa peoples, and forest dwellers and island peoples in the archipelagos of Southeast Asia and Indonesia. The Aboriginal peoples in Australia are one of many indigenous peoples living in or around the Pacific region. There are many Melanesian nations and peoples of the western Pacific, Polynesian nations and peoples of the southern and eastern Pacific including the Maori in New Zealand, and the Ainu of Japan. In the Americas we are familiar with the many native American peoples of North America, but there are also diverse peoples in Central and South America, including the Awa, Enxet, Guarani, Yanomami and Wichi.

This is but a brief account of the indigenous peoples of the world. As indigenous peoples we have identifying characteristics that clearly distinguish us from other populations and nation states. In general these distinguishing features are racial, linguistic, social, ideological, political, economic and religious. Our claim to a global identity is based upon our ancient cultures and viable relationships with our territories, in contrast to the modern political entities of nation states and consumer cultures. However, our identity can also be attributed to a history of oppression and the blatant inequalities that have been allowed to develop, establishing the vast gap of disadvantage for indigenous peoples compared to other peoples of the world. Indigenous peoples claim the distinction of being the 'first peoples' of the world, successful in maintaining throughout the history of humankind, civilised social

## LES MALEZER

order, natural laws and a benign relationship with our environment. Our societies are complex and resilient, but at the same time they can be extremely vulnerable to exploitation and domination.

European colonisation of the world, later intermixed with imperialism and industrialism, and followed by the re-order triggered by modern global wars, have resulted in modern political states. These political institutions are founded in the integrity of geographical boundaries between peoples, the rights of peoples to self-determination, the universality of human rights and international order through the United Nations. In the aftermath of World War II, the period when the modern political order was largely determined, many new nations were created and fundamental principles regarding international relationships were established. Colonial empires were disbanded and dependent territories progressively evolved into nation states. International codes and standards were identified and treaties became the means of establishing global order. After World War I attempts to establish human rights and anti-discrimination standards in the League of Nations failed due to lack of international goodwill. However the events and aftermath of World War II made these standards imperative and many peoples of the world demanded recognition of their right to self-determination, the means to exercise that self-determination and a world free of racial discrimination. Indigenous peoples, although almost universally the victims of colonialism, imperialism and war, did not have a place in shaping these events or determining the outcomes.

Some indigenous peoples were fortunate to achieve nationhood and independence, but such achievements were usually limited to situations where there was no claim to natural or land resources. This phenomenon was particularly apparent in the Pacific region where island populations of indigenous peoples achieved statehood. There, indigenous peoples' claims for independence were probably less a factor in their achievement of self-determination than the international pressures for de-colonisation and the absence of sufficient economic incentives for continuing European domination. Thus extremely small and isolated populations achieved nation status – Fiji, Vanuatu, Solomon Islands, and Tonga, among others – and the right to participate in international affairs, particularly in the United Nations. These examples can be regarded as exceptional and do not provide the precedent for all indigenous peoples to gain recognition as independent states. However they do provide the argument that there is no rule preventing indigenous peoples from having the right to self-determination, statehood and a role in international affairs.

Have indigenous peoples sought independence? This question is easily answered in contemporary times, exemplified by the many international meetings that have been held in the past three decades on the topics of elimination of racism, human rights, environmental protection and development, all of which have been ringing with the demands of self-determination for indigenous peoples. It has not been just a recent outcry. The world has at least some exposure to the opposition posed by indigenous peoples to their colonial domination. The histories of the seventeenth, eighteenth and nineteenth centuries are filled with one-sided accounts

## PERMANENT FORUM ON INDIGENOUS ISSUES

of genocide, murder and brutality used to steal wealth, capture territories and force dominion over indigenous peoples. Even the most romantic 'western' movie cannot conceal the efforts made by Native Americans to protect their sovereignty and rights to property.

However, a gap exists in the historical record about the struggle by indigenous peoples to maintain sovereignty over their lands. The first half of the twentieth century does appear to be missing accounts of the struggle for indigenous freedoms. This phenomenon is worthy of further study, as it is one which I believe leads to the assumption by nation-states of their acquisition of sovereignty over indigenous peoples and their lands. I do not intend, in this essay, to tackle this issue of where sovereignty lies, or why indigenous peoples have the right to self-determination. My argument is simply that there has clearly been an uninterrupted struggle by indigenous peoples to maintain both identity and autonomy.

The lack of historical account of the indigenous struggle in the early twentieth century is attributable to widespread policies of 'exclusion' and 'assimilation' that followed the domination of the peoples and the lands. These policies were a consequence of the exploitation phase where lands and resources were acquired through force and compulsion. Under the policy of exclusion, indigenous peoples were treated as 'aliens' within the state. Where our territories were not under claim by the state, the indigenous population may have been ignored, or subjected to a territorial boundary in place to identify the state's interests and non-interests. Where territories were under claim, the indigenous population would be annihilated, removed, restricted or restrained. As these procedures required formal endorsement by the state, they led to the establishment of 'reserve lands' and 'protectorates'. Indigenous peoples were thus effectively excluded from the state while their lands and resources were included. In compatibility with this territorial and economic policy, the state would contemplate the 'assimilation' of the population, relying upon the assimilation of the individual. To effectively implement an assimilation policy, the state needed to establish control over the population as a race, to restrict the freedoms of the population and to denigrate and deny indigenous identity.

During the first half of the twentieth century, indigenous peoples all around the world were thus imprisoned. At a period of time when much of the world was being redefined by industry, technology and new economic developments, indigenous peoples were suffering a dark period of existence. Their social systems were being disrupted, their governance and political institutions were being overlaid by alien religious orders, their leaders were being outlawed in foreign legal frameworks and their children were being removed and re-educated for assimilation. However, in spite of the apparent lack of historical accounts of indigenous peoples' claim to sovereignty, there were still clear signs that the struggle for autonomy continued. During the period of the League of Nations there are at least four separate occasions when representatives of indigenous peoples sought to gain recognition of their existence and inherent rights before the international organization.

The first of these cases occurred in 1924. Levi General, born in 1872, became chief of the Younger Bear clan of the Cayuga Nation, one of the six nations of the

## LES MALEZER

Iriquois Confederacy in North America. He was fluent in all six languages of the Iriquois, and was an eloquent speaker. His title became 'Deskaheh'. The Iriquois believed their rights of sovereignty were recognised and protected in international law, in the *Jay Treaty 1794* and the *Treaty of Ghent 1814*, signed between Great Britain and the United States of America:

The United States of America engage to put an end immediately after the ratification of the present treaty to all hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities, against the United States of America, their Citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly, and

His Britannic Majesty engage on His part, to put an end, immediately after the ratification of present treaty, to all hostilities with all the tribes or nations respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to in One Thousand Eight Hundred and Eleven, previous to such hostilities, provided always that such tribes or nations shall agree to desist from all hostilities against His Majesty and His subjects, upon ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly.<sup>1</sup>

Following World War I, the Canadian Government proposed to alter the legal foundation and status of governance for the Iriquois, using the *Indian Act*. Deskaheh was strongly opposed to any loss of rights for the Iriquois and was motivated to seek international support for the Iriquois cause. Deskaheh signed a petition to the Governor General of Canada, recalling Great Britain's commitment to Indian autonomy. When the petition received no response, in 1921 he undertook to sail to Great Britain, using a Six Nations passport, to seek an audience with King George V. His audience was refused and he returned home. Nonetheless he continued with his international quest. In particular he was inspired by the creation of the international League of Nations, which, in the words of President Woodrow Wilson, was meant to be a guarantee to 'great and small states alike'.

A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike. In regard to these essential rectifications of wrong and assertions of right we feel ourselves

---

<sup>1</sup> Article 9, Treaty of Ghent (1814), signed after the War of 1812 between Great Britain and the United States of America.



## PERMANENT FORUM ON INDIGENOUS ISSUES

to be intimate partners of all the governments and peoples associated together against the Imperialists.<sup>2</sup>

Deskaheh arrived in Geneva, Switzerland, in late 1923 and for a year prepared petitions and held meetings with officials and representatives. Although he received popular support from some governments and the European public, he failed to gain enough support to address the League of Nations. Some countries, such as Estonia, Ireland, Panama and Persia gave their support to Deskaheh's cause but Great Britain, also representing Canada at the League of Nations, had the issues taken off the Leagues' agenda:

My appeal to the Society of Nations has not been heard, and . . . the attitude of Government does not leave me any hope<sup>3</sup>

We appealed to Ottawa in the name of our right as a separate people and by right of our treaties, and the door was closed in our faces. We then went to London with our treaty and asked for the protection it promised and got no attention. Then we went to the League of Nations at Geneva with its covenant to protect little peoples and to enforce respect for treaties by its members and we spent a whole year patiently waiting but got no hearing.<sup>4</sup>

Coincidentally, at the same time that Deskaheh was lobbying for Native American rights in Geneva, a delegation from the Maori of New Zealand also arrived in Geneva to seek audience with the Secretary-General of the League of Nations.

On 12 September 1924, Mr. T.W. Ratana, a Maori political and religious leader, and Mr. Moko met with a League official who recorded in a memo that the delegation was bringing Maori concerns over land in New Zealand. Ratana claimed that the *1840 Treaty of Waitangi* had been violated. They had taken their grievance to the New Zealand government but failed to get satisfaction. They wanted their claims to be submitted to the League of Nations but their case does not appear to have been accepted for consideration. Ratana returned to New Zealand and said that, in his international delegation to the King of Great Britain and the League of Nations, he had been treated as a beggar.

In 1926, the United States of America received a petition from the Miskito Indians of Central America to have their case taken before the League of Nations. They sought an international remedy to the breaches of the Miskito Convention, and a international treaty between three governments:

Thirty two years of the most humiliating experience that has never before befallen a nation has been our lot since the incorporation of our race and

---

<sup>2</sup> W. Wilson, 'Speech on the Fourteen Points' (1918), Congressional Record, 65th Congress 2nd Session, pp. 680–681.

<sup>3</sup> Letter from Deskaheh to the editor of a Swiss journal, November 1924.

<sup>4</sup> Radio speech on 10 March 1925, Rochester Radio, from *DESKAHEH - Iroquois Statesman And Patriot* (Akwasasne Notes – Mohawk Nation).

## LES MALEZER

territory under the terms of the Miskito Convention by the Republic of Nicaragua.

This Covenant which was witnessed and signed by the representatives of the United States Government and also by those of the British, is the ground on which we base our complaint, and also the proof of our argument . . .

We continue to plead our cause for we are confident that it is Just, and in our appeal to the United States, which is also a member of the League of Nations, we are assured that the articles embodied in this universal contract may be practically applied . . . we cannot under existing conditions assimilate or amalgamate with the people of Latin civilization, therefore we are looked upon and treated as enemies by them, which is in direct opposition to the terms of the Miskito Convention.<sup>5</sup>

The fourth case relates to the Aboriginal peoples in Australia. In 1938, the Australian nation was celebrating its 150<sup>th</sup> year of 'settlement' dating from the landing of the British 'First Fleet'. Aboriginal leaders, led by William Cooper and Bill Ferguson of the Australian Aborigines League<sup>6</sup>, had prepared a national 'Day of Mourning' to coincide with the Australian celebrations. This protest highlighted Aboriginal concerns about exclusion and unjust treatment by the state governments of Australia. Until then the Australian Constitution prevented the national government making laws or taking jurisdiction over Aboriginal people – a provision that remained ensconced until 1967. The 1938 public protest followed other previous efforts by William Cooper to change the relationship between Aborigines and the state. In 1935, he petitioned for Aboriginal seats in Parliament and a national department for Aboriginal affairs. The government rejected the request because it was unconstitutional. The petition was addressed to King George V but the government refused to hand it on. Later in 1938, the Aborigines Progressive Association sent a letter to the President of the League of Nations calling for the organization to adjudicate the interests of Aboriginal people:

Owing to the ill treatment of the aborigines through-out Australia in the past and the recent happenings<sup>7</sup> in Darwin & knowing that the League of Nations has a mandate over the Northern Territory we appeal to you in the interest of our down-trodden natives to exercise your mandated authority in the cause of justice.<sup>8</sup>

There is no record of any reply to this letter from the League of Nations office.

---

<sup>5</sup> G.A. Hodgson, Miskito Indian Patriotic League, letter to the Secretary of State, United States of America, 10 Feb. 1926.

<sup>6</sup> The Australian Aborigines League later became the Aboriginal Progressive Association.

<sup>7</sup> Apparently a federal judge in the Northern Territory, Judge Wells, had made statements that Aboriginal people should be, in certain cases, flogged with the lash.

<sup>8</sup> Aborigines Progressive Association, letter to League of Nations, 4 July 1938.

## PERMANENT FORUM ON INDIGENOUS ISSUES

The messages to the League of Nations from indigenous peoples are clear enough: indigenous peoples of different cultures and in different locations of the world, acting independently to their circumstances, were asserting a right to be heard and to be considered by the international community. These voices represented only a proportion of the indigenous peoples in the same circumstances. Many indigenous peoples did not have the means to identify an appellant body outside their captured existence, or to make representations to that body. The lack of response from the League of Nations to indigenous peoples may be of little relevance now but it is worth noting that the League had at least more exposure to the issues of 'peoples' rights and could have been more perceptive of, and responsive to, indigenous peoples' concerns.

The United Nations has been less concerned, until recently, with the assertions made by indigenous peoples for the exercise of the right of self-determination. Henry Reynolds, a historian, argues that the League of Nations gave a lot of thought to the situation of minorities while the United Nations, until recent years, emphasized the rights of individuals and the rights of states, but assumed no other entities existed in between to have rights:

The creation of new states out of the ruins of the Turkish and Austro-Hungarian empires produced the situation where many national minorities found themselves imprisoned within the new countries dominated by majorities which were, as often as not, traditionally hostile to them. So the League of Nations negotiated a whole series of minority treaties to ensure the cultural survival of the minorities. They were about groups, not about individuals. They were about minority rights . . . So in 1927 it was possible to consider separatism as a serious consideration. By 1967 the emphasis was on assimilation and integration.<sup>9</sup>

Even though evidence exists that indigenous peoples were endeavouring to use the international arena to create a consciousness of their legitimate existence, it was not until the period after World War II that the winds of change began to blow. In the aftermath of the war, the world seemed to have become more intolerant of class inequalities in societies, and inequalities generated through racial and ethnic prejudice. At the international level there were a number of factors that led to increased activism by indigenous peoples. The first and most obvious of these factors was the universal commitment to anti-racism and human rights that gelled within the opposition and combating of Nazi Germany and its policies of racial superiority. Another factor, linked to the strong humanitarian sentiment, was the desire to decolonise the populations of the world and to establish the right of self-determination for all peoples.

The International Labour Organization (ILO) had also been working since the days of the League of Nations on establishing suitable labour standards where the interests of ethnic groups, tribal peoples and indigenous peoples were threatened by

---

<sup>9</sup> H. Reynolds 'Aborigines and the 1967 Referendum: Thirty Years On', (Department of the Senate Occasional Lecture Series, Parliament House, Australia, 14 Nov. 1997).

## LES MALEZER

expansionist economic developments, such as the exploitation of forests and minerals. When ILO Convention 107 was adopted in 1957, it became the first international instrument to recognise the right of ownership of tribal and indigenous peoples over their traditional lands. Although some provisions of the convention would not meet contemporary standards for recognition of indigenous rights, it has stood as a cornerstone of international policy, and as a reference point for indigenous representatives in the post-war years.

The civil rights movement in the United States of America was a clear sign of the momentum by the population, now referred to as civil society, for worldwide changes in race relations. During the 1960s and 1970s the battle against racial and gender discrimination took hold and led to the breakdown and removal of unfair laws and practices, and challenged any overt signs of racism. The rapid growth of indigenous organizations and increased political activism soon resulted in national organizations, international linking of indigenous peoples and indigenous organizations' registering with the United Nations agencies. One of the first indigenous organizations to be recognised by the United Nations as a Non-Governmental Organization (NGO) was the International Indian Treaty Council, in 1977. But this was not the first indigenous organization that existed.

In 1974 the National Indian Brotherhood (NIB), under the leadership of George Manuel, became the first indigenous NGO to the United Nations. George Manuel had benefited and learnt from the experience gained in developing the NIB as a pan-aboriginal organization across Canada, from his earlier failed attempts in the 1960s to gain access and influence in the UN headquarters in New York, and from his participation on Canadian Government delegations to international meetings and events. After successfully organising the national profile of the indigenous rights movement Manuel set his focus upon international developments.

The first meeting of the World Council of indigenous Peoples (WCIP) occurred in 1975, and was hosted by the National Indian Brotherhood. The meeting was held in Port Alberni in British Columbia, Canada. Indigenous peoples from 24 different countries around the world attended the first General Assembly.

Now, we come from the four corners of the earth,  
we protest before the concert of nations  
that, 'we are the indigenous peoples, we who  
have a consciousness of culture and peoplehood . . .'  
We vow to control again our own destiny and  
recover our complete humanity and  
pride in being indigenous People.<sup>10</sup>

The meeting was organized around topics to be discussed in workshop and plenary sessions. These topics included representation at the United Nations, the Charter of the World Council of indigenous People, social, economic and political justice,

---

<sup>10</sup> Extract from Declaration, WCIP First General Assembly, Port Alberni, BC Canada, October 1975.

## PERMANENT FORUM ON INDIGENOUS ISSUES

cultural identity, and land and natural resources. By the end of the week the participants had confirmed the common interests of the indigenous peoples around the world and agreed to continue a strategy of active participation in the United Nations.

The second General Assembly of the WCIP was held in Kiruna in Samiland, Sweden. This meeting continued the unification of the international cause of indigenous peoples. The representations were increased by greater participation from the Indian peoples of Latin America. Professor of Law, Douglas Sanders, made the observation that a dichotomy of interests existed for the indigenous peoples represented at the WCIP meeting. He distinguished between the experiences of the indigenous peoples colonized by Nordic/Anglo powers and the experiences of the indigenous peoples in Latin America. Sanders saw significance in the international perspectives from delegations whose members faced imprisonment and torture upon their return from the WCIP General Assembly:

The Sami, the North American Indians, the Maoris and the Australian Aborigines could understand each other's situation quite easily. But the relationships between those groups and their national governments were paradoxical, perhaps incomprehensible to the delegates from most of Latin America.

Correspondingly, the political tension within which Indian organizations functioned in Latin America was difficult for the other delegates to appreciate . . . The basic elements of indigenous culture were mutually understood – but the political differences between governments in Latin America and the industrialized west had given the two groups of delegates radically different experiences with national governments.

The early delegations to England from British Columbia and New Zealand were experiments in political action. It can be argued that the delegations mistook the locus of power. They relied on colonial myths and symbols, misunderstanding the realities of the political system with which they had to deal.

Will the work of the World Council, accredited to the United Nations, simply prove to be another symbolic exercise that cannot produce results?<sup>11</sup>

Professor Saunders questioned the potential of the World Council to achieve international results. This question was posed soon after the second General Assembly of the World Council. Since 1980 the World Council has faded from view, although the organization still exists, and international focus has shifted to the United Nations meetings where large numbers of indigenous peoples delegates have been active in international developments.

---

<sup>11</sup> D. Sanders, 'The Formation of the World Council of indigenous Peoples', Paper, April 1980.

## LES MALEZER

The participation of indigenous peoples in United Nations meetings by the end of the twentieth century is a stark contrast to the first half of the century, when indigenous delegations failed to glean any response to their representations. The primary reason for the successful participation lies with the United Nations' own commitment to recognise the contribution to international affairs from non-governmental sources. This recognition is incorporated in the UN Charter:

The Economic and Social Council may make suitable arrangements for consultation with non-government organizations, which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the member of the United Nations concerned.<sup>12</sup>

While a number of NGOs have received accreditation since 1948, there existed tensions in the earlier years of the United Nations over the meaning of Article 71, and 'Cold War manoeuvres' meant that accreditation of NGOs was an uncertain process. In 1968 the rules for accreditation were reviewed and ECOSOC Resolution 1296 then became the basis for establishing accreditation criteria. Under the new arrangements any organization seeking consultative status to ECOSOC must have appropriate goals, have a representative and international character, and democratic authority to speak for the members of the organization. In the 1970s and 1980s, a number of indigenous organizations did receive consultative status, even though not all of these organizations were international bodies. What these organizations do share, as a general or broad characteristic, is a capacity to represent indigenous peoples at a 'peoples' level. The number of indigenous NGOs participating at the UN forums is steadily increasing, but the accreditation for these organizations is occurring through another mechanism, which will be discussed later in this chapter.

It is relevant to discuss the more recent developments within the United Nations to promote the role of civil society. Part of the reason for the recent boom in NGO activity is that Western governments are financing them in a process of privatisation of government functions. Also, NGOs are becoming more important as a source of information to the UN, and are correspondingly more demanding of governments at the international level. NGO participation soared with the global conferences of the 1990s, particularly the UN Conference on Environment and Development, or Rio Conference, in 1992, and many international interests, such as the environment, information and intellectual property, are perhaps less the active domain of governments than they are of civil society. One other development is the increased exchange of personnel between governments and NGOs.

It would be misleading to attribute the momentum of increased participation by indigenous peoples to the UN Charter and NGO policy alone. Indigenous peoples have been developing this momentum for the past century, and it is coincidental that opportunities existed through concurrent developments in the UN. The use of the

---

<sup>12</sup> UN Charter, Article 71.

## PERMANENT FORUM ON INDIGENOUS ISSUES

term 'Non-Governmental Organization' has been met with resistance by indigenous delegations on the basis that their populations' status as 'peoples' is thereby diminished, and 'non-government' is an incorrect description. These delegations claim that participation in the United Nations as 'indigenous peoples' delegations is the legitimate arrangement. It might be argued this is a pedantic point, and that the members of the United Nations would not share this view of the delegations and their 'organizations' or constituents. However, it is important to see that there is a consistency between these contemporary delegations by indigenous peoples to the UN and the past delegations to the League of Nations.

The key to the induction of delegates of indigenous peoples into UN processes lies in three particular developments. The first of these is Resolution 34 passed by ECOSOC at its 28<sup>th</sup> Plenary meeting on 7 May 1982. The resolution established an expert 'Working Group on Indigenous Populations' under the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to meet for five days annually, and consult with governments and indigenous peoples. The resolution identified four reasons for establishing the Working Group. These reasons included the 'urgent' need to protect rights, the concern that recourse is needed at the international level to promote and protect rights for indigenous peoples, and the conclusions reached, by the Sub-Commission, that the plight of indigenous peoples is of a serious and pressing nature and that special measures are urgently needed. The noteworthy part of this resolution is that it was passed by the states at ECOSOC level. While a number of states may have felt threatened by the discussion of indigenous policies on an international level, and opposed indigenous delegations participating in UN forums, the human rights agenda of the UN left little room for these concerns to be voiced openly.

The second development was the establishment of a voluntary trust fund to assist indigenous delegations to participate in the meetings of the Working Group on Indigenous Populations. This decision was made by the General Assembly in Resolution 40/31, passed on 13 December 1985, and was regarded as a significant step to increase indigenous participation in the forum of the Working Group.

The third development, contributing to the new relationship forming between indigenous peoples and the United Nations, was the ECOSOC decision in 1995 to extend consultative status to more indigenous groups to participate in the elaboration of a declaration on the rights of indigenous peoples.<sup>13</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities had previously reported that there were twelve indigenous organizations with ECOSOC NGO consultative status. Clearly this decision in 1995, to extend a special consultative status, was appropriate to ensure indigenous peoples would have sufficient status to negotiate with states on the form and content of any declaration on indigenous rights. The mechanism to establish this access was to use the NGO provisions specified in Article 71 of the UN Charter and ECOSOC Resolution 1296 of 1968. However, the status afforded under the 1995 resolution was to allow the accredited organizations

---

<sup>13</sup> UN Doc. E/CN.4/RES/1995/32.

## LES MALEZER

to participate in the Working Group on the Draft Declaration. These organizations, once accredited under Resolution 1995/32, did not have the same access as that afforded to other accredited NGOs to participate in the sessions of ECOSOC, the Commission on Human Rights or the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. This discrepancy has not been discriminatory, as the organizations have not sought participation through this process, although there is an increasing call for more indigenous organizations to hold full ECOSOC NGO accreditation. This call unfortunately coincides with the UN's own concern to review the number and quality of NGO accreditations.

The three developments, the establishment of the Working Group on Indigenous Populations, the voluntary trust fund and the special accreditation of indigenous groups, have had the combined effect of bringing indigenous peoples to the United Nations. Thus, the ambitions of the pre-WWII delegations to gain access to the international organization, originally the League of Nations, has been realised in the 1980s and 1990s.

The sessions of the Working Group on Indigenous Populations have become popular for indigenous peoples to attend and participate in. Held in July of each year, for a duration of five working days, the Working Group session sees over 600 delegates arrive from almost every region on earth. The Working Group, which consists of five experts appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, sits as a panel and listens to the many delegates presenting submissions under the themes and agenda items of the session. The primary concern of the Working Group was to 'give special attention to the evolution of standards concerning the rights of indigenous populations'.<sup>14</sup> This task led almost immediately to the development of a draft declaration on the rights of indigenous peoples. The draft declaration prepared by the Working Group, and recommended to the Sub-Commission, carried two central concepts. The indigenous populations are 'peoples', in the terms of the United Nations charter and conventions, and the rights of indigenous peoples are 'collective' rights. These concepts are regarded as intrinsic by the indigenous delegations, but states have not been prepared to reach a consensus on these challenging concepts.

More recently, states have softened their positions on collective rights, and the focus of international dialogue on indigenous rights is now centred on 'peoples'. The states' concern is over the wording of Article 3 of the draft declaration which reads: 'indigenous peoples have the right to self-determination.' Whether indigenous peoples are 'peoples' is repeatedly debated at the Working Group and other UN forums, and this issue continues to be at the nub of the relationship between indigenous peoples and states. But while the standoff continues, other developments are occurring in areas of interest to indigenous peoples. For example, the Working Group members have completed extensive and expert studies on the relationship between indigenous peoples and land, on treaties, and on heritage protection. These documents have been added to the knowledge base of the UN and the findings

---

<sup>14</sup> ECOSOC Resolution 1982/34.



## PERMANENT FORUM ON INDIGENOUS ISSUES

remain a point of reference for UN business. In addition to the expert papers the Working Group has been successful in having theme discussions at each of its sessions, and sometimes these themes are directly linked to other major activities occurring within the UN organization.

In 2002 the Working Group convened its twentieth session, a milestone representing a significant era of indigenous participation in the UN. The list of developments over that twenty-year period looks impressive, and includes documentation, structural changes within the UN organization and specific events addressing indigenous interests. Some of these developments include:

- Document – Study on treaties, agreements and other constructive arrangements between States and indigenous populations<sup>15</sup>
- Document – Final working paper – indigenous peoples and their relationship to land<sup>16</sup>
- Document – Report of the Special-Rapporteur on the Protection of the heritage of indigenous people<sup>17</sup>
- Structure – Voluntary Trust Fund for Indigenous Peoples
- Structure – Open Ended Inter Sessional Working Group on the Draft Declaration on the Rights of Indigenous peoples
- Structure – Appointment of Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people
- Event – International Year for the World's Indigenous Peoples (1993)
- Event – International Decade for World's Indigenous Peoples (1995-2004)

However impressive these achievements may be, there is also a negative side to these two decades. First, the Working Group on Indigenous Populations is a body of experts who are themselves non-indigenous, the Special Rapporteur on Indigenous People is non-indigenous, and the secretariat supporting the Working Group has, until recently, been made up almost entirely of non-indigenous staff. This lack of indigenous personnel is not in itself a problem, however, it can be a problem if the delegations do not have, or lose, trust in these institutions.

Secondly, the Working Group meetings are large forums and the many participants are competing for a few minutes on the agenda to present their

---

<sup>15</sup> UN Doc. E/CN.4/Sub.2/1999/20.

<sup>16</sup> UN Doc. E/CN.4/Sub.2/2001/21.

<sup>17</sup> UN Doc. E/CN.4/Sub.2/1996/22.

## LES MALEZER

interventions. These interventions are almost always extremely important to the delegates themselves but can be easily ‘lost’ in the processes of the Working Group and beyond. Most interventions do not get direct responses. Furthermore, a large proportion of the delegates to the Working Group sessions are presenting complaints and grievances about treatment by states. These interventions consisting of complaints about states are discouraged by the Working Group, with every sympathy for the delegates’ situation, as the body does not have, and cannot have, a complaints process.

The large volume of information presented during the week long session of the Working Group does not make it to the Working Group report. The Working Group is focused upon key issues and strategies and may disregard much of the intervention information. Therefore, the delegates who come to sessions seeking redress to crises in their communities will be extremely disappointed with the process.

The Working Group is, itself, little more than a sub-group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission is made up of ‘human rights experts’ who are not representatives of states, although they are selected from regions. It is possible that state affiliations may exist. The Working Group members are appointed from within the body of experts in the Sub-Commission.

In practice, the Working Group has served as, for indigenous participants, a funnel for information into the UN system with little capacity for those participants to define actions and stimulate UN responses. The power still rests with states, largely uninhibited by indigenous voices in the main organs of the UN. The distance between the Working Group on Indigenous Populations and the General Assembly has been vast in distance, communications and time. The Working Group, for example, met in Geneva while the General Assembly met in New York. A resolution from the Working Group would take nearly eighteen months if it were to reach the General Assembly – during which time the Working Group would hold another meeting. The Working Group is four levels below the General Assembly, as shown:

- General Assembly
- Economic and Social Council (ECOSOC)
- Commission on Human Rights
- Sub-Commission on Promotion and Protection of Human Rights
- Working Group on Indigenous Populations

If certain states want to dampen an initiative from the Working Group, they simply need to do nothing, by not proposing a resolution at the Commission, ECOSOC or General Assembly, or draft and advocate a passive, perhaps-qualified resolution. It is not clear whether this has actually happened in practice but there have been very few resolutions that arose from the Working Group which were advanced through the system. Each year, the General Assembly would consider and endorse

## PERMANENT FORUM ON INDIGENOUS ISSUES

resolutions supporting the International Decade of indigenous peoples and note the work being undertaken on the Draft Declaration on the Rights of indigenous peoples. However, the General Assembly did not deal with specific issues of concern raised by indigenous peoples.

The atmosphere of states' complacency, if it existed, would have been jolted in June 1993, at the World Conference on Human Rights, when the Vienna Declaration and Programme of Action supported a new structure in the UN – a Permanent Forum on Indigenous Issues. The call for action from the World Conference was finally met in July 2000 when ECOSOC adopted the recommendation from the Commission on Human Rights to establish the Permanent Forum.<sup>18</sup> The resolution was adopted by consensus.

The Permanent Forum is the first permanent structure in the UN where state and non-state representatives (in this case, indigenous peoples' representatives) hold equal status. The other significant factor is that the Permanent Forum is established as a subsidiary mechanism to ECOSOC, at a much higher level in the UN than the Working Group. Under the terms of the ECOSOC resolution, the Permanent Forum consists of sixteen members. Half of the members are elected by ECOSOC from nominations received from governments. The President of ECOSOC appoints the other eight members from nominations received from indigenous peoples. Although states usually consider regional representations based upon five UN regional groups, the indigenous peoples caucus chose to nominate representatives based upon seven geographical regions and use one position to rotate in key regions for additional representation.

The ECOSOC resolution called for representatives to be appointed on the basis of broad consultations with indigenous organizations and to take into account the diversity and geographical distribution of the populations. Communications between groups on these nominations also called for gender balance in the nominations. Unfortunately, only two women were nominated and appointed for the available indigenous representatives positions and, with the four women elected by ECOSOC, a total of six women were appointed to the sixteen positions. The clear majority of the experts on the Permanent Forum are indigenous persons. The appointments are for a three-year period. Given the difficulties experienced in generating and determining regional nominations from the indigenous peoples, and difficulties and controversy over gender-balance, it can be expected that a much more competitive process will occur in 2004 when the next round of appointments is to occur.

Other decisions made in relation to the structure of the Permanent Forum are that the meetings will be held over a period of ten working days per year; the meetings will be rotated between New York and Geneva; and a secretariat is to be established, based in the Department of Economic and Social Affairs in New York. The latter aspect, regarding a secretariat, was subject to further consideration by the General Assembly due to the budget processes and the limitations on new expenditures. The General Assembly approved six positions for the secretariat but

---

<sup>18</sup> ECOSOC Resolution 2000/22.

## LES MALEZER

identified funding for only three positions. Funding for the other positions will be determined in later considerations of the UN budget, and may be subject to the outcomes of the review of various UN structures and arrangements concerned with indigenous peoples' issues.<sup>19</sup> To ensure that indigenous peoples have access to the Permanent Forum, the United Nations has agreed to adopt the same accreditation procedures for the Permanent Forum as for the Working Group on Indigenous Populations.

In addressing the first session of the Permanent Forum and to welcome the members and observer delegations, the President of ECOSOC described the establishment of the Permanent Forum as 'a great victory and a cause for celebration'. He referred to his senior role during the 1993 World Conference on Human Rights in Vienna, when the Permanent Forum was recommended, and expressed great satisfaction that the work of the Permanent Forum is about to commence:

The Permanent Forum is an innovative organ. It is characterised by its unique membership, composed of indigenous and non-indigenous experts, and by the principle of inclusion of all concerned in its work. Since the work of the Permanent Forum is open to all indigenous representatives, whether of not they belong to organizations accredited with ECOSOC, we can conclude that we have created a very open, transparent and participatory body.<sup>20</sup>

The work of the Permanent Forum had to be decided by the expert members in order to proceed with business in an orderly way, and to ensure that the Permanent Forum established its credentials securely in the high echelons of the United Nations.

On 14 February 2000, the UN High Commissioner for Human Rights, Mary Robinson, set out her ideas for the role and *modus operandi* of the Permanent Forum. Ms. Robinson was addressing the second meeting of the Open-Ended Working Group on the Permanent Forum on Indigenous Issues, a working group set up by the Commission on Human Rights to prepare concrete proposals on the establishment of the Permanent Forum. Her statement referred to the growing agenda in the UN relating to indigenous peoples. She reminded participants that the International Decade of the World's Indigenous People had generated a number of programmes and activities but there was no formal mechanism for sharing

---

<sup>19</sup> The government-nominated experts on the Permanent Forum are: Mr Yuri A. Boitchenko (Russia); Ms. Njuma Ekundanayo (Democratic Republic of the Congo); Mr. Yuji Iwasawa (Japan); Mr. Wayne Lord (Canada); Ms. Otilia Lux de Coti (Guatemala); Mr. Marcos Matias Alonso (Mexico); Ms. Ida Nicolaisen (Denmark); and Mrs. Qin Xiaomei (China). The nominated indigenous representatives are: Mr. Antonio Jacanomijoy Tisoy (Colombia); Mr. Ayitegau Kouevi (Togo); Mr. Willie Littlechild (Canada); Mr. Ole Henrik Magga (Norway); Ms. Zinaida Strogaltchikova (Russian Federation); Mr. Parshuram Tamang (Nepal); Ms Mililani Trask (United States of America); and Mr. Fortunato Turpo (Peru).

<sup>20</sup> I. Simonovic, President of ECOSOC, Speech, Permanent Forum on indigenous Issues, 13 May 2002.

## PERMANENT FORUM ON INDIGENOUS ISSUES

information and experiences, and for coordinating and strengthening the activities of interest to indigenous peoples:

To the extent possible, the Office of the High Commissioner actively works with sister organizations within the UN system. Cooperation has led to fruitful results and a number of UN organizations – ILO, UNESCO, WHO, UNDP, the World Bank, WIPO and several others – are committed to activities benefiting indigenous communities within their areas of competence. However, a formal UN body in which all interested parties, including governments, indigenous peoples, UN specialised agencies, NGOs experts and others, able to discuss all relevant matters such as health, education, development, environment and human rights will contribute to a more transparent and coordinated institutional approach by the international community. I may add that I believe that the forum will help to rationalise and make more efficient system-wide efforts to address indigenous concerns.<sup>21</sup>

The resolution establishing the Permanent Forum states that the mandate is to ‘discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights’. In accordance with this phrasing the Permanent Forum structured its agenda to deal with the categories as established in the resolution. The first session was divided into five topics, including Economic and Social Development, Environment, Education and Culture, Health and Human Rights. Each topic was introduced by presentations from the UN and international agencies concerned with the topic. This process helped participants to identify the relevant agencies and to gain an understanding of the current activities and programmes undertaken by the agencies. The expert members of the Permanent Forum then each had an opportunity to make statements, ask questions and otherwise respond to the presentations. The UN and international agencies responded as required to these experts. The indigenous representatives at the first session of the Permanent Forum, estimated to be approximately 300 persons, could then present their submissions to the Permanent Forum on the relevant topic.

As the topic concluded, a member of the Permanent Forum who was appointed to the task of noting the submissions gave a summary of the discussions and issues raised under the topic. This summary provided the expert members and the participants a preliminary indication of the final reporting to be made on the topic and an opportunity to consider what recommendations might be adopted by the Permanent Forum on the topic.

After two weeks of meetings, the first session of the Permanent Forum had obviously collected much information and innovations on the topics, as well as proposals and aspirations for the continuation of work. All participants were left with the wonder of how the Permanent Forum might cope with the volume of input

---

<sup>21</sup> M. Robinson, High Commissioner for Human Rights, Speech to 2<sup>nd</sup> meeting of Working Group on the Permanent Forum on indigenous Issues, 14 Feb. 2000.

## LES MALEZER

and the range of the topics and discussion, and translate the material into useful resolutions and recommendations for consideration by ECOSOC. Earlier fears by some indigenous groups, that the Permanent Forum would be criticised for lack of organization and lack of purpose and direction had quickly melted away during the course of the meeting. The UN agencies and international organizations had responded to the Permanent Forum and it seemed that the Permanent Forum was very capable of communicating its role and importance to these other bodies.

The question still remains, however, as to how the Permanent Forum will cope with its responsibilities. The key factors are the resources that are at hand to the Permanent Forum and the degree of cooperation afforded by the other agencies.

The Chairman of the first session of the Permanent Forum, Ole Henrik Magga, said that the first session had been a success and that it was evident from the testimonies heard during the two weeks that indigenous peoples remain among the most marginalised in the world and were among the poorest of the poor. indigenous peoples were engaged in an ongoing battle for the continuous existence of their cultures.

He declared that indigenous peoples must never give up the fight for equality and justice, but stressed that for the Forum to become a true vehicle for the advocacy of indigenous rights, it was essential to remain action-oriented and focus on the solutions, rather than on the problems. He stressed that this session was historical, in that, for the first time, indigenous peoples and governments met on a truly equal basis to address mutual concerns and that past experiences showed that without the full, equal and effective participation of indigenous peoples themselves, it was not possible to adequately address their concerns.<sup>22</sup>

IWGIA, a key NGO active in indigenous forums, concluded in its report of the first session that it still remains to be seen whether the Permanent Forum is going to receive adequate funding to satisfactorily fulfil the task entrusted to it by ECOSOC. IWGIA noted a lack of high-level representation from the states to the first session, and considered that state delegations kept a low profile in the proceedings. The UN agencies and programmes, IWGIA said, clearly remained sceptical about the role of the Permanent Forum and that a solid effort would be needed to 'break down the walls' of the dominant UN organs.

Another discerning participant, Kenneth Deer, editor of *The Eastern Door* newspaper, but better known in international circles for his previous roles as Chairman of the indigenous Caucus, wrote of promising outcomes for the Permanent Forum:

There is no other body quite like it in the entire UN at such a high level. It is the only one where indigenous persons have equal status to other international experts. It is not a seat in the UN General Assembly but it's a notch closer. To get a seat in the UN is a totally political process which

---

<sup>22</sup> IWGIA Report on First Session of the Permanent Forum on indigenous Issues, IWGIA.

## PERMANENT FORUM ON INDIGENOUS ISSUES

would require the acceptance as a member from all the member states of the UN; not likely at this time. But the Permanent Forum is useful in bringing our concerns to the highest levels of the UN. Hundreds of interventions by indigenous representatives flooded the forum's speakers lists. It was clear from the start that indigenous spokespersons have high expectations for this UN body. Others were not so sure that the Forum would work well in our favour. Some feel that the Forum is a trap where indigenous concerns would be subverted by the government-elected experts on the Forum. But that did not happen at this first meeting. As a matter of fact, several of the government experts were indigenous themselves and were very supportive of indigenous peoples and their plight . . .

In conclusion, the Permanent Forum on indigenous Issues was more successful than some had hoped and not as successful for some others. It did not end up in a deadlock between indigenous and non-indigenous Forum members. Everyone seemed to have a deep interest in trying to resolve the longstanding grievances of indigenous peoples. The proof, however is still in the pudding and the forum will be judged by the impact it will have on the UN system, a system entrenched in its ways and difficult to move. But with the support of friendly governments and the support of the Secretary General, Kofi Annan, we can hope that the UN will move in a positive direction to improve the conditions which indigenous peoples live in throughout the world.<sup>23</sup>

The most stirring words in support of the Permanent Forum and its future came from the Secretary General of the United Nations, Mr Kofi Annan, when he gave the closing speech:

On the first day of your session last week, the President of the Economic and Social Council greeted you with the words, 'Welcome to the United Nations family'. I would like to reiterate that sentiment, and say to all the world's indigenous peoples: 'You have a home at the United Nations' . . . On behalf of the United Nations family, I would like to pledge our strong commitment to your cause and your concerns.<sup>24</sup>

The revolutionary change has come. Yet, it is just the beginning. The future success of the Permanent Forum on Indigenous Issues is still at risk. The future can be reliant upon personalities. But it is now time to look to the future and plan for the work to come. Madam Erica-Irene Daes, the former Chairperson of the Working Group on Indigenous Populations, is one person who has committed herself to the highest cause of indigenous peoples, even in retirement. Based upon her experiences in the Working Group on Indigenous Populations and her lobbying within the corridors of the UN for the successful establishment of the Permanent Forum,

---

<sup>23</sup> K. Deer, 'The Eastern Door', Vol. 11, No. 19, Kahnawake, 31 May 2002.

<sup>24</sup> UN Secretary General K. Annan, Speech to Permanent Forum on indigenous Issues, New York, 24 May 2002.

## LES MALEZER

Madam Daes has looked ahead and identified the key tasks for the future. She writes:

The recently established Permanent Forum for indigenous People should consider playing a constructive role regarding problems pertaining to land and resource rights and environmental protection. In particular, consideration should be given to the following:

- The creation of a fact-finding body, with a mandate to make site visits and to prepare reports concerning particular indigenous land and resource issues;
- The creation of an indigenous land and resource ombudsman or office which could provide response, mediation and reconciliation services;
- The creation of a complaint mechanism or procedure for human rights violations that pertain to indigenous land and resource situations;
- The creation of a body with ‘peace-seeking’ powers to investigate, recommend solutions, conciliate, mediate and otherwise assist in preventing or ending violence in situations regarding indigenous land rights;
- The creation of a procedure whereby countries would be called upon to make periodic reports with regard to their progress in protecting the land and resource rights of indigenous people.<sup>25</sup>

We have a home in the United Nations. The Permanent Forum is a huge achievement. For the United Nations there is still much to be achieved for indigenous rights. For indigenous peoples there is much work yet to be done in the international arena. But at least we can look back to the endeavours of Deskaheh and his contemporaries, and feel some sense of satisfaction and accomplishment.

---

<sup>25</sup> Special Rapporteur E. Daes, ‘Indigenous Peoples and Their Relationship to Land’, U.N. Doc. E/CN.4/Sub.2/2000/25, pp. 39–40, paragraph 152.



## PART II

# SPECIFIC ISSUES AFFECTING INDIGENOUS PEOPLES



## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

*Joshua Castellino* \*

The assumption of defined and fixed territoriality is one of the most fundamental facets of the recognition of statehood.<sup>1</sup> Since it is states that are entrusted with the privilege of the creation of international law, this emphasis on territoriality for its recognition has particular impact on indigenous peoples.<sup>2</sup> However, the notion of territoriality itself remains contested in international law and its implications for the human rights agenda is most visible in the treatment of indigenous peoples and their right to self-determination.<sup>3</sup>

The determination and demarcation of fixed territories and the subsequent allegiance between those territories and the individual, or group of individuals that inhabit it is, arguably, the prime factor that creates room for individuals and groups within international and human rights law.<sup>4</sup> Thus 'international society'<sup>5</sup> consisting of individuals and groups existing within sovereign states, ostensibly gain legitimacy and *locus standi* in international law by virtue of being part of a

---

\* I would like to thank Kwadwo Appiagyei-Atua whose comments on an earlier draft were particularly helpful.

<sup>1</sup> See Article 1, Montevideo Convention 1934.

<sup>2</sup> For a general reading on issues of statehood in international law see e.g. J. Crawford, *The Creation of States in International Law* (CUP, Cambridge, 1979); N.L. Wallace-Bruce, *Claims to Statehood in International Law* (Carlton Press, New York, N.Y., 1994); R.Y. Jennings, *The Acquisition of Territory in International Law* (1963); M.N. Shaw, *Title to Territory in Africa* (1986); O.C. Okafor, *Re-defining Legitimate Statehood: International Law & State Fragmentation in Africa* (M. Nijhoff, The Hague, 2000). Also see R. Lapidoth 'statehood & Sovereignty', 46 *Journal of International Affairs* (1992); A. Anghie 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International law', 40 *Harvard Journal of International Law* (1999) 1.

<sup>3</sup> For a general reading on the issue of self-determination see A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP, Cambridge, 1995); H. Hannum, *Autonomy, Sovereignty & Self-determination: The Accommodation of Conflicting Rights* (1980); M. Koskenniemi 'National Self-determination Today: Problems of Legal Theory and Practice', 43 *International & Comparative Law Quarterly* (1994) 857.

<sup>4</sup> See the argument made by L.A. Gerson, Deputy Assistant Secretary of State, U.S.A. 'General Statement at the Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples' (30 Nov. 1998) available at <<http://hookele.com/netwarriors/us-opening.html>>; also available in B. Kingsbury 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International & Comparative Law', 34 *New York University Journal of International Law & Politics* (2001) 189 at note 4.

<sup>5</sup> As defined by Hedley Bull in *Anarchical Society: A Study of World Order in Politics* Chapter IV.

sovereign state. While this concept is being eroded by developments within international criminal law that seek to place the onus on the individual away from the confines of his/her state, the concept of nationality remains central to personal identity within the international system.<sup>6</sup> In addition even though it can be argued that notions of democratic governance are increasing,<sup>7</sup> this democracy is assumed as being expressed within the narrow confines of an identifiable territorial unit for it to gain international legitimacy.

In this light, this chapter seeks to identify the applicable regime in international law that has governed the treatment of territory, tracing its evolution and purpose and offering some suggestions as to the manner in which it impacts on indigenous peoples. Towards this end it seeks to unpack the doctrinal package of tools that lie at the foundation of the treatment of territory in international law. In addition, it seeks to glean the interpretation of these norms through a brief examination of cases before international judicial bodies that question the validity, and measure the effectiveness of their application. A secondary objective is to address some comments to the dichotomy between the right of self-determination and the issue of land rights with a view to presenting a hypothesis about the manner in which the two can be conceptualised.

It is normal in human rights literature to begin the quest for an examination of indigenous peoples' territorial rights from the perspective of self-determination.<sup>8</sup> The discussion on indigenous peoples' rights *vis-à-vis* territory thus often begins by an examination of the extent to which self-determination provides a useful and effective tool towards empowerment of a people who have been disenfranchised. This chapter seeks to contribute to an examination of the relationship between the right to land and self-determination, with a view to testing the extent to which international legal precepts on title to territory are reflected in documents developing for the protection of indigenous peoples' rights.

## STATEHOOD & LAND IN INTERNATIONAL LAW

The sovereign state is enshrined at the heart of the international legal system where it functions as the primary actor in international law and politics. In recognition of

---

<sup>6</sup> In contrast see Kymlicka *Minority Rights Cultures* – which argues against a strict linkage between territory and identity. See Kymlicka W., *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (OUP, Oxford, 1995).

<sup>7</sup> Franck T., 'The Emerging Right to Democratic Governance', 86 (1) *AJIL*(1992) pp.46–91.

<sup>8</sup> For more on this subject see M. Scheinin & P. Aikio (eds.), *Operationalizing the Rights of Indigenous Peoples to Self-Determination* (Institute for Human Rights: Aabo, Finland, 2000); W.M. Reisman 'Protecting Indigenous Rights in International Adjudication', 89 *American Journal of International Law* (1995) 350; M. Holley 'Recognizing the Rights of Indigenous Peoples to their Traditional Lands: A Case Study of an Internally Displaced Community in Guatemala', 15 *Berkeley Journal of International Law* (1997) 119; G. St. Louis 'The Tangled Web of Sovereignty and Self-governance: Canada's Obligation to the Cree Nation in Consideration of Quebec's Threat to Secede', 14 *Berkeley Journal of International Law* (1996) 380.

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

the rights of sovereign states the United Nations Charter enunciates article 2(7) to the effect that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>9</sup>

The key characteristic that generates such sovereignty is given by Article 1 of the *Montevideo Convention on the Rights and Duties of States of 1934*<sup>10</sup> to the effect that:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Though each of the concepts contained in the article are problematic themselves,<sup>11</sup> there is little doubt that (b), a defined territory remains fundamental to the acceptance of statehood and the trappings of sovereignty that accompany it.<sup>12</sup> The doctrinal package that international law uses in the determination and treatment of such fixed territory are: that of *uti possidetis* and the older, accompanying principle of *terra nullius*. Borrowed from Roman law,<sup>13</sup> the re-statement of the former at specific instances within international legal history has established it as doctrine that continues to have salience in international law governing territory.<sup>14</sup> The evolution of these doctrine remain out of the scope of this present work, suffice to state that with each restatement they seem to have an increased sphere of operation.<sup>15</sup>

---

<sup>9</sup> UN Charter Article 2 para. 7. For a general reading of its interpretation see Simma *et al*, *The United Nations Charter: A Commentary* (OUP, Oxford, 2000) pp. 139–154.

<sup>10</sup> The text of the treaty is available at the Avalon Project site at Yale University see <[www.yale.edu/lawweb/avalon/avalon.htm](http://www.yale.edu/lawweb/avalon/avalon.htm)>.

<sup>11</sup> For a general discussion of article 1 of the Montevideo Convention see Fenwick C.G., 'The Inter-American Conference for the Maintenance of Peace', 31 *American Journal of International Law* (1937) pp.201–225.

<sup>12</sup> For more literature on the notion of sovereignty see Grovogui S., *Sovereigns, Quasi Sovereigns and Africans: Race and Self-determination in International Law* (Minnesota Press, Minneapolis, 1996).

<sup>13</sup> H. F. Jolowicz & B. Nicolas, *Historical Introduction to the Study of Roman Law* (CUP, Cambridge, 1972).

<sup>14</sup> For a more recent enunciation of the doctrine of *uti possidetis* in the context of the Badinter Commission see A. Pellet 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-determination of Peoples', 3(1) *European Journal of International Law* (1998); Radan P., 'Post-Succession International Orders: A Critical Analysis of the Workings of the Badinter Commission' 24 *Melbourne University Law Review* (2000) 50.

<sup>15</sup> See J. Castellino & S. Allen, *Title to Territory in International Law: A Temporal Analysis* (Ashgate Publishers, Dartmouth, 2003).

## JOSHUA CASTELLINO

The principle of *terra nullius* has no direct contemporary significance,<sup>16</sup> however the doctrine of *uti possidetis* differs in that it has been referred to as recently as in the context of the disintegration of Yugoslavia.<sup>17</sup> Initially employed to designate territory that was ‘empty’ and therefore free for colonisation, *terra nullius* gradually took on racist overtones and until recently, in an International Court of Justice<sup>18</sup> case, it was determined to be referring to territory on which people who inhabited it were not ‘socially or politically organised’.<sup>19</sup> This represents a radical departure from the original meaning of the concept of ‘blank territory’ to a manifestation that suggests that the territory in itself did not have to be empty or void of inhabitants. The change enabled the acquisition of large tracts of land in international legal history under the guise of colonisation; and had a particularly adverse effect on indigenous communities globally. Once this land had been acquired, boundary lines were drawn to demarcate ownership between settlers; with these boundaries eventually being recognised as territorial demarcations on the basis of which valid statehood and its accompanying right of territorial integrity could be awarded. The system was then buffered from change in a period of transition by the doctrine of *uti possidetis* which sought to maintain order by freezing the territorial units created.<sup>20</sup>

Thus, the cumulative effect of the two doctrines has been to create rigid geographic entities within a short period of time, within which dialogue based on ownership of territory had to be framed. To validate and legitimise this acquisition, international law brings into play the rule governing intertemporal law by which actions committed in previous eras are buffeted from scrutiny against more modern norms and principles.<sup>21</sup> Thus, while the woes of colonialism are well documented, international law is precluded from raising legal questions and seeking self-

---

<sup>16</sup> Except in the context of ownership over the Antarctic and outer space; For more on this discussion see P.C. Jessup & H.J. Taubenfeld ‘Outer Space, Antarctica, and the United Nations’, 13 (3) *International Organization* (1959) 363; P.A. Toma ‘soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic’, 50 (3) *American Journal of International Law* (1956) 611; F. Kratochwil ‘Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System’, 39 (1) *World Politics* (1986) 27.

<sup>17</sup> For general sources on this issue in the context of Yugoslavia see Ragazzi M., ‘Conference on Yugoslavia Arbitration Commission: Introductory Note’, 31 *International Law Materials* (1992) p. 1488; S. Stojanovic, ‘The Destruction of Yugoslavia’ 19 *Fordham Journal of International Law* (1996) p. 337; Weller M., ‘The International Response to the Dissolution of the Federal Republic of Socialist Yugoslavia’ 86 *American Journal of International Law* (1992) pp.569–607 and Craven M., ‘The European Community Arbitration Commission on Yugoslavia’ 66 *British Yearbook of International Law* (1995) p.333.

<sup>18</sup> Henceforth, ICJ.

<sup>19</sup> Western Sahara Case *ICJ Reports* (1975) p. 39 at para. 81.

<sup>20</sup> Bartos T., ‘*Uti Possidetis: Quo Vadis?*’, 18 *Australian Yearbook of International Law* (1997) p.37.

<sup>21</sup> For a basic understanding of the intertemporal rule see J. Castellino & S. Allen (2003) *supra* note 15 at pp.234-235

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

correction with regards to these issues.<sup>22</sup> Yet when the existing standards governing property rights during colonial times are examined, it is immediately apparent that rules applicable to private property existed in domestic settings: they were simply not extended to annexed territories on the grounds of racism.<sup>23</sup> An infamous quote from Winston Churchill in 1937 captures the sentiment accurately. Speaking in relation to the Palestinian claim to land he states:

I do not agree that the dog in a manger has the final right to the manger even though he may have lain there for a very long time. I do not admit that right. I do not admit for instance, that a great wrong has been done to the Red Indians of America or the black people of Australia. I do not admit that a wrong has been done to these people by the fact that a stronger race, a higher-grade race, a more worldly wise race to put it that way, has come in and taken their place.<sup>24</sup>

The sheer racism at the heart of the colonial project robbed native inhabitants of their territory, justifying it by recourse to law and ownership of artificially created illegitimate title deeds. The intertemporal rule clearly has merit as a legal concept, yet it needs to be analysed against objective standards rather than the asinine one so aptly captured in Churchill's speech. This objective analysis dictates that a rigid application of the intertemporal rule would see the extinguishments of native titles globally, thereby validating the principle as a handmaiden to the politics of power of the Imperial states who set out on global conquest and illegal acquisition of territory. The fact that victims of this conquest are widespread, accentuates the need to highlight the situation and prevent blind acceptance of past manipulations of a legal system that was created, dominated and imposed by Imperial states upon the rest of the world. If modern trends towards the internationalisation of the discourse are to be accepted, international law must begin by seeking to examine its own structures and institutions to determine their objectivity. With this in mind the following sections seeks to elaborate on the principle of *terra nullius*, that of *uti possidetis* and to offer a brief critique of their interpretation before the ICJ.

### PRINCIPLE OF TERRA NULLIUS

In seeking to demonstrate that Latin American states were different from the European states that governed them, Alvarez, writing at the turn of the last century described them thus:

---

<sup>22</sup> The claim for reparations remains a fascinating area of law and was to be discussed at the Durban World Conference against Racism. Details are available at <[www.wcar.ch](http://www.wcar.ch)>. Also see W. Bradford 'With a Very Great Blame on Our Hearts: Reparations, Reconciliation and an American Indian Plea for Justice', 27 *American Indian Law Review* (2002) 1.

<sup>23</sup> This is the main claim of the work *Title to Territory* see at pp.229-238

<sup>24</sup> As quoted by Arundhati Roy in 'Come September' a speech organised by the Lannon Foundation. See <[www.lannan.org/](http://www.lannan.org/)>.

## JOSHUA CASTELLINO

Europe is formed of men of a single race, the white; while Latin America is composed of a native population to which in colonial times was added in varying proportions an admixture of the conquering race and emigrants from the mother country, Negroes imported from Africa, and the Creoles, that is those born in America but of European parents. Out of this amalgamation of races (the Aborigines, the Whites, and the Negroes, together with the Creole element), the Latin American continent presented an ethnical product which was no less peculiar than its physical environment. The resultant *colonial society* . . . is completely *sui generis*; in it the whites, born in the mother country, although in the minority, exercised the control and guided a multitude which was in great part illiterate and ignorant.<sup>25</sup>

The tone and language of this statement reveals the extent to which many theorists generalised about situations concerning “otherness”.<sup>26</sup> The continued marginalization of native indigenous peoples across modern Latin America<sup>27</sup> means that the crux of the issues raised by Alvarez remain relevant. Also significant is the setting described above which propelled the Creoles, themselves European descendants, into the forefront of the independence movement from Europe. Endowed with European values and education, the Creoles quickly became the dominant force in wresting independence away from Spain. They formed the intellectual *élite* on whom the main thrust of the pro-independence movement fell. For Alvarez, this responsibility was natural enough since he identified them as the ‘only thinking part of the population’.<sup>28</sup> However, the failure to include other groups, especially indigenous peoples, has left a long legacy in many of the Inter-American states.<sup>29</sup> The prime motivation for Creole independence was identified as being the injustice with which the mother country treated its colonies. Instructed by travel and greatly influenced by the philosophical writings of the eighteenth century, the Creoles seized the opportunity presented by the embarrassment of Spain in the Napoleonic Wars to launch their bid for emancipation.<sup>30</sup>

In asserting their independence, the new states maintained that their actions were a natural consequence of their individual liberty, which, they argued, gave

---

<sup>25</sup> A. Alvarez ‘Latin America and International law’ 3(2) *American Journal of International Law* (1909) p. 271–272.

<sup>26</sup> See for instance E. Gellner, *Arabs & Berbers: From Tribe to Nation in North Africa* (Duckworth Trinity Press, London, 1972). Gellner makes the essential point that the vision of North Africa that was perceived in Europe came from personal accounts of travellers and explorers and therefore they were influenced by their own prejudice.

<sup>27</sup> As aptly captured in this volume by the chapters by A. Anaya and C. Binder.

<sup>28</sup> Alvarez, *supra* note 25 at p.274.

<sup>29</sup> See Yanoamani Indian Case, Case 7615 IACHR 24, OEA/Ser.L/V/11.66, doc. 10 Rev.1 (1985). For this and other cases concerning indigenous peoples in the Americas see S.H. Davis, *Land Rights and Indigenous Peoples: The Role of the Inter-American Commission on Human Rights* (1988).

<sup>30</sup> See D.A. Brading, *Classical Republicanism & Creole Patriotism: Simon Bolivar (1783–1830) & the Spanish Revolution* (CUP, Cambridge, 1983) p.16.



## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

them the right to form sovereign states.<sup>31</sup> Interestingly, they were keen to distinguish this right from one of a civil struggle, insisting rather, that it be considered as one of international war.<sup>32</sup> This is particularly relevant to our current study since it can be argued that while Latin American independence from Spain was achieved outside the rubric of civil liberties and human rights, modern struggles over territory and their governance are integral to the growing relevance of human rights and humanitarian law.<sup>33</sup> Latin American decolonisation can thus be argued as being a triumph for notions of territoriality over considerations of identity, since the Creoles used their ties to the territory as overriding any emotional attachment they might have had to the mother country from which their parents first emerged: a situation markedly different from modern manifestations of decolonisation.<sup>34</sup>

The first threat faced by the new regimes in Latin America was that of renewed European conquest.<sup>35</sup> To be able to harvest the fruits of the independence struggle, the Creoles sought a way to buttress themselves in law against renewed European interest in what they saw as 'their' lands. Within the continent it was necessary to build geographical parameters of the new state into its constitution, in order to forestall territorial disputes that might arise between themselves.<sup>36</sup> The process was coupled with attempts to foster co-operation between the states by agreeing to forge regional pacts for defence and co-operation.<sup>37</sup>

---

<sup>31</sup> Alvarez (1909), *supra* note 25 at p. 275.

<sup>32</sup> Alvarez *ibid.*

<sup>33</sup> Issues concerning land rights within the UN system either come under the auspices of the Fourth Committee on Decolonisation, before the Human Rights Committee claiming violations of articles 1 and/or 27 of the International Covenant on Civil and Political Rights, 1966, or before the International Court of Justice when concerned with strict territorial disputes between states.

<sup>34</sup> For an understanding of the motivating factors for the Creole action see T. Franck 'The Emerging Right to Democratic Governance', 86 (1) *AJIL* (1992) pp. 1–46. In the UN decolonisation process the closest to such an equivalent would be the attempt by the Ian Smith regime in then Rhodesia to seize power from the British. For the deep legacy of the land rights question in Zimbabwe see *Re S. Rhodesia* [1919] A.C. at 233–34 (Eng.), where the English Court of Appeals' application of *terra nullius* to indigenous peoples was based on '... some native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them"'.

<sup>35</sup> See Alvarez (1909) *supra* note 25.

<sup>36</sup> This can be seen in numerous Latin American constitutions, see the Constitution of El Salvador 1981. Referred to in the *El Salvador/ Honduras Case (Nicaragua Intervening)* (1992) *ICJ Reports* 357.

<sup>37</sup> For an analysis of the early discussions in this context see J.L. Kunz, 'Guatemala v Great Britain: in *Re Belice*', 40(2) *American Journal of International Law* (1946) pp. 383–390; also 'The First Pan-American Scientific Congress', 2(3) *American Political Science Review* (1908) pp. 441–443 in *News and Notes*; C.G. Fenwick 'The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro' in 36(2) *American Journal of International Law* (1942) pp. 169–203; W. Manger 'The Pan American Union at the Sixth International Conference of American States' in 22(4) *American Journal of International Law* (1928) pp. 764–775.

Arguably, the most significant ramification of Creole action is the further development of the Roman law doctrine of *terra nullius* and its expression in the international sphere. This development sought to prevent the acquisition of territory by Europeans in Latin America by way of a legal mechanism that has been consolidated as a principle within international law.<sup>38</sup> While the concept of *terra nullius* was not new to international law at that point, it had not constricted Imperial states in their quest to acquire overseas territories though existing international norms of the time did not necessarily recognise the principle of occupation of already occupied territory,<sup>39</sup> it was nonetheless subject to the power dynamic of expansionism. In addition, by way of justification these Powers occupied lands where there was no ‘recognisable’ form of government, even if in *strictu sensu* these lands were not *terra nullius* in that they had inhabitants upon them. It was the ‘failure’ of the incumbents to organise themselves into units ‘recognisable’ to colonists that left a margin for the creative interpretation of the norm. This, in addition to the pressure being exerted by the adversarial quest for territory between rival colonial powers, effectively determined the nuance attached to the interpretation of *terra nullius* and left indigenous territories vulnerable in ‘law’ to annexation. Thus the prime utility of the principle of *terra nullius* simply lay, at the time, in the identification by the international community of the geographic space available for its occupation and colonisation. However in declaring that all Latin American territories were considered occupied territory the Creoles made some salient points that directly challenged and undermined the international perception of *terra nullius*.

First, they implied that all territory within the continent, whether viewed from an internal continent-wide perspective or from an external perspective was under the guise of an existing sovereign power.<sup>40</sup> This claim is essentially one of ‘effective control’ over territory. It can be categorically proven that many of the new states did not, in fact, exercise effective jurisdiction to the extent of the territory claimed within their respective boundaries.<sup>41</sup> By insisting that all territory within Latin America came under the auspices of sovereign states, the Creoles were clearly misrepresenting their situation since many of the tribes of the interior had never paid allegiance to any specific government.

The second important point within the Creole declaration of independence relates to their selective view of personal liberty. Although they claimed their actions were an extension of their individual personal liberty, they did not feel the need to include other groups within the continent in the process. Modelled upon the

<sup>38</sup> As discussed by Alvarez (1909) *supra* note 25, at p. 278.

<sup>39</sup> See R. Jennings & A. Watts, *Oppenheim’s International Law* 9<sup>th</sup> edition, Volume I Parts 2–4 (Longman, London, 1992) pp. 661–716.

<sup>40</sup> This claim is also part of the Monroe Doctrine, see generally C.E. Hughes ‘Observations on the Monroe Doctrine’ 17(4) *American Journal of International Law* (1923) pp. 611–628.

<sup>41</sup> For a similar discussion *vis-à-vis* African states see R.H. Jackson, ‘Juridical Statehood in Sub-Saharan Africa’ 46 *Journal of International Affairs* (1992) pp. 17–30.

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

virtues of the Westphalian state,<sup>42</sup> they believed that the most suitable strategy for state building<sup>43</sup> on the new continent was to accept the administrative boundaries created by the Spanish and to leave them uncontested. This action had the prime purpose of preserving order,<sup>44</sup> and although the new states continued to hold claims against each other these claims were nevertheless subject to a general belief that the borderlines drawn by Spain (and Portugal in the case of Brazil) were sacrosanct.<sup>45</sup>

The general impact of this doctrine on indigenous peoples has already been discussed in various legal fora.<sup>46</sup> However it is worth reiterating that the doctrine itself was largely unproblematic. If a territory was blank it could conceivably be open to claims. For some, such claims could be addressed through a process of adverse possession,<sup>47</sup> in other systems claims could be lodged through a process of formal accession of title deeds.<sup>48</sup> In either situation the accessing of property that was bereft of owners is a reasonable one and is in keeping with the large-scale migration of peoples that are significant to human history.

The corruption of the doctrine lies in the manner of its interpretation and this was already discernible in its application in Roman law. As captured effectively by Judge Ammoun in a dissenting opinion to the Western Sahara Case, it was first interpreted to render all non-Roman territory as *terra nullius*, thus implying that

---

<sup>42</sup> For text of the Peace of Westphalia see <[www.yale.edu/lawweb/avalon/westphal.htm](http://www.yale.edu/lawweb/avalon/westphal.htm)>.

<sup>43</sup> For an enunciation of the notion of state building see K. Deutsch & W. Foltz, *Nation Building* (Atherton Press, New York, NY, 1963).

<sup>44</sup> 'Order' as defined by Hedley Bull consists of an arrangement of life that promotes given goals and values. The three things he lists as being essential towards this are: security against violence, assurance of maintenance of promises and stable possession of things. See *Anarchical Society: A Study of Order in International Society* (1995) p. 4.

<sup>45</sup> See for instance 'In the Matter of the Arbitration of the Boundary Dispute between the Republics of Costa Rica & Panama Provided by the Convention between Costa Rica and Panama of March 17<sup>th</sup> 1910', 8(4) *American Journal of International Law* (1914) pp. 913–941.

<sup>46</sup> *Mabo v. Queensland*, 107 A.L.R. (1992); also see M. Legg 'Indigenous Australians & International Law: Racial Discrimination, Genocide and Reparations', 20 *Berkeley Journal of International Law* (2002) 387; G.D. Meyers & J. Mugambwa 'The Mabo Decision: Australian Aboriginal Land Rights in Transition', 23 *Environmental Law* (1993) 1203. Comments on the case can be found in *Essays on the Mabo Decision* (1993); Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence', 19 *Melbourne University Law Review* (1993) 195; Julie Cassidy, Observations on *Mabo v Queensland*, 1 (1) *Deakin Law Review* (1994) 37. Also P. Butt & R. Eagleson, *Mabo, Wik & Native Title* (3d ed. 1998) (providing a plain English explanation of the Court's reasoning). The text of J. Brennan's reasoning in this case was central to the overturning of 200 years of precedent.

<sup>47</sup> For a manifestation of doctrine in English municipal law see J.B. Ames, *Lectures on Legal History* (Harvard Press, Cambridge, MA, 1913); F. Pollock & F.W. Maitland, *History of English Law* Vol.2 (CUP, Cambridge, 1898) pp. 29–80; and H. Ballantine, 'Title by Adverse Possession' 32 *Harvard Law Review* (1918-19) pp. 135–159.

<sup>48</sup> For a general discussion of land law and concepts related to it see L. Tee (ed.), *Land Law: Issues, Debates, Policy* (2002).

JOSHUA CASTELLINO

none other than Roman law could create legitimacy and title bearing rights. This was modified in the nineteenth century when tribes who were considered ‘uncivilised’ were denied the right to populate territory; *i.e.* the land on which they subsisted would still be considered *terra nullius* despite their presence.<sup>49</sup> The evidence of this claim is especially visible in the naked aggression of Imperial Powers in their quest for territory in Africa;<sup>50</sup> and is avidly captured in the treatment of indigenous peoples’ territory – the ramifications of which are central to the sustenance of an effective modern regime for the protection of indigenous interests.<sup>51</sup>

Essentially, the international legal position on *terra nullius* is epitomised by the Judgement in the Western Sahara Case. Two questions were addressed to the Court:

Was the Western Sahara (Rio de Oro and Saket El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?

If the answer to the first question is in the negative,

What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?<sup>52</sup>

To the first question the Court determined that the territory of the Western Sahara was not *terra nullius* before the arrival of the Spanish on the grounds that:

In the Western Sahara, at the time of the Spanish colonisation, the nomadic tribes of the region were clearly organised politically and socially under chiefs competent to represent them.<sup>53</sup>

This would seem to favour the indigenous Saharan tribes existing on the territory; however notwithstanding this, the Judgment ruled, with reference to the second question, that a link existed between these tribes and the Sherifian State (the precursor to modern Morocco).<sup>54</sup> This finding was subsequently used by the late

---

<sup>49</sup> See Dissenting Opinion of Vice President Ammoun (1975) *ICJ Reports*, p. 98. Also see *Pleadings CR.75/19* pp. 2–23.

<sup>50</sup> See generally L.H. Gann & P. Duignan (eds.), *Colonialism in Africa 1870–1960* (CUP, Cambridge, 1969) Vol.1; J.E. Flint ‘Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa’, in S. Forster, W.J. Mommsen & R. Robinson (eds.), *Bismarck, Europe, and Africa* (OUP, Oxford, 1988) and especially J.D. Hargreaves ‘The Making of the Boundaries: Focus on West Africa’, A.I. Asiwaju (ed.), *Partitioned Africans* (Hurst & Co., London, 1985) pp. 19–27.

<sup>51</sup> See S.J. Anaya & R.A. Williams Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 *Harvard Human Rights Journal* (2001) pp. 33–86.

<sup>52</sup> *ICJ Reports* (1975) p.6.

<sup>53</sup> *Ibid.* p.39 para 81.

<sup>54</sup> *Ibid.*, at p.40, para. 84. For a discussion of the merits of this decision see J. Castellino, *International Law & Self-determination* (M. Nijhoff, the Hague, 2000) pp. 233–252; also see M. Shaw ‘The Western Sahara Case’, 44 *British Yearbook of International Law* (1978) 118

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

King Hassan to justify the Green March by Moroccans into the desert upon the vacating of the territory by the Spanish.<sup>55</sup> Thus the damage caused by the doctrine of *terra nullius* on indigenous land rights can be effectively summarised by reference to the inherent racism through which it was interpreted; and the greed of the Powers that sought to nullify and extinguish inherent rights in the face of their own possessory interdicts.

### THE DOCTRINE OF UTI POSSIDETIS

Unlike the principle of *terra nullius*, the doctrine of *uti possidetis* was framed with the objective of guaranteeing the rights of existing stakeholders to the land.<sup>56</sup> It basically posits 'that new States will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power'.<sup>57</sup>

The centrality of 'order' to the propagation of international law cannot be underestimated.<sup>58</sup> While Hugo Grotius did not refer to the norm of *uti possidetis*, in *De Pacis Juris Bella*,<sup>59</sup> his tacit support for it can be gleaned from his emphasis on the concept of order – which he considered a prime requirement within international law.<sup>60</sup> The doctrine traces its roots directly to *jus civile* in the Roman law norm of *uti possidetis ita possidetis* which forms the basis of the modern doctrine. This possessory interdict was available to the Praetor to prevent the 'disturbance of the

---

and T. Franck 'The Stealing of the Sahara', 70 *American Journal of International Law* (1978) 694.

<sup>55</sup> See generally J. Chopra, *UN Determination of the Western Saharan Self* (Justus Forlag, Oslo, 1994); T. Hodges, *Western Sahara: The Roots of a Desert War* (Lawrence Hill, Westport, 1987).

<sup>56</sup> M.N. Shaw 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 *British Yearbook of International Law* (1996) pp. 75–154 at 78; See generally, S. Ratner 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90 *American Journal of International Law* (1996) pp. 590–624; K.H. Kaikobad 'Some Observations on the Doctrine of Continuity and Finality of Boundaries' 49 *British Yearbook of International Law* (1983) pp. 119–141.

<sup>57</sup> Shaw (1996) *supra* note 56, at p. 97.

<sup>58</sup> For a general reading on the importance of order see Rosemary Foot, John Lewis Gaddis & Andrew Hurrell (eds.), *Order & Justice in International Relations* (OUP, Oxford, 2003).

<sup>59</sup> For a general discussion on the influence of Grotius on international relations see Bull H., Kingsbury B., & Roberts A., (eds.), *Hugo Grotius and International Relations* (OUP, Oxford, 1990).

<sup>60</sup> See R. Higgins, 'Grotius and the Development of International Law During the United Nations Period', in Bull, Kingsbury & Roberts (eds.), (1990), *ibid.* pp. 267–280. This is notwithstanding the fact that Grotius expressly recognised the right to resistance (*jus resistendi ac secessionis*) for oppressed people. See Neuberger B., *National Self-Determination in Postcolonial Africa* (L. Rienner Publishers, Boulder, Colo., 1986) p. 4.

existing state of possession of immovables as between two individuals'.<sup>61</sup> Thus, it was a tool to promote and maintain order.<sup>62</sup> Translated, it reads, 'as you possess, so you possess'. Thus according to *jus civile*, the object of the interdict was to recognise the *status quo* in a given situation involving immovable property such as land: and was designed to protect existing arrangements of its possession without regard to its merits. Nevertheless, possession had to be acquired from the other party *nec vi, nec clam, nec precario*, i.e. without force, secrecy or permission.<sup>63</sup> These restrictions on the acquisition of prescriptive claims in general were developed to ensure that the *de facto* possessor exercised his/her claim to the property as of right and was thereby open to challenge by other interested parties.

When applied to an international dispute over territory, the doctrine reduces a situation of conflict over territory to one that could take place between two individuals. In the course of this process it treats the issue of their dispute, i.e. the territory, as the *de facto* as well as *de jure* legal possession of the current occupier. Another feature of the doctrine is that it does not seek to differentiate between the *de facto* and the *de jure*. Rather, it confers temporary possessory rights upon the *de facto* holder in the event of a dispute. It suffices to emphasise the crux of the original norm: that it prevented further aggravation over a particular possession by assuming that the title of the immovable property belonged to its incumbent, and in turn, negated the case of the aspirant to possession. The result was that territorial disputes between sovereigns were resolved by legalising the possession of the *de facto* occupier. Thus the occupier continued to exercise sovereignty over the land, ostensibly dismissing the claim of the aspirant as being disruptive of the peace. This was a clear departure from the Roman law *diktat* since under that system, rather than rejecting the claim of the aspirant, it merely *estopped* the dispute until the claim could be analysed. In this sense, it could be seen as a doctrine that kept the possessory aspect of the territory in abeyance while the aspirant's claim could be examined. It was only for the duration of the process that it legitimised continued occupation by the possessor in the interest of order.<sup>64</sup>

With its clear emphasis on the maintenance of order, the doctrine of *uti possidetis* provided modern international law with an ideal conduit to restrict conflict and consolidate the *de facto* situation following hostilities. This facilitated a conclusion of hostilities without redress and reassessment of the relative merits of each side. From the point of view of dispute settlement, it had the added benefit of

---

<sup>61</sup> See J.B. Moore, 'Memorandum on *Uti Possidetis*: Costa Rica-Panama Arbitration 1911', *The Collected Works of John Bassett Moore* (1944) p. 328, as quoted in Shaw (1996), *supra* note 56, at p. 98.

<sup>62</sup> In the late Republic, the Praetor *Urbanus* was responsible for the administration of *jus civile* and the Praetor *Peregrinus* held the same position with regard to *jus gentium*. See generally, J Muirhead, *Historical Introduction to the Private Law of Rome* (A & C Black Ltd., London, 1916).

<sup>63</sup> See H.F. Jolowicz & B. Nicholas (1972) *supra* note 13, at p. 259 and also Muirhead, *supra* note 62, at p. 11, and pp. 315–339.

<sup>64</sup> See Shaw (1996) *supra* note 56, at 106.

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

ignoring other, more difficult to determine, sources of difference *e.g.* tribal affiliations or social cohesion, in determining the territorial demarcations.<sup>65</sup> Rather it would suffice to achieve the end of hostilities by a simple decision to allow the aggressor continued possession of territory gained by belligerent occupation, conquest (or otherwise), and for the *status quo* to be maintained from that point onwards. Of course, in theory this would lead to a continuously available process, which ultimately legitimised violence and occupation by force. Thus a crucial restriction to the doctrine being used to justify this process was the emphasis laid on the notion of the 'critical date',<sup>66</sup> or the point at which the territorial dimensions of an entity would be considered crystallised.<sup>67</sup> Therefore the doctrine of *uti possidetis*, when combined with the notion of a rigid critical date, ultimately yielded a process that was believed to support the preconditions necessary for order.<sup>68</sup>

The salient effect of the doctrine is best captured in the Judgment of the International Court of Justice in the *Burkina Faso-Mali Case*:

the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries may be no more than delimitation between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>69</sup>

What was of grave importance was the single point in time at which this boundary was constructed, since no subsequent change would be recognised unless it had the consent of the incumbent powers. It can be compellingly argued that all boundaries are constructions and are artificial in and of themselves.<sup>70</sup> In that sense one approach towards resolution would be to examine the manner in which some of these critical dates were formed and to test their validity based on a plethora of other international violations such as, for instance, the signature of acquisitory treaties that were

---

<sup>65</sup> As can be seen in several ICJ Cases *see* J. Castellino & S. Allen, *supra* note 15, at pp.119-155.

<sup>66</sup> L.F.E. Goldie, 'The Critical Date', 12 *International & Comparative Law Quarterly* (1963) pp. 1251.

<sup>67</sup> Frontier Dispute (*Burkina Faso v. Republic of Mali*) *ICJ Reports* (1986) p. 554, p. 586.

<sup>68</sup> For a general reading on Spanish conquest in the Americas *see* B.B. Pastor, *The Armature of Conquest: Spanish Accounts of the Discovery of America 1492-1589* (translated from Spanish by Longstreth) (Stanford University Press, Stanford, 1992) and *See* M. Picon-Salas, *A Cultural History of Spanish America from Conquest to Independence* (California University Press, Berkeley, 1962).

<sup>69</sup> *See* Frontier Dispute *ICJ Reports* (1986) at p. 586.

<sup>70</sup> S.W. Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (Columbia University Press, New York, 1980) especially at pp. 74-94. Also *see* S. Reeves, 'International Boundaries', 38 *American Journal of International Law* (1944) p. 533-545.

patently unequal between the coloniser and the indigenous community.<sup>71</sup> However, any attempt to redress and question these notions comes up against the intertemporal rule of law.

Once again, as in the case of the principle of *terra nullius*, it can be argued, on the face of it, that the doctrine of *uti possidetis* itself is relatively unproblematic. The justification of it is easy to see: especially in the context of the return to peace after cessation of hostilities. In addition the greatest merit of the doctrine lies in the importance given to the consent of the parties to the dispute, to a settlement that deviates from the *status quo*. While there is little doubt that such consent involves difficult negotiations, it is certainly preferable that such negotiations do take place, rather than resolutions through force. Most crucially in the context of indigenous peoples land rights, it could be argued that had this doctrine functioned effectively from the start, indigenous land rights would have been adequately protected. The grant of *de facto* possessory rights to the existing holders of territory would have precluded annexation by colonial powers and would have seen legitimacy properly ascribed to existing populations, in denial of *terra nullius*.

However the emphasis on ‘possession’ from the Roman law precept remained central to the political development of the concept, and in addition to indigenous personality not being recognised upon the territories on which they subsisted, was added the failure to recognise possessory aspects in their behaviour towards the land. Indeed it can be argued that this was the central feature towards the interpretation of indigenous territory as *terra nullius*: the fact that while peoples may have existed on the land, the relationship they exercised towards it was not enough to suggest individual ownership *i.e.* title generating activity.

## CHALLENGES WITHIN INTERNATIONAL LAW: ICJ JURISPRUDENCE

The ICJ provides an important lens through which the interpretation of the doctrines in international law can be viewed. Access to the Court itself is fraught with insurmountable limitations for indigenous peoples; not least of which is the fact that it can only be accessed by state parties.<sup>72</sup> Thus the cases before the Courts have been of an inter-state nature, though in several of them the issues of *uti possidetis* and *terra nullius* have been discussed in great detail.<sup>73</sup> While the *Western Sahara Case*,

---

<sup>71</sup> See C.H. Alexandrowicz, ‘The Role of Treaties in the European-African Confrontation in the Nineteenth Century’ in *African International Legal History* Mensah-Brown, A.K. (ed.), (1975) pp. 27–68, pp.61–63.

<sup>72</sup> For a general reading on the issue of the ICJ see Shabati R., *Intervention in the International Court of Justice* (Kluwer Publishers, Dordrecht, 1993).

<sup>73</sup> Nine different cases are reviewed in Chapter V of J. Castellino & S. Allen *supra* note 15, at pp. 119-155. In addition see also Rann of Kutch Arbitration, 50 *ILR* (1968) p. 407; Dissenting Opinion Bebler; Dubai-Sharjah Case, 91 *ILR* (1981) p. 543; Frontier Dispute (Burkina Faso v. Republic of Mali) *ICJ Reports* (1986); Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras Case) *ICJ Reports* (1992) p. 351; Case Concerning the Territorial Dispute (Libyan Jamahiriya v. Chad) *ICJ Reports* (1994) p. 4; Sep. Op.



## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

which directly used the terminology of *terra nullius* was about the future of a territory which was at the time, not in full possession of either of the claimants to it,<sup>74</sup> in other cases the territory is usually already in the possession of a state: a presence not always deemed *de jure*.<sup>75</sup> In terms of the doctrine of *uti possidetis*, a strict reading suggests that the incumbent within the territory would continue to hold title in the interim until the opponent establishes the legal basis for their own claim. This situation was reflected in the *Belgium Netherlands Case of 1959*,<sup>76</sup> where attention focussed around the findings of the Mixed Boundary Commission that sought to preserve the *status quo*. In seeking final dispensation for the territory, the Court set out the premise that sovereignty over the territory was held by Belgium, as established by the Mixed Commission set up to examine the issue at the time, and then sought to examine whether there was proof of an extinguishment of this sovereignty since then.<sup>77</sup>

One issue pointed out by Bekker in his commentary on some of the cases is that the concept of 'title' is used widely in international legal cases; however, its actual meaning remains indeterminate.<sup>78</sup> In the context of ICJ cases the best elaboration of the concept comes by way of a statement in the *Frontier Dispute Case (1986)* where title was deemed as:

generally not restricted to documentary evidence alone, but comprehends both any evidence which may establish the existence of a right, and the actual source of that right.<sup>79</sup>

This statement is accurate in reflecting the obscurity that the question of title to territory represents in modern international law, though it remains inadequate as an explanation of clear legal intent. To examine the explanation further, it can be isolated as representing the factors examined below, which are of particular importance to claims of indigenous peoples in territorial claims.

---

Ajibola; and Cukwurah A.O., *The Settlement of Boundaries in International Law* (Manchester University Press, Manchester, 1967) pp.102–155, pp.190–99.

<sup>74</sup> The two claimants at the time were Morocco and Mauritania. Spain had accepted its need to decolonise and the Saharawis represented by the Polisario were not allowed to be represented in proceedings.

<sup>75</sup> For instance Nigerian 'occupation' of the Bakassi Peninsula or the occupation of Northern Cyprus leading to the 'Turkish Northern Republic of Cyprus'. For a historical precedent see the situation concerning Manchukuo in D.J. Harris, *Cases & Materials in International Law* (Sweet & Maxwell, London, 1998) p.109.

<sup>76</sup> Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands) 20 June 1959 *ICJ Reports* (1959) pp. 209–258.

<sup>77</sup> A summary of the case is available at <[www.icj-cij.org](http://www.icj-cij.org)>.

<sup>78</sup> See P.H.F Bekker, *Commentaries on World Court Decisions (1987-1996)* (M. Nijhoff, The Hague, 1998).

<sup>79</sup> *ICJ Reports* (1986) p. 565, para. 18.

(i) *Title is not restricted to documentary evidence*

Pleadings to the cases before the ICJ concerning title to territory often devote an inordinate amount of time towards ‘proving ownership’ over a particular territory. With not every claimant being able to produce evidence that could satisfy the strict needs of being ‘documentary’, states have relied extensively on various kinds of documents of an external nature that they claim show them as owning or possessing a certain tract of territory or demonstrating respect from others to the notion that they possess certain tracts of land.<sup>80</sup> The fact that first and foremost, the Court has engaged this material at all suggests that it believes a certain internal validity can be assuaged through the respect of a frontier externally. Second, the fact that it has examined this ‘documentary evidence’ against specific norms of law suggests that the measurement of a title can be gauged against objective legal criteria. This is problematic at best, owing to a number of factors, such as, the power dynamic present in unequal treaties signed by colonial powers with the colonised;<sup>81</sup> the treaties signed between colonial powers designating spheres of influence,<sup>82</sup> the difficulty of gauging effective control over territory claimed by documents<sup>83</sup> and the differences in culture and tradition that were often misrepresented in cultural anthologies of different territories and peoples.<sup>84</sup> Nonetheless, when a dispute over territory occurs and the Court is called upon to adjudicate, it needs to ensure that the evidence, in these cases usually the ‘facts’ presented, are verifiable. As a result, the Court is forced to give credence to evidence of a documentary nature and in verifying this evidence, the Court needs to subjectively ascertain its resonance.

(ii) *Evidence that may establish existence of a right*

When dealing with the treatment of territory, the Court has sought out ‘reliable’ evidence. However, it is difficult to understand the parameters of evidence that ‘may establish the existence of a right’. While not questioning the need for evidence in these proceedings, the Court seems willing to engage issues of a historical nature, the history of which is bitterly contested by the parties in the first place.<sup>85</sup> As a result the Court has often been left badly exposed in terms of verifying the details of non-

---

<sup>80</sup> For instance Moroccan justifications in the *Western Sahara Case* see *ICJ Reports* (1975) p. 49, paragraph 108.

<sup>81</sup> See generally, I. Brownlie, *Treaties and Indigenous Peoples* (Clarendon Press, Oxford, 1992).

<sup>82</sup> For further discussion of this issue see S. E. Crowe, *Berlin West-African Conference* (Longmans Green, London, 1942). Documents also available at <[www.yale.edu/lawweb/avalon/avalon.htm](http://www.yale.edu/lawweb/avalon/avalon.htm)>.

<sup>83</sup> Contrast the writing of Jackson (1992) *supra* note 41, with S. Grovogui, (1996) *supra* note 12.

<sup>84</sup> See D. Hart, ‘The Tribe in Modern Morocco: Two Case Studies’ in Gellner, (1972) *supra* note 26, pp. 425.

<sup>85</sup> See J. Castellino & S. Allen (2003) *supra* note 15, at pp. 152-154

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

documentary evidence *per se*.<sup>86</sup> When this is added to the fact that the evidence requested for proof of title ought to establish existence of a right, we have a further clouding over of issues. The fact remains that in many of the cases before the ICJ, the evidence presented by both sides seems equally compelling. This is particularly true in the context of the Advisory Opinion on the *Western Sahara Case* where both Mauritania and Morocco produced different kinds of evidence to support their respective territorial claim to the Western Sahara.<sup>87</sup> The fact that the Court based its decision with regards to the links between the two entities and the territory on factors that could be considered dubious, suggests that it is extremely difficult to produce evidence of the establishment of a right.<sup>88</sup> This was also true in the Frontier Dispute Case where in seeking to examine the evidence establishing a right in this particular case the court was forced to engage the issue of *colonial effectivités*.<sup>89</sup>

### (iii) *The sources of rights*

The Court seems to have engaged in the rights discourse without necessarily laying down the parameters of what it anticipates this to entail. When it talks about the sources of rights for instance, there remains ambiguity as to exactly what this entails. In the *Western Sahara Case*, Morocco sought to prove its title to territory by demonstrating exercise of internal sovereignty.<sup>90</sup> One such issue was the appointment of *caids*<sup>91</sup> – which was advanced as an important factor in proving the role and influence of the Sultan over the region.<sup>92</sup> Similar argumentation was embarked upon with regard to the presence and activities of the Masubian people and their title-generation capacities in the context of the *Kasiliki Sedudu Case*.<sup>93</sup> While not examining the merits of either of these arguments, it is suggested that they have their sources in religion, tradition and culture and their different interpretations. However, the task of determining the sources of other rights presented in the various cases are difficult when not all sources may be as well established as the notion of religion.<sup>94</sup> What is clear though is that the World Court is willing to engage

---

<sup>86</sup> This is true in the Libya-Chad case as well as the Burkina Faso Mali Case, *ibid.* pp.137-140 & 125-130.

<sup>87</sup> J. Castellino, (2000) *supra* note 54, pp. 263–267.

<sup>88</sup> *Supra* note 54.

<sup>89</sup> *ICJ Reports* (1986) p. 586 paragraph 63. Also see the related concept of French colonial law as discussed in Libya-Chad, namely that of *droit d'outre-mer* in *ICJ Reports* (1986) p. 568 paragraphs 29–30.

<sup>90</sup> See *ICJ Reports* (1975) pp. 45–49.

<sup>91</sup> *Caids* are religious representatives of the Sultan among various tribes. See *ICJ Reports* (1975) p.45.

<sup>92</sup> *Ibid.*, p. 45

<sup>93</sup> *Case Concerning Kasikili/Sedudu Island* (Botswana/Namibia) 13 December 1999 *ICJ Reports* (1999) Also available at <[www.icj-cij.org/icjwww/idocket/ibona/ibonaframe.htm](http://www.icj-cij.org/icjwww/idocket/ibona/ibonaframe.htm)>.

<sup>94</sup> For instance see the argument advanced in a dissenting opinion by Judge Ammoun in the context of nomadism and its importance in the Western Sahara Case *ICJ Reports* (1975) pp. 83–101.

arguments with regard to alternative displays of ownership and usage and this in itself needs highlighting in the context of indigenous peoples' claims to territory.

Another issue worthy of comment is the notion of colonial law or *colonial effectivités* as it was deemed in the *Burkina Faso-Mali Case*.<sup>95</sup> As defined in the case, this pertains to the 'conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period'.<sup>96</sup> Thus the principle of *colonial effectivités* has formed an important tool for the explication of the doctrine of *uti possidetis*. The relationship between the two concepts is intricate: while *colonial effectivités* represents 'title to territory' under colonial law, it sets in place limits to this jurisdiction, which are subsequently protected by the doctrine of *uti possidetis* on the withdrawal of the colonial power. Thus, it can be categorically stated that proof of *colonial effectivités*, in the face of a failure of the parties to come to any other agreement by consent, essentially informs the sanctifying and ossifying of colonial boundaries within international law.<sup>97</sup>

The Libya-Chad case establishes that application of colonial law is the determining factor in the delimitation of the *uti possidetis* line within territories.<sup>98</sup> Yet a similar argument made in the *Kasiliki Sedudu Island Case* with respect to an administrative agreement between the Caprivi authorities and those in Bechuanaland was not considered as being indicative of an agreement.<sup>99</sup> Another sub-issue that emerges from case law is that the doctrine of *uti possidetis* is, essentially, a retrospective doctrine that applies after the event. In this sense it needs to be flagged as being subject to all the features that retrospection in law generates. Yet the doctrine of *uti possidetis* seems unproblematic when applied without this question being considered. Once again, the over-riding reason for this is state's consent to its use. A third sub-issue concerns the notion of whether *colonial effectivités* was as extensive and exclusive territorially, as was often claimed. This is usually the underlying sentiment in many cases where modern post-colonial entities seek to argue that the *uti possidetis* line varies since the colonial power could not demonstrate its occupation of some of the border regions.<sup>100</sup>

Thus *colonial effectivités* itself is open to criticism on a number of grounds, especially in the context of an expression of indigenous rights to territory. Different states in which indigenous peoples live have interpreted their legal doctrine in different ways. Kingsbury identifies five competing conceptual structures for the perpetuation of indigenous peoples' claims in international and comparative law.<sup>101</sup> These are extremely helpful since they reveal the range of arguments that attach

<sup>95</sup> *ICJ Reports* (1986) pp. 554–651.

<sup>96</sup> *ICJ Reports* (1986) at p. 586 para.63.

<sup>97</sup> For more on this discussion see Castellino & Allen (2003) *supra* note 15, at pp.154-155.

<sup>98</sup> Especially in the context of the discussion of *droit d'outrre-mer* in *ICJ Reports* (1986) p. 568, paragraphs 29–30.

<sup>99</sup> See J. Castellino & S. Allen (2003) *supra* 15, at pp. 143-144.

<sup>100</sup> As in *Territorial Dispute (Libya v Chad)* see *ICJ Reports* (1994) pp. 6–41; also see J. Castellino & S. Allen (2003) *supra* note 15, at pp.137-140.

<sup>101</sup> B. Kingsbury (2001) *supra* note 4.

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

themselves to the relationship between existing legal doctrine within a state and its application to the rights of indigenous peoples. Weissner's detailed study on the range of jurisdictions in which these issues have been examined is also interesting for its breadth on the subject, and reveals the different approaches that exist in state parties treatment of indigenous peoples rights.<sup>102</sup>

Having analysed the two major doctrinal tools that have been used to colonise territories and wrest title to land from indigenous peoples the rest of the analysis is devoted to how self-determination can be used as a tool to help peoples who, in spite of decolonisation, still remain dispossessed and marginalized within their own territories.

### SELF-DETERMINATION: A WORKING HYPOTHESIS

A central assumption to highlight, in light of the above, is the nuance of self-determination itself. Towards this the following is proposed as a given:

1. The right, initially expressed in the American and French revolutions at the end of the eighteenth century, was considered as one of guaranteeing democratic consent within an entity. Wilsonian interpretation applied it to minorities, with a view to giving them a choice of political lineage, determined through plebiscites.<sup>103</sup>
2. Self-determination reappeared in the UN era as it became the vehicle of choice for decolonisation.<sup>104</sup> Three options were identified in clarification of its parameters in decolonisation namely: a) secession to form a new state; b) association with an existing state; c) integration into an existing state.<sup>105</sup>
3. The transformation from political tenet to legal norm was arguably completed with its expression as the first human right in the Covenants

---

<sup>102</sup> S. Wiessner 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', 12 *Harvard Human Rights Journal* (1999) p.57.

<sup>103</sup> For more on this issue see R.S. Baker & W.E. Dobbs, (eds.), *The Public Papers of Woodrow Wilson* (Harper, New York, 1925-1927). Also see A. Whelan 'Wilsonian Self-determination and the Versailles Settlement', 43 *International & Comparative Law Quarterly* (1994) 99.

<sup>104</sup> As evidenced by three general Assembly Resolutions on the subject namely *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960* UNGAOR 1514 (XV); UN GAOR 1541 (XV); and *Declaration on the Principles of International Law Governing Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970* UN GAOR 2625 (XXV).

<sup>105</sup> See UN GAOR 1541 (XV); For a commentary on self-determination within the United Nations see H. Gros-Espiell, 'The Right to Self-determination: Implementation of United Nations Resolutions' (1980) UN Doc. E/CN.4/Sub.2/405/Rev.1; A. Cristescu, 'The Right of Self-determination: Historical and Current Developments on the Basis of United Nations Instruments' (1981) UN Doc. E/CN.4/Sub.2/Rev.1; R. Emerson, *Self-determination Revisited in the Era of Decolonisation* (Harvard University Press, Cambridge, MA, 1964).

## JOSHUA CASTELLINO

of Human Rights in 1966 though the land rights element of the right was not made explicit.<sup>106</sup>

4. The 1970 General Assembly Declaration (GAOR 2625) sought to enshrine this legal norm into a guiding principle of the United Nations, though it is clear that the context for that document remained traditional colonisation.<sup>107</sup>
5. Vital questions remain as to: i) whether it has validity in a post-decolonisation<sup>108</sup> phase; ii) who is entitled to self-determination as currently expressed; and iii) the extent to which the availability of appropriate solutions temper the appropriateness of the legal norm.<sup>109</sup>

In addition the following direct constraints can be identified for the principle of self-determination *vis-à-vis* its application in the context of the land rights of indigenous peoples:

1. Its expression in human rights law;
2. Its expression in public international law;
3. The legal entitlements of ‘peoples’, ‘indigenous peoples’ & ‘minorities’ to this right; and,
4. The difficulties with the ‘means’ for expressing self-determination.

Many arguments pertaining to indigenous peoples’ self-determination start from the premise that the right ought to be applied in the same manner as in the context of colonisation.<sup>110</sup> It would therefore follow that the first task in seeking to gain self-determination as a form of decolonisation is to examine whether a group has been subjected to treatment that amounts to colonisation.<sup>111</sup> Many groups allege that the treatment meted out to them by an unrepresentative state is unfair and quasi-

---

<sup>106</sup> See D. McGoldrick *The Human Rights Committee* (OUP, Oxford, 1991); also see S. Joseph, J. Schultz & M. Castan, *The International Covenant on Civil & Political Rights: Cases, Materials and Commentary* (OUP, Oxford, 2000).

<sup>107</sup> For a general reading of the significance of the 1970 Declaration see V. Lowe & C. Warbrick (eds.), *The United Nations & the Principles of International Law: Essays in Memory of Professor Michael Akehurst* (Routledge, London, 1994).

<sup>108</sup> With ‘decolonisation’ interpreted as being European domination over non-European peoples. However even this remains problematic in the context of indigenous peoples. For a discussion of the ‘Belgian Thesis’ and its relation to indigenous peoples see Van Langenhove, ‘The Question of Aborigines Before the United Nations: The Belgian Thesis’ 89 *Rec. des Cours* (1954) 321. Also see UN Doc. A/AC.67/2 pp.3-31.

<sup>109</sup> See J. Castellino, (2000) *supra* note 54, pp. 43–44.

<sup>110</sup> See the discussion outlined by Kingsbury *supra* note 4, at pp. 216–234.

<sup>111</sup> For general commentary on the UN and decolonisation see R. Sureda, *The Evolution of the Right to Self-determination: A Study of United Nations Practice* (Sijhoff, Leiden, 1973); see also F.L. Kirgiss, ‘The Degrees of Self-determination in the UN Era’, 88 *American Journal of International Law* (1994) 304.

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

colonial, however the threshold for this would need to be considerably higher.<sup>112</sup> It could be argued that indigenous peoples have the best case of all for using the decolonisation rhetoric in their favour. Since indigenous peoples have all the rights of minorities, but in addition were deprived of their land through a process of subterfuge,<sup>113</sup> it would seem that any attempt to redress the imbalance would need to be similar to a quasi-decolonisation process. While within the UN era of decolonisation the options were straightforward: namely the creation of an independent state; free association with an existing state; or integration with a pre-existing state, these would be much more tenuous with regard to indigenous peoples. The question of strategy *vis-à-vis* implementation of these rights is arguably the stumbling block that prevents expression of the political nuance of the right of self-determination for indigenous peoples.<sup>114</sup> However as was shown in Nunavut there might be other means in which the claim to self-determination can be expressed.<sup>115</sup>

It is the contention of this paper that self-determination, including the potential option of political status determination should be made available to indigenous peoples just as it was to colonial peoples. This argument can be developed by conceptualising self-determination for indigenous peoples through an expansive analysis of the increasing jurisprudence of the Human Rights Committee<sup>116</sup> on the issue of the applicability of article 1(2).

Article 1 of the Covenants states that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-

---

<sup>112</sup> It is clear that no objective standard can be constructed as to what specific treatment could be considered 'colonial' in the modern context. However it could be argued that widespread and consistent denial of human rights law and access to justice to a territorially based indigenous population could present the basis for the identification of such a threshold.

<sup>113</sup> Namely through the conclusion of unequal treaties or through a process of using illegitimate force on territories that could not be considered *terra nullius*, and therefore not open to acquisition or annexation.

<sup>114</sup> This is also true for the ILO Convention 169. See <[www.ilo.org](http://www.ilo.org)>, see also Swepston in this volume.

<sup>115</sup> For the official website of the government of Nunavut see <[www.gov.nu.ca/](http://www.gov.nu.ca/)>.

<sup>116</sup> Henceforth HRC.

JOSHUA CASTELLINO

determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The HRC has found in favour of indigenous peoples in relation to their right to self-determination in the context of ‘subsistence’.<sup>117</sup> This approach is a significant improvement on the previous decisions on indigenous peoples issues where the Committee was extremely reluctant to engage article 1 at all.<sup>118</sup> However, by ruling that indigenous peoples might have access to self-determination under sub-article (2) and not (1) the HRC took a restrictive and conservative view. While the *travaux préparatoires* to the Covenant makes it clear that the notion of self-determination was framed in relation to colonial peoples, it would seem incongruent that the notion of peoples contained in article 1(1) would differ so radically from article 1(2). Rather, it can be argued that since indigenous peoples are recognised as a ‘people’ for the purposes of 1(2) that ought to hold also for article 1(1). That is, the applicability of 1(1) should be considered a derivative of acceptance of 1(2) and thereby made to override the political exception doctrine.<sup>119</sup> The justification for this contention is that the article as a whole was put in place to deal with the nuances of subjugated peoples.

The only permissible distinction then would be one with regards to the potential of a resolution to different situations: whereby indigenous peoples living on contiguous territory could access rights that would be different to those indigenous peoples who lived among other groups whose rights would also need to be respected. Arguably this approach would serve as a more coherent, responsive and realistic approach, in tune with the evolving nature of indigenous claims, and therefore a welcome challenge to the Committee’s conservative approach in General Comment 12.<sup>120</sup>

Folling this argument through, four models of political self-determination would be discernable:

---

<sup>117</sup> M. Scheinin (2000) *supra* note 8.

<sup>118</sup> Notably in the Mikmaq Tribal Case Comm. No. 78/1980 UN.Doc. Supp.No.40 (A/39/40) at 200 (1984).

<sup>119</sup> See D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, New York NY, 2002) pp. 22–24.

<sup>120</sup> General Comment 12 ‘The Self-determination of Peoples (Article 1)’ 13 March 1984 (21<sup>st</sup> session). See also General Comment 23 (Article 27) 8 April 1994 (50<sup>th</sup> session) and compare this to General Recommendation XXI given by the Committee for the Elimination of Racial Discrimination (CERD) entitled ‘The Right to Self-determination’ 23 August 1996 (48<sup>th</sup> session) and General Recommendation XXIII ‘Rights of Indigenous Peoples’ 18 August 1997 (51<sup>st</sup> session) (1997). These documents are available at <www.unhchr.ch>, and are also in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Monitoring Bodies*, UN Doc. HRI/GEN/1/Rev.5 of 26 April 2001, at p. 121, 147, 189 and 192.



## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

1. Political self-determination offered to territorially based indigenous people living in a contiguous zone, that includes the right of a determination of the title to the territory they inhabit;
2. Non-political self-determination to non-territorially based indigenous peoples that confer rights falling short of title to territory but guarantees access to human rights law, and seeks to address issues of personal autonomy;
3. Non-political self-determination to minorities that guarantees human rights and access to special measures but does not confer the right of self-determination in a political sense;
4. A remedial right of self-determination in the event where widespread and consistent rights denial occurs against a vulnerable group (indigenous people or minority).

It is clear that one vital consideration to this equation is an acceptance of the territorial basis of a community: since it would be nearly impossible to realign states where indigenous populations do not live in a contiguous zone. To consolidate the situation and prevent the sliding scale of claimants to this right it would also be necessary to reiterate the HRC attitude in relation to the access of minorities to this right – which is that they do not have the right to self-determination except in the remedial sense indicated in point (4) above. Thus, in the Civil and Political Rights Covenant terms, a hierarchy would develop whereby territorially based indigenous peoples would have the rights akin to a colonial peoples and would thus enjoy the full benefits of article 1 including sub-paragraph 1(1) as given by option (1) above. Meanwhile indigenous peoples who do not inhabit distinct territories would have the right of self-determination as given by article 1(2) which can be identified as resource based self-determination *i.e.* option (2) above.<sup>121</sup> By contrast minorities would only have the rights guaranteed by article 27 – which is the combination of non-discrimination and equality and the right to special measures that seek to give equal opportunities to minorities in the civil, political, as well as economic, social and cultural realm; while also entertaining notions of 'internal' self-determination where such minorities are based on contiguous territories.

This approach would make some telling differentiations. First, it would differentiate between indigenous peoples and minorities: one that is readily accepted in the literature and in law.<sup>122</sup> Secondly, it would bring indigenous peoples within the parameters of 'peoples' due to the similarities of their situation with colonial peoples, and in recognition of the dispossession of their lands which first led to the incursion and creation of non-representative sovereign states upon their territories. This is particularly appropriate since dispossession usually occurred through a process of formal law either without consent, or through consent gained by the

<sup>121</sup> This is in line with the recent HRC cases as discussed in Scheinin (2000) *supra* note 8.

<sup>122</sup> See especially T. Makkonen, *Identity, Difference and Otherness: The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law* (Eric Castren Institute, Helsinki, 2000).

subterfuge of unequal treaties that would fail to satisfy the basic tenets of a contract between two parties, never mind customary legal norms or expressions of the Vienna Convention on the Law of Treaties, 1969.<sup>123</sup>

Finally, with the strength of conviction in the norms against genocide and crimes against humanity, it could be argued that should a state pursue such an agenda as a matter of policy, a natural right to self-defence would exist for the incumbent population; and the expression of this right might well take the form of secession from the state.<sup>124</sup> Framed in these terms the right of self-determination is arguably closest to *jus secessionis ac resistendi* as expressed by Grotius in *De Jure Pacis*.<sup>125</sup> In terms of international politics, the secessions of East Timor, Eritrea and Bangladesh would arguably come within this rubric; though the former were achieved through UN organised plebiscites.<sup>126</sup>

Thus despite the weakness of self-determination as a right, it remains the only vehicle through which indigenous rights to territory can be expressed. The right itself has seen numerous changes since its early expressions, and at each *fin de siècle* it has transformed itself in its nuance as a political principle. Giving such a principle of uncertain substantive content the authority of a legal tenet was arguably fraught with danger: yet political forces bestowed it as the vehicle for expression of freedom in the face of oppression. Yet in looking towards it as a tool for modern freedom from oppression Kingsbury's warning *vis-à-vis* the future of self-determination is worth heeding:

[The] argument from decolonisation has been reinforced by practice suggesting that self-determination in the strong form as a right to establish a separate state may be an extraordinary remedy in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state . . . But the far reaching argument that self-determination in this strong form of statehood or almost complete autonomy is essential as a general precondition for human rights does not establish which groups or territories are the units of self-determination for the purposes of human rights enhancement; nor does it overcome legitimate concerns about the threats to human rights and to human security posed by repeated fragmentation and irredentism. The remedial human rights justification for self-determination, while

---

<sup>123</sup> For a general commentary on the law of treaties see A. Aust, *Modern Treaty Law and Practice* (CUP, Cambridge, 2000).

<sup>124</sup> This was the chief argument in J. Castellino, 'The Secession of Bangladesh: Setting New Standards in International Law?', 7 *Asian Journal of International Law* (2000) 83.

<sup>125</sup> For a general discussion of the framing of this right see B. Neuberger, *supra* note 60. See also H. Bull, B. Kingsbury & A. Roberts, *Hugo Grotius and International Relations* (OUP, Oxford, 1990).

<sup>126</sup> The Western Sahara Case is also scheduled for decision through a plebiscite though the decision of who is entitled to vote continues to cause much consternation. For the latest Secretary General Report available see *Report of the Secretary-General on the situation concerning Western Sahara*, 16 January 2003, S/2003/59. Newer reports will be available at <www.un.org>.

## THE 'RIGHT' TO LAND, INTERNATIONAL LAW & INDIGENOUS PEOPLES

persuasive in some cases, is most unlikely to become normal rather than exceptional unless the sovereignty and legitimacy of states declines precipitously.<sup>127</sup>

### CONCLUSION: EFFECT OF INTERNATIONAL LAW ON INDIGENOUS PEOPLE

As stated earlier, past injustices such as colonisation are protected from legal scrutiny in modern international law via the intertemporal rule of law. The rule itself needs to be commended since it would clearly be unjust to seek to project a more progressive notion of law and its underpinning morality onto the actions of the past in a bid to determine culpability. This would violate basic legal entitlements against retrospection in contradistinction to revisionist notions. While the validity of revisionist notions is being questioned in other forums,<sup>128</sup> it is not the purpose here to seek to question the rule itself, rather to demonstrate the extent to which the rule is incoherent and often applied inappropriately to situations governing the treatment of territory in modern international law. If the actions of the Imperial Powers in annexing territories in Africa in the late nineteenth century are beyond culpability because they ought to be subject to the intertemporal rule, then the temporal context of that time bears examination, and is provided by the decolonisation in Latin America. By analysing and discussing notions that concerned not only territoriality but also the manner of conquests of colonies, it could be argued that the tone had been set in customary international law at least, for the development and further solidification of norms of international law against wanton conquest and annexation of territory. Viewed from this perspective, a conclusion can be drawn that the norms that had developed and that were considered appropriate in Latin America, were disregarded on purpose in the colonisation of Africa. Indeed the situation was compounded by blatant violations of the norms governing the signing of 'treaties' as European Powers sought to challenge each other in a bid to accumulate colonies in the continent.<sup>129</sup> Further, in decolonising these territories the need for 'international' order was considered so sacrosanct that it overruled the history and geography of post-colonial entities. Rather than seeking to accommodate and negotiate with diverse peoples that happened to fall within rigidly defined frontiers, the simplistic decision to maintain colonial boundaries was taken: an attitude that was bound to have longer-term implications. The result of these actions while nearly universally

---

<sup>127</sup> B. Kingsbury, 'Restructuring Self-determination: A Relational Approach' in M. Scheinin & P. Aikio (eds) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (2000) *supra* note 8, at p. 23.

<sup>128</sup> See *Irving v Penguin Books Ltd. & D. Lipstadt* [2001] EWCA Civ 1197 (20 July 2001) available at <[www.bailii.org](http://www.bailii.org)>.

<sup>129</sup> See generally L.H. Gann & P. Duignan, (eds.), (1969) *supra* note 50; See also P. Gifford & W.R. Louis, *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (Yale University Press, New Haven, 1971); L.H. Gann & P. Duignan, *The Rulers of British Africa 1870-1914* (Croom Helm, London, 1978); J.D. Hargreaves, *West Africa Partitioned* Vol.1 (Macmillan, London, 1974).

## JOSHUA CASTELLINO

accepted by western-trained state leaders in Africa, nonetheless, failed to accommodate non-state actors who sought to gain legitimacy by seeking statehood themselves.<sup>130</sup> The result has been numerous conflicts of so-called 'post-modern tribalism',<sup>131</sup> as artificial colonial boundaries that have only been of significance for roughly fifty years (and much less in some instances) are sought to be renegotiated along more historical lines.<sup>132</sup>

While it needs to be admitted that the application of the doctrine of *uti possidetis* which sanctifies colonial boundaries does allow change in the face of consent, it is important to remember that this consent is required between existing sovereign states and thus generally rules out indigenous peoples. Non-state actors have no explicit right to demand territorial adjustment even though the right to self-determination is enshrined as the first and foremost right in the two International Covenants of 1966 that are the blue-print for the human rights regime. Thus, existing states have sought to minimise the impact of the right of self-determination by declaring it as a right that only exists in 'internal' guises.<sup>133</sup> While notions of international order are to be cherished, the offer of autonomy regimes to indigenous groups that fail to see why they should exist within an externally defined unit for the sake of the historical convenience of a colonial power, remains difficult to resolve. This can often result in aggrieved and un-represented peoples within a state seeking secession and in bid to access the international right to self-determination these groups seek to pierce the veil of domestic sovereignty and internationalise their conflicts with their respective state governments.<sup>134</sup>

Thus in terms of indigenous peoples and the right to land, the discussion usually stalls in the face of the backdrop provided above. International law is keen to guarantee order and is keen to stymie any norm that could potentially violate such order. In keeping with the process of self-determination it stresses that this should involve the accommodation of differing national identities within the confines of the

---

<sup>130</sup> This is often justified in an African context by recourse to the Cairo Declaration of 1963 which was adopted by the Heads of States of African countries. But this in itself is arguably not an effective test since it was the territorial rights of these very sovereigns that was guaranteed by the adoption of such a principle. See generally, Neuberger (1986) *supra* note 60; see also A. Mazrui, *Towards a Pax Africana: A Study of Ideology and Ambition* (Weidenfield & Nicholson, London, 1967).

<sup>131</sup> See T.M. Franck, 'Post-modern Tribalism and the Right to Secession' in C. Brölmann, R. Lefeber, & M. Zieck, (eds.), *Peoples & Minorities in International Law* (M. Nijhoff, Dordrecht, 1993) p. 3.

<sup>132</sup> See D. Wippman (ed.), *International law & Ethnic Conflict* (Cornell University Press, Ithaca, NY, 1998).

<sup>133</sup> See P. Thornberry, 'The Democratic or Internal Aspect of Self-determination with Remarks on Federalism' in C. Tomuschat (ed.), *Modern Law of Self-determination* (M. Nijhoff, Dordrecht, 1994) p. 101.

<sup>134</sup> As is occurring in several ethnic conflicts See F. De Varennes, 'Minority Rights and the Prevention of Ethnic Conflicts', (Working Group on Minorities, 6 session 22–26 May 2000). E/CN.4/Sub.2/AC.5/2000/CRP.3, available at <[www.unhchr.ch](http://www.unhchr.ch)>, See also C.O. Quaye, *Liberation Struggles in International Law* (Temple University Press, Philadelphia, 1991).

state, rather than the creation and/or dismembering of older states. Human rights instruments take up this cause: but although recognising the importance of self-determination, seem less keen to make the connection between it and the right to property in deference to state parties. Indeed the attempt to enshrine this within the International Covenants was effectively sacrificed in the discussion between East and West. Thus human rights instruments stress the availability of rights to all; and are willing to make special concessions to indigenous peoples – but are reluctant for these concessions to take on the mantle of the title to territory. From an indigenous peoples' perspective, self-determination often has to include some manifestation of the relationship of the community to the territory, and more importantly the relationship of settlers *vis-à-vis* that same territory. While the general growth of enfranchisement of indigenous peoples within the UN and most states systems is commendable, it remains akin, in many cases, to the granting of full franchise to members living within a colonial setting. For a fully acceptable solution to the situation the underlying basis of the self-determination claim needs to be addressed.

But the constraints to such an address remain clear: populations that have settled upon the territory have claims too. The state often acts in the interest of these settler claims; and it is the state that consents to human rights law in the name of its inhabitants. The frustration of this particular debate has resulted in the stalling of several important legal documents within the UN system,<sup>135</sup> within regional settings<sup>136</sup> and also in the context of other organisations.<sup>137</sup> The stalling point remains the issue of land rights and while important case law is being developed on the subject<sup>138</sup> this tends to occur within domestic rather than international settings.<sup>139</sup>

<sup>135</sup> Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994 at pp. 105–115; also reprinted in 34 *International Law Materials* (1995) 541 and available at <www.unhchr.ch>. See S. Wiessner, 'The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People', 13 *St. Thomas Law Review* (2000) p. 383. For a general discussion see P. Thornberry, *Indigenous Peoples & Human Rights* (Juris Publishing, Manchester, 2002) pp. 370–396.

<sup>136</sup> See the *Proposed American Declaration on the Rights of Indigenous Peoples* approved by the Inter-American Commission on Human Rights at its 133<sup>rd</sup> session, 26 Feb. 1997, OEA/Ser.L/V/II.9, doc.7, rev. 1997; see also P. Thornberry, *Ibid.*, pp. 397–404.

<sup>137</sup> For a commentary on developing standards at the World Bank *vis-à-vis* Indigenous Peoples see F. MacKay, 'Universal Rights or Universe Onto Itself? Indigenous Peoples' Human Rights and the World Bank's draft Operational Policy 4.10', 17 *American University International Law Review* (2002) p. 527; see also *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 5 Sept. 1991, 169 ILO 1989 especially articles 13–17.

<sup>138</sup> For a relatively wide comparison of developments see S. Wiessner, (1999) *supra* note 102; see also I. Sansani, 'American Indian Land Rights in the Inter-American System: Dann v. United States', 10 *Human Rights Briefs* (2003) 2, and O. Kreimer, 'Indigenous peoples' Right to Land, Territories and natural Resources: A Technical meeting of the OAS Working Group', 10 *Human Rights Briefs* (2003) 13.

<sup>139</sup> This has been demonstrated by some of the case studies in this volume. Despite this there have been numerous significant achievements at the regional level particularly within the

JOSHUA CASTELLINO

Thus we remain a considerable way from being able to address the issue of land rights within international and human rights law, though rather than this being a clash of ideology, as it was in the negotiation of the International Bill of Rights, it is a clash between the Old World and the New – and the mechanism for the address of this remains central to the protection, promotion and propagation of indigenous rights and identity.

---

Inter-American system. For more on this *see* S. J. Anaya, 'Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001) 33.

## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

*William A. Schabas\**

Although it takes on a range of meanings in colloquial usage, the term ‘genocide’ as employed in a legal sense has a precise meaning and is defined in a universally recognised text. Article II of the *Convention for the Prevention and Punishment of the Crime of Genocide (Convention or Genocide Convention)*, adopted by the United Nations General Assembly on 9 December 1948, says:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>1</sup>

Often criticised as being too narrow and restrictive, either because of the limited scope of the groups it protects or the exhaustive list of punishable acts, the *Convention* definition has nevertheless stood the test of time. It is repeated without significant change in the statutes of the two *ad hoc* tribunals for the former Yugoslavia<sup>2</sup> and Rwanda,<sup>3</sup> established by the United Nations Security Council in 1993 and 1994 respectively, and in the *Rome Statute of the International Criminal Court*, adopted in 1998 and in force since 2002.<sup>4</sup> The scores of countries that have enacted crimes of genocide in their domestic criminal codes have, with only a few

---

\* Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights.

<sup>1</sup> 78 UNTS (1951)277. On the *Convention* generally, see W. A. Schabas, *Genocide in International Law* (Cambridge University Press, Cambridge, 2000).

<sup>2</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), annex, art. 4.

<sup>3</sup> Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1993), annex, art. 2.

<sup>4</sup> Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, art. 6.

exceptions, satisfied themselves with repeating the *verbatim* text of article II of the *Convention*. Any deviation is very much the exception that confirms the rule.<sup>5</sup>

There have been frequent suggestions over the years that the *Convention's* definition of genocide should be extended to cover political, social, economic and other groups.<sup>6</sup> However at the time it was adopted in 1948 the intent of its drafters did not include such a broad range of criteria, but rather the already well-recognised concept in international law then known as 'national minorities'. The man who first proposed the term 'genocide', Raphael Lemkin, in his 1944 book *Axis Rule in Occupied Europe*, called for the development of 'provisions protecting minority groups from oppression because of their nationhood, religion, or race'.<sup>7</sup> In its first genocide conviction, in August 2001, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed that this should be the scope of the term 'national, ethnical, racial or religious group' that appears in article II of the *Convention*: 'The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what were recognised, before the second world war, as "national minorities", rather than to refer to several distinct prototypes of human groups.'<sup>8</sup> The Tribunal explained:

National, ethnical, racial or religious group are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous. European instruments on human rights use the term 'national minorities', while universal instruments more commonly make reference to 'ethnic, religious or linguistic minorities'; the two expressions appear to embrace the same goals. In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F. Capotorti commented that 'the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word "racial" by the word "ethnic" in all references to minority groups described by their ethnic origin'. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. The preparatory work on the Genocide Convention also reflects that the term 'ethnical' was added at a later stage in order to better define the type of

---

<sup>5</sup> See, e.g., *Penal Code* (France), *Journal officiel*, 23 July 1992, art. 211-1.

<sup>6</sup> See F. Chalk and K. Jonassohn, 'The Conceptual Framework', in F. Chalk and K. Jonassohn (eds.), *The History and Sociology of Genocide*, (Yale University Press, New Haven and London, 1990) pp. 3-43; B. Whitaker, Revised and updated report on the question of the prevention and punishment of the crime of genocide, UN Doc E/CN.4/Sub.2/1985/6.

<sup>7</sup> R. Lemkin, *Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress*, (Carnegie Endowment for World Peace, Washington, 1944) pp. 93-94.

<sup>8</sup> *Prosecutor v. Krstic* (Case no. IT-98-33-T), Judgment, 2 August 2001, paragraph 556.



## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

groups protected by the Convention and ensure that the term 'national' would not be understood as encompassing purely political groups.<sup>9</sup>

Aboriginal and indigenous peoples are not, of course, properly described as 'national minorities' or, to use the more contemporary term, 'ethnic, religious or linguistic minorities'. But the inadequacies of international law in terms of the protection of aboriginal and indigenous peoples have to some extent been compensated for with reference to such provisions as article 27 of the *International Covenant on Civil and Political Rights*,<sup>10</sup> a core text in this respect and a norm whose import has been described by the Human Rights Committee as one of customary international law.<sup>11</sup> Several of the leading cases dealing with the application of article 27 are in fact based upon attacks on the human rights of aboriginal and indigenous peoples.<sup>12</sup>

As with the norms that contemplate national, ethnic, linguistic and religious minorities, those instruments that prohibit genocide and define it as an international crime provide potent norms for the protection of the rights of aboriginal and indigenous peoples. Indeed, the attempt by German colonisers to destroy the Herero people of Namibia is often cited as the first genocide of the twentieth century,<sup>13</sup> a grisly prelude to the horrors that befell the Armenians in the Ottoman empire, the Jews and Gypsies of Nazi Germany, and the Tutsi of Rwanda. It is one of the great ironies of history that the German colonial official responsible for subduing the Herero was the father of Nazi leader Herman Goering, himself convicted of crimes against humanity by the International Military Tribunal at Nuremberg in 1946.<sup>14</sup> When the Herero rebelled in 1904, the German military commander sent to quell the uprising, General Lothar Van Trotha, ordered: 'Within the German boundaries, every Herero, whether found with or without a rifle, with or without cattle, shall be shot . . .'. Of the 80,000 Herero on the territory at the time, fewer than 20,000 survived.<sup>15</sup> Writers have attempted to develop arguments supporting application of the *Genocide Convention* to the situation of aboriginal populations, notably those in

---

<sup>9</sup> *Prosecutor v. Krstic*, *supra* note 8, paragraph 555 (references omitted).

<sup>10</sup> *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 171.

<sup>11</sup> *General Comment 24 (52)*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, paragraph 8.

<sup>12</sup> *Lovelace v. Canada* (No. 24/1977), UN Doc. CCPR/C/OP/1, p. 83; *Lubicon Lake Band (Bernard Ominayak) v. Canada* (No. 167/1984), UN Doc. CCPR/C/38/D/167/1984, U.N. Doc. A/45/40, Vol. II, p. 1; *Kitok v. Sweden* (No. 197/1985), UN Doc. A/43/40, p. 221; *O. Sara et al. v. Finland* (No. 431/1990), UN Doc. A/49/40, Vol. II, p. 257.

<sup>13</sup> L. Berat, 'Genocide: The Namibian Case Against Germany', *5 Pace Int'l L. Rev.* (1993) 165.

<sup>14</sup> J. Bridgman & L. J. Worley, 'Genocide of the Hereros, Eyewitness Accounts', in S. Totten, W. S. Parson and I. W. Charny (eds.), *Genocide in the Twentieth Century, Critical Essays and Eyewitness Accounts*, (Garland Publishing, New York and London, 1995) pp. 3–48.

<sup>15</sup> A. Hochschild, *King Leopold's Ghost*, (Houghton Mifflin, Boston, 1998) p. 282.

North<sup>16</sup> and South America.<sup>17</sup> Robert Hitchcock provides a list of ‘some cases’ of genocides of indigenous peoples, most of them conducted in the second half of the twentieth century; there are thirty-four entries.<sup>18</sup> Two of the more compelling charges of genocide in recent years, those relating to the destruction of Mayan communities in Guatemala and the forced transfer of a ‘stolen generation’ of aboriginal children in Australia, involve attacks directed at aboriginal groups.

In 1999, the Guatemalan Commission for Historical Clarification concluded genocide had been committed against the Mayan people by the country’s armed forces from 1981–1983, during a time of civil war. The Commission documented practices that consisted of razing of villages, destruction of property, including collectively worked fields, and burning of harvests. These left the communities without food. In the opinion of the Commission, this amounted to deliberate infliction of conditions of life ‘that could bring about, and in several cases did bring about, its physical destruction in whole or in part’,<sup>19</sup> an act of genocide explicitly prohibited by article II(c) of the *Convention*. According to the Commission:

122. In consequence, the [*Commission for Historical Clarification*] concludes that agents of the State of Guatemala, within the framework of counterinsurgency operations carried out between 1981 and 1983, committed acts of genocide against groups of Mayan people which lived in the four regions analysed. This conclusion is based on the evidence that, in light of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the killing of members of Mayan groups occurred (Article II.a), serious bodily or mental harm was inflicted (Article II.b) and the group was deliberately subjected to living conditions calculated to bring about its physical destruction in whole or in part

---

<sup>16</sup> C. C. Tennant and M. E. Turpel, ‘A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-determination’, 59–60 *Nordic J. Int’l L.* (1990–91) 287; R. Strickland, ‘Genocide-at-law: An Historic and Contemporary View of the North American Experience’, 34 *U. Kansas L. Rev.* (1986) 713; M. C. Bassiouni, ‘Has the United States Committed Genocide Against the American Indian?’, 9 *California Western Int’l L. J.* (1979) 271; W. Churchill, *A Little Matter of Genocide, Holocaust and Denial in the Americas, 1942 to the Present*, (City Lights Books, San Francisco, 1997); J. Bridgman and L. J. Worley, ‘Genocide of the Hereros, Eyewitness Accounts’, *supra* note 14; T. M. Twedt, ‘Physical and Cultural Genocide of Various Indigenous Peoples’, in S. Totten, W. S. Parson and I. W. Charny, *supra* note 14, pp. 372–407.

<sup>17</sup> R. Arens, ‘The Ache of Paraguay’, in J. N. Porter, *Genocide and Human Rights, A Global Anthology* (University Press of America, Lanham/New York/London, 1982) pp. 218–237; R. Arens, *Genocide in Paraguay*, (Temple University Press, Philadelphia, 1976).

<sup>18</sup> R. K. Hitchcock, ‘Genocide of Indigenous Populations’, in I. W. Charny (ed.), *Encyclopedia of Genocide*, (Denver and Oxford ABC-CLIO, Santa Barbara, California, 1999) pp. 349–354, at p. 350.

<sup>19</sup> *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations*, Conclusions, paragraphs 116–118, <[www.hrdata.aas.org/ceh/report/english/toc.html](http://www.hrdata.aas.org/ceh/report/english/toc.html)> (consulted 28 January 2003). See J. Perlin, *The Guatemalan Historical Clarification Commission Finds Genocide*, 6 *ILSA J. Int’l & Comp. L.* (2001) 389.

## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

(Article II.c). The conclusion is also based on the evidence that all these acts were committed ‘with intent to destroy, in whole or in part’ groups identified by their common ethnicity, by reason thereof, whatever the cause, motive or final objective of these acts may have been (Article II, first paragraph).<sup>20</sup>

The Inter-American Commission on Human Rights has declared admissible a petition alleging genocide in Guatemala in 1982.<sup>21</sup>

In 1997, the Australian Human Rights and Equal Opportunities Commission concluded that the Australian practice of forcible transfer of indigenous children to non-indigenous institutions and families violated article II(e) of the *Genocide Convention*.<sup>22</sup> According to its report, ‘[t]he Inquiry’s process of consultation and research has revealed that the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture . . . Removal of children with this objective in mind is genocidal because it aims to destroy the “cultural unit” which the Convention is concerned to preserve’.<sup>23</sup> Australian judges have resisted admitting that genocide took place in Australia, although they have not hesitated to recognise the persecution and suffering of the country’s aboriginal peoples since the beginnings of English colonisation. For example, in *Nulyarimma v. Thompson*, Justice Wilcox of the Federal Court of Australia wrote:

5. Anybody who considers Australian history since 1788 will readily perceive why some people think it appropriate to use the term ‘genocide’ to describe the conduct of non-indigenes towards the indigenous population. Many indigenous Peoples have been wiped out; chiefly by exotic diseases and the loss of their traditional lands, but also by the direct killing or removal of individuals, especially children. Over several decades, children of mixed ancestry were systematically removed from their families and brought up in a European way of life. Those Peoples who have been deprived of their land, but who nevertheless have managed to survive, have lost their traditional way of life and much of their social structure, language and culture.

6. Not surprisingly, this social devastation has led to widespread (although not universal) community demoralisation and loss of individual

---

<sup>20</sup> *Ibid.*, paragraph 122.

<sup>21</sup> *Plan de Sanchez Massacre* (Case no. 11.763), Report No. 31/99, 11 March 1999, in *Annual Report of the Inter-American Commission on Human Rights*, O.A.S. Doc. OEA/Ser.L/V/II.102, Doc. 6, p. 132.

<sup>22</sup> Australian Human Rights and Equal Opportunities Commission, *Bringing them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, pp. 270–275, <[www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen)> (consulted 28 January 2003).

<sup>23</sup> *Ibid.*

## WILLIAM A. SCHABAS

self-esteem, leading in turn to a high rate of alcohol and drug abuse, violence and petty criminality followed by imprisonment and, often, suicide. Many (not all) communities suffer substandard housing, hygiene and nutrition, leading to prevalent diseases that are rarely experienced by non-indigenous communities. The result of all this, as numerous studies have demonstrated, is that indigenous Australians face health problems of a different order of magnitude to those of other Australians, leading to an expectancy of life only about two-thirds that of non-indigenous people.<sup>24</sup>

But Justice Wilcox confirmed that genocide had taken place in Australia, although he treated it as a somewhat isolated and marginal phenomenon:

[I]t is of the essence of the international crime of genocide that the relevant acts be intended to destroy, in whole or in part, a national, ethnical, racial or religious group. Some of the Australian destruction clearly fell into this category. A notable example is the rounding up of the remaining Tasmanian Aboriginals in the 1830s, and their removal to Flinders Island. There are more localised examples as well. Before that date in Tasmania, and both before and after that date on the Australian mainland, there were shooting parties and poisoning campaigns to 'clear' local holdings of their indigenous populations.

Justice Wilcox was sceptical that it would be possible to demonstrate these actions were part of a general plan intended to destroy the aboriginal peoples of Australia.

### **'CULTURAL' GENOCIDE AND THE CONVENTION**

Probably the principal legal difficulty facing those who seek to enforce the rights of aboriginal and indigenous peoples by invoking the provisions of the *Genocide Convention* is establishing that the punishable acts fit within those listed in article II. The list of five acts of genocide is an exhaustive one, as the rejection of various attempts to expand it over the years makes quite clear.<sup>25</sup> With the exception of the

---

<sup>24</sup> *Nulyarimma v. Thompson*, [1999] FCA 1192, 165 ALR 621 (per Wilcox J.). See also *Re Thompson; Ex parte Nulyarimma*, 136 ACTR (1998) 9; *Kruger v. Commonwealth*, 190 CLR (1997) 1. On the Australian cases, see M. Legg, 'Indigenous Australians and International law: Racial Discrimination, Genocide and Reparations', 20 *Berkeley J. Int'l L.* (2002) 387; B. Saul, 'The International Crime of Genocide in Australian Law', 22 *Sydney L. Rev.* (2000) 527; A. D. Mitchell, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v. Thompson*, [1999] 165 A.L.R. 621', 24 *Melbourne U.L. Rev.* (2000) 15; D. Guilfoyle, '*Nulyarimma v. Thompson*: Is Genocide a Crime at Common Law in Australia?', 29 *Fed. L. Rev.* (2001) 1; M. Flynn, 'Genocide: It's a Crime Everywhere. But Not in Australia', 29 *U. Western Australia L. Rev.* (2000) 59.

<sup>25</sup> For the debate in the Sixth Committee of the General Assembly at the time the *Convention* was being adopted, see U.N. Doc. A/C.6/SR.78. For more recent consideration of transforming the list from an exhaustive to an indicative one, see *Yearbook. 1991*, Vol. I, 2239th meeting, p. 214, paragraphs. 7–8; *ibid.*, 2251st meeting, pp. 292–293, paragraphs 9–

## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

fifth act of genocide – forcibly transferring children from one group to another – the *Convention* appears to be limited to acts of what are known as physical and biological genocide. A recent ruling of the German Constitutional Court,<sup>26</sup> as well as an *obiter dictum* of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia,<sup>27</sup> suggest that the law may be evolving so as to broaden the prohibition on genocide to include acts more properly described as ‘cultural genocide’.

There are many ways to destroy a national, ethnic, racial or religious group, of which extermination camps like those at Auschwitz-Birkenau, Treblinka and Belzec are only one. It is also possible to destroy a group by prohibiting its language, or by eliminating its traditional economy, or by a multitude of means falling short of actual physical elimination whose consequence is loss of identity by a people. The *chapeau* of article II of the *Convention* requires that a perpetrator of genocide have the ‘intent to destroy’ a protected group. But it does not specify the type of destruction. Obviously, this covers physical extermination. But does it also cover other means of destruction that ensure the disappearance of a group although by means that strike at its culture, its language and its economy rather than its physical or biological existence?

The drafters of the *Genocide Convention* meant to confine its scope to physical and biological genocide. At various stages in the process of negotiating the text, they debated whether to include ‘cultural genocide’ alongside physical and biological genocide. Advocates of a narrow approach argued that cultural genocide was more properly addressed under the rubric of minority rights in other human rights instruments, like the *Universal Declaration of Human Rights*, whose preparation was contemporaneous to that of the *Convention*, in the Third Committee of the General Assembly.<sup>28</sup> The opponents of including cultural genocide carried the day in the Sixth Committee of the General Assembly, which voted to exclude cultural genocide from the *Convention*.<sup>29</sup> Several delegations indicated that they had considered the possible application of the *Convention* to the situation of aboriginal and indigenous peoples within their borders. For example, Sweden noted that the fact it had converted the Lapps to Christianity might lay it open to accusations of cultural genocide.<sup>30</sup> New Zealand argued that even the United Nations might be

---

17; Report of the Commission to the General Assembly on the work of its forty-third session, A/CN.4/SER.A/1991/Add.1 (Part 2), p. 102, paragraph (2).

<sup>26</sup> *Nikolai Jorgic, Bundesverfassungsgericht* [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99.

<sup>27</sup> *Prosecutor v. Krstic, supra* note 8, paragraph 580.

<sup>28</sup> GA Res. 217 A (III), UN Doc A/810. But the minority rights clause in the draft declaration was dropped and did not appear in the final version: W. A. Schabas, ‘Les droits des minorités: Une déclaration inachevée’, in *Déclaration universelle des droits de l’homme 1948-98, Avenir d’un idéal commun*, (La Documentation française, Paris, 1999), pp. 223–242.

<sup>29</sup> UN Doc. A/C.6/SR.83.

<sup>30</sup> *Ibid.* (Petren, Sweden).

liable to charges of cultural genocide, because the Trusteeship Council itself had expressed the opinion that ‘the now existing tribal structure was an obstacle to the political and social advancement of the indigenous inhabitants’.<sup>31</sup> South Africa endorsed the remarks of New Zealand, insisting upon ‘the danger latent in the provisions of article III where primitive or backward groups were concerned’.<sup>32</sup>

The initial draft of the *Genocide Convention*, prepared by the United Nations Secretariat in 1947, referred, in the *chapeau* of article II, to acts committed ‘with the purpose of destroying [the group] in whole or in part, or of preventing its preservation or development’.<sup>33</sup> This phrase was followed by a list involving physical acts, such as killing, biological acts, such as sterilisation or compulsory abortion, and ‘destroying the specific characteristics of the group’ by such measures as prohibiting the national language.<sup>34</sup> The *chapeau* of the final text of the *Convention* uses the word ‘destroy’, but does so without reference to ‘preventing preservation or development’. Moreover, it eliminates the reference to ‘destroying the specific characteristics of the group’. The list of acts of genocide in article II of the *Convention* is considerably shorter than what appears in the original Secretariat draft. One of them, forcibly transferring children, is all that remains of the cultural genocide provisions in the early version. And it was added as an exception to the general exclusion of cultural genocide, on a proposal from Greece, made long after the notion of cultural genocide had been definitively rejected.<sup>35</sup> Greece successfully argued that even States opposed to cultural genocide did not necessarily contest inclusion of forcible transfer of children.<sup>36</sup>

Yet if the *travaux* attest to the exclusion of cultural genocide, a literal reading of the text can certainly support an alternative, broader interpretation. The *Convention* does not say that genocide is committed *by* one of the five prohibited acts, that is, that a perpetrator must intend to destroy a group *by* killing, causing serious bodily or mental harm, inflicting harsh conditions of life, imposing measures to prevent births and forcibly transferring children. The text of article II says that genocide is perpetrated if one of those five acts is committed by a person with the intent to destroy the group. In other words, it can be argued that a person who intends to destroy a group by means that fall short of physical extermination, but who kills members of the group in so doing, or commits one of the other four prohibited acts, falls within the parameters of the definition of the crime.

This view is supported by recent rulings of the German courts, in cases involving prosecution related to the war in Bosnia and Herzegovina. According to

<sup>31</sup> U.N. Doc. A/C.6/SR.83 (Reid, New Zealand). Referring to U.N. Doc. A/603, concerning Tanganyika.

<sup>32</sup> U.N. Doc. A/C.6/SR.83 (Egeland, South Africa). See also U.N. Doc. A/C.6/SR.64 (Egeland, South Africa).

<sup>33</sup> R. Lemkin himself, in the book that initially proposed the term genocide, attached great importance to its cultural aspects. See R. Lemkin, *supra* note 7, pp. 84–85.

<sup>34</sup> UN Doc E/447, pp. 5–13.

<sup>35</sup> UN Doc A/C.6/242.

<sup>36</sup> UN Doc A/C.6/SR.82 (Vallindas, Greece).

## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

one judgment, the ‘intent to destroy’ set out in the *chapeau* of article II of the *Convention* need not be to destroy the group physically. It is sufficient to put the group in a situation likely to result in its destruction.<sup>37</sup> In a ruling issued in December 2000, the Federal Constitutional Court said that:

the statutory definition of genocide defends a supra-individual object of legal protection, *i.e.* the *social* existence of the group . . . [T]he intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group.<sup>38</sup>

These words were cited with considerable sympathy the following August by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia when it held that the Srebrenica massacre of July 1995 could be described as genocide. Nevertheless, the Trial Chamber felt that such a progressive approach might offend the principle *nullum crimen sine lege*:

[D]espite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.<sup>39</sup>

The question to be asked is whether it is now desirable that the definition of genocide move from the *lex lata* articulated by the Trial Chamber in *Krstic* to the *lex ferenda* proposed by the German Constitutional Court in *Jorgic*. Certainly, the broader interpretation supported by the German Constitutional Court and viewed with sympathy by the judges of the International Criminal Tribunal for the former Yugoslavia will permit a broader range of violations of the human rights of aboriginal and indigenous peoples to fall within the scope of the *Genocide Convention*.

### STATE PLAN OR POLICY

Another issue that has taken on significance in genocide litigation concerning aboriginal and indigenous peoples is whether or not evidence need be produced that the crimes were committed as part of a State plan or policy. For example, the

---

<sup>37</sup> *Kjuradj Kusljic*, *Bayerisches Oberstes Landesgericht*, 15 December 1999, 6 St 1/99, appeal dismissed: *Kjuradj Kusljic*, *Bundesgerichtshof* [Federal Court of Justice], 21 February 2001, BGH 3 Str 244/00.

<sup>38</sup> *Nikolai Jorgic*, *supra* note 26, paragraph (III)(4)(a)(aa).

<sup>39</sup> Cited in *Prosecutor v. Krstic*, *supra* note 8, paragraph 580.

Guatemalan Commission for Historical Clarification considered it necessary to demonstrate the existence of a plan to exterminate Mayan communities that obeyed a higher, strategically planned policy, manifested in actions which had a logical and coherent sequence.<sup>40</sup> The Australian authorities, although they have tended to frame the issue as one of intent, also suggest that this is a concern. Recent judgments of the International Criminal Tribunal for the former Yugoslavia establish that a State plan or policy is not an element of the crime of genocide, although of course evidence of its existence will help to establish the intent to destroy a group.

In *Prosecutor v. Jelusic*, the prosecution evidence indicated that over a two-week period the accused was the principal executioner in the Luka camp, in northwest Bosnia. Jelusic was shown to have systematically killed Muslim inmates, as well as some Croats. The victims were essentially all of the Muslim community leaders. Jelusic was charged with genocide as both an accomplice and as a principal perpetrator. Examining the evidence, the Trial Chamber, presided by Judge Claude Jorda, concluded that the Prosecutor had failed to prove the existence of any general or even regional plan to destroy in whole or in part the Bosnian Moslems. It said that Jelusic could in no way be an accomplice to genocide if in fact genocide was never committed by others. It concluded there was insufficient evidence of the perpetration of genocide in Bosnia in the sense of some planned or organised attack on the Moslem population.<sup>41</sup>

After dismissing the charge of complicity, the Trial Chamber turned to whether or not Jelusic could have committed genocide acting alone, as the principal perpetrator rather than as an accomplice. This Trial Chamber said it was 'theoretically possible' that an individual, acting alone, could commit the crime, although in the result, Jelusic was also acquitted as a principal perpetrator. But the Trial Chamber's approach is authority for the proposition that genocide may be committed without any requirement of an organised plan or policy of a State or similar entity. According to the Trial Chamber:

The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the *ad hoc* committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they

---

<sup>40</sup> *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations*, Conclusions, *supra* note 19, paragraph 120.

<sup>41</sup> *Prosecutor v. Jelusic* (Case no. IT-95-10-T), Judgment, 14 December 1999, paragraph 98.



## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

did not discount the possibility of a lone individual seeking to destroy a group as such.<sup>42</sup>

This pronouncement was endorsed on appeal:

The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.<sup>43</sup>

Referring to its ruling in *Jelisić*, the Appeals Chamber recently declared that there is also no plan or policy element for crimes against humanity.<sup>44</sup>

### COMPETENT COURTS FOR GENOCIDE PROSECUTIONS

Despite authority for the claim that genocide was committed against Mayan peoples in Guatemala and aboriginal children in Australia, these cases have not resulted in prosecutions. There was litigation in Australia directed at initiating genocide prosecutions, despite the failure of Australia to introduce implementing legislation for the *Genocide Convention*. Australia's courts refused to allow this litigation to proceed without a genocide provision in the country's criminal law statutes. Their conservative conclusion may be regrettable, from the standpoint of the enforcement of human rights norms and challenging impunity, but it cannot be said that it is unreasonable as a matter of common law. The real failing in Australia was legislative; the judges merely confirmed the fact that the country's parliament had not implemented fully the obligations assumed under the *Convention*, which Australia had ratified as early as 1949, being the second country to do so.

The fact that these two relatively well-documented cases of genocide continue to go unpunished is a breach of international norms to prevent and punish the crime of genocide. In its advisory opinion on reservations to the *Genocide Convention*, the International Court of Justice wrote:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims

---

<sup>42</sup> *Ibid.*, paragraph 100.

<sup>43</sup> *Prosecutor v. Jelisić* (Case no. IT-95-10-A), Judgment, 5 July 2001, paragraph 48. The Appeals Chamber's *obiter dictum* was followed in *Prosecutor v. Sikirica et al.* (Case no. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, paragraph 62.

<sup>44</sup> *Prosecutor v. Kunarac et al.* (Case no. IT-96-23 & IT-96-23/1-A), Judgment, 12 June 2002, fn. 114.

WILLIAM A. SCHABAS

of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation.<sup>45</sup>

In *Nulyarimma*, Justice Wilcox of the Australian Federal Court said:

I accept that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogatable obligation by each nation State to the entire international community. This is an obligation independent of the Convention on the Prevention and Punishment of the Crime of Genocide. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also, that the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law.

Legislative failure to implement the *Genocide Convention* is not so significant when the acts of genocide constitute killing, or causing serious bodily harm, or imposing conditions of life calculated to destroy the group. These acts are crimes under most criminal law systems, even if they are not described as genocide. But the act of forcibly transferring children from one group to another is less likely to be contemplated by a national criminal code. Indeed, it is likely that when it takes place, as in the Australian context, it is actually authorised by law and pursuant to legislation. But as a general rule, impunity for genocide is not so much a result of legislative inadequacy as it is one of political will, or the lack of it.

Article VI of the *Genocide Convention* says that the crime is to be prosecuted by ‘a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’. The formulation of this Article is the result of an unfortunate compromise, because the very reason for the *Convention* was that the States where the crime took place failed to punish it, and there was no international penal tribunal, nor would there be one for more than four decades. Ideally, the *Convention* would have authorised the prosecution of genocide even when committed outside the territory of the State, or by persons having no bonds of nationality with it; in other words, according to the principle of universal jurisdiction. The draft resolution on genocide submitted to the General

---

<sup>45</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] ICJ Reports 16, p. 23 (quoted in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, [1996] ICJ Reports 226, paragraph 31). See also Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, paragraph 45.

## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

Assembly in 1946 that launched the process leading to adoption of the *Convention* had lamented the fact that ‘punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern’.<sup>46</sup> The first draft of the *Convention*, submitted by Saudi Arabia, proposed that the crime should attract universal jurisdiction: ‘Acts of genocide shall be prosecuted and punished by any State regardless of the place of the commission of the offence or of the nationality of the offender, in conformity with the laws of the country prosecuting.’<sup>47</sup> Similarly, the initial draft, prepared by the United Nations Secretariat, stated: ‘The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.’<sup>48</sup>

The United States of America was opposed to universal jurisdiction for genocide. Its delegate to the negotiations said that ‘[t]he principle of universal punishment was one of the most dangerous and unacceptable of principles’.<sup>49</sup> Other great powers, notably the Soviet Union<sup>50</sup> and France,<sup>51</sup> also rejected the idea. The Sixth Committee of the General Assembly voted rather convincingly to exclude universal jurisdiction from the *Genocide Convention*, by twenty-nine to six with ten abstentions.<sup>52</sup> Nevertheless, over the years since adoption of the *Convention* in 1948, there has been considerable judicial support for the view that genocide is a crime subject to universal jurisdiction,<sup>53</sup> as well as no shortage of favourable academic opinion,<sup>54</sup> and a growing body of national practise, in the form of enabling

---

<sup>46</sup> UN Doc. A/BUR/50.

<sup>47</sup> UN Doc. A/C.6/86.

<sup>48</sup> UN Doc. E/447, pp. 5–13, art. VII. *See also* UN Doc. E/AC.25/8.

<sup>49</sup> UN Doc. A/C.6/SR.100.

<sup>50</sup> Basic Principles of a Convention on Genocide, UN Doc. E/AC.25/7, Principle IX.

<sup>51</sup> UN Doc. E/AC.25/SR.7, p. 9.

<sup>52</sup> UN Doc. A/C.6/SR.100. Six in favour, twenty-nine against, with ten abstentions.

<sup>53</sup> *A.-G. Israel v. Eichmann*, 36 ILR (1968) 5 (District Court, Jerusalem), paragraphs 20–38; *A.-G. Israel v. Eichmann*, 36 ILR (1968) 277 (Israel Supreme Court), paragraph 12; *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the Indication of Provisional Measures, 13 September 1993, [1993] ICJ Reports 325, Separate Reasons of Judge *ad hoc* Lauterpacht; *Prosecutor v. Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 62; *Nikola Jorgic*, *supra* note 26.

<sup>54</sup> *See, e.g.*, T. Meron, ‘International Criminalisation of Internal Atrocities’, 89 *Am. J. Int’l L.* (1995) 554, p. 569; International Law Commission, Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, 2000, p. 5.

legislation.<sup>55</sup> The recent ruling of the International Court of Justice, in the *Arrest Warrant case*, resurrects some of the hesitations about the legitimacy of universal jurisdiction for the crime of genocide.<sup>56</sup>

Universal jurisdiction has generated more heat than light, and while widely recognised in theory, it has not amounted to very much in practice. Although there have been a few celebrated affairs – Eichmann, Pinochet – as a general rule, for both political and practical reasons, States are reluctant to prosecute cases in which they have no direct interest. Perhaps the most stunning case is that of the Cambodian ‘genocide’. When, in June 1997, the United States believed it would be able to arrest Khmer Rouge leader Pol Pot and deliver him to a State willing to prosecute, it failed to interest Canada, Spain, the Netherlands and Israel in the case.<sup>57</sup> Canada has also declined to prosecute a Rwandan genocide suspect, although it has been willing enough to accuse him of the crime and to attempt to expel him from the country.<sup>58</sup>

There are better prospects for genocide prosecutions before the International Criminal Court, established pursuant to the *Rome Statute*, which entered into force on 1 July 2002. The Court became fully operational early in 2003, with the election of its eighteen judges and the Prosecutor.<sup>59</sup> It has jurisdiction over the crime of

---

<sup>55</sup> On the new German legislation, see G. Werle and F. Jessberger, ‘International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law’, 13 *Criminal Law Forum* (2002) pp.191-223. F. Jessberger, ‘Prosecuting International Crimes in Domestic Courts: A Look Back Ahead’, 12 *Finnish YB Int’l L.* (2001) pp.281-304. For Canada’s universal jurisdiction legislation: *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

<sup>56</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 15 February 2002. See especially Separate opinion of President Gilbert Guillaume, pp. 5–6; Individual opinion of Francisco Rezek; Declaration of Raymond Ranjeva.

<sup>57</sup> E. Becker, ‘U.S. Spearheading Effort to Bring Pol Pot to Trial’, *New York Times*, 23 June 1997, p. A1; ‘Editorial: A Trial for Pol Pot’, *New York Times*, 24 June 1997, p. A18; A. DePalma, ‘Canadians Surprised by Proposal to Extradite Pol Pot’, *New York Times*, 24 June 1997, p. A10; B. Crossette, ‘Beijing Says it Won’t Go Along with Creation of Pol Pot Tribunal’, *New York Times*, 25 June 1997, p. A6; ‘U.S. To Press for Pol Pot Trial’, *New York Times*, 30 July 1997, p. A10.

<sup>58</sup> See *Mugesera et al. v. Canada (Minister of Citizenship and Immigration)*, [2001] 4 FC 421 (TD). See also W. A. Schabas, ‘L’affaire Mugesera’, 7 *Revue universelle des droits de l’homme* (1996) 193; W. A. Schabas, ‘Mugesera v. Minister of Citizenship and Immigration’, 93 *Am. J. Int’l L.* (1999) 529.

<sup>59</sup> On the Court generally, R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, (Kluwer Law International, The Hague, 1999); O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, (Nomos, Baden-Baden, 1999); H. von Hebel, J. G. Lammers and J. Schukkin (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, (T.M.C. Asser, The Hague, 1999); F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the ICC*, (Editrice il Sirente, Rome, 2000); D. Shelton, (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Transnational Publishers, Ardsley, New York, 2000); W. A. Schabas, *Introduction to the International Criminal Court*, (Cambridge University Press, Cambridge, 2001); A.

## CULTURAL GENOCIDE AND THE PROTECTION OF THE RIGHT OF EXISTENCE OF ABORIGINAL AND INDIGENOUS GROUPS

genocide, as defined in article II of the 1948 *Convention*, as well as over a broader range of atrocities – crimes against humanity – and war crimes. Where the narrowness of the definition of genocide found in the *Convention* is an obstacle to prosecution, the scope of crimes against humanity can often fill the breach. But the International Criminal Court cannot, however, promise to be of any great utility in terms of redress for the historic grievances of indigenous and aboriginal peoples. This is because of article 11(1): ‘The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.’ The Court provides a response to issues of impunity with respect to crimes in the future, but can do nothing about those committed in the past.

It is to be hoped that the existence of the International Criminal Court will incite national justice systems to assume their responsibilities with respect to genocide prosecutions. The stigma of an admissibility determination by the International Criminal Court, in accordance with articles 17 and 18 of the *Rome Statute*, may encourage States to prosecute those genocide suspects who are found on their territory, even in the absence of any other nexus with the crime, thereby breathing new life into the universal jurisdiction regime. No such obligation is set out explicitly in the *Rome Statute*, and the closest expression of any applicable norm appears in an ambiguous paragraph of the preamble: ‘Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’ Only time will tell how this paragraph is interpreted by States.

Although the *Genocide Convention* might have seemed to have rich potential for the promotion, protection and enforcement of the rights of aboriginal and indigenous peoples, in practise it must be said that it has been a disappointment. As Georg Schwarzenberger famously remarked, the *Convention* has been ‘unnecessary when applicable and inapplicable when necessary’.<sup>60</sup> Although most criticism has focused on the limited scope of groups protected, this limitation presents no difficulty with respect to aboriginal and indigenous peoples. In their case, the real difficulty has been the restricted list of punishable acts.

Although clearly not the intent of its drafters, the *Convention’s* wording certainly can permit a dynamic interpretation so as to cover a range of attacks upon racial or ethnic groups intended to destroy them by destroying their cultural institutions and values, and their traditional economies. While seemingly less brutal than out and out physical extermination, the result is the same. Recent judgments show that some courts are now alive to such interpretations. In parallel, there has been a remarkable expansion in the judicial mechanisms available for the enforcement of the *Convention*, notably the establishment of the International Criminal Court and the unexplored potential of universal jurisdiction. Aboriginal and indigenous peoples may understandably have viewed the *Genocide Convention* as a disappointing

---

Cassese, P. Gaeta and J. R.W.D. Jones, *The Rome Statute of the International Criminal Court, A Commentary*, (Oxford University Press, Oxford, 2002).

<sup>60</sup> G. Schwarzenberger, *International Law*, Vol. I, 3rd ed., (Stevens and Sons, London, 1957) p. 143.

WILLIAM A. SCHABAS

instrument, of little practical value in litigation or advocacy. However, over the past five years the *Convention* has shown more life than it did in the previous fifty. Its possibilities deserve to be reconsidered and explored anew.

## ‘... ANOTHER BOX OF *TJURINGAS* UNDER THE BED’: THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

*Mark Harris*

This chapter argues that Australian cultural heritage legislation has operated to deny Aboriginal control and ownership of cultural property and knowledge whilst simultaneously privileging development and research interests. The tendency to disregard the claims of Indigenous communities to control their cultural property is consistent with the trend towards neo-liberalism in aspects of governance. This chapter further considers the intersection of statutory cultural heritage provisions with the native title legislation and the way in which the legislative form given to the ‘recognition space’ has served to further facilitate the commodification of Aboriginal cultural heritage consistent with the interests of non-Indigenous developers and researchers.

### RECONCILIATION AND CULTURAL HERITAGE ISSUES

The third of June, 2002 marked the tenth anniversary of the High Court of Australia’s landmark *Mabo*<sup>1</sup> judgment, yet the indications are that the Australian legal system and indeed the Australian nation are not any closer to an effective *rapprochement* with its Indigenous peoples. In part this lack can be directly attributed to the incapacity of the Australian legal system to entertain the recognition of Indigenous cultural property rights and the rights of Indigenous Australians to own and control them. The recognition of Aboriginal cultural property rights has gradually evolved over the last thirty years, from the original colonialist view that the ‘relics’ of Aboriginal presence were to be rightly vested in the Crown to a gradual awareness of the importance of place to Indigenous communities. This recognition of Indigenous rights to land was accompanied by land rights legislation, and culminated in the landmark judgment in the *Mabo* case. Despite the recognition of Indigenous property rights through the *Mabo* decision and subsequent legislation, Aboriginal cultural property has continued to be viewed as an inferior interest which should be subordinated to both economic interests, such as mining, and the dictates of academic research.

This increasing opposition within certain sectors of the Australian community towards Aboriginal cultural heritage issues can be directly aligned with the development of neo-liberalism as an influential aspect of governance. Bourdieu has defined ‘neo-liberalism’ as tending ‘on the whole to favour severing the economy from social realities and thereby constructing, in reality, an economic system

---

<sup>1</sup> *Mabo v. Queensland* (No. 2), 175 CLR 1.

MARK HARRIS

conforming to its description in pure theory, that is a sort of logical machine that presents itself as a chain of constraints regulating economic agents'.<sup>2</sup>

The consequences of relying upon economic pragmatism as the major determinant of social policy have been, as Thornton comments, that 'the language of social justice and the espousal of values associated with the communitarian side of the spectrum have virtually disappeared from the contemporary political rhetoric'.<sup>3</sup> The operation of neo-liberalism in relation to the environment has prompted Campbell to observe that '... neo-liberalism does not have regard for ecological effects or social impacts which cannot be reconciled within an economic framework ... Fundamentally, environmentalism must merge into economic theory'.<sup>4</sup> In a similar vein it could be argued that neo-liberalism views Aboriginal cultural property rights as an unnecessary burden upon productive economic activities, such as mining. In the last decade there have been a number of notable examples of the conflict between the developers and Indigenous communities which graphically illustrate both how the social justice of Aboriginal cultural rights has been the subject of vicious attack and also the extent to which governmental policy has sought to protect the interests of those that Bourdieu terms 'economic agents'.

Although Aboriginal cultural property rights have been recognised in a limited form in legislation, this same recognition has not facilitated Aboriginal control of this cultural property. The utilisation of the 'beneficial' cultural heritage legislation has resulted in the subordination of Aboriginal cultural material and knowledge within Western paradigms of knowledge and control. The legislation has produced administrative regimes that require the disclosure of confidential (and sometimes sacred) information to validate claims to areas and the 'mapping' of the location of sacred sites to expedite development and mining projects. In part, the conflict that has arisen periodically in relation to Aboriginal cultural property stems from the vastly different perceptions of what actually constitutes 'cultural property'. Clearly any discussion of terms such as 'intellectual property', 'cultural property' or 'cultural heritage' will invite misrepresentations based upon differing cultural perceptions. As Greenfield observes, 'the term "cultural property" has come to mean all things to all people'.<sup>5</sup> The idea of cultural heritage allied with cultural property is also argued to be too vast, extending to 'mean all forms of cultural and artistic expression inherited from the near or distant past of a given country or cultural

---

<sup>2</sup> P. Bourdieu, 'Utopia of Endless Exploitation. The essence of neoliberalism', *Le Monde Diplomatique*, December 1998, available at <[//mondediplo.com/1998/12/08/bourdieu](http://mondediplo.com/1998/12/08/bourdieu)>.

<sup>3</sup> M. Thornton, 'Neo-Liberalism, Discrimination and the Politics of Resentment' in M. Jones, and L. Basser-Marks (eds.), 17(2) *Explorations on Law and Disability in Australia Law in Context Special issue* (Federation Press, Annandale, 2000) p.14.

<sup>4</sup> S. Campbell, 'Governance, responsibility and the market: neo liberalism and aspects of the Environment Protection and Biodiversity Conservation Act 1999 (Cth.)' 16(4) *Environmental and Planning Law Journal* (1999) 294.

<sup>5</sup> J. Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, Melbourne, 1996) p.255.



## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

area'.<sup>6</sup> The *Our Culture, Our Future* report, which was released in 1998 and comprises the results of a wide-ranging consultation with Indigenous communities, defines Indigenous Cultural and Intellectual Property as being the rights of Indigenous Australians 'to their heritage' which has been expressed, manifested and celebrated in a range of artistic, literary and performance mediums as well as evidenced in 'moveable and immoveable cultural property, ancestral remains, cultural environmental resources and the documentation of Indigenous Peoples' heritage in all forms of media'.<sup>7</sup> While the definition that is being framed by Indigenous communities holds Indigenous Cultural and Intellectual Property as both consubstantial and inalienable,<sup>8</sup> the non-Indigenous community views it as being both divisible and something which does not confer any proprietary rights upon Indigenous Australians. Mick Dodson, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, acknowledged this fact at a conference on Indigenous Intellectual Property Rights at the University of Melbourne on 12 July, 2000 when he criticized the tendency of the Australian legal system to compartmentalize the various aspects of Aboriginal cultural expression. It is a point that is reiterated by Coombe, in reference to the experience of North American Indians, who notes that: 'The West has created categories of property – intellectual property, cultural property, and real property – that divides peoples and things according to the same colonizing discourses of possessive individualism that historically disintitiled and disenfranchised Native peoples.'<sup>9</sup>

The reduction of aspects of Aboriginal culture into discrete aspects has allowed for them to be subsumed within the general categories of Australian law, such as property, copyright and intellectual property law. Having been re-defined in a form that is recognisable by legal principles, Aboriginal cultural materials are more easily defined, regulated and controlled by non-Indigenous legislators. It is through this process of compartmentalisation and segmentation that Indigenous culture is created anew as a commodity that can be incorporated within resource development plans, exploited and, perhaps most significantly, adapted to the task of giving definition to the Australian nation.

### CULTURAL HERITAGE AND THE AUSTRALIAN NATION

Whilst the economic imperative insists that Aboriginal cultural property should not be a barrier to development, particularly in the mining sector, there is a paradoxical tendency to believe that the elements of Aboriginal cultural property should be

---

<sup>6</sup> *Ibid.*, p. 254.

<sup>7</sup> T. Janke, *Our Culture, Our Future* (Michael Frankel & Co, Sydney, 1998) p. 2–3.

<sup>8</sup> S. Pannell, 'Mabo and museums: the indigenous (re)appropriation of indigenous things' 65(1) *Oceania* (1994) 18.

<sup>9</sup> R. Coombe, 'The Properties of Culture and the Politics of Possessing Identity' in J. Hart and R. Bauman (eds.), *Explorations in Difference: Law, Culture and Politics* (University of Toronto, Toronto, 1996) p.252.

## MARK HARRIS

retained for the benefit of the Australian nation. Assertions of Aboriginal cultural heritage are challenged where they bring into question the legitimacy of a homogenous, unified sovereign Australian state, yet the same cultural heritage is celebrated when it is represented as the property of *all* Australians. There is certainly a tendency within certain sectors of the community to characterise any assertions of Aboriginal difference as being divisive. Just as Poole identified the discourse which characterises the dangers in multiculturalism of weakening the Australian identity through constant reference to the migrant's country of origin,<sup>10</sup> the possibility that Aboriginal cultural heritage might be vested only in the nation's Indigenous inhabitants traces back to unresolved questions as to the legitimacy of the British settlement of the continent. Muecke has correctly observed:

If 'Australia' has to be sold on the world market to the tourists, to keep our second biggest industry going, then the image of Australia we project is crucial. And what Australia is, our national identity, depends on the definition of Aboriginality . . . They want a narcotic dream of the Noble Savage, and that is the ambiguous position – between pre-history and modernity – that Aboriginal people are asked to occupy, particularly in consumables, in art, in performance and in literature.<sup>11</sup>

In considering how non-Indigenous Australia draws from markers derived in large part from Indigenous Australia in its search for national identity, it should be distinguished from the experience of other colonised nations, where the newly independent States look for the return of cultural property that may have been removed during the process of colonisation. While formerly colonised nations might be seen to be 'reconstituting their national identity',<sup>12</sup> the existence of Aboriginal claims to cultural property are so inherently linked to rights to land that were, until the *Mabo (No. 2)* decision, fundamentally ignored, that the claims to cultural property in fact represent a challenge the sovereignty of the non-Indigenous Australian nation.

### COLONIAL DAYS – GRAVE-ROBBERS AND MUSEUMS

The status of Aboriginal cultural materials has not always been the site of such virulent contestation. From the first point of white contact, any notion that Aboriginal claims to land should be recognized was roundly dismissed. Just as the vast new continent was deemed to be *terra nullius*, an empty land ripe for the taking, so too were the bodies of the inhabitants deemed to be important scientific items that

---

<sup>10</sup> R. Poole, 'The Limits of Multiculturalism and the Claims of Aboriginal Australia' in G. Couvalis (ed.), *Cultural Heritage Values and Rights* (Flinders University Press, Adelaide, 1998) p. 26.

<sup>11</sup> S. Muecke, 'Where are the Aboriginal Intellectuals?' 148 *Australian Book Review* (1993) 25.

<sup>12</sup> See L. Prott, & P. O'Keefe, *Law and the Cultural Heritage Vol.3* (Butterworths, Melbourne, 1989) p. 842.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

could contribute to the debate related to Darwin's theories of natural selection. As Turnbull puts it: 'Aboriginal remains had the status of rare and valuable objects. They were ideal gifts by which colonists could gain a name and place in metropolitan scientific circles.'<sup>13</sup> Aboriginal bodies were collected through the efforts of the grave robbers, creating as Turnbull puts it a 'valuable source of cash' for the range of itinerant workers living on the frontier of white settlement. Even more disturbing than the activities of the grave-robbers were the allegations that Aboriginal people were killed to provide material for the purpose of what was deemed to be scientific inquiry.

While many pastoralists collected remains of Aboriginal people, exercising a type of *droit de seigneur*,<sup>14</sup> the teaching institutions and museums both in Australia and abroad were also willing participants in the collection of Aboriginal skeletal materials. The Murray Black collection was particularly emblematic of the colonial appropriation of Aboriginal bodies, comprising more than 1600 Aboriginal skeletons excavated by George Murray Black who was employed by Melbourne University during the 1930s to disinter the Aboriginal skeletal remains buried along the banks of the Murray River.<sup>15</sup> The Murray Black skeletal material came to prominence when Jim Berg, who was working with the Koorie Heritage Trust, approached the University of Melbourne on 18 May, 1984, about the collection. The University proved unsympathetic to Mr. Berg's request to view the collection and as a consequence, as Warden under the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* ('*Relics Preservation Act*'), he served notices of detention and impoundment on the University. The University subsequently sought and obtained an interim injunction from His Honour Justice Gobbo on 24 May 1984. The University then sought the consent of the secretary, pursuant to s.26B (1) of the Act, for the retention of the collection, which was refused. Accordingly, His Honour Justice Murphy ordered that the University of Melbourne deliver to the Museum of Victoria its holdings of the Murray Black collection.<sup>16</sup> Significantly, Justice Murphy accepted that the University might have mistakenly believed that 'being the seat of knowledge and of learning that we all know it is, in some way the strict provisions of the Act in its amended form might not apply to it or to its members', but found that such belief was totally groundless. While Justice Murphy acknowledged that the University's intention to preserve the relics was never at issue, he did comment that '... the preservation to which it directs its attention is because of their scientific

---

<sup>13</sup> P. Turnbull, 'Ancestors, not Specimens: Reflections on the Controversy over the Remains of Aboriginal People in European Scientific Collections' *The Electronic Journal of Australian and New Zealand History* 8, at <[www.jcu.edu.au/aff/history/articles/turnbull.html](http://www.jcu.edu.au/aff/history/articles/turnbull.html)>.

<sup>14</sup> *Ibid.*, p. 9.

<sup>15</sup> G. Wettenthal, 'The Murray Black collection goes home' [Dec. 1988-89] *Australian Society* 18.

<sup>16</sup> *James Rueben Berg v. The University of Melbourne, David Caro and James Potter* (unreported judgment, No. 2175 of 1984, delivered 18 June 1984).

MARK HARRIS

value rather than because of any desire to preserve them as being the remains of human beings, for what the Aborigines term “sacred purposes”<sup>17</sup>.

In reaching this conclusion, Justice Murphy relied upon affidavit material provided by Mr. Berg, which stated that the Aboriginal community intended that the skeletal remains be returned to their burial grounds. While His Honour made no direction as to whether the remains should be returned, the case was important for the manner in which the spiritual or cultural importance of the remains was given judicial consideration. Ultimately, a large number of skeletal remains in the collection were repatriated for reburial to various sites in Victoria. In addition, the skeletal remains of 38 Victorian Aborigines were reburied in Kings Domain in Melbourne in 1985.<sup>18</sup>

The reburial process was vehemently opposed by certain sections of the archaeological community. One of the most vocal critics of the reburial program was Professor John Mulvaney, who argued that the reburial process was a politically motivated gesture by radical Aboriginal activists that could not be justified on a number of grounds. Mulvaney maintained that there was, in fact, support for the preservation of such material amongst young Aborigines, that the belief that remains were sacred could not be seen as universal in Aboriginal societies, that the action created a world precedent for the treatment of such ancient materials and that no direct link could be established between the Kow Swamp people and the modern Aboriginal inhabitants of Victoria.<sup>19</sup> Within Indigenous communities there is understandably a great significance attached to the repatriation of skeletal material. Griffiths observes: ‘Aboriginal bones in European museums are symbolic of oppression and dispossession. The liberation of these bones from European custody, their reverent return to the soil is equally eloquent of modern Aboriginal self-determination and of the persistence of cultural ways and religious beliefs.’<sup>20</sup>

Since the move to repatriate Aboriginal cultural material commenced, there have been a number of significant achievements. In April 1991, the University of Edinburgh announced that it would return what was then known to be one of the largest collections of Aboriginal skeletal remains. There were 295 skulls or cranial fragments and four skeletons in the collection.<sup>21</sup> During 1997, the head of an Aboriginal warrior called Yagan was returned from its resting place in Liverpool in the United Kingdom.<sup>22</sup> The struggle for the return of Yagan’s skull had commenced in the 1950s. In June 2000, ahead of the London celebrations of the centenary of Australian Federation, it was announced that Prime Minister Howard would approach the British Prime Minister to ask for the return of all Aboriginal skeletal

---

<sup>17</sup> *Ibid.*, p. 4.

<sup>18</sup> M. Eidelson, *The Melbourne Dreaming: A Guide to Aboriginal Places of Australia* (Aboriginal Studies Press, Canberra, 1997) pp. 8–9.

<sup>19</sup> J. Cribb, ‘Bones of Contention’ *Weekend Australian*, 11–12 Aug. 1990.

<sup>20</sup> T. Griffiths, *Hunters and Collectors* (Cambridge UP, Melbourne, 1996) p. 96.

<sup>21</sup> M. Easterbrook, ‘Uni to give back Aboriginal bones’ *Age*, 29 Apr. 1991.

<sup>22</sup> D. Graham, ‘A Spirit Released, now to be put to rest’ *Age*, 16 Aug. 1997, p. 4.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

remains from British museums.<sup>23</sup> The announcement coincided with the second return of Aboriginal remains from the University of Edinburgh, following their discovery in 1997 after inquiries from the Aboriginal Legal Rights Movement. The second lot of remains from the Edinburgh University collection were handed over to representatives of the Ngarringeri and Kurna peoples. In December 1997, Tasmanian Aboriginals returned from meetings with European museum directors with the skull of an ancestor that had been in the Folkens Museum in Stockholm as well as hair samples from three Palawa people that had been kept in the University of Edinburgh.<sup>24</sup> While progress has been made on the repatriation of Aboriginal skeletal material it remains unclear as to the extent of holdings in museums and Universities, both in Australia and overseas. In October 2002, both the University of Melbourne and the Victorian Freemasons were severely embarrassed by the revelation that they still retain hundreds of Aboriginal artefacts, including human remains. The Aboriginal and Torres Strait Islander Commission have initiated discussions with the organisations, threatening to prosecute them if they do not return the materials and fund the reburial process.<sup>25</sup>

### **RECOGNITION OF ABORIGINAL CULTURAL HERITAGE: BENEFICIAL LEGISLATION**

When the first legislation to protect Aboriginal cultural materials was introduced in Australia it was concerned primarily with preserving objects that would prove to be of scientific and archaeological value. While there had been a shift in perception of Aboriginal people from the nineteenth century view of them as ‘relics of a “primitive” or “stone age” race’ to ‘archaeological representations of Aboriginal people as the descendants of last Pleistocene migrants’, Aboriginal people still remained the objects of scientific inquiry. The first such legislative recognition of Aboriginal cultural heritage in Australia was passed by the Commonwealth government in relation to the Northern Territory in 1955 and was the *Native and Historical Objects and Areas Protection Ordinance*. This legislation was designed to protect places such as burial, ceremonial or initiation grounds and made it an offence for a person to either wilfully or negligently damage or harm either places where human remains were situated or places that had been used for purposes of Aboriginal ceremony.<sup>26</sup> Significantly, the type of disturbance or damage, which the Ordinance proposed to guard against, could be carried out with the written permission of the Minister.<sup>27</sup>

---

<sup>23</sup> M. Marion, ‘PM to ask for return of bones’ *Age*, 21 June 2000.

<sup>24</sup> R. Buchanan, ‘Finders not keepers’ *Age*, 14 Mar. 1998.

<sup>25</sup> ‘Prosecution over Aboriginal remains’, transcript of *The World Today* broadcast, 17 Oct. 2002 on ABC radio, at <[www.abc.net.au/worldtoday/s704000.htm](http://www.abc.net.au/worldtoday/s704000.htm)>.

<sup>26</sup> *Native and Historical Objects and Areas Protection Ordinance* 1955 (NT), s.9H.

<sup>27</sup> *Ibid.*

The Australian Federal system of government has subsequently resulted in a system whereby there are both Commonwealth statutes pertaining to Aboriginal cultural heritage and also legislation enacted in each of the States and Territories.<sup>28</sup> The extent of the protection afforded to Indigenous cultural interests in each of the States and Territories varies from jurisdiction to jurisdiction. For example, in 1972 the State of Victoria, in the south of the continent, also passed legislation that could be characterised broadly as relating to Aboriginal cultural heritage, but which also shared the archaeological focus of the earlier Northern Territory Ordinance. The title of the Victorian *Relics Preservation Act* gives a clear indication of the focus of the legislation. Aboriginal 'relics' were defined as 'pertaining to the past occupation by the Aboriginal people of any part of Australia, whether or not the relic existed prior to the occupation of that part of Australia by people'.<sup>29</sup>

The Act also reiterated the idea that cultural property of Aboriginal people was part of the Crown by virtue of section 20 that states: 'All relics within an archaeological area shall be the property of the Crown and be under the protection of the Crown'. In considering the application of the *Relics Preservation Act*, His Honour Chief Justice Gibbs noted in the case of *Onus v. Alcoa of Australia* that 'the Act was passed for the benefit of the public at large, with a view to the conservation of relics which are regarded as being of interest and value not only to Aborigines but also to archaeologists and anthropologists and indeed to Australians generally'.<sup>30</sup>

Whilst judicial interpretations of the *Relics Preservation Act* initially privileged the idea that Aboriginal cultural property was owned by the Crown and was valuable for its archaeological worth, a number of cases brought by Jim Berg, the director of the Aboriginal Legal Service, illustrated the manner in which Aboriginal people have utilized even the most limited legislative measures to protect Indigenous cultural property. The issue of control of Aboriginal cultural property first came to prominence when Berg, a Gunditjmara man and director of the Victorian Aboriginal Legal Service, brought an action to prevent the Museum of Victoria from loaning the Keilor skull and a skull from Kow Swamp to the American Museum of Natural History.<sup>31</sup> Interestingly, the Court in *Berg v. Council of the Museum of Victoria* deemed that the provisions of the *Relics Preservation Act* gave the relics 'a special status over and above other types of relic which may come into the hands of the Museum'.<sup>32</sup>

With the development of the claims to land rights by Indigenous Australians in the early 1970s, the definition of Aboriginal cultural property shifted from being solely concerned with 'relics' and sites that were of archaeological significance to an acknowledgment of the spiritual importance of land and place to Aboriginal peoples. The Western Australian legislation, originally passed in 1972, went further than the Victorian *Relics Preservation Act* in that it recognised Aboriginal custodians of

---

<sup>28</sup> The extent of the State and Territory protection varies from jurisdiction to jurisdiction.

<sup>29</sup> *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic), s.3.

<sup>30</sup> *Onus v. Alcoa of Australia Ltd.* (1983), 149 CLR 27, 35.

<sup>31</sup> Griffiths, *supra* note 20, p. 95.

<sup>32</sup> *Berg v. Council of Museum of Victoria & Ors* [1984] VR 613, 616.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

cultural sites and objects and also applied to places and objects of spiritual, ritual or ceremonial significance. However after the Supreme Court of Western Australia had given a very expansive reading of the meaning of the term 'Aboriginal site' in the *Noonkanbah* case,<sup>33</sup> the Western Australian government introduced the *Aboriginal Heritage Amendment Act (No. 2) 1980* to implement a far more restrictive reading of the definition of sites and places. The experience of the Noonkanbah raised the prospect that Aboriginal claims to places and sites might prove to be a serious impediment to possible future mineral exploration. The Western Australian amending legislation also substantially increased the power of the Minister with regard to decision-making. In a subsequent Supreme Court decision involving a challenge to the Western Australian government's approval of the redevelopment of the Swan River brewery site in Perth, the majority of the Western Australian Supreme Court found that the application of the Aboriginal parties was based on a 'mere intellectual or emotional concern' and that the desire to protect a site based upon the spiritual or cultural heritage qualities was not sufficient to give them standing. In a ruling that is indicative of the general belief that Aboriginal cultural materials and objects somehow form part of the national estate, the Western Australian Supreme Court ruled that the Act was intended to benefit 'all Western Australians – with a view to the preservation of objects and places'.<sup>34</sup>

While various State and Territory legislatures have passed what might be termed beneficial legislation, Aboriginal custodians of land have not always been eager to utilise the protection supposedly afforded by it. The *Northern Territory Aboriginal Sacred Sites Act 1989*, for example, created the Aboriginal Areas Protection Authority. The task of the Authority is to establish and maintain a register of sacred sites, to examine all claims made for protection of sacred sites by Aboriginal people and to record sacred sites and the details of their sacred stories.<sup>35</sup> A sacred site was defined by the Northern Territory land rights legislation as being a 'site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aborigines or of significance according to Aboriginal tradition'.<sup>36</sup>

The purpose of this register is to facilitate certainty for developers of land where there might be the possibility of a sacred site's being disturbed. The operation of the register has been less than successful, however, in that Aboriginal custodians have been reluctant to provide all of the information relative to a specific site until such time as the prospect of harm to the site becomes imminent. An example of this reluctance occurred in 1989 when the Department of Lands proposed a development in the area of Alice Springs, in central Australia. The area in question was

---

<sup>33</sup> *Noonkanbah Pastoral Co Pty Ltd v. Amax Iron Corporation* (unreported decision, Supreme Court Western Australia, per Brinsden J, 27 June 1979, No. 1558 of 1979).

<sup>34</sup> *Western Australia v. Bropho*, (1991) 5 WAR 75, 86 (Anderson J).

<sup>35</sup> *Northern Territory Aboriginal Sacred Sites Act 1978 (NT)*, s. 10.

<sup>36</sup> *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, s. 3.

subsequently identified as being very important by the traditional custodians because of its relevance to dreaming stories and initiation ceremonies. The importance of the secrecy attached to such ceremonies was not seen as a relevant factor of the government, however, which accused the land owners of being capricious and trying to thwart development in the area.<sup>37</sup> Apart from the insistence that Aboriginal custodians should disclose secret material (which may be compromised by such disclosure), the *Northern Territory Sacred Sites* legislation is flawed in the provision that a person can apply for an Authority Certificate to allow her or him to carry out works on land where there may be a sacred site.<sup>38</sup> This Certificate can be granted by either the Authority or, on appeal, to the Minister.<sup>39</sup> While the *Sacred Sites* legislation ostensibly protects the interests of Aboriginal communities, it does so at the cost of disclosure of significant knowledge and maintains the authority of the Minister to authorise the destruction of a site.

The first significant intervention of the Federal government into the area of Aboriginal cultural heritage came in 1984 with enactment of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ('*Heritage Protection Act*'). The express purposes of the *Heritage Protection Act* are listed as: 'The preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.'<sup>40</sup>

This statute was only intended to be a temporary measure and initially had a sunset clause but it was subsequently made permanent in 1986. While the Act vests significant powers in the Minister to make a declaration to protect an area or object in a State or Territory,<sup>41</sup> the Federal Minister is required to consult with her or his State and Territory counterparts and the Act is not intended to cover the field, making provision for the operation of complementary State and Territory legislation.

In recent years, the dispute concerning the secret Ngarrindjeri women's business at Kumargank or Hindmarsh Island in South Australia have exemplified the conflict in Australian society over sites of Aboriginal cultural significance.<sup>42</sup> The case commenced with the decision in 1989 to build a bridge to link Hindmarsh Island, which had previously relied upon a ferry service. After anthropological and archaeological reports were prepared in 1993, the South Australian government declared in 1994 that the development would proceed. At this juncture, concerned members of the Ngarrindjeri people, the traditional owners of that country, sought an emergency declaration from the Federal Minister for Aboriginal Affairs, Robert Tickner, under the *Commonwealth Heritage Protection Act* ('*Heritage Act*'). The

<sup>37</sup> *Hansard*, Northern Territory Parliament, 6 June 1981, p. 8.

<sup>38</sup> *Northern Territory Aboriginal Sacred Sites Act 1989*, s. 20(1).

<sup>39</sup> *Ibid.*, s.32(1).

<sup>40</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*, s. 4.

<sup>41</sup> *Ibid.*, s. 9.

<sup>42</sup> For a comprehensive coverage of the Kumargank (Hindmarsh Island) dispute, see D. Bell, *Narrindjeri Wurrurarrin: a world that is, was, and will be* (Spinifex, North Melbourne, 1998).



## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

Minister exercised his power to halt proceedings for two 30 day periods and sought a report on the veracity of the claims made by the Ngarrindjeri women from a female academic. On 16 June 1995 the South Australian government convened a Royal Commission into the 'secret women's business', the terms of reference of which required the Commissioner to investigate whether there had been a fabrication of the secret women's business that formed the basis of the emergency declaration. Following the release of the Royal Commission findings the construction of the bridge went ahead and the Commonwealth government passed the *Hindmarsh Island Act 1997* to ensure that the bridge development would be exempted from any future application of the Act.<sup>43</sup> One of the main proponents of the secret women's business, Doreen Kartinyeri, challenged the validity of the legislation but the High Court of Australia found, on a range of different grounds, that the amendment was a valid legislative enactment.<sup>44</sup> In the aftermath of the Hindmarsh Island case the developers also brought an action seeking damages against the then Minister for Aboriginal Affairs who had issued the original emergency protection orders, the academic who had provided the advice for his decision and the anthropologist who had prepared the initial report. The Federal Court decision of Justice von Doussa in this matter is significant for the fact that it found that the negligence claims should fail and that there was also no duty of care owed to the developers. Most significantly, however, Justice von Doussa held that: 'Upon the evidence before this Court I am not satisfied that the restricted women's knowledge was fabricated or that it was not part of genuine Aboriginal tradition.'<sup>45</sup>

The judgment of Justice von Doussa can only be seen as a Pyrrhic victory for the Ngarrindjeri people, however, given that the proceedings commenced under the *Heritage Act* resulted in the disclosure of their secret knowledge, the widespread ridicule of these beliefs and the final construction of the bridge.

It is interesting to contrast the Hindmarsh Island case with another cultural heritage dispute that arose in northern Victoria from 1996. The Commonwealth *Heritage Act* was amended in 1987 to include a section that has application only to the State of Victoria. This legislation was passed by the Commonwealth government at the request of the Cain Victorian Labor government of the time, which was confronted by an Upper House dominated by the Liberal and National Parties. This legislation represented a significant development from the Victorian *Relics Preservation Act*. The Federal Cultural Heritage legislation is also notable for the Amendment made in 1987 that created a specific section relating to Victorian cultural heritage. Under Part 11A of the Act, Aboriginal cultural areas are established with responsibility for cultural heritage matters. The geographic boundaries for each community group are extensively detailed. An example of the

---

<sup>43</sup> *Hindmarsh Island Act 1997 (Cth)*, s. 4.

<sup>44</sup> *Kartinyeri v The Commonwealth* [1998] HCA 22 (High Court of Australia).

<sup>45</sup> *Chapman v. Luminis Pty Ltd (No 5)* [2001] FCA 1106 (Aug. 21, 2001) Federal Court of Australia, per von Doussa J at paragraph 12.

MARK HARRIS

exact manner in which part of the community area of the Echuca Aboriginal community is defined in the legislation is as follows:

The boundary commences at the bridge where the Murray Valley Highway crosses the Loddon River, approximately 1 km west of Kerang, thence north-westerly along the Murray Valley Highway to its junction in Swan Hill with the Moulamein-Swan Hill Road, which is followed east, to the bridge over the Murray River, thence generally south-easterly along the Victoria-New South Wales border to the point where the Goulburn River joins the Murray River at approximately E.304600 N.6002200, thence continuing in a generally south-easterly direction upstream along the southern bank of the Goulburn River to where it is crossed at Yambuna township by the road between Echuca and this township, thence from Yambuna easterly then northerly along the road which runs through Narioka and joins the Echuca-Nathalia Road approximately 5 kms west of Picola, thence easterly along the Echuca-Nathalia Road to the point 5 kms east of Picola where this road turns due south, thence . . .

While the Victorian legislation effectively defined Aboriginal communities with responsibility in cultural heritage matters, it was also contentious in that it gave inspectors appointed under the Act powers to make emergency declarations over cultural heritage sites. This legislation differed from the provisions in relation to other States where an application for an emergency declaration is required to be made to the Federal Minister for Aboriginal Affairs. Pursuant to section 8A(2) of the *Federal Heritage Protection Act 2*, an authorized officer must not make an emergency declaration unless she or he is 'satisfied that an application in relation to the area or object under Part IIA would be inappropriate or could not be made'. A provision of this type which gives Aboriginal communities the capacity to directly protect culturally significant areas has, predictably, excited the ire of governments which view this as an inappropriate encumbrance upon development.

The controversy arose when the Kraft factory in Leitchville, in Victoria, sought to run a pipeline from its factory site to another site for treatment. The proposed route of the 15 kilometre pipeline traversed the area of Kow Swamp, which had been the site of the reburial of Aboriginal remains in 1970. The threat of the construction works to the burial sites resulted in the placing of an emergency declaration under the Act by an Aboriginal cultural officer.<sup>46</sup> After consultation between Kraft, the Njernda Aboriginal Co-Operative and Aboriginal Affairs Victoria, the Victorian Archaeological Survey prepared a report on the site. The report stated that the proposed pipeline route would have no impact upon heritage values.<sup>47</sup> In March 1997 the Federal Parliament member for Murray, Ms. Sharman Stone, declared that 21C(3)(a) of the 11A Act was 'a time bomb' which led to its misuse by 'vexatious people' who used it as a 'weapon'.<sup>48</sup> In April 1997 it was

---

<sup>46</sup> Under section 18 of the Act, an emergency declaration can be made by an Inspector.

<sup>47</sup> 'Stone aims to prevent abuse of Heritage Act' *Riverine Herald* (Echuca) 16 Apr. 1997.

<sup>48</sup> Commonwealth, *Hansard* (House of Representatives, 24 Mar. 1997) p. 2818.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

reported that Ms. Stone intended moving a private Members Bill to amend the Victorian section of the *Federal Cultural Heritage Act* so as to allow the Federal Minister the power to override an emergency order. According to Ms. Stone, the Act 'was open to abuse or misuse because it depended totally on the Aboriginal people and their inspectors, who had the power to stop any development indefinitely, merely by claiming it threatened Aboriginal heritage sites'.<sup>49</sup>

Following the controversy of the Ngarrindjeri women's business case in South Australia, the Kow Swamp dispute was further confirmation for the Howard Coalition government of the need to remove aspects of the existing Heritage legislation which gave Indigenous communities the power to halt development. Significantly, the Howard government chose to ignore the recommendations of the 1996 Evatt Report that had reviewed the operation of Federal cultural heritage legislation.<sup>50</sup> The criticisms made by Indigenous community members of the operation of the Act were expressed in the Evatt Report in the following terms:

They say that the administration of the Act has given too much deference to ineffective State and Territory processes which do not recognize their role in the identification, management and protection of heritage. In some situations negotiations by the Commonwealth with the State/Territory government have resulted in arrangements being made without adequate consultation with Aboriginal people. In addition, the Act does not recognize that there are Aboriginal restrictions on information which play an important role in the protection and maintenance of their cultural heritage. The Act does not protect confidential information or respect Aboriginal spirituality and beliefs which require that confidentiality be maintained.<sup>51</sup>

In December 1996, Senator Herron, the Minister for Aboriginal Affairs in the Howard Coalition government, made a media release announcing an overhaul of the Federal Heritage protection legislation. The media release emphasised the desire of the Coalition government to 'prevent another Hindmarsh Island saga', which was characterised as a 'debacle'. The announcement concluded by noting that 'the Government is committed to ensuring that heritage protection laws benefit indigenous people and the wider Australian community and, in doing so, contribute to the broader goals of Aboriginal reconciliation'.<sup>52</sup>

While acknowledging that the heritage protection legislation should benefit Aboriginal people, the media release from Senator Herron also focuses upon the extent to which Aboriginal cultural property is to be subsumed within the general

---

<sup>49</sup> *Riverine Herald* (Echuca) 16 Apr. 1997.

<sup>50</sup> E. Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Minister for Aboriginal & TSI Affairs, Canberra, 1996).

<sup>51</sup> *Ibid.*, p. xiv.

<sup>52</sup> Media Release, Senator John Herron, 'Government Moves to Avoid Repeat of Hindmarsh Island', 17 Dec. 1996.

rubric of the 'wider Australian community'. At the second reading of the Bill, the then Shadow Minister for Aboriginal Affairs, Daryl Melham, attacked its lack of support from the Parliamentary Joint Committee which had inquired into it, Elizabeth Evatt and the Indigenous community. Melham further argued:

The bill persists with methods that assume that indigenous heritage can be protected by means and through processes that are intrinsically offensive to indigenous values, practices and beliefs. The positivism and legalism of mainstream culture demand methods that identify, locate, name, map and register for general information the sites of significance to the stories, ritual, songs, and dreaming of our indigenous peoples.<sup>53</sup>

After the Senate voted 179 amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* on 26 November 1999 the Bill was returned to the House of Representatives. When the amended Bill was put to the House of Representatives with all but twenty exceptions they were rejected.<sup>54</sup> While the current heritage legislation has not been amended, the lesson that can be drawn from the Hindmarsh Island and Kow Swamp cases is clearly that Australian governments, both State and Federal, are loathe to give ultimate control over the protection of Aboriginal cultural materials to Aboriginal people. The market force that demands that a bridge should be built or a pipeline discharging factory effluent constructed even where they may have a catastrophic effect upon Aboriginal sites, objects and, by implication, beliefs, is a further testimony to the primacy of neo-liberalism in governance. The clamour for the repeal of those sections of the Commonwealth Heritage legislation that allowed a Victorian Aboriginal cultural officer to block an action that he believed would be detrimental to significant sites also illustrates the extent to which there is still a reluctance to allow Aboriginal people to have any sort of meaningful control of their cultural sites and knowledge.

In tracing the three 'shifts' by which neo-liberalism is constituted, Rose notes that it produces a 'new specification of the subject of government'.<sup>55</sup> Through this process the individual citizens of society are produced as persons who are 'experts of themselves'.<sup>56</sup> In the environmental context, Campbell gives the example of how this process is manifested in the transfer of control of land care programs to farmers and to the development of voluntary environmental codes for companies.<sup>57</sup> Yet the experience of Aboriginal people in relation to cultural heritage has certainly not been one in which they are now 'responsible for their own destiny', and where there

---

<sup>53</sup> Commonwealth, *Hansard* (House of Representatives, 4 Jun. 1998) p. 4817.

<sup>54</sup> J. Sutherland, 'Federal Heritage Protection Bill: Senate Upgrade Rebuffed' 4(27) *Indigenous Law Bulletin* (2000) 21.

<sup>55</sup> N. Rose, 'Governing Advanced Liberal Democracies' in A. Barry, T. Osborne and N. Rose (eds.), *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (University of Chicago Press, London, 1996) p. 57.

<sup>56</sup> *Ibid.*

<sup>57</sup> Campbell, *supra* note 4, p. 292.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

is a modicum of control (such as in the Victorian provisions of the Federal Heritage legislation) there is clearly a desire in government to remove it.

Two conclusions might be drawn from this occlusion of Aboriginal people from the control of cultural heritage materials. The first is that Aboriginal people remain less than citizens in their own country, a point that has been argued by those Aboriginal activists who maintain that they have never ceded sovereignty of this country. The second implication is that such an approach is consistent with the idea of governing from afar, such that the appearance of Aboriginal participation is maintained; yet, the legislation and policies remain consistent with the strategies of government. It is these strategies of government that continue to adhere to the importance of economic theory in governance and, consequently, privilege the market forces over cultural concerns. Aboriginal cultural heritage is recognized such that it can be subsumed within the parameters of Australian property law and will not present any threat to the advancement of mining and development.

### ISSUES OF OWNERSHIP: THE STREHLOW COLLECTION

While there is increasing pressure upon public institutions to repatriate certain cultural property, and particularly skeletal remains, the controversy that continues to surround the Strehlow collection of Aranda cultural property is a graphic illustration of the consequences of the failure of the Australian legal system to recognise Aboriginal community claims to cultural property. In October 1999 an auction was conducted in Adelaide of some of the collection of cultural artefacts assembled by T.H. Strehlow during a lifetime of involvement with the Aranda people of Central Australia. The auction realised some AUD 200,000 and comprised some 361 lots.<sup>58</sup> The intervention of the Strehlow Foundation resulted in 119 of the lots being withdrawn from sale. A large proportion of the pieces were purchased by private collectors. Apart from the last minute withdrawal of the pieces over which ownership was disputed, there was also controversy surrounding the actual display of some of the lots. The display was divided into two sections. One section comprised a number of colour photographs of men's 'secret business'. Although there was a notice displayed which stated that the photographs should not be viewed by anyone apart from initiated Aboriginal men, no attempt was made to enforce this restriction.

This dispute involving the proposed sale of Strehlow items was only the most recent instance of the family of T.H. Strehlow selling items that he had acquired from the Aranda people during his lifetime. In 1985 Kathleen Strehlow signed over ownership of artefacts to be housed in the Strehlow Research centre at Alice Springs. In 1992 it became apparent that the Strehlow family had still more artefacts and the collection was seized from their Adelaide home by the South Australian government, who feared that the materials would be taken overseas. The collection was then offered for sale through an Adelaide art dealer for \$6.5 million. The

---

<sup>58</sup> T. Plane, 'Custody to the highest bidder' (23–24 Oct. 1999) *Weekend Australian* 23.

## MARK HARRIS

revelation that there were still more artefacts being held by the Strehlow family prompted the director of the Strehlow Research Centre, David Hugo, to state: 'We were completely taken aback, because the Northern Territory government, when it negotiated with Mrs Strehlow in 1985, was under the impression that what it was paying money for was the entire Strehlow collection.'<sup>59</sup>

Following the raid upon the Strehlow house, the South Australian government offered to purchase the artefacts, conceding that it might be a more expeditious path, rather than trying to sort out ownership in court.<sup>60</sup> Whilst it was clear that the elders of the Aranda had given the materials to Strehlow voluntarily, it remains unclear how he maintained ownership of the property. During the period in which Strehlow acquired much of the material he had been employed by Adelaide University. Despite this fact, senior members of the University signed ownership of the artefacts over to Kathleen Strehlow after T.H. Strehlow's death.<sup>61</sup> The Deputy Chancellor of Adelaide University, Dr. Harry Medlin, who gave the valediction at Strehlow's funeral, observed that while ownership of the collection was disputed both prior to and after Strehlow's death 'the case was too complex for normal rules on ownership to apply, so in the end it was abandoned'.<sup>62</sup> The prospect that the Indigenous owners might have some claim to the materials clearly did not enter the minds of the University. The fate of the collection after his death did, however, plague Strehlow, for he wrote in his diary in 1962:

I have indeed gained the confidence of my dark friends. I have been given their songs, their myths, their *tjuringa*, their traditions to hold safe, to guard, to preserve. But for whom? My dead aboriginal friends gave these things to me because they had become disillusioned with the remnants of their own dark descendants . . . I had been young when the first of these treasures came into my hands. Now thirty years had passed, and I had grown old myself. Like my dark friends I now had the problem of deciding what to do with all that they had entrusted into my keeping. I too must not hand these things over into the hands of sneerers and scoffers, into the clutch of a white population whose eyes were bulging with greed, who sold everything for money, to whom food, drink and idleness represented the '*summum bonum*'. Would I ever find someone to whom I in my turn could hand on these '*tjuringa*' for safe keeping, or would I have to arrange for their burial somewhere where the greedy, clutching

---

<sup>59</sup> D. Bogle, 'Strehlow cuts price for sacred artifacts' (4–5 Dec. 1993) *Weekend Australian*.

<sup>60</sup> S. Pannell, 'The Cool Memories of Tjuringa: A Symbolic History of Collecting, Authenticity and the Sacred' in C. Anderson (ed.), *Politics of the Secret Oceania Monograph No. 45* (Sydney University, Sydney, 1995) p. 110.

<sup>61</sup> W. McNally, *Aborigines, Artefacts and Anguish* (Lutheran Publishing House, Adelaide, 1981) p. 198.

<sup>62</sup> J. Hawley, 'The Strehlow Collection Preserved in Vitriol', (28–29 Aug. 1987) *Age Good Weekend* 32.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

fingers of white Australians to whom nothing was sacred could not be laid on them.<sup>63</sup>

Yet the publication of *Songs of Central Australia* in 1971 saw Strehlow more certain as to the rights he had gained. He maintained that in accordance with the Aranda rules of *tjurunga* inheritance 'these traditions would be regarded as becoming my personal property after the deaths of their original owners. There is thus no longer any reason for not publishing these songs'.<sup>64</sup> Strehlow's adamant insistence that he had been installed as the guardian of the Aranda knowledge is treated with some scepticism by Rowse, however, who notes the intervention of the white notions of commodities into the tribal setting.<sup>65</sup> By insisting upon the continued existence of a corpus of customary law, there was provided 'a solid bedrock of custom into which he, Strehlow, the State's agent, could sink the foundations of his own authority'.<sup>66</sup> As Morton has observed, it resulted in a construction whereby 'Strehlow did more than represent the Aranda, he came to represent them absolutely'.<sup>67</sup>

While Theodore Strehlow, raised with the Aranda people at Hermannsburg Mission in the Northern Territory, might have felt some right to speak as the authoritative voice of the Aranda, the presumption of his second wife, Kathleen, to do so is more problematic. She vehemently responded to demands that the Aranda cultural materials be returned, stating:

When sweeping statements are made – 'give the objects back' – I answer, to whom? I have flung down the challenge. Any Aborigine who thinks he has a legitimate claim to any object can come and see me and I'll check his credentials. I want to know the names of his ancestors, his totem, the name verses of his songs. Not one has come forward. The Aborigines don't want these things sent back regardless, they are powerful objects that could cause trouble and bloodshed in the wrong hands. Few elders remain alive who know anything about them and I know who those elders are.<sup>68</sup>

The Strehlow collection presents the dilemma of how Indigenous communities can be refused ownership of a body of secret and sacred items, yet the law can acquiesce to non-Indigenous persons laying claim to these materials.

---

<sup>63</sup> T.H. Strehlow, Office Diary 11, 1962, pp. 54–55. I acknowledge the assistance of the Strehlow Research Centre and in particular Head of research, Mr. Brett Galt-Smith, for allowing me to reproduce the quote.

<sup>64</sup> J. Morton, 'Romancing the Stones' (1993) *Arena* 39.

<sup>65</sup> T. Rowse, 'Strehlow's Strap' in B. Attwood & J. Arnold (eds.), *Power, Knowledge and Aborigines* (La Trobe University Press, Bundoora, 1992) pp. 94–99.

<sup>66</sup> *Ibid.*, p. 98.

<sup>67</sup> J. Morton, "'Secrets of the Arandas' TGH Strehlow and the Course of Revelation' in C. Anderson (ed.), *Politics of the Secret Oceania Monograph No.45* (Sydney University, Sydney, 1995) p. 56.

<sup>68</sup> Hawley, *supra* note 62, p. 30.

MARK HARRIS

Leaving aside the issue of ownership of the Strehlow collection, the saga surrounding the collection also raises issues of the breach of trust by Strehlow. John Strehlow, Strehlow's son from his first marriage, is clearly of the view that the materials were given to his late father to be held in trust. He observed that:

There's no question that it was given to dad as something to be held in trust for the Arrente. It was assumed by the people who gave it to him that he could do with it what he wanted, but they would never have assumed it could be sold to the highest bidder.<sup>69</sup>

The possibility that Kathleen Strehlow continues to retain significant items from the collection of T.H. Strehlow further prompted John Strehlow to observe that: 'There will always be another box of *tjuringas* (sacred objects) under the bed'.<sup>70</sup>

Quite clearly there are precedents for the Indigenous community to bring an action against persons for just such a breach of trust. In the case of *Foster v. Mountford*, an action was brought by the Pitjantjatjara Council seeking to prohibit the circulation of a book, *Nomads of the Australian Desert*, which contained images of a secret nature.<sup>71</sup> In his judgment, Justice Muirhead ordered an injunction restraining the defendants from selling or distributing the book in the Northern Territory. In 1982 another action was brought in the Supreme Court of Victoria relating to a proposed auction of more than 1,000 lantern-slides of secret sacred material of the Pitjantjatjara people that Mountford had taken.<sup>72</sup> The Pitjantjatjara Council maintained that at least 100 of the slides related to secret ceremonies and opposed the sale. When the auctioneer refused its request to withdraw the items the Council made application for a summons in chambers seeking an injunction to prevent the slides from being displayed or sold. The supporting affidavits presented to the Court maintained that the slides were made by Dr. Mountford for his personal use and were given as confidential information. After interlocutory orders were made requiring the production of the slides for examination by the representatives of the Council, the Court finally made orders that the property in, and ownership of, the slides was vested in the Pitjantjatjara Council on behalf of the Aboriginal peoples who it represented. Interestingly Strehlow saw Mountford as an interloper in his field of expertise and attacked Mountford's book *Winbaraku* on its publication as a 'mess of distortions'.<sup>73</sup> The dilemma that confronts Aboriginal people with respect to cultural property, as evidenced in the Strehlow case, is the fact that it remains 'more of a privilege bestowed by the government through regulatory legislation than ownership in any meaningful sense'.<sup>74</sup>

---

<sup>69</sup> Plane, *supra* note 58, p. 23.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Foster v. Mountford*, 14 ALR (1976) 71.

<sup>72</sup> *Pitjantjatjara Council Inc & Peter Nguningu v. Lowe & Bender*, [1982] Supreme Court of Victoria, Unreported Judgment.

<sup>73</sup> W. McNally, *Aborigines, Artefacts and Anguish*, p. 144.

<sup>74</sup> A. McLennan, 'A Struggle Between Owners? What is the Legal Status of an interest in Cultural Property?' 15(4) *Environmental and Planning Law Journal* (1998) 245.



## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

The rights that Aboriginal people might seek to exercise over cultural property are frustrated by the fact that the nature of the right enjoyed is seen as being inferior to the rights of ownership enjoyed over chattels and property under common law. Even in the resolution of the initial dispute with Katherine Strehlow, the cultural materials were not viewed as the property of the Aranda people, to be returned to them. The Strehlow Research Centre in Alice Springs was established to house the collection under an Act of the Northern Territory Parliament. The Strehlow Centre is devoted almost exclusively to materials relating to Aboriginal men's secret/sacred business. As a consequence of the protected nature of these materials, any access to the Centre is restricted to persons gaining permission from the Aboriginal men who have a clear affiliation with the material.<sup>75</sup> The *Strehlow Research Centre Act 1988 (N.T.)* provides that the functions of the Board of management include securing the Collection 'and keep[ing] it intact as provided in the agreement'.<sup>76</sup> While this provision would seem to preclude the prospect of repatriation of cultural materials, the Centre is currently undertaking an internal review of the issues concerned with the repatriation of any items. In the past, the development of a clear repatriation policy has been identified as one of the key concerns of Aboriginal organisations and traditional custodians.<sup>77</sup> Although the Strehlow Centre has safeguarded against the prospect of the collection's being dismantled and sold in individual lots to private collectors, the case further emphasises the extent to which the rights of Indigenous communities to control their cultural property is overlooked by legislators and the courts. While there is a danger in essentializing the experience of Aboriginal people, such that they are presented as a homogenous, identical group, the comments of Myers in relation to the Pintupi and the meanings attributed to 'objects' are relevant here. Myers observed: 'My argument is that "things" (objects, ritual, land, prerogatives, duties) have meaning – that is, significance or social value – for the Pintupi largely as an expression of autonomy and what I have elsewhere defined as "relatedness" or shared identity.'<sup>78</sup>

In the same way it can be argued that the legal system which validated the Strehlow claims to 'ownership' of the Aranda cultural materials was complicit in denying Aranda autonomy and promoting the disintegration of the tribe's shared identity.

---

<sup>75</sup> Cultural Ministers Council, *Records of National Cultural Significance: Indigenous Australians* (AGPS, Canberra, 1997) p. 25.

<sup>76</sup> *Strehlow Research Centre Act 1988 (N.T.)*, s. 6(d).

<sup>77</sup> J. Morton, 'Romancing the Stones' (1993) 4 *Arena Magazine* 40.

<sup>78</sup> F. Myers, 'Burning the Truck and Holding the Country: Pintupi Forms of Property and Identity' in E. Wilmsen (ed.), *We Are Here: Politics of Aboriginal Land Tenure* (University of California Press, Berkeley, 1989) p. 15.

**INDIGENOUS CULTURAL MATERIAL AND THE OVERSEAS MARKET**

While there is increased evidence of the willingness of museums and public institutions to embrace the idea of repatriation of cultural materials to Indigenous communities, the large amount of Indigenous cultural property in private hands has meant that in the past there was no guarantee that items could not be moved from Australia. This possibility prompted the Federal government to pass the *Protection of Movable Cultural Heritage Act 1986 (Cth)* ('*Protection of Movable Cultural Heritage Act*'). The Act was passed to comply with Australia's international obligations under the UNESCO 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*.<sup>79</sup> It should be stressed that the operation of the *Movable Cultural Heritage Act* is not concerned solely with Aboriginal or Indigenous cultural heritage material.<sup>80</sup> The importance of restrictions upon the export of significant Aboriginal art work can be gleaned, however, from the reports in June 2000 when, in the course of a week, the Sotheby's and Deutscher-Menzies auctions of Indigenous art saw the former reach AUD 4.09 million in sales, and the latter, AUD 2 million.<sup>81</sup> It was estimated by a representative from Sotheby's that up to 70 per cent of the sales on the first night of auction went to overseas bidders, who demonstrated a preference for artwork more than ten years old and from a number of Western Desert communities such as Papunya, Yuendumu and Utopia.

Notwithstanding the limitations that the *Protection of Movable Cultural Heritage Act* puts upon the export of Indigenous cultural property, there is no protection against the inappropriate display of culturally sensitive material. This limitation was evidenced in 1994 when the Christie's auction of tribal artefacts included in its catalogue four *tjuringas*, a shield and two sword clubs. The then Federal Minister for Aboriginal Affairs, Robert Tickner, sought to intervene, arguing that 'display and sale would be highly offensive to Aboriginal people and a desecration of their strongly held religious beliefs'.<sup>82</sup> Christie's declined to halt the scheduled auction, despite the Minister's entreaties, and responded that the company had 'considerable experience in dealing with religious and spiritually significant items' and also that 'those collectors of Aboriginal objects who are likely to buy these objects are equally aware of their importance as spiritual objects and no doubt will accord them appropriate respect'.<sup>83</sup>

The letter from Christie's concluded by stating: 'We would hope in fact that the sales such as ours will increase understanding and interest in Aboriginal culture.' The ambiguity is apparent. The narrative of the Australian nation will recognise the

---

<sup>79</sup> C. Simpson, 'Cultural Heritage on the Move: Significance and Meaning' in M. Chanock, & C. Simpson (eds.), *14(2) Law and Cultural Heritage Special issue of Law and Context* (La Trobe University Press, Bundoora, 1996) p. 46.

<sup>80</sup> *Protection of Movable Cultural Heritage Act 1986 (Cth)*, s. 7.

<sup>81</sup> M. Reid, 'The return of the native – offshore' *Weekend Australian*, 22–23 Jul. 2000.

<sup>82</sup> G. Boreham, 'Christie's rejects plea on tribal art' *Age* 3 Oct. 1994.

<sup>83</sup> *Ibid.*

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

Aboriginal presence, but it is not accorded the same status or degree of protection as items that are the product of the post-invasion nationhood. Even more problematically, the operation of legislation designed to protect items such as Papunya art school works from being exported overseas and lost to the national heritage is premised around the idea that a ten person National Cultural Heritage Committee can determine the importance of such art works. This presumption leads to circumstances whereby items, such as the 1902 Ashes diary of the cricketer Victor Trumper, are prohibited from being exported overseas, and an *ad-hoc* decision allows certain artworks to be protected from the Central Desert School but then allows other, equally significant, works to be granted a permit for export. One such painting by artist Mick Namarari Tjapaltjarri was not accorded protection, despite the secret/sacred nature of the work. Rothwell notes that one member of the consultative committee reported that the committee had agonised over the decision: 'It was remarkably important, but we couldn't in the end justify holding it back. I must say it's a bit difficult, after that, to see what . . . we would hold back. But you know there's just not the sense that Australian institutions are around queuing up to buy these things.'<sup>84</sup>

In June 2000 it was estimated that forthcoming sales by two major auction houses in Melbourne would see 1000 pieces of Aboriginal art placed on the market.<sup>85</sup> Amongst these pieces were included a number of artworks that were valued in the hundreds of thousands of Australian dollars. The problem that emerges with regard to the operation of the current legislation is that it provides for artworks to be assessed – but the other issue that emerges is that of the expert dimension. The Aboriginal art specialist from the Deutscher-Menzies auction-house, Ms. Vivien Anderson, stated: 'I don't think every object more than 20 years old needs a permit . . . With my experience over the last 15 years dealing in Aboriginal art, I think I should determine what works fit the criteria in the act.'

Similarly, the Sotheby's representative, Tim Klingender, observed that he has been repeatedly surprised at the decisions made by the committee and cited an example:

The Old Walter painting banned last year was a simple, generic work devoid of any secret or sacred information and which attracted no interest from any institution or Australian private collector. It sold to the only bidder, who happened to live overseas, for well below the estimate. Yet it has been banned.

There is an implicit notion within these arguments that the white 'expert', the curator, is somehow cognisant of the secret or sacred meanings that might be embedded within a particular artwork. As Ormond-Parker has commented, the legislation is defined in terms of its importance to the nation and 'such a definition is

---

<sup>84</sup> N. Rothwell, 'Reconciled to rip-offs' *Weekend Australian* 24–25 June 2000.

<sup>85</sup> G. Maslen, 'Caught in the act' *Age* 21 Jun. 2000.

of course at odds with the inalienable rights of Indigenous communities to own, control and manage their cultural property'.<sup>86</sup> Aboriginal cultural rights are subsumed or assimilated under the rubric of 'nation' and the relative importance of works can be best determined by the non-Indigenous curators of auction houses. Despite the existence of the *Protection of Movable Cultural Heritage Act*, the notification process continues to be oblivious to any concept that Indigenous Australians should be notified as to the prospective sale of cultural materials. In October 1999 when the artefacts from the Strehlow collection were presented for sale, a third of the items originally offered were removed from sale after the auctioneers received a legal letter from the Strehlow foundation. The senior curator of the Aboriginal collection at the South Australian Museum, Phillip Jones, commented that: 'The auction was a major and spectacular example of a major collection slipping through the net. It's a concern to Aboriginal people.'<sup>87</sup> A tribal elder of the West Aranda people supported Jones' statement, stating that his community had not been told of the auction.

### **CULTURAL HERITAGE AND A POST-COLONIAL NATION?**

The original conception of Aboriginal cultural heritage in terms of 'archaeological relics' has been transformed in the last thirty years by the recognition of the significance of place for Indigenous Australians. While Griffiths observes that 'heritage legislation has offered a means by which Aboriginal people can gain some recognition for their association with place, and some control over those places',<sup>88</sup> it is a control that is severely circumscribed and which, ultimately, excites antipathy amongst those who see it as an impediment to economic development. The 2001 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr. Jonas, criticised the failure of the Australian government to embrace the possibility for reconciliation with Indigenous Australians. In part, Dr. Jonas noted that:

The current offer of equal participation in the great Australian nation blurs the visions and perspectives of different citizen groups into one 'Australian dream', obscuring the need for specific recognition of Indigenous social and racial identity. In doing so, it closes down the dialogue between Indigenous and non-Indigenous peoples that was envisaged as an essential part of the reconciliation process. This dialogue was to be respectful of cultural difference while promoting co-existence . . .<sup>89</sup>

---

<sup>86</sup> L. Ormond-Parker, 'A Commonwealth Repatriation Odyssey' 3(90) *Aboriginal Law Bulletin* (1997) 9.

<sup>87</sup> T. Plane, 'Cultural art sold by mistake' *Australian* 20 Oct. 1999.

<sup>88</sup> Griffiths, *supra* note 20, p. 230.

<sup>89</sup> ATSI Social Justice Commissioner, *Social Justice Report 2001*, ch. 6 at <[www.humanrights.gov.au/social\\_justice/sjreport\\_01/chapter6.html#4p](http://www.humanrights.gov.au/social_justice/sjreport_01/chapter6.html#4p)>.

## THE APPROPRIATION OF ABORIGINAL CULTURAL PROPERTY TO BENEFIT NON-INDIGENOUS INTERESTS

The views that Indigenous Australian cultural property is either a commodity to be dealt with by the market, or, alternatively, an appropriate prop in the construction of the Australian 'dream' of nationhood, can only serve to accentuate the failure of reconciliation. As Janke puts it: '[R]ecognizing Indigenous cultural and intellectual property is at the heart of the reconciliation process. Indigenous Australians must have the right to control uses of their cultural and intellectual property in order to maintain their unique cultural identities.'<sup>90</sup>

The experience of Indigenous Australians has been for the control of their cultural property to be appropriated by non-Indigenous 'experts'. This appropriation has been validated by the non-Indigenous legal system that is only capable of conceptualising Aboriginal cultural heritage and native title as 'two discrete sets of business risks whose relationship has blurred at the margins'.<sup>91</sup> Whilst Indigenous cultural heritage and knowledge is defined and limited by the operation of market forces which view it solely in terms of either an exportable market commodity or as a 'business risk', the prospect for genuine reconciliation remains very slight.

---

<sup>90</sup> T. Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' 22(2) *UNSW Law Journal* (1999) 639-40.

<sup>91</sup> D. Gately and J. Fulcher, 'Native Title and Cultural Heritage: the blurring of the issues?' (1998) *APPEA Journal Part 2* 158.



PART III

INDIGENOUS PEOPLES IN  
DOMESTIC JURISDICTIONS





## AUSTRALIA

### INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

*Steve Kinnane*

#### ABSTRACT

Sustainability operates across a range of contested and diverse fields as an interdisciplinary discourse integrating socio-cultural, ecological and economic relationships with the natural world. Recent movements within sustainability have sought to integrate Indigenous relationships to natural resources as part of the sustainability paradigm. Australian Indigenous peoples, and Indigenous movements internationally, have also utilized the language of sustainability when promoting inherent Indigenous rights to land, aspirations of self-determination and obligations to 'country'. However, in utilising sustainability as a field of negotiation, Indigenous participants generally speak of another dimension within this debate, an Indigenous approach to 'country' that is bound within Indigenous relationships to natural-cultural resources that cannot be divorced from cultural-spiritual relationships with our natural world. This chapter examines relationships between sustainability movements and Indigenous approaches to country within this emerging trans-disciplinary field, and argues that recognition of inherent Indigenous rights to 'country' offers unique insights to the management of natural resources, provides Indigenous models for community development, and holds the promise of invigorating the international sustainability movements.

#### 1. INTRODUCTION

The history of development of Indigenous<sup>1</sup> natural-cultural resources<sup>2</sup> in Australia, and internationally, is steeped in the hegemony of Western resource management

---

<sup>1</sup> Indigenous is used here in a general sense, usually accompanied with 'peoples' as a general term with regard to diverse Indigenous peoples of the world. I use the capital 'I' as is done with the term, 'Aboriginal' which has become a pan-Aboriginal defining term for many Indigenous peoples. Capital 'I' Indigenous is also used as the chosen form of expression within recent declarations from the Kimberley Declaration of Indigenous Peoples at the 2002 World Summit on Sustainable Development.

<sup>2</sup> The term 'natural-cultural resources,' is used in this thesis as a means of subverting dominant Western approaches to resources as being innate, asocial, and apolitical constructs, as related by M. Langton, *Burning Questions: emerging environmental issues for indigenous*

practices in which resources are perceived as being developed by States toward a so called 'greater common good' of the citizens of the State.<sup>3</sup> Australian academic Ritchie Howitt defines this controlling and dominating hegemony with respect to resource management as a system in which, 'the institutions of resource management, environmental planning and regulation are almost all legacies of previous eras of injustice and denial'.<sup>4</sup> Such reproduced systems of hegemony have dominated Indigenous lands and waters in Australia for over two hundred years. Indigenous epistemology and metaphysics surrounding cultural, social, spiritual and economic relationships to natural-cultural resources within Indigenous countries<sup>5</sup> have been misappropriated and consumed by such hegemonic Western imperatives to exploit these resources, most often at the expense of the many for the benefit of the few. This Western resource exploitation system is based on imperial and colonial imperatives.<sup>6</sup> It is a system that has continued as a reproduced ideology integrating industrial, corporate, and State perceptions of Indigenous natural-cultural resources.<sup>7</sup>

In Australia the struggle for recognition of Indigenous rights, obligations and practices with regard to natural-cultural resources has been informed in recent years by two main shifts in power relations. The first shift has involved what Professor Peter Jull has referred to as 'Indigenous Internationalism'.<sup>8</sup> This emerging Indigenous Internationalism is described by Jull as being a significant new arena for

---

*peoples in northern Australia* (CINCRM, NTU, Darwin, 1998) p. 7 (hereinafter *Burning Questions*).

<sup>3</sup> H.C. Coombs (ed.), *Land of Promises: Aborigines and Development in the East Kimberley* (Centre for Environmental Studies, Australian National University and Aboriginal Studies Press, Australian Institute of Aboriginal Studies, Canberra, 1989) pp. 1–5.

<sup>4</sup> R. Howitt, *Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples* (Routledge, London and New York, 2001) p. 47 (hereinafter *Rethinking Resource Management*).

<sup>5</sup> Country is described as the 'totality of Indigenous connections to land, kin, spirit, and place', in M. Dodson, 'Indigenous peoples, social justice and rights to the environment', in Sultan *et al.* (eds.), *Ecopolitics IX Conference; Perspectives on Indigenous Peoples Management of the Environment Resources, Darwin, 1995* (Northern Land Council, Darwin, 1996) p. 25; also in *Understanding Country*, Key Issues Paper No. 1 (Council for Aboriginal Reconciliation, Canberra) 1994, p. 1.

<sup>6</sup> Throughout this paper I refer to this system of Western resource exploitation or development as one of 'mainstream Western development practices'. I recognise that it is problematic to generalise about a unitary 'mainstream' system of Western development practices as this overlooks the role of Labour and other social movements associated with the resistance of overtly capitalist structures. However, from an Indigenous perspective, such systems have operated historically in predominantly exploitative systems and it is this perspective of this system that I refer to when using this term.

<sup>7</sup> J. Connell, P. Hirsch, and R. Howitt, 'Resources, Nations, and Indigenous Peoples', in R. Howitt, *et al.* (eds.) *Resources, Nations and Indigenous Peoples* (Oxford University Press, Melbourne, 1996) p. 1.

<sup>8</sup> P. Jull, 'Outback Internationalism: New Linkages in Northern Development', in P. Jull and S. Roberts (eds.), *The Challenge of Northern Regions* (Australian National University/ North Australia Research Unit, Darwin, 1991) p. 284 (hereinafter 'Outback Internationalism').

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

Indigenous peoples that 'caught national governments by surprise'.<sup>9</sup> Considering that governments have mostly preferred to operate out of 'welfare colonialism' and 'tutelage', Jull noted that the embarrassing impacts of Indigenous peoples utilising International forums successfully has pressured national governments overlaying Indigenous nations into negotiation.<sup>10</sup> Key national and domestic Indigenous gains within Australian polity can be considered to have been the result of a reflexive engagement within international conventions and obligations within an Indigenous rights agenda, and Indigenous internationalism has displayed a significant role in these negotiated, if sometimes problematic, outcomes.

The second shift has involved the concurrent rise of sustainability as a discipline that questions the entrenched hegemony of Western neo-colonial<sup>11</sup> practices with respect to natural resources and human relationships with ecological systems of the natural world. Sustainability has often been portrayed as an elastic language of compromise between competing systems of belief with regard to human connections with the natural world.<sup>12</sup> However, it is precisely this open nature of sustainability that I believe has opened up new avenues of negotiation with respect to Indigenous country and Indigenous aspirations toward more sustainable futures.<sup>13</sup> These shifts in power relations have taken place within Australia under the influence of international political movements. These influences include International Indigenous movements towards self-determination,<sup>14</sup> the consideration of universal versus inherent Indigenous rights to resources and development, and international protest movements over the impacts of globalisation on sustainability.<sup>15</sup> These movements have interacted to create new forms of negotiated stewardship and negotiation of dominant Western forces within Indigenous countries in ways that have the potential

---

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Neo-colonial practices are described by Coombs as being a form of continuing modern internal colonialism in which Indigenous natural-cultural resources continue to be exploited by hegemonic Western development paradigms. Coombs, *supra* note 3, p. 5.

<sup>12</sup> M. Jacobs, 'Sustainable Development as a Contested Concept', in *Fairness and Futurity* (Oxford University Press, Oxford, 1999), p. 33.

<sup>13</sup> A. Davison, *Technology and the Contested Meanings of Sustainability* (State University of New York Press, New York, 2001) p. 213.

<sup>14</sup> F. Passy, 'Supranational Political Opportunities as a Channel of Globalization of Political Conflicts: The Case of the Rights of Indigenous Peoples', in D. della Porta, *et al.* (eds.), *Social Movements in a Globalizing World* (St Martin's Press Inc., New York, 1999) p. 162.

<sup>15</sup> E. Becker, 'Fostering Trans-disciplinary Research into Sustainability in an Age of Globalization: A Short Political Epilogue', in E. Becker *et al.* (eds.), *Sustainability and the Social Sciences: A cross-disciplinary approach to integrating environmental considerations into theoretical reorientation* (UNESCO and the Institute for Social Ecological Research, St Martins Press, New York, 1999) p. 288.

STEVE KINNANE

to transform, not only Indigenous development and self-determination, but developmental paradigms in general.<sup>16</sup>

In 1992, Mr. Eddie Mabo and the Meriam people of Mer Island achieved their historic victory in the High Court of Australia declaring invalid the notion of *terra nullius*,<sup>17</sup> and laying the foundation for the *Native Title Act* (1993), the Native Title Tribunal, and the Indigenous Land Fund.<sup>18</sup> It was in this same year at the Rio Earth Summit that the Indigenous People's Earth Charter was created at the Kari-oca Conference on Human Rights and International Law. The first item of the Indigenous declaration demanded that, 'the concept of *terra nullius* must be eliminated from International Law usage', as, 'many state governments have used internal domestic laws to deny us [Indigenous peoples] ownership of our own lands'.<sup>19</sup> The Rio Earth Summit energised sustainability on an international scale and began what can be considered a series of inter-subjective<sup>20</sup> negotiations of what sustainability would really mean for Indigenous peoples when confronted by dominant Western capitalist systems.<sup>21</sup>

In Australia the legislative framework created by the *Native Title Act* (1993) was designed to mediate and recognise continuing Indigenous connections to country. However, this system, being based within Western legal frameworks rather than Indigenous cultural practices, has not adequately recognised Indigenous rights and responsibilities to country.<sup>22</sup> Native Title rights, unlike universal human rights, are inherent rights held by Traditional Owners. Piecemeal mediation of Indigenous rights and obligations to country, as occurs within the framework of Native Title, is a poor reflection of the complex Indigenous considerations of development and

---

<sup>16</sup> Jull argues that Indigenous Internationalism is leading to the creation of new 'political institutions and political cultures', from which national governments must negotiate with Indigenous peoples as self-governing entities as the only means of subverting neo-colonial practices. P. Jull, 'The Politics of Sustainable Development: Reconciliation in Indigenous Hinterlands', draft paper for *Indigenous Peoples, Power and Sustainable Development in the Global World* (International Research Project, University of Tromsø, 2002) p. 1 (hereinafter 'The Politics of Sustainable Development').

<sup>17</sup> *Terra Nullius*, translating as 'land belonging to no one', was the legal fiction by which Indigenous Australian lands were colonized, as outlined in H. Amankwah, 'Mabo and International Law', 35 *Race and Class: A Journal for Black and Third World Liberation* (1994) 58.

<sup>18</sup> *Ten Years of Native Title - Information Kit*, National Native Title Tribunal, 2002, p. 6.

<sup>19</sup> Indigenous Peoples Earth Charter, Kari-oca Conference, 25–30 May 1992, Human Rights and International Law.

<sup>20</sup> Inter-subjective negotiations are discussed within this paper with reference to Marcia Langton's consideration of inter-subjectivity with respect to Indigenous/non-Indigenous negotiations in which engagement occurs on a subjective level of actual negotiation rather than an objectified dogmatic positioning of ideas, perspectives and hierarchies. M. Langton, '... Well I heard it on the radio, and I saw it on the television ...' (Australian Film Commission, North Sydney, 1993) p. 10 (hereinafter 'Well I heard it').

<sup>21</sup> Coombs, *supra* note 3, pp. 1–5.

<sup>22</sup> Kimberley Land Council, Media Release – Miriwung-Gajerrong Decision, 08/08/2002, p. 1.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

governance that are required to negotiate models of Indigenous sovereignty in relation to the national civic state. Indigenous requirements for a holistic consideration of Indigenous and non-Indigenous relationships with country require an ideological shift within the Western development paradigm that is unfulfilled by tinkering with the edges of recognition of Indigenous rights, as occurs within the *Native Title Act* (1993).

Likewise, Indigenous engagement with sustainability requires an interrogation of the spectrum of movements existing within this formative discipline. Indigenous inherent rights arise from an Indigenous world-view in which reflexive obligatory responsibility toward natural-cultural resources is not simply enshrined in a conjunction of social, economic, and environmental factors, but is an essential element of spiritual and cultural practices that permeate engagement with, and management of, natural-cultural resources.<sup>23</sup> While challenging neo-colonial practices toward Western resource exploitation, Indigenous approaches to country also challenge utopian elements of the sustainability spectrum that fall into a 'unity of interests' approach, overrunning the diversity of Indigenous ethics with respect to country.<sup>24</sup>

In conjunction with the few determinations of Native Title claims that have occurred within the last ten years, there has been an increase in intra-Indigenous alliances towards community development, resource development monitoring within Indigenous country,<sup>25</sup> and muted State Government promises of negotiated models of regional sustainable development.<sup>26</sup> Within a climate of enforced negotiation in which Native Title has been the *waddi*<sup>27</sup> that has brought dominant Western governments and developmental players to the table, sustainability has recently become the meeting space in which new development proposals are being

---

<sup>23</sup> Dodson, *supra* note 5, p. 25; Langton, *Burning Questions*, *supra* note 2, pp. 7–8; and J. Davies and E. Young, 'Taking Centre Stage: Aboriginal Strategies for Marginalisation' in Howitt *et al.* (eds.), *Resources, Nations, and Indigenous Peoples*, *supra* note 7, p. 152.

<sup>24</sup> 'Unity of Interests' refers to a non-recognition of Indigenous rights to resources and resource development, and an expectation of the State as 'honest broker' through which resource development is promoted for the 'good of all citizens', described by R. Dixon in 'In the Shadows of Exclusion: Aborigines and the Ideology of Development in Western Australia', (1985) reprinted in M. Dillon and R. Dixon, *Aborigines and Diamond Mining* (UWA Press, Perth, Australia, 1990) p. 155.

<sup>25</sup> M. Langton, 'The Nations of Australia,' An Alfred Deakin Lecture (Melbourne Town Hall, 20 May 2001) p. 17.

<sup>26</sup> S. Kinnane, 'Beyond Boundaries: Exploring Indigenous Sustainability Issues Within a Regional Focus Through the State Sustainability Strategy' (Sustainability Policy Unit, Department of Premier and Cabinet, Perth, Western Australia) April 2002, p. 2.

<sup>27</sup> *Waddi* is Nor'west lingo for a Digging Stick also used by women for Fighting. It is a big heavy fire-hardened wooden stick.

considered in Indigenous country by governments, mining companies, conservationists, and Indigenous landholders.<sup>28</sup>

Within this paper I argue that trans-disciplinary<sup>29</sup> interaction between cultural considerations within sustainability and Indigenous approaches to country have created a new trans-disciplinary field of 'Indigenous sustainability'. The diversity of possible spaces of negotiation that are created out of such inter-subjective negotiations operates within a 'multiple interests'<sup>30</sup> paradigm in which Indigenous approaches to country and Western sustainability movements negotiate within an acceptance of inherent Indigenous obligatory responsibility to country. Subverting the unity of interests approach, this multiple interests approach enables Indigenous knowledge and ethics to be negotiated within sustainable practices, rather than simply being incorporated within the wider sustainability movement.

In conducting this examination I will discuss historical, socio-political, and cultural factors surrounding the colonisation of Indigenous lands and waters in Australia that have led to these responses by Indigenous peoples. The dominant hegemony of Western colonial and neo-colonial practices with regard to Indigenous natural-cultural resources will be examined so as to identify the foundations and continuing influences within Western resource exploitation. Sustainable development, arising from a global recognition of the impact of human development upon the Earth's natural resources and the need to integrate socio-cultural, economic, and environmental factors in all elements of human development, will then be deconstructed. This analysis leads through to an examination and critique of recent negotiations between the discipline of sustainability and Indigenous approaches to country. In conclusion, I argue that it is possible to identify 'Indigenous sustainability' as a new trans-disciplinary field of negotiation between the sustainability movement and Indigenous approaches to country that offers unique insights and approaches to natural-cultural resources in a way that can both benefit Indigenous community development, and also invigorate the wider sustainability movement.

---

<sup>28</sup> P. Newman *et al.*, 'Focus on the Future,' Consultation Paper for the State Sustainability Strategy (Department of Premier and Cabinet, Western Australia, 2001) p. 1.

<sup>29</sup> While constituting a 'paradigm' within the meaning of a conceptual framework, Indigenous sustainability is a body of knowledge constituting a 'trans-disciplinary field', as related by Becker *et al.* as a 'multiplicity of new forms of cross-disciplinary co-operation'. E. Becker (*et al.*), 'Exploring Common Ground: Sustainability and the Social Sciences', in *Sustainability and the Social Sciences: A cross-disciplinary approach to integrating environmental considerations into theoretical reorientation*, UNESCO and the Institute for Social Ecological Research (St. Martins Press, New York, 1999) p. 12.

<sup>30</sup> 'Multiple interests' paradigm refers to the recognition of indigenous interests in resource development through an understanding of indigenous cultural-spiritual relationships with land and indigenous approaches to resource development and trade, as described by R. Dixon, *supra* note 24, p. 155. Note also that when referring to 'the State', I am referring to a general sense of the 'state' as a totality of civic governance that encompasses Australian non-Indigenous federated political systems of governance, not to any particular State within that federal system.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

### 2. WESTERN EXPLOITATION OF INDIGENOUS NATURAL-CULTURAL RESOURCES

Driven by the forces of his own civilisation, the Anglo-Saxon goes to the foreign country to develop its natural resources – and the consequences seem inescapable.<sup>31</sup>

Benjamin Kidd, 1894.

Economic globalisation constitutes one of the main obstacles for the recognition of the rights of Indigenous Peoples. Trans-national corporations and industrialized countries impose their global agenda on the negotiations and agreements of the United Nations system . . . Unsustainable extraction, harvesting, production and consumption patterns lead to climate change, widespread pollution and environmental destruction, evicting us from our lands and creating immense levels of poverty and disease.<sup>32</sup>

The Kimberley Declaration  
International Indigenous Peoples  
Summit on Sustainable Development.  
2002

#### 2.1. *The Coming of the Kartiya*<sup>33</sup>

From the earliest Indigenous glimpses of Kartiya sailing off the coastal regions of Aboriginal countries, Indigenous peoples of this continent have operated out of an understanding of ownership of our respective countries.<sup>34</sup> First contacts between Indigenous and non-Indigenous peoples have varied across the continent, from acts of open warfare to Indigenous readings of the light-skinned strangers as returning spirit beings.<sup>35</sup> However, for Indigenous peoples of Australia it soon became

---

<sup>31</sup> S. Lindqvist, *Exterminate All the Brutes* (Granta Books, London, 1998) p. 138.

<sup>32</sup> *The Kimberley Declaration*, International Indigenous People's Summit on Sustainable Development Khoi-San Territory, Kimberley, South Africa, 20–23 August 2002, p. 1.

<sup>33</sup> Kartiya is a term for non-Indigenous peoples used across a wide variety of Indigenous languages in the Kimberley region of Western Australia. In Australia there are many such terms that are used by particular Indigenous regional groupings such as Wedjalla (Nyungar), Migloo (Murri), and Gunbba (Koori). I use Kartiya because it is a term in common usage in the East Kimberley and among Nor-westers, like myself, whose families were removed to the South.

<sup>34</sup> M. Dodson, 'The End In The Beginning: Re-(de)fining Aboriginality', The Wentworth Lecture, 1 *The Australian Aboriginal Studies Journal of the Australian Institute of Aboriginal and Torres Strait Islander Studies* (1994) p. 3 (hereinafter 'The End In The Beginning').

<sup>35</sup> T. Rowse, 'Were You Ever Savages: Aboriginal Insiders and Pastoral Patronage', 158:1 *Oceania* (1987) 92. Rowse relates how the Duracks' (Kartiya) approach into Mirriwoong

apparent that any misreading of the arriving invaders as returning kin was far from the reality. Within the first years of colonial expansion many Indigenous peoples soon found their lands, rivers, and forests being taken over by these newcomers for whom the certainty of their 'rightful' claims to Indigenous territories was inscribed in their colonial doctrines.

From the initial 'official' landing at Sydney Cove in 1788 to the beginning of the twentieth century, Indigenous resistance faced the growing number of colonists and changing technological advances of the encroaching Europeans. However, as with other parts of the world subject to colonisation and imperialism, the overpowering nature of Western technology and imported diseases took its toll on Aboriginal peoples of Australia.<sup>36</sup> These actions of invasion and resistance were played out across the nation as Europeans expanded ever further into Aboriginal territories. In my home state of Western Australia the colonial frontier was extended slowly north from the original Swan River Colony that was established to the Southwest in 1829. In the Kimberley Region, my home country, such frontier resistance and acts of war occurred much later than for the rest of the continent, occurring well into the twentieth century.<sup>37</sup> With the coming of Europeans the subtle balances by which these Indigenous political systems were managed became threatened along with Indigenous natural-cultural resources that were being exploited.<sup>38</sup>

## 2.2. Colonialism, Capital, Hegemony and Projected Superiority<sup>39</sup>

In regard to the historical influences and their continuing impacts upon Indigenous peoples within Western hegemony, Howitt stated that:

---

Country upon the backs of strange beasts was seen as coming from areas of traditional cultural renewal and as such, along with the later revelation of their off-cider 'Boxer' to be a 'Marban' man, they were somehow imbued with spiritual associations. See also A. Lanyon, *Malinche's Conquest* (Allen and Unwin, Sydney, 1999) pp. 120–121. Lanyon relates the similar myth that invading Conquistadores in the various indigenous countries of Mexico in the 15th Century were believed by Montezuma to have been returning gods. However, Lanyon notes that this internationally popular myth actually sprung from the work of 16th Century Franciscan evangelists who were propagating this myth as a means of aiding the conversion of Indigenous peoples of the Culua-Mexica into the fold of colonial España.

<sup>36</sup> Reynolds, *infra* note 49, p. 99.

<sup>37</sup> Rowse, *supra* note 35, pp. 92–97.

<sup>38</sup> J. Kohen, *Aboriginal Environmental Impacts* (UNSW Press, NSW, 1995) pp. 107–109.

<sup>39</sup> Ironically, in Flinders's 1801 expedition journal he wrote of the Nyungar peoples whose country he was passing as seeming undesirous of communication and in fact gestured to Flinders and his crew to go back to where they came from, indicating an air of indifference, indeed contempt, to the assumed superiority that Flinders believed he represented. 'The Navigators', ABCTV Documentary, 13 Oct. 2002. However, Lindqvist notes many instances where imagined European superiority formed the foundation of eventual domination and exploitation of Indigenous peoples the World over. Lindqvist, *supra* note 31, pp. 115–155.



## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

The colonial interplay of economic and religious zealotry fragmented, disoriented and disabled many indigenous groups. Similarly, the diverse forms of modern internal colonialism and post-colonialism with their continued religious, economic and state institutionalism of Indigenous peoples, the myriad forms of dependence, marginalisation, exclusion, and entrenched structures of racism and disadvantage reflected in the economy, education systems, legal systems, prison systems and so on, all contribute to current crises for Indigenous survival.<sup>40</sup>

This Western sense of superiority is uniquely captured in Herbert Spencer's statement supporting the view that imperialism was an inevitably dominant civilising process that would consume Indigenous peoples, described as inferior races, according to the doctrine that, 'be he human or be he brute – the hindrance must be got rid of'.<sup>41</sup> This statement supporting Social Darwinism as a process of colonial and imperial domination was further supported by Eduard von Hartman who stated that, 'the true philanthropist, if he has comprehended the natural law of anthropological evolution cannot avoid desiring an acceleration of the last convulsion, and labor for that end'.<sup>42</sup> This statement clearly supports Howitt's contention that colonial expansion of Western societies into Indigenous lands was integrally linked to 'access to resources for industrialisation and development . . . an important motivation for both *in situ* intensification and geographical expansion of industrial societies', in which 'both these processes have brought industrial societies into contact and conflict with tribal and indigenous peoples'.<sup>43</sup>

Nineteenth century notions such as Social Darwinism assumed an 'inevitable' destruction of Aboriginal peoples of 'inferior' races during this period, influencing a policy in Western Australia generally described as 'Soothing the Dying Pillow'.<sup>44</sup> Under this policy it was assumed that Indigenous Australians would 'die out' and therefore the only appropriate practice would be to aid this passing. However, increased populations of Aboriginal peoples emerging from disenfranchised groups warranted consideration by governments and local authorities concerned at the increase of the so called 'half-caste' populations.

This led to the enacting of 'Protection' Acts in Queensland (1897), Western Australia (1905), New South Wales (1909), and South Australia (1911), aimed at 'protecting' Aboriginal peoples from the imagined worst elements of White society.<sup>45</sup> Framed within a segregationist and authoritarian assumption of superiority

---

<sup>40</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, pp. 29–30.

<sup>41</sup> Lindqvist, *supra* note 31, p. 8 (citing Herbert Spencer, *Social Statistics* (London, 1850) p. 410).

<sup>42</sup> Lindqvist, *supra* note 31, p. 12.

<sup>43</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 23.

<sup>44</sup> A. Haebich, *For Their Own Good – Aborigines and Government in the South of Western Australia 1900 – 1940* (UWA Press, Western Australia, 1988) p. 48.

<sup>45</sup> *Ibid.* p. 8.

on the part of the dominant powers, these acts only added to the greater burden of Aboriginal existence.<sup>46</sup>

Within Indigenous Australian lands and territories between 1880 and 1900, when British Imperialism, operating within this hegemony of exploitative cleptocracy<sup>47</sup> was at its zenith, over one third of the State of Western Australia was engaged in a land-grab that had not been seen since the initial days of the colony in 1829.<sup>48</sup> Viewing Indigenous lands as *tabula rasa* – a blank slate – Western imperial and colonial appropriation of Indigenous lands took place within a legal fiction that colonists themselves chose to uphold contrary to the evidences that surrounded them in the form of an Aboriginal created landscape and obvious Indigenous relationships as owners and managers of country.<sup>49</sup> The Europeans, who arrived on the Australian continent in the eighteenth century, constructed human development of the land as Western development of the land. They also, therefore, constructed Indigenous lands and waters as a wilderness uninhabited by humans, and this projection laid the foundation for doctrine of *terra nullius* – land belonging to no one.<sup>50</sup> *Terra nullius* formed the legal basis for the appropriation of Indigenous Australian lands by the British Crown and was dependent on the European belief that Indigenous land use did not constitute agriculture.<sup>51</sup> These beliefs supported the notion of colonisation of Indigenous lands as part of a natural anthropological and ecological process. The outcome of these beliefs resulted in a Western ethic in which it was not only considered prudent, but ‘rightful’ and ‘inevitable’ that Indigenous peoples of the ‘New World,’ being inferior, would give way to superior Western peoples as they encroached upon Indigenous lands. Thus, it was thought that Indigenous peoples would ‘dissolve in a mist of inevitability before the superior European’.<sup>52</sup>

The combination of imperialism, industrialisation, and supposed scientific proof of Western superiority was a heady hegemonic potion of mutually supportive, self-prophetic ideologies. These ideologies formed the foundational belief system that drove Westerners in search of Indigenous natural resources that they considered were theirs by right – theirs to own, master, exploit, and manipulate. As Lord Salisbury so clearly stated in 1898, ‘one can roughly divide the nations of the world into the living and the dying’, and from this vantage point it was inescapable that ‘the living nations will naturally encroach on the territory of the dying’.<sup>53</sup> Operating schizophrenically between notions of saving Indigenous peoples through the trickling down of resources and aid from the expected Anglo-Saxon ‘top’ to the ‘inevitable’ Indigenous ‘bottom’, to the inevitability of Indigenous subservience of

<sup>46</sup> B. Attwood and A. Markus, *The Struggle for Aboriginal Rights – A Documentary History* (Allen and Unwin, Sydney, 1999) p. 8.

<sup>47</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, pp. 48, 155.

<sup>48</sup> Haebich, *supra* note 44, p. 8.

<sup>49</sup> H. Reynolds, *With The White People* (Penguin Books, Sydney, 1990).

<sup>50</sup> Attwood and Marcus, *supra* note 46.

<sup>51</sup> Coombs, *supra* note 3, p. 12.

<sup>52</sup> *Ibid.*, p. 10.

<sup>53</sup> *Ibid.*, p. 140.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

extinction, this model has continued well into the twentieth century and still operates in a neo-colonial resurgence within Indigenous lands around the world.<sup>54</sup>

### 2.3. Neo-Colonialism – Economic Rationalism

Contemporary mainstream Western approaches to resource development have been widely considered to operate within the framework of economic rationalism, wherein nature is seen as standing in reserve for the use of humans.<sup>55</sup> H. C. (Nugget) Coombs has noted this development as a hegemonic practice with a long legacy linking current modern neo-colonial practices with Western Industrialisation.<sup>56</sup> While relating that development in its original meaning,<sup>57</sup> Coombs also noted that this idealised, positivist, essentialist notion of ‘development’, has come to be understood as extremely problematic with ‘less emphasis given to its origins in gross exploitation and its effects on local populations’,<sup>58</sup> particularly Indigenous populations.

In regard to projected hegemonic values within the mainstream, Coombs argues that internationally, and within Australia, national identities were created within foundational ‘imagined frontiers’ in which Indigenous people were to be considered nothing more than ‘objects of conquest’, as a hurdle to be leaped in order to fulfil an imagined national destiny.<sup>59</sup> Likewise, Howitt, upon considering Western mythologies surrounding Indigenous lands as ‘virgin territories’,<sup>60</sup> found such ideas continued to dominate contemporary Western visions describing them as underpinning ‘much of the orientalist literature of conquest and exotica, driving ‘ideologies and political programs of nationalist, racist and supremacist movements in many places’.<sup>61</sup>

Coombs eloquently described the Western development paradigm as operating on the ‘accumulation of capital, the growth of organisational and managerial skills, the development of a science-based technology, and the mobilisation of the world’s resources and human capacities’.<sup>62</sup> In this sense mainstream contemporary economic rationalist approaches to natural resources operate from simplistic assumptions that there will be continued growth in material consumption. Economic rationalism assumes that the Earth’s natural resources are limitless, will be able to be utilised indefinitely, and any damage, in terms of waste arising from such human activity,

---

<sup>54</sup> *The Kimberley Declaration*, *supra* note 32, p. 1.

<sup>55</sup> J. Saul, *On Equilibrium* (Penguin Books, Sydney, 2001) pp. 54–55. Coombs, *supra* note 3, pp. 3–5. R. Williams, ‘Socialism and Ecology’, 6:1 *Capitalism, Nature, Socialism* (1995) 46.

<sup>56</sup> Coombs, *supra* note 3, pp. 3–4.

<sup>57</sup> *Ibid.*, p. 3. The original meaning of this development is ‘refers to the way potential is realised’.

<sup>58</sup> *Ibid.*, p. 4.

<sup>59</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 63.

<sup>60</sup> *Ibid.*, p. 62.

<sup>61</sup> *Ibid.*, p. 63.

<sup>62</sup> Coombs, *supra* note 3, p. 4.

will simply be able to be absorbed in a similarly limitless fashion by ecological sinks.<sup>63</sup> This ‘super-ideology’, in which capitalism and consumerism are intertwined, is considered by Andrew Dobson to entail a form of continued industrial suicidal action akin to ‘rearranging the deckchairs on the *Titanic*’.<sup>64</sup>

In attempting to counter this ingrained hegemony Indigenous peoples are faced with the powerful, interconnected, and overtly dominant force of capitalist market systems. Howitt argues that these neo-colonial practices often become embedded to such a degree that the hegemony reproduces itself continually in ‘practices of colonization [which] are so institutionalised in political and bureaucratic structures and policies, that they are almost unnoticed’.<sup>65</sup> It is within this heady brew of mutually supportive ideologies existing within the socio-historical, situational, and institutional hegemony of colonial and imperial exploitation of Indigenous natural-cultural resources that neo-colonialism flourishes and re-invents itself as the assumed credo of common sense, ‘practical’ development.<sup>66</sup> The ignorant power of this invisibility of the hegemony of Western resource exploitation works to overpower Indigenous ways of relating to natural and cultural resources. Its seamless invisibility appears to work, by acting like a smothering government blanket under which Indigenous voices, practices, and beliefs are expected to disappear. These voices have not disappeared, however, and have continued to speak to country both as acts of resistance and as acts of survival.

### 3. INDIGENOUS NATURAL CULTURAL RESOURCES – ‘COUNTRY’

‘Country in the Aboriginal sense is like a book – you learn plenty of information – and you respect it.’<sup>67</sup>

Mary Tarran, Yarwuru/ Bardi Elder, 1997

---

<sup>63</sup> A. Dobson, *Green Political Thought* (2nd ed.), (Routledge, London, 1995) p. 30 (citing E. Goldsmith and N. Hildyard, *Green Britain or Industrial Wasteland?* (Oxford Polity Press, London, 1986) pp. 343–344).

<sup>64</sup> *Ibid.*

<sup>65</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 117 (citing D. Rose, ‘Indigenous ecologies and an ethic of connection’, in N. Low (ed.), *Global Ethics and Environment* (Routledge, London, 1999) p. 182–183).

<sup>66</sup> *Ibid.*, p. 116.

<sup>67</sup> M. Tarran, ‘People, country and protection of cultural properties’, in D. Rose and A. Clarke, *Tracking Knowledge Across North Australia* (NARU, ANU, Canberra, ACT, 1997) p. 83.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

Our lands and territories are at the core of our existence – we are the land and the land is us; we have a distinct spiritual and material relationship with our lands and territories and they are inextricably linked to our survival and to the preservation and further development of our knowledge systems and cultures, conservation and sustainable use of biodiversity and ecosystem management.

The Kimberley Declaration  
International Indigenous Peoples  
Summit on Sustainable Development.  
23 August 2002

### 3.1. *Resources as Natural-Cultural Resources*

Indigenous ethics, beliefs, and practices with relation to natural-cultural resources generally operate in contradiction to mainstream Western development paradigms. Aboriginal approaches to country have been described by Coombs as operating out of an obligatory responsibility in which rights of ownership are integrally tied to human existence, responsibilities to country and kin, control of, and stewardship towards the natural-cultural world.<sup>68</sup> This obligatory right of ownership confers a heavy responsibility that requires carefully managed utilisation and relationships with natural resources. This holistic Indigenous approach to natural resources as country, ensures the protection and rejuvenation of resources for future generations, in terms of physical balance, as well as, importantly, in terms of spiritual cultural balance.<sup>69</sup> Coombs, in considering these Indigenous actions, considered the Australian landscape as ‘an Aboriginal artefact, maintained in its “pristine” form by conscious Aboriginal management’.<sup>70</sup>

Deborah Bird Rose has developed this consideration of Aboriginal agency in the construction of Australian ecological and human relationships as forming a kind of ‘sacred geography’.<sup>71</sup> Building on her previous considerations of such Aboriginal agency as forming a ‘dreaming ecology’, Rose believes that these unique Indigenous philosophies with respect to country are not alien to non-Indigenous Australians, yet are constrained by historical and institutional hegemony.<sup>72</sup> Within these considerations, Rose notes that Australians, in general, are considered to be one of the most ecologically conscious peoples of the world and yet there remains an ambivalence at the heart of mainstream Australian identity which is unable to grasp Indigenous notions of connection to country. Regardless of this divide, Rose

---

<sup>68</sup> Coombs, *supra* note 3, p. 37.

<sup>69</sup> Coombs, *supra* note 3, p. 38.

<sup>70</sup> *Ibid.*, p. 7.

<sup>71</sup> D. Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, Canberra, 1996), p. 5 (hereinafter *Nourishing Terrains*).

<sup>72</sup> D. Rose, ‘Exploring an Aboriginal Land Ethic’, in (1988) 3:47 *Meanjin* 382 (hereinafter ‘Exploring’).

maintains that Indigenous notions of caring for country exist as a possible bridging philosophy for all future management of Australian landscapes.<sup>73</sup>

The doctrine of *terra nullius* continues to undermine Indigenous approaches to country in the context of ongoing contemporary resource exploitation of Indigenous natural-cultural resources. From an anthropocentric perspective, Indigenous natural resources are assumed to be available to be utilised by ‘superior’ Western agents.<sup>74</sup> From an eco-centric perspective, Indigenous country is seen as a natural ‘wilderness’ devoid of human interaction.<sup>75</sup> Within this duality the notion of wilderness continues to act as a powerful recurring motif for Western developers and Western conservationists resulting in Indigenous peoples rights, processes, and practices in relation to country being doubly disadvantaged. Existing beyond this eco-centric/anthropocentric divide, Indigenous approaches to country are best described as operating within an anthropogenic, human-created natural world in which Indigenous practices are considered to be essential elements of the natural world.<sup>76</sup>

### *3.2. Human-Centred Relationships and Human-Centred Consumption and Conservation*

In an interesting twist on the notion of wilderness, Gurindji Elder Daly Pukara related: ‘[C]ountry is becoming a “wilderness” – a man-made cattle wilderness where nothing grows, where life is absent, where all the care, intelligence and respect that generations of Aboriginal people have put into the country have been eradicated in a matter of a few short years’.<sup>77</sup> In contrast, he tells us that country that is cared for, that is unspoilt by the encroaching wilderness, is ‘quiet’.<sup>78</sup>

This notion of ‘quiet’ country, has also been related by Paddy Roe and Jimmy Pike with reference to the need for continued care and maintenance of water sites.<sup>79</sup>

<sup>73</sup> Rose, *Nourishing Terrains*, *supra* note 71, pp. 83–84.

<sup>74</sup> ‘Anthropocentric’ reflects a view of our environment as being human-centred, with benefit to human existence at its core. See D.A. Posey, ‘Indigenous peoples and traditional resource rights: A basis for equitable relationships?’, in Sultan *et al.* (eds.), *Ecopolitics IX Conference; Perspectives on Indigenous Peoples Management of the Environment Resources 1995, Darwin* (Northern Land Council, Darwin, 1996) p. 45.

<sup>75</sup> ‘Ecocentric’ reflects the view of our environment as a non-human world of which humans are only a part, and of which humans are not any more integral than any other species. See R. Eckersley, ‘The development of modern ecopolitical thought: from participation and survival to emancipation’, in *Environmentalism and political theory: toward an ecocentric approach* (London, UCL Press, 1992) pp. 7–31.

<sup>76</sup> ‘Anthropogenic’ references human created and/or modified landscapes that require continued human intervention and engagement. See Langton, *Burning Questions*, *supra* note 2, p. 9 (citing Posey, *supra* note 74, p. 45).

<sup>77</sup> *Ibid.*, p. 61.

<sup>78</sup> *Ibid.*

<sup>79</sup> S. Yu, ‘Ngapa Kunangkul: Living Water’, Report on the Aboriginal Cultural Values of Groundwater in the La Grange Sub-basin, Centre for Anthropological Research, University of

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

These uncared-for sites are not considered to be gone, but to be 'sleeping'. In contrast to the Western ideal of 'wilderness' that has supported the conservationist ideological framework, Davies and Young consider that, for Indigenous peoples, 'wilderness' is land that has been taken out of their care and, in the absence of their active management, has become 'wild'.<sup>80</sup> 'Wilderness' in this Indigenous sense is sleeping country that is not being rejuvenated through human interaction within particular Indigenous relationships in an anthropogenic sense. This sense contrasts both with the exploitative resource extraction that characterises mainstream anthropocentrism, and with the segregationist conservation strategies that typify eco-centrism.<sup>81</sup> Rose regards this eco-centric conservationist approach as being equally informed by constructions of wilderness that blind the beholder in such a way, 'wherein one sees oneself or one sees nothing at all'.<sup>82</sup> This approach is at odds with an Indigenous world-view in which the 'beholder' is unable to be separated from the lands being considered.

Thus, Indigenous approaches to country subvert Western ideas of wilderness and encompass wider considerations of cultural, spiritual, historical, and physical relationships to resources. Any possible damage to country may not only constitute physical damage to the ecology of the land but may also impact upon the obligatory responsibility to land, thus resulting in cultural and spiritual harm. Obligation incorporates complex structures and practices that allow Indigenous owners to negotiate careful access to non-owners of resources within a careful consideration of control that ensures that their resources are accessed by non-owners in such a way that the resources can continue to be regenerated.<sup>83</sup> This form of ownership does not constitute ownership in the Western sense of proprietary ownership, rather, it is part of a collective ownership mediated by responsibility to the resource, to kin, and by all other elements of life that make up country from considerations of intergenerational utilisation of the resource to spiritual cultural obligations.<sup>84</sup>

Thus, what are described as 'resources' by the West are considered to be natural-cultural resources by Indigenous peoples, for whom human interaction with the natural worlds is not divorced from culture, spirituality, and economy.<sup>85</sup> Indigenous ethics to natural-cultural resources are described by Michael Dodson as being ones which involve 'another dimension, that invests the land with meanings

---

Western Australia, And the Waters and Rivers Commission of Western Australia, December, 1999, p. 22.

<sup>80</sup> Davies and Young, *supra* note 23, p. 155, citing Rose, 'Exploring', *supra* note 72, pp. 378–387.

<sup>81</sup> R. Eckersely, 'The development of modern ecopolitical thought: from participation and survival to emancipation', in *Environmentalism and political theory: toward an ecocentric approach* (London, UCL Press, 1992) p. 29.

<sup>82</sup> Rose, *Nourishing Terrains*, *supra* note 71, p. 18.

<sup>83</sup> Coombs, *supra* note 3, p. 32.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

and significance – that transforms land and environment into landscape and into country'.<sup>86</sup> The importance of culture in consideration of sustainability for Indigenous peoples is fundamental to the division and separation of Indigenous approaches to country and Western approaches to resources.<sup>87</sup> It is this cultural relationship of resources and human existence that has been reiterated constantly by Indigenous peoples in seeking negotiated outcomes over resource and other development activities within Indigenous lands. This is common within Aboriginal cultures across Australia as we link our connections to land ethno-culturally and ancestrally in an approach which acknowledges what the Kimberley declaration described as an inter-linkage of 'distinct spiritual and material relationship with [Indigenous] lands and territories'.<sup>88</sup>

With regard to Indigenous approaches to country in the Kimberley region of Western Australia, Bunuba Leader, Peter Yu, has spoken of the system of respect for one another's country as being 'the glue that holds this wider Aboriginal Kimberley Region together . . . respect for each other's traditional ownership, cultural responsibility, and local autonomy'.<sup>89</sup> For June Oscar, then Deputy Chair of the Kimberley Land Council, 'country and people go together. Without people the country would suffer. Without country the people would suffer'.<sup>90</sup> As Mandawuy Yunupingu has stated with reference to the importance of Aboriginal cultural perspectives on development:

[Y]ou have to understand, this is our mainstream. Sure, we might have made it into what you call the mainstream in your culture, but we have our own mainstream and our own structures . . . we have a mainstream that we talk about, but it is ours . . . but ours is literal. For us, the mainstream is a literal stream, a stream that carries knowledge.<sup>91</sup>

This Yolngu philosophy is at the heart of Indigenous approaches to balance in which Mandawuy speaks of the idea of 'balance, the harmony we actively work at'.<sup>92</sup> Within the complex and specific cultural rituals, stories and rights associated with 'country', this core notion of Indigenous rights to particular lands and waters is an essential element of Aboriginal belonging to country.

<sup>86</sup> Dodson, 'Indigenous peoples, social justice and rights to the environment', *supra* note 5, p. 25.

<sup>87</sup> Kohen, *supra* note 38, p. 125. Kohen refers to Aboriginal peoples as 'managers' of country, and non-Indigenous Australians as 'exploiters' of resources.

<sup>88</sup> The Kimberley Declaration, *supra* note 32.

<sup>89</sup> P. Yu, 'Aboriginal Rights and Governance, A Kimberley Perspective', April 2002, p. 3.

<sup>90</sup> F. Walsh, 'Information Needs and Media in Aboriginal Land Management' (citing J. Oscar, Kimberley Land Council Land and Sea Management Unit), March 2002, p. 3.

<sup>91</sup> A. Shoemaker, 'The Politics of Yothu Yindi', in K. Dorian-Smith (ed.), *Working Papers in Australian Studies*, Nos. 88–96, (Australian Studies Centre, Institute of Commonwealth Studies, University of London, London, 1994) p. 35 (citing M. Yunupingu as quoted in S. Brown, 'The Rock of Ages Past', *The Australian*, Weekend Review, 27 May 1989).

<sup>92</sup> M. Yunupingu, 'Yothu Yindi: Finding Balance', *Race and Class* [1994] 112.



## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

### 4. SUSTAINABILITY – AN INTERSECTION OF EQUITY, CONSERVATION, DEVELOPMENT, AND COMMUNITY

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>93</sup>

Our Common Future  
WCED Report, 1987

*Sustainable Development*, or *sustainability* for short is easily understood at its most basic level. It means simply that in a global context any economic or social development that should improve, not harm, the environment.<sup>94</sup>

Jeff Kenworthy and Peter Newman, 1999

#### 4.1. Sustainability as a Counter-Point to Neo-Colonial Developmental Practices

Sustainability is recognised to have broken through as a widely accepted concept in 1972 at the United Nations Conference on Human Environment.<sup>95</sup> Growing public awareness and public debate about environmental destruction generated the understanding that development practices are limited by the capacity of the natural world to both sustain industrial growth through resource exploitation, while assimilating the waste therefrom.<sup>96</sup> Integrating economic, environmental, and social ramifications of development, sustainability is a contested ideology that has been resisted by neo-classical economics with its emphasis on the ‘invisible hand’ of the market as the best driver of economic development, and its lack of consideration about social and environmental factors.<sup>97</sup> Some economists have sought to extend the market to accommodate these factors and have generated environmental

---

<sup>93</sup> M. Diesendorf and C. Hamilton, *Human Ecology, Human Economy* (Allen and Unwin, Sydney, Australia, 1997) p. 68 (citing the World Conference on Environment and Development Brundtland Report, *Our Common Future*, 1987, p. 46).

<sup>94</sup> P. Newman and J. Kenworthy, *Sustainability and Cities: Overcoming Automobile Dependence* (Island Press, Washington, DC, 1999) p. 1.

<sup>95</sup> *Ibid.* Notably, Diesendorf and Hamilton relate this breakthrough as having direct linkages to the publication of *Silent Spring* (Carson, 1962), and the growth in concern over chemical pollution in particular.

<sup>96</sup> Diesendorf and Hamilton, *supra* note 93, pp. 67–71.

<sup>97</sup> I. Sachs, ‘Social Sustainability and Whole Development: Exploring the Dimensions of Sustainable Development’, in *Sustainability and the Social Sciences: A cross-disciplinary approach to integrating environmental considerations into theoretical reorientation*, UNESCO and the Institute for Social Ecological Research (St. Martins Press, New York, 1999) p. 28.

economics as a tool of sustainability; however, neo-classical models of economic development still predominate.<sup>98</sup>

Sustainability is a process-oriented field that operates within particular 'sustainability principles' toward a negotiated ideal of what is considered a sustainable outcome for regional localised communities operating within a global setting. Newman and Kenworthy have noted that, while most of the debates surrounding sustainability have taken place at the executive, management, and governance level, 'it is recognised that this can only create the right signals for change'.<sup>99</sup>

However, while governments have been reluctant to embrace sustainability, 'throughout the 1970s and 1980s, there was a rapid growth in community-based environmental organizations, to the extent that the movement gained significant influence on government decisions in many countries'.<sup>100</sup> During this period, and to date, political debate surrounding sustainability has been concerned with many issues including Malthusian<sup>101</sup> predictions of a global ecological crisis, the usefulness of Western scientific and technocratic solutions, the distribution of power and resources between the 'North' and the 'South', and the regenerative capacities of the earth.<sup>102</sup> Existing within conservationist foundations, sustainability has also been critically assessed by marginalised nations of Indigenous peoples,<sup>103</sup> as being a front for further first world expansion into marginalised and Indigenous territories.<sup>104</sup> The sustainability movement during this 'first wave' was sign-posted by the World Conservation Strategy in 1980<sup>105</sup> and the creation of the United Nations World Commission on Environment and Development in 1983.<sup>106</sup>

The first wave of environmental concern, between the 1950s and the late 1970s, has been characterised by Davison as being, 'sceptical of the modernist model of progress and called for a far-reaching spiritual, moral, and economic change in

---

<sup>98</sup> K. Turner *et al.*, *Environmental Economics: An elementary introduction* (Harvester Wheatsheaf, Hertfordshire, UK), p. vii.; Rosewarne, 'Selling the environment: a critique of market ecology', in S. Rees *et al.* (eds.), *Beyond the market: alternatives to economic rationalism* (Pluto Press, Lichardt, NSW, 1993) p. 55.

<sup>99</sup> Newman and Kenworthy, *supra* note 94, p. 3.

<sup>100</sup> Diesendorf and Hamilton, *supra* note 93, p. 68.

<sup>101</sup> 'Malthusian' refers to the work of Thomas Malthus, (1798) and Malthus's idea of 'absolute limits', or scarcity, in which Malthus argued that as an economy developed, human population would always outstrip growth, and therefore lead to poverty, misery and despair. Turner, *supra* note 98, p. 2.

<sup>102</sup> Diesendorf and Hamilton, *supra* note 93, p. 68; *see also* Newman and Kenworthy, *supra* note 94, p. 2; *see also* Davison, *supra* note 13, p. 12.

<sup>103</sup> F. Bayet, 'Overturning the doctrine: Indigenous people and wilderness. Being Aboriginal in the environment movement', 13(2) *Social Alternatives* (1994) 31.

<sup>104</sup> Newman and Kenworthy, *supra* note 94, p. 2; *see also* Davison, *supra* note 13, p. 14.

<sup>105</sup> S. Beder, 'What is Sustainable Development', in *The Nature of Sustainable Development* (Scribe Publications, Newham, 1993) p. 4.

<sup>106</sup> Newman and Kenworthy, *supra* note 94, p. 2.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

technical societies'.<sup>107</sup> This wave was also responsible for the founding of an identifiable environmental movement in the West and, in particular, in the North.<sup>108</sup> This period is also characterised by a massive concurrent growth in Multi-National Corporations ('MNC's) throughout the world and the beginnings of globalisation of the world economy. While this shift towards globalisation gained pre-eminence in the 1990s, it was within the period of the first wave that the world experienced the decolonisation of Africa and South America and the rise of the United Nations system enshrining universal human rights. Multilateral agreements on trade and investment embracing free trade principles were also a hallmark of this period.<sup>109</sup>

The seminal contribution to what Davison termed 'optimism of the second wave'<sup>110</sup> was the World Conference on Environment and Development's ('WCED') 1987 Brundtland Report, *Our Common Future*. The Brundtland Report promoted sustainable development as a 'process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'.<sup>111</sup> Coombs maintained that, with its emphasis on the proper treatment of the environment, the Report spoke directly to Aboriginal reservations about the economic excesses of continued resource exploitation in Aboriginal lands.<sup>112</sup>

Focusing on the elements of the Brundtland Report that have received too little focus in regard to the issues of development and Indigenous peoples, Peter Jull considers that this original document engaging with sustainability and development still has great relevance for Indigenous peoples and for policy makers dealing with Indigenous peoples internationally.<sup>113</sup> Nevertheless, while Jull is keen to recognize and promote Indigenous engagement with contemporary political institutions and systems as being of great value, he acknowledges that many contemporary national and international political regimes have failed to see such Indigenous engagement as a positive 'knowledge revolution' and instead retreat into their old approaches of seeking to bend Indigenous peoples to the Western development paradigm.<sup>114</sup> To this end, while lauding the role of the Brundtland Report as a major turning point in considerations of human interaction with the natural world, he is rightfully cautious

---

<sup>107</sup> *Ibid.*, p. 13.

<sup>108</sup> *Ibid.*

<sup>109</sup> Coombs, *supra* note 3, pp. 3–5.

<sup>110</sup> Davison, *supra* note 13, p. 16.

<sup>111</sup> Coombs, *supra* note 3, p. 10.

<sup>112</sup> *Ibid.*

<sup>113</sup> Jull, 'The Politics of Sustainable Development', *supra* note 16, pp. 3–5 (citing the World Conference on Environment and Development Brundtland Report, *Our Common Future*, 1987, pp. 114–115).

<sup>114</sup> *Ibid.*, p. 6.

to consider how 'sustainable development' is, 'too often, an empty cliché used by governments, policy makers, and commentators everywhere'.<sup>115</sup>

#### *4.2. Sustainability and New Spaces for Negotiation for Indigenous Peoples*

Increased attention to divergent notions of 'sustainability' by Non-Governmental Organisations ('NGO's), MNCs, and nation-states led to the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, on the twentieth anniversary of the 1972 Stockholm Conference.<sup>116</sup> This conference marked a watershed in sustainability movements with the creation of multilateral agreements on the environment, as well as Agenda 21. It is within this momentous Agenda 21 document that Chapter 26, Local Agenda 21, dealing with sustainable development of localised communities on a global scale, was drafted.<sup>117</sup> Chapter 26 of Agenda 21, entitled 'Recognizing and Strengthening the Role of Indigenous People and their Communities',<sup>118</sup> was welcomed by the Indigenous Peoples Conference as a major step forward in recognising the rights, responsibilities, and the key roles that Indigenous peoples fulfil in working towards the enshrined principles of sustainable development.<sup>119</sup>

Section 26.3 of Agenda 21 spoke of empowering Indigenous peoples, creating instrumentalities for Indigenous peoples, recognising land rights of Indigenous peoples, recognising Traditional Ecological Knowledge of Indigenous peoples; and improving economic development in line with Indigenous community values. It did not go as far as many Indigenous people had hoped in recognising Indigenous peoples as 'peoples' rather than as 'Indigenous people and their communities,' which, in United Nations circles, amounted to less acknowledgment. However, it recognised Indigenous action and responsibility with regard to country, and was the beginning of the possibility of real engagement of Indigenous peoples in the debate surrounding Indigenous rights in the context of sustainability.

Regardless of the positive outcomes of the Rio Earth Summit in terms of agreed targets and plans, the realities of implementing these plans, particularly the far-reaching Agenda 21, have not lived up to expectations. While the United Nations Commission on Sustainable Development was charged with the role of overseeing the implementation of Agenda 21, the lack of resources and focus within the United Nations system, coupled with a growing multinational capturing of the sustainability agenda, have limited its effectiveness.<sup>120</sup> During this period the development of sustainability was influenced by Western approaches to natural resources, based within the Western scientific and technical paradigm. Coinciding with shifting power balances surrounding the collapse of Cold War politics, environmentalist

---

<sup>115</sup> *Ibid.*, p. 3.

<sup>116</sup> *Ibid.*, p. 69.

<sup>117</sup> Newman and Kenworthy, *supra* note 94, p. 6.

<sup>118</sup> UNCED, Agenda 21, Chapter 26, Rio, Brazil, 1992.

<sup>119</sup> Kar-o-ca Declaration, 25–30 May 1992.

<sup>120</sup> Davison, *supra* note 13, p. 16.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

warnings of the need to limit growth became countered by the inclusion of big business.<sup>121</sup>

As Coombs has related, opening up the debate on sustainability created spaces for the engagement of Indigenous peoples in the debate surrounding Indigenous natural cultural resources in a way that had not been previously possible.<sup>122</sup> However, opening up the debate also included the necessary involvement of the very mainstream groups responsible for much of the exploitation and destruction of the natural world. For many, the effect has weakened sustainability, allowing it to be captured by big business and states seeking to utilise the language of sustainability while masking the real damage being done in its name.<sup>123</sup> However, this broadened the debate to include much wider cultural considerations, allowing engagement with a diversity of possible interactions outside of Western mainstream hegemony. For this potential to be realised, however, it is imperative that the debate be monitored so as to focus on equity for all partners rather than merely the powerful elites. Such monitoring is particularly pertinent for Indigenous peoples.

Interestingly, it was against the backdrop of the Rio Earth Summit in 1992 that Indigenous peoples from all over the world met to consider how sustainability would be negotiated in an Indigenous context. These meetings, which took place with support of preparatory forums conducted by NGOs, resulted in the creation of the Indigenous Peoples' Earth Charter at the 1992 Kari-oca Conference. Commonly referred to as the Kari-oca Declaration, it made 109 demands within the following areas: Human Rights and International Law; Indigenous Lands and Territories; Biodiversity and Conservation; Development Strategies; and Culture, Science and Intellectual Property.<sup>124</sup> Sustainability's strength is that it has allowed integration of participants from regional, minority and Indigenous peoples, governments, and MNCs within the debate. Sustainability's weakness is that powerful voices within this debate could subvert the openness and capture the debate, pulling it away from open dialogue into a guided discussion that takes place at the lowest common denominator. Sustainability revolves between eco-radical and eco-modernist<sup>125</sup> discourses and the spectrums of sustainability between poles described by Zethoven as 'weak' and 'strong' sustainability.<sup>126</sup> Therefore, the possibility for real Indigenous engagement requires a framework for sustainability radical enough to re-cast mainstream Western resource development imperatives.

Young and Davies argue that a shift has taken place in recent years with regard to new approaches to resource management and sustainability in Australia in which a sea change has occurred involving a 'land ethic' embodied in ecological

---

<sup>121</sup> *Ibid.*

<sup>122</sup> Coombs, *supra* note 3, p. 10.

<sup>123</sup> I. Zethoven, 'Sustainable Development a Critique of Perspectives', in J.W. Smith (ed.), *Immigration, population and sustainable environment* (Flinders University Press, 1991) p. 7.

<sup>124</sup> Kar-oca Declaration, *supra* note 119.

<sup>125</sup> Davison, *supra* note 13, p. 33.

<sup>126</sup> Zethoven, *supra* note 123, p. 7.

STEVE KINNANE

sustainable development.<sup>127</sup> This optimistic observation is at odds with Davison's argument that, while accepting the notion of sustainability as 'an essentially contested and culturally rich discursive domain . . . the language of sustainable development is conceptually incoherent and politically compromised'.<sup>128</sup> This tension between optimistic utopianism and critical suspicion of the reality of sustainability requires further consideration of how Indigenous peoples can engage openly with sustainability.

## 5. SUSTAINABILITY, COUNTRY, AND REAL DIALOGUE

The commitments made to Indigenous Peoples in Agenda 21, including our full and effective participation, have not been implemented due to a lack of political will . . . Since 1992, the discussions on sustainable development have been intensified, however, the ecosystems of our Mother Earth continue to be degraded increasingly. We are in crisis. We are in an accelerating spiral of climate change that will not abide unsustainable greed.<sup>129</sup>

Tom Goldtooth  
Director  
Indigenous Environmental Network  
2002

Political commitment to the environment has not been matched by a recognition of the need for strategies consistent with the notion of conservation of cultural diversity or the sustainability of social and cultural identity. Indeed, in many quarters, the quest for sustainability has been rapidly incorporated into the ideology of industrialisation and development.<sup>130</sup>

Professor Ritchie Howitt  
*Justice Sustainability and  
Indigenous Peoples*  
2001

### 5.1. *The Realpolitik of Indigenous Peoples and Natural Resources*

With regard to the inherently political nature of resource use, Howitt has defined the dominant hegemony of Western development as one in which Indigenous places, resources, and peoples are 'brought within the narrative of industrialisation and development and their meaning reduced to their part in that narrative'.<sup>131</sup> Marcia

---

<sup>127</sup> Davies and Young, *supra* note 23, p. 155.

<sup>128</sup> Davison, *supra* note 13, p. 38.

<sup>129</sup> T. Goldtooth, *Indigenous Environmental Network Statement at the WSSD Full Plenary*, Johannesburg, South Africa, 29 August 2002.

<sup>130</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 26.

<sup>131</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 148.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

Langton has criticised this ideal of a 'unity' of Australian citizenry over the 'diversity' of Aboriginal experience arguing that 'it is still the case that Indigenous people have neither a clear nor a just place in the ambit of the Australian polity'.<sup>132</sup> This point is clear in relation to the dominant Western industrial 'unity of interest' paradigm by which Indigenous resources are exploited and controlled, but is less evident within the field of sustainability. This does not mean that Indigenous peoples' approaches could not also be consumed within a sustainability paradigm.

This neo-colonial sleight of hand in regard to Indigenous natural-cultural resources, while operating under the guise of universal rights, acts to subvert Indigenous claims to inherent rights to resources which are seen as a threat to the dominant Western developmental system. Indigenous inherent rights are not universal, but are often viewed as part of an obligatory responsibility to country that is particular to Indigenous peoples. Davison has described this neo-colonialism as existing in two distinct forms of control of resources, the first being exploitative corporate neo-colonialism as described previously, and the second being environmental colonialism with respect to lands of so called 'Third World' and 'Fourth World' (Indigenous) peoples in which conservation becomes the driving force of neo-colonial control.<sup>133</sup> It is within this second category that Indigenous peoples can likewise be overrun within a sustainability paradigm.

Mainstream notions of sustainability speak of the integration of local cultural and spiritual connections with the natural world. Nevertheless, sustainability can also become aligned within a global Western capitalist economic paradigm.<sup>134</sup> However, it is important to remember that Indigenous communities are also seeking to invigorate economic development within our communities within desires for autonomy enshrined in aims towards self-determination. The difference is that Indigenous peoples are not seeking forms of development existing within the dominant national and global capitalist economic systems that continue to ignore Indigenous cultural-spiritual beliefs in relation to natural-cultural resources. To this end, I am keen to consider Coombs's and Jull's positive observation that sustainability offers a new development paradigm for Indigenous peoples.<sup>135</sup> Jull describes sustainability as a daily reality for Indigenous peoples operating in their home countries, forming 'an organic part of evolved or evolving indigenous economies, societies, cultures, and self-identifying political communities'.<sup>136</sup> It is therefore necessary to examine how Indigenous peoples have been negotiating sustainability within the diverse possible cultural, geographical, and spiritual connections to country.

---

<sup>132</sup> Langton, 'The Nations of Australia', *supra* note 25, p. 16.

<sup>133</sup> Davison, *supra* note 13, pp. 50–51.

<sup>134</sup> Coombs, *supra* note 3, p. 3.

<sup>135</sup> *Ibid.*, p. 10; Jull, 'The Politics of Sustainable Development', *supra* note 16, pp. 3–5.

<sup>136</sup> Jull, 'The Politics of Sustainable Development', *supra* note 16, pp. 21–22 (citing Jull, *Politics, Development and Conservation in the International North (Canadian Arctic Resources Committee, Ottawa, 1986)*).

### 5.2. *Indigenous International Engagement*

Operating within the frame of ‘sovereign’ peoples, Indigenous peoples operate as ‘peoples’ in the stronger legal sense of international systems of conventions and treaties. This idea of ‘peoples’ as having any power at all has been questioned in recent years within a consideration of the Realpolitik of international systems of governance that operate, essentially, through horse-trading between nations. Within this argument, even the United Nations is the poor cousin to bilateral and multilateral agreements between states and trading blocs. However, while these criticisms have to be taken into account, what cannot be ignored are the international alliances that Indigenous peoples have been able to create out of the desire to exist as sovereign peoples within Indigenous lands.<sup>137</sup>

Helen Corbett cites Indigenous engagement with the United Nations to the 1920s involvement of Native Americans’ approaches to the League of Nations. However, Corbett notes the 1993 Year of International People, and the following 1994 World Conference On Human Rights adoption of the Decade of International People, as key turning points that held much promise, but yielded little.<sup>138</sup> Peter Jull cites the December 1973 meeting of Inuit, Northwest Territory Indians, and the Yukon, the Inuit of Greenland and Sami of Norway, Sweden and Finland as the foundational meeting point of what he has termed, ‘Indigenous Internationalism’ that led to the creation of the World Council of Indigenous Peoples in 1975.<sup>139</sup> This Arctic Peoples Conference was considered a seminal shift in Indigenous responses within home territories, as Indigenous peoples were able to interact as equals with common problems and a wealth of knowledge in dealing with pressures of development within Indigenous homelands.<sup>140</sup> He notes that in 1990 the Sami hosted the World Congress of Indigenous Peoples in Norway, ‘under the theme of “sustainable development”, as a direct result of the Brundtland Report of 1987’.<sup>141</sup>

In describing the achievements of Indigenous Internationalism, Jull considers many of these to be major breakthroughs in which Indigenous international negotiation and cooperation has led to specific Indigenous political and cultural responses to threats of resource exploitation and the influence on national governments of other international and global pressures, from global environmentalism to global corporatism. Without the formation of these movements and the engagement of national governments with other Indigenous peoples’ support, Jull contends that it is unlikely that Indigenous concerns would have received an airing. In this sense, Jull has described Indigenous Internationalism as

<sup>137</sup> G. Alfredsson, Human Rights Workshop, Irish Centre for Human Rights, National University of Ireland, Galway, 6 June 2002.

<sup>138</sup> H. Corbett, ‘International Efforts’, in Yunupingu *et al.* (eds.), *Voices From the Land*, Boyer lectures, (ABC Books, Sydney, 1993) p. 83.

<sup>139</sup> Jull, ‘Outback Internationalism’, *supra* note 8, p. 285.

<sup>140</sup> P. Jull, ‘Indigenous Internationalism: What Should we do next?’, Draft Article, *Indigenous Affairs*, IWGIA, Copenhagen, 1999, pp. 1–2.

<sup>141</sup> Jull, ‘Outback Internationalism’, *supra* note 8, p. 285.



## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

‘one of the startling achievements of the 20th Century’.<sup>142</sup> However, while acknowledging the success of Indigenous Internationalism and noting that the relative success of Indigenous international movements is not necessarily supported by all Indigenous leaders, Jull relates that the shifting dynamic created by Indigenous negotiation also requires a shift in Indigenous acceptance of the Realpolitik of ‘the beginning of a new relationship in modern states between resurgent indigenous political communities and a more enlightened and open-minded non-indigenous public’.<sup>143</sup>

Having broken new ground, the task is now to build on the gains that have been made. To this end, Jull believes that ‘Indigenous peoples are creating a new field of political philosophy and political economy through their self-determination movements and interaction with nation-state governments to achieve political administration and reform’.<sup>144</sup> This new field includes Indigenous Sustainability, operating out of an Indigenous Internationalism made up of composite Indigenous ethics with regard to natural-cultural resources. This Indigenous Internationalism, as Jull relates, is not only a ‘marginal issue’<sup>145</sup> but also a new field of interdisciplinary engagement that is invigorating wider debates on issues of sustainability, governance, and human relationships with the natural world. In considering how such Indigenous models are engaging with sustainability, it is necessary to open up the sustainability paradigm to greater scrutiny.

### 5.3. *Deconstructing Sustainability*

In contrasting Indigenous and Western approaches to resource management, Young and Davies consider that this new ‘trend’ of sustainability allows for a greater negotiation of Indigenous approaches to country, ‘within which there is now space for indigenous voices to be heard’.<sup>146</sup> However, they are also at pains to point out that such cases, requiring ‘fundamentally different ways of reading the landscape, and defining and valuing resources’, need to be carefully understood against Western and Indigenous approaches to land, and as such, the divergent paradigms that exist.<sup>147</sup> It is within the spectrum of negotiations of sustainability as a discipline that Howitt has noted critics who consider that ‘ecological sustainability’, could be seen as a ‘sixth face of oppression’,<sup>148</sup> if not carefully negotiated by Indigenous peoples.

Similarly, in considering sustainability as the next major universal ideology of promise for human development, Davison, citing Ashok Khosha’s statement that

---

<sup>142</sup> *Ibid.*, p. 1.

<sup>143</sup> *Ibid.*, p. 2.

<sup>144</sup> *Ibid.*, p. 3.

<sup>145</sup> *Ibid.*

<sup>146</sup> Davies and Young, *supra* note 23, p. 155.

<sup>147</sup> *Ibid.*

<sup>148</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 93.

sustainable development 'may well go down as one of the major intellectual breakthroughs of the twentieth century',<sup>149</sup> cautions against such uncritical assumptions. While Davison is careful to point out the promise that he sees in the diversity of debates surrounding sustainability, he also points out the potential for this promise within the ideals of sustainability to be 'confused, co-opted and steadily dissipated by the eco-modernist agenda'.<sup>150</sup>

This problematic situation occurs when sustainability as a movement, while dialoguing with Indigenous approaches to country and belief systems, finds itself operating within neo-colonial practices by speaking of resources in terms of the 'common good'. It is a difficult yet interesting situation that sustainability, operating from principles recognising and valuing cultural and regional relationships with the environment, also forces a consideration of global impacts that can result from such local cultural values. Therefore, conservative elements of sustainability may fall into the trap of working to subvert 'local' Indigenous knowledge to achieve aims of 'global' Western sustainability of resources.

Howitt, in stating the need for new approaches to resource management noted that 'the realities of resource management are not asocial, ahistorical, or aspatial . . . they are embedded within socially constructed realities'.<sup>151</sup> Usually such issues do not arise between Indigenous ethics and 'strong' sustainability due to their common approaches.<sup>152</sup> However, with its focus on economic development at the expense of the precautionary principle, 'weak' sustainability is an obstacle to Indigenous approaches to country and new movements in Indigenous sustainability.<sup>153</sup> Citing the 1992 Global Forum, held concurrently with the 1992 Rio Earth Summit, Davison points to the statement by conference participants that 'the non-government organizations from all nations . . . do not accept the concept of sustainable development that is used only to produce cleaner technology while maintaining the same patterns of exclusive and unjust social relations for the majority of the Earth's people'.<sup>154</sup> This statement places cultural considerations at the head of the sustainability debate. Davison identifies root cultural causes of un-sustainability as including 'Euro-centrism in development theories and economic structures . . . marginalisation of women and indigenous peoples . . . degradation and loss of local

---

<sup>149</sup> Davison, *supra* note 13, p. 37, (citing, Kholsha, 'Forward', in T.C. Trzyna (ed.), *A Sustainable World: Defining and Measuring Sustainable Development* (Earthscan/IUCN/ICEP, 1995) pp. 7–9.

<sup>150</sup> Davison, *supra* note 13, p. 37.

<sup>151</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 111.

<sup>152</sup> 'Strong sustainability' refers to operating with strong adherence to sustainability principles with particular focus on the precautionary principle. This concept is also referred to as 'deep sustainability'. Zethoven, *supra* note 123, p. 9.

<sup>153</sup> 'Weak sustainability' operates with a focus on economic development within the eco-modernist technocratic agenda outlined previously. It is usually applied as a cooption of the term sustainability with little real adherence to its principles. Weak sustainability is also termed 'shallow sustainability'. Zethoven, *supra* note 123, p. 9.

<sup>154</sup> *Ibid.*

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

knowledge, languages, and practices, and degradation and devaluation of non-human life'.<sup>155</sup>

In considering the integration of local and global relationships to natural resources, this tendency towards Euro-centrism remains a stumbling block for Indigenous peoples seeking to negotiate the sustainability movement. This global/local tension of sustainability of natural-cultural resources cannot be ignored by localised Indigenous speakers for country when considering issues of sovereignty and inherent rights to land, and the backdrop of colonial and neo-colonial exploitation of lands and waters. It is therefore important not to allow a sense of global utopianism to overtake the sustainability discourse any more than it is useful to allow the neo-colonial elements within the eco-modernist agenda to dominate. This has been related by Vanada Shiva with reference to global crises in the so called 'third world' in which she argues that top-down global solutions, even operating under the mantle of sustainability, can be detrimental to Indigenous approaches to country, and in this sense form a neo-colonial practice.<sup>156</sup>

Howitt believes that it is precisely for the reason that Indigenous approaches to resource management open up areas of debate and challenge the hegemony of Western resource development systems that this area of dialogue between sustainability and Indigenous ethics with regard to country is of 'profound' importance.<sup>157</sup> Likewise, Jull argues that Indigenous internationalism is leading to the creation of new 'political institutions and political cultures', from which national governments must negotiate with Indigenous peoples as self-governing entities.<sup>158</sup> However, within the institutional, ideological, epistemic, and hegemonic communities that influence debates about development, sustainability, and Indigenous peoples, there is a key need to remain vigilant against neo-colonial tendencies. This process has been referred to by Howitt as a process of decolonisation, but is more aptly referred to by Langton as an anti-colonial ethic.<sup>159</sup>

### 5.4. *Inter-Subjectivity and an Indigenous Anti-Colonial Ethic*

I suggest that Indigenous sustainability exists within an inter-subjective negotiation between the spectrum of sustainability practice on the one hand, and Indigenous approaches to country on the other.<sup>160</sup> It is important that sustainability does not

---

<sup>155</sup> *Ibid.*, p. 48.

<sup>156</sup> *Ibid.*, p. 97.

<sup>157</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 49.

<sup>158</sup> Jull, 'The Politics of Sustainable Development', *supra* note 16, p. 1.

<sup>159</sup> Langton, *Well I heard it*, *supra* note 20, p. 10. Langton argues that an anti-colonial engagement is necessary for non-Indigenous Australians to engage with their pasts, and for Indigenous Australians to realise that constructions of Aboriginality and Indigenous/ non-Indigenous relations have been mitigated within the colonial processes that have consumed our countries.

<sup>160</sup> *Ibid.*, p. 10.

simply become the replacement hegemony that dominates Indigenous beliefs, but operates within a recognition of Realpolitik diversity inscribed by equity and respect in negotiations. Howitt has described the complexities of these relationships as involving ‘a complex dialectical relationship between threat and resistance, knowledge and power, past, present and future in the struggle for Indigenous recognition and survival’.<sup>161</sup> Langton, in considering this ‘complex dialectical relationship’ has stated that ‘sustainable ecological management is principally a problem of human decision making’, in which ‘the challenge for responsible management . . . is to develop beyond narrow discipline boundaries’.<sup>162</sup> The narrow disciplinary boundaries to which Langton is referring replicate neo-colonial practices with regard to Indigenous natural-cultural resources that have been resisted by Indigenous peoples of Australia for centuries.

In considering the problematic spaces opened up by such negotiations, Howitt argues that sustainability must be flexible and enable Indigenous diversity to flourish; however, he also notes that this is rarely the case.<sup>163</sup> Therefore, noting the realities of Indigenous experience and powerlessness against global capital, Howitt posits a process of decolonising the fourth world space of Indigenous peoples as a solution.<sup>164</sup> However, in making this call, Howitt rightly points out that simply opting for a naive approach to Indigenous resource management in which it is assumed that inherent Indigenous knowledge will prevail is erroneous. Professor Langton has criticised romantic views that ‘Aborigines were closer to nature somehow and were thus more “natural” people’, on the basis that ‘this sort of thinking is muddled, based on misinformation and is racist’.<sup>165</sup> In making this statement Langton does not suggest that romanticism is peculiar to non-Indigenous people engaging in understandings of Aboriginality, but asserts that Aboriginal people can likewise engage in romanticization of Aboriginality, and as such Aboriginal culture in relating stories about country.<sup>166</sup>

To this end, Langton recommends that we apply an anti-colonial critique to the knowledge that circulates surrounding Aboriginality, Aboriginal knowledge, and Aboriginal connections with culture and country. Aboriginal connections with country, integrally associated with Aboriginality as a core element of existence, can likewise be, and are, constructed against inter-subjective experiences.<sup>167</sup> Within the field of Indigenous negotiations with sustainability, this has been the case with regard to assumptions both of exaggerated projections of Aboriginal conservationist ethics about resources, and also of Aboriginal inferiority in regard to any

<sup>161</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 34.

<sup>162</sup> Langton, *Burning Questions*, *supra* note 2, p. 8.

<sup>162</sup> *Ibid.*, p. 74.

<sup>163</sup> Howitt, ‘Resources, Nations and Indigenous Peoples’, *supra* note 7, p. 22.

<sup>164</sup> *Ibid.*, p. 6.

<sup>165</sup> C. Anderson, ‘Aborigines and conservationism; The Daintree Bloomfield Road’, 24:3 *Australian Journal of Social Issues* (1989) 219.

<sup>166</sup> Langton, *Well I heard it*, *supra* note 20, p. 10.

<sup>167</sup> *Ibid.*, p. 34.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

stewardship. As Aboriginal member of the Northern Territory Parliament, John Ah Kitt has described such Western developmental approaches as promoting 'a theory of wealth creation for the few, at the expense of the many. It doesn't work anywhere in the world, and it certainly doesn't work for Aboriginal Australia'.<sup>168</sup> In making this statement, Ah Kitt called for Indigenous peoples and those interested in truly working with Indigenous Australians to develop, along the lines of an anti-colonial approach, 'a new model, or even a series of models, and it is the task of Aboriginal people to develop these models if we are to survive into the next century'.<sup>169</sup> As Pat Dodson stated in 1996:

The track behind us is littered with relics of policies, programs and projects that failed, that wasted taxpayers' money and failed to deliver real outcomes to those crying out for them. They failed because they did not include Indigenous people in making the decisions. To impose policies, to impose programs without participation, without involvement, without concern for self-determination or empowerment, is to return to the bitter mistakes of our past.<sup>170</sup>

And, as was stated recently in the Indigenous Peoples Political Declaration as part of Prepcom IV leading up to the 2002 World Summit on Sustainable Development, 'Indigenous peoples have consistently called for international recognition of our rights as a pre-condition for our empowerment for sustainable development. We reaffirm that self-determination and sustainable development are two sides of the same coin'.<sup>171</sup> For Indigenous communities the heavy hand of the State has to be negotiated most carefully indeed, and it seems at this period of negotiated possibilities that sustainability is offering new cultural, political, and environmental solutions involving Indigenous collaboration.

---

<sup>168</sup> J. Ah Kit, 'Our Place: Our Future', Conference Report, KLC, 1998, p. 37.

<sup>169</sup> *Ibid.*

<sup>170</sup> P. Kaufman, *Wik, Mining, and Aborigines* (Allen and Unwin, Sydney, 1998) pp. 171–172.

<sup>171</sup> Indigenous Peoples Political Declaration, Prepcom IV, Indonesia, Bali, 6 June 2002, p. 1.

## 6. INDIGENOUS SUSTAINABILITY – A TRANS-DISCIPLINARY FIELD

The national, regional and international acceptance and recognition of Indigenous Peoples is central to the achievement of human and environmental sustainability . . . We are determined to ensure the equal participation of all Indigenous Peoples throughout the world in all aspects of planning for a sustainable future with the inclusion of women, men, elders and youth. Equal access to resources is required to achieve this participation.<sup>172</sup>

The Kimberley Declaration  
International Indigenous Peoples Summit on Sustainable Development  
Khoi-San Territory Kimberley, South Africa  
20–23 August 2002

We reaffirm the vital role of indigenous peoples in sustainable development.<sup>173</sup>

(Paragraph 22bis)  
Johannesburg Political Declaration  
World Summit on Sustainable Development  
4 September 2002

### 6.1. *Contested Domains*

It is one thing to have rights. It is quite another thing to have the ability to exercise those rights.

Examining Indigenous political movements and rising negotiations of sustainability in resource development and practice, Ian Moffatt argued along similar lines to Coombs, that Indigenous approaches to management of resources have historically and culturally operated within an Indigenous form of sustainable development. Moffatt stated that ‘in the pre-history and history of human kind, many of the aboriginal peoples have practiced their own forms of sustainable development in harsh environments’.<sup>174</sup> Noting belated attempts by some governments to recognise long-held and hard fought Indigenous movements to reclaim inherent rights to land, Moffatt rightly questions whether such actions will necessarily resolve centuries of exploitation of Indigenous resources. However, Moffatt notes that it at least does represent a shift in the political landscape of that

---

<sup>172</sup> The Kimberley Declaration - International Indigenous Peoples Summit on Sustainable Development Khoi-San Territory Kimberley, South Africa 20–23 August 2002.

<sup>173</sup> Johannesburg Political Declaration, Paragraph 22bis, World Summit on Sustainable Development, 4 September 2002.

<sup>174</sup> I. Moffatt, ‘An Impression of New Developments and Trends in Northern Regions’, in Jull and Roberts (eds.), *The Challenge of Northern Regions*, *supra* note 8, p. 272.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

time with regard to possible further Indigenous engagement and involvement in real control and self-determination.<sup>175</sup>

In considering the beginnings of the resource extraction boom that impacted upon Indigenous lands and waters in the northern regions of developed nations and the 'mixed blessings' of possible employment but also likely disruption, Moffatt reveals that a key feature of this process has been the divergent Aboriginal and non-Aboriginal perceptions of environment and resources.<sup>176</sup> For Indigenous peoples, Moffatt sums up Indigenous positions within such civic states as, 'finding themselves part of a nation which has scant regard to their human rights, culture, or ways of life'.<sup>177</sup> This conjunction of self-determination and self-government has been described by Jackie Wolfe as 'essential' for any real sense of Aboriginal self-government.<sup>178</sup> Noting the ways in which terms such as self-determination, self-government, and self-management have been loosely bandied about by governments in particular, Wolfe relates that for Aboriginal peoples this sense of self-determination and self-government cannot be mediated by the preferred less rigorous idea of self-management.<sup>179</sup>

Self-determination, enshrined in the Universal Declaration of Human Rights, is a long held dream of political Aboriginal sovereignty over Aboriginal resources, lands, and waters. From policies of segregation through biological absorption and assimilation to integration and 'self-management', Indigenous communities have continued to create Indigenous political-cultural frameworks. These have evolved from movements of resistance and response to movements engaging real and valuable prospects for future determination of Aboriginal life. However, these movements, arising out of one to two per cent of the Australian population, and spread widely and in a dispersed manner throughout traditional homelands, also have to deal with the revolving door of recurring poor mainstream political engagement with Indigenous Issues. Mick Dodson has described self-determination as a process and 'the right to make decisions . . . to the full range of fundamental freedoms and human rights of Indigenous peoples'.<sup>180</sup> For Dodson, the Federal Governments' view of self-determination is at odds with Indigenous aspirations, which are not about simple notions of better management of resources through the supreme power of the state. Dodson related this in the statement that 'the aim is not merely to participate in the delivery of . . . services, but to penetrate their design and inform them with Indigenous cultural values'.<sup>181</sup>

---

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*, p. 275.

<sup>178</sup> J. Wolfe, 'Canada: Current Developments in Aboriginal Self-Government', in Jull and Roberts (eds.), *The Challenge of Northern Regions*, *supra* note 8, p. 129.

<sup>179</sup> *Ibid.*, p. 130.

<sup>180</sup> Dodson, 'The End In The Beginning', *supra* note 34, pp. 8–10.

<sup>181</sup> *Ibid.*

In supporting the role of sustainability in generating debate surrounding equity, resources, and our environment, Davison argues that sustainability is 'at best a wedge in political discourse' that works by opening up and holding open dialogue and reflection within an understanding of the plurality of human existence.<sup>182</sup> The ambivalence of sustainability is often critiqued as weakening the discipline as it becomes a site of contested meaning and ethic as opposed to a definable normative body of knowledge, a science, if you will. However, the ambivalence of sustainability as a contested concept is considered by Davison to be a political strength, not a political weakness, as it allows for an openness that 'makes possible the ongoing mediation of meaningful, legitimate political difference'.<sup>183</sup> It is precisely the multi-faceted nature of sustainability as an inter-disciplinary field that has attracted Indigenous interest in sustainability. Indigenous ways of relating to and managing natural and cultural resources are more clearly aligned with 'cultural sustainability', but it is within specific Indigenous cultural associations to country that interesting developments within the cultural sustainability arena occur.

### *6.2. Indigenous Sustainability: An Inter-Subjective, Trans-Disciplinary Field*

Indigenous Sustainability operates as a negotiated trans-disciplinary field negotiating sustainability paradigms and Indigenous approaches to country. Evidence of this emerging field exists in the growing body of knowledge generated by a new epistemic community of academics, Indigenous leaders, and growing Indigenous engagement with the sustainability paradigm through negotiated agreements and new alliances. Indigenous sustainability can only be considered sustainable within Indigenous frameworks when it takes into account the real and powerful social, cultural, and spiritual elements of sustainability within Indigenous world-views.

In regard to common good resources and the problems associated with managing resources across international borders, Sidney Adams has defined epistemic communities as 'a distinct policy community claiming particular expertise in a particular issues area. Rather than being a passive source of information to government, an epistemic community actively seeks to lobby government to bring about policy reform'.<sup>184</sup> In this regard Indigenous sustainability, and sustainability movements in general, form part of what Adams terms a process in which 'epistemic communities . . . are the site of competing policy communities . . . of competing policy groups either within the state or operating across national borders'. Within such epistemic communities, 'knowledge and the policy process is thus a contested domain between different group alliances'.<sup>185</sup>

---

<sup>182</sup> Davison, *supra* note 13, p. 61 (citing, P. Mcnaughten and J. Urry, *Contested Natures* (London, Thousand Oaks, CA and New Dehli, Sage, 1998)).

<sup>183</sup> Davison, *supra* note 13, p. 61.

<sup>184</sup> S. Adams, 'The Management of Southern Bluefin Tuna: Consensus or Conflict' in S. Sergeson (ed.), *Collective Good: Collective Futures in Asia* (Routledge, London, 2002) p. 3.

<sup>185</sup> *Ibid.*, p. 4.



## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

These movements have a long lineage linking Indigenous land-rights and Indigenous calls for recognition of inherent obligatory rights and responsibilities with regard to country, and movements within cultural sustainability. Considering cross-cultural Indigenous engagement with sustainability, Howitt argues that ‘indigenous groups and their supporters must construct approaches that are capable not only of challenging the dominant terms of engagement that are derived from the operations of institutions, processes and relations that were predicated on upon *terra nullius*, but also encompassing epistemic diversity’.<sup>186</sup> However, Howitt also believes that there is no such epistemic community in existence at this time that is able to bridge Indigenous approaches to country, and Western development paradigms. Warning that ‘a naïve or simplistic accommodation of diversity’ in negotiation denies the hegemony of Western ‘power and privilege’, and that such unequal negotiations may actually bring more harm than good for Indigenous peoples, Howitt still argues for the necessity of Indigenous and non-Indigenous engagement over natural resource management.<sup>187</sup>

### 6.3. *Speaking of Country*

It is important to consider both the benefits and risks encountered in seeking alliances between Indigenous and non-Indigenous peoples, organizations, and political movements. If forming an alliance or conducting a negotiation is indeed a ‘joining of efforts’ of two divergent or different groups and their respective ideas, then within the neo-colonial practices that constitute Indigenous policy formation and control within Australia polity, power differentials become an essential consideration in the analysis. Indigenous responses, negotiations and protestations are not simply moving against particular political colours of governmental policy, but against the hegemony of the current global-political economic order.

However, in calling for the inter-subjective negotiations between Indigenous and non-Indigenous peoples with regard to sustainability to be known as a trans-disciplinary field encompassing an epistemic community of debate and policy formation, I am drawing attention to recently negotiated processes that are seeking to operate within such a new approach.

Regardless of the mobilisation of Indigenous peoples and engagement within the sustainability movement that occurred at the time of the 1992 Rio Earth Summit, the recent WSSD involved much less engagement of Indigenous peoples. However, this does not negate the impetus for change that has been established as a part of the Indigenous Internationalism, as many Indigenous peoples have utilized the knowledge gained from such exchanges to facilitate change within their home territories.<sup>188</sup>

---

<sup>186</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 161.

<sup>187</sup> Howitt, *Rethinking Resource Management*, *supra* note 4, p. 161.

<sup>188</sup> Jull, ‘The Politics of Sustainable Development’, *supra* note 16, p. 20. Jull cites that the Indigenous Internationalism movement began in 1973.

Collaboratively negotiated solutions between Western scientists and Indigenous knowledge systems operate across a diverse range of areas including alternative technologies movements, conservation and biodiversity protection, and programs aimed at caring for country through Indigenous practices. The Centre for Indigenous Cultural Resource Management (of the Australian National University) in Darwin ('CINCRIM') is an institutional expression of this epistemic community that is forming around the notion of Indigenous Sustainability.<sup>189</sup> Working in collaboration with the Dhimurru Land Management Corporation, and the Bawinaga Aboriginal Corporation within the Yolngu Arafura Wetlands, CINCRIM is an actively working expression of Indigenous Sustainability within the sustainability spectrum.<sup>190</sup>

Relating his long-term views in this regard, Mandawuy Yunupingu framed his outlook toward inter-subjective negotiations philosophy in Yolngu terms: 'We are trying to suggest ways and means to build our relationship together in Australia. That will come when we both respect and come to understand each other's knowledge structures and knowledge streams.'<sup>191</sup> However, reiterating Althusser's theory of the reproduction of ideology we see a process in which Aboriginal and mainstream Western negotiations and collaborations walk a knife edge in which Aboriginal interests can be caught in the process of: i) being rejected; ii) being recast in terms that are assimilable by the dominant ideology; and iii) being caught in the mobilisation by the dominant paradigm being negotiated with to maintain the ideology's hegemony.<sup>192</sup>

Indigenous approaches to negotiating from a basis of inherent rights have been so far from the centre of negotiations for centuries, and are so disadvantaged by these other powerful influences also, that it is an extremely problematic and cyclically repeating scenario of reproduction of ideologies against Indigenous values that needs to be broken. As Peter Yu stated with reference to the Kimberley Region of Western Australia, the glue that holds this wider Aboriginal Kimberley Region together is 'respect for each other's traditional ownership, cultural responsibility, and local autonomy . . . The challenge for Indigenous people in this country is to articulate our position and assert through self-determination our personal and collective rights.'<sup>193</sup> However, to articulate such a position as a minority Indigenous population requires careful negotiation, and the need to strengthen intra-Indigenous models of governance in light of the problems of dealing with Western hegemony and the Realpolitik of Indigenous community existence in the 21st Century.

To this end the inter-subjective engagement of sustainability and Indigenous approaches to country is operating in a formative trans-disciplinary field of Indigenous sustainability that offers Indigenous and non-Indigenous peoples the possibility of mediating dominant Western development paradigms for Indigenous

---

<sup>189</sup> Langton, *Burning Questions*, *supra* note 2, pp. 59–71.

<sup>190</sup> *Ibid.*, p. 62.

<sup>191</sup> Shoemaker, *supra* note 91, p. 35.

<sup>192</sup> *Ibid.*

<sup>193</sup> Yu, P., *supra* note 89, p. 3.

## INDIGENOUS SUSTAINABILITY: RIGHTS, OBLIGATIONS, AND A COLLECTIVE COMMITMENT TO COUNTRY

peoples, within the real and functioning ethics of country. This in turn acts to invigorate the sustainability paradigm through ensuring adherence to the multiplicity of participants, acknowledging Indigenous paradigms that subvert dominant Western development paradigms, and recognising the powerfully transforming role of cultural-spiritual relationships with our natural-cultural resources.



## CANADA

### ABORIGINAL SELF-GOVERNMENT IN CANADA: RECONCILING RIGHTS TO POLITICAL PARTICIPATION AND INDIGENOUS CULTURAL INTEGRITY

*Alexis P. Kontos\**

The landscape of Aboriginal rights in Canada was fundamentally transformed with the adoption of the *Constitution Act, 1982*.<sup>1</sup> While the Canadian courts had previously acknowledged the existence of Aboriginal title to land at common law, Aboriginal rights were now constitutionally entrenched under section 35 which recognized and affirmed '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada', thereby restricting the ability of the Canadian government to unilaterally extinguish those rights.<sup>2</sup> The *Constitution Act, 1982* also entrenched for the first time in Canada a constitutional bill of rights in the *Canadian Charter of Rights and Freedoms*.<sup>3</sup> The drafters of the new constitution were aware, however, of the potential conflict between Aboriginal group rights and individual rights under the *Charter* and therefore included in section 25 a clause with the apparent intention to preserve the collective nature of Aboriginal rights in Canada: 'The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada . . .'. Nonetheless, more than twenty years later, the

---

\* Counsel, Human Rights Law Section, Department of Justice Canada. This chapter was written while on education leave for an LL.M. in International Human Rights Law at the University of Essex and contains the author's personal views, ones that are not necessarily shared by the Department of Justice or Government of Canada. I would like to thank Professors Geoff Gilbert and Patrick Macklem and my colleague Jim Hendry for their helpful comments.

<sup>1</sup> Schedule B, *Canada Act 1982*, (U.K.) 1982, c. 11, entered into force 17 Apr. 1982, available at <[laws.justice.gc.ca/en/charter/index.html](http://laws.justice.gc.ca/en/charter/index.html)>, last consulted 1 Dec. 2002.

<sup>2</sup> *Ibid.*, Part II. Aboriginal title was first recognized by the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 311. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Delgamuukw*, [1997] 3 S.C.R. 1010 (Supreme Court of Canada) for judicial development of the scope of Aboriginal rights and limitations on extinguishment. Post-1982 Supreme Court of Canada judgments are available at <[www.lexum.umontreal.ca/csc-scc/en/index.html](http://www.lexum.umontreal.ca/csc-scc/en/index.html)>.

<sup>3</sup> *Ibid.*, Part I (hereinafter '*Charter*').

practical effect of section 25 in reconciling individual and group rights under the Canadian Constitution has yet to be determined in any meaningful sense.<sup>4</sup>

In this chapter I seek to explore certain aspects of the debate over individual and group rights in the context of Canadian Aboriginal law as informed by international human rights law.<sup>5</sup> In particular, I will examine the potential interplay between the individual and Aboriginal group rights guarantees in the Canadian Constitution for purposes of determining the extent of the right to political participation of non-First

---

<sup>4</sup> Much of the academic commentary on the potential application of section 25 focuses on whether it is more of an interpretive provision that might inform a balancing approach or whether it acts more as a shield that immunizes section 35 rights under the *Charter*. See, e.g., B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Institute for Research on Public Policy, Montreal, 1986) pp. 332–352; B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Native Law Centre, University of Saskatchewan, Saskatoon, 1988); W. Pentney, ‘The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982 – Part I: The Interpretive Prism of Section 25’ 22(1) U. British Columbia L. Rev. (1988) 21; P.W. Hogg and M.E. Turpel, ‘Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues’ 74(2) Canadian Bar Rev. (June 1995) 187; K. McNeil, ‘Aboriginal Governments and the Canadian Charter of Rights and Freedoms’ 34(1) Osgoode Hall L.J. (1996) 61; K. Wilkins, ‘. . . But We Need the Eggs: the Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government’ 49 U. Toronto L.J. (1999) 53; P. Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) pp. 221–233. See also the Royal Commission on Aboriginal Peoples, ‘Restructuring the Relationship’, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, Part 1 (Minister of Supply and Services Canada, Ottawa, 1996), highlights available at <[www.ainc-inac.gc.ca/ch/rcap/index\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/index_e.html)>, last consulted 1 Dec. 2002.

<sup>5</sup> Much has been written about the compatibility of individual and collective or group rights, but my focus here is on whether certain dignity interests at the heart of Indigenous rights claims to cultural integrity are afforded sufficient weight in consideration of a rights challenge on behalf of an individual dignity interest. See, e.g., L.A. Jacobs, ‘Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity’ 4(2) Can. J. L. and Jur. (July 1991) 375; J. Baker (ed.), *Group Rights* (University of Toronto Press, Toronto, 1994); W. Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford University Press, Oxford, 1995); L. McDonald, ‘Can Collective and Individual Rights Coexist?’ 22 Melbourne U. L. Rev. (1998) 310; P. Jones, ‘Human Rights, Group Rights and Peoples’ Rights’ 21(1) Hum. Rts. Quarterly (1999) 80; D. Ivison, et al. (eds.), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000); C.L. Holder and J.J. Corntassel, ‘Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights’ 24(1) Hum. Rts. Quarterly (2002) 126; and J. Packer, ‘Problems in Defining Minorities’ in D. Fottrell and B. Bowring (eds.), *Minority and Group Rights in the New Millennium* (Martinus Nijhoff Publishers, The Hague, 1999) pp. 223–274, 247 (‘because one’s identity is intimately linked with human dignity, and insofar as one’s culture is a major aspect of one’s identity, we are concerned to ensure sufficient space for its maintenance and development’). References in the literature vary between rights to survival or existence, to cultural difference, identity or integrity, or a right to enjoy a distinct culture, but I prefer to use cultural integrity as the more holistic term that encompasses notions of dignity, vulnerability and self-perpetuation.

## ABORIGINAL SELF-GOVERNMENT IN CANADA

Nation citizens who reside on territory under the jurisdiction of a First Nation government pursuant to an Aboriginal self-government agreement.<sup>6</sup>

An examination of current international approaches reveals a textual tendency that favours individual rights over Indigenous group rights with no indication as to how practically to assess and reconcile the differing human dignity interests that are at stake. One decision-making body that has had, nonetheless, to resolve individual rights challenges to Indigenous collective interests is the U.N. Human Rights Committee. Although the Committee works primarily with the individual rights guarantees under the *International Covenant on Civil and Political Rights*, it has gone some way toward addressing the interests of Indigenous communities in the face of individual rights challenges and competing collective State interests.<sup>7</sup>

What I hope to demonstrate through the following examination of the Canadian and international approaches to this issue is that there is nothing inherent in rights discourse that should necessarily favour individual over group dignity interests; rather, such interests may be better reconciled through consideration of the nature and severity of their potential impacts on each other on a case-by-case, context-specific basis. My purpose is not to presume to provide answers to an issue that will not be resolved for many years to come, but instead to highlight the kind of questions that will present a practical challenge for States seeking to fulfil their obligations under international human rights law.<sup>8</sup>

---

<sup>6</sup> For some early expressions of concern in this particular regard, see L.A. Rehof, 'Effective means of planning for and implementing autonomy, including negotiated constitutional arrangements and involving both territorial and personal autonomy' in Commission on Human Rights, *Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples* (Nuuk, Greenland, 24–28 Sept. 1991), U.N. Doc. E/CN.4/1992/42 (25 Nov. 1991) pp. 87–108, 90; see also N. Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments' 17 Hum. Rts. Quarterly 48 (1995) pp. 65–71. The concern here is with negotiated self-government treaty rights to determine citizenship and voting rights, which may involve different considerations than those involving any other right to determine community membership. The term 'First Nations' is used in this chapter to refer generally to Aboriginal peoples and their communities in Canada unless otherwise indicated.

<sup>7</sup> *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, adopted 16 Dec. 1966, entered into force 23 Mar. 1976 (hereinafter '*ICCPR*').

<sup>8</sup> A backdrop to this discussion is the emerging right to democracy at international law based on existing rights to political participation and self-determination. See *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (1990), Part I, paragraphs 2–8, available at <[www.osce.org/docs/english/1990-1999/hd/cope90e.htm](http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm)>, last consulted 1 Dec. 2002; Organization of American States, *Representative Democracy* (Resolution of 5 Jun. 1991) OEA/Ser.P, AG/RES. 1080 (XXI-O/91); *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (12 July 1993), Part I, paragraph 8, and Part II, paragraph 66 (hereinafter '*Vienna Declaration*'); Human Rights Committee, *CCPR General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (article 25)*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996), paragraphs 1, 21; *United Communist Party of Turkey and Others v. Turkey*, No. 133/1996/752/951 (30 Jan. 1998), Reports 1998-I (European Court of Human Rights);

## 1. CANADA'S ABORIGINAL SELF-GOVERNMENT POLICY

The *Aboriginal Self-Government Federal Policy Guide* elaborates on the Canadian government's recognition of the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*.<sup>9</sup> In particular:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.<sup>10</sup>

According to the *Guide*, the inherent right of self-government does not include 'a right of sovereignty in the international law sense' and will not lead to 'sovereign independent Aboriginal nation states'.<sup>11</sup> As such, Aboriginal governments and institutions are to exercise the inherent right of self-government 'within the framework of the Canadian Constitution', and therefore self-government agreements must provide that 'the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their

---

Commission on Human Rights, *Promotion of the right to democracy*, Resolution 1999/57, U.N. Doc. E/CN.4/RES/1999/57 (27 Apr. 1999); *U.N. Millennium Declaration*, U.N. Doc. A/RES/55/2 (8 Sept. 2001), paragraph 25, available at <[www.un.org/millennium/declaration/ares552e.htm](http://www.un.org/millennium/declaration/ares552e.htm)>, last consulted 1 Dec. 2002; and G.H. Fox and B.R. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2001).

<sup>9</sup> Department of Indian Affairs and Northern Development Canada, *Aboriginal Self-Government Federal Policy Guide: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Public Works and Government Services Canada, Ottawa, 1995) p. 1, available at <[www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html)>, last consulted 1 Dec. 2002 (hereinafter '*Federal Policy Guide*'). See *R. v. Pamajewon*, [1986] 2 S.C.R. 821, in which the Supreme Court of Canada assumed without deciding that section 35(1) constitutional Aboriginal rights include self-government.

<sup>10</sup> *Ibid.*, p. 3.

<sup>11</sup> *Ibid.*, p. 4. Canada stated in 1996 before the UN Commission on Human Rights (Open-Ended Intersessional) Working Group on the Draft Declaration on the Rights of Indigenous Peoples that it 'accepts a right of self-determination for indigenous peoples, which respects the political, constitutional and territorial integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various indigenous peoples within those states to determine the political status of the indigenous peoples involved, and the means of pursuing their economic social and cultural development'. See J. Wilton Littlechild and D. Callihoo, 'International Law and Indigenous Self-Determination', prepared for the Law Commission of Canada for presentation at the joint [I]ndigenous Bar Association & Canadian Bar Association Conference on the Royal Commission on Aboriginal Peoples (April 1999) p. 18 (quoting 'Statements of the Canadian Delegation', Commission on Human Rights, 53<sup>rd</sup> sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2<sup>nd</sup> sess., Geneva (31 Oct. 1996, statement on art. 3, right to self-determination)).



## ABORIGINAL SELF-GOVERNMENT IN CANADA

respective jurisdictions and authorities'.<sup>12</sup> The *Guide* notes, however, that section 25 of the *Charter* is meant 'to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada'.<sup>13</sup>

The rest of the *Guide* deals with implementation issues for negotiating self-government agreements. According to the *Guide*, the Government of Canada views the scope of Aboriginal jurisdiction or authority as likely including matters 'internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution'.<sup>14</sup> Such matters could include: the establishment of government structures, internal constitutions, elections, membership, marriage, adoption and child welfare, Aboriginal language, culture and religion, education, health, social services, administration/enforcement of Aboriginal courts and laws, policing, property rights, natural resource and land management, agriculture, hunting and fishing, taxation, money and group asset management, public works and infrastructure, housing, local transportation and regulation of businesses on Aboriginal lands.<sup>15</sup>

To the extent that the federal government has jurisdiction in areas that may go beyond matters that are integral or strictly internal to an Aboriginal group's culture, the *Guide* indicates that the federal government is willing to negotiate some measure of Aboriginal jurisdiction or authority. Primary law-making authority would have to remain, however, with the federal or provincial government, and their laws would prevail in the event of a conflict, since in those areas laws tend to have broader impacts beyond individual communities, including, for example: divorce, labour/training, administration of justice and criminal law enforcement, penitentiaries and parole, environmental protection, fisheries and migratory birds co-management, gaming and emergency preparedness.<sup>16</sup>

A final list contains subject matters that, in the federal government's view, cannot be characterized as integral or internal to Aboriginal group culture and for which it is considered essential that the federal government retain sole law-making authority such as powers related to Canadian sovereignty, defence and external relations (international/diplomatic relations and foreign policy, national defence and security, international treaty making, immigration, international trade), and other 'national interest powers'.<sup>17</sup>

---

<sup>12</sup> *Ibid.*, pp. 3–4.

<sup>13</sup> *Ibid.*, p. 4.

<sup>14</sup> *Ibid.*, p. 5.

<sup>15</sup> *Ibid.*, pp. 5–6.

<sup>16</sup> *Ibid.*, p. 6.

<sup>17</sup> *Ibid.*, p. 7. Other national interest powers include management and regulation of the national economy, including fiscal and monetary policy, banking, bankruptcy, trade policy, intellectual property; maintenance of national law and order and substantive criminal law; protection of the health and safety of all Canadians; and federal undertakings and other powers, including telecommunications, aeronautics, shipping, national transportation, postal service and the census.

Aboriginal governments will therefore have law-making powers in a number of important areas that potentially impact human rights as guaranteed under the *Charter* and under international human rights law. Furthermore, since Aboriginal governments are to be territorially based, they can exercise their law-making authority over all those within their jurisdiction, including non-First Nation citizens or members residing on First Nation lands. According to the *Guide*:

‘Where the exercise of Aboriginal jurisdiction or authority over non-members is contemplated, agreements must provide for the establishment of mechanisms through which non-members may have input into decisions that will affect their rights and interests, and must provide for rights of redress.’<sup>18</sup>

The test of this aspect of the policy was to come sooner than expected in July 2000 by way of a peremptory judicial challenge to the first Aboriginal self-government agreement recognized as a section 35 treaty pursuant to the Self-Government Policy.

## 2. NISGA’A SELF-GOVERNMENT AGREEMENT

The *Nisga’a Final Agreement* was signed on 27 April 1999.<sup>19</sup> The history behind the Aboriginal claims underlying the agreement can be traced back hundreds of years at least to the Nisga’a protesting before a Royal Commission in 1887, petitioning the British Privy Council in 1913, and litigating before the Supreme Court of Canada in 1973 until the final implementation of the treaty in 2000 after years of negotiation.

Yet members of the British Columbia provincial legislature representing the opposition Liberal party of the day presented one last roadblock by bringing suit to prevent the implementation of the agreement. In *Campbell v. British Columbia*, the plaintiffs argued, among other points, that the *Nisga’a Final Agreement* was unconstitutional because it purported to bestow governing powers on the Nisga’a First Nation inconsistent with the exhaustive division of powers between the national Parliament and the provincial legislative assemblies under the *Constitution Act, 1867*, and because non-Nisga’a Canadian citizens residing in or having other interests in Nisga’a territory could be denied their right to vote under section 3 of the *Charter*.<sup>20</sup>

---

<sup>18</sup> *Ibid.*, p. 12.

<sup>19</sup> *Nisga’a Final Agreement*, initiated 4 Aug. 1998, signed 27 Apr. 1999, between the Nisga’a Nation, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of British Columbia, available at <[www.ainc-inac.gc.ca/pr/agr/nsga/nisdex\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html)>, last consulted 1 Dec. 2002, implemented 13 Apr. 2000 under the *Nisga’a Final Agreement Act*, S.C. 2000, c. 7, available at <[www.canlii.org/ca/sta/n-23.3/whole.html](http://www.canlii.org/ca/sta/n-23.3/whole.html)>, last consulted 1 Dec. 2002 (hereinafter ‘*Final Agreement*’).

<sup>20</sup> *Campbell, et al. v. British Columbia (Attorney General), et al.*, [2000] B.C.J. No. 1524, 4 C.N.L.R. 1 (British Columbia Supreme Court), paragraph 12, available at <[www.canlii.org/bc/cas/bcsc/2000/2000bcsc1123.html](http://www.canlii.org/bc/cas/bcsc/2000/2000bcsc1123.html)>, last consulted 1 Dec. 2002; *Constitution Act, 1867* (Consolidated with amendments), 30 & 31 Victoria, c. 3 (U.K.), 29 Mar. 1867, available at <[laws.justice.gc.ca/en/const/c1867\\_e.html](http://laws.justice.gc.ca/en/const/c1867_e.html)>, last consulted 1 Dec.

## ABORIGINAL SELF-GOVERNMENT IN CANADA

Under the *Nisga'a Final Agreement*, any elections for Nisga'a Government must be held in accordance with the Nisga'a Constitution and Nisga'a laws.<sup>21</sup> The Nisga'a Constitution is required to ensure that Nisga'a Government is democratically accountable to Nisga'a citizens by way of elections at least every five years, and that every Nisga'a participant who is a Canadian citizen or permanent resident of Canada is entitled to be a Nisga'a citizen.<sup>22</sup> Nisga'a participants include individuals (or their descendants) of Nisga'a ancestry whose mother was born into one of the Nisga'a tribes, the adopted child of such persons, and Aboriginal individuals married to those previously described individuals, who have been adopted into a Nisga'a tribe as a member in accordance with Nisga'a custom.<sup>23</sup>

It is clear, therefore, that under the terms of the *Agreement* the Nisga'a Government may deny non-Nisga'a citizens the right to vote in Nisga'a Government elections. Pursuant, however, to the Self-Government Policy, the *Agreement* does provide mechanisms for input by non-Nisga'a citizens whose rights and interests are affected by Nisga'a jurisdiction.<sup>24</sup> In particular, the Nisga'a Government must consult with non-Nisga'a citizens ordinarily resident within Nisga'a Lands about decisions that 'directly and significantly affect them' and must allow them to participate in a Nisga'a Public Institution, the activities of which might similarly affect them.<sup>25</sup>

The means of participation include, among other comparable measures, a reasonable opportunity to make representations, and, if the members of the Institution are elected, the ability to vote for or become members of the Institution or to have a guaranteed number of members in the Institution with the right to vote.<sup>26</sup> Nisga'a Government will also provide appeal or review procedures for administrative decisions of Nisga'a Public Institutions with judicial review available to the provincial courts once all Nisga'a Government procedures have been exhausted.<sup>27</sup>

---

2002. Section 3 of the *Charter*, *supra* note 3, states: 'Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.'

<sup>21</sup> *Final Agreement*, *supra* note 19, Chapter 11, paragraph 15, p. 162.

<sup>22</sup> *Ibid.*, Chapter 11, paragraphs 9(k) and (p), p. 161.

<sup>23</sup> *Ibid.*, Chapter 20, paragraph 1, p. 241.

<sup>24</sup> *Federal Policy Guide*, *supra* note 10.

<sup>25</sup> *Final Agreement*, *supra* note 19, Chapter 11, paragraphs 19–20, p. 163. A 'Nisga'a Public Institution' (Chapter 1, p. 12) is defined as 'a Nisga'a Government body, board, commission, or tribunal established under Nisga'a law, such as a school board, health board, or police board, but does not include the Nisga'a Court . . . '.

<sup>26</sup> *Ibid.*, paragraph 20. The Nisga'a Government (paragraph 23) can also appoint non-citizens as members of Nisga'a Public Institutions.

<sup>27</sup> *Ibid.*, paragraphs 16–17, 22.

### 3. SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA

In a Written Submission in the *Campbell* case, the Attorney General of Canada responded to the plaintiffs' *Charter* arguments by alleging a lack of standing and factual foundation and by denying any *Charter* violation.<sup>28</sup> In the alternative, the Attorney General argued that any infringement of the section 3 *Charter* right to vote would constitute a 'reasonable limit' under section 1 of the *Charter*, one that was 'demonstrably justified in a free and democratic society'.<sup>29</sup>

Section 1 provides a general means for government to justify infringements of *Charter* rights in the public interest, and not just in the Aboriginal context. The section 1 test as developed by the courts requires a 'pressing and substantial' objective and proportional means to achieve that objective such that the means are 'rationally connected' to the objective, they 'minimally impair' the *Charter* right in question, and their 'salutary effects' outweigh their 'deleterious effects'.<sup>30</sup>

According to the Attorney General, 'the objective of limiting the right to vote for, and qualify for membership in, Nisga'a Government to Nisga'a citizens is to provide political autonomy to the Nisga'a people to enable them to protect and promote their collective rights and culture'.<sup>31</sup> In support of the submission that such an objective is pressing and substantial, the Attorney General cited the Supreme Court of Canada's finding in *Ford v. Quebec* that the protection of distinctive aspects of a minority culture (Québécois in Canada) can constitute a pressing and substantial objective.<sup>32</sup>

In arguing that the means chosen to accomplish the objective fell within a 'range of reasonable alternatives', the Attorney General cited the holding in *Corbiere v. Canada* that it is not always necessary to provide identical rights of political participation in a government to protect the differing interests of people affected by government decisions.<sup>33</sup> According to the Attorney General:

---

<sup>28</sup> Written Submission of the Attorney General of Canada, *Campbell v. British Columbia (Attorney General)*, on file with author, paragraphs 125–127.

<sup>29</sup> *Ibid.*, paragraph 154. Section 1 of the *Charter*, *supra* note 3, states: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

<sup>30</sup> *Ibid.*, paragraph 155. See *R. v. Oakes*, [1986] 1 S.C.R. 103, pp. 138–40 and *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, p. 889 (Supreme Court of Canada).

<sup>31</sup> *Ibid.*, paragraph 160.

<sup>32</sup> *Ibid.*, paragraph 163 (citing *Ford v. Quebec*, [1988] 2 S.C.R. 712, pp. 777–779).

<sup>33</sup> *Ibid.*, paragraphs 167–68, 170 (citing *Corbiere v. Canada*, [1999] 2 S.C.R. 203, pp. 226, 272–73). In *Corbiere*, the Supreme Court of Canada struck down provisions of the *Indian Act*, R.S.C. 1985, c. I-5, that allowed only on-reserve *Indian Act* Band members to vote and run for Band Council but held that off-reserve Band members were not necessarily entitled to one person one vote representation depending on the extent of their on-reserve interests.

## ABORIGINAL SELF-GOVERNMENT IN CANADA

[E]xtending equal rights of political participation in Nisga'a Government to people who are not members of the Aboriginal community, who have not received a legal interest in the treaty lands and resources and who do not share an equal interest in the other issues that come under the jurisdiction of Nisga'a government would . . . undermine the purpose of the NFA [*Nisga'a Final Agreement*] legislation and the collective rights of the Nisga'a protected under s. 35.<sup>34</sup>

In the Attorney General's submission, the provisions designed to provide non-Nisga'a citizens with rights of political participation in decisions that directly and significantly affect them struck an appropriate balance between the different interests at stake.<sup>35</sup> The Attorney General would therefore appear to be of the view that the limited political participation of non-Nisga'a citizens could be reasonably justified through a purposive interpretation of the right itself, one that considers the right on its own terms in light of the nature of the interests it seeks to protect and the severity of the impact of the limitations on those particular interests.

In addition to the arguments in defence of the legislation implementing the *Nisga'a Final Agreement*, the Attorney General also made submissions on the application of section 25 of the *Charter* to the Aboriginal self-government treaty right of the Nisga'a Government to establish its own citizenship laws without guaranteeing voting rights to non-Nisga'a citizens.<sup>36</sup> According to the Attorney General, section 25 is engaged when upholding a *Charter* right or freedom would have a negative impact on an Aboriginal, treaty or other right or freedom listed in section 25.<sup>37</sup> The purpose of section 25, in keeping with the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown under section 35 of the Constitution, 'is to prevent the distinctive cultures of the Aboriginal peoples from being undermined by the *Charter*'.<sup>38</sup> Thus, where upholding a *Charter* claim would undermine the distinctive culture of an Aboriginal group, 'the *Charter* right or freedom should be limited to the extent necessary to accommodate the right or freedom protected by s. 25'.<sup>39</sup> In the submission of the Attorney General, therefore, the Nisga'a treaty right to determine citizenship would be protected under section 25 as integral to the protection and promotion of the Nisga'a Nation's cultural distinctiveness.<sup>40</sup>

As with the submissions on section 1 of the *Charter*, the Attorney General apparently advocates a purposive approach to the application of section 25 that seeks

---

<sup>34</sup> *Ibid.*, paragraph 169.

<sup>35</sup> *Ibid.*, paragraph 172.

<sup>36</sup> The Attorney General (paragraphs 124, 129–136) argued that the plaintiffs incorrectly challenged the NFA legislation which was not the source of any *Charter* violation since it merely empowered the Nisga'a Government to exercise a discretionary treaty right to determine citizenship and voting rights in conformity with the *Charter*.

<sup>37</sup> *Ibid.*, paragraph 178.

<sup>38</sup> *Ibid.*, paragraph 179.

<sup>39</sup> *Ibid.*, paragraph 180.

<sup>40</sup> *Ibid.*, paragraph 181.

to safeguard Nisga'a cultural distinctiveness by interpreting the individual right in such a way as to afford reasonably necessary limitations on its scope in light of the culturally integral nature of the treaty right at stake.

#### 4. THE CAMPBELL JUDGMENT

On 24 July 2000, Mr. Justice Williamson of the British Columbia Supreme Court rendered his decision in *Campbell v. British Columbia*.<sup>41</sup> Mr. Justice Williamson rejected the plaintiffs' argument for the exhaustive division of governmental powers between the federal and provincial governments in Canada on the basis that section 35 of the Constitution encompasses a limited right to Aboriginal self-government or legislative power necessary to meet the threat of assimilation faced by vulnerable minority groups.<sup>42</sup> As a result, in Mr. Justice Williamson's view, the plaintiffs' argument for a 'fundamental equation' between the guarantee of democratic rights under section 3 of the *Charter* and the exclusive distribution of legislative powers under the *Constitution Act, 1867* was seriously undermined.<sup>43</sup>

Mr. Justice Williamson further held that if he were wrong in this conclusion, then section 25 nevertheless provided a complete answer to the plaintiffs' proposition:

In construing this section, one must keep in mind that the *communal* nature of aboriginal rights is on the face of it at odds with the European/North American concept of *individual* rights articulated in the Charter. Although there are few cases considering s. 25, what they show is that the section is meant to be a "shield" which protects aboriginal, treaty and other rights from being adversely affected by provisions of the Charter. It does not in itself add any substantive rights. The section is only triggered when aboriginal or treaty rights are challenged on the basis of the Charter and the outcome of that challenge might abrogate or derogate from "rights or freedoms that pertain to the aboriginal peoples of Canada" . . . This case being one involving treaty rights, section 25 is triggered and must be given effect. Keeping these authorities in mind, and applying a purposive interpretation to s. 25 in light of the admonition of the Supreme Court of Canada that where there is ambiguity, constitutional or statutory provisions are to be given a large and liberal interpretation in favour of aboriginal peoples, one comes to the conclusion that the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the Charter.<sup>44</sup>

While the *Campbell* decision is significant for being the first direct judicial treatment of the application of section 25 in the context of Aboriginal self-government, it is important to keep in mind that it is a lower court provincial

---

<sup>41</sup> *Campbell*, *supra* note 20.

<sup>42</sup> *Ibid.*, paragraphs 142–143.

<sup>43</sup> *Ibid.*, paragraph 152.

<sup>44</sup> *Ibid.*, paragraphs 153, 155–158 (emphasis in original).

## ABORIGINAL SELF-GOVERNMENT IN CANADA

decision, and, as such, has relatively limited precedential value.<sup>45</sup> Furthermore, contrary to the Attorney General's more balanced purposive approach, Mr. Justice Williamson in effect adopted a complete 'shield' approach to the application of section 25, one that, with all due respect, did little to reconcile the differing interests at stake, and besides which was *obiter dicta* in not having been necessary in the final result.<sup>46</sup> It should therefore prove useful to turn now to a consideration of the applicable international human rights law in this case that might instead suggest some operative principles for reconciling individual and group rights in the context of Aboriginal self-government.

### 5. INTERNATIONAL LAW IN CANADA

The application of international law in Canada is based in part on colonial British common law doctrine, although the independent Canadian courts have since developed their own approach. International treaties ratified by Canada are not automatically incorporated into Canadian law, and therefore it is not possible to bring an action against the government directly for violation of a treaty provision.<sup>47</sup> Customary international law, on the other hand, has direct application in Canada unless there is unambiguous legislation or settled common law to the contrary.<sup>48</sup>

---

<sup>45</sup> On election to the provincial government, the plaintiffs, now members of the governing party, withdrew their appeal of the trial decision. The provincial government did, however, hold a controversial referendum seeking to limit the scope of negotiations under the treaty process that was passed on 3 July 2002 after only about a third of eligible ballots were cast. See report available at <[cbc.ca/news/features/treaty\\_referendum1.html](http://cbc.ca/news/features/treaty_referendum1.html)>, last consulted 1 Dec. 2002; see also the earlier decision of Mr. Justice de Weerd of the Northwest Territories Supreme Court in *Friends of Democracy v. Northwest Territories (Attorney General)*, [1999] N.W.T.J. No. 28 (QuickLaw) (dismissing the argument of The Aboriginal Summit intervenors that, in order not to interfere with future self-government negotiations, section 25 should apply to prevent a successful section 3 challenge to electoral boundaries favouring sparsely populated, predominantly Aboriginal, rural districts).

<sup>46</sup> Mr. Justice Williamson indicated that his rejection of the plaintiffs' exclusive division of powers argument was sufficient to address the section 3 *Charter* argument, not to mention that later in his reasoning, he found that section 3 applies only to provincial and federal government elections anyway. *Campbell*, *supra* note 20, paragraph 162. In addition, if the Attorney General's submissions with respect to section 1 were correct, then no recourse to section 25 would have been required, at least in the sense of a 'shield' as opposed to an interpretive effect in applying section 1 or other sections of the *Charter*.

<sup>47</sup> *Arrow River and Tributaries Slide & Boom Co., Ltd. v. Pigeon Timber Co., Ltd.*, [1932] S.C.R. 493, p. 510 (*per* Lamont J.); *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326, pp. 347–48 (Judicial Committee Privy Council); *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141, p. 173 (Supreme Court of Canada). See also W.A. Schabas, 'Twenty-Five years of Public International Law at the Supreme Court of Canada' 79 *Can. Bar Rev.* (2000) 174, 177.

<sup>48</sup> *Chung Chi Cheung v. The King*, [1939] A.C. 160, pp. 167–68 (Judicial Committee Privy Council); *Reference re Exemption of U.S. Forces from Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, p. 517 (*per* Taschereau J.) and pp. 524–525 (*per* Rand J.);

There is also a rebuttable presumption that the federal Parliament and provincial and territorial legislatures legislate in conformity with Canada's international treaty and customary international law obligations.<sup>49</sup>

A majority of the Supreme Court of Canada has also held that the *Charter* should generally be presumed to provide protection at least as extensive as that under similar provisions in international human rights treaties ratified by Canada, and that international human rights law provides a relevant and persuasive source when interpreting provisions of the *Charter*.<sup>50</sup> Any application of section 25 under the *Charter* should, therefore, be informed by relevant international norms, particularly those binding on Canada under treaty or customary international law.

## 6. INDIGENOUS RIGHTS AT INTERNATIONAL LAW

The textual international approach to potential conflicts between individual rights and Indigenous group rights has so far given primacy to the former. For example, the International Labour Organization's *Indigenous and Tribal Peoples Convention, 1989* contains specific provisions that premise the guarantee of Indigenous custom on compatibility with individual human rights standards.<sup>51</sup> Article 8.2 states

---

*Reference re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] 2 D.L.R. 481, pp. 501-502 (per Duff C.J.C.); *Saint John (City) v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263 (Supreme Court of Canada).

<sup>49</sup> *R. v. The Ship 'North'* (1906), 37 S.C.R. 141, p. 394 (per Davies J. (MacLennan J. ccr.)) and pp. 398, 400 (per Idington J.); *Daniels v. White and The Queen*, [1968] S.C.R. 517, p. 539 (per Hall J.) and p. 541 (per Pigeon J.); *Capital Cities Communications Inc.*, *supra* note 47; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, paragraph 51; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, paragraph 137; *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, paragraphs 69-70; *1147 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, paragraphs 30-32 (Supreme Court of Canada). This description is, of course, simplified, and judicial approaches may vary somewhat, for example, depending on whether in fact the legislation was passed to implement an international legal obligation. See, generally, J. Brunée and S.J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" 40 *Can. Yrbk. Int'l L.* (2002) 3; Justice L. LeBel and G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" 16 *Supreme Court L. Rev.* (2d) (2002) 23; and Schabas, *supra* note 47.

<sup>50</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, paragraph 46; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1098, pp. 1056-1057; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, pp. 349-350 (per Dickson C.J. dissenting on another point) (Supreme Court of Canada).

<sup>51</sup> *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, adopted on 27 Jun. 1989 by the General Conference of the International Labour Organization at its seventy-sixth session, entered into force 5 Sept 1991, 72 ILO Official Bulletin 59, available at <[www.ilo.org/iloex/english/convdisp1.htm](http://www.ilo.org/iloex/english/convdisp1.htm)>, last consulted 1 Dec. 2002. See, generally, M. Tomei and L. Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (ILO, Geneva, 1996), available at <[www.ilo.org/public/english/](http://www.ilo.org/public/english/)>



## ABORIGINAL SELF-GOVERNMENT IN CANADA

(emphasis added): ‘These peoples shall have the right to retain their own customs and institutions, *where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights . . .*’ Article 9.1 states (emphasis added): ‘*To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.*’ Similarly, Article 33 of the *Draft United Nations Declaration on the rights of indigenous peoples* reads as follows (emphasis added): ‘Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, *in accordance with internationally recognized human rights standards.*’<sup>52</sup>

Article II of the *Proposed American Declaration on the Rights of Indigenous Peoples* states in part that:

1. Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other international human rights law; and nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with the instruments of international law including human rights law.
2. Indigenous peoples have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize *inter alia* the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs, and to use their languages.<sup>53</sup>

---

employment/strat/poldev/papers/1998/169guide/>, last consulted 1 Dec. 2002. Canada is not party to the Convention.

<sup>52</sup> Annex, Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1994/45, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 Oct. 1994). Canada has maintained before the Commission on Human Rights Working Group on the Draft Declaration that collective and individual rights should be balanced without creating a fixed hierarchy. See R.L. Barsh, ‘Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force’ 18(4) Hum. Rts. Quarterly (1996) 782, 796 (citing Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Statement by the Head of the Canadian Delegation Ambassador Mark Moher 1 (29 Nov. 1995)).

<sup>53</sup> Inter-American Commission on Human Rights, *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, Doc. 62 (20 Oct. 2000), Chapter II, Doc. 8, available at <[www.cidh.oas.org/indigenas/chap.2g.htm](http://www.cidh.oas.org/indigenas/chap.2g.htm)>, last consulted 1 Dec. 2002. The U.N. Declaration and the Inter-American Declaration are both drafts with their content subject to change. Once adopted, declarations are non-binding instruments, but they can provide important evidence for establishing the existence or emergence of a rule of customary

The Inter-American Commission on Human Rights provides the following rationale for the *Proposed Declaration*:

In drawing up the Proposed American Declaration on the Rights of Indigenous Peoples, the Commission began to develop in 1990 the legal principle that individual and collective rights are not opposed but, rather, are part of the principle of full and effective enjoyment of human rights. Following the precedent set by Article 29 of the Universal Declaration of Human Rights and Article 27 of the International Covenant on Civil and Political Rights, which recognize that there are certain rights which can only be enjoyed in community with other members of the group, the Commission considered that the full realization by the individual of certain individual rights is only possible if that right is recognized for the other individual members of that community as an organized group. The right of individuals to use their own language or to profess their own religion or spiritual beliefs requires not only respect for the right of the individual to do so, but also respect for the right of the group to establish its own institutions, practice its own rituals, and to develop such shared beliefs or cultural elements . . . Indigenous communities are the holders of the rights enunciated in the proposed Declaration. Those rights refer to the collective legal status of those communities and may be invoked, as appropriate, either by individuals, or by the representative authorities in name of the community.<sup>54</sup>

---

international law. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), I.C.J. Reports (1996) 226 (International Court of Justice), paragraph 70; *Mary and Carrie Dann v. United States*, Case No. 11.140, Report No. 113/01 (Inter-American Commission on Human Rights), OEA/Ser.L/V/II.114 Doc.5 rev. (15 Oct. 2001), paragraph 129 ('the Commission considers that the basic principles reflected in many of the provisions of the [Proposed American] Declaration . . . reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration [on the Rights and Duties of Man] in the context of indigenous peoples'). As a member of the Organization of American States, Canada is legally bound by the provisions of the *American Declaration on the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V./II.82 doc. 6 rev. 1 (1992), p. 17. See *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 (July 14, 1989), Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989), paragraph 45.

<sup>54</sup> *Ibid.*, Chapter 3, I.6.B. I am indebted to my colleague Jane Arbour for bringing this statement to my attention. For similar references to the individual and collective aspects of the same rights see, e.g., *Draft United Nations Declaration*, *supra* note 52, articles 1, 6–8. Compare article 3(2) of the Council of Europe *Framework Convention for the Protection of National Minorities*, opened for signature 1 Feb. 1995, entered into force 1 Feb. 1998, E.T.S. No. 157, available at <conventions.coe.int/treaty/en/treaties/html/157.htm>, last consulted 1 Dec. 2002 (paragraphs 13 and 37 of the accompanying explanatory report, available at <conventions.coe.int/treaty/en/reports/html/157.htm>, indicate that only individual rights are

## ABORIGINAL SELF-GOVERNMENT IN CANADA

It is not clear in what way the Inter-American Commission's rationale might lead to a different result in resolving an actual individual rights challenge to collective Indigenous interests. Conceptually, it suggests that the individual right must be interpreted in keeping with the ability of other members of the group to exercise their rights in community with each other, but also that the Indigenous communities have a separate legal status that might require consideration of a broader collective interest reflecting a sum greater than its parts. It would still seem necessary, however, to assess the dignity interests at stake in order to decide which is to prevail in terms of practical result. One tribunal that has dealt with these issues directly is the UN Human Rights Committee, which has rendered decisions under the *International Covenant on Civil and Political Rights* that may provide certain guidance in reconciling these interests.<sup>55</sup>

### 7. INDIGENOUS RIGHTS UNDER ICCPR ARTICLE 27

Article 27 of the *ICCPR* provides that 'persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.<sup>56</sup> In its General Comments, the Human Rights Committee has stated that the minority rights of individuals under Article 27 must be exercised in a manner consistent with the *ICCPR*'s other provisions, in particular, the protection of equality in Articles 2.1 and 26.<sup>57</sup>

In similar fashion to the Inter-American Commission, however, the Committee has recognized that while the rights protected under Article 27 are individual rights, they 'depend in turn on the ability of the minority group to maintain its culture, language or religion'.<sup>58</sup> Thus, restrictions on the right of an individual member of a

---

recognized in the Convention, which may be exercised communally but not as collective rights) (hereinafter '*Framework Convention*').

<sup>55</sup> *ICCPR*, *supra* note 7.

<sup>56</sup> *Ibid.*

<sup>57</sup> Human Rights Committee, *CCPR General Comment 23: The rights of minorities (article 27)*: 08/04/94, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994), paragraphs 6.2, 8 and *CCPR General Comment 28: Equality of rights between men and women (article 3)*: 29/03/2000, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (29 Mar. 2000), paragraphs 5, 32. The U.N. Human Rights Committee is the treaty monitoring body for the *ICCPR* that issues General Comments to offer guidance in interpreting the Covenant in addition to considering individual communications alleging violations of the Covenant by States Parties. There is ongoing debate as to the appropriateness of addressing Indigenous rights under the rubric of minority rights, for which, in any event, individual rights have apparent primacy over minority group rights. See, e.g., articles 4 and 8 of the *U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135 (18 Dec. 1992), Annex, reprinted in 14 Hum. Rts. L.J. (1993) 54; *Framework Convention*, *supra* note 54, articles 20, 23.

<sup>58</sup> *General Comment 23, ibid.*, paragraph 6.2.

minority will be acceptable where it is 'shown to have a reasonable justification and to be necessary for the continued viability and welfare of the minority as a whole'.<sup>59</sup>

In *Sandra Lovelace v. Canada*, a Maliseet woman claimed that provisions of the Canadian *Indian Act* violated her *ICCPR* rights by revoking her Indian status under the *Act* because she had married a non-Indian man.<sup>60</sup> Without Indian status, Ms. Lovelace no longer had a right to reside on her reserve with other members of her *Indian Act* Band, even after she had divorced her non-Indian husband.<sup>61</sup>

The Committee first determined that Ms. Lovelace was a person belonging to a minority for purposes of Article 27 on the basis that she was an ethnic Maliseet Indian born and brought up on the reserve who had only been absent for a few years during her marriage and who wished to maintain ties with her community.<sup>62</sup> In doing so, the Committee expressly distinguished protection under the *Indian Act* afforded on the statutorily determined basis of Indian status from minority status under the *ICCPR*, thus rejecting the ability of the State legislatively to determine minority membership on that basis alone.<sup>63</sup>

The Committee then found that the denial of Ms. Lovelace's right to reside on the reserve constituted an interference with her right to access her native culture and

<sup>59</sup> *Kitok v. Sweden*, U.N. Doc. CCPR/C/33/D/197/1985 (27 July 1988), paragraph 9.8.

<sup>60</sup> Communication No. R.6/24 (30 July 1981), U.N. Doc. Supp. No. 40 (A/36/40), p. 166 (1981); *Indian Act*, R.S.C. 1970, c. I-6.

<sup>61</sup> According to Canada's submissions in *Lovelace*, she also lost access to federal government programs for Indian people in areas such as education, housing and social assistance, although she became eligible to receive similar benefits under provincial programs. *Ibid.*, paragraph 9.8. In addition to an article 27 violation, Ms. Lovelace alleged violations of equality articles 2(1), 3 and 26 and article 23 (family life) on the basis that only Indian women lost Indian status when marrying out (to a non-Indian) while Indian men who married out not only kept their Indian status, but their non-Indian wives also gained Indian status. The Committee (paragraphs 13.2, 18) considered article 27 to be the most directly applicable provision and therefore, in the result, did not have to consider any violation of article 26 (but compare the appended individual opinion of Mr. Nejib Bouziri finding a violation of all of the articles in question). See A.F. Bayefsky, 'The Human Rights Committee and the Case of Sandra Lovelace', 20 *Can. Yrbk. Int'l L.* (1982) 245, 263 (suggesting that the Committee failed to make the more accurate finding that Ms. Lovelace was discriminatorily denied her right to enjoy her culture in community with others in order to avoid the problem that her loss of Indian status occurred prior to the Covenant coming into force for Canada). Compare K. Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, Cambridge, 2002) pp. 362–372 (criticizing Professor Bayefsky's external equality standard approach for exacerbating the tension between the right to self-determination and women's equality rights).

<sup>62</sup> *Ibid.*, paragraph 14.

<sup>63</sup> *Ibid.* Canada (paragraph 5) sought to justify the *Indian Act* provisions as consistent with traditional Indian patrilineal family relationships and as originally necessary to protect against the greater threat in 19<sup>th</sup> century farming societies posed by non-Indian men. Ms. Lovelace argued, however, that for Maliseet society at least, their traditions were in fact matrilineal. See Knop, *supra* note 61, pp. 363–364 ('For the Maliseet, then, the Indian Act legislated not indigenous custom, but European patriarchy.').

## ABORIGINAL SELF-GOVERNMENT IN CANADA

language in community with the other members of her group.<sup>64</sup> In conclusion, it did not seem to the Committee that ‘to deny Sandra Lovelace the right to reside on the reserve is reasonable or necessary to preserve the identity of the tribe’.<sup>65</sup>

It is significant that the *Indian Act* provisions in question had led to the loss of Indian status for an average of 510 Indian women per year and that the Canadian government had been consulting with Canadian Aboriginal groups divided over the equality rights issue and how best to amend the *Indian Act* in a way that would give Bands greater control over their own membership.<sup>66</sup> The focus of the Committee, however, was on the individualized impact of the *Indian Act* exclusions on Ms. Lovelace and the impact her right to reside on the reserve might have on her particular Band.<sup>67</sup> The fact that Ms. Lovelace had divorced her husband after only a few years and apparently had no other option for accessing her culture in community with other group members spoke to the severe impact her exclusion would have on her in comparison to the limited impact of her return on the Band.

Even so, it appears that the issue for the Band was more a matter of limited resources for providing Ms. Lovelace with a permanent residence of her own than the cultural appropriateness of her return to the reserve. Indeed, the Band did have the power under the *Indian Act* to allow Ms. Lovelace to reside on the reserve, but housing was limited, and therefore the Band had given priority in allocation to those with Indian status.<sup>68</sup> The divisiveness of the issue for the community was nonetheless evident in that Ms. Lovelace was actually living on the reserve with her parents contrary to Band by-laws, allegedly under the protection of some dissident Band members.<sup>69</sup> In those circumstances, the Band was apparently tolerating her presence at her parents’ house on the reserve, but government funding for on-reserve housing was tied to Indian status, and therefore no additional funding would be available to provide her with a house of her own, not to mention the lack of housing for those with Indian status who had never left the reserve.<sup>70</sup>

---

<sup>64</sup> *Ibid.*, paragraph 15.

<sup>65</sup> *Ibid.*, paragraph 17.

<sup>66</sup> *Ibid.*, paragraphs 5, 9.5.

<sup>67</sup> This context-specific approach also helped the Committee avoid having to make a more generalized equality ruling that might have been applicable to all women who had married out and wished to continue residing on their reserves. See Knop, *supra* note 61, pp. 371–372 (commending the Committee’s approach for reconciling the tension between external equality norms and Indigenous culture by focusing on state limits on identity rather than on its objective definition). Note, however, that while it respects cultural context, the Committee’s approach places the onus on already disadvantaged women individually to vindicate their cultural rights. See, e.g., *L.S.N. v. Canada*, Communication No. 94/1981 (30 March 1984), U.N. Doc. CCPR/C/OP/2 (1990), p. 6 for an admissible communication based on similar facts to those in *Lovelace* that was subsequently withdrawn once the *Indian Act* was finally amended.

<sup>68</sup> *Ibid.*, paragraph 9.6.

<sup>69</sup> *Ibid.*, paragraph 9.7.

<sup>70</sup> See J. Borrows, ‘Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics’ 43 *U. New Brunswick L. J.* (1994) 19, pp. 36–37 (noting the post-*Lovelace*

In the Committee's view, however, upholding Ms. Lovelace's individual right to reside on the reserve did not threaten the viability of the group.<sup>71</sup> Subsequent to the Committee's decision, the government of Canada passed Bill-C-31, amending, among others, the *Indian Act* provisions challenged in *Lovelace*.<sup>72</sup>

The *Lovelace* case bears direct comparison with that of *Kitok v. Sweden* in which an ethnic Sami alleged that a statutory prohibition denying him membership in the Sami community and the cultural right to engage in reindeer breeding violated Articles 1 and 27 of the *ICCPR*.<sup>73</sup> The statute in question denied membership to

---

resentment in some First Nations communities at the reinstatement of many women who as a result became eligible for special housing and therefore were perceived to have jumped the queue).

<sup>71</sup> For a similar United States Supreme Court case, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) involving a challenge by a female member of the tribe to the denial of tribal membership for the children of female but not male members who married outside the tribe. Ms. Lovelace did in fact have children who were similarly excluded, although she had married a non-Indian and was divorced, whereas Ms. Martinez was still married to an Indian from another tribe and was challenging a tribal ordinance rather than federal legislation. The majority of the U.S. Supreme Court held that Congress had not intended to allow for a federal cause of action for enforcement of the equality provisions of the 1968 *Indian Civil Rights Act*, 25 U.S.C. §§ 1301–1303, which otherwise would constitute undue interference with tribal self-government. See, generally, A.J. Ziontz, 'After *Martinez*: Civil Rights under Tribal Government' 12(1) U. Calif. Davis L. Rev. (March 1979) 1; Schwartz, *supra* note 4, pp. 376–379; G. Schultz, 'The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After *Santa Clara Pueblo v. Martinez*' 62 (3 & 4) Denver U. L. Rev. (1985) 761; C.A. MacKinnon, 'Whose Culture? A Case Note on *Martinez v. Santa Clara Pueblo*' in C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, 1987) pp. 63–69; C. Christofferson, 'Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act' 101 Yale L.J. (1991) 169.

<sup>72</sup> *An Act to Amend the Indian Act*, S.C. 1985, c. 27. The amendments reinstated the women who had lost their Indian status and Band membership and prospectively provided that no Indian (male or female) would lose status on marriage to a non-Indian nor would any non-Indian gain status on marriage to an Indian. The timing of the amendments coincided with the three year delayed entry into force of the section 15 equality provisions of the *Charter*. See *Response, dated 6 June 1983, of the Government of Canada to the Committee's views, Sandra Lovelace v. Canada*, Communication No. 24/1977 (30 July 1981), U.N. Doc. CCPR/C/OP/2 at 224 (1990); Borrows, *supra* note 70, pp. 32–34. There is, however, on-going litigation over whether the limited reinstatement of the children of the women who had lost their status on marrying out constitutes residual discrimination. See M. Boldt and J. Anthony Long, 'Tribal Philosophies and the Canadian Charter of Rights and Freedoms' in *The Quest for Justice* (University of Toronto Press, Toronto, 1985) pp. 165–179, at pp. 173–74; W. Moss, 'Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights' 15 Queen's L.J. (1990) 279; see also *R.L. et al. v. Canada*, U.N. Doc. CCPR/C/43/D/358/1989 (6 Nov. 1991), in which the Human Rights Committee declared a challenge to Bill C-31 under the *ICCPR* to be inadmissible for failure to exhaust domestic remedies.

<sup>73</sup> *Kitok*, *supra* note 59.

## ABORIGINAL SELF-GOVERNMENT IN CANADA

ethnic Sami who did not engage in reindeer breeding as a permanent occupation and who had gone over to any other main economic activity.<sup>74</sup>

The Committee, in applying the reasonable and objective justification test from *Lovelace*, first recognized the importance of the statutory measures for ensuring the sustainability of reindeer breeding and the livelihood of those relying on it as a primary source of income.<sup>75</sup> It nevertheless then expressed ‘grave doubts’ about whether the statutory exclusions as applied to Mr. Kitok were compatible with Article 27 on the basis that they ‘may have been disproportionate to the legitimate ends sought by the legislation’.<sup>76</sup> As in *Lovelace*, the Committee noted that the legislative definition excluded an ethnic member of a community despite the efforts of the individual to maintain links with that community.<sup>77</sup> Yet inexplicably this time, and without further explanation or any attempt to distinguish *Lovelace*, the Committee found no violation of Article 27.<sup>78</sup>

Besides the apparent inconsistency between the two cases, part of their difficulty from the perspective of reconciling individual and group rights lies with the threshold definitional issue of who is entitled to claim membership in a minority and who has the final say in determining the group’s membership: the individual, the group, the State or an external decision-making body. Professor Patrick Macklem characterizes these types of membership cases as ‘confound[ing] the distinction between laws that provide external protection and laws that impose internal restrictions; they define the border between the external and the internal’.<sup>79</sup>

---

<sup>74</sup> *Ibid.*, paragraph 9.6.

<sup>75</sup> *Ibid.*, paragraph 9.5.

<sup>76</sup> *Ibid.*, paragraph 9.7.

<sup>77</sup> *Ibid.* Mr. Kitok had sought to return to full-time reindeer breeding as soon as he was financially able.

<sup>78</sup> One possible albeit less than persuasive explanation for the difference in result could be the potentially greater cultural impact in allocating finite natural resources for reindeer breeding in *Kitok* as compared to the additional housing in *Lovelace* which could have been funded by the Canadian government. The Sami community was, however, permitting Mr. Kitok to pasture his reindeer for a fee despite his statutory exclusion, and Mr. Kitok argued that one of the results of the impugned statutory scheme was a consolidation of community control in the hands of the big reindeer owners. Paragraphs 5.3–5.4. Another questionable explanation would be that Ms. Lovelace’s potential cultural exile was more severe than Mr. Kitok’s potential inability (or added cost) to engage in a particular cultural practice. See Knop, *supra* note 61, p. 370 (suggesting that although both claimants were in the circumstances *de facto* able to exercise their rights to enjoy their cultures, Ms. Lovelace was in a more precarious position). See also P. Thornberry, *International law and the Rights of Minorities* (Clarendon Press, Oxford, 1991) p. 213, (noting the difficulty in squaring the Committee’s acceptance of Sweden’s argument on the role of the law in preserving Sami identity with Sweden’s admission that assimilation was the fate of the majority of Sami).

<sup>79</sup> Macklem, *supra* note 4, p. 231 (having cited earlier W. Kymlicka, *Multicultural Citizenship: A Theory of Minority Rights* (Clarendon Press, Oxford, 1995) p. 35). In the Canadian context, Professor Macklem advocates a strong protective role for section 25 of the *Canadian Charter of Rights and Freedoms* in cases involving an external rights challenge, while for internal membership cases he suggests that section 25 should be interpreted in a way

The inapplicability of the internal/external dichotomy in these kinds of ‘border’ cases demonstrates its limited usefulness as a proxy for the nature and severity of the threat to the individual and group dignity interests at stake. The right to determine community membership was at issue in both *Lovelace* and *Kitok* as well as in the Nisga’a *Campbell* case. In *Lovelace* and *Kitok*, however, the nature and severity of the cultural threat of the inclusion of individuals with ‘objective’ cultural attachment to ‘their’ communities does not appear to have been equivalent to the cultural threat of permitting non-Nisga’a citizens equal voting rights for Nisga’a Government. In the Nisga’a case, the very existence of the autonomous cultural community was at stake, at least in the sense of the Nisga’a Government’s ability to determine and direct community priorities. Furthermore, the exclusion of culturally attached individuals from their communities would seem to have a much greater individual impact on human dignity than the restricted political participation of those with a more limited, territorially-based interest.

Of course, cultural threats must be considered on a case-by-case basis as they are necessarily contextual and fairly subjective, bringing into question whether external decision-makers are in an appropriate position to realistically assess community attachment and cultural impacts.<sup>80</sup> That, however, is a separate debate in which I will not engage here; rather, I wish to explore the basis for existing decisions and how they might be improved.<sup>81</sup>

Professor Martin Scheinin, for example, argues for greater attention in Human Rights Committee cases to qualitative and not just quantitative assessments of cultural impacts, as with permits to quarry or log on a relatively small scale that might, nonetheless, impact on strategically important areas for particular cultural practices such as reindeer breeding.<sup>82</sup> The cases to which he refers address State-

---

that maximizes the opportunity to air and accommodate competing interests keeping in mind that ‘membership laws will always involve a measure of arbitrariness’. *Ibid.*, pp. 225, 231–232; see also Knop, *supra* note 61, p. 364 (contrasting the external standard of sex discrimination in *Lovelace* with the internal challenge to the supposed patrilineal tradition); L. Green, ‘Internal Minorities and Their Rights’ in Baker, *supra* note 5, pp. 101–117; Borrows, *supra* note 70, pp. 31–32, 40, 48 (describing the application of the *Charter* to First Nations communities as providing in some cases a source of positive identity, reinvigorating extended family relationships and injecting new understanding into customary gender relations in traditional cyclical fashion).

<sup>80</sup> See, e.g., Schultz, *supra* note 71 (proposing U.S. federal appellate review of tribal court decisions only after exhaustion of tribal remedies and subject to a lower procedural standard of fundamental fairness which accounts for tribal custom); but see *Vienna Declaration*, *supra* note 8, Part I, paragraph 5 and Part II, paragraph 38 (proscribing cultural relativism).

<sup>81</sup> See Thornberry, *supra* note 78, p. 210 (‘It is, however, to be expected in the application of such a “hybrid” right [article 27] that the individual and collective components of the right will require constant adjustment and balance.’).

<sup>82</sup> M. Scheinin, ‘The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land’ in T.S. Orlin, et al. (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2000) pp. 159–222, 170, 175 (hereinafter ‘Distinct Culture’).



## ABORIGINAL SELF-GOVERNMENT IN CANADA

facilitated third party encroachment on traditional Indigenous lands involving activities with the potential to destroy Indigenous culture as they destroy the land on which it is based.<sup>83</sup> Professor Scheinin's insights speak, therefore, to the need to address not just the severity of the threat to the viability of a particular Indigenous cultural practice but also the nature of the threat in its interference with culturally integral activities.

Some of the difficulty for the Human Rights Committee in addressing these kinds of cultural integrity concerns may well be a reflection of the individual rights formulation of Article 27 of the *ICCPR*.<sup>84</sup> Nonetheless, the Committee has begun to develop an approach with the potential to address these issues in innovative yet principled fashion and form more of a group rights perspective through the *ICCPR* Article 1 right to self-determination, an approach that is based on the widely recognized principle that all human rights are universal, indivisible, interdependent and interrelated.<sup>85</sup>

### 8. INDIGENOUS PEOPLES AND ICCPR ARTICLE 1

Paragraph 1 of *ICCPR* Article 1 provides that '[a]ll peoples have the right to self-determination . . . [to] . . . freely determine their political status and freely pursue their economic, social and cultural development'.<sup>86</sup> Early on, however, the Committee denied the availability of the individual complaints procedure of the *ICCPR* for alleged violations of a people's right to self-determination under Article

---

<sup>83</sup> See *I. Länsman, et al. v. Finland*, U.N. Doc. CCPR/C/52/D/511/1992 (8 Nov. 1994) and *J. Länsman, et al. v. Finland*, U.N. Doc. CCPR/C/58/D/671/1995 (30 Oct. 1996). See, more recently, *A. Äärelä, et al. v. Finland*, U.N. Doc. CCPR/C/73/D/779/1997 (7 Nov. 2001), paragraph 7.6. In a more technical sense, the encroachments interfered with culturally significant land-based practices that were a source of Indigenous livelihood (note the Committee's shift from economic activities as an 'essential' cultural element in *I. Länsman* (paragraph 9.2) to culturally 'significant' economic activities in *Mahuika, infra* note 93, paragraph 9.5).

<sup>84</sup> See W. Kymlicka, 'Theorizing Indigenous Rights' 49 *U. Toronto L.J.* (1999) 281, pp. 284–285 (arguing that article 27 of the *ICCPR* fails adequately to protect vulnerable national minorities by guaranteeing only certain civil rights relating to cultural expression and not a right of self-determination at least in the sense of some form of autonomy); see also A. Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, Cambridge, 1995) p. 330 (asserting that article 27 protects only the maintenance of cultural identity and does not secure the right of the group to pursue its expansion and development).

<sup>85</sup> *Vienna Declaration, supra* note 8, Part I, paragraph 5. On the interdependence of *ICCPR* provisions relevant to Indigenous rights see, generally, Scheinin, *supra* note 82 and M. Scheinin, 'The Right to Self-Determination under the Covenant on Civil and Political Rights' in P. Aikio and M. Scheinin, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2000) pp. 179–199 (hereinafter 'The Right to Self-Determination').

<sup>86</sup> *ICCPR, supra* note 7.

1.<sup>87</sup> Although the Committee has imposed certain consultation and sustainability requirements under Article 27, its approach nevertheless seems to favour the State's collective interest in resource development over Indigenous self-determination.<sup>88</sup>

Still, multicultural States such as Canada also have a collective interest in fostering democracy through pluralism and the protection of minorities and Indigenous peoples in particular.<sup>89</sup> The more fundamental concern, therefore, is whether a provision like Article 27 affords an adequate basis on its own or in conjunction with other Covenant articles for appropriate consideration of these kinds of interests. For example, despite denying the availability of the *ICCPR* individual complaints procedure for Article 1 violations, the Human Rights Committee has considered communications seeking a similar practical result under Article 27, and has recognized that the protection of Indigenous land use is essential to the maintenance of Indigenous cultural integrity.<sup>90</sup> In addition, the Committee has stated

---

<sup>87</sup> *A. D. v. Canada*, Communication No. 78/1980 (29 July 1984), U.N. Doc. CCPR/C/OP/1 at 23 (1984), paragraph 8.2; *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (26 March 1990), paragraph 32.1; *General Comment 23*, *supra* note 57, paragraph 3.1 ('Self-determination is not a right cognizable under the Optional Protocol.'). The following discussion raises issues of State sovereignty over Aboriginal peoples and their lands that will not be addressed here other than to note that the original claim to British colonial sovereignty has been authoritatively denounced for its reliance on the racist doctrine of *terra nullius*. See RCAP, *supra* note 4, 'Building the Foundations of a New Relationship', Vol. 1, Part 3, p. 696; *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1, 5 C.N.L.R. 1 (Australia High Court); and by implication see *R. v. Calder*, *supra* note 2, p. 328 per Judson J. ('when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries'); *Western Sahara*, Advisory Opinion (Oct. 16, 1975), I.C.J. Reports (1975) 12 (International Court of Justice) pp. 39–40.

<sup>88</sup> See *I. Länsman*, *supra* note 83, paragraphs 9.6 (on consultation), 10.7 (recognizing the cumulative danger of otherwise acceptable discrete interferences with cultural practices); Scheinin, *The Right to Self-Determination*, *supra* note 85, p. 193 (arguing that consultation and sustainability are constitutive elements of self-determination). In Article 27 cases, the Committee appears to afford States a fair amount of deference though it has only once, in a non-article 27 case, relied explicitly on a 'margin of discretion' and, in *I. Länsman*, paragraph 9.4, even expressly denied the applicability of any 'margin of appreciation'. See *Leo Hertzberg, et al. v. Finland*, Communication No. 61/1979 (2 Apr. 1982), U.N. Doc. CCPR/C/OP/1 at 124 (1985), paragraph 10.3.

<sup>89</sup> Article 27 of the Canadian *Charter*, *supra* note 3, states that '[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'. See, e.g., *United Communist Party of Turkey*, *supra* note 8 (forming a political party to debate in public and seek political solutions to the situation of part of the State's population is part of the democratic process and does not necessarily threaten territorial integrity); *Vienna Declaration*, *supra* note 8, Part I, paragraph 20 (recognizing the value and diversity of Indigenous cultures).

<sup>90</sup> See, e.g., *Ominayak*, *supra* note 87, paragraphs 29.1, 33 (Canada in violation of article 27); the *Länsman* cases, *supra* note 83; *General Comment 23*, *supra* note 57, paragraphs 3.2, 7; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (31 Aug. 2001), available at <[www.indianlaw.org/awas\\_tingni\\_decision\\_english\\_.htm](http://www.indianlaw.org/awas_tingni_decision_english_.htm)>, last consulted 1 Dec. 2002 (Inter-American Court of Human Rights). See also *Hopu and Bessert v. France*, U.N. Doc.

## ABORIGINAL SELF-GOVERNMENT IN CANADA

that Article 27 requires positive measures to ensure the enjoyment of minority cultures.<sup>91</sup>

The Committee has in the past also been willing to address Article 1 issues directly when considering the periodic reports of States under *ICCPR* Article 40 on the implementation of their Covenant obligations, and more recently with specific regard to Indigenous peoples.<sup>92</sup> Furthermore, the Committee has indicated recently that Article 1 can at least have an indirect interpretive effect on other Covenant provisions.<sup>93</sup> Although on the surface this seems like a potentially promising development, it is too early to determine whether this approach will make a real difference in consideration of the group rights of Indigenous peoples.<sup>94</sup> It should,

---

CCPR/C/60/D/549/1993/Rev.1 (29 July 1997) in which the Committee found that although France had reserved against the application of article 27, the construction of a hotel complex on the authors' ancestral burial grounds interfered with their article 17 rights to family and privacy.

<sup>91</sup> *General Comment 23*, *supra* note 57, paragraphs 6.1–9. See also the U.N. *Declaration on Minorities*, *supra* note 57, article 4; *Framework Convention*, *supra* note 54, articles 4, 5, 12, 15; *Vienna Declaration*, *supra* note 8, Part I, paragraph 20; *Awasi Tingni*, *ibid.*; Macklem, *supra* note 4, pp. 257–261. The Human Rights Committee has also referred at times to the importance of protecting the culture of the minority or people as a whole and not just from the individual perspective. See, e.g., *Lovelace*, *supra* note 60, paragraph 7.2; *J. Lämsman*, *supra* note 83, paragraph 10.7; and *Ominayak*, *supra* note 87, paragraph 33.

<sup>92</sup> See, e.g., *Concluding Observations of the Human Rights Committee: Canada*, U.N. Doc. CCPR/C/79/Add.105 (7 Apr. 1999), paragraphs 7–8 (relying on the Article 1(2) peoples' right to freely dispose of their natural resources to recommend that Canada urgently implement the Royal Commission on Aboriginal Peoples recommendations on land and resource allocation); *CCPR General Comment 12: The right to self-determination of peoples (Art. 1)*, paragraphs 3–4 (13 Mar. 1984) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 (26 Apr. 2001), pp. 121–122; see also Scheinin, *The Right to Self-Determination*, *supra* note 85, pp. 189–90; A.J. Orkin and J. Birenbaum, "Aboriginal Self-Determination Within Canada: Recent Developments in International Human Rights Law" 10:4 *Constitutional Forum* (1999) 112; and Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, U.N. Doc. A/52/18, Annex V, p. 122 (1997), paragraph 5 ("The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources...").

<sup>93</sup> *Diergaardt, et al. v. Namibia*, U.N. Doc. CCPR/C/69/D/760/1997 (6 Sept. 2000), paragraph 10.3; *Mahuika, et al. v. New Zealand*, U.N. Doc. CCPR/C/70/D/547/1993 (27 Oct. 2000), paragraph 9.2; *Gillot et al. v. France*, UN Doc. CCPR/C/75/D/932/2000 (15 July 2002), paragraph 13.4; see also Cassese, *supra* note 84, p. 345 (arguing for gradual change to the restrictive approach of the Committee through a more liberal interpretation of article 1).

<sup>94</sup> In both *Diergaardt*, *ibid.*, and *Mahuika*, *ibid.*, the Committee found no State violation. The concern in *Diergaardt* seemed to lie with whether the group's (mixed Indigenous Khoi and Afrikaans settlers) cattle ranching and self-government were in fact cultural practices deserving of positive protection and in *Mahuika* with whether the State had to consult (and perhaps receive the consent of) all major Indigenous groups (the author's claimed to represent 140,000 out of 500,000 Maori) in reaching a national settlement on fisheries issues.

nevertheless, prove of interest to apply this kind of approach to the specific issue of reconciling rights to political participation and Indigenous cultural integrity in the context of the *Nisga'a Final Agreement*.

## 9. THE RIGHTS TO POLITICAL PARTICIPATION AND INDIGENOUS SELF-DETERMINATION AT INTERNATIONAL LAW<sup>95</sup>

As surveyed earlier, international norms on the protection and promotion of Indigenous cultural integrity exist and continue to emerge to the extent that the implementation of such norms respects individual human rights guarantees. A U.N. meeting of experts stated in the *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government* that an integral part of the right to self-determination of Indigenous peoples 'is the inherent and fundamental right to autonomy and self-government', but that 'Indigenous autonomies and self-governments must, within their jurisdiction, assure the full respect of all human rights and fundamental freedoms and popular participation in the conduct of public affairs'.<sup>96</sup> The problem once again with such a statement is that it is unhelpful in reconciling the competing interests at stake – in this case, determining at what point political participation by non-Indigenous people nullifies the 'self' in Indigenous self-government.

Article 25 of the *ICCPR* guarantees the right of every citizen without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives, and to vote and be elected at genuine periodic elections under universal and equal suffrage.<sup>97</sup> Unlike the section 3 right to vote under the Canadian *Charter*, it apparently applies to all political levels of government, although it does not require direct political participation by individuals

---

<sup>95</sup> In this section I have endeavored to be mindful of Professor Gudmundur Alfredsson's admonition against the interchangeability of terms like minority and peoples' rights, autonomy, political participation and internal and external self-determination. See G. Alfredsson, 'Different Forms of and Claims to the Right of Self-Determination' in D. Clark and R. Williamson (eds.), *Self-Determination: International Perspectives* (MacMillan Press Ltd., London, 1996) pp. 58–86. Part of the difficulty, of course, lies in the conceptual overlap between the terms. See, e.g., K. Myntti, 'The Right to Self-Determination and Effective Participation', in Aikio and Scheinin, *supra* note 85, pp. 85–130, at p. 101 (on the similarities between the *ICCPR* article 1 right to self-determination, article 25 right to political participation and article 27 right to minority participation in decisions affecting the minority) and *CCPR General Comment 25*, *supra* note 8, paragraph 2 ('The rights under article 25 are related to, but distinct from, the right of peoples to self-determination').

<sup>96</sup> Commission on Human Rights, *supra* note 6, p. 12; see also Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, Report submitted by Mr. Asbjørn Eide, U.N. Doc. E/CN.4/Sub.2/1993/34 (10 Aug. 1993), paragraphs 251–254, 348–349 (stating that local ethnic majorities in decentralized territorial subdivisions must share power democratically with members of other resident groups).

<sup>97</sup> *ICCPR*, *supra* note 7.

## ABORIGINAL SELF-GOVERNMENT IN CANADA

in all public matters.<sup>98</sup> Like section 1 of the *Charter*, which provides for reasonable restrictions on *Charter* rights that can be demonstrably justified in a democratic society, Article 25 of the *ICCPR* allows for reasonable restrictions on the right to political participation.<sup>99</sup>

Restrictions under the *Nisga'a Final Agreement* on the Article 25 rights of non-Nisga'a citizens could be justified as reasonably necessary along the lines argued by the Attorney General in the *Campbell* case under sections 1 and 25 of the *Charter*, and in keeping with Canada's Indigenous rights obligations at international law.<sup>100</sup> It is clear, for example, that Indigenous self-government can facilitate the public participation rights of Indigenous people under Articles 25 and 27 of the *ICCPR*.<sup>101</sup>

---

<sup>98</sup> See *CCPR General Comment 25*, *supra* note 8, paragraph 5. In *Debreczeny v. The Netherlands*, U.N. Doc. CCPR/C/53/D/500/1992 (4 Apr. 1995), the Human Rights Committee considered a legal prohibition against police officers sitting on municipal councils and in *Marshall v. Canada*, Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 (4 Nov. 1991) the Committee found that Canada did not violate the *ICCPR* by failing to allow Mikmaq representatives direct participation in a constitutional conference between the federal and provincial governments and national Aboriginal associations. See also M.E. Turpel, 'Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International legal Developments and the Continuing Struggle for Recognition' 25 *Cornell Int'l L.J.* (1992) 579, pp. 593, 596 (suggesting that the *Marshall* decision closed the door on public participation complaints from Indigenous groups and that '[w]ithout participation in national decision-making, self-government is not meaningful because Indigenous self-government is [about] redefining the nation'); see, finally, *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, in which the Supreme Court of Canada held that the failure to fund and allow direct representation of NWAC during constitutional reform consultations with umbrella national Aboriginal associations did not violate any equality rights or freedom of expression under the *Charter*.

<sup>99</sup> See, e.g., *Ignatane v. Latvia*, Communication No. 884/1999, U.N. Doc. CCPR/C/72/D/884/1999 (25 July 2001) (annulment of a Russian speaker's candidacy for lack of Latvian language proficiency violated article 25 because it was not based on objective criteria nor was it procedurally correct). For a recent split decision by the Supreme Court of Canada on prisoner voting rights, see *Sauvé v. Canada*, [2002] 3 S.C.R. 519, in which members of the Court were divided over the extent to which the right to vote could reasonably be infringed in a democratic society, with the majority relying on the fundamental nature of the right to vote to strike down a voting prohibition for prisoners serving sentences of two or more years.

<sup>100</sup> See notes 31–40; see also Sub-Commission on the Promotion and Protection of Human Rights, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples* by Professor Erica-Irene Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/2000/10 (19 July 2000), paragraphs 43–44 (stating that the principal legal distinction between the rights of minorities and indigenous peoples is with respect to internal self-determination under which the latter have a right to political identity and self-government as a matter of international law).

<sup>101</sup> *General Comment 23*, *supra* note 57, paragraph 7; *U.N. Declaration on Minorities*, *supra* note 57, articles 2(2) and (3) and *Framework Convention*, *supra* note 54, article 15. See C.M. Brölmann and M.Y.A. Zieck, 'Indigenous Peoples' in C. Brölmann, *et al.* (eds.), *Peoples and*

Non-Nisga'a citizens might argue that they constitute a minority for purposes of section 27 entitled to participation in Nisga'a Government decisions affecting them, but besides the fact that the *Nisga'a Agreement* guarantees them a certain degree of participation short of voting rights, the Human Rights Committee does not allow for minority claims by individuals who are not part of an overall State minority.<sup>102</sup> A more direct equality rights challenge based on the fact that voting eligibility turns on largely racial or ethnic citizenship criteria would involve consideration of whether such distinctions are reasonable and objective measures for the protection of Indigenous cultural integrity.<sup>103</sup>

---

*Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1992) pp. 187–220, 209 (arguing that an individual rights approach to article 25 is inadequate to ensure meaningful political participation by minorities); H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1996 revised edition) p. 471 (arguing for a right to autonomy on the basis that 'one person, one vote' may not be sufficient to ensure internationally required effective political and cultural participation); Y. Ghai, *Public Participation and Minorities* (Minority Rights Group, London, 2001) p. 8 ('The exercise of some of these [minority public participation] rights implies a measure of autonomy . . .'); *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note* (Foundation on Inter-Ethnic Relations, The Hague, September 1999), paragraph 14 ('Effective participation of minorities in public life may call for non-territorial or territorial arrangements of self-governance or a combination thereof'); *CSCE Copenhagen* (1990), *supra* note 8, Part IV, paragraph 35, ('The participating states . . . note . . . as one of the possible means to achieve [effective minority public participation], appropriate local or autonomous administrations . . .'). *But see* Scheinin, *Distinct Culture*, *supra* note 82, p. 172, (acknowledging that article 25 has so far not been interpreted so as to require special autonomy arrangements for Indigenous peoples).

<sup>102</sup> See with respect to Anglophones in Francophone Quebec, *Ballantyne, Davidson, McIntyre v. Canada*, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (5 May 1993).

<sup>103</sup> In *Campbell*, *supra* note 20, paragraphs 163–166, Mr. Justice Williamson rejected the plaintiffs' bare allegation of a violation of their section 15 *Charter* equality rights as speculative and addressed by section 25 of the *Charter*. On the distinction between institutional autonomy or self-government arrangements and temporary affirmative action or special measures see the U.N. *Declaration on Minorities*, *supra* note 57, article 8(3) ('Measures taken by States to ensure the effective enjoyment of rights set out in this Declaration shall not *prima facie* be considered contrary to the principle of equality . . .'); *CCPR General Comment 23*, *supra* note 57, paragraph 6.2; Sub-Commission Eide Report, *supra* note 96, paragraph 193; Hannum, *supra* note 101, p. 474; articles 1(4) and 2(2) of the *International Convention on the Elimination of all Forms of Racial Discrimination*, U.N. Doc. A/Res/2106(XX) (21 Dec. 1965), entered into force 4 Jan. 1969, 660 U.N.T.S. 195; G. Triggs, 'The Rights of "Peoples" and Individual Rights: Conflict or Harmony?' in J. Crawford (ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988) pp. 141–157, 147–152; K. Henrad, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers, The Hague, 2000) pp. 150–152. See also *Lovelace v. Ontario*, [2002] 1 S.C.R. 950 in which the Supreme Court of Canada applied the affirmative action provision under section 15(2) of

## ABORIGINAL SELF-GOVERNMENT IN CANADA

In *Gillot et al. v. France*, the Human Rights Committee found that the 10–20 year continuous residency requirements for voting eligibility in independence referenda for New Caledonia did not violate Article 25 of the ICCPR since they were objective and reasonable grounds ‘in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided’.<sup>104</sup> The New Caldeonia referenda were, however, part of a process of decolonization to which the self-determination doctrine more clearly applies, and the Committee stated that the referenda criteria, ‘did not have the purpose or effect of establishing different rights for different ethnic groups or groups distinguished by their national extraction’.<sup>105</sup>

While still a contentious subject in debates on the *Draft United Nations Declaration on the rights of indigenous peoples*, an emerging right of ‘internal’ self-determination would seem nonetheless to support the establishment of autonomous Indigenous self-governments within the Canadian democratic polity.<sup>106</sup> Autonomy in the form of Indigenous self-government could be the best way to guarantee Indigenous cultural integrity in the long run, and may well be necessary in particular circumstances.<sup>107</sup> The Inter-American Commission on Human Rights concluded in

---

the *Charter* to a casino agreement between *Indian Act* Bands and the provincial government that excluded Aboriginal communities that were not Bands under the *Indian Act*.

<sup>104</sup> *Supra* note 93, paragraph 14.7.

<sup>105</sup> *Ibid.*, paragraph 13.11.

<sup>106</sup> See article 31 of the *Draft UN Declaration*, *supra* note 52 (‘Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs . . .’); article XV of the *Proposed American Declaration*, *supra* note 53, and article 6 of the *ILO Convention (No. 169)*, *supra* note 51. For a discussion of internal self-determination at international law involving meaningful access to government to pursue political, economic, cultural and social development, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 272 (Supreme Court of Canada); see also Committee on the Elimination of Racial Discrimination, *General Recommendation No. 21: Right to self-determination*, U.N. Doc. A/51//8, Annex VIII, p. 125 (1996); European Parliament, *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples* (9 Feb. 1994), Eur. Parl. Doc. PV 58 (II) (1994); J. Wright, ‘Minority Groups, Autonomy and Self-Determination’ 19 *Oxford J. Legal Studies* (1999) 605; and C.E. Foster, ‘Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples’ 12(1) *E.J.I.L.* (Feb. 2001) 141.

<sup>107</sup> The U.N. Special Rapporteur, José R. Martínez Cobo, concluded that ‘[s]elf determination, in its many forms, is . . . a pre-condition if indigenous peoples are to be able to enjoy their fundamental rights and determine their future, while at the same time preserving, developing and passing on their specific ethnic identity to future generations’. See U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987), paragraph 269. See also G. Alfredsson, ‘Indigenous Peoples and Autonomy’ in M. Suksi (ed.), *Autonomy: Applications and Implications* (Kluwer Law International, The Hague, 1998) pp. 125–37, p. 125 (‘Self-government or self-control by a group over its internal affairs is probably the most effective means of protecting group identity, group equality and group

its 1984 *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* that '[a]lthough international law does not allow the view that the ethnic groups of the Atlantic zone of Nicaragua have a right to political autonomy and self-determination . . . the need to preserve and guarantee . . . [their cultural identity] . . . entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state'.<sup>108</sup> Finally, the terms of a negotiated self-government treaty should at least be respected as the result of a process of internal self-determination.<sup>109</sup>

On the one hand, therefore, a challenge to the negotiated autonomy of Indigenous self-government by an individual who has no objective cultural attachment to that community represents a potentially severe threat to the very

---

dignity within states'); A. Eide, 'Peaceful Group Accommodation as an Alternative to Secession in Sovereign States' in Clark and Williamson, *supra* note 95, pp. 87–110, 89, 96; Hannum, *supra* note 101; Brölmann and Zieck, *supra* note 101, p. 219.

<sup>108</sup> OAS Doc. OEA/Ser.L/V/II.62, doc. 26 (1984) pp. 81–82. The Nicaraguan government subsequently established two autonomous Atlantic regions governed by elected regional parliaments with balanced interethnic representation. See C.P. Scherrer, 'Regional Autonomy in Eastern Nicaragua (1990–1994)' in W.J. Assies and A.J. Hoekema (eds.), *Indigenous Peoples' Experiences with Self-government*, Proceedings of the seminar on arrangements for self-determination by Indigenous Peoples with national states (10–11 Feb. 1994), Law Faculty, University of Amsterdam (IWGIA and University of Amsterdam, Copenhagen, 1994) pp. 109–148; see also P. Thornberry, 'Self-Determination and Indigenous Peoples' in Aikio and Sheinin, *supra* note 85, pp. 39–64, 56 ('In terms of *lex lata*, for once tolerably clear, self-determination is a right, autonomy is not . . .'); Myntti, *supra* note 95, pp. 117–118 (concluding that Indigenous territorial autonomy is not yet a right under customary international law); Kymlicka, *supra* note 79, pp. 173–192; Macklem, *supra* note 4, pp. 265–285; M. Suksi, 'On the Entrenchment of Autonomy' in Suksi, *ibid.*, pp. 151–171.

<sup>109</sup> According to RCAP, *supra* note 4, p. 172, 'the basic sense of emerging international norms relating to Indigenous peoples' is that 'the right of self-determination should ordinarily be interpreted as entitling Indigenous peoples to negotiate freely their status and mode of representation within existing states . . . and to implement such reforms by negotiations and agreements with other Canadian governments, which have the duty to negotiate in good faith and in light of fiduciary obligations owed by the Crown to Aboriginal peoples'. See also the Canadian U.N. statement on self-determination, *supra* note 11; *R. v. Delgamuukw*, *supra* note 2, paragraph 186 ('Ultimately, it is through negotiated settlements, with good faith and give and take on all sides . . . that we will achieve . . . the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.'). I. Brownlie, 'The Right of Peoples in Modern International Law' in Crawford, *supra* note 103, pp. 1–16, 6 ('The recognition of group rights, more especially when this is related to territorial rights and regional autonomy, represents the practical and internal working out of the concept of self-determination'); Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Explanatory note concerning the draft declaration on the rights of indigenous peoples* by Erica-Irene A. Daes, Chairperson of the Working Group on Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993), paragraph 26 ('the right of self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live . . . as a kind of "belated State-building" . . .').



## ABORIGINAL SELF-GOVERNMENT IN CANADA

ability of the Indigenous community to maintain its cultural integrity through internal self-determination. On the other hand, the less than total exclusion of non-First Nation citizens from the local political process enables them to still play a meaningful role in decisions of the Indigenous self-government that affect them.

Thus, it may well be possible to reconcile an individual right such as the right to political participation with the group right of Indigenous peoples to their cultural integrity without unduly compromising either right. This reconciliation can be accomplished by way of provisions that allow for reasonable restrictions on the individual right as informed by the purpose of safeguarding cultural integrity and applied in a way that accounts for the nature and severity of the threat to both the group and individual dignity interests at stake. Whether this approach would be viable with respect to other individual rights in the context of Indigenous self-government warrants a separate discussion, one hopefully that will be better informed by the practical difficulties in assessing and reconciling individual rights and the group rights of Indigenous peoples.<sup>110</sup>

---

<sup>110</sup> In *Campbell*, *supra* note 20, paragraph 166, Mr. Justice Williamson made the further *obiter* comment that section 25 of the *Charter* would be an answer to any violation of section 7 (life, liberty and security of the person). Compare *Santa Clara Pueblo*, *supra* note 71, where the *Indian Civil Rights Act* expressly provides for *habeas corpus* review before a federal court and T. Isaac, 'Individual Versus Collective Rights: Aboriginal People and the Significance of *Thomas v. Norris*' 21 *Manitoba L.J.* (1992) 618 (arguing that individual rights supersede group rights when personal security is threatened).



## MEXICO

### MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

*Alejandro Anaya-Muñoz*

#### 1. INTRODUCTION

Mexico is a multicultural country. Around ten million people – that is, about ten per cent of the country's total population – are members of one of the 56 ethnolinguistic groups spread throughout most of the country's states.<sup>1</sup> However, as the literature on the relations between the state and indigenous peoples in the country shows, until quite recently, the objective was not to recognise cultural diversity but to negate it and, ultimately, to eliminate it.<sup>2</sup> This attempt to create a 'nation without Indians' became institutionalised during the second half of the twentieth century, specifically with the creation of the National Indigenist Institute (INI), the State agency in charge of undertaking the task of assimilation.<sup>3</sup>

As the Quincentennial (the 500<sup>th</sup> anniversary of the 'discovery' of the Americas) approached, the debate on the recognition of cultural diversity – particularly in relation to the situation of indigenous peoples – acquired an unprecedented relevance within the international agenda. Simultaneously, the indigenous movement throughout Latin America achieved growing levels of co-ordinated activism. Mexico was not the exception. In this context, the Mexican state's pro-cultural homogenisation ideology and practice started to give way to a discourse that

---

<sup>1</sup> Some accounts estimate the country's indigenous population to be 11 million. R. Sieder, 'Introduction', in R. Sieder (ed.) *Multiculturalism in Latin America. Indigenous Rights, Diversity and Democracy* (Palgrave, Houndmills, Basingstoke, Hampshire and New York, 2002) pp. 1–23. The 2000 census reports nearly 5.5 million people over five years of age who speak an indigenous language; that is, 6.8 per cent of the total population over five years of age. The census also reports nearly nine million people living in households with an indigenous father or mother; that figure amounts to 9.9 per cent of the country's total population. See <[www.inegi.gob.mx/difusion/espanol/fietab.html](http://www.inegi.gob.mx/difusion/espanol/fietab.html)>.

<sup>2</sup> H. Díaz Polanco, *Autonomía regional. La autodeterminación de los pueblos indios* (Siglo XXI Editores and Instituto de Investigaciones Interdisciplinarias en Humanidades-UNAM, Mexico City, 1991) pp. 34–41; G. Aguirre Beltrán, *Formas de gobierno indígena* (INI, Universidad Veracruzana, Gobierno de Veracruz and Fondo de Cultura Económica, Mexico City, 1991); and R. Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate', in R. Sieder (ed.), *supra* note 1, pp. 24–44.

<sup>3</sup> See J. Hindley, 'Towards a Pluricultural Nation: The Limits of *Indigenismo* and Article 4', in R. Aitken *et al.*, *Dismantling the Mexican State?* (Macmillan Press, London and New York, 1996) pp. 225–243; G. Aguirre Beltrán, *supra* note 2, pp. 18–19.

was willing to recognise and (allegedly) value and safeguard the multicultural character of the country.<sup>4</sup> In 1990, Mexico was one of the first countries to ratify Convention 169 of the International Labour Organisation (ILO). Later, in 1992, Article 4 of the Federal Constitution was reformed so as to declare that the ‘Mexican Nation has a pluri-cultural composition based originally on its indigenous peoples’, and that ‘the law will protect and promote the development of their languages, cultures, uses, customs resources and specific forms of social organisation, and will guarantee the effective access of their members to the jurisdiction of the state’.<sup>5</sup> In addition, since 1990, a number of the country’s states<sup>6</sup> recognised in their constitutions their multiethnic character, in similar terms to those of Article 4 of the Federal Constitution.<sup>7</sup>

The development of the process of recognition of multiculturalism and indigenous rights in the southern state of Oaxaca is particularly relevant. Oaxaca is perhaps the most clearly multicultural state of the country, comprised of 16 ethno-linguistic groups and an indigenous population that accounts for nearly half of the state’s total population.<sup>8</sup> Since 1990, the state’s Constitution and secondary

---

<sup>4</sup> See J. Hindley, *supra* note 4; S. Sarmiento, ‘El movimiento indio mexicano y la reforma del Estado’ (March 2001) *Cuadernos del Sur* 16., pp. 65–96.

<sup>5</sup> *Constitución Política de los Estados Unidos Mexicanos*, (Ediciones Delma, Mexico City, 1999).

<sup>6</sup> Mexico is a federal republic, made up of 31 states and a Federal District. The design of the federal system, however, did not follow the ‘ethnic question’, but economic and political considerations. H. Díaz Polanco, *supra* note 2, p. 34. Although most of the country’s states have some level of indigenous presence, this population is particularly important in absolute and/or relative terms in the states of Campeche, Guerrero, Chiapas, Hidalgo, Mexico State, Michoacán, Oaxaca, Puebla, Quintana Roo, San Luis Potosí, Tlaxcala, Veracruz and Yucatán. See <[www.inegi.gob.mx/difusion/espanol/fietab.html](http://www.inegi.gob.mx/difusion/espanol/fietab.html)>.

<sup>7</sup> The Constitutions of Oaxaca, Chiapas, Querétaro and Hidalgo were reformed in 1990. The Constitution of Sonora was reformed in 1992, and the Constitutions of Veracruz and Nayarit, in 1993. In 1994, the Constitutions reformed were those of Chihuahua, Jalisco and Durango. The Constitution of Mexico State was reformed in 1995. Campeche’s Constitution was reformed in 1996, together with San Luis Potosí’s. In the case of Quintana Roo, the constitutional reforms were implemented in 1997. For a detailed description of the scope of these Constitutions, see F. López Bárcenas, ‘La diversidad simulada. Los derechos indígenas en la legislación de los estados de la federación mexicana’, in H. Cámara de Diputados, *El derecho a la identidad cultural* (Instituto de Investigaciones Legislativas de la H. Cámara de Diputados, Mexico City, 1999) pp. 159–193.

<sup>8</sup> Oaxaca is the Mexican state with the largest indigenous population. The 2000 national census identified 1,027,847 speakers of indigenous languages, which amounts to 36.6 per cent of the state’s total population being over five years of age. The census also reports 1,483,395 people living in households in which a father or mother speaks an indigenous language; this figure comprises 45.9 per cent of the total population of the state. See <[www.inegi.gob.mx/difusion/espanol/fietab.html](http://www.inegi.gob.mx/difusion/espanol/fietab.html)>. It is widely accepted that language is an imperfect indicator of ethnic identity. In this way, some anthropologists argue that over 50 per cent of the state’s population is indigenous. M. A. Bartolomé & A. Barabas, ‘La pluralidad desigual en Oaxaca’, in A. Barabas & M. A. Bartolomé (eds.) *Etnicidad y pluralismo cultural*.

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

legislation have undergone an intense process of reform that has resulted in the establishment of the country's most extensive legal framework for multiculturalism and indigenous rights. This chapter will describe and explain the process of recognition, with the particular intention of identifying the reasons behind it and its reach and scope. The chapter will attempt to scrutinise the links between the legal recognition of cultural diversity, on the one hand, and governance and the advancement of the indigenous autonomy agenda in the state, on the other. From a broader perspective, this chapter constitutes an empirical reference for the study of the relationship between law and politics within a democratising multicultural state.

This chapter will argue that the pro-multiculturalism legal reforms and policies implemented by Oaxaca's government have been part of an encompassing strategy implemented by the ruling Institutional Revolutionary Party ('PRI') to face the erosion of its legitimacy in the state.<sup>9</sup> In addition, the recognition policies have been a key element of the (PRI) state government's attempts to preserve governability in the state. The chapter will argue that, in spite of these instrumentalist motivations, the recognition reforms and policies implemented in Oaxaca have multiculturalised important aspects of the state's institutional framework – *i.e.* the electoral system – and have improved the opportunities for the promotion of a broader scheme of indigenous autonomy. Finally, the chapter will conclude by stressing the dialectic character of the relationship between politics and the law.

### 2. THE LEGAL RECOGNITION OF MULTICULTURALISM AND INDIGENOUS RIGHTS IN OAXACA

The starting point of the process of legal recognition of multiculturalism and indigenous rights in Oaxaca is the administration of Governor Heladio Ramírez

---

*La dinámica étnica en Oaxaca*, 2d ed. (Conaculta, Mexico City, 1990) pp. 14–95; J. Hernández Díaz, 'Etnicidad y nacionalismo en México: una interpretación', in J. Hernández Díaz *et al.* *Etnicidad, nacionalismo y poder. Tres ensayos* (Universidad Autónoma de Oaxaca Benito Juárez, Oaxaca City, 1993) pp. 9–64. Oaxaca's indigenous population is divided into 16 different ethno-linguistic groups – Amuzgos, Chatinos, Chinantecos, Chochos, Chontales, Cuicatecos, Huaves, Mazatecos Mixes, Mixtecos, Náhuatls, Triquis, Zapotecos, Zoques, Ixcatecos and Popolocas. These groups, however, are not ethnically or even linguistically homogenous. Thus, they do not encapsulate perfectly Oaxaca's ethnic and cultural diversity.

<sup>9</sup> PRI ruled Mexico for over seventy years. In the late 1970s, the PRI's hegemonic position started to deteriorate in increasing proportions. Since the late 1980s, this trend has been reflected in electoral competition – the country's political system turned gradually into a competitive multiparty democracy. This process experienced a crucial moment in 2000, when the PRI lost the presidential elections. The PRI, however, still holds power in many of the country's states, including Oaxaca. See A. Anaya-Muñoz, *Governability and Legitimacy in Mexico: The Legalisation of Indigenous Electoral Institutions in Oaxaca* (University of Essex, PhD Thesis, 2002) pp. 38–57.

López (1986–1992).<sup>10</sup> Heladio Ramírez’s pro-multiculturalism approach was well known years before becoming governor of his state. In 1982, as a senator for Oaxaca, he headed the Senate’s Committee for Indigenous Affairs. From that position, he promoted a first attempt to reform the Federal Constitution so as to recognise the multicultural and multiethnic character of the country. His initiatives, however, met strong opposition from within the political elite.<sup>11</sup> Indeed, to this point, the national political elite had not abandoned its integrationist approach to the ‘indigenous problem’. Some years later, in a speech given at the ceremony at which he was formally nominated as PRI candidate to Oaxaca’s governorship, in mid-April 1986, Heladio Ramírez stressed that ‘the recognition of the culture and the identity of the ethnic groups of our state; the defence of their ancient traditions in the promotion of their great creative drive, are actions that give sense to our Oaxacan identity’.<sup>12</sup> His electoral campaign started with a series of forums of consultation with representatives from the different ethnic groups of the state, held in a number of indigenous municipalities during mid 1986.<sup>13</sup> In a similar fashion, in his inaugural speech as governor he claimed: ‘Let us recognise today that Oaxaca is a multicultural state. We are heirs of autochthonous cultures, of a Spanish culture, and even of the cultures of small groups of immigrants. All of them enrich us.’<sup>14</sup>

In 1990, in the context of an emerging pro-multiculturalism and indigenous rights campaign in the state, the country and the whole American continent, and two years before the reforms to Article 4 of the Federal Constitution, Ramírez López promoted the reform of six articles of the Oaxacan Constitution.<sup>15</sup> Article 12 was reformed so as to enshrine the protection of the *tequio* social institution.<sup>16</sup> Article 16 was modified so as to declare that ‘Oaxaca has a pluralist ethnic composition founded on the presence of the indigenous peoples that integrate it’.<sup>17</sup> The Article also guarantees the protection and promotion of indigenous cultures and forms of social organisation, and takes respect of and concern for multiculturalism to the

<sup>10</sup> Heladio Ramírez was born in an indigenous community, located in the Mixteco Sierra, in Oaxaca’s North-Western corner. He was educated, however, away from his community and, in time, earned a law degree in Mexico City, where he started his political career within the PRI and the National Peasant Confederation (‘CNC’). He was identified with the nationalist-populist wing of the party which was dominant during the 1970s, but which, by the early 1980s, was displaced by a group of neo-liberal technocrats.

<sup>11</sup> Interview with S. Nahmad (anthropologist, national director of National Indigenist Institute in the early 1980s; close friend and personal advisor to Heladio Ramírez), Oaxaca City, August and September, 2001 (on file with author).

<sup>12</sup> Centro de Estudios Políticos, Económicos y Sociales del Partido Revolucionario Institucional, *Memoria. Campaña Política 1987. Lic. Heladio Ramírez López. Consulta al Pueblo* (Partido Revolucionario Institucional, Oaxaca City, 1986) p.13.

<sup>13</sup> *Ibid.*, pp. 16–23, 32–42, 52–58.

<sup>14</sup> *Ibid.*, p. 223.

<sup>15</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (Oct. 29, 1990).

<sup>16</sup> *Tequio* is the non-remunerated communal work given by the members of a community to contribute with the implementation of public works.

<sup>17</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (Oct. 29, 1990).

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

concrete spheres of the judicial system and the resolution of land-related quarrels. The reforms to Article 25 are particularly important. This article stated the recognition of and the respect for the ‘democratic traditions and practices of indigenous communities’.<sup>18</sup> Article 94 was reformed so as to enable the municipalities of the state to ‘associate between themselves freely, taking into account their ethnic and historical affiliation’.<sup>19</sup> The importance of this provision lies in the fact that even if the faculties provided to indigenous municipalities are limited to the definition and implementation of development programs, they give a (limited) framework within which indigenous peoples can reconstitute themselves across municipal boundaries. The reforms to Article 15 enshrine the obligation of the state to provide bilingual and inter-cultural education. Finally, Article 151 was modified so as to declare that tourist activities in indigenous regions of the state should not affect the indigenous cultural and environmental heritage. These 1990 reforms to the Constitution of Oaxaca are more far-reaching than those implemented in other states and those promoted by President Carlos Salinas (1988-1994) to the Federal Constitution in 1992, and even, in some respects, than the federal reforms recently adopted in 2001. This underlines the (by Mexican standards) advanced approach to multiculturalism adopted in Oaxaca since the early 1990s, during Heladio Ramírez’s period in office.

In 1992 – the final year of his administration – Governor Ramírez López promoted a new Electoral Code. Article 17.2 of the new Electoral Code provided that ‘in those municipalities whose electoral process is ruled by the “*usos y costumbres*” system, what is stated by Article 25 of the Constitution [of Oaxaca] will be respected’.<sup>20</sup> This was just as vague and ambiguous as the content of Article

---

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (Feb. 12, 1992). The term ‘*usos y costumbres*’ – literally meaning uses and customs – is generally used to make reference to the social and political practices in force in indigenous communities and municipalities in Oaxaca. Electoral *usos y costumbres* are thus the electoral (traditional) institutions in force in Oaxaca’s indigenous communities and municipalities. Although the particular voting procedures vary from community to community – a ‘show of hands’ being the most widely used mechanism – electoral *usos y costumbres* rest on a series of common principles – the communal assembly as the main decision-making instance, communal as opposed to party-based representation, and the search for consensus in the appointment of authorities. In spite of these traits – close to the democratic ideal, one could say – electoral *usos y costumbres* show some exclusionary tendencies; women are excluded from the electoral process in up to a fifth of the indigenous municipalities of Oaxaca, while newcomers and non-residents of the municipalities’ head towns are disenfranchised in up to a third of them. It is not the purpose here to make a detailed (normative or empirical) appraisal of Oaxaca’s indigenous electoral institutions. For the purpose of this chapter, it should suffice to stress that the principles and practices that guide and shape electoral *usos y costumbres* denote an electoral system alternative to that of the ‘national society’ that emerges from a different ethnic reality. See A. Anaya-Munoz, *supra* note 9, pp. 17–31.

25 itself. The combined ambiguity of Article 25 of the Constitution and Article 17.2 of the new-born Electoral Code did not provide solid legal grounds for an actual modification of formal electoral institutions in Oaxaca. Nevertheless, this new legislative framework represented or symbolised the effective multiculturalisation of the electoral institutions of the state. These reforms were the first step towards the effective legalisation of electoral *usos y costumbres* in hundreds of indigenous municipalities in Oaxaca. In this way, they expressed clearly the Oaxacan elite's intention to continue to move forward in the direction of multiculturalising not only the state's (declarative) constitutional framework, but also its (working) institutions.

Diódoro Carrasco Altamirano took up the governor's seat in Oaxaca in December 1992.<sup>21</sup> According to one account, when serving in Heladio Ramírez's administration, Carrasco Altamirano (then a senior member of Ramírez's cabinet) was sceptical about the possibility of ethnic conflict in the country, and disregarded the arguments of anthropologists and other analysts that underlined the importance of defining a new relationship between the state and the indigenous population.<sup>22</sup> However, when he became a senator for Oaxaca, he was also appointed president of the Senate's Commission on Indigenous Affairs, a position from which he promoted, in 1990, the ratification of ILO Convention 169, signed the previous year by the Mexican government. Observers of politics in Oaxaca tend to consider that during his first year in office Diódoro Carrasco ignored the issues related to the recognition of multiculturalism and indigenous rights. However, the Municipal Law of Oaxaca was reformed in 1993 – the first year of Carrasco's administration – so as to enshrine the respect for electoral *usos y costumbres* for the election of municipal authorities.<sup>23</sup> This (generally ignored) fact underlines that, from the outset of his period in office, Carrasco intended to follow Heladio Ramírez's approach to multiculturalism.

Certainly, the importance he would give to the 'indigenous question' was increased after the Zapatista National Liberation Army ('EZLN') uprising in the neighbouring state of Chiapas, in early 1994.<sup>24</sup> In March, Governor Carrasco

---

<sup>21</sup> His background was different from that of his predecessor – he was a young technocrat, an economist from the Autonomous Technological Institute of Mexico ('ITAM'), who, far from having an indigenous or peasant background, was a member of a rich Creole family.

<sup>22</sup> Nahmad, *supra* note 11.

<sup>23</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (20 Nov. 1993).

<sup>24</sup> The Zapatista National Liberation Army ('EZLN') is mainly made up of indigenous peasants from the Lacandon Jungle and the Highlands regions of the southern state of Chiapas. In January 1994 the EZLN declared war on the federal government, demanding land, democracy and social justice. Shortly after, the EZLN also adopted the indigenous peoples' demands for autonomy. After a short period of combat between the rebels and the Mexican Army, the federal government declared a cease-fire. A series of negotiations rounds ensued. Even if direct hostilities have not resumed, the peace negotiations have been suspended since 1996, in part due to a fundamental disagreement on the appropriate constitutional recognition of indigenous rights. See N. Harvey, *The Chiapas Rebellion. The Struggle for Land and Democracy* (Duke University Press, Durham and London, 1998); J. Womack Jr., *Rebellion in*



## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

announced a ‘New Deal’ for indigenous peoples, which, in addition to a commitment to address socio-economic demands, decentralised political and resource allocation decision-making, and, to promote the solution of agrarian conflicts, declared the government’s intention to protect indigenous traditions and practices and to transform the state’s bodies in charge of indigenous affairs. Soon after, Article 16 of the Constitution, which already declared the multiethnic character of the state, was further reformed so as to recognise and guarantee the protection of the languages of the state’s different ethno-linguistic groups.<sup>25</sup> In addition, the Attorney’s Office for the Defence of the Indigenous [Population] was created to assist the indigenous population on all kinds of legal issues, and also to protect indigenous culture, and promote the participation of indigenous communities in the formulation of development programs.<sup>26</sup>

After these initial reforms came the key piece of the PRI’s recognition (of multiculturalism and indigenous rights) strategy in Oaxaca – the 1995 and 1997 reforms to the Constitution and, most importantly, the Electoral Code which made the recognition of electoral *usos y costumbres* a reality in practice. In May 1995, the ambiguity of Article 25 of the state’s Constitution was eliminated. This Article was reformed so as to declare that ‘[t]he Law will protect the democratic practices and traditions of the indigenous communities, that until now they have used for the election of their *ayuntamientos*’.<sup>27</sup> Months after, in August, this Constitutional declaration resulted in the further reform of the Electoral Code. A whole new chapter within the Electoral Code was devoted to the election of municipal authorities via the *usos y costumbres* regime.<sup>28</sup> In this way, since the November 1995 municipal elections, the municipal authorities of 412 municipalities of Oaxaca are legally elected via the uses and customs in practice in those indigenous municipalities.<sup>29</sup> But this initial recognition was limited and somehow still ambiguous. Perhaps the main problem of the Electoral Code was that it still allowed for some room of political intervention by political parties – and one of the main characteristics of electoral *usos y costumbres* is supposed to be the exclusion of party politics from the process of election of municipal authorities.<sup>30</sup> This was rectified in a subsequent wave of reforms to the Electoral Code in late 1997, when

---

*Chiapas* (The New Press, New York, 1999). See also <[www.laneta.org/cdhbcasas](http://www.laneta.org/cdhbcasas)>; and <[www.ezln.org](http://www.ezln.org)>.

<sup>25</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (9 Jul. 1994).

<sup>26</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (8 Oct. 1994). The Attorney’s Office was, in practice, a sort of ministry for indigenous affairs.

<sup>27</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (13 May 1995). *Ayuntamiento* is the Spanish term for municipal council or government.

<sup>28</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (Sept. 1995).

<sup>29</sup> In 1998, the number of *usos y costumbres* municipalities reached 418 – 73 per cent of the total 570 municipalities of the state.

<sup>30</sup> This statement does not imply that political parties do not intervene by indirect and informal means in municipal politics. In addition, political parties still hold the monopoly of political action in state and federal level elections.

the Code was made more comprehensive and clear.<sup>31</sup> Firstly, whereas the 1995 version considered as *usos y costumbres* municipalities those that ‘since time immemorial, or at least three years ago, choose their authorities through mechanisms established by their customary law’,<sup>32</sup> the 1997 Electoral Code regarded as *usos y costumbres* municipalities those that ‘have developed their own forms of political institutions, differentiated and inveterate;’ or those ‘whose regime of government recognises the general assembly of the population or other forms of consultation to the community as the main organ of consultation and designation of the posts that integrate the *ayuntamiento*,’ or ‘[t]hose that by their own decision, by the majority of their communal assembly, opt for the *usos y costumbres* regime in the renovation of their bodies of government’.<sup>33</sup> Secondly, the 1997 Electoral Code rules out all participation by political parties in municipal elections – Article 118 states clearly that ‘[t]he *ayuntamientos* elected through norms of customary law will not have party affiliation’.<sup>34</sup> In sum, the 1995 and 1997 reforms on electoral *usos y costumbres* signify the effective multiculturalisation of Oaxaca’s electoral system. This, as suggested above, is the most significant element of the broader ‘politics of recognition’ implemented in Oaxaca and, in fact, has no parallel elsewhere in Mexico.

But between and after the (1995 and 1997) electoral reforms, the Diódoro Carrasco administration continued to promote a series of reforms that expanded and deepened the legal recognition of multiculturalism and indigenous rights in the state. Amongst other things, in mid-1995, the Penal Code and the Penal Proceedings Code were reformed so as to comply with Article 16 of the local Constitution.<sup>35</sup> The Education Law was reformed in the same way, so as to comply with Article 150 of the Constitution, which, since 1990, established the state’s obligation to provide bilingual and intercultural education. Furthermore, a significant number of the Education Law’s articles were reformed so as to deal with the promotion and protection of indigenous languages, history and cultures.<sup>36</sup> A most relevant development came in 1998, when Governor Carrasco promoted the Law of the Rights of Indigenous Peoples and Communities of the State of Oaxaca. The ‘Indigenous Law’, made up of 63 articles, defines what is understood by indigenous peoples, recognises the right to autonomy and sets the community and the municipality as the territorial space in which it is going to be exercised, safeguards indigenous culture and guarantees bilingual and intercultural education, recognises indigenous normative systems and defines the limits of an indigenous judicial jurisdiction, protects indigenous women, provides some level of control over natural resources by indigenous communities and guarantees the participation of the

<sup>31</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (1 Oct. 1997).

<sup>32</sup> *Periódico Oficial del Estado de Oaxaca*, *supra* note 28.

<sup>33</sup> See *Periódico Oficial del Estado de Oaxaca*, *supra* note 31.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (3 Jun. 1995).

<sup>36</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (5 Nov. 1995).

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

communities in the definition of development programs.<sup>37</sup> As shown, what Dióodoro Carrasco did was not only to recognise electoral *usos y costumbres*, but also to create a comprehensive body of secondary legislation that deepened and made the principles of multiculturalism and indigenous rights enshrined in the Constitution during the Heladio Ramírez administration more encompassing and precise.

José Murat took office as Oaxaca's governor in December 1998, after the most competitive elections ever in the political history of the state.<sup>38</sup> During the first two and a half years of his administration, he did little to continue with the pro-multiculturalism approach followed by his predecessors. However, in early-to-mid 2001 he made a radical u-turn in this respect. The first step, taken in March was perhaps not so spectacular – he transformed the Attorney's Office for the Defence of the Indigenous [Population] into the Ministry of Indigenous Affairs, quite a natural step to take given that the Attorney's Office was already something like a ministry anyway.<sup>39</sup> But the most important turn took place after President Vicente Fox (2000-present) opened up a process of legislative debate regarding a constitutional reform on indigenous rights at the federal level. The EZLN's Commanders marched to Mexico City, in March 2001, in an attempt to gain public opinion's support and promote within the Federal Congress a particular draft for constitutional reform.<sup>40</sup> The Federal Constitution was certainly modified – Article 2 is now devoted fully to indigenous rights. However, and despite the political clout obtained by the Zapatistas during their march to the capital, the reforms did not follow the draft advocated by the EZLN.<sup>41</sup> The now ruling National Action Party (PAN) and the PRI joined forces in the Federal Congress and imposed their own version of indigenous rights, one that was not accepted by the EZLN and its national level ally, the National Indigenous Congress (CNI).

At this point, Governor Murat – backed by the PRI-dominated local Chamber of Deputies – became 'the champion of indigenous rights', and the main detractor of the reforms to the Federal Constitution. From the outset, the Oaxacan Chamber of Deputies had announced that it would not ratify the constitutional reforms approved by the Federal Congress.<sup>42</sup> Governor Murat started his campaign against the reforms

---

<sup>37</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (19 Jun. 1998).

<sup>38</sup> Although Murat was not a clear-cut technocrat, like Carrasco, he was not a politician linked to the peasant sector of the PRI either, and in spite of having a Zapotec-speaker mother, he had no links with the indigenous population of the state.

<sup>39</sup> *Periódico Oficial del Estado de Oaxaca*, Oaxaca City (21 Mar. 2001).

<sup>40</sup> See the issues of the national newspaper *La Jornada* (<[www.jornada.unam.mx](http://www.jornada.unam.mx)>) from late February to early April 2001.

<sup>41</sup> The draft had been elaborated in 1996 by a plural congressional commission, the Commission for Concord and Pacification ('Cocopa'). From the outset, the 'Cocopa Draft' was accepted by the EZLN. Nevertheless, it was rejected by President Ernesto Zedillo's government (1994–2000) and thus put into the legislative freezer, until it was later retaken by President Vicente Fox.

<sup>42</sup> Reforms to the federal Constitution need to be approved by an absolute majority of the state legislatures – that is, by at least 17 state congresses.

arguing incompatibility with the local legislation on indigenous issues, which, he sustained, was more far reaching. But, by July 2001, the process of ratification by the state congresses had been culminated, and the new federal constitutional framework became fully valid. Murat was the first to react – in August 2001 his government presented an unconstitutionality challenge to the National Supreme Court. Days after Murat presented his unconstitutionality challenge, he was seen in the front pages of the local press sharing the table with well known non-PRI indigenous municipal authorities, announcing the presentation of unconstitutionality challenges by municipal authorities. In this same forum, authorities from a number of indigenous municipalities expressed their support for the governor's 'struggle for an authentic law which responds to the feelings and the demands of the indigenous [people] from Oaxaca and the country'.<sup>43</sup> So, during the following weeks, around 320 municipal authorities of the different regions of Oaxaca presented their own unconstitutionality challenges to the National Supreme Court; the majority of them (around 250) did so encouraged and advised by the state government; the rest acted independently, supported and advised by indigenous NGOs.

Even if no legislative reforms were implemented during José Murat's administration, he continued to adopt an advanced approach on the recognition of multiculturalism and indigenous rights. The political position he took in relation to the reforms to the Federal Constitution – similar to that adopted by the more important indigenous organisations in Oaxaca and the whole country, and even the EZLN – denoted, once more, that the Oaxacan political elite was willing to take the change of paradigm in regard to the indigenous question further than the bulk of the PRI political elite elsewhere in Mexico. The following section will argue that the motivations behind such pro-multiculturalism and indigenous rights tendencies are to be found in the realm of politics, more than in that of ethics.

### **3. LEGITIMACY, GOVERNABILITY AND THE RECOGNITION OF MULTICULTURALISM AND INDIGENOUS RIGHTS**

#### *3.1. The Popular Movement in Oaxaca during the 1970s and 1980s*

Since its emergence in the late 1920s, the post-Revolution regime – embodied in the PRI and its forefathers, the National Revolutionary Party and the Mexican

---

<sup>43</sup> *El Imparcial* (9 Aug. 2001), p.1. David Beetham stresses that '[w]hat is common to legitimate power everywhere, however, is the need to "bind in" at least the most significant members among the subordinate through actions or ceremonies publicly expressive of consent, so as to establish or reinforce their obligation to a superior authority and to demonstrate to a wider audience the legitimacy of the powerful'. David Beetham, *The Legitimation of Power* (Humanities Press International, Atlantic Highlands, New Jersey, 1991) p. 19. Weeks after the public meeting with municipal presidents of the Northern Sierra, governor Murat would appear in the front pages of the local press with 1992 Noble Prize winner Rigoberta Menchú, who praised Murat's 'courage' and declared that 'few governors get fully involved in this struggle, and José Murat deserves all my respect.' *Noticias* (24 Sept. 2001) p.1.

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

Revolutionary Party – founded its hegemony on consent more than coercion.<sup>44</sup> In other words, the PRI's political supremacy rested on its own legitimacy.<sup>45</sup> However, since the late 1960s, the legitimacy of the regime of the *Revolución hecha gobierno* (the Revolution-turned-government) started to show signs of weakness and decline. Its legitimacy began to be questioned and its hegemony threatened by different emerging political opposition actors.<sup>46</sup>

In Oaxaca, during the early 1970s a number of independent popular organisations – encouraged and led by a quite radical leftist students' movement, which drew strategic alliances with workers and peasants – emerged and mobilised in the main cities of the state, particularly Oaxaca City and Juchitán.<sup>47</sup> These organisations (in particular the Coalition of Workers, Peasants, and Students of Oaxaca, COCEO, and the Coalition of Workers, Peasants, and Students of the Isthmus, COCEI) extended their activities to the rural areas of the Central Valleys and the Isthmus regions, where they struggled for land, and/or liberalisation of local political life. The mobilisation included strikes, marches, sit-ins in front of government offices, and the occupation of private ranches and the seizure of public offices (mainly municipal halls) in the countryside. Regardless of a hard repressive campaign implemented by the local government, this process continued throughout the decade, and culminated in a governability crisis that led to the ousting of governor Manuel Zárate Aquino, in 1977.

Hard repression and co-optation of leaders caused the defeat of the independent popular movement in the Central Valleys, in the late 1970s. But the process of independent organisation persisted around land and the democratisation of local political life in the Isthmus, and also the Tuxtepec region during the 1980s. In addition to these popular struggles for land and democratisation, the 1980s were marked by a lengthy and dramatic mobilisation by the state's teachers, who demanded not only better wages and working conditions, but also, principally, the democratisation of their union. The quarrel of the democratic teachers was not with the state government but with the national leadership of the teachers' union. Nevertheless the teachers' movement signified a direct critique and challenge to PRI-style politics. In addition, the massive, intense and prolonged character of their struggle clearly undermined the conditions for governability in the state.

During this period of repeated challenges to the PRI's hegemony – underscored by a growing decline of its legitimacy – Oaxaca's political-institutional life was highly unstable. Between 1974 and 1985, Oaxaca had four different governors. Neither Governor Manuel Zárate Aquino (elected in 1974) or Governor Pedro

---

<sup>44</sup> For an initial approach to history of the post-1910 Revolution regime see H. Aguilar Camín and L. Meyer, *In the Shadow of the Mexican Revolution. Contemporary Mexican History, 1910–1989*, Translated by Luis Alberto Fierro (Univ. of Texas Press, Austin, Texas, 1993).

<sup>45</sup> See A. Anaya-Muñoz, *supra* note 9, pp. 57–60.

<sup>46</sup> See *ibid.*, pp. 38–57.

<sup>47</sup> The following account on the popular movement in Oaxaca is taken from A. Anaya-Muñoz, *supra* note 9, pp. 99–125.

Vázquez Colmenares (elected in 1980) were able to complete their six-year constitutional term in office – both were ousted and replaced by interim governors. Governor Heladio Ramírez was able to break this trend and stay in power throughout his constitutional term.

### 3.2. *The Decline of the PRI's Electoral Supremacy*

The loss of legitimacy of the PRI regime in Oaxaca was also reflected in the electoral terrain. Since the early 1970s, some local popular struggles for land and/or against boss-rule undertaken by organisations like the COCEO and the COCEI were also taken to the electoral arena.<sup>48</sup> In the 1974 municipal elections, these organisations formed alliances with left-wing opposition parties and disputed local power in a handful of municipalities. Their challenge was successful, and the military had to intervene to impose the 'victory' of the PRI candidates. Nevertheless, electoral competition was still a marginal issue in Oaxaca – it had hardly reached more than ten municipalities, out of a total of 570. But this was just the beginning. By 1977, electoral competition for municipal power reached over twenty municipalities, with the opposition managing to win thirteen of them. From then on, the formerly absolute electoral supremacy of the PRI entered a process of growing decline.

*Table 1. Municipal Elections in Oaxaca 1980–2001*<sup>49</sup>

<b>Electoral Period</b>	<b>Mpalties. w/ party competition</b>	<b>Opposition victories</b>	<b>PRI's vote as percentage of total vote</b>
1980	35	17	94
1983	51	11	91
1986	61	15	92
1989	69	33	84
1992	59	22	74
1995	70	47	47
1998	-	39	47
2001	-	66	41

<sup>48</sup> For a complete account of the development of post-1970 electoral politics in Oaxaca see A. Anaya-Muñoz, *supra* note 9, pp. 159–186.

<sup>49</sup> As noted above, since 1998, political parties are formally excluded from municipal elections in Oaxaca's 418 *usos y costumbres* municipalities. Obviously, this table's figures for 1998 and 2001 reflect only the electoral results in the state's 152 non-*usos y costumbres* (or 'party-system') municipalities. Therefore, the 1998 and 2001 figures are not to be taken as reflecting overall, state-level electoral preferences. A. Anaya-Muñoz and F. Díaz Montes, 'Elecciones Municipales en Oaxaca: 1980–1992' (Jan.-Aug. 1994) *Cuadernos del Sur* 6–7; State Electoral Institute of Oaxaca. See also the *Mosaico* database in A. Anaya-Muñoz, *supra* note 9, Appendix 1.

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

Table 1 presents the picture neatly. The number of municipalities in which opposition parties have presented a significant challenge and the number of municipalities in which they have won has continued to increase throughout the last two decades. Even if the PRI has managed to contain its own decline at some points – like in 1992 – it is clear that, overall, its electoral hegemony has kept on falling. This tendency was particularly sharp in 1989, when opposition parties won a record of 33 municipal elections. It was also particularly acute in 1995, when the PRI lost 47 municipalities to the opposition. Although this loss amounted to just over 8 per cent of the state's total number of municipalities, in perspective, it was a considerably important setback for the PRI. Not only had the PRI lost two times as many municipalities as ten years before, but it also only accumulated 47 per cent of the total vote, whereas in 1986 it had obtained 92 per cent.

A similar, though more recent, process also developed in state-level elections. During the 1970s and 1980s, PRI's candidates to the governorship and the local congress did not face any challengers that endangered their election. Heladio Ramírez, for example, was elected governor of the state in 1986 with over 90 per cent of the total vote. Nevertheless, this situation started to change quite significantly with the 1992 election. Dióodoro Carrasco was elected governor with 'only' 74 per cent of the total vote, while the PRI candidates to the local congress obtained a similar proportion of the vote. In the 1995 mid-term elections (to renew the local congress), even if the PRI candidates won all the districts, the overall vote share of their party fell to 54 per cent. This tendency of decline in the PRI's electoral supremacy intensified in the 1998 elections. Current Oaxaca governor, José Murat Casab, was elected with some 417,000 votes (47 per cent of the total vote), while PRD's candidate obtained 320,000 votes. In addition, for the first time, the PRI lost two electoral districts in the elections to renew the state congress. In sum, since the late 1970s, but particularly since the late 1980s, the erosion of the PRI's legitimacy has resulted in an increasingly important challenge to its hegemony, this time in the electoral field.

### *3.3. The Indigenous Movement in Oaxaca and the Impact of the Chiapas Rebellion*

In addition to the popular anti-regime mobilisations of the 1970s and 1980s and the electoral challenge posed by opposition parties described above, a vigorous indigenous movement also challenged the PRI's hegemony in the state.<sup>50</sup> Since the

---

<sup>50</sup> Many of the popular organisations that emerged in the rural areas of Oaxaca during the 1970s and 1980s had a largely indigenous membership. Nevertheless, many of them had mostly peasant (class-based) demands – such as land distribution, financial support and better prices for agricultural produce – and did not include ethnic demands within their agendas. In this way, from the perspective of this chapter, the *indigeness* of rural popular organisations is not determined by the ethnic identity of their members, but by the inclusion of ethnic claims – basically related to the respect of cultural diversity and the right to self-

early 1980s, communal and municipal authorities of the indigenous municipalities of the Northern Sierra of Oaxaca formed organisations and associations that sought to break free from the PRI's tutelage and political control, and struggled to achieve the autonomous control of the communities' natural resources and demanded the recognition of and respect for indigenous cultural identity. In other regions of the state, thousands of indigenous coffee growers gathered around a number of independent organisations and struggled for autonomous control over the process of production and commercialisation of coffee. Some of them did so from a clearly ethnic perspective and explicitly demanded the recognition of and respect for indigenous identity. Other organisations gravitated mainly around peasant and rural demands – e.g. the distribution of land, the support for agricultural production and the liberalisation of local political life. However, their political identity and practices rested on the vindication of ethnic identity, at the same time that they included specifically ethnic demands within their agendas. Finally, indigenous intellectuals created research centres in a number of regions of the state, with the objective of preserving and promoting indigenous cultures, mainly through the definition of alphabets for the different indigenous languages and research on local history and traditions. Although these centres are not mass organisations, their role should not be underestimated; undoubtedly, their existence has complemented, reinforced and animated the overall indigenous struggle for recognition and rights.

As the Quincentennial approached, ethnic claims started to gain more and more relevance within the organisations' agendas. From the late 1980s throughout the early 1990s, and particularly after the EZLN's uprising in 1994, indigenous organisations started to clarify and prioritise their demands related to multiculturalism and indigenous rights – in particular, the right to autonomy. Indeed, the Zapatista uprising in the neighbouring state of Chiapas had a tremendous impact on the politics of ethnicity in Oaxaca. As just suggested, the organisations' 'indigeneness' was strengthened, while the relevance of their political challenge to the PRI regime was dramatically altered.<sup>51</sup> Indeed, after 1 January 1994, the peasant movement in general, and the movement of indigenous revival that had been in ascendance since the late 1980s in particular, received unprecedented support.<sup>52</sup> The Zapatista rebellion elicited sympathies and solidarity from many independent organisations in Oaxaca, including many which did not previously have a political character. In addition, Oaxacan communities and organisations were the first to show effective solidarity with the Zapatista communities, sending convoys with supplies.<sup>53</sup> According to one account, the *no están solos!* (you are not alone!) slogan

---

determination – within their agendas. For a detailed account on the development of the indigenous movement in Oaxaca see A. Anaya-Muñoz, *supra* note 9, pp. 126–158.

<sup>51</sup> See A. Anaya-Muñoz, *supra* note 9, pp. 144–158.

<sup>52</sup> Benjamín Maldonado has argued that the Zapatista uprising in Chiapas made the 'recuperation of Indian utopias' possible. B. Maldonado, 'De la resistencia india a la liberación. (La insurrección de Chiapas y la recuperación de las utopías indias)' (Mar.–Apr. 1994) 44 *Guchachi* 'Reza', pp. 27–31.

<sup>53</sup> See *Noticias* (28 Mar 1994) p.1.



## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

originated from Oaxaca, together with the first letters of solidarity sent by the authorities of many communities to the Zapatista leadership.<sup>54</sup> When recalling the impact of the EZLN rebellion over Oaxacan indigenous organisations, the leader of an important indigenous organisation affirmed that the Zapatista uprising was something like ‘lightning that illuminated, a thunder [that] awakened’.<sup>55</sup> This lightning unleashed a new wave of peasant and indigenous mobilisation in Oaxaca. The creation of networks and the organisation of forums to co-ordinate the new efforts were reinforced, mainly through the creation of two state-wide umbrella organisations – the Council of Indigenous and Peasant Organisations of Oaxaca (COICO) and the State Democratic Assembly of the Oaxacan People.

Governor Diódoro Carrasco was deeply concerned about social peace and stability – that is, about the conditions for governability – in Oaxaca after the EZLN uprising. The reasons for this concern are not difficult to discern – geographical proximity, a huge indigenous population living in acute poverty and a wide variety of indigenous organisations that had openly expressed their sympathy for the Zapatista uprising. Not surprisingly, the governor feared a possible expansion of Zapatismo in Oaxacan territory, a contagion of the state by the Chiapas conflict.<sup>56</sup> The possibility of the existence of Zapatista guerrilla cells in Oaxacan territory was a real concern for the federal government; during the first months of 1994, the Mexican Army began an active campaign in different regions of the state searching for guerrilla units.<sup>57</sup> In August 1994, the Ministry of the Interior concluded that there was no reason ‘to suppose the existence of armed groups or organisations with a political-military structure’ in Oaxaca.<sup>58</sup> In any case, according to a close adviser of Governor Carrasco, what the government was really concerned about was not so much the existence of active Zapatista cells, but the growing pro-Zapatista feeling within entire communities.<sup>59</sup>

Although they were rather cautious in their statements about the possibility of a Chiapas-like conflict in Oaxaca, indigenous leaders and representatives suggested that the state’s indigenous communities and organisations could radicalise their struggle if they did not get proper governmental answers to their needs and

---

<sup>54</sup> Interview with G. Esteva (former advisor to governors Heladio Ramírez and Diódoro Carrasco, and, paradoxically, to the EZLN) (Sept. 2001) (on file with author).

<sup>55</sup> Interview with C. Beas (leader of the Union of Indigenous Communities of the Northern Zone of the Isthmus, UCIZONI), Matías Romero, Oaxaca (Sept. 2001) (on file with author).

<sup>56</sup> According to Salomón Nahmad, close adviser to Diódoro Carrasco, the governor was ‘quite anguished!’ about the possibility of ‘contagion’. Interview with S. Nahmad, Oaxaca City (Aug. 2001). Gustavo Esteva is in agreement that the governor was deeply concerned about the possibility of the Chiapan conflict expanding into Oaxaca. Interview with G. Esteva, *supra* note 54.

<sup>57</sup> See P. Matías and I. Ramírez, ‘Militarización y ‘alerta roja’ en Oaxaca; El Ejército busca grupos armados relacionados con la guerrilla’ (8 Jan. 1996) 1001 *Proceso*, pp. 16–21; *Noticias* (4 Apr. 1994) p.1; *Noticias* (10 Apr. 1994) p.16.

<sup>58</sup> *Ibid.*

<sup>59</sup> Interview with G. Esteva, *supra* note 54.

demands.<sup>60</sup> Indeed, the emergence of the EZLN gave rise to the possibility of the (violent) radicalisation of the, until then, civil indigenous struggle in Oaxaca. So, it was not only the hegemony of the regime that was under more strain, it was social peace and stability itself that was at stake.

To a large extent, this threat dissipated after 1995. However, it re-emerged in the period from 1997–1998. Cells of the Popular Revolutionary Army ('EPR') appeared in Oaxaca in late 1996, and launched an insurgent campaign in early 1998, showing greater activism in the state, adopting a pro-indigenous autonomy discourse and demanding the fulfilment of the *San Andrés Agreements on Indigenous Rights and Culture* ('*San Andrés Agreements*').<sup>61</sup> The dimension of the EPR's threat was not as worrisome as that of the EZLN. Although the EPR had active guerrilla cells operating in the state, its presence in Oaxaca was quite marginal. The EPR never managed to have a significant influence on the peasant population or significant support from indigenous communities or organisations. In addition to the EPR presence, a renewed threat of indigenous radicalism also came from the same organisations that had been stimulated by the Zapatista uprising in 1994. In early 1996, Oaxacan indigenous organisations continued to have a primary role in the Zapatista led pro-indigenous autonomy campaign, including the negotiations between the EZLN and the federal government in San Andrés Larráinzar, Chiapas.<sup>62</sup> Throughout that year numerous indigenous organisations and authorities continued to discuss in massively attended forums and meetings the indigenous rights issue, and started to consider that, just as the *San Andrés Agreements* called for the reform of the Federal Constitution, the Oaxacan Constitution should be reformed so as to go beyond the recognition of multiculturalism and electoral *usos y costumbres* and include the recognition of a broader range of indigenous rights. The indigenous organisations continued to emphasise that what they had been demanding since the early 1990s was the recognition of indigenous rights in general – condensed in the

---

<sup>60</sup> For example, one indigenous leader said that even if 'peace is better', if there were no satisfactory answers to their demands, 'a stronger voice might be required.' *Noticias* (8 Apr. 1994) p. 12A. Another leader warned that the communities have 'struggled for the free self-determination of the peoples. [But i]f they are not taken into consideration, the peoples will choose the way to make their rights valid.' *Noticias* (16 Apr. 1994) p.1.

<sup>61</sup> See *Noticias* (1 Feb. 1998), p. 1; *Noticias* (7 Feb. 1998) p. 1; *Noticias* (10 Feb 1998) p. 13A; *Noticias* (1 Mar. 1998) p. 1; *Noticias* (27 Mar. 1998) p. 1. The *San Andrés Agreements on Indigenous Rights and Culture* were signed by the EZLN and federal government representatives in early 1996. This is a political commitment – not legally binding – which is supposed to provide the basis for a constitutional reform on indigenous rights. From the perspective of the national-level indigenous movement, the *San Andrés Agreements* have become some sort of 'fundamental charter' on indigenous rights, and therefore are now the ideological reference – together with ILO Convention 169 and the 'Cocopa Draft' – and the central objective of their struggle for constitutional recognition of autonomy and rights.

<sup>62</sup> Gustavo Esteva recalls that many and often the 'most influential' of the indigenous advisors to the EZLN during the negotiations of the *San Andrés Agreements* were from Oaxaca. Interview with G. Esteva (Jan. 2002) (on file with author).

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

right to autonomy. And even if significant reforms had been implemented in Oaxaca in this respect, it was not yet enough for the indigenous movement.

### *3.4. The Legal Recognition of Multiculturalism and Indigenous Rights as a Response to the Erosion of the PRI's Legitimacy and the Threats to Governability in Oaxaca*

If we look at the development of the process of recognition of multiculturalism and indigenous rights in Oaxaca – presented in section two of this chapter – in the light of the process of erosion of the PRI's legitimacy – described in the past three subsections – it is clear that the adoption by the last three Oaxacan governments of a pro-recognition agenda has been a direct answer to the challenges to the PRI's hegemony and to the threats to governability in the state. The PRI elite in Oaxaca decided to multiculturalise the legal and institutional framework of the state not because they believed in the virtues of multiculturalism or in the fairness of the recognition of indigenous cultures and rights, but because they considered that it would support their efforts to restore their party's legitimacy and thus overcome challenges to its hegemony and threats to governability in the state.

As shown in section 3.1, by the time Governor Heladio Ramírez took office, the PRI regime had undergone a decade and a half of different kinds of popular insurrections in both rural and urban settings which reflected the deterioration of the regime's legitimacy in the state. Heladio Ramírez assumed the governorship of Oaxaca in a context of longstanding social and political instability and unrest, which was also reflected in the fact that he was the fifth governor of the state in just 12 years. Thus, according to a close aid, Heladio Ramírez took power with the clear determination of consolidating a new political project in the state and staying in power throughout his constitutional term.<sup>63</sup> He had to deal with the growing deterioration of the PRI's electoral performance and with a complex, and still unsolved, social and political instability problem. Governor Ramírez could not disregard one fundamental factor that underscored this situation: the legitimacy of the PRI regime, damaged since the early 1970s, had not recovered it could actually be said that it had continued to deteriorate. So, by early 1989, Heladio Ramírez had launched an aggressive campaign to restore the legitimacy of his party in Oaxaca. Some analysts have argued that he saw the urgency of defining a new strategy of political control, a 'neo-corporatist project', based on the revitalisation of the National Peasant Confederation (CNC), and the provision of financial support to independent peasant organisations. Regardless of the new, or not so new, nature of this strategy, Governor Ramírez did launch a serious offensive for the restoration of his party's legitimacy. In other words, he revitalised the PRI's strategy of legitimacy re-building in Oaxaca. In addition to the programs that targeted peasant

---

<sup>63</sup> Interview with F. Zardain (Deputy Minister of Government for Heladio Ramírez; also member of cabinet for Diódoro Carrasco and José Murat), Oaxaca City (Sept. 2001) (on file with author).

organisations, he promised to carry out public works in the state's 3,000 communities and he established innovative social development programs. Indeed, this decision to invigorate the efforts to restore the PRI's legitimacy makes more sense if we recall that Heladio Ramírez was a politician who emerged from the ranks of the CNC and was linked to the populist wing of the PRI.

But the PRI's legitimacy problems were a national-level issue. So, just as elsewhere in the country, the federal government launched the National Solidarity Program, aimed at restoring the regime's legitimacy through the implementation of targeted anti-poverty and social development programs. Indeed, the federal government funds intended for the Solidarity Program in Oaxaca increased dramatically between 1987 and 1990 – the amount rose from MXN 18,660,000 (USD 9,330,000) in 1987 to MXN 245,304,000 (USD 83,436,734) in 1990. Although these programs were implemented by the federal government, they were clearly intended to promote the restoration of the legitimacy of the PRI regime as a whole; indeed, what benefits the whole, benefits the parts.

But Governor Ramírez saw beyond this anti-poverty and social development strategy; he saw beyond the need to reconcile the regime with the deprived rural population. It seems that he acknowledged two primordial facts. First, he recognised that the harsh financial restrictions faced by the government – dictated by austerity-based, neo-liberal economics – limited the potential reach and impact of this anti-poverty and social development strategy. Therefore, the restoration of legitimacy strategy could not be based only on the implementation of cash-expensive programs. Second, and more importantly, Heladio Ramírez envisaged that *the* political actor in rural Oaxaca in the near future would no longer be the peasant, but the Indian; he acknowledged that ethnicity, more than mere class, would become a fundamental element in the emergence and mobilisation of political identities in the state and other indigenous regions of Mexico. So, his strategy for the restoration of social support for the PRI regime in Oaxaca included a fundamental element that transcended a simple socio-economic or development strategy – the recognition of multiculturalism and indigenous rights. The inclusion of a new approach to multiculturalism within the government discourse, and the process of gradual modification of the legal and (to some point) institutional framework of the state constitutes the really innovative and transcendent element of his strategy. Furthermore, more than just being yet another part of his strategy for legitimacy rebuilding, the pro-multiculturalism approach promoted by Governor Ramírez became the basis of a completely different perception of governance in Oaxaca, one that would transcend his own period in office. According to one account, Heladio Ramírez understood not only that he could not govern against the indigenous communities, but also that it was necessary to govern with them.<sup>64</sup>

---

<sup>64</sup> Interview with G. Esteva, *supra* note 54. In this respect, Heladio Ramírez recently warned the members of the Senate: 'It is not healthy to legislate for the indigenous without the indigenous, but even less [healthy, to legislate] without sensing their own vision on their problems and [their] solutions'. H. Ramírez, speech given to the Senate of the Republic (19 Mar. 2001) (unpublished manuscript).

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

Ramírez López left his successor an important legacy, a series of suggestions, a blueprint that would prove fundamental for future PRI efforts to implement a more effective strategy to restore its legitimacy, and ultimately to maintain stability in Oaxaca. It seems that Governor Diódoro Carrasco acknowledged this fact from the beginning of his gubernatorial period. As mentioned in section two of this chapter, he took a further step forward in the recognition of electoral *usos y costumbres* in 1993, his first year in office, through the reform of the Municipal Law. But it is evident that the watershed in Carrasco's approach to multiculturalism and indigenous rights was the Zapatista rebellion in Chiapas. As underlined in section 3.3, Governor Carrasco was deeply concerned about social peace and stability in the state – that is, about the conditions for governability – after the EZLN uprising. The invigoration of the recognition strategy coincides with the moments of greater strain over the PRI's hegemony and the preservation of governability in Oaxaca. The first wave of Carrasco's reforms (1994–1995) responded to the Zapatista rebellion, its immediate aftermath and the PRI's 1995 electoral debacle, whereas the second wave (1997–1998) came as an answer to the EPR emergence and the continued national-level struggle for autonomy and indigenous rights. Similarly, José Murat's sudden and vehement adoption of a pro-multiculturalism and indigenous rights discourse came just after the reanimation and reaffirmation of the pro-EZLN sympathies amongst Oaxaca's indigenous and peasant organisations. Indeed, just as Diódoro Carrasco before him, Governor Murat was worried about the possible radicalisation of indigenous communities and organisations. In June 2001, Governor Murat and the governor of Chiapas both stressed that the 2001 reforms to the Federal Constitution (on indigenous rights and cultures) do not provide:

the basis for peace with the EZLN in Chiapas nor dissipate the risk of social explosions in the state of Oaxaca and other regions of the country. Moreover, in the case of Oaxaca, the terms in which the reform has been approved by the Federal Congress means that the reform affronts the electoral legislation related to the [indigenous] customary system, which would oblige a counter-reform, which, if it was to happen, would provoke severe problems of social instability.<sup>65</sup>

José Murat thus positioned himself and his government on the same side of the political terrain as the pro-Zapatista indigenous organisations of Oaxaca. This positioning rendered unjustifiable – and thus politically untenable – any attempt at indigenous rights-based radicalisation on the part of the pro-Zapatista organisations of the state. In other words, José Murat decided to develop further the pro-indigenous rights strategy adopted by his predecessors in order to underpin the conditions for governability in the state. By doing so, Governor Murat confirmed the centrality that the pro-multiculturalism and indigenous rights policies have had in the PRI's endeavours to prevent indigenous radicalism in Oaxaca. In addition, again,

---

<sup>65</sup> *La Jornada* (12 Jul. 2001) p.1.

just like governors Ramírez and Carrasco, José Murat acknowledged the strategic importance of the advocacy of multiculturalism and indigenous rights as a fundamental element of the PRI's strategy to restore its legitimacy. Murat's loud and clear defence of indigenous rights came about just before the celebration of important midterm elections, in the summer of 2001. In sum, the reactivation of the politics of recognition in Oaxaca during Murat's period has responded – just as during the previous two gubernatorial periods – to the PRI's attempts to restore its eroded legitimacy and thwart the possibility of indigenous radicalism in the state.

#### **4. THE PRO-MULTICULTURALISM REFORMS AND INDIGENOUS AUTONOMY IN OAXACA**

The picture presented in the previous section may suggest that the process of recognition of multiculturalism and indigenous rights in Oaxaca has advanced only the interests of the PRI regime in the state. The objective of this final section is to look at the other side of the coin, and assess the extent to which indigenous claims for recognition and, particularly, autonomy have been advanced (if at all) by the multiculturalist legal reforms adopted in Oaxaca during the past 12 years.

The core of the pro-multiculturalism and indigenous rights strategy implemented by the PRI regime in Oaxaca are the different reforms to the state's Constitution and secondary legislation described in section two of this chapter. Some of these reforms have resulted in the creation of working institutions, like the Attorney's Office/Ministry of Indigenous Affairs. Other reforms have multiculturalised existing working institutions, in particular, the legalisation of electoral *usos y costumbres*, which created a truly multicultural institutional framework for the election of municipal authorities.<sup>66</sup> Other reforms, however, remain largely declarative – they still have to result in the creation or transformation of working institutions. For example, the constitutional and statutory reforms on the judicial and education systems and the Law of the Rights of Indigenous Peoples and Communities still need to bring about working institutions and effective policies that deliver the objective goods they represent or symbolise – a judicial system that gives proper consideration to linguistic and other cultural differences and creates an effective indigenous jurisdiction, bilingual and intercultural schools and a comprehensive working scheme of indigenous municipal and communal autonomy.

The reforms that legalise electoral *usos y costumbres* are the most significant element within the broader set of multiculturalist reforms implemented in Oaxaca, particularly because they imply the effective multiculturalization of working institutions. In this respect it is important to recall, however, that the indigenous electoral practices had been, in fact, exercised by hundreds of indigenous municipalities long before they came to be legally sanctioned in 1995. This practice had been tolerated by the different state governments throughout the post-Revolution period. In order to keep the formalities, the elections by *usos y*

---

<sup>66</sup> The multiculturalization of the electoral system for the election of the members of the local congress is an indigenous demand that still needs to be addressed.

## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

*costumbres* used to be 'ratified' following western rituals; the authorities previously elected would be registered as PRI candidates, and would then appear in the ballot under the PRI register. The municipal authorities, or the municipal electoral committee (linked to the local PRI and the municipal authorities) would receive the electoral package (lists of voters, ballots, ballot boxes, and so on), and would return the documentation to the electoral authority. A common practice was that the ballots were marked and the rest of the documentation was filled in directly by the municipal authorities or the municipal electoral committee, without the participation of the population. Not surprisingly, the PRI would get all the votes. However, the actual election was made via *usos y costumbres*. So what the Diódoro Carrasco government did in 1995 was to turn this toleration, or this denied or concealed recognition, into formal constitutional and statutory recognition. As a result, it could be thought that the *usos y costumbres* reforms only recognised what was already a well-entrenched political practice. The reforms could be seen, thus, as costless concessions provided by the PRI regime which did not alter political life in the state. Was this so? Article 25 of Oaxaca's Constitution was reformed in 1995 so as to legalise the election of municipal authorities via 'the democratic practices and traditions of the indigenous communities'.<sup>67</sup> This constitutional reform was complemented by the reform of the state's Electoral Code. But, as mentioned in section two, what the new Electoral Code recognised was the selection of candidates, not the election of authorities; those elected through *usos y costumbres* would then need to be registered in the State Electoral Institute as candidates and would have to be ratified through the electoral procedures of the party system. The reforms did not eliminate, then, the electoral simulation characteristic of the pre-1995 period. It would thus seem that the 1995 *usos y costumbres* reforms brought little change in practice. Nevertheless, the novelty was that these candidates could now be registered 'without the intervention of any political party, or through one of them'.<sup>68</sup> And the fact that these candidates could be registered without the intervention of political parties was no small change, as shown by the fact that in the 1995 municipal elections 86 *usos y costumbres* municipalities registered their candidates without the intervention of political parties – that is, as '*planilla comunitaria*' (communal slate). In this way, the 1995 reforms opened up a formal institutional path for indigenous authorities and organisations that sought to establish municipal governments based on indigenous political institutions and away from the political patronage of political parties – particularly that of the PRI.

As stressed in section two, the 1997 reforms addressed many of the limits and ambiguities included in the 1995 Electoral Code. The Code's chapter on elections by *usos y costumbres* was expanded and clarified. The 1997 Electoral Code recognised the election of authorities, not the selection of candidates; those elected through indigenous electoral institutions no longer needed to be ratified through an electoral

---

<sup>67</sup> *Periódico Oficial del Estado de Oaxaca*, *supra* note 27.

<sup>68</sup> *Ibid.*

simulation with ballots and ballot boxes. Furthermore, the new Code formally excluded party politics from municipal elections in *usos y costumbres* municipalities. Through this disposition, the Electoral Code safeguarded one of the main features of *usos y costumbres* – the election of candidates without the intervention of political parties. While the exclusion of political parties from municipal elections does not necessarily imply their absolute exclusion from municipal politics, it does provide more solid and broader grounds for autonomous political decision-making in the indigenous municipalities of Oaxaca. The 1997 Code's definition of *usos y costumbres* municipalities is also highly relevant in this respect. The Electoral Code distances itself from history and a static perception of customary law and founds the definition of such municipalities on municipal self-determination – it makes reference to municipalities 'that have developed *their own* forms of political institutions', and to municipalities that 'by *their own* decision . . . opt for the *usos y costumbres* regime'.<sup>69</sup> Indigenous electoral institutions are therefore regarded as being founded not on a series of ancient practices, but on municipal self-determination. The understanding of electoral *usos y costumbres* enshrined in the 1997 Electoral Code goes beyond fixed identities and opens up the possibility for the reconstitution of identities lost or severely damaged by decades of government efforts to impose cultural assimilation. In sum, the Electoral Code provides a positive framework for the exercise of local autonomy in the election of municipal authorities in hundreds of indigenous municipalities of Oaxaca. The Indigenous electoral institutions made legal what was a non-legal practice. Evidently, this legalisation validated and thus consolidated and safeguarded the existence of an alternative (indigenous) electoral regime in Oaxaca. It did multiculturalize an important part of the formal institutional framework of the state of Oaxaca. But the *usos y costumbres* reforms not only formalised an actual political practice; they provided the legal grounds for its transformation. As just argued, the new (multicultural) institutional framework for the election of municipal authorities provides the basis from which indigenous municipalities can break away from the tutelage of political parties and can thus promote an autonomous decision-making process, based on their own institutional practices.

The legalisation of electoral *usos y costumbres* has meant a step forward in the construction of an institutional scheme for the exercise of indigenous autonomy at the municipal level. Evidently, electoral institutions are just one of many elements within a broader set of political, economic and cultural institutional arrangements required for the establishment of a comprehensive scheme of indigenous autonomy. Oaxaca's constitutional and statutory framework on multiculturalism and indigenous rights provides a good foundation for the establishment of such a scheme. The Law of the Rights of Indigenous Peoples and Communities has a particularly relevant potential in this respect. However, it still has to be implemented and result in the establishment of working institutions that make it a reality in practice. The task of

---

<sup>69</sup> *Periódico Oficial del Estado de Oaxaca*, *supra* note 31. Emphasis added.



## MULTICULTURAL LEGISLATION AND INDIGENOUS AUTONOMY IN OAXACA, MEXICO

accommodation of cultural diversity within the institutional framework of the state is far from being fulfilled in Oaxaca. The constitutional and statutory framework now existent and, particularly, the effective respect for electoral *usos y costumbres* are important developments, but by no means the end of the road.

This chapter has shown that the law is both an object of and a tool for political struggle. Political actors interact – in a more or less confrontational fashion – and struggle over the definition of the legal framework. Concomitantly, this legal framework defines the limits and the scope, and thus to a large extent the outcomes, of that political struggle. In the case of the politics of recognition of multiculturalism and indigenous rights in Oaxaca, the dialectic interaction between indigenous and government interest and agency will continue to influence and be influenced by another dialectic process – that between law and politics. The attempted multiculturalisation of Oaxaca’s working institutional framework – in particular, the establishment of a scheme of indigenous autonomy – will depend on the future developments of this two-dimensional dialectic process. Considering the way the interaction between government and indigenous actors has evolved recently in the state, with both actors willing to take a cautious but progressive approach on the multiculturalism agenda, and the current legal terrain in which this interaction is taking place – one that provides the fundamental bases for an effective and comprehensive multiculturalisation of the state’s institutional framework – it may be that Oaxaca will continue to move, slowly but progressively, towards a more effective accommodation of cultural diversity. However, only time will tell.



## NICARAGUA

### THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE AWAS TINGNI CASE, OR REALIZING THAT A GOOD LEGAL SYSTEM OF PROTECTION OF LAND RIGHTS IS NO GUARANTEE OF EFFECTIVE IMPLEMENTATION<sup>1</sup>

*Christina Binder*

#### 1. INTRODUCTION

In autumn 2001, the Inter-American Court on Human Rights ('Inter-American Court', 'Court') handed down a landmark decision in the case the *Mayagna (Sumo) Awas Tingni Community v. the Republic of Nicaragua*.<sup>2</sup> In this decision, the Court found the communal property rights of the members of the indigenous Awas Tingni community to be protected by the right to property under the American Convention on Human Rights (henceforth American Convention) and thereby acknowledged their property rights to the lands they currently inhabit on the Nicaraguan Atlantic coast.<sup>3</sup> In the opinion of the Court, the Nicaraguan state had violated the American Convention when it considered the traditional settling area of the Awas Tingni community to be state-owned land, where timber logging concessions could be granted to the multinational company SOLCARSA. In its judgment, the Court thereby found an overall violation of the obligation to respect and ensure the rights guaranteed in the Convention by all necessary means, including the right to

---

<sup>1</sup> This article partly refers to the Master thesis of C. Binder, 'Indigenous Peoples and Their Lands. International Standards and Domestic Implementation. The Case of the Atlantic Coast of Nicaragua', to be published in *European Master's Degree in Human Rights and Democratization. Awarded Theses of the Academic Year 2001/02* (Marsilio Editori S.P.A., Venice, 2003). A scholarship granted by the Austrian Academy of Sciences supported the investigations undertaken.

<sup>2</sup> Inter-American Court on Human Rights, *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. The Republic of Nicaragua*, Judgment of 31 August 2001, text of the case available at <[www.indianlaw.org/Sentencia\\_de\\_la\\_Corte.pdf](http://www.indianlaw.org/Sentencia_de_la_Corte.pdf)>.

<sup>3</sup> *Ibid.*, paragraph 148: 'It is the opinion of this Court that article 21 of the *Convention* protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.'

property, and the right to judicial protection, as enshrined in the American Convention.<sup>4</sup>

The decision handed down by the Inter-American Court represents a far-reaching acknowledgment of indigenous land rights. In the absence of a demarcation-mechanism established by the state, the Court states that a formal title is not necessary to create the right to property of the Awas Tingni community.<sup>5</sup> 'It is the opinion of the Court that, pursuant to Article 5 of the Constitution of Nicaragua, the members of the Awas Tingni community have a communal property right to the lands they currently inhabit.'<sup>6</sup> Factual possession is considered sufficient by the Court, with the dimensions of the protected area to be measured according to customary indigenous law and the traditional settling pattern of the community.<sup>7</sup> Thereby, applying the method of teleological interpretation<sup>8</sup> as well as the system of maximal protection,<sup>9</sup> the Inter-American Court formulates the individualistic property concept of Article 21 of the American Convention in a way as to include the communal property rights of Awas Tingni.<sup>10</sup> Furthermore, the Court states the obligation of the Nicaraguan state to 'carry out the delimitation, demarcation and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni community'.<sup>11</sup>

The findings of the Court signify an essential step forward in the ongoing evolution of international standards protecting indigenous lands and reflect an important development of Human Rights law in general. International monitoring bodies<sup>12</sup> have gradually begun to interpret and adapt human rights treaties so as to include indigenous peoples in their ambit of protection. One realizes the importance of this development especially if one considers that many other indigenous peoples

---

<sup>4</sup> *Ibid.*, paragraphs 173 1. and 2. The obligation to respect and ensure the rights in the *Convention* by all necessary means, as well as the right to property, are found in Article 2. The right to judicial protection is found in Article 25.

<sup>5</sup> *Ibid.*, paragraph 152.

<sup>6</sup> *Ibid.*, paragraph 153.

<sup>7</sup> As stated by the Court, '[i]ndigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land, to obtain official recognition of that property, and for consequent registration'. *Ibid.*, paragraph 151.

<sup>8</sup> *Ibid.*, paragraph 146.

<sup>9</sup> *Ibid.*, paragraph 148.

<sup>10</sup> *American Convention on Human Rights*, Art. 21: '1. Everyone has the right to the use and enjoyment of his property. [...].'

<sup>11</sup> *Awás Tingni v. Nicaragua*, *supra* note 2, paragraph 173.4.

<sup>12</sup> The jurisprudence of the HR Committee with respect to Article 27 of the *CCPR* reflects perhaps the most notable evolution of standards in this sense. However, it must also be noted that the CERD Committee in its *General Recommendation XXIII (51) on Indigenous Peoples* (1997) and the Inter-American Commission on Human Rights (IACHR) in its recent land reports, also recognize indigenous land rights to a considerable extent.

## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

in Latin America and throughout the world are confronted with violations and encroachments similar to those faced by the *Awas Tingni* community.<sup>13</sup>

It seems, however, especially astonishing that the Nicaraguan state is found guilty and condemned for violating the land rights of its indigenous peoples; on paper, the Nicaraguan legal system of protection of land rights seems to be far-reaching. The indigenous communities are the legitimate and collective owners of the lands they have inhabited since time immemorial. A statute of regional autonomy guarantees the autonomous regions (the *Región Autónoma Atlántica Norte* (RAAN) and the *Región Autónoma Atlántica Sur* (RAAS)) of the Atlantic coast, the main settling area of the Nicaraguan indigenous peoples,<sup>14</sup> a considerable extent of self-government, which, as one will see later, could also be used to defend indigenous interests concerning their lands against the central government.<sup>15</sup> Reading the Nicaraguan Constitution<sup>16</sup> and the *Autonomy Statute For the Regions of the Atlantic Coast of Nicaragua* (*Autonomy Statute*),<sup>17</sup> one is amazed by the far-reaching recognition of the rights of the communities of the Atlantic coast.

However, despite such constitutional and legal protection, the communal lands of the *Awas Tingni* were encroached upon by SOLCARSA with a concession by the Nicaraguan government, and the Nicaraguan courts failed to enforce the land rights of the communities. This paper will seek to address these apparent contradictions within the legal conception of the protection of land rights from the aspect of their ultimate realization. In doing so, it will also explore questions regarding the overall situation of the Atlantic coast, the extent of the rights guarantees and the failure to implement these rights.

The first step towards addressing these questions focuses investigation on the sociological and historical situation of the indigenous communities of the Atlantic coast. This contextual discussion will set the background for the *Awas Tingni* case.

The second step involves analysis of the Nicaraguan legal system of protection of land rights, with emphasis on the property conception of the Nicaraguan Constitution and *Autonomy Statute*. It will be argued here that Nicaraguan law

---

<sup>13</sup> The Yanomami in Brazil and the Huaorani in Ecuador are two examples of peoples who are nearly extinguished and annihilated by modern logging activities and incoming settlers.

<sup>14</sup> There are also some indigenous peoples living in the Pacific region; however, this investigation will be restricted to the situation of the communities settling on the Atlantic coast, as settling area of the *Awas Tingni* community and because of the interesting and far-reaching regime which has been established to protect the land rights of the communities living there.

<sup>15</sup> Note, however, that the autonomous regime and the recognition of land rights on the Atlantic coast is not merely an indigenous privilege, but applies, as multi-ethnic autonomy, also to the Creole, Mestice and Garífuna communities living there.

<sup>16</sup> *Constitución Política de la República de Nicaragua de 1987*, partly reformed by *Ley No. 192 o Ley de Reforma Parcial a la Constitución Política de Nicaragua* in 1995, as well as by *Ley No. 330* in 2000.

<sup>17</sup> *Estatuto de la Autonomía de las Regiones de la Costa Atlántica de Nicaragua, Ley No. 28* (1987).

should provide for sufficient protection of indigenous lands in a culturally adequate manner, against interferences from the outside, and against the kinds of encroachments as transpired in the case of the Awas Tingni community. Had this been the case, the condemnation of the Nicaraguan state by the Inter-American Court would not have been necessary.

Finally, the problems of implementation and enforcement of indigenous land rights – which in the end led to the Awas Tingni decision – will be examined. Under this rubric, the circumstances and reasons that impede the effective realization of legally guaranteed rights will be analysed. Other issues that will be addressed include: why, in practice, the existing theoretical protection failed in Nicaragua; and an enunciation of the actors, and factors, that led to the violation of indigenous rights as were confronted in the case of the Awas Tingni community.

## 2. SOCIOLOGICAL AND HISTORICAL BACKGROUND

The region of the Atlantic coast where the Awas Tingni case arises is actually situated in the main settling area for many of Nicaragua's indigenous peoples such as the Miskitos, the Sumus and the Ramas. Since 1987, when a statute of regional autonomy was granted to the Atlantic coast, the area has been administratively divided into two autonomous regions, the RAAN and the RAAS.<sup>18</sup> Despite the fact that the surface of the two regions covers 49 percent of national territory, the population of the regions constitutes only 9.63 percent of Nicaragua's 4.3 million inhabitants. In fact, the total indigenous population of the Atlantic coast represents only 2.45 percent (105,427 persons) of the total Nicaraguan population.<sup>19</sup>

Indigenous peoples living on the Atlantic coast have maintained a certain historical independence vis-à-vis the central government ever since the arrival of the first settlers.<sup>20</sup> In the 17<sup>th</sup> and 18<sup>th</sup> centuries, Spanish colonization only took place in the Pacific region; Spanish colonizers never effectively conquered the Atlantic coast. In fact, the indigenous peoples of the Atlantic coast (namely the Miskitos) founded, with the support of the English Crown, the independent Kingdom of the Mosquitia, which lasted until 1860. However, with the Treaty of Managua in 1860 and the Treaty of Harrison Altamarino in 1905, the Atlantic coast became formally integrated into the state of Nicaragua.

---

<sup>18</sup> Note, however, that today, despite the devolution of powers to the Atlantic coast, Nicaragua is still to be considered a central state, which is characterized by a centralization of political power and a concentration of economic power in the Pacific region.

<sup>19</sup> Source: Censos Nacionales, Datos de Población y Vivienda (INEC, Managua, 1998). The other inhabitants of the Atlantic coast are the English speaking Creoles, the Spanish-speaking Mestices, and the Garifunas.

<sup>20</sup> For a general survey of history, see O. Roque Roldan, *Legalidad y Derechos Étnicos en la Costa Atlántica de Nicaragua* (Fundación Gaia, Colombia, 2000) pp. 37–52. For a general survey of the political history of 20<sup>th</sup> century Nicaragua, see M. Rizo, 'Indian Rights in Nicaragua: State, Regional Autonomy and Indian Communities in 1998' LVIII No 1-2 *América Indígena*, (1998) p. 119.

## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

The 20<sup>th</sup> century also saw, however, the indigenous communities of the Atlantic coast develop separately from the rest of Nicaragua (the Pacific region). Under dictator Somoza, for instance, indigenous communities remained relatively untouched, to the point of complete neglect by the central government in Managua. In the Nicaraguan civil war that followed the Sandinista revolution and takeover of power in 1979, the Miskitos actively supported the Contras against the Sandinista government. One of the major reasons identified for this support was the integrationist tendency of the Sandinistas who were opposed by the Miskitos, determined to keep a certain independency vis-à-vis the central government.<sup>21</sup>

The special status the indigenous communities of the Atlantic coast maintained throughout history enabled them to uphold a unique, unanimous political discourse and a special cultural identity. It also helped the communities to hold effective possession of their lands, even if most of these lands were never formally recognized by the Nicaraguan state.<sup>22</sup> In this context, one can observe that the territories of the communities are a classic example of lands ‘traditionally occupied by indigenous peoples’ who are the historical occupants of their territories, which they still inhabit today.

Violations, such as concessions granted by the government to such timber logging companies like SOLCARSA, are of such severe gravity as to affect the full realization of the rights of indigenous communities to enjoy their culture. The relationship to their lands and territories plays a central role for the totality of life of the communities.<sup>23</sup> The communities not only need their lands as a basis for their physical survival (as cultivators, farmers and hunters, the physical subsistence of the peoples of the Atlantic coast depends on the accessibility and cultivation of their lands), their lands are also essential for the religion and the spirituality of the

---

<sup>21</sup> ‘The Miskitos fight the Government, not the revolution!’, as stated by Mario Rizo, Anthropologist and Lawyer, Researcher at the Universidad Centro-Americana, Interview conducted 3 August 2001 in Managua, Nicaragua.

<sup>22</sup> Some indigenous property rights were recognized by the *Treaty of Harrison Altamarino* in 1905; other lands were titled under the Agrarian reforms of 1963, 1981 and 1986 as agrarian lands. However, such recognized lands were few and an effective implementation of these land rights never really took place. *See*, in this context, O. Roque Roldán, *supra* note 20, at pp. 41–52.

<sup>23</sup> The importance of lands to the indigenous communities of the Atlantic coast is highlighted, for example, by O. Roque Roldán, *ibid.*, p. 13. In fact, the elements enumerated in the *Final UN-Working Paper* as ‘unique to indigenous peoples’ define and characterize also the relationship, which the indigenous communities of the Atlantic coast have to their lands: ‘(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability’. UN Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous Peoples and their Relationship to Land*, Final Working Paper prepared by E.-I. Daes, E/CN.4/Sub.2/2001/21 (2001) p. 9.

communities.<sup>24</sup> Equally, the social organization of the indigenous peoples is closely linked to their lands. The traditional institution of the *Sindico*, for example, the communal body responsible for the management of lands and resources, occupies a crucial place in the social system of the communities.<sup>25</sup> This observation leads to the issue of the specific relationship of the indigenous communities in Nicaragua to their lands and the extent to which they are protected by Nicaraguan law – to which we shall now turn.

### 3. NICARAGUAN LEGAL CONCEPTS FOR THE PROTECTION OF LAND RIGHTS

Paradoxically, in Nicaragua the land rights of the indigenous communities of the Atlantic coast are fairly well protected by international as well as national norms. One could conceivably argue that the special regime of protection established for indigenous lands by Nicaraguan laws should prevent the violations of rights as it happened in the case of the *Awás Tingni* community.

#### 3.1. *Applicable Norms*

Firstly, the most important international human rights treaties, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights as well as the American Declaration on Human Rights and the American Convention, are directly incorporated into the Nicaraguan Constitution via Article 46, which confers on them full validity (*plena vigencia*) in the national territory.<sup>26</sup> With the exception of the ILO Conventions Nos. 107 and 169, which still have not been ratified by the Nicaraguan government, the major international human rights treaties of relevance for the protection of indigenous lands have already been incorporated into Nicaraguan statutory law.

More importantly, national laws confer ample protection to indigenous lands. In 1987, the Sandinista government passed the *Autonomy Statute For the Regions of the Atlantic coast of Nicaragua*<sup>27</sup> and enacted a new Constitution (which was partly

---

<sup>24</sup> See Testimony of C. Webster Maclean Cornelio, the Secretary of the *Awás Tingni* Territorial Committee, '[t]he territory of the Mayagna is vital for their cultural, religious, and family development, and for their very subsistence, as they carry out hunting activities (they hunt wild boar) and they fish (moving along the Wawa River), and they also cultivate the land'. *Awás Tingni v. Nicaragua*, *supra* note 2, p. 22.

<sup>25</sup> Interview with Edda Moreno, Anthropologist, Researcher at IEPA-URACCAN, conducted 26 July 2001 in Puerto Cabezas (RAAN), Nicaragua.

<sup>26</sup> Other important human rights treaties, such as the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on Biological Diversity* were (specially) transformed by the National Assembly (*Asamblea Nacional*), acting in its competence under Article 138.12 of the Constitution.

<sup>27</sup> See *Estatuto de Autonomía*, *supra* note 17.



## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

reformed in 1995 and 2000).<sup>28</sup> The aforementioned legal instruments protect the interests of the (indigenous) communities of the Atlantic coast by establishing a regimen *sui generis* for communal lands, as well as by guaranteeing a far-reaching devolution of powers to the autonomous regions.

### 3.2. Property Concept

In Article 5 of the Nicaraguan Constitution, the Nicaraguan state explicitly recognizes the rights of all its indigenous peoples to maintain communal forms of property on their lands, as well as the rights to use and exploit these lands. In a similar wording, Article 89 of the Constitution refers to the communities of the Atlantic coast specifically,<sup>29</sup> recognizing their forms of communal property ('el Estado reconoce las formas comunales de propiedad de [sus] tierras') and the right to *usus* and *ususfructus* (use and enjoyment) of their waters and forests ('goce, uso y disfrute de las aguas y bosques de sus tierras comunales'). These communal property rights of the indigenous communities are further specified in Article 36 of the Autonomy Statute, which defines communal property as 'constituted by the land, waters and forests, which traditionally have belonged to the communities of the Atlantic coast'.

The clear legal recognition of the collective rights of ownership<sup>30</sup> of the indigenous communities, on lands traditionally occupied by them, is essential. As the wording of the above-mentioned articles indicates (for instance, in Article 89 above, communal land rights are 'recognized', which presupposes an already existing right), the rights of the communities with respect to their lands arise with the factual situation of their historical settling pattern in a specific area – a formal recognition or titling by the state is thus not necessary for the existence of the property right.

---

<sup>28</sup> See *Constitución Política de Nicaragua*, *supra* note 16. Before this recognition of rights in 1987, violent discrepancies between the Sandinists and the Miskitos had led, among other things, to the forced displacement of half of the population of the region of Rio Coco by the Sandinist government. This is dealt with by the IACHR in the remarkable *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.10 rev.3 (1983), which emphasizes clearly that the Miskitos have the right to a distinct culture, and that the Nicaraguan state is obliged to adopt measures to protect aspects in connection to this cultural identity, *i.e.* communal and ancestral lands. For a more detailed analysis see F. MacCay, *IWGIA Handbook: A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System* (IWGIA, Copenhagen, 2002), pp. 63–68.

<sup>29</sup> In fact, in line with the model of multi-ethnic autonomy established for the autonomous regions, it is not only the property of the indigenous communities which is recognized in the Nicaraguan Constitution and Autonomy Statute, but also more generally the property of all communities settling of the Atlantic coast (therefore, also Creoles, Mestices and Garifuna are included). However, this paper discusses the indigenous communities only.

<sup>30</sup> Article 89 of the Constitution explicitly uses the word 'property'.

As per Nicaraguan laws, the Nicaraguan state has therefore only to identify and to protect the lands of the communities; it is not up to the government to determine the extent and the dimensions of the communal land rights, which have to be defined according to indigenous customs and traditions (by the communities themselves).<sup>31</sup> The indigenous lands are thereby protected in the way they are used and needed by the communities and according to the indigenous conception of territory which may differ from the western one (for instance, the indigenous system of shifting subsistence agriculture, which is essential for the survival and the basic subsistence of the communities, uses a greater expansion of land than a western style cultivation of lands). Furthermore, the emergence of the communal property rights with the mere fact of traditional occupancy implies that, legally, the government cannot consider traditional communal lands or territories which are part of the settling area of a community to be 'national lands' as it did in the Awwas Tingni case.

However, it is crucial to understand the identification of the legal features necessary for adequate protection of indigenous lands under Nicaraguan laws. In addition, it is also vital to examine the state's positive obligations to implement and enforce these rights as granted and explicitly defined by the Nicaraguan legal system.

### 3.3. *Positive State Obligations to Implement and Enforce*

*A priori*, the positive state obligation to implement the indigenous land and resource rights by all necessary means is inherent in every granted right.<sup>32</sup> This state duty is made even more explicit in Article 180 of the Constitution, where the Nicaraguan state guarantees that the communities of the Atlantic coast can use their natural resources and peacefully (or 'effectively') enjoy their communal property.<sup>33</sup> This assurance can be interpreted as a positive obligation on the part of the Nicaraguan state. The state must undertake all necessary measures to realize and to protect the property rights of the communities, as well as to guarantee the peaceful use of their

---

<sup>31</sup> Authorities recognized by the state, *i.e.* the expert opinion of an anthropologist and a geographer, could then officially certify and acknowledge the customary indigenous settling patterns of the respective indigenous peoples in order to facilitate and to ensure state recognition of the boundaries drawn. See J. Anaya & R. Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System' 14 *Harvard Human Rights Journal* (2001) 46.

<sup>32</sup> In its *Ecuador Report*, for instance, the Inter-American Commission underlines the fact that the formal existence of laws is not enough to guarantee the rights protected therein. Inter-American Commission, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev.1 (1997), 89. Equally, Article 2 of the *ACHR* states the obligation of state governments to give effect to the rights recognized in the *ACHR* by all necessary (legislative and other) means.

<sup>33</sup> Article 180 of the *Constitution* states: 'El Estado garantiza a estas comunidades el disfrute de sus recursos naturales, la efectividad de sus formas de propiedad comunal.' (The state guarantees to these communities the enjoyment of their natural resources and the efficacy of their forms of communal property.)

## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

resources, including: demarcation, protection of the communal lands and resources against interference by third parties, and the non interference with communal property and resource exploitation by the state government itself.

The concession, which was granted to SOLCARSA on the lands of Awas Tingni, constitutes, therefore, a violation of Article 180 of the Constitution. By granting the concession, the Nicaraguan state not only ignored its guarantee of 'effectiveness' of communal property, but also equally disregarded the constitutionally fixed right of the communities to use and benefit from their natural resources.

Thus, it can be seen that the existence of the law should have been able to render a situation whereby the Awas Tingni community could lay claim to these rights before domestic courts. This also raises issues about the enforceability and effectiveness of the Nicaraguan court system and its ability to deliver constitutionally guaranteed rights.

In fact, the Nicaraguan legal system provides for the enforcement of constitutionally guaranteed rights, as are the land rights of the indigenous communities of the Atlantic coast, by a special mechanism: the Recurso de Amparo, or the amparo remedy.<sup>34</sup> The amparo remedy can be brought in to claim any violation of rights, which are constitutionally guaranteed and which are violated by action or omission of a state agent acting with discretionary power.<sup>35</sup> The amparo remedy has to be claimed before a Court of Appeal (Tribunal de Apelaciones) or directly before the Nicaraguan Supreme Court (Corte Suprema de Justicia)<sup>36</sup> within 30 days after knowledge of the violation of the respective right,<sup>37</sup> with the condition that all possible remedies established by Nicaraguan laws have to be exhausted. If the denounced act violates a constitutionally guaranteed right, it will be declared null and void.<sup>38</sup>

Any person can bring a claim under Article 23 of the Ley de Amparo. Consequently, as indigenous communities are recognized as moral persons under the Nicaraguan Constitution,<sup>39</sup> they can claim violations of their collective land rights as constitutionally guaranteed rights via their representatives. As to the legal concept of the amparo remedy, the Awas Tingni community should therefore be able to go before the Nicaraguan Supreme Court and claim that there were encroachments on their lands, which constitute violations of their land rights by an omission (missing demarcation) as well as by an action (granting of the concession to SOLCARSA) of

---

<sup>34</sup> The relevant provisions can be found in Articles 45 and 187–190 of the *Constitution*; they are regulated by the *Ley de Amparo* (Ley N° 49 (1988)). For more details, see J. Ramoz Mendoza, 'Control constitucional', in A. Casco Guido (ed.) *Comentarios a la Constitución Política de Nicaragua* (Hispaner, Managua, 1999), pp. 249–265.

<sup>35</sup> See *Constitution*, Arts. 45, 188; *Ley de Amparo*, Art. 3.

<sup>36</sup> *Ley de Amparo*, Art. 25.

<sup>37</sup> *Ley de Amparo*, Art. 26.

<sup>38</sup> *Ley de Amparo*, Arts. 31–36.

<sup>39</sup> See, e.g., *Nicaraguan Constitution*, Art. 89.

the Nicaraguan government. In theory, the amparo remedy could alleviate the problems of the Awas Tingni community; however, in practice, the Recurso de Amparo was dismissed by the Nicaraguan Supreme Court.

### 3.4. *Indigenous Participation*

In addition to an *a priori* adequate legal concept of protection of indigenous lands and the establishment of the amparo remedy as a possibility to enforce the granted rights, a possibility of indigenous participation in decisions concerning their lands is fixed in Nicaraguan laws. This participation is essential, because it should enable the indigenous communities to decide, or at least take part in decisions, about the future of their lands and should therefore guarantee the communities' involvement when concessions, as the one to SOLCARSA, are granted by the central government in Nicaragua.<sup>40</sup>

As stipulated in Nicaraguan laws, it is mainly the Regional Councils, acting in their capacity as parliaments, that function as representative organs of the autonomous regions and who have the duty to represent the interests of the communities against the central government in Managua. This model of representation of communal interests appears to be promising at first glance: the region can serve as a grouping of communal claims and thereby defend indigenous interests more effectively than if every community were to speak independently.<sup>41</sup>

In this capacity, the Regional Councils are given fairly far-reaching powers to influence the decisions of the central government in Managua. For instance, a fixed number of seats are reserved for representatives of the autonomous regions (three for the RAAN, two for the RAAS) in the National Assembly.<sup>42</sup> In addition, the Regional Councils can participate in plans of national development of the region<sup>43</sup> and 'promote the rational use and enjoyment of the communal waters, forests, and lands and the defence of their ecological system'.<sup>44</sup> There also exists a possibility to

---

<sup>40</sup> As stated in the *Final UN-Working Paper*, prepared by E. Daes, 1983. An important dimension in affirming indigenous land rights is the exercise of a measure of control over lands, territories and resources by indigenous peoples through their own institutions. Though rights to lands, territories and resources may be affirmed, the exercise of internal self-determination, in the form of control over and decision-making concerning development, use of natural resources, management and conservation measures is often absent. For example, indigenous people may be free to carry out their traditional economic activities such as hunting, fishing, gathering or cultivating, but may be unable to control development that may diminish or destroy these activities." [Emphasis added]. E. Daes, *supra* note 23, p. 26.

<sup>41</sup> Consuelo Sanchez criticizes the model of communal autonomy in Mexico in this respect. In her opinion, the indigenous communities (which are lacking a common representation) are too weak to adequately defend their interests against the central Mexican government. Interview with Consuelo Sanchez, Anthropologist, Researcher at ENAH, conducted 6 March 2001 in México D.F..

<sup>42</sup> See *Constitution*, Art. 132 in combination with *Ley Electoral No. 211*, Art. 147 (1996).

<sup>43</sup> *Autonomy Statute*, Art. 8(1).

<sup>44</sup> *Autonomy Statute*, Art. 8(4).

THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

prepare draft laws in matters of municipal demarcation<sup>45</sup> and with respect to the use and conservation of natural resources of the region,<sup>46</sup> offering an additional avenue to the Regional Councils for introducing their ideas about regional development at the national level. Most importantly, the Regional Councils have to approve any concession for the exploitation of natural resources that is granted in the territory of the Atlantic coast according to Article 181 of the Constitution.<sup>47</sup> This *de facto* veto power of the Regional Councils is of special relevance for this investigation, since the Regional Council of the RAAN theoretically could have vetoed the concession granted to SOLCARSA by the Nicaraguan government.

It is important to note that the Constitution makes no allowance for direct opportunities for indigenous participation in self-control over their lands or direct participation in decisions concerning these lands. An implicit right of self-control can, however, be deduced from the ownership of the indigenous communities over their natural surface resources<sup>48</sup> and from their right to exploit these resources.<sup>49</sup> The aforementioned arguments suggest that, according to Nicaraguan laws, the government would have no legal right to grant concessions to exploit the timber of *Awas Tingnis* without the express consent of the community.<sup>50</sup>

Thus it would seem that Nicaraguan laws are well conceived to defend the lands of the indigenous communities of the Atlantic coast adequately, especially with respect to culture and against interference from the outside. In line with these arguments, the Inter-American Court acknowledges the Nicaraguan legal concept of protection of land rights in its *Awas Tingni* decision. '[T]he Court believes that the existence of norms recognizing and protecting indigenous communal property in

---

<sup>45</sup> *Id.*, Art. 23(7).

<sup>46</sup> *Id.*, Art. 23(10).

<sup>47</sup> Note, however, that the Nicaraguan government does *not* have the power to grant concessions for surface resources on the communal lands of the indigenous communities. These are in the property of the communities. The veto power of the Regional Councils was decisive in the *Awas Tingni* case because of the unclear property situation of the Atlantic coast.

<sup>48</sup> According to Arts. 622 and 623 of the *Nicaraguan Civil Code*, the renewable resources are in the property of the respective owner of the land. If one applies the principle of non-discrimination (explicitly stated in the general non-discrimination provision Art. 27 of the *Constitution*, as well as in Art. 89 of the *Constitution* with special reference to the communities of the Atlantic coast), communal property has to have the same status as privately owned land – that is why their surface resources have to belong to the communities.

<sup>49</sup> *Constitution*, Arts. 89, 180.

<sup>50</sup> See in this sense M.L. Acosta, *El Derecho de los Pueblos Indígenas de las Regiones Autónomas de la Costa Atlántica de Nicaragua al Aprovechamiento Sostenible de Sus Bosques: El Caso de la Comunidad Mayagna de Awas Tingi*, Tesis per la Maestría en Medio Ambiente y Recursos Naturales, (UNAN, UBA, Managua, 2000), p. 4. Practically, as one will see in section 4, the communal lands of *Awas Tingnis* are not demarcated and the government argues that they are national lands despite the fact that the lands in question are part of the traditional settling area of the community.

Nicaragua is evident.<sup>51</sup> The Court goes on to apply the concept of maximal protection fixed in Article 29(b) of the American Convention and refers explicitly to the 'framework of communal property, which is also recognized by the Constitution of Nicaragua'<sup>52</sup> to justify its extensive interpretation of the right to property as contained in the Convention. A correct application of Nicaraguan laws would, therefore, have led to adequate protection, implementation and enforcement of the land rights of the communities by the Nicaraguan state, in compliance with legally and constitutionally fixed obligations; no concession would have been granted to SOLCARSA and the *Awas Tingni* decision of the Inter-American Court would not have been necessary.

Certainly, this course of events raises vital questions with regard to the realization of rights, an issue the following section will address.

#### **4. OBSTACLES AND DIFFICULTIES PREVENTING THE EFFECTIVE REALISATION OF INDIGENOUS LAND RIGHTS**

A variety of practical, operational and political reasons appear to weaken the strong legal provisions of the Nicaraguan Constitution. One can detect these problems at distinct levels, such as the effective implementation of legal provisions, their adequate enforcement and appropriate indigenous participation in decisions taken, all of which are arguably necessary for a successful realization of indigenous rights.

##### *4.1. Lacking Implementation*

Despite the legally binding obligation of the Nicaraguan state to guarantee the effectiveness of communal land rights, Nicaragua has failed to comply with its obligations in the implementation of indigenous rights. First of all, laws regulating the constitutional provisions as well as the Autonomy Statute have not been passed, so no specific laws have been set up to establish the administrative procedures to identify and demarcate indigenous lands.<sup>53</sup> The initiatives of legal regulation, until now, have not been successful.

A draft law to regulate the regime of communal property, proposed by President Aléman in 1998 (after the World Bank had conditioned its loan to the Nicaraguan government for the *Corredor Biológico Atlántico* with the effective demarcation of

---

<sup>51</sup> See *Awas Tingni v. Nicaragua*, *supra* note 2, paragraph 122.

<sup>52</sup> *Ibid.*, paragraph 148. According to Art. 29b of the *ACHR*, no provision of the *Convention* may be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any state party'.

<sup>53</sup> As to the Nicaraguan government, the lands of the communities should be titled following the procedure established in Law No. 14, *Amendment of the Agrarian Reform Law* (1986), by INRA, the Nicaraguan Agrarian Reform Institute. However, as one will see below, this procedure of demarcation, which is normally used to title agrarian lands, fails to take into consideration the specific characteristics of indigenous communities.

THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

indigenous lands),<sup>54</sup> was rejected by indigenous communities due to the legal inadequacy of, and inconsistencies within, the respective law proposal.<sup>55</sup> Recently, a comprehensive and well-conceived draft law on the regulation of communal property was developed by the two Regional Councils in extensive collaboration with the communities.<sup>56</sup> While it was presented to the National Assembly in September 2000, it is yet to be adopted.<sup>57</sup> This failure to put in place adequate initiatives is summarized by the Inter-American Court in the *Awás Tingni* decision with the Court concluding that ‘there is no effective procedure in Nicaragua for delimitation, demarcation and titling of indigenous communal lands’.<sup>58</sup>

Further to this failure to adopt the Draft Law on Communal Property, the ambiguous legal climate makes an effective demarcation process difficult and leaves room for the use of political influence and argumentation concerning what is an *a priori* legal and factual decision regarding which lands are to be titled. Apparent contradictions between property provisions of the Nicaraguan agrarian laws and the Autonomy Statute are detrimental to the realization of the property rights of indigenous communities. According to Article 2 of the Ley de Reforma Agraria of 1981, for instance, lands that are not worked effectively (*propiedades ociosas*) are to be redistributed under agrarian reform. This provision gives state agents the possible argument that indigenous lands cultivated in shifting subsistence agriculture are to be subject to reallocation.<sup>59</sup> As stated in the General Diagnostic Study on Land Tenure in the Indigenous Communities of the Atlantic Coast, ‘there is an incompatibility between the specific Agrarian Reform laws on the question of indigenous lands and the country’s legal system. That problem brings with it legal and conceptual confusion, and contributes to the political ineffectiveness of the institutions entrusted with resolving this issue’.<sup>60</sup>

---

<sup>54</sup> *Anteproyecto de Ley Especial que Regula el Régimen de Propiedad Comunal de las Etnias de la Costa Atlántica y BOSAWAS.*

<sup>55</sup> See M.L. Acosta, *supra* note 46, p. 52.

<sup>56</sup> *Draft Law for a System of Communal Ownership on the Part of the Indigenous Peoples and Ethnic Communities of the Atlantic Coast of the Rivers Bocay, Coco and Indio Maiz (Draft Law on Communal Property).*

<sup>57</sup> As of November 2002.

<sup>58</sup> *Awás Tingni v. Nicaragua*, *supra* note 2, paragraph 127.

<sup>59</sup> Note, nevertheless, that legally there is no doubt; the indigenous peoples are the real owners of their lands. The land rights granted by the *Autonomy Statute* to the indigenous communities have been passed after the agrarian laws and establish a special regime for the indigenous communities of the Atlantic coast. The juridical rules *lex posterior derogat lex prior* and *lex specialis derogat lex generalis* give full validity and priority to indigenous land rights. The problem appears because the derogated provisions of the agrarian law have never been formally detailed or invalidated.

<sup>60</sup> *General Diagnostic Study on Land Tenure in the Indigenous Communities of the Atlantic Coast. General Framework*, prepared by the Central American and Caribbean Research Council (1998), paragraph 64.

The majority of lands traditionally occupied by the communities of the Atlantic coast have yet to be identified. As much as 85 percent of land still lacks demarcation with no title deeds having been issued to the communities since 1990.<sup>61</sup> Private settlers and the Nicaraguan government itself benefit from this unclear property situation. In the case of Awas Tingni, the government had considered the non-demarcated lands of the Awas Tingni community as ownerless (*baldía*) and, therefore, as national territory.<sup>62</sup>

One can see from the above that, despite the state's positive duty to implement the legal provisions as clearly stated in the Constitution as well as in international treaties, these legal provisions do not become reality: regulatory laws have not been passed and the political will to implement them is lacking.<sup>63</sup> Accordingly, in its considerations to the Awas Tingni case, the Inter-American Court, in finding a violation of Article 21 of the American Convention in combination with Articles 1(1) and 2 of the ACHR, concluded that the members of the indigenous communities have the right of demarcation of their own lands and territories. The Court also found that until demarcation is carried out, no further interference with indigenous lands<sup>64</sup> must take place:

Based on this understanding, the Court considers that the members of the Awas Tingni community have the right that the state a) carry out the delimitation, demarcation, and titling of the territory belonging to the community; and b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the state itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the community live and carry out their activities.<sup>65</sup>

---

<sup>61</sup> *Ibid.*, paragraph 103.

<sup>62</sup> The government applied Art. 614 of the *Nicaraguan Civil Code* as an argument in favour of the state, according to which all lands belonging to nobody would be in the property of the state. As to the arguments brought forward by the Nicaraguan state before the Inter-American Court: 'i) the logging concession granted to the SOLCARSA corporation was restricted to areas which were considered to be national lands'. *Awas Tingni v. Nicaragua*, *supra* note 2, paragraph 141.

<sup>63</sup> As mentioned by the *General Diagnostic Study on Land Tenure*, 'in Nicaragua the problem is the lack of laws to allow concrete application of the Constitutional Principles, or when laws do exist (case of the *Autonomy Law*) there has not been sufficient political will for them to be regulated'. *General Diagnostic Study on Land Tenure*, *supra* note 55, paragraph 65.

<sup>64</sup> Defined as the indigenous settling area, *Awas Tingni v. Nicaragua*, *supra* note 2, paragraphs 153b, 173.4.

<sup>65</sup> *Awas Tingni v. Nicaragua*, *supra* note 2, paragraphs 153, 173.4. The wording of Paragraph 153 is interesting and shows how far the obligation of the Nicaraguan state reaches to implement the granted rights. The Court explicitly states the demarcation of the indigenous lands as a right of the members of the community (and not only as a state obligation).



## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

The judgment of the Inter-American Court thus aimed to guarantee the peaceful enjoyment of communal possessions for the Awas Tingni. However, the question still remains as to why these rights needed to be accessed using international measures when a specific domestic procedure, the amparo remedy, existed for the enforcement of constitutionally guaranteed rights.

### 4.2. *Lacking Enforcement*

In Nicaragua, even if the possibility of enforcing communal land rights exists in theory, the amparo remedy in practice is quasi inaccessible for the indigenous communities of the Atlantic coast. Expensive judicial procedures pose insurmountable obstacles to indigenous peoples. In addition, linguistic constraints cause other problems, as most indigenous persons do not speak the language of the Court and good translators are rare.<sup>66</sup> Furthermore, Nicaraguan courts competent to deal with amparo remedies are geographically situated far away from the communities: a Court of Appeal exists now in Puerto Cabezas, but the Nicaraguan Supreme Court is placed in Managua and poor road conditions make it difficult for the communities to access the courts.

However, even if the communities are able to reach the courts and submit a claim, their complaints are often not adequately dealt with by Nicaraguan judges.<sup>67</sup> The community of Awas Tingni, for example, tried to ask for precautionary measures before the Nicaraguan Supreme Court, when the Nicaraguan government was at the point of granting concessions to SOLCARSA on their communal lands. However, this amparo was dismissed by the Supreme Court at the admissibility stage. The reasons given by the Court for its dismissal (18 months later in February 1997) were that the community had not proceeded within 30 days after notice of the violation (which had not even occurred at the time).<sup>68</sup> A subsequent amparo remedy brought in by the Awas Tingni community was, after 11 months, also dismissed at the admissibility stage by the Supreme Court in October 1998.<sup>69</sup>

When dealing with the amparo remedy sought by the Awas Tingni community, it therefore took the Nicaraguan Supreme Court 11 and 18 months (instead of the 45 days of deliberation required by Article 47 of the Ley de Amparo) to make a

---

<sup>66</sup> CALPI (*Centro de Asistencia Legal a Pueblos Indígenas*), for instance, denounces these problems in its reports. CALPI, *Propuestas de CALPI a IWGLA* (2000), p. 1.

<sup>67</sup> The necessity to strengthen the understanding of the Nicaraguan judges of the indigenous culture is stressed by local NGOs. Interview with Lottie Cunningham, Attorney, Head of an NGO in Puerto Cabezas, conducted 25 July 2001 in Puerto Cabezas (RAAN).

<sup>68</sup> Supreme Court of Justice of Nicaragua, *Judgment No. 11* of 27 February 1997 on the amparo remedy brought in by the Awas Tingni community against M. Caldera Cardenal, Minister of MARENA and others. The reasons given by the Supreme Court for its dismissal are quite questionable, as strongly argued by M.L. Acosta, *supra* note 46, p. 46.

<sup>69</sup> Supreme Court of Justice of Nicaragua, *Judgment No. 163* of 14 October 1998 on the amparo remedy brought in by the Awas Tingni community against R. Stadhagen, Minister of MARENA and others. For a detailed survey, see M.L. Acosta, *supra* note 46, pp. 39–46.

decision on admissibility. Referring to this undue procedural lapse, the Inter-American Court found that the Nicaraguan Supreme Court had not decided within a ‘reasonable time’<sup>70</sup> and ‘according to the criteria of th[e] Court, amparo remedies will be illusory and ineffective if there is unjustified delay in reaching a decision on them’.<sup>71</sup> In short, the Nicaraguan Supreme Court had failed to enforce the land rights of the community, and the Inter-American Court found a violation by the state of Article 25 of the American Convention (the right to judicial protection) in combination with Articles 1(1) and 2 of the Convention.<sup>72</sup>

As seen in *Awas Tingni* case, even if a theoretically adequate remedy, such as the amparo remedy, is established by the Nicaraguan Constitution, practical obstacles prevent the indigenous communities from enforcing their constitutionally guaranteed rights. Even access for the communities via the Regional Councils or as owners of their lands and natural surface resources failed to prevent the violation of their communal land rights *ex ante*. This result seems to be in violation of the right of participation and self-control over indigenous lands even before the granting of concessions. Thus, it appears that the obstacles are not merely in the implementation of Nicaraguan law and its enforcement, but also in the participation or lack thereof, by the indigenous communities in the decision-making process.

#### 4.3. *Unrealised Participation and Self-control*

Despite their ample capacity to influence decisions concerning the regions at the state level, the Regional Councils fail to stand for the communities living in these regions. The *Awas Tingni* case presents a clear illustration of this lack of representation.<sup>73</sup> As discussed above, the Regional Council of the RAAN could have vetoed the concession granted to SOLCARSA, as its approval was constitutive and a necessary precondition for the activities of the company in the territory of the RAAN. However, the Junta Directiva, the executive organ of the Regional Council, approved the concession without query. When this approval was considered insufficient in light of the requirements of Article 181 of the Constitution and the concession was declared null and void by the Nicaraguan Supreme Court,<sup>74</sup> the

<sup>70</sup> *Awas Tingni v. Nicaragua*, *supra* note 2, paragraph 137.

<sup>71</sup> *Ibid.*, paragraph 134. The reasons given by the Inter-American Court for the violation found were therefore delayed procedures. However, and here the decision of the Inter-American Court appears unsatisfactory, the Court did not enter into the consideration whether the dismissal as an unjustified denial of access to the judicial system alone constituted a violation of Art. 25 of the ACHR.

<sup>72</sup> *Ibid.*, paragraphs 139, 173.1.

<sup>73</sup> For a detailed survey of the facts discussed below, see M.L. Acosta, *Derecho de los Pueblos Indígenas*, *supra* note 46, pp. 39–46.

<sup>74</sup> Simultaneously with the indigenous communities, also two members of the Regional Council had brought in an *amparo* remedy, alleging that the requirements of Art. 181 of the *Constitution* had not been fulfilled, because the Regional Council in full had never approved the concession in question. Accordingly, in its judgment, the Supreme Court nullified the concession granted to SOLCARSA. Supreme Court of Justice of Nicaragua, *Judgement No 12*

## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

Regional Council subsequently sanitized the concession in question. In a meeting financed by SOLCARSA in October 1997, the Regional Council approved the previously nullified concession within the correct procedure. In doing so, it tacitly admitted the timber logging activities of SOLCARSA in the lands of Awás Tingni and openly ignored the express wish of the community, preferring instead to follow the suggestions of the economically strong Pacific region and the central government.<sup>75</sup>

The indigenous communities generally have too little weight to influence decisions at the state level where powerful actors such as multinational companies are involved. Even if the communities could legally control the exploitation of their surface resources as legitimate owners of their lands, the Nicaraguan government still reserves the right to declare the land and surface resources to be national property where concessions can continue to be granted.

### 5. CONCLUSION

The Nicaraguan legal system for protection of land rights is constructed relatively well in theory and should, as to its legal conception, protect the lands of the communities of the Atlantic coast adequately against encroachments as occurred in Awás Tingni. The communities have constitutionally recognized property rights on their traditional settling area. A formal act of titling by the state is not necessary for the existence of these (collective) property rights. The duty to implement and enforce these granted rights exists as a binding state obligation. In addition, the communities are given the possibility to participate in decisions concerning their lands, either via the Regional Councils as their representative organs, or as legitimate owners of their natural surface resources.

In practice though, the far-reaching rights are neither implemented nor enforced by the Nicaraguan authorities. Regulatory laws have not been adopted by the National Assembly to establish procedures to identify and demarcate indigenous lands and constitutionally guaranteed rights of the communities cannot be claimed effectively before Nicaraguan courts. Even worse, the Nicaraguan government actively violates the rights of the communities by granting concessions of resource exploitation on their lands.

In short, the situation in Nicaragua coherently demonstrates that the mere existence of rights in theory does not tell us anything about their effective implementation in practice. Thus, while justice is reflected in Nicaraguan laws it is

---

of 27 February 1997 on the *amparo* remedy brought in by A. Smith Warman and H. Thompson Sang, members of the Regional Council of the RAAN, against C. Gutiérrez, Minister of MARENA and A. Láinez, Director of the National Forestry Administration of MARENA.

<sup>75</sup> Recently, however, this tendency seems to have changed. The *Draft Law on Communal Property*, for instance, mentioned above, was elaborated by the Regional Councils in extensive collaboration with the communities and reflects adequately indigenous interests.

CHRISTINA BINDER

denied in reality where land rights of the indigenous communities are concerned. While legal justiciable standards are established, strong counter lobbying forces and factual difficulties impede their realization. At the national level at least, the situation of the indigenous community of Awas Tingni has not improved through the guarantees of the Nicaraguan Constitution and the Autonomy Statute. Their communal lands have not been demarcated and, as a result they are encroached upon by SOLCARSA while attempts by the community to enforce their rights before domestic courts fail.

Nevertheless, viable ways exist to realize the rights of the communities. Instead of ignoring their land and resource claims, the Nicaraguan government could directly involve the communities in the resource exploitation process. A positive example of such indigenous participation would be the trilateral agreement, which was concluded in May 1994, between the Awas Tingni community, the Nicaraguan government (the Ministry of MARENA, the section in the government competent to grant concessions for wood exploitation), and the company of MADENSA.<sup>76</sup> This contract concerned the harvesting of timber on lands claimed by the community.<sup>77</sup> Commentators praise the agreement as a 'new model of forestry development on land owned or claimed by indigenous peoples in developing countries'.<sup>78</sup> The trilateral agreement can thereby be considered as a sustainable counter-model to the resource exploitation effectuated by SOLCARSA on the lands of the Awas Tingni.<sup>79</sup> In addition, the Draft Law on Communal Property presented by the Regional Councils to the National Assembly in September 2000 proposes a promising model of how to realize the rights of the communities, though this, too, is pending before the legislature.<sup>80</sup>

---

<sup>76</sup> See K. de Feyter, *World Development Law: Sharing Responsibility for Development* (Intersentia, Antwerpen, Groningen, Oxford, 2001), p. 161; M.L. Acosta, *supra* note 46, pp. 66–74.

<sup>77</sup> The parties had come to that agreement in spite of the missing demarcation and the legal insecurity with regard to the ownership of the lands on the Atlantic coast. Subsequently, however, the renewal of the 5 year contract was boycotted by the Nicaraguan government.

<sup>78</sup> J. Anaya and T. Crider, 'Indigenous Peoples, the Environment and Commercial Forestry in Developing Countries: the Case of Awas Tingni, Nicaragua' 18 *Human Rights Quarterly* (1996) 367.

<sup>79</sup> As to the expert opinion of G. Castilleja, Special Projects Director for the WWF, who is comparing the logging agreements granted to SOLCARSA and MADENSA: 'The state has had two policies in granting the concession to MADENSA, first, and subsequently to SOLCARSA. One was a recognition of the acquired rights of the communities, and that they should be taken into account in those forest management contracts; the other was that as long as there is no title deed, there is no basis for thinking that the communities have acquired rights, and, therefore, concessions on public lands can be granted to third parties'. *Awas Tingni v. Nicaragua*, *supra* note 2, p. 30.

<sup>80</sup> For instance, the draft law establishes the exact procedures of an obligatory consultation and direct participation of the communities if development projects affect their lands (Art 38), as well as in case of subsurface resource exploitation Arts. 17, 18.

## THE CASE OF THE ATLANTIC COAST OF NICARAGUA: THE *AWAS TINGNI* CASE

As one can see from above, the non-realization of indigenous land rights are less due to factual impossibilities than to the lack of political will. It is in this sense that the *Awas Tingni* decision of the Inter-American Court is especially important. If the realization of justice for indigenous communities does not work at a national level because opposing forces are too strong, international supervision and monitoring ought to present checks and balances to remedy the situation.<sup>81</sup> In the aftermath of the *Awas Tingni* decision, a mixed Commission comprised of governmental representatives and community members was installed to implement the judgment and to demarcate the communal lands of the Atlantic coast.<sup>82</sup>

The indigenous communities who have, in the last 15 years, been too politically weak to effectively claim their constitutionally guaranteed rights at a national level, are thereby supported by an international body, in this case the Inter-American Court. Since Nicaragua has ratified the American Convention, it is therefore bound by its international obligations and can be held accountable if it does not implement the rights guaranteed in the Convention. The Inter-American Court has thus clearly elevated the rights of the communities above political factors. In short, *Awas Tingni* is a landmark decision for the evolution of international standards, as well as for their implementation at the national level.

---

<sup>81</sup> Regarding monitoring: for example, in order to supervise the effective implementation of its judgment, the Inter-American Court stated the obligation of the Nicaraguan state to report in a six month term on the measures undertaken to comply with the *Awas Tingni* decision. *Awas Tingni v. Nicaragua*, *supra* note 2, paragraph 173.8.

<sup>82</sup> Email correspondence with Cesar Paiz Coleman, Director of IEPA-URACCAN, 4 October 2002.



## INDIA

### THE BLUR OF A DISTINCTION: *ADIVASIS* EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

*Jérémine Gilbert\**

#### 1. INTRODUCTION

The indigenous peoples of India, the *Adivasis*, represent the largest indigenous population within the borders of any single state in the world. According to the United Nations estimates there are over 300 million indigenous peoples in the world and 70 million of them live in India.<sup>1</sup> The indigenous population of India, which lives in different parts of the country, represents more than eight per cent of the total Indian population.<sup>2</sup> From the northern mountains down to the central and southern plains of India they represent an astonishingly complex and rich account of the world's cultural diversity. Some states, like the central and north eastern states, have a large indigenous population – in some instances, even a majority such as in Mizoram where indigenous peoples comprise 95 per cent of the population. However, in others, such as Uttar Pradesh, they represent just 0.2 per cent of the total state population. Composed of thirty states and more than one billion people speaking several different languages, India represents a vast and ambitious project of bringing together peoples of different ethnic and religious backgrounds in a 'united and multicultural' democracy. In this 'big puzzle of ethnic and communal division',<sup>3</sup> the political and legal situations faced by different indigenous populations of the country are fairly similar. The position of the government of India has always been contradictory with regard to its large indigenous population. On the one hand there is a real policy of protection and promotion of indigenous rights, as the Constitution of India explicitly recognises the rights of the tribes and puts in place a system of positive discrimination in their favour. On the other hand, however, government policy is often at the fulcrum of indigenous oppression and appropriation of indigenous lands and generally the 'legal and constitutional frame is defeated by a

---

\* Jérémine Gilbert is a PhD candidate at the Irish Centre for Human Rights, NUI Galway. The author wishes to acknowledge the financial support received from the Irish Research Council for the Humanities and Social Sciences.

<sup>1</sup> *UN Chronicle* (UN Publications, June 1993) p. 40.

<sup>2</sup> 1991 Census; figures for 2001 are available at <[www.censusindia.net](http://www.censusindia.net)>, last consulted 9 July 2003.

<sup>3</sup> A. Lijphart, 'The Puzzle of Indian Democracy: A Consociational Interpretation' 90 *American Political Science Review* (1996) p. 258.

## JÉRÉMINE GILBERT

co-opted leadership, weak political will, poor execution coupled with ignorance, poverty and lack of organisation as an interest group'.<sup>4</sup>

As in many other countries, the bedrock of the indigenous struggle is the issue of land ownership. All over the country, the *Adivasis* are pushing the political and legal agenda for the recognition of their right to self-determination, the recognition of customary land tenure systems, and the restoration of traditional lands. From the north eastern states to the southern states of India, indigenous peoples' land ownership is at the forefront of the struggle. The situation of the *Adivasis* relating to the right to own their lands varies considerably within the country, with the struggle touching every aspect on the spectrum of land rights issues. In the North-east, the struggle focuses on the range of options presented by access to 'self-determination', whereas in some other parts of the country the struggle is for access to natural resources, right of livelihood through legal ownership, or simply the right to live on their lands. However, both federal and state governments tend to react with the same level of intensity, leading to extensive human rights violations. This tendency is especially true in some parts of the North-eastern regions (Assam, Manipur, Nagaland) where arbitrary arrest, torture, and rape are widespread, and where a state of emergency prevails allowing for the arrests of suspicious persons for up to one year without charges or legal proceedings.<sup>5</sup> Thus, even though the situations faced by the *Adivasis* vary considerably within the country, they face similar pressures as elsewhere *vis-à-vis* ownership of their own territories. In past years, the *Adivasis* have become more and more organised and united in their struggle for the recognition of their land rights. This activity makes India a good illustration of the indigenous struggle worldwide: in particular, for a study of the political organisation of indigenous movements in their fight for the recognition of land rights. The activities employed in this battle range from armed struggle and large-scale movements of civil disobedience, to political lobbying and individual hunger strikes.

The purpose of the present chapter is twofold. First, it seeks to emphasise that even though Indian legislation provides the *Adivasis* population with specific entitlements over their territories, those rights are not properly enforced and are often violated. Second it proposes to explore the issue of the recognition of indigenous land rights and its fundamental linkage with the recognition of indigenous customary land tenure systems and autonomy *vis-à-vis* internal legislation. In this regard, the case of the *Adivasis* of India reveals that the distinction often made in international law between autonomy and collective land rights is empirically blurred by the practical experience that the *Adivasis* have lived through in the very recent past. Ultimately, the present chapter seeks to argue that the failure of the central government to ensure indigenous peoples' ownership of their lands has ratcheted up the struggle of the *Adivasis* to a phase where claims for

---

<sup>4</sup> Commonwealth Human Rights Initiative, *Human Rights and Poverty Eradication – A Talisman for the Commonwealth*, (CHRI's Millennium Report, New Delhi, 2001).

<sup>5</sup> See Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 2000–2001), pp. 407–411.



## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

autonomy and self-determination are becoming the main focus of indigenous survival across the country.

### 2. RACISM AND DEFINITION: ARE THE ADIVASIS INDIGENOUS?

At the World Conference Against Racism, a member of the Indian National Human Rights Commission highlighted that ‘there can be no doubt that in India – as everywhere else in the world – history and society have been scarred by discrimination and inequality’.<sup>6</sup>

The indigenous peoples of India have been subjected to a system of segregation from very early in the history of the country tracing back to about 3500 BC when the Aryans arrived in India and introduced the *Varna* system. *Varna* means ‘colour’ and the *Adivasis* were called *Atisudra*, meaning ‘lower than the Sudras’, the untouchables. The Aryans introduced a system that still prevails today – the caste system – that has a great impact on indigenous peoples, as they are considered so low that they are included only at the very bottom of the social system.<sup>7</sup> There has been strong social pressure from the Hindu religious system on all indigenous social structures. The fact that the *Adivasis* are considered even lower in the social hierarchy than the so-called ‘untouchables’ helps explain the general racism they suffer. This racism is firmly rooted within Indian society and is often reflected within Indian legislation.<sup>8</sup> Such legislative racism started a long time ago, as when the British colonized India one of the first laws undertaken by the British administration regarding tribal issues was the *Criminal Tribes Act 1871*. This Act ‘notified’ some of the tribes as criminals from birth, affirming that entire tribal communities were born criminals due to their nomadic lifestyle.<sup>9</sup> With independence, the new government amended this Act and have since ‘denotified’ the nomadic tribes. However after several substantive amendments, the Act was renamed *Habitual Offenders Act* and still concerns more than 2 per cent of the Indian population that is classified as ‘denotified and nomadic tribes’.<sup>10</sup>

The *Adivasis* claim that they are the original settlers of the country, a claim that is not fully accepted by the government. The word *Adivasi* comes from the Sanskrit and is a conjunction of two words: *Adi* meaning ‘original’ and *Vasi* meaning

---

<sup>6</sup> Statement at the Plenary of WCAR, National Human Rights Commission, Dr. Justice K. Ramaswamy, <[www.un.org/WCAR/statements/india\\_hrE.htm](http://www.un.org/WCAR/statements/india_hrE.htm)>, last consulted 9 July 2003.

<sup>7</sup> S. Chakma, ‘Setting the Records Straight’ in S. Chakma and M. Jensen (eds.), *Racism Against Indigenous Peoples* (IWGIA Document No. 15, Copenhagen, 2001) p. 11.

<sup>8</sup> S. Chakma, ‘Behind the Bamboo Curtain: Racism in Asia’ in S. Chakma and M. Jensen (eds.), *Racism Against Indigenous Peoples* (IWGIA Document No. 15, Copenhagen, 2001) p. 176.

<sup>9</sup> See M. Radhakrishna, *Dishonoured by History: ‘Criminal Tribes’ and British Colonial Policy*, (Orient Longman Limited, New Delhi, 2001).

<sup>10</sup> On this issue, see Chakma, ‘Behind the Bamboo Curtain: Racism in Asia’, *supra* note 8, p. 176.

‘inhabitant’.<sup>11</sup> The use of this term is preferred to the term ‘tribes’ or ‘tribal’, because those terms echo the colonial past of the country and the use of the term *Adivasi* is also the symbol of the new political organisation of the indigenous movement in India.<sup>12</sup> Officially, the Constitution uses the term ‘Scheduled Tribes’; such nuances remain important, since, according to the government of India, there are no *Adivasis* – only ‘Scheduled Tribes’ – in the country. The usual argument made by the government is that India was previously Hindustan: the country of the Hindus who are the indigenous population of the country.<sup>13</sup> It is therefore a very sensitive issue and, accordingly, the Indian Constitution gives power to the President to designate ‘Scheduled Tribes’. This power is achieved by Presidential decree seeking to define which indigenous community should be recognised for this purpose, and when such recognition is made, the official term ‘Scheduled Tribes’ attaches itself to the population, bringing it under the special protection of the Constitution. The Constitution itself thus defines ‘Scheduled Tribes’ in Article 366(25): ‘Scheduled Tribes’ means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this constitution.’

Article 342(1) empowers the President of India to specify the tribal communities of India. By this procedure, an important number of *Adivasi* communities have not been recognised as ‘Scheduled Tribes’ and are still claiming recognition in order to gain access to the legal protection to which they are entitled. In 1952, the Commissioner for Scheduled Castes and Scheduled Tribes issued a list of criteria for identifying a tribe and included it in the Schedule:

- a. Autochthony;
- b. Groupism or a very strong community fellowship, if not descent from common ancestor or loyalty to a common headman or chief;
- c. A principal, if not an exclusive habitant;
- d. A distinctive way of life, primitive or backward by modern standards and apart and aside from the main current of culture;
- e. Economic, political and social backwardness.<sup>14</sup>

---

<sup>11</sup> On this issue see C. Bates, ‘Lost Innocents and the Loss of Innocence: Interpreting *Adivasi* Movements in South Asia’ in R.H. Barnes, A. Gray, and B. Kingsbury (eds.), *Indigenous Peoples of Asia* (Association for Asian Studies, Inc., No. 48) p. 103.

<sup>12</sup> However, in this chapter, the term ‘Tribal’ or ‘Tribes’ is used when referring to official figures, documents, or legislation.

<sup>13</sup> This issue is one of the central issues of the tension between Hindus and Muslims. For an illustration in the state of Maharashtra, see C. Talwalker, ‘Shivaji’s Army and Other “Natives” in Bombay’ 16 *Comparative Studies of South Asia, Africa and the Middle East* (1996) 114.

<sup>14</sup> Report of the Commissioner for Scheduled Castes and Scheduled Tribes (Manager of Publications, Government of India, New Delhi, 1952).

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

These criteria compare reasonably well to the different international definitions of indigenous peoples used by the UN, the ILO, and the World Bank. For each of these three institutions, though their views vary, the notions of descent, territory, distinctive way of life, non-dominance, and economic, social and political disadvantages are central features to the definition of indigeness.<sup>15</sup> India, however, rejects the recognition of *Adivasis* as indigenous peoples at international level. Instead, the government argues that the notion of indigenous peoples does not apply to the tribal groups of the country because the whole population of the country is indigenous. This argument posits that after centuries of migration it would be impossible to differentiate between the first inhabitants and the several generations resulting from the Indian 'melting pot'. Thus, on several occasions, Indian representatives to the UN Working Group on Indigenous Populations have highlighted that 'Scheduled Tribes' of India are not indigenous peoples.<sup>16</sup> At the UN level, however, *Adivasi* representatives are usually recognised as indigenous representatives by the ECOSOC<sup>17</sup> and participate in the debates of the Working Group.<sup>18</sup> In its periodic report to the Committee on the Elimination of Racial Discrimination (CERD), the Indian government stated that Article 1 of the Convention was not applicable in India.<sup>19</sup> However, based on the notion of descent mentioned in article 1 of the Convention, the CERD affirmed that 'the situation of the scheduled castes and scheduled tribes falls within the scope of the Convention'.<sup>20</sup> In a similar vein, the World Bank, in its developmental programmes, classified Scheduled Tribes as indigenous peoples. It is also worth noting that India was one of the first countries to ratify the ILO Convention 107, which concerns indigenous populations.<sup>21</sup> As argued by Das, it should be affirmed that the 'Scheduled Tribes' of India, the *Adivasis*, are certainly indigenous peoples, and that 'by refusing to acknowledge that there are indigenous peoples in India, all that the government

---

<sup>15</sup> See J. M. Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations', U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, paras. 379–380; ILO Convention 169, 27 June 1989, 28 ILM 1382, Article 1 (1); World Bank Operational Directive 4.20 (reprinted in IWGIA, Newsletter, Nov/Dec 1991).

<sup>16</sup> For examples, see U.N. Doc. E/CN.4/Sub.2/1992/33, p. 13; U.N. Doc. E/CN.4/Sub.2/1993/29, p. 22.

<sup>17</sup> For example, the Indian Council of Indigenous and Tribal Peoples is affiliated with the World Council of Indigenous Peoples that has the consultative status with the ECOSOC.

<sup>18</sup> However, see M.A. Martínez, 'Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations', Final Report, U.N. Doc. E/CN.4/Sub.2/1999/20, paragraphs 90–91.

<sup>19</sup> See U.N. Doc. CERD/C/304/Add.13 and CERD/C/299/Add.3.

<sup>20</sup> U.N. Doc. CERD/C/304/Add.13, paragraph 14.

<sup>21</sup> See R.D. Munda, 'India's Protection and Promotion of Tribal Rights: Obligations under ILO Convention on Indigenous and Tribal Peoples 1957 (No.107)' (Paper Submitted at Indigenous Rights in the Commonwealth Project, South & South East Asia Regional Expert Meeting, New-Delhi, 2002) <[www.cpsu.org.uk/projects/DELHI\\_P2.htm](http://www.cpsu.org.uk/projects/DELHI_P2.htm)>, March 2002.

seeks to achieve is to ensure that there are no problems for it to discuss in the UN Sub-Committee'.<sup>22</sup>

Based on the position of the Indian government and its policy regarding the Scheduled Tribes, it can be affirmed that the rejection of the recognition of the *Adivasis* as indigenous peoples is a simple case of political hypocrisy that is hiding racism. Evidence of such hypocrisy is highlighted through the policy of positive discrimination, and the set of rights that the Indian legislation put in place with regard to its tribal population. With varying degrees of success, such legislation addresses all the specific entitlements of indigenous peoples in international law *i.e.*, specific legislation regarding occupation of their ancestral lands, legislation in favour of the protection of the indigenous cultures and languages, and some autonomy rights. Under the heading of 'Scheduled Tribes', the Indian Constitution specifically organises some ratio regulations to encourage positive discrimination and affirmative action in favour of tribal members. According to their proportion of the total population, 8 per cent of the jobs in the public service are reserved for *Adivasis*. The Constitution also includes some clauses for the protection and promotion of indigenous languages and cultures. However, an evaluation of the situation today quickly reveals that such special provisions have failed to bring positive gains for the *Adivasis*; for instance, the *Adivasis* still represent only 2 per cent of personnel in public services. Constitutional provisions relating to education have also failed, as tribal children have had to study in a language foreign to them. As a result, most Scheduled Tribes lag behind the majority of the population of India with regard to development indicators (85 per cent of the *Adivasis* live below the poverty line and even though 90 per cent of them depend on agriculture for their livelihood, it is estimated that about ten million of the indigenous peoples live in urban slums).<sup>23</sup> Thus, even though there are some potentially positive provisions in the Constitution, these provisions seem only notional, as the political will to implement them has been lacking since the beginning. As in many other countries with a large indigenous population, one of the central angles of the Constitution concerns the land rights issue.

### **3. ONE STEP FORWARD, TWO STEPS BACK: INDIAN POLICY REGARDING ADIVASIS LAND RIGHTS**

#### *3.1. Constitutional Entitlements: An Overview*

In India, like in Australia, North America and many other places, the concept of land ownership started with the arrival of European colonisers. When the British arrived, they started a huge enterprise of forestry across the country and introduced the idea

---

<sup>22</sup> J.K. Das, *Human Rights and Indigenous Peoples* (A.P.M. Publishing Corporation, New Delhi, 2001) p. 35

<sup>23</sup> On this issue, see Minority Rights Group, 'Development, Equity & Justice: *Adivasi* Communities in India in the Era of Liberalization and Globalization' (MRG Workshop Report Title, 6–9 April, 1998).

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

of property of forestlands resulting in the loss of land ownership for a large number of *Adivasis*. Prior to the arrival of the British, there was no record of land ownership in India and some of the first pieces of land legislation adopted under British rule remained in use until the 1980s. Independent India has often re-used the schemes put in place by the British administration in its tribal policy. In 1874, the British introduced the notion of ‘Scheduled Areas’ to provide tribals with special protection; by the same token, the Indian Constitution also provides special provisions for ‘Scheduled Areas’. However, one of the objectives of Indian policy since independence has been the protection of its tribal population against land alienation by non-tribals. There are two annexes to the Constitution that deal with indigenous peoples’ land rights, the Fifth and Sixth Schedule of the Constitution. The Fifth Schedule gives special protection to the ‘Scheduled Tribes’ that are included within the territory of the ‘Scheduled Areas’, meaning the eight states that the Constitution officially proclaimed as ‘scheduled’.<sup>24</sup> Thus, several states, especially in the south of the country, are not included in the Scheduled Areas even though large *Adivasi* communities inhabit those states. The prime objective of this part of the Constitution is to create special provisions for the development of tribal lands and to prevent their alienation. Within the Scheduled Areas, in order to protect the Scheduled Tribes, the Governor of each of the eight federal states, who represents the executive, has the power to restrict the application of any legislation of the state parliaments that might apply to Scheduled Areas. The Governor is also in charge of making regulations to:

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such areas;
- (b) regulate the allotment of land to members of the Scheduled Tribes in such areas;
- (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.<sup>25</sup>

Nevertheless, before making such regulations, the Governor is required to consult the Tribes Advisory Council. The Tribes Advisory Councils are bodies established in each state having Scheduled Areas, and consist of twenty members, fifteen of whom are representatives of the Scheduled Tribes in the state legislative assembly. However, even though the Governor has to consult the Tribes Advisory Councils it must do so only as an advisory body on ‘matters pertaining to the welfare and the advancement of the Scheduled Tribes’. Before making any regulation, the Governor has to submit it to the President for assent. Thus, even though land is a subject that

---

<sup>24</sup> These states are: Andhra Pradesh, Bihar, Gujarat, Haryana, Madhya Pradesh, Maharashtra, Orissa, and Rajasthan.

<sup>25</sup> Constitution of India, Art. 244(1), Part B, 5.

comes under the power of each state, the central government has an advisory and coordinating role in every land program in the country.

The other scheme of the Constitution, the Sixth Schedule, a much more complex part, provides for some autonomy to specific tribes of the Northeast. This part of the Constitution is applicable only in the states of Assam, Meghalaya, Tripura, and Mizoram, and reflects the legacy of the history of resistance of the Northeastern tribes towards colonisers.<sup>26</sup> When independence was proclaimed, the geopolitical situation in the Northeast implied that the Constitution recognised special autonomy rights for those regions.<sup>27</sup> In this sense, the Fifth Schedule is the generally applicable rule, while the Sixth Schedule is seen as special law. The Sixth Schedule creates some elected bodies, most notably the *Autonomous District Councils*, which are given some administrative and legislative powers, even though the Governor always ultimately controls such powers.<sup>28</sup> Relating to *Adivasi* land rights, the Sixth Schedule gives power to these prescribed autonomous bodies to legislate on the allotment, occupation, use, or setting apart of land, as well as the management of the forest, the inheritance of property, and on the regulation of money-lending.<sup>29</sup>

Thus, from the two major schemes in the Constitution, the Fifth Schedule tends to be protective and 'paternalistic' as the government is in charge of any development in tribal lands, whereas the Sixth Schedule is more in favour of self-management.<sup>30</sup> While these two parts of the Constitution are the pillars of legislation regarding tribal land rights, several other statutes also deal with *Adivasi* land rights. As stated earlier, the federal government has an advisory and coordinating role in national land policy but the states are the prime actors in implementing land reforms.<sup>31</sup> Thus, in concordance with the Constitution, both the central and state governments have enacted laws based on two main principles: the prohibition of tribal land alienation (*e.g.* transfer of individual tribal land to non-tribal individuals) and the restoration of alienated lands. However, while this has been official state policy, the reality is that governments at both levels are often responsible for seizing *Adivasi* lands through means such as manipulation of laws, the national forest policy, large scale development programmes, the non-implementation of the land

<sup>26</sup> See Chakravorty, Birendra C., *British Relations with the Hill Tribes of Assam since 1858* (Firma K. L. Mukhopadhyay, Calcutta, 1981).

<sup>27</sup> On the drafting of the Constitution, see R. Joshi, M. Pinto, L. D'Silva, *The Indian Constitution and its Working* (Orient Longman, Bombay, 1986) and B. Shiva Rao, *The Framing of the India's Constitution: Select Documents* (N.M. Tripathi, Bombay, 1967).

<sup>28</sup> See Supreme Court of India, *Edwingson v. The State of Assam*, AIR (1966) SC 1220; and *State of Assam v. K.B. Kurkalang*, AIR (1972) SC 223.

<sup>29</sup> On the limitation of the power of the District Council, see Supreme Court of India, *District Council of U.K. & J.H. v. Sitimon*, AIR (1972) SC 787.

<sup>30</sup> The self-management orientation of the Sixth Schedule will be analysed in the latter section relating to self-rules and autonomy.

<sup>31</sup> For an overview of states' policy see S.N. Mishra (ed.), *Ownership and Control of Resources Among Indian Tribes* (Inter-India Publications, Tribal Studies of India Series T 184, Vol.3, 1998).

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

restoration policy, and/or simply by not protecting tribal lands against transnational corporations. Three major aspects of the policy that have been undertaken by the government of India with regard to tribal lands seem crucial to appreciate the failure of the Indian policy:

1. The proposition to amend the protection of land alienation of tribal lands to non-tribals;
2. The failure and non-implementation of the restoration policy of the stolen lands;
3. The usurpation of tribal lands under land acquisition laws coupled with the lack of a proper rehabilitation policy for persons forcibly displaced.

### *3.2. The Real Face of the Central Government: Attempting to Subvert the Constitutional Provisions*

During the 1990s, the Andhra Pradesh government leased forestlands of indigenous peoples to a company to exploit calcite. The High Court dismissed the case filed by an NGO called *Samatha* on behalf of the *Adivasi* challenging this lease. On appeal however, the Supreme Court upheld the case and annulled the lease in what became the landmark judgment known as the *Samatha* case.<sup>32</sup> In many respects, the *Samatha* case can be regarded as the 'Indian Mabo', as its consequences regarding indigenous peoples' land rights in India are very similar to the impact of the Mabo decision in Australia. The central issue in the case concerned the meaning of the legal prohibition of 'transfer of immovable property to any person other than a tribal' as enacted in the Andhra Pradesh *Scheduled Area Transfer Regulation*. The question for the judges was to define whether the word 'person' would include the state government. The Supreme Court stated that the word 'person' would include natural persons as well as judicial persons and constitutional governments. In this regard, this judgment had far-reaching consequences across the country as the Supreme Court clarified the content of the Fifth Schedule of the Constitution by stating that government lands, tribal lands, and forestlands that are included in the Scheduled Areas cannot be leased out to non-tribals or to private companies for mining or industrial operations. Consequently, all mining leases granted by the state governments in Fifth Scheduled Areas were suddenly illegal and the government was asked to stop all illegal mining and other industrial activities within the Scheduled Areas. This ruling of the Supreme Court had a strong impact all over the country, as 90 per cent of India's coalmines and 80 per cent of the forests and other natural resources are on *Adivasi* lands.<sup>33</sup> Subsequently, the Andhra Pradesh

---

<sup>32</sup> Supreme Court of India, *Samatha v. State of Andhra Pradesh* (1997) 8 SCC 191.

<sup>33</sup> On the other implications of the judgment, see PUCL Bulletin 2001, 'Attempts to Subvert "Samatha" Judgment' (January 2001).

government, as well as the central government, filed appeals to the Supreme Court, both of which were dismissed.<sup>34</sup> The legal battle continues, however. In 2000, the Ministry of Mines, in a document classified 'secret', proposed to the Committee of Secretaries of the government of India that it should modify the Constitution to subvert the Supreme Court judgment and allow private investors to own tribal lands. In this note, the Attorney General suggested that the amendment of the Fifth Schedule of the Constitution would be the solution 'to counter the adverse effect of the *Samatha* judgement'.<sup>35</sup> The proposed amendment's purpose is to remove the prohibitions and restrictions on the transfer of land by *Adivasis* to non-*Adivasis* for undertaking operations such as mining and any other non-agricultural operations.

### 3.3. Land Alienation and Lack of Rehabilitation Policy

Since independence, more than 50 million people have been displaced by large-scale development projects, including industries, mines, irrigation projects, national parks, and wildlife sanctuaries, based on the right of land acquisition for 'public purpose'. Forty per cent of the total displaced population belongs to groups classified in the Scheduled Tribes. Notably, only a quarter of the total displaced population has been rehabilitated so far.<sup>36</sup> Like everywhere else, this displacement mostly occurs in the name of economic interests and 'development'. India has witnessed many famous cases of tribal land alienation for the construction of dams, mining interests, and forestry. The Narmada Valley Project, for example, is a plan for building 30 major, 136 medium, and 3,000 minor dams. The scale of the total population affected by the overall project is colossal with especially disastrous consequences for the *Adivasis* in terms of displacement and loss of land. More than 90 per cent of the people affected by the Sardar Sarovar Project, one of the project's dams, are members of the *Bhil* and *Tadavi* tribes.<sup>37</sup> One of the major objections of the concerned *Adivasis* has been the total lack of rehabilitation policy for those forcibly displaced. This case is not isolated, and despite the large number of displaced persons, India still does not have a proper national rehabilitation policy.<sup>38</sup> To respond to this lack of a national rehabilitation policy, the central government put in circulation a scheme in 1994, entitled *National Policy for Rehabilitation of Persons*

---

<sup>34</sup> For an overview of the legal proceedings, see South Asia Human Rights Documentation Centre, *Racial Discrimination: The Record of India* (SAHRDC, New Delhi, 2001), pp. 26–30.

<sup>35</sup> Government of India, Ministry of Mines, 'Note for the Committee of Secretaries regarding amendment of the Fifth Schedule to the Constitution of India in the light of the *Samatha* Judgment' (No.16/48/97-M.VI, 10 July 2000).

<sup>36</sup> A. Ekka, 'Adivasi Rights: Empowerment and Deprivation' in Vigil India Movement *Human Rights 2001* (Vigil India Movement 2001) p. 76.

<sup>37</sup> S. Kavaljit, 'The Narmada Issue: An Overview' *Cultural Survival* Issue 13.2; see also The Constitution (Scheduled Castes and Scheduled Tribes) Orders (Amendment) Bill (2002).

<sup>38</sup> Three states, namely, Madhya Pradesh, Karnataka, and Maharashtra, have their own national laws. The National Thermal Power Corporation and Coal India promulgated their policies in the 1990s; on this issue, see W. Fernandes and V. Paranjpye (eds.), *Rehabilitation Policy and Law in India: A Right to Livelihood* (Indian Social Institute, New Delhi, 1997).



## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

*Displaced as a Consequence of Acquisition of Land.* A year later, concerned NGOs published a critique to this governmental proposition in the form of a draft bill. This bill was entitled *Land Acquisition Rehabilitation and Resettlement Act* since one of the pillars of the proposal was to link land acquisition and rehabilitation, two areas currently separated in Indian legislation.<sup>39</sup> Finally, a governmental commission was established to draft the future bill. The proposed bill, designated the *Land Acquisition Bill*, is an initiative that amends the *Land Acquisition Act of 1894*, which, for more than a century, has allowed compulsory acquisition of lands for 'public purpose'. The proposed amendment is aimed at facilitating the process of acquisition; for example, the government would be allowed to acquire lands for the benefit of private companies 'not only for work which would be in the nature of public purpose but also for engaging in productive activities that are likely to prove useful to the public'.<sup>40</sup> The proposed amendment does not address the definition of 'public purpose' even though there was a grave need for such definition. As highlighted by Ramanathan, one of the striking features of the notion of 'public purpose' is the fact that courts 'have generally sustained the view that a state's perception of what constitutes "public purpose" cannot be judicially reviewed' and thus this notion has acquired immunity from challenge in the courts.<sup>41</sup> The amendment of the *Land Acquisition Act* was expected to redress such loopholes in the land acquisition system but instead the proposed amendment excludes rehabilitation measures.<sup>42</sup> In response, the *National Human Rights Commission* (NHRC) has stated 'that provisions relating to the resettlement and rehabilitation of persons displaced by land acquisition for developmental projects should form a part of the *Land Acquisition Act* itself (or an appropriate separate legislation) so that they are justiciable'.<sup>43</sup>

The NHRC also highlighted the government's obligation under ILO Convention 107 (ILO 107) article 12(2) of which addresses the issues of rehabilitation and resettlement. Article 12(2) reads: 'When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.'<sup>44</sup> Even though article 12(2) of ILO

---

<sup>39</sup> *Ibid.*

<sup>40</sup> Ekka, *supra* note 36, p. 80.

<sup>41</sup> U. Ramanathan, 'Issues of Equity in Rural Madhya Pradesh' in K.J. Praveen (ed.), *Land Reforms in India* (Vol. 7, New Delhi, Sage, 2002) p. 204.

<sup>42</sup> On this issue, see Government of India, 'National Policy Packages and Guidelines for Resettlement and Rehabilitation 1998' (Ministry of Rural Areas and Employment, New Delhi, 1998).

<sup>43</sup> National Human Rights Commission, 'Resettlement and Rehabilitation of Persons Displaced by Land Acquisition should form a part of Land Acquisition Act' (Newsletter, New Delhi, March 2001).

<sup>44</sup> *Convention (No.107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries* (ILO 1957, 328 UNTS 247, entered into force June 2, 1959).

107 was not specifically mentioned by the NHRC, it took the view that it was desirable to incorporate the rehabilitation and resettlement package in the *Land Acquisition Act* itself, otherwise India would be in violation of its international obligations as enacted by ILO 107.

### 3.4. *The Setback of the Land Restoration Policy*

As in other countries of the world, the government has recognised past abuses and started to organise a land restoration process across the country. So far, however, the implementation of such a policy has been unsuccessful.

An example of the lack of implementation is visible in Kerala. In 1975, the Kerala government adopted the *Kerala Scheduled Tribes Act (1975 Act)* which was supposed to restore some of the one million acres of land that are believed to have been stolen by settlers from *Adivasis* over the last century. However, 27 years after the *1975 Act* was passed and despite orders from the High Court, this law has not been implemented. In 1999, the government of Kerala adopted a new law that sought to overturn the *1975 Act*. Even though the High Court of Kerala stated that such a law could not legally overrule the *1975 Act*, the government challenged this decision in the Supreme Court and the pending decision will have serious consequences for the whole country.<sup>45</sup>

Aside from this legal battle, in the months of July–August 2001 several *Adivasis* died of starvation in Kerala, provoking large and well-organized protests by the *Adivasis*.<sup>46</sup> Subsequent demonstrations were launched by the *Adivasis-Dalit Action Council* agitating for a political discussion within the state and resulting in dialogue between government and *Adivasi* representatives, the cornerstone of which was the land restoration process. In October 2001, an agreement was finally signed that entered into force in January 2002. The agreement guarantees the allotment of one to five acres of land to landless tribal families. This agreement is the result of the new governmental policy based on the idea of providing ‘alternative land’ instead of the ‘alienated land’ to affected groups, transforming its land restoration policy to a rehabilitation policy. However, only a few months after this agreement entered into force, it seems that the promised lands are lands and forestlands dedicated to timber, naturally protected areas, or lands not suitable for cultivation. Thus, the agreement signed by the government appears to be nothing more than empty rhetoric as, legally, the landless tribals would not be able to own the promised lands. In a recent decision, the High Court of Kerala has already intervened in favour of the forest department, as under the *1980 Forest Conservation Act* assigning such tracts of land

---

<sup>45</sup> See C.R. Bijoy, ‘Indigenous Peoples’ Rights in Kerala, India’ (Paper Submitted at Indigenous Rights in the Commonwealth Project, *supra* note 21), available at <[www.cpsu.org.uk/downloads/C\\_R\\_Bijo.pdf](http://www.cpsu.org.uk/downloads/C_R_Bijo.pdf)>, last consulted 9 July 2003. More detailed information about the Indigenous Rights in the Commonwealth Project is available at <[www.cpsu.org.uk](http://www.cpsu.org.uk)>.

<sup>46</sup> See K.S. Singh, *The Dark Clouds and the Silver Lining: Adivasi Struggle in Kerala* (Kerala Study Group, Delhi Forum, November 2001).

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

to tribal populations is illegal, reasoning that those forestlands fall under the jurisdiction of the forest department: and can only be assigned with prior permission of the central government.

The government has been accused of ‘double standards’ on the *Adivasi* rehabilitation issue. This criticism was based on the involvement of the state government in claiming those lands that had been assigned to the *Adivasis* as forestlands in Mathikettanmala. In this regard, the state government has been blamed for ‘conspiracy’ with the central forest department to deny land to the *Adivasis*.<sup>47</sup> This example shows the hypocrisy and the unwillingness of the state government to implement its own policy of land restoration, and reflects a general trend with other states that have a fairly similar approach to the issue.<sup>48</sup> The case of the *Adivasis* of Kerala points out another fundamental issue in the land rights struggle, which is the potential conflict between wildlife protection, forest preservation, and *Adivasis* rights of land ownership.

### 3.5. Impact of Wildlife Conservation on Adivasis Land Rights

In India, the protection of the environment is often used as a way of expelling indigenous peoples from their land in the name of ‘wildlife protection’, notably through the establishment of ‘protected areas’ within tribal areas.<sup>49</sup> The establishment of protected areas, such as national parks or sanctuaries, is frequently done with a lack of respect for tribal relations with land, forest, and water, and is often aimed at expelling tribal communities. During colonization, the British introduced the idea that forests should be owned by government and classified as ‘protected areas’. The *Adivasis*, as inhabitants of those forestlands, entered into conflict with the British government and finally with the Indian government that maintained the same laws.

The legislation that is in contradiction with *Adivasis* land rights is based on two statutory acts: the 1927 *Forest Act* and the 1972 *Wild Life Protection Act*. The International Work Group for Indigenous Affairs has highlighted the case of the *Van Gujjar* indigenous peoples of Uttar Pradesh which illustrates such confrontations as a result of these acts and supports the resistance organized by this semi-nomadic community against ‘faulty conservation policy’.<sup>50</sup> In this case, the Uttar Pradesh

---

<sup>47</sup> *The New Indian Express* (Kochi), 20 April 2002.

<sup>48</sup> For another example, see R. Ramagundam, *Defeated Innocence, Adivasi Assertion, Land Rights and the Ekta Parishad Movement* (Grassroots India Publishers, New Delhi, 2001).

<sup>49</sup> On this issue, see Survival International, *Tribal Peoples and Conservation, Parks and Peoples* (Survival International, London, 1999) and more generally M. Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation* (UNRISD Discussion Paper, Geneva, 1994).

<sup>50</sup> See Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 1996–1997), pp. 219–222 (1996–1997), pp. 279–280; (1998–1999), pp. 265–268.

government had planned to convert indigenous homelands into a national park. Under the *Wild Life Act of 1972*, no residence is allowed in national parks, thus forcing the indigenous populations to move. This case is just one example of a larger policy that has developed across the country. Recently, the central government decided to set-up paramilitary forces to 'protect' forest areas. Such paramilitary forces regularly threaten indigenous inhabitants – with several cases of human rights abuses already registered.<sup>51</sup> Another important issue in India has been the recent adoption of the *Biological Diversity Bill*. The implementation of this national legislation is Indian's attempt to fulfil obligations under the international *Convention on Biological Diversity*<sup>52</sup> to which India is a party, and which is in favour of the protection of indigenous knowledge by regulating access to natural resources to ensure the protection of local knowledge and thus indigenous intellectual property. However, the *Biological Diversity Bill* is another illustration of how the government is using the guise of environmental concerns to violate indigenous rights, as it will allow transnational corporations to research and use indigenous biodiversity resources and knowledge, rejecting indigenous peoples' rights over their own resources.<sup>53</sup>

In this debate it is essential to understand that both objectives, preservation of the environment and protection of indigenous rights, should be complementary to each other and not opposed. At the international level, indigenous peoples are often considered as being 'environmentally friendly'. The *Rio Declaration on Environment and Development* placed emphasis on the importance of respecting indigenous cultures and several environmental NGOs have pointed out that the preservation of the environment is interlinked with the protection of indigenous knowledge.<sup>54</sup> The declaration adopted at the *United Nations World Summit on Sustainable Development* states: '[W]e reaffirm the vital role of indigenous peoples in sustainable development'.<sup>55</sup> Despite such declarations, governments often use the protection of the environment as a pretext to violate indigenous land rights. The *Adivasis* situation shows how governments might use environmental arguments against indigenous rights.

It is also important to stress that international debate has evolved in recent times and international developmental agencies have adopted new guidelines emphasising the essential protection of indigenous rights as the basis for developmental or environmental projects. In this sense, quite often both the central as well as state governments are turning a blind eye to the reports submitted by *ad hoc* international

<sup>51</sup> See N. Kaur, 'Targeting Tribal People' *Frontline* (Vol. 19, Issue 21, 12 October 2002) and L. Bavadam, 'Fear in the Forests' *Frontline* (Vol. 18, Issue 13, 23 June 2001).

<sup>52</sup> Convention on Biological Diversity, UNEP, Na. 92-7807, 5 June 1992.

<sup>53</sup> On this issue, see Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 2000–2001) p. 304.

<sup>54</sup> Hitchcock, 'International Human Rights, the Environment, and Indigenous Peoples' 5(1) *Colorado Journal of International Environmental Law and Policy* (1994) p. 1-22.

<sup>55</sup> Johannesburg Declaration on Sustainable Development (Johannesburg, South Africa, 26 August – 4 September 2002), UN.Doc. A/CONF.199/L.6, paragraph 22bis.

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

bodies inviting these governments to respect the minimum standards generated by international law.<sup>56</sup> Locally, the Indian indigenous movement has shown its ability to propose alternative policies based on both protection of the environment and respect for their fundamental rights. The creation of the *Jharkhand Save the Forest Movement* is another illustration of this central complementarity between environmental and indigenous concerns.

### 4. ADIVASIS EXPERIENCE WITH SELF-RULE, AUTONOMY AND SELF-DETERMINATION

#### 4.1. *The Panchayati Raj System: Self-Rule?*

After independence, the government engaged itself in a broad 'Community Development Programme', one of the pillars of which was the development of a decentralized system of rural governance under the organizational structure of the *Panchayati Raj* (local government). The Panchayats have two main responsibilities: to plan economic development and to organise social justice. The experience started at the state level but was finally nationally and constitutionally regularized through the *73rd Constitutional Amendment Act of 1992*.<sup>57</sup> However, this Act was not applicable in states having Scheduled Areas, and the Panchayat system was not extended to tribal areas. Following the vast movement of protest organised by the *National Front for Tribal Self-Rule*, the Parliament appointed a committee of experts, the *Bhuria Committee*, to work on the issue. Based on recommendations of this special committee, the government finally adopted specific legislation on the issue. In 1996, the *Provisions of the Panchayats (Extension to the Scheduled Areas) Act (PESA)* was passed to extend the application of the Panchayat system to Scheduled Areas. Under the *PESA*, the *Gram Sabha* (village council) was given the power to manage natural resources, conserve and protect customs and traditions, manage community resources, manage minor water bodies, resolve disputes through customary methods, control money lending to Scheduled Tribes, and control and manage non-timber forest produce (minor forest produce). Thus, the *PESA* brought a new approach to indigenous peoples rights; whereas the Fifth Schedule of the Constitution is based on a paternalistic approach giving power to the President and his appointed state Governors to rule the rights of the tribals, the Panchayat system is a self-management approach based on the decision of the village community represented in the *Gram Sabha*. Relating to land control, the *Gram Sabha* has a central role to prevent alienation of land and to restore unlawfully alienated land of Scheduled Tribes. On the issue of land alienation, the *PESA* states that 'the Gram Sabha or the Panchayats at the appropriate level shall be *consulted* before making

---

<sup>56</sup> For example, see World Bank Inspection Panel Report on the Rajiv Gandhi National Park Ecodevelopment Project, more information available at <[www-wds.worldbank.org](http://www-wds.worldbank.org)>, last consulted 9 July 2003.

<sup>57</sup> Constitution (Seventy-third Amendment) Act 1992 (20/4/93).

the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas .

...<sup>58</sup>

Even though this new legislation was acclaimed as an 'historical' evolution for the rights of the Adivasis, it was criticised for the fact that the Gram Sabha will only have to be consulted by the government before any government decision to acquire land. In its recommendations to the government, the Bhuria Committee had emphasised the fact that 'land should be acquired with the consent of the *Gram Sabha*',<sup>59</sup> thus, it was hoped that the government would have needed the consent of the village council, rather than only having the duty to consult it. The second criticism concerns the implementation of the PESA. The PESA states that every concerned state government should organize the implementation of the Panchayat system in its respective state. States having a recognized, scheduled tribal population were required to make appropriate amendments to state laws to give power of self-governance and traditional community rights to their tribal population. However, a majority of states have not carried out the necessary amendments; several states did not amend their Acts according to the PESA, even after the stipulated time.

The PESA also stipulates that, in the implementation process, state governments have the power to increase the power given to local councils. However, during the implementation process, in some cases, state governments have infringed on the power of the local council. For example, the Jharkhand state government passed a Panchayat Raj Act in 2001 to implement the central legislation but in violation of 'every constitutional principle and in defiance of the central act of 1996'.<sup>60</sup> Even when states have implemented the Constitutional provision, local administration often tries to subvert the process of self-governance that it is officially pretending to facilitate. A striking example of such subversion took place in the state of Chhatisgarh, where the district administration of Bastar tried to allot tribal land under the *Land Acquisition Act* to the National Mineral Development Cooperation (NDMC) to establish a steel plant in the Scheduled Area of Nagarnar.<sup>61</sup> In this case, the concerned *Gram Sabhas* strongly resisted the proposal of land acquisition for the steel plant in the absence of clear plans for the future of the villagers. The local administration rejected this position, however, and fabricated records concluding with an 'agreement by majority' of the *Gram Sabha*. The concerned villagers petitioned the National Commission for Scheduled Castes and Scheduled Tribes, which came to the conclusion that the acquisition process violated the Constitutional

---

<sup>58</sup> Provision of the Panchayats (Extension to the Scheduled Areas) Act, 1996, Section 4(i) (Emphasis added).

<sup>59</sup> Report of MPs and Experts to Make Recommendations on the Salient Features of the Law Extending Provisional Constitution (73rd) Amendment Act, 1992 to Scheduled Areas, paragraph 21(v).

<sup>60</sup> B. Mundu, 'Challenges of Traditional Customary Rights of the Adivasis: The Jharkhand Experience' (Paper Submitted at Indigenous Rights in the Commonwealth Project, *supra* note 21), available at <[www.cpsu.org.uk/downloads/Bineet\\_M.pdf](http://www.cpsu.org.uk/downloads/Bineet_M.pdf)>, last consulted 9 July 2003.

<sup>61</sup> K. Ray, 'Bastar Tribal's Endless Wait For Justice', *Deccan Herald*, 13 July 2002.

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

mandate for the Scheduled Areas.<sup>62</sup> The National Commission pointed out that neither the letter nor the spirit of the law regarding consultation with the *Gram Sabhas* had been followed. However, the advice of the National Commission to restart the process by honouring the spirit of the constitution and legal provisions was ignored by the government, and, even though it is a constitutional body, the Commission has 'no teeth' to ensure compliance with its decisions. This contention remains unresolved and some 365 tribal people have been arrested for opposing the district administration on this issue while several others have been the victims of police violence.

Thus, the process so far has been disappointing; however, introduction of the PESA is still recent and more time is needed to evaluate its full impact in terms of indigenous self-governance. Even though officially the PESA provided one year for concerned states to enact the constitutional legislation, in most cases the relevant state legislation has been enacted quite recently. Thus, there is a need to examine the impact of the PESA with regard to its implementation by states and its actual impact on village governance. It is also relevant to bear in mind that Article 254 of the Constitution of India provides that if a state law is not consistent with central law, then the state law, to the extent of its repugnancy, is void. Therefore, there are still a number of ways for the *Adivasis* to push for proper enforcement of the Panchayati Raj system. It is important to underline that the PESA has opened up a very important door, as the spirit of this Act is based on co-habitation between customary laws and national laws.<sup>63</sup> Thus, it might take some time before a proper evaluation of the real impact of the PESA can be undertaken.

### 4.2. *Adivasi Experience of Autonomy: Disenchantment in Jharkhand and Chhattisgarh*

Several *Adivasi* communities have petitioned for autonomy within confines of Indian democracy since Indian independence in 1947 and sometimes even long before that. The recent establishment of new states in eastern and central India, in fact, came as a result of the autonomy demands from *Adivasis*.<sup>64</sup> Regarding such autonomy demands and corresponding rights, the different *Adivasi* communities in the Northeast of India have always sought autonomy *vis-à-vis* the central government. As pointed out earlier, some communities have been granted a certain

---

<sup>62</sup> On the mandate and power of the Commission, see P.D. Mathew, 'The National Commission for Scheduled Castes and Scheduled Tribes' (Indian Social Institute, Legal Education Series No. 59, Delhi 2002).

<sup>63</sup> See S.V. Sharan, 'Implementing the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, Perspectives and Issues', Keynote Paper-11, 'National Conference On Panchayats (Extension to the Scheduled Areas) Act, 1996: Its Implications and Challenges for Tribal Development and the Local Government System' (Institute of Social Science, New Delhi, March 1999).

<sup>64</sup> See S. Muralidharan, 'The Birth of Three States' *Frontline* (1 September 2000).

degree of autonomy rights under the *Sixth Schedule of the Constitution* and tribal affiliation has been recognised as a basis for statehood in some parts of the Northeast. But a closer scrutiny of these two cases of apparent success towards the enjoyment of autonomy rights asserts that no significant changes were brought to the concerned tribal communities despite the reference to autonomy rights.

One of the eminent hopes for the development of indigenous peoples' rights to autonomy was the creation of new states in 2000. The formation of Jharkhand and Chhattisgarh – newly created states in the eastern regions of India – followed a long struggle of the *Adivasis* of these regions for the creation of their own state.

The Jharkhand movement started about 200 years ago, and the region is famous for its anti-colonial rebellions.<sup>65</sup> One of the central claims of the movement was the legal recognition of the ancestral system of self-governance of the tribals of the region. To different extents across history, the *Adivasis* of Jharkhand have always lived under customary self-governing structures. Those traditional customary systems of governance have been put under pressure by different colonisers; however, until independence, these systems endured. *Jharkhand*, meaning 'forest land', is a dream come true for the tribals of the region as it is the result of a long struggle for land rights. *Jharkhand* has been established from the existing state of Bihar, which is one of the poorest states of India. However, by itself, Jharkhand is a region rich in terms of natural resources and industries.

The *Adivasi* struggle was motivated by the creation of a state in which the *Adivasis* would be a majority, placing them in a better bargaining position *vis-à-vis* the central government and allowing them to benefit economically from the wealth of their land.<sup>66</sup> The 18 districts of the new state cover only half of what the Jharkhand Movement leaders asked for. By excluding some indigenous areas from this new state, the government managed to form it in such a way that the indigenous peoples continue to be a minority within what was supposed to be their own state. The *Adivasi* population is recorded to be as low as 27 per cent of the total population of Jharkhand.

Similarly, the *Adivasi* population of Chhattisgarh fails to constitute the majority of the total population of the state. By the exclusion of large tribal areas in the bordering states of Orissa and West-Bengal, the government succeeded in maintaining the *Adivasis* as a minority within their newly created, supposedly autonomous states. As a result, after only two years of existence, the new state of Jharkhand has already witnessed a series of bloody and repressive acts against its *Adivasis* population. There were important demonstrations in this state during the summer of 2001, and several clashes with the police. In 2002, several *Adivasis* were killed by police forces during a peaceful anti-dam protest. Thus, overall, the establishment of the two new states did not bring the hope that it was supposed to carry, and *Adivasis* remain a minority subject to discrimination from the non-tribal

<sup>65</sup> On the history of the movement, see R. Bhengra, 'The Jharkhand Region' in R. Bhengra, C.R. Bijoy and S. Luithui (eds.), *The Adivasis of India* (Minority Rights Group, London, 1998) pp.15–20.

<sup>66</sup> Ekka, *supra* note 36.



## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

majority. In terms of land legislation, the *Adivasis* did not gain any improvement of their rights, nor can any serious evolution of autonomous rights be detected. Thus, after only two years of existence, these two states, which seemed to be a victory for the *Adivasis* of the concerned regions, appear to be more a story of disenchantment.

### 4.3. *The Struggle for Autonomy in the Northeast*

The Northeast of India is composed of seven states: Arunachal Pradesh, Assam, Manipur, Mizoram, Tripura, Nagaland, and Meghalaya. In those seven states indigenous peoples represent a large percentage of the total population and the region also contains a high concentration of different indigenous communities. By its geographical position, the Northeastern region regroups several different indigenous communities (Mongoloid, Tibeto, Birman racial ancestry) that have lived in the region in relative isolation. The region has historically been separated from mainland India; during British colonization the Northeastern regions had always been kept under separate legislation. For example, in 1873, the *Inner Line Regulation*<sup>67</sup> regulated entrance to the hill district and later the region was considered as an 'excluded and partially excluded area'.

Apart from the Nagas, who have always fought for self-determination, most of the other communities sought autonomy within India at the time of independence. Thus, in 1947, the indigenous communities asked for preservation of specific laws that protected their cultures. These demands were acknowledged under the provisional constitution of the *Sixth Schedule of the Constitution* that provides for a certain degree of autonomy. This part of the Constitution operates in parts of the Northeast (applicable to the tribal areas in Assam, Meghalaya, Tripura and Mizoram) and embodies the notion of self-management of resources and a substantial measure of autonomy, including the power to legislate through the *Autonomous District Council* (ADC). As pointed out by one author, this scheme of the constitution highlights two major aspects of governmental policy towards the Northeast: '(t)he successful political incorporation of dissenting minority groups by giving them significant level of political autonomy and a major say in determining public policy . . .'.<sup>68</sup>

Similar to the facade of autonomous rights, the ADCs set up by the Constitution are largely controlled by the centre. The ADCs also depend financially on the central government, though state governments have the power to dismiss them. Finally, any legislation undertaken by the autonomous council requires the consent of the state Governor. These severe restrictions have pushed the indigenous communities to ask for real autonomy. Apart from the *North-Eastern Areas Reorganization Act of 1971* that reconstituted the region into a number of distinct states but was 'only a change

---

<sup>67</sup> Still applicable in Nagaland, Mizoram and Arunachal Pradesh.

<sup>68</sup> B. Sanjib, 'Indigenous Peoples, Cultural Survival and Minority Policy in Northeast India', (Cultural Survival, Issue 13.2).

of name',<sup>69</sup> the reaction of the government has always been to treat this demand as a problem of 'law and order'. In this sense, the region has witnessed numerous special laws derogating from general legislation and human rights protection.

As early as 1958, the parliament enacted the *Armed Forces (Assam-Manipur) Special Powers Act*, an act extended to the totality of the region by the 1972 *Armed Forces (Special Powers) Act (AFSPA)*. Generally, these laws empower army members to shoot at any person 'suspected' of disrupting law and order, protecting military personnel from any eventual responsibility for their acts. From time to time, Special Ordinances are promulgated to allow the imprisonment of individuals for a period of six months to one year without trial. The injustices are exacerbated by the government's inability to respond to the pressure created by the massive arrival of migrants and refugees to the region. One of the crucial issues in the Northeast is centred on the problems generated by the policy of forcible relocation. Migration from outside India or within the national boundaries has drastically affected the position of the indigenous peoples of the region, who have found themselves as a minority *vis-à-vis* the new in-groups. There is no prevention and protection of indigenous rights from these large-scale settlements of migrant populations within tribal lands, often resulting in violent conflict. Despite specific legislation regarding tribal land rights, large areas of cultivable lands are transferred to migrants, which usually results in the economic exploitation of the *Adivasis*. This scenario aggravates the already difficult social and economic conditions of the *Adivasis*, and also highlights the unwillingness of the government to implement effective laws and to address the definitive lack of autonomy of the *Adivasi* communities of the region. Thus, the situation in the Northeast is not encouraging, and after several years of struggle to achieve some degree of autonomy the *Adivasis* continue to face state repression and land-grabbing by migrants, making the Northeast a place where violence is more common than peace.

#### 4.4. *From Nagaland to Nagalim: Nagas' Experience with Self-Determination*

The Nagas, who live at the junction of China, India and Myanmar (previously Burma), have remained unconquered and independent from time immemorial. Even though part of the Naga territory was administered under British rule during the British colonization of India, the Nagas retained their independence. When the British withdrew from the region, the Nagas saw their land (Nagalim or the Land of the Nagas) divided between India and Burma. The Nagas declared independence one day before India. Notwithstanding the promise made at the time of independence by Gandhi, and despite the *Hydari Agreement* of 1947<sup>70</sup> signed between Naga representatives and the government (that agreed that the Nagas would administer their affairs themselves for ten years and then decide on their own future), and

---

<sup>69</sup> R. Bhengra, C.R. Bijoy, and S. Luithui, *supra* note 65, p. 32.

<sup>70</sup> For a full text of the Sir Akbar Hydari Agreement, see R. Vashum, *Naga's Right to Self-Determination: Anthropological-Historical Perspective* (Mittal Publications, New Delhi, 2000).

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

regardless of the Naga plebiscite of 1951 by which 99.9 per cent of the Nagas expressed their desire for independence, the Nagas were not granted their independent national state and the promises made by the Indian government have never been honoured.<sup>71</sup> To respond to the demands of the Nagas and the establishment of the *Naga National Council*, the government resorted to violence and then to negotiation. The government of India sent the army and paramilitary forces into the region to suppress the Naga movement. This action started the first Indo-Naga conflict during which thousands of people were killed and hundreds of villages were burnt down.<sup>72</sup> The next solution was attempted through political negotiations, which gave birth to the Indian state of Nagaland in 1963. The Constitution recognises the specificity of Nagaland, and states that no act of parliament in respect of 'ownership and transfer of land and its resources, shall apply to the state of Nagaland unless the legislative assembly of Nagaland by a resolution so decides'.<sup>73</sup>

However, even though a peace process was agreed upon (1964–1972), the establishment of Nagaland did not put an end to the conflict, and the Nagas remain divided between different states of India. The disagreement persisted as the Nagas insisted on sovereignty, whereas the government offered an agreement within the Union of India. This resulted in the transfer of Nagaland state from the *Ministry of External Affairs* to the *Ministry of Home Affairs* and the classification of the *Naga National Council* as an unlawful organization. In 1975, the *Shillong Accord* was signed by a faction of the Nagas who later confessed that they signed under duress.<sup>74</sup> After several years of violence, another ceasefire was signed in 1997 and was extended until August 2003.<sup>75</sup> Even though the government has acknowledged and highlighted the 'uniqueness' of the Naga case, parallel to the cease-fire, the Indian government and Naga representatives still disagree on several contentious and central issues. Some of the issues concern the peace process itself, as based on past betrayal it might be difficult for the Nagas to trust the Indian government on its sincerity and commitment to dialogue.<sup>76</sup> During the ceasefire, military forces committed several atrocities against the Nagas and draconian laws, such as the *AFSPA* and the *Nagaland Security Regulations*, are still in place.<sup>77</sup> The so-called

---

<sup>71</sup> *Ibid.*

<sup>72</sup> S. Luithui, 'The North-East Region', in R. Bhengra, C.R. Bijoy, and S. Luithui, *supra* note 65, p. 31.

<sup>73</sup> Constitution of India, Arts. 371-A and 371-G(4).

<sup>74</sup> R. Vashum, 'Challenges and Prospects of Peace Process in Nagalim (Nagaland)' (Paper Submitted at Indigenous Rights in the Commonwealth Project, *supra* note 21), available at <[www.cpsu.org.uk/downloads/Dr\\_R\\_Vas.pdf](http://www.cpsu.org.uk/downloads/Dr_R_Vas.pdf)>, last consulted 9 July 2003.

<sup>75</sup> Unrepresented Nations Organisation, 'Naga Peace Talks' (UNPO News, The Hague, May-July 2002).

<sup>76</sup> Vashum, *supra* note 74.

<sup>77</sup> Indigenous Work Group for Indigenous Affairs, *The Indigenous World* (IWGIA, Copenhagen, 2000–2001) p. 407.

## JÉRÉMINÉ GILBERT

*Operation Good Samaritan* has also highlighted the ambiguity of the government. In 1995, the launching of *Operation Good Samaritan* gave power to the Army Development Group, i.e. the army, to carry out 'development projects' across the region. This operation is often designated as a 'peace offensive'. As pointed out by the International Work Group for Indigenous Affairs:

'Through 'Operation Good Samaritan', the army is actually able to freely interfere in people's lives, to disorient them and then co-opt and assimilate them. The Indian authorities fully understand the Nagas sense of dignity, self-respect and responsibility is rooted in their traditional self-sufficient community-based way of life. The 'peace offensive', it appears, is an attempt to cripple this.<sup>78</sup>

On substantive issues, the dialogue is only just beginning; thus, several central questions will have to be resolved including the central issue of the right to self-determination of the Nagas. Another significant issue is also likely to be the challenge the Nagas face in entering into political discussions to determine their leadership in a decisive manner. As highlighted by Vashum, as the talks on substantive issues are being initiated there will be a great demand for able statesmanship and leadership from the leaders of the government and the Nagas.<sup>79</sup> Thus, as stated a few years ago by the Chairman of the *Nationalist Socialist Council of Nagaland* to the *UN Sub-Commission*, the question in Nagaland remains: 'will the international community allow India and Burma to continue to exterminate the Naga nation and its right to self-determination?'<sup>80</sup>

It is important that the international community involve itself in the peace process, especially since these peace talks have begun after nearly 50 years of war. It remains crucial to monitor the actors and the use of delay tactics in the tentative evolution toward peace.

### 5. CONCLUSION

The overall result of land policy towards *Adivasis* in India remains poor. The general policy protecting land alienation is not working, policies governing the return of territory have so far failed, and there is no adequate policy of rehabilitation. Generally speaking, land legislation has remained patriarchal. Indian legislation has so far failed to provide enough recognition of indigenous peoples' traditional forms of land tenure systems. Even though some communities contained individual households, usually village councils owned, controlled, and managed the lands and natural resources within those communities.

---

<sup>78</sup> *Ibid.*

<sup>79</sup> Vashum, *supra* note 74.

<sup>80</sup> Oral Statement, Mr. Isak Chishi Swu, United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, 1 August 1995 (oral statement delivered by the Society for Threatened Peoples).

## ADIVASIS EXPERIENCE WITH LAND RIGHTS, SELF-RULE AND AUTONOMY

The *Adivasis* have been fighting for this recognition through different means but in most cases, the response of the government has been inadequate, pushing the *Adivasis* to seek greater autonomy. The government's reactions in turn have been very poor; when the *Adivasis* sought recognition of their land rights it was denied, when they sought autonomy they received minimal land rights protection, and when they sought self-determination they received limited autonomy rights. There has been some evolution as the central government has tried to give more space for the recognition of a tribal land tenure system through the recognition of the *Gram Sabha* system. However, as highlighted earlier, this system is in its infancy and state governments are already showing reluctance in enforcing it. The issue of inequality in land policy remains vital all across the country. In this sense, the *Sixth Schedule of the Constitution* should be seen not as a special body of law only applicable in the Northeast, but as the minimum threshold of rights guaranteed by the Constitution to the *Adivasis*.

Addressing the future of this issue, Ratnaker Bhengra, who was engaged in the *Adivasi* struggle for autonomy in Jharkhand, stated: 'We feel that for uniformity in the treatment of the Scheduled Tribes/*Adivasis* in the country, the powers – executive, legislative and judicial that is there in the Schedule should apply also in the Fifth Schedule.'<sup>81</sup>

Compared to other countries, India has the potential to clearly recognise collective and autonomous tribal rights over their lands. In the debates relating to land rights, the issues of collective ownership, traditional land tenure systems, and autonomy are interlinked. It is now time for the central government and state governments to change their ethos and stop treating indigenous demands as issues of law and order. The *Adivasi* representatives have demonstrated their political ability and should be regarded as able politicians and not as terrorists. In this sense, there remains an urgent need for the government to withdraw the *AFSPA*, which has led to human rights abuses. However, to conclude on a more positive note, India has to be regarded as a promising model for judicial activism among indigenous peoples. As highlighted throughout this chapter, the Supreme Court of India has often been successfully petitioned in cases related to indigenous peoples rights. An important legal victory was gained recently when the Supreme Court ordered the closure of the Andaman Trunk Road and the removal of settlers from tribal reserves. This road was threatening the survival of the Jarawas, a nomadic tribe of the Andaman Islands.<sup>82</sup> This case is just another illustration of the important role that judicial activism can play in the fight for indigenous peoples' rights, and indigenous organisations in India have demonstrated their ability to enter such judicial activism.

---

<sup>81</sup> R. Bhengra, 'Autonomy in Jharkhand: Past and Present' (unpublished paper, on file with the author).

<sup>82</sup> See Survival International, News Release, 'India's Supreme Court Closes Isolated Jarawa Tribe's Road of Death' (27 May 2002).



## BANGLADESH

### THE CHITTAGONG HILL TRACTS PEACE ACCORD AND THE LONG ROAD TO PEACE: A CASE STUDY

*Faustina Pereira\**

#### 1. INTRODUCTION

Traditionally, many Asian and African states have denied that there are indigenous peoples within their territories.<sup>1</sup> Bangladesh, for example, was subjected to considerable pressure in the United Nations by the International Labour Organisation before it would address the issue of the Chittagong Hill people.<sup>2</sup> In fact, when in 1993 the United Nations adopted the Year of the Indigenous People, the status of the tribal and indigenous people in Bangladesh suffered. This anomaly arose because the people comprising the dominant mainland Bengali population of Bangladesh also considered themselves to be indigenous to the land, and felt no obligation to observe the rights of indigenous people separately.<sup>3</sup> Nevertheless, over the past few decades, the mainland dominant Bangladeshi population and the Chittagong Hill Tracts ('CHT') peoples have, at least on paper, achieved a level of interaction and collaboration. One indication of this achievement is the historic CHT Peace Accord between the Government of the day and the representatives of the CHT peoples in 1997. The progress from abstract collaboration to full and sincere partnership, however, continues to be mired by a complicated and almost intractable cycle of political and ethnic power struggles. At the root of these struggles is, as in most cases of internal displacement, the issue of the ownership of land. In Bangladesh, the premium on land is perhaps the single highest in the South Asian region.

---

\* Advocate, Supreme Court of Bangladesh. Member and Deputy Director (Advocacy and Research) of *Ain-o-Salish Kendra* (ASK), a leading legal aid and human rights organization in Bangladesh. Bank of Ireland Postdoctoral Fellow 2001–2002, Irish Centre for Human Rights, National University of Ireland, Galway.

<sup>1</sup> See generally, S.C. Perkins, *Researching Indigenous Peoples' Rights Under International Law* (1992), document prepared for presentation at the 1992 Annual Meeting of the American Association of Law Libraries.

<sup>2</sup> D. Sanders, 'The UN Working Group on Indigenous Populations' 11 *Hum. Rights Q.* (1989) 405, pp. 423–427.

<sup>3</sup> R.W. Timm, 'State of Ethnic and Religious Minorities in Bangladesh' in Father R. W. Timm, CSC (ed.), *State of Human Rights in Bangladesh 1999* (Coordinating Council for Human Rights in Bangladesh, 2000) p. 146.

In this brief case study, I discuss the CHT Peace Accord and try to relate its emergence and present status to developments *vis-à-vis* indigenous peoples in Bangladesh. Although this chapter will be limited to the main highlights of the Peace Accord, I hope that it will raise points for discussion on the ongoing process through which internally displaced peoples in a country such as Bangladesh, or in the South Asian region, can seek to create a domestic political and legal space for themselves.

## **2. THE CHT PEOPLES AND THEIR CONSTITUTIONAL AND LEGAL STATUS**

The CHT population consists mainly of Buddhist Sino-Tibetan ethnic groups, the largest being the Chakma and the Marma. Based on their geographic location, the ethnic communities in Bangladesh can be divided into two broad groups: The Plains Groups, who are mainly in the northern districts, with some scattered settlements in other parts of the country; and the Hill Groups, who live in the CHT, which is in the south-eastern part of the country. There is a discrepancy as to the exact number of ethnic groups in Bangladesh. Figures vary between the official Census Reports and private surveys. According to the Census Report of 1991, the ethnic population of Bangladesh was 1.2 million, comprising 1.13 per cent of the total population.<sup>4</sup> Private estimates, however, place the figure at almost double this number. It has been put forward that the Government used the Census Reports as a mechanism to marginalize the ethnic population numerically.<sup>5</sup>

The discussion in this chapter, while restricted to the CHT peoples and their Peace Accord, keeps as a backdrop the plight of the other ethnic communities in Bangladesh, many of who live in the plain lands, amongst the dominant Bengali population. The narratives of these 'other' ethnic groups have not, for various historical and political reasons, gained as much international attention and political pressure to address their concerns, as has the CHT issue. After decades of uncertainty, injustice and unrelenting internal displacement of ethnic minorities, and after innumerable failed political and administrative efforts, the only prospect for peace now perhaps lies in a legislative or judicial direction. But even here, the outlook is challenging, especially when one analyses the underlying, and sometimes blatant, dominant state ideology influencing the laws of the country, starting from the Constitution. It could be argued that the only effective solution to the ongoing tension of ethnic conflict and internal displacement is a combination of various efforts, including legal and quasi-legal efforts, backed by a sincere measure of political will and an active civil society.

---

<sup>4</sup> Population Census, 1991, Bangladesh Bureau of Statistics, Statistics Division, Ministry of Planning, Government of the People's Republic of Bangladesh.

<sup>5</sup> A. Mohsen, 'Rights of Ethnic Minorities' in H. Hossain (ed.), *Human Rights in Bangladesh 2000* (Ain-o-Salish Kendra, 2001) p. 145.



## THE CHITTAGONG HILL TRACTS PEACE ACCORD AND THE LONG ROAD TO PEACE: A CASE STUDY

Bangladesh is a state predicated upon the spirit of Bengali nationalism.<sup>6</sup> This spirit is clear from its Constitution. Before being amended in 1977, the definition of nationalism in the Constitution was such that the very ideals of state structure worked to alienate the non-Bengali (indigenous) population of the state and, in turn, constructed political minorities. By institutionalising the ideals of nationalism based on dominant ideology, it, in effect, made the legal system of the country an instrument of hegemony and domination, and narrowed the space for minorities. Article 9 of the Constitution defined Bengali nationalism as: ‘The unity and solidarity of the Bengali nation, which deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bengali nationalism.’

Again, Article 6 of the Constitution declared that the citizens of Bangladesh were to be known as Bengalis, and Article 3 declared that the official language of the state is Bangla. None of these constitutional provisions took into account the fact that ‘Bengali’ nationalism was a cultural category based on the language and culture of the people, thus turning the non-Bengali population into not only cultural minorities but also linguistic minorities. Article 12, which ensured that ‘secularism and freedom of religion’ were one of the fundamental principles of state policy, was totally deleted. The specific language of Article 12 is worth noting:

The principle of secularism shall be realized by the elimination of

- a. communalism in all its forms;
- b. the granting by the State of political status in favour of any religion;
- c. the abuse of religion for political purposes;
- d. any discrimination against, or persecution of, persons practicing a particular religion.

The deletion of the above Article from the Constitution, along with the deletion of several other important provisions and repeated amendments brought into the Constitution from 1977 onwards, directly focused on issues of nationalism, culture and religion. Instead of rectifying existent disparities, the changes worked to further marginalise ethnic minorities, and in fact resulted in creating more categories of minorities, this time religious, in total contravention of the original secular foundations of the Constitution and state ideology.

For example, Article 6(2) was amended to declare that the citizens of Bangladesh shall be known as Bangladeshis. The change from ‘Bengali’ to ‘Bangladeshi’ nationalism only helped to further marginalise and alienate the ethnic communities, for Bangladeshi nationalism is based on the elements of race, the war of independence, the Bangla language, culture, religion (in this case, Islam), land

---

<sup>6</sup> This section on the various amendments to the Constitution of Bangladesh on minorities is based on A. Mohsen, ‘Minority Rights’, *ibid.*, pp. 244–245.

(geographical area) and economy.<sup>7</sup> A further marginalisation came through the 1988 Amendment, which amended both a crucial article of the Constitution and its Preamble.<sup>8</sup> The Preamble of the Constitution of Bangladesh is now preceded with the invocation *Bismillah-ar-Rahman-ar-Rahim* (In the name of Allah, the Beneficent, the Merciful). Article 8 had been amended so as to read: ‘The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice . . . shall constitute the fundamental principles of state policy.’ All of these changes have meant that the very laws of the country recognise and help sustain ethnic, religious and linguistic minority division from within.

Despite the constricted space carved into the law for ethnic, religious and linguistic minorities in Bangladesh, there are important provisions within the Constitution of Bangladesh, and the international instruments to which Bangladesh is a signatory, that hold crucial elements of redress. The challenge is to combine these provisions with political and administrative efforts to resolve the predicament of the ethnic minorities.

Article 27 of the Constitution of Bangladesh guarantees equality of all citizens before the law and their entitlement to equal protection under the law. Article 28(1) also guarantees that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. Bangladesh is a signatory to important international human rights instruments such as the Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’); the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’); the UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities; and the ILO Convention 169 of 1989, concerning Indigenous and Tribal Peoples in Independent Countries.<sup>9</sup> Although some would argue that the reality on the ground is such that these commitments are at odds with the State ideology, I would argue that even within the confined legal spaces and institutional mechanisms the internal displacement issue can be resourcefully addressed, provided efforts are not hindered by a narrow political agenda.

---

<sup>7</sup> See e.g., *Banglapedia – National Encyclopedia of Bangladesh*, Vol. 7., Asiatic Society of Bangladesh (2003).

<sup>8</sup> For a general discussion of the continued subordination of the principles of secularism, as enshrined in the original Constitution of Bangladesh, through the various amendments, including the 1988 amendment, see F. Pereira, *The Fractured Scales: the Search for a Uniform Personal Code* (Stree, Kolkata and University Press Limited, Dhaka, 2002). For a detailed discussion of each of the 13 amendments, see M.A. Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (A Comparative Study of the Problems of Constitutionalism in Bangladesh) (Dhaka, 1998).

<sup>9</sup> Bangladesh’s registration, ratification and accession to CERD occurred on 11 June 1979. Bangladesh’s registration, ratification and accession to ICESCR occurred on 5 October 1998.

## THE CHITTAGONG HILL TRACTS PEACE ACCORD AND THE LONG ROAD TO PEACE: A CASE STUDY

### 3. THE PEACE ACCORD<sup>10</sup>

The historic signing in 1997 of the Peace Accord between the Government of Bangladesh and the tribal people of the CHT came after more than two decades of severe unrest and insurgency in the hill districts.<sup>11</sup> During this time, the indigenous hill people had been the targets of massacres, arbitrary detention, torture and extrajudicial executions. These human rights violations have been systematically documented by national and international human rights bodies, such as Amnesty International.<sup>12</sup> There is documentation on the main factors of dissension between Bengalis and the CHT peoples, some of which are rooted in colonial history.<sup>13</sup>

Since the departure of the British colonisers in 1947, ethnic populations had declined in numbers due to the persistent encroachment of the dominant Bengalis into the tribal lands. Land had always been at the crux of the clashes between ethnic groups and Bengalis. Land continues to be the primary impetus for conflict. Along with clashes in the CHT area itself, there has been systematic erosion of the civil, political and cultural rights of the ethnic minorities on several fronts. For example, the ethnic minorities, being mostly agriculturists (*jummas*) and having a subsistence economy, were forced to become integrated into the market economy. Today, they feel that the state machineries, including the media, are less sensitive to their situation. They blame the political machinery for their continued insecurity in relation to land, livelihood, habitat, and to life and personal security.<sup>14</sup>

A recurring theme of concern of the CHT peoples is that they lack any constitutional protective provisions, since the Constitution recognizes a predominantly Bengali state ideology. The most distressing problem has been the sustained military presence in the CHT since 1975. The army was used to assist and control unrest between tribal and Bengali settlers in the area. As a response to the military presence, the ethnic peoples developed a resistance movement through the *Parbattya Chattagram Jana Sanghati Samity* ('PCJSS') and formed their own army, the *Shanti Bahini* ('Peace Force').

---

<sup>10</sup> For a well-researched discussion of the Peace Accord, see Amnesty International Report, *Bangladesh: Human Rights in the Chittagong Hill Tracts*, ASA 13/001/2000 01/02/2000. I have relied upon this report particularly for information on the composition and functioning of the Regional Council under the Accord.

<sup>11</sup> For a history of the struggle, see e.g., *ibid.*; see also Global IDP Database, *Bangladesh – Causes and Background of Displacement*, at <[www.idpproject.org](http://www.idpproject.org)>.

<sup>12</sup> Amnesty International, *ibid.*

<sup>13</sup> See Chittagong Hill Tracts Commission, *Life is Not Ours – Land and Human Rights in the Chittagong Hill Tracts, Bangladesh* (Organising Committee, Chittagong Hill Tracts Campaign, Amsterdam, May 1991); see also D.R. Panday and J. Thiagarajah, *Chittagong Hill Tracts – Displacement, Migration and Accommodation* (International Centre for Ethnic Studies, Colombo, Sri Lanka, September 1996).

<sup>14</sup> See e.g., *Briefing Note of the Jumma People's Network* (Jumma People's Network, Göteborg, Sweden., June 1997). This *Briefing Note* was drafted prior to the finalization of the Peace Accord.

## FAUSTINA PEREIRA

For over two decades, until 1997, there were violent attacks and counter-attacks between the *Shanti Bahini* on the one hand and the Bengali settlers and state army on the other. Official figures indicate that more than 8,500 rebels, soldiers and civilians have been killed during these two decades of insurgency.<sup>15</sup> The number of civilians killed is estimated at 2,500.<sup>16</sup> Other sources, however, claim this number to be much higher. According to these sources, the armed conflict took approximately 25,000 lives and created over 50,000 internally displaced people, who were forced to seek refuge in the Indian state of Tripura.<sup>17</sup>

There had been sporadic efforts to settle the conflict by successive governments. These efforts have had limited success, being mostly in the nature of pacifying breakaway factions of the insurgent groups, with 'rehabilitation packages'. One of the more affirmative efforts had taken place in 1992, when the Prime Minister in Bangladesh, Begum Khaleda Zia,<sup>18</sup> signed a joint declaration with her Indian counterpart at the end of a visit to India, seeking a speedy repatriation of tribal refugees to the Chittagong Hill Tracts.<sup>19</sup> Later that year, Begum Khaleda Zia's government formed a committee to make recommendations on how to resolve the conflict. Although that Committee was active until early 1996, there does not seem to be any public information about any of the recommendations the Committee may have made.

In June 1996, the Government of Prime Minister Sheikh Hasina came into power and expedited the process to work out a solution to the conflict in Chittagong Hill Tracts. This process included the formation of a committee made up of parliamentarians from the Treasury as well as the opposition, retired government officials and other professionals, and continued dialogue with the leaders and representatives of the Chittagong Hill Tracts and PCJSS. This process culminated in an historic agreement between the Government of Bangladesh and the peoples of the Chittagong Hill Tracts, known today generally as the 'Peace Accord'.<sup>20</sup>

The Peace Accord was widely greeted by national and international groups as a positive achievement. Soon after it was signed, Amnesty International, in its report on the human rights situation in the CHT, welcomed the peace agreement as a major step towards the resolution of a situation that had resulted in serious human rights violations in the past. It also called for the Government of Bangladesh and the Chittagong Hill Tracts authorities to act decisively to ensure that victims of past and present human rights violations receive truth, justice and redress.<sup>21</sup> The unique feature of this Agreement was that it came about without external mediation. This is

---

<sup>15</sup> Amnesty International, *supra* note 10.

<sup>16</sup> *Ibid.*

<sup>17</sup> Research Directorate, *Bangladesh: Political Developments, December 1996 – April 1998* (Dhaka, 1998).

<sup>18</sup> Mr. Zia is also the present Prime Minister, having won the October 2001 general elections.

<sup>19</sup> 'Chittagong Hill Tracts Chronology', *Daily Star*, 3 Dec. 1997 (archived in <[www.dailystarnews.com](http://www.dailystarnews.com)>).

<sup>20</sup> *Ibid.*

<sup>21</sup> Amnesty International, *supra* note 10.

## THE CHITTAGONG HILL TRACTS PEACE ACCORD AND THE LONG ROAD TO PEACE: A CASE STUDY

an important achievement in terms of the state's handling of the issue of self-determination. The Peace Accord, however, was not welcomed by all. Forceful opposition to the Accord came from the main political opposition party at the time, the Bangladesh Nationalist Party ('BNP'), which is now the party in power in Bangladesh. In addition, the Accord was also opposed by a number of dissident groups from the CHT.

There are several important features to the Peace Accord. Broadly speaking, these features include the surrender of weapons, the return of refugees from exile in India, the formation of a semi-autonomous CHT Regional Council, a Land Commission to settle land disputes with settlers, and the setting up of a Ministry for the CHT with a minister appointed from the Tribal people. Of these features, perhaps the most significant is the establishment of the CHT Regional Council. This Regional Council is comprised of the Local Government Councils of the three Hill Districts, including Bandarban, Rangamati and Khagrachari.

According to the Agreement, the Regional Council is to be constituted of 22 members with tenure for a period of five years. It is also specified that the Regional Council Chairman shall be a member of the tribal community and will have the status of a state minister.<sup>22</sup> As to the constitution of the Regional Council, it has been specified that '[t]wo thirds of the Regional Council members (12 male, 2 female) will be elected from . . . the tribal population with a special quota for each tribe' and the remaining '[o]ne third of Regional Council members (6 male, 1 female) will be elected from the non-tribal population of the Chittagong Hill Tracts . . .'.<sup>23</sup>

The scope and extent of the functions of the Regional Council encompass the development activities in the three Hill Districts, general administration, law and order, NGO activities, disaster management and relief programs. In case of any inconsistencies found in the discharge of responsibilities given to the three District Councils, the decision of the Regional Council is to be final.

The most vexing and persistent problem of the CHT issue, as mentioned earlier, has to do with land ownership. Quite understandably, the Peace Accord deals with this issue at some length. Article D.4 of the Accord states, for example:

A commission (Land Commission) shall be constituted under the leadership of a retired Justice for settlement of disputes regarding lands and premises. This Commission shall, in addition to early disposal of land disputes of the rehabilitated refugees, have full authority to annul the rights of ownership of those hills and lands which have been illegally settled and in respect of which illegal dispossession has taken place. No

---

<sup>22</sup> According to a notification published in Bangladesh Gazette, the Minister of State is at number nine in the warrant of precedence. Persons holding status of Minister are at number seven in the said warrant of precedence. Notification Number CD-10/1/85-Rules/361, extraordinary dated 20 Sept. 1986.

<sup>23</sup> Amnesty International Report, *supra* note 10

## FAUSTINA PEREIRA

appeal shall be maintainable against the judgment of this commission and the decision of this commission shall be deemed to be final.<sup>24</sup>

Another important aspect of the Accord relates to the question of general amnesty. The Accord does not provide amnesty to the army or police personnel for past human rights violations, but leaves open the question as to whether the past human rights violations by Bengali settlers or accomplices of the law enforcement personnel would be addressed. The amnesty does extend, however, to *Shanti Bahini* members who have surrendered their arms.

Article D.2 of the Accord provides for the rehabilitation of tribal refugees and internally displaced tribal members, via a land survey in consultation with the Regional Council to ‘finally determine land ownership of the tribal people through settling the land-disputes on proper verification and shall record their lands and ensure their rights thereto’.

### 4. AFTER THE PEACE ACCORD

December 2, 2002 marked the fifth anniversary of the signing of the Peace Accord. The lethargic process of its implementation over the past five years belies the dynamism surrounding the signing of the Agreement. The unique features of this Accord, and the consensus through which it emerged, are undeniable. These features, in fact, are those for which the Accord was so widely acclaimed by local and international organizations.<sup>25</sup> Unfortunately, and perhaps typically, this unique Agreement has been caught up in political crossfire. On 6 November 2002, the Chairman of the CTR Regional Council, Jyotirindra Bohipriya Larma, said that the signing of the Peace Accord was a ‘great mistake’.<sup>26</sup> Mr. Larma stated that the present government is also following the previous Awami League government’s policy of ‘dawdling in implementing the [P]eace [A]ccord’, and called upon the hill people to continue their movement until the realization of their rights. He did not elaborate on what form this ‘movement’ should take, but he went on to say that the government is now ‘politicizing’ the *zila parishads* (district councils) in the CHT, further impeding the implementation of the Accord. He also hinted at a conspiracy to ‘Islamize’ the CHT.<sup>27</sup> These fears, along with other frustrations, continued to be reiterated throughout the fifth anniversary programmes. In an extensive interview given to a leading mainstream Bangla newspaper, Mr. Larma blamed both the previous Awami League government and the present BNP-Jamaa’t-i-Islami coalition Government for a lack of political will to implement the Accord. He also criticized the continued military presence in the CHT and called for the withdrawal of army

---

<sup>24</sup> See full text of Accord, ‘Text of CHT Peace Agreement’, *Daily Star*, 3 Dec. 1997 (archived in <[www.dailystarnews.com](http://www.dailystarnews.com)>).

<sup>25</sup> Amnesty International, *supra* note 10.

<sup>26</sup> CHT Correspondent, Signing of CHT Accord was a Big Mistake, Larma tells JSS Congress, *The Daily Star*, 6 Dec. 2002, p. 1.

<sup>27</sup> *Ibid.*

## THE CHITTAGONG HILL TRACTS PEACE ACCORD AND THE LONG ROAD TO PEACE: A CASE STUDY

camps from the region and to cease military activities carried out under the euphemistically named ‘Operation Uttoron (*Overcome*)’.<sup>28</sup>

Critiquing the present political handling of the CHT issue, an editorial in a leading Bangladeshi English daily asks the uncomfortable question, ‘Do we really want insurgency to return in the Chittagong Hill Tracts and make the whole region unstable all over again?’<sup>29</sup> The answer to this question is, of course, no. But the prevarication of the present government on such a sensitive issue is swiftly pushing the whole region into an unstable and dangerous situation. Due to the fact that the present government, which had been in the political opposition when the Accord was signed, had strongly opposed the Accord and threatened to scrap it, there were grave apprehensions as to the future of the Accord once this government came into power. It now seems that those fears have come to pass.

Fifteen months have passed since this government has been at the helm with a two-thirds majority in Parliament, but no steps have been taken on the CHT Accord, in either direction. What is necessary at the moment is for the Government to establish its good faith and sincerity in implementing the Accord at the earliest opportunity, before the hopes, aspirations and sacrifice of millions of people are totally shattered. This call to action is more urgent than ever before, as threats of rebellion from tribal factions and fresh insurgency are gaining momentum by the day.<sup>30</sup>

---

<sup>28</sup> ‘*Chukti bastobayan er lokkhye amra niyomtantrik bhabey ogorshor hobo.*’ (‘We shall proceed systematically towards implementation of the Accord.’) J. Larma, Interview given to Mostofa Kamal, *Daily Prothom Alo*, 1 Dec. 2002, available at <[www.prothom-alo.com](http://www.prothom-alo.com)>.

<sup>29</sup> CHT Peace Accord – Authorities have to be Sincere in Implementation, *The Daily Star*, 4 Dec. 2002 (available at <[www.dailystarnews.com](http://www.dailystarnews.com)>).

<sup>30</sup> ‘*UPDF ki parbottyo chottogram e shoshostro andoloner prostuti nichechey?*’ (‘Is the UPDF Preparing for an Armed Rebellion in the CHT?’), H. Kishore Chakma, *Daily Prothom Alo*, 6 Jan. 2003; see also ‘*Tin ti shonghoton parbottyo shanti chukti ke ghirey notun korey andolon e nemechey*’ (Three organisations have started a fresh movement around the peace accord), *Daily Inquilab*, 21 Dec. 2002.





## NIGERIA

### SELF-DETERMINATION V. STATE SOVEREIGNTY: A CRITIQUE OF THE AFRICAN COMMISSION'S DECISION IN THE OGONI CASE

*Kwadwo Appiagyei-Atua\**

In a true Federation, each ethnic group no matter how small, is entitled to the same treatment as any other ethnic group, no matter how large – Obafemi Awolowo.<sup>1</sup>

#### I. INTRODUCTION

In the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*,<sup>2</sup> the African Commission on Human and Peoples' Rights<sup>3</sup> handed out a significant decision which has been hailed as representing a major victory for minority rights and economic, social and cultural rights in Nigeria and Africa as a whole.<sup>4</sup>

The decision of the Commission was grounded among the following complaints presented before it: the reckless exploitation of oil leading to environmental degradation and health problems for the Ogoni people; condoning and facilitation of the violation of rights by the Nigerian government against the Ogoni people; lack of responsibility in monitoring the operations of the oil companies and requiring them to produce basic health and environmental impact studies; lack of consultation with

---

\* Senior Project Officer, International Cooperation Group / Agent principal de projet, Groupe de la coopération internationale. Formerly Bank of Ireland Post-Doctoral Fellow, Irish Centre for Human Rights, National University of Ireland, Galway, Ireland. Kwadwo obtained his LL.B (Hons) from the University of Ghana, Legon and his Barrister-at-Law degree from the Ghana School of Law, Accra. He did his Masters in Law (LL.M) at Dalhousie University, Halifax, NS, Canada and his Doctor of Civil Law (DCL) from McGill University, Montreal, Quebec, Canada.

<sup>1</sup> Obafemi Awolowo, *Path to Nigerian Freedom* (Faber & Faber, London, 1966, c.1947). Quoted in Ogoni Bill of Rights: <[www.waado.org/NigerDelta/RightsDeclaration/Ogoni.html](http://www.waado.org/NigerDelta/RightsDeclaration/Ogoni.html)>. Affectionately known as Awo, Dr. Awolowo was one of the founding fathers of the Nigerian state.

<sup>2</sup> Communication 155/96.

<sup>3</sup> Hereinafter, the African Commission or the Commission. Constituted during the OAU Assembly of Heads of state and government in 1987, in line with Article.

<sup>4</sup> The case was brought in August 1996, following the killing of Ken Saro-Wiwa and eight other members of the Movement for the Survival of the Ogoni People (MOSOP) for the alleged murder of four Ogoni youths.

## KWADWO APPIAGYEI-ATUA

the community before commencement of operations; systematic attack, burning and destruction of Ogoni villages, resulting in homelessness, and destruction of Ogoni food sources and other sources of livelihood.<sup>5</sup> Consequently, the Complainants alleged violations of the African Charter on Human and Peoples' Rights<sup>6</sup> with specific reference to: Article 2 (right to equality),<sup>7</sup> Article 4 (right to life),<sup>8</sup> Article 14 (right to property),<sup>9</sup> Article 16 (right to health),<sup>10</sup> Article 18(1) (right to a family),<sup>11</sup> Article 21 (right of peoples to wealth and natural resources)<sup>12</sup> and Article 24 (right to environment).<sup>13</sup>

### II. THE CHARTER SCEPTICS/PESSIMISTS

Before this case and following the coming into force of the African Charter, writers and commentators have expressed scepticism regarding its potential and, indeed, relevance for effective promotion of human rights in Africa for a variety of reasons. Among others, the contention was that it placed more prominence on social,

---

<sup>5</sup> Paragraphs 1–9 of the Communication.

<sup>6</sup> Hereinafter, the African Charter or the Charter: < <http://www1.umn.edu/humanrts/instreet/zlafchar.htm> >.

<sup>7</sup> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

<sup>8</sup> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

<sup>9</sup> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

<sup>10</sup> Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

<sup>11</sup> (1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

<sup>12</sup> (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. (2). In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. (3). The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. (4). States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. (5). States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources.

<sup>13</sup> All peoples shall have the right to a general satisfactory environment favorable to their development.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

economic and cultural rights to the neglect or watering down of civil and political rights.<sup>14</sup> And looking at the record of African leaders for championing the cause of economic, social and cultural rights but excusing its respect for those rights and their promotion on grounds of lack of availability of resources, not much could be expected from the Charter.<sup>15</sup> A related cause for concern was that economic, social and cultural rights are non-justiciable, even under the Charter.<sup>16</sup> Also, some of these economic, social and cultural rights are framed in such language as to not recognise the substantive right itself.<sup>17</sup> Then, of course, the reference in the Charter to the so-called third generation rights, wherein is embedded the notion of peoples' rights.<sup>18</sup> In fact, the first Chairman of the Commission, U. Umozurike of Nigeria, is noted as having said that the Commission was going to concentrate on civil and political

---

<sup>14</sup> For example, paragraph 8 of the Preamble seems to trump the right to development and economic, social and cultural rights over civil and political rights, thus: 'Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.' At the same time, the civil and political rights provisions are limited by the presence of claw-back and derogation clauses. See e.g., Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford, 1983). Also: Amnesty International, 'The Organisation of African Unity and human rights,' London, May 1987, IOR 03/04/87, at 7; Gittleman, 'The Banjul Charter on Human and Peoples' Rights: A Legal Analysis,' in C.E. Welch and R.I. Meltzer, (eds.), *Human Rights and Development in Africa*, (1984) p. 159; P. Takirambudde, 'Six Years of the African Charter on Human and Peoples' Rights: An Assessment,' 7(2) *Lesotho Law Journal*, 35. See also, El Obaid and Appiagyei-Atua, who argued that the Charter was likely to be interpreted in a narrow way as to limit successful claims for economic, social and cultural rights, as well as a narrow interpretation of people's to mean a nation-state. However, they argued that a progressive interpretation of the Charter lends itself to the opposite view and that is the stance that the Commission should adopt. Ahmed El Obaid and Kwadwo Appiagyei-Atua, 'Human Rights in Africa: A New Perspective on Linking the Past to the Present', 41 *McGill Law Journal* (1996) p. 819;

<sup>15</sup> J. Oloka-Onyango, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa', 26 *California Western International Law Journal* (1995) 1; Rhoda Howard, 'The Full belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa', 9 *Human Rights Quarterly* (1987) p. 467; Rhoda Howard, 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons', 6 *Human Rights Quarterly* (1984) 160; D'Sa, 'Human and Peoples' Rights: Distinctive Features of the African Charter', 29 *Journal of African Law*, (1985) 72; and Eugene Kamenka, 'Human Rights, Peoples' Rights', 9 *Bulletin of Australian Law and Sociology* (1985) 148.

<sup>16</sup> However, see Nana Kusi-Appea and Mbaye, 'Advancing the Struggle', in *West Africa* 29 March–4 April 1993, at 506–507. Details below.

<sup>17</sup> Article 15, on the right to work: Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

<sup>18</sup> Articles 21–24.

## KWADWO APPIAGYEI-ATUA

rights and would not allow itself to be bogged down by economic, social and cultural rights cases.<sup>19</sup>

Judging by the fact that the word 'people' was used in Charter to connote different meanings, another crucial issue was the likely interpretation to be assigned by the African Commission to 'people' in the Charter.<sup>20</sup> Referring to the Preamble of the Charter, it is noted that 'peoples' is used ten times in the ten preambular paragraphs and in two instances, connected to the fight against colonialism.<sup>21</sup> For instance, paragraph eight of the Preamble makes reference to the duty on African peoples, 'to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism . . .'. And with specific reference to Article 20 of the Charter:

- a. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- b. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
- c. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

This particular provision, especially paragraphs 2 and 3, is among those that are touted as being distinctly African, and incorporated in the Charter to express 'African history, a tale of foreign aggression, subjection, domination, discrimination and exploitation in their own countries'.<sup>22</sup> In the Charter itself, more than 30 references to 'peoples' are noted in the various Articles. Similar common references to 'people' are noted in the OAU Charter.<sup>23</sup>

---

<sup>19</sup> U. Oji Umzurike, 'The Protection of Human Rights Under the African Charter on Human and Peoples' Rights', 1 *African Journal of International Law* (1988) p. 62, at p. 81.

<sup>20</sup> R.N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', 82 (1) *American Journal of International Law*, (1988) 80.

<sup>21</sup> Paragraphs 3 and 8.

<sup>22</sup> U. Oji Umzurike, *The African Charter on Human and Peoples' Rights*, (Kluwer Law International, Dordrecht, 1997) p. 93.

<sup>23</sup> For instance, the first, second and third paragraphs of the Preamble recognize, respectively: 'the inalienable right of *all people* to control their own destiny'; that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the *African peoples*'; and the 'responsibility [of Member States] to harness the natural and human resources' of the continent 'for the total advancement of *our peoples* in spheres of human endeavour'. See El Obaid and K. Appiagyei-Atua, *supra* note 14.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

The general conclusion reached by the reviewers of the Charter on peoples' rights has been that a contextual analysis of 'people' with respect to self-determination referred to 'colonized people' or nations only.<sup>24</sup> That is, in the context of the absolutist idea of self-determination.<sup>25</sup> This view, indeed, was initially supported by a number of states, including the United States of America<sup>26</sup> and intergovernmental organisations, such as the Council of Europe.<sup>27</sup> Incidentally, this was also the position of the Soviet Union, though for different reasons: it limited the idea of self-determination to economic independence which would then pave the way towards the adoption of socialist ideals.<sup>28</sup> Indeed, apart from the incorporation of the concept into the major international covenants<sup>29</sup> there at least two significant international documents,<sup>30</sup> which affirmed unanimously that 'any attempt aimed at the practical or total disruption of the national unity and the territorial integrity of a State or country or at its political independence is incompatible with the purpose and principles of the Charter'.<sup>31</sup> The UN Human Rights Committee has also generally refused to recognise the right to external self-determination under Article 1(1) of the ICCPR.<sup>32</sup> No wonder the OAU also affirmed and adopted the *uti possidetis* principle in its Charter.<sup>33</sup>

---

<sup>24</sup> E.g., Ayo Langley has criticised the Charter for not incorporating minority rights: A. Langley, 'The African Charter on Human and Peoples' Rights', XIX (1 & 2) *Indian Political Science Review*, (1985) 16. Also see, generally, Murray R. And Evans M., *The African Charter on Human and Peoples' Rights: The System at Work*, Cambridge University Press, (2002).

<sup>25</sup> As opposed to relativist self-determination. The absolutist discourse relates to *self-determination as a state formation entitlement*, or nothing at all. That is, self-determination leading to the establishment of sovereignty. The latter, on its part, sees self-determination as 'a principle of using *some degree of political power*'. T. Makkonen, *Identity, Differences and Otherness* (Faculty of Law of the University of Helsinki, Helsinki, 2000) p.68, 69.

<sup>26</sup> It is important to place in this context, the Wilsonian concept of self-determination. See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1990).

<sup>27</sup> Makonnen, *supra* note 25 at p. 65.

<sup>28</sup> Isa Shivji, *The Concept of Human Rights in Africa* (CODESRIA, London, 1989).

<sup>29</sup> International Covenant on Civil and Political Rights (ICCPR) (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976); and, the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entered into force* 3 January 1976.

<sup>30</sup> The Declaration on Granting Independence to Colonial Countries and Peoples (GA Res. 1514 (XV), 14 December 1960; and the Declaration on Principles of International Law Concerning the Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN (GA Res. 2625 (XXV), 24 October 1970).

<sup>31</sup> Article 6 of GA Res. 1514 (XV) and paragraph 15 of Preamble to GA Res.2625 (XXV).

<sup>32</sup> Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to 'dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In

## KWADWO APPIAGYEI-ATUA

In sum, the Charter sceptics and pessimists, relying on the past human rights record of African leaders have generally assumed a position which is captured by El Obaid and Appiagyei-Atua thus:

Human rights in Africa were to be peoples' rights; freedom, for example, was seen as *national* freedom, not *individual* freedom. The class struggle was to be between the 'developed' and 'developing' nations; the widening gap between the emerging political elite and the *nouveaux riches*, on the one hand, and ordinary citizens, on the other, was overlooked. The O.A.U.'s commitment to human rights was, therefore, vague and weak. This situation influenced the human-rights provisions of the subsequent *African Charter*.<sup>34</sup>

### III. THE COMMISSION DECIDES AGAINST NIGERIA

In this reputed landmark case, however, the Commission was bold to come to some important conclusions.<sup>35</sup> Among others, it held that the Nigerian government was in breach of Articles 16 and 24 by contending, *inter alia*:

These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.<sup>36</sup>

---

no case may a people be deprived of its own means of subsistence'. This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant. Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI\GEN\1\REV.1 at 12 (1994).

<sup>33</sup> W. Ofuately-Kodjoe, *The Principle of Self-Determination in International Law* (Nellen, New York, 1977); Joshua Castellino, 'Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara', in 28 (3) *Millenium: Journal of International Studies* (1999) 523; Steven R. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', in 90 *American Journal of International Law* (1996) 590; Antonio Cassese, *Self-Determination of Peoples* (Cambridge University Press, Cambridge, 1996); U. Umozurike, *Self-Determination in International Law* (Archon Books, Hamden, Conn, 1972); C.O.C. Amate, *Inside the OAU: Pan-Africanism in Practice* (Macmillan, London, 1986).

<sup>34</sup> El Obaid and Appiagyei-Atua, *supra* note 14 at p. 827.

<sup>35</sup> Albeit, in a hesitant manner. The case was brought before the Commission in 1996. However, it went through a tortuous journey before finally being heard and a decision given afterwards. It had to be postponed at least 9 times. Apart from the first 2 postponements which are deemed normal to enable Complainants file detailed written submission and for the Commission to await its Nigerian Mission report, there were no reasons attached to the rest, apart from flimsy ones like 'due to lack of time'.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

The Nigerian government was also held to be in breach of Article 21 of the Charter. It contended that governments have a duty to protect their citizens through legislative and effective enforcement as well as protection from damage by third parties. In that regard, the Commission referred to the cases of *Union des Jeunes Avocats/Chad*,<sup>37</sup> *Velasquez Rodriguez v. Honduras*,<sup>38</sup> and *X and Y v. Netherlands*<sup>39</sup> to conclude that, 'by any measure of standards, its [Nigerian government] practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter'.<sup>40</sup>

More importantly, the Commission went on to decide that the Nigerian government was in breach of the right to housing or shelter as well as the right to food, though these rights are not explicitly catered for in the African Charter. With respect to the former, it argued that:

[T]he corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.<sup>41</sup>

The right to food, on its part, was held to be implicit in such provisions as the right to life,<sup>42</sup> the right to health<sup>43</sup> and the right to economic, social and cultural development.<sup>44</sup> This innovative approach is related to the concerted and integrative approach which seeks to enforce economic, social and cultural rights through the justiciable provisions on civil and political rights.<sup>45</sup>

Based on its decision, the Commission recommended or appealed to the Nigerian government to:

- Stop all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;

---

<sup>36</sup> Paragraph 51.

<sup>37</sup> Communication 74/92.

<sup>38</sup> Inter-American Court of Human Rights, Judgment of 19 July 1988, Series C, No. 4.

<sup>39</sup> 91 ECHR (1985) (Ser. A) at 32.

<sup>40</sup> Paragraph 58.

<sup>41</sup> Paragraph 60

<sup>42</sup> Article 4.

<sup>43</sup> Article 16.

<sup>44</sup> Article 22.

<sup>45</sup> See analysis in Shedrack C. Agbakwa, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights', 5 *Yale Human Rights & Development Law Journal* (2000) 177.

## KWADWO APPIAGYEI-ATUA

- Conduct an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- Ensure that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.<sup>46</sup>

### IV. REACTIONS. ISSUE ARISING

On the face of it, the Commission's decision seems to prove the Charter sceptics wrong. After all, the Commission contended in its concluding notes thus: '[The Commission] welcomes this opportunity to make clear there is no right in the African Charter that cannot be made effective.'<sup>47</sup> This view is supported generally by the positive reactions received in response to the decision. They include those expressed by Felix Morka, the director of the Social and Economic Rights Actions Centre,<sup>48</sup> who said, 'This is the first decision by the African Commission to specifically and comprehensively address violations of economic and social and cultural rights under the Africa Charter'.<sup>49</sup> Also, Bronwen Manby, a Nigeria specialist at the London office of Human Rights Watch (HRW) remarked thus: 'It is a remarkable decision indeed. The very fact that it's a decision by the African Commission – which is a body of the Organisation of African Unity (OAU) and appointed by governments – means that it will certainly form a part of the body of international jurisprudence on economic and social rights.'<sup>50</sup>

This chapter will attempt to examine the decision and determine whether it is as ground-breaking as it has been perceived and therefore really proves the Charter sceptics wrong. It will also interrogate, based on the Commission's findings, the adequacy and effectiveness or otherwise of the Commission's appeals to the Nigerian government to deal with the deplorable situation of minority rights in Nigeria in particular and Africa in general. Other issues for investigation will

---

<sup>46</sup> Communication 155/96 at p.13

<sup>47</sup> Paragraph 68.

<sup>48</sup> One of the Complainants in the case.

<sup>49</sup> [www.selfdetermine.org/news/0207nigeria.html](http://www.selfdetermine.org/news/0207nigeria.html).

<sup>50</sup> *Ibid.* See also, Jim Lobe, 'People versus Big Oil: Rights of Nigerian Indigenous People Recognized', in *Foreign Policy in Focus*, 5 July 2002. >[www.foreignpolicy-infocus.org/pdf/gac/0207nigeria.pdf](http://www.foreignpolicy-infocus.org/pdf/gac/0207nigeria.pdf)<.



## SELF-DETERMINATION V. STATE SOVEREIGNTY

include, whether and to what extent the case of the Ogonis and other minority groups in the Niger Delta can be considered in the context of the right to self-determination; what are the constitutional arrangements that Nigeria should put in place to promote the right to self-determination of Nigerian minority groups; whether the issue of compensation should be limited to the immediate violations of human rights or go further back, as demanded by various indigenous communities; whether it is enough for the Commission to stick to the minimum threshold of duties on the Nigerian government.

To deal with these issues, this chapter will first examine the political history of Nigeria in the context of minority rights struggle.

### V. A BRIEF POLITICAL HISTORY OF NIGERIA AND MINORITY RIGHTS STRUGGLES

Following the haphazard and irresponsible carving of borders and the scramble for Africa,<sup>51</sup> and the creation of Nigeria, it became apparent that the recognition for minority rights was key towards a successful creation and maintenance of a new nation-state. In fact, that should have been the case in many African states, considering the fact that different ethnic groups, were lumped together without any consideration of their different political and socio-economic lifestyles. However, on the contrary, even respect for civil and political rights was seen by the new African leaders as likely to breed ‘centrifugal forces’ that would disrupt the unity and stability of the nation-state.<sup>52</sup> A few that stood out, however, is the Nigerian statesman, Obafemi Awolowo. According to Itse Sagay,<sup>53</sup> one of the popular statements responsible for engendering Nigerian federalism is attributed to Awolowo thus:

Nigeria is not a nation. It is a mere geographical expression. There are no ‘Nigerians’ in the same sense as there are ‘English’, ‘Welsh’, or ‘French’. The word ‘Nigerian’ is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not. There are various national or ethnical groups in the country. Ten such main groups were recorded during the 1931 census as follows: (1) Hausa, (2) Ibo, (3) Yoruba, (4) Fulani, (5) Kanuri, (6) Ibibio, (7) Munshi or Tiv, (8) Edo, (9) Nupe, and (10) Ijaw. According to Nigerian Handbook, eleventh edition, ‘there are also a great number of other small tribes too

---

<sup>51</sup> *E.g.*, refer to Lord Salisbury’s oft-quoted remarks made at the Berlin Conference of 1885 in the scramble for Africa: ‘We have been engaged in drawing lines on maps where no white man’s foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we have never known where the rivers and lakes and mountains were.’

<sup>52</sup> A. Casesse, *International Law in a Divided World* (Clarendon Press, Oxford, 1988).

<sup>53</sup> Prof. Itse Sagay, ‘Nigeria: Federalism, the Constitution and Resource Control’, speech delivered at the 4<sup>th</sup> Sensitization Programme organised by Ibori Vanguard, Lagos, Nigeria. <[www.waado.org/Niger\\_Delta/Essays/ResourceControl/Sagay.html](http://www.waado.org/Niger_Delta/Essays/ResourceControl/Sagay.html)>, Last visited 14 May 2003.

## KWADWO APPIAGYEI-ATUA

numerous to enumerate separately, whose combined total population amounts to 4,683,044. It is a mistake to designate them “tribes”. Each of them is a nation by itself with many tribes and clans. There is as much difference between them as there is between Germans, English, Russians and Turks, for instance. The fact that they have a common overlord does not destroy this fundamental difference. The languages differ. The readiest means of communication between them now is English. Their cultural backgrounds and social outlooks differ widely; and their indigenous political institutions have little in common. Their present stages of development vary.<sup>54</sup>

This assertion was made against the backdrop of agitation by minority groups who felt boxed in into political arrangements that did not suit their interests. For example, in their Ogoni Bill of Rights, the Ogoni people contend, in points two and three:

- a. That British colonisation forced us into the administrative division of Opobo from 1908 to 1947.
- b. That we protested against this forced union until the Ogoni Native Authority was created in 1947 and placed under the then Rivers Province.<sup>55</sup>

Thus, the pre-independence Constitutional arrangement put in place by Britain did not take into account the interests and concerns of the Niger Delta minority groups.<sup>56</sup> The general concern expressed by the minority groups regarding how past experiences of injustices and discrimination meted out to them under the experimental colonial arrangements set up by the British and the fear of their repetition, led to the setting up of the Willink Commission of Enquiry into Minority Fears in 1958 by the departing British colonizers. Yet, again, the call for establishing special political arrangements to protect the autonomy and vulnerability of the minority groups was ignored. The various ethnic groups were subsumed under the three regions which emerged to form the new Nigerian nation-state. They were the Northern, Eastern and Western Regions. But the arrangements did not work, as minorities continued to suffer neglect and marginalisation. Thus, *e.g.*, according to the Ogonis, they were ‘forcibly included in the Eastern Region of Nigeria where [they] suffered utter neglect’.<sup>57</sup> Consequently, through the referendum of 13 July

---

<sup>54</sup> Obafemi Awolowo, *supra* note 1 p. 48. *Cf., ibid.*

<sup>55</sup> Ogoni Bill of Rights drafted in 1990 and which listed the grievances of the Ogoni and the call for political and economic autonomy and resource, respect for language, cultural and religious rights, among others: <nigerianscholars.africanqueen.com/docum/ogoni.htm>, Last visited 22 March 2003.

<sup>56</sup> This process involved the elevation of the then provinces to the status of regions.

<sup>57</sup> Paragraph 4 of Preamble of the Ogoni Bill of Rights, *supra* note 55

## SELF-DETERMINATION V. STATE SOVEREIGNTY

1963<sup>58</sup> a fourth region, the Mid-West was created out of the Western region in August 1963. It included most of the Niger Delta minority groupings.

Despite its limited accommodation for minority needs, post-independence Nigerian Constitutions generally carved out a more liberal federal constitutional arrangement. Both the 1960 Federal Constitution of Nigeria<sup>59</sup> and 1963 Federal Republican Constitution<sup>60</sup> granted extensive powers to the Regions, 'making them effectively autonomous entities and the revenue arrangements which ensured that the regions had the resources to carry out the immense responsibilities'.<sup>61</sup> They were declared 'self-governing region of the Federal Republic of Nigeria'<sup>62</sup> and each had a separate regional constitution, a separate coat-of-arms, separate judiciary with final right of appeal to the Supreme Court of Nigeria, residual powers, and a revenue allocation control system strictly based on derivation.<sup>63</sup> In modern parlance, this revenue allocation control system is referred to as resource control or fiscal federalism. Thus, the regions exercised a high level of political and fiscal autonomy. For example, the Federal government was to allocate 50 per cent of the proceeds from the exploitation of minerals, including mineral oil to the regions while also recognising the Continental shelf of the Region to be part of the Region, in consonance with International law.<sup>64</sup> Also, 30 per cent of import duties went to the Regions and for certain items, all the import duties, less administrative costs.<sup>65</sup>

While not directly granting internal self-determining status to local ethnic groups, this arrangement could have enhanced their chances of being involved in the decision-making process.<sup>66</sup> It is also important to note that title to land remained in the native communities. However, the replacement of the Regional system by a

---

<sup>58</sup> The regional system was replaced by 12 States in 1967 by the then military ruler, Yakubu Gowon. This new arrangement served as the last straw that broke the camel's back and led to the secessionist attempt by the then Governor of the Eastern Region, Ojukwu. For an analysis of the Biafran War in the context of self-determination, see Ijalaye, 'Was "Biafra" at Any Time a State in International Law?' 65 *American Journal of International Law*, (1971) p. 55.

<sup>59</sup> The Constitution which ushered in Nigeria's independence on 1 October 1960.

<sup>60</sup> Like most post-colonial independent constitutions, the two constitutions maintained similar structures, institutions and processes apart from the fact that the Republican Constitution replaced the Queen of England with a ceremonial President, and also the Supreme Court of Nigeria as the final judicial appeal system in place of the Judicial Committee of the British Privy Council.

<sup>61</sup> Sagay, *supra* note 53

<sup>62</sup> Nigerian Constitution 1963.

<sup>63</sup> Sagay, *supra* note 53

<sup>64</sup> See United Nations Convention on the Law of the Sea (UNCLOS). However, contrast the decision of the case of *Attorney-General of the Federation v. Attorney-General of Abia State and 35 ors.*, treated in detail below.

<sup>65</sup> Section 136(1) of the 1960 Constitution.

<sup>66</sup> The lack of attention to minority issues and at the same the absence of space to critically voice out grievances and legitimately make claims, led to the agitations such as 'The Twelve Day Revolution' initiated by Isaac Boro, by proclaiming the republic of Ijaw in 1966. The cause of the agitation was for recognition of the Ijaw nation to control its resources.

## KWADWO APPIAGYEI-ATUA

Federation of States in 1967 under the military administration of Yakubu Gowon was to see a consolidation of power in the Federal government. This arrangement, which saw the emergence of 12 States, consequently led to a reduction of influence that the Regions wielded, one of the factors responsible for the Biafran rebellion and secessionist attempt the same year.<sup>67</sup> Gradual erosion of State power into the Federal structure was to continue under the various military regimes that Nigeria had; and, as a matter of course, the worsening of the situation for minority groups.<sup>68</sup> Thus, for example, the allocation of revenue based on derivation was to go through a back-and-forth process, each time resulting in a reduction in the percentage until finally abolished in the 1979 Constitution.<sup>69</sup>

Meanwhile, the human rights situation of the Niger Delta communities went from bad to worse, in respect of both civil and political and economic, social and cultural rights.<sup>70</sup> Years of oppression and disenfranchisement and the corresponding resistance by Niger Delta minority groups culminated in the creation of the Movement for the Survival of the Ogoni People (MOSOP) in 1990. The movement was able to organise the most effective opposition to years of abuse and neglect against minority groups in the Niger Delta area under the leadership of Ken Saro-Wiwa. That same year, it drafted the famous Ogoni Bill of Rights and presented a copy of the Bill to the then military leader, General Ibrahim Babaginda<sup>71</sup> who ignored it. Through intensification of its campaigns against the military dictatorship and the Shell Oil Company, MOSOP was able to influence the Ogoni boycott of the June 1993 elections and to force Shell to suspend its oil exploration activities in Ogoniland in 1993. The Ogoni struggle was to enter a new phase following the

---

<sup>67</sup> See *supra* note 58

<sup>68</sup> One such result was the balkanisation of minority groups into different regions or the inclusion of other smaller groups into a region populated mainly and dominated by major ethnic groups.

<sup>69</sup> From 100 per cent in 1953, to 50 per cent (1960), 45 per cent (1970), 40 per cent (1975), 2 per cent (1982), 1.5 per cent (1984), 3 per cent (1992) Section 149 of Constitution 1979. In place of that, and pursuant to section 149(2) of the said 1979 Constitution, the then National Assembly of Nigeria enacted the Allocation of Revenue (Federation Account, *etc*) Act (Cap 16). This Act was in turn amended by the military regime of Ibrahim Babangida in 1992 by Decree 106 of 1992, allocating 1 per cent of the revenue to the Federation Account derived from minerals for sharing among the mineral-producing states in proportion to the amount of mineral produced from each state, whether on-shore or off-shore.

<sup>70</sup> HRW, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (January, 1999). Also, see generally Amnesty International Annual Reports, and UNDP and World Bank Reports.

<sup>71</sup> Babangida assumed office in August 1985 and ruled Nigeria with an iron fist. A new constitution was set up in 1990, with plans to return to civilian rule in 1992. Elections were reluctantly held in 1992, after attempts to postpone it failed. However, the Babangida government annulled the results of that election on grounds of fraud. New elections were held in June, 1993 in which Moshood Abiola won. The results again were annulled on grounds of fraud, though believed to be one of the fairest elections held in the political history of Nigeria. Internal and external pressure led to the resignation of Babangida in August 1993, and in his stead, Ernest Shonekan, a civilian, was appointed President.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

successful coup d'état against Ernest Shonekan which ushered General Sani Abacha into power.<sup>72</sup> Gen. Abacha set up a Rivers State Internal Security Task Force specifically to deal with the Ogoni issue, which resulted in intimidation, arrests, torture, beating and other massive violations of human rights.<sup>73</sup>

In spite of these attempts to break the back of the Ogoni resistance, the Movement waxed and won a lot of international recognition and sympathy which damaged the reputation of the Abacha government. In the face of this situation, attempts were made to eliminate the MOSOP leadership, leading to their implication in the murder of some Ogoni youth. A special tribunal whose trial procedures and standards flew in the face of due process of law was quickly set up to try the 9. As expected, they were found guilty. Gen. Abacha subsequently defied international public opinion and executed the 9.<sup>74</sup>

### VI. A CRITIQUE OF THE AFRICAN COMMISSION DECISION

It is contended that the African Commission's decision is indeed ground-breaking, and to a large measure might have caught the Charter sceptics off-guard. In fact, the Commission is on record as having come up with some important decisions in other areas of the law as well.<sup>75</sup> However, the review will observe that the decision does not go far enough and to a large extent represents no more than a hollow victory.

The most important issue, around which the others revolve, is that of self-determination. Much as the Ogonis have always couched their claims in the context of self-determination – for, *inter alia*, political autonomy and control over its natural resources, the African Commission failed to deal with the issue. One may argue that the Complainants did not, in any case, specifically allege a breach of Article 20, which expressly mentions 'self-determination'. However, it is contended that

---

<sup>72</sup> Gen. Abacha staged a coup d'état three months into the regime of Ernest Shonekan, and ousted him from office in November 1993. Abacha served as Defence Minister under Babangida.

<sup>73</sup> HRW, *supra* note 70

<sup>74</sup> According to Human Rights Watch report, a jurist described the judgement of the Tribunal as 'not merely wrong, illogical or perverse. It is downright dishonest. The Tribunal consistently advanced arguments which no experienced lawyer could possibly believe to be logical or just. I believe that the Tribunal first decided on its verdicts and then sought for arguments to justify them. No barrel was too deep to be scraped'. HRW, <[www.hrw.org/reports/1999/nigeria/Nigew991-08.htm](http://www.hrw.org/reports/1999/nigeria/Nigew991-08.htm)>, Last visit 17 January 2003.

<sup>75</sup> *E.g.*, it was instrumental in developing procedures to allow communication by NGOs. According to Corrine Parker, in spite of the limited space for promoting women's rights in the Charter, the Commission has generally proven itself more ready to interpret favourably women's rights issues. See Corinne A.A. Packer, *Using Human Rights to Change Tradition* (Intersentia, Antwerpen, 2002). Also, Chidi Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment', 8 *Transnational Law & Contemporary Problems* (1998) p. 359; Gino Naldi, 'Reparations in the Practice of the African Commission on Human and Peoples' Rights', 14 *Leiden Journal of International Law* (2001) p. 681.

## KWADWO APPIAGYEI-ATUA

Articles 19 to 24, which enshrine peoples' rights should be read together since they explain and/or reinforce each other. Thus, Umozurike,<sup>76</sup> even considered as one of the most conservative when it comes to interpreting the Charter, contends:

This provision [Article 19] is one of the most significant in the Charter for it confirms our view that long after colonialism may have retreated into the limbo of history, self-determination will still be relevant to people in independent states to ensure that they have governments that are responsive to their needs.<sup>77</sup>

Indeed, Article 19 of the Charter,<sup>78</sup> read together with Article 20(1) seeks to give further support to view that the latter Article protects the rights of minority groups against genocide<sup>79</sup> and the denial of the right to subsistence through provision of the necessities of life.<sup>80</sup>

Between Articles 19 to 24, Kiwanuka identifies four categories of the definition of peoples:

- (i) all persons within a dependent (colonised) territory: (Article 20(2);
- (ii) certain persons possessing certain common characteristics and living within a dependent or independent territory (Articles 19 and 20 (1);
- (iii) people as synonymous with the state (economic self-determination, Articles 21 and 22);
- (iv) all persons living within a state (synonymous to ii but reinforced by individual rights).<sup>81</sup>

Dropping category (i) from our discussion, it is observed that among the other three categories, only one equates people with states, that is category (ii). This category is related to the notion of economic self-determination, which the Charter sought to grant specifically to states as a distinct right. The reason, among others, is that it is a

---

<sup>76</sup> The first President of the African Commission who has generally adopted a conservative approach to interpretation of the Charter. *See e.g.*, Umozurike, *The African Charter on Human and Human Peoples' Rights* (Martinus Nijhoff Publishers, The Hague, 1997).

<sup>77</sup> *Ibid.*, 54.

<sup>78</sup> All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another. *See*, below, however, for a critique of this Article.

<sup>79</sup> Kiwanuka, *supra* note 20 It is important to refer to Ken Saro-Wiwa's contention that the Ogoni's had been subjected to acts of genocide (Interview in *Tell* (Lagos), 8 Feb. 1993), even though writers such as, Eghosa Osaghae refute the claim. *See* E. Osaghae, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State', 94 (376) *African Affairs* (July 1995) p. 325.

<sup>80</sup> Umozurike, *supra* note 76

<sup>81</sup> Kiwanuka, *supra* note 20

## SELF-DETERMINATION V. STATE SOVEREIGNTY

right that is recognised by the UN for states.<sup>82</sup> While Kiwanuka supports the idea that for practical reasons states should be given that responsibility, he contends that for this arrangement to work, states should adequately represent the interests of the people.<sup>83</sup> And a democratic arrangement should also be put in place, in support of Cassesse's claim.<sup>84</sup> But it will seem that Kiwanuka's concept of economic self-determination is steeped in the traditional unidimensional sense: state-determination<sup>85</sup> which is subjected to severe criticism by Shivji.<sup>86</sup> Economic self-determination involves as well consultation with the local people who own the land and the resources, and making suitable arrangements with them regarding allocation of fair share of the revenue and royalty.

Thus, it is interesting and positive to note that the Commission went as far as to determine that the category three definition of peoples applied to minority or indigenous groups as well. Yet, though couching its words in a language that transcended the narrow confines of seeing 'people' as applying to nation-states only, it did not see self-determination as applying to 'people' within a particular territorial state:

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.<sup>87</sup>

It is our contention that, having determined that Article 21 applies to the Ogonis, it should be extended to *economic* self-determination,<sup>88</sup> in combination with some form of political autonomy within the state, since the former cannot be effectively exercised without the latter.<sup>89</sup> After all, there is a direct relationship between the twin concepts of peoples and self-determination, according to the expansive definitional, or the relativist, approach to 'people' and 'self-determination'. Ethnic/multiethnic-based communities who qualify as people have the right to

---

<sup>82</sup> Referring to, *inter alia*, the NIEO, the Charter of Economic Rights and Duties of States of 1974 and GA Res 1803 (XVII) of 1962 which recognised the right of peoples and nations to permanent sovereignty over natural resources.

<sup>83</sup> Kiwanuka, *supra* note 20 at p. 98.

<sup>84</sup> *Ibid.*, 98, 99.

<sup>85</sup> Oloka-Onyango, *supra* note 15 at p. 156.

<sup>86</sup> Shivji, *supra* note 28 at p. 79.

<sup>87</sup> Paragraph 56 of Decision.

<sup>88</sup> See J. Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium', 15 *American University International Law Review* (1999) 151.

<sup>89</sup> Detailed analysis below.

## KWADWO APPIAGYEI-ATUA

internal self-determination, with the extended right to external self-determination where they are denied the exercise of internal self-determination consonant with their peculiar circumstances.

Makonnen argues thus:

These peoples are 'peoples' in accordance with international law, in so far as the relativist approach to self-determination is adopted. The people in question usually belong to two 'peoples' simultaneously, having the right to two complementary forms of internal self-determination. They are part of the 'people' enjoying autonomy or some other limited form of self-determination. These peoples are, however, 'peoples' by virtue of the exercise of the internal self-determination of the whole 'people' . . .<sup>90</sup>

This view is supported by the Human Rights Committee's General Comment 12 on Article 1(2) of the International Covenant on Civil and Political Rights (ICCPR), whose equivalent provision in the African Charter is Article 21 (1). Article 1(2) of the ICCPR is stated thus:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

As noted above, the Committee has interpreted this particular provision to mean the right to internal self-determination.<sup>91</sup>

Yet, significantly missing in the Commission's decision is the lack of reference to a recommendation or appeal to the Nigerian government to respect, protect, promote or fulfil the right to internal self-determination of the Ogoni people. Rather, it limited the resolution of the problem to the Nigerian government without any reference to the involvement of the Ogoni people in resolving the issues of environmental degradation, abuse of civil and political and economic, social and cultural rights. This is in spite of the Commission having broached the issue of self-determination indirectly with this remark: 'Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland . . .'<sup>92</sup> Perhaps, the Commission is still set in the traditional definition of self-determination which led to its non-recognition of the Katangese claim for political/external self-determination. Thus, the impression one gets in this analysis is that the Commission gave with one hand and took with the other.

Another crucial dimension to the economic self-determination is its linkage to respect for economic, social and cultural rights. Oloka-Onyango laments about the lack of connection between the two. He argues that in spite of the common article in the ICCPR and the ICESCR on self-determination, 'when the discussion is extended

---

<sup>90</sup> Makonnen *supra* note 25 at p. 72.

<sup>91</sup> General Comment 12, *supra* note 32

<sup>92</sup> Paragraph 4.



## SELF-DETERMINATION V. STATE SOVEREIGNTY

to examine the implications of self-determination for human rights, the treatment of economic, social and cultural human rights is merely an afterthought'.<sup>93</sup>

This view rightly captures the lackadaisical attempt made by the Commission in dealing with the issue regarding whether the Nigerian government was in breach of its duty regarding economic, social and cultural rights towards the people of Ogoni; and the nature of the compensation that was due them for the violation of rights.

First, the Commission concluded that the Nigerian government, through the Nigerian National Petroleum Corporation (NNPC) '[u]ndoubtedly and admittedly, . . . has the right to produce oil, the income from which will be used to fulfill the economic and social rights of Nigerians'.<sup>94</sup> This view, though, is wrong, since a State cannot possess such a right. The correlative of a right is a duty.<sup>95</sup> Therefore, if the people have the right to economic, social and cultural rights, then it is a duty on the government, not a right, to provide. One can read through this remark, a subtle attempt to rule out any possibility of entertaining the central claim of the Ogoni people, that is the right to economic self-determination, or resource control.<sup>96</sup> Secondly, the decision against the Nigerian government for breach of economic, social and cultural rights was expressed more in terms of breach of the first and second levels of obligation, the minimum requirement, which is to respect<sup>97</sup> or protect such rights from abuse by third parties.<sup>98</sup> It argues: 'As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.'<sup>99</sup> Thus, the Commission argued that Nigeria was in breach of its economic, social and cultural rights obligation only to the extent of using government forces to destroy farms, homes, etc and allowed the multi-national corporations to do the same.<sup>100</sup> Effectively, therefore, the Nigerian government was absolved from not having provided such structures and means of survival in the first place for the Ogoni people.

Neither was it asked to provide structures that will assist the most vulnerable and deprived to lead decent lives. All it recommended was an appeal to the Nigerian government to 'ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers

<sup>93</sup> Oloka-Onyango, *supra* note 15 at p. 155.

<sup>94</sup> Paragraph 54.

<sup>95</sup> Hohfeld, *Foundational Legal Conceptions* (New Haven, Reprinted, 1923).

<sup>96</sup> Treated in detail below.

<sup>97</sup> The Commission argues: 'With respect to socio economic rights, this means the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.' Paragraph 45.

<sup>98</sup> On this Commission argued, *inter alia*, 'This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences'. Paragraph 46.

<sup>99</sup> Paragraph 68.

<sup>100</sup> *See, e.g.*, paragraphs 61, 62.

## KWADWO APPIAGYEI-ATUA

damaged by oil operations'.<sup>101</sup> The question is, what about those who at the time of the commission of the atrocities did not have any property or means of survival in the first place but whose condition may be directly attributable to the Nigerian government's systemic and systematic policy of neglect and marginalisation of the Niger Delta communities?

Certainly, this attempt by the African Commission in finding the Nigerian government in breach of the economic, social and cultural rights of the Ogoni people does not go far enough, compared with jurisprudence developed on the subject. The Commission is noted for having 'drawn inspiration' from the Economic, Social and Cultural Rights Committee of the UN to find the Nigerian government to be in breach of the right to life, health, housing, etc; and, the Inter-American Commission with regard to the protective aspect of economic and social rights. Yet, it failed to adopt the 'minimum threshold approach'<sup>102</sup> developed by both bodies that lay emphasis on the government doing something *positive*, as well as *negative*, to ensure the meeting of the needs of the most vulnerable and needy. According to Agbakwa, referring to Eide<sup>103</sup> and Craven<sup>104</sup>:

Among other things, this approach [the minimum threshold approach] calls for 'the *identification* of the most deprived groups' and demands 'that in the creation and implementation of economic and social policies, states should place emphasis, as a priority, upon *assisting* the poorest and the most vulnerable in society.' [Emphasis added]<sup>105</sup>

Perhaps the Commission did not have to look far, but its own precedent set in the consolidated case against Zaire,<sup>106</sup> with particular reference to case 100/93,<sup>107</sup> where it held that:

---

<sup>101</sup> Page 13 of the Decision.

<sup>102</sup> Though at certain points it uses the language of 'minimum expectations' or 'minimum core obligations'. See *e.g.*, paragraphs 50, 58, 61, 62.

<sup>103</sup> Asbjørn Eide, 'Realization of Social, Economic and Cultural Rights and the Minimum Threshold Approach', 10 *Human Rights Law Journal* (1989) p. 35.

<sup>104</sup> Matthew Craven, 'The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights', in David J. Harris & Stephen Livingstone (eds.), *The Inter-American System of Human Rights*, (Clarendon Press, Oxford, 1998), p. 289 at p. 318.

<sup>105</sup> S. C. Agbakwa, *supra* note 45

<sup>106</sup> Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Témoins de Jehovah vs. Zaire, African Comm. Hum. & Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (Consolidated. Not Dated).

<sup>107</sup> Communication 100/93, submitted by the *Union Interfricaine des Droits de l'Homme* and dated 20 March 1993. It makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that public finances were mismanaged; that the failure of the Government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media. Paragraph 4.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. *The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine* as alleged in communication 100/93 constitutes a violation of Article 16.<sup>108</sup> [Emphasis added].

This will confirm the view expressed elsewhere that the economic, social and cultural provisions in the African Charter are justiciable, and more importantly their justiciability is not dependent on the progressive realization of resources.<sup>109</sup> However, since mere imposition of obligations, or raising the standards too high without any hope of its realization may render the provisions ineffectual, a more reasonable and workable solution is suggested by Agbakwa:

Using the minimum threshold approach, the African Commission or the African Court could set up country-specific thresholds (or minimum core obligations) measured by indicators to determine what amounts to 'the best attainable state of physical and mental health' or 'necessary measures to protect the health of their people'. In this way, what the government can or cannot afford can be independently verified and juxtaposed with other competing national priorities. This baseline approach could also be used to set up benchmarks to measure the 'equity' and 'satisfaction' in 'equitable and satisfactory working conditions'.<sup>110</sup>

Looking at the grim statistics of the living realities of the Niger Delta people in general, the Commission's decision fails to establish the strong relationship that exists between the recent violations and previous violations of civil and political rights and neglect of economic, social and cultural rights. That is to say, except for the previous violations by previous regimes which put the Ogonis in a pauperised state, the scene would not have been set for further rights violations. This contention is sustainable on the grounds that corruption in government can be argued as the cause for failure of a particular government to recognize and respect an individual or a group's social and economic rights. That is, if a direct relationship between the neglect and the corrupt practice can be established.<sup>111</sup> Therefore, one cannot isolate the remote

---

<sup>108</sup> Paragraph 47 of the decision.

<sup>109</sup> Kwadwo Appiagyei-Atua, 'Re-Discovering the Rights-Development Linkage through the Theory of Community Understanding: The Experiences of Ghana and Canada', Unpublished LL.M dissertation, Dalhousie University, Halifax, NS, Canada at p. 234.

<sup>110</sup> Agbakwa, *supra* note 45 at pp. 214–215.

<sup>111</sup> In support of this, Nana Kusi-Appa and Bibiane G. Mbaye outline the procedure likely to be followed by the Commission should such a case be brought before it: that the burden of proof of the breach of *linkage* rights should be on the individual or group alleging the breach. The claimant/s must be able to show why the allegation that the state is in a position to make the rights enjoyable, as well as producing data/facts to the Commission to support the claim that the state has violated.

## KWADWO APPIAGYEI-ATUA

past from the immediate past if the issue of minority rights violations are to be dealt with in a holistic and comprehensive fashion.

The indubitable fact is that Nigeria depends on 90 per cent of its revenue from oil and more than 80 per cent of the oil comes from the Niger Delta. Yet, paradoxically, the Niger Delta, Nigeria's oil belt, is 'easily the most repressed and deprived region of the country'.

Statistics of social conditions in the geographical zone are quite dire – only 27% of households had access to safe drinking water in 1994, while 30% of households had access to electricity. On both indicators, the Niger Delta fell below the national average that stood at about 32% and 34% respectively. In 1991, the population per doctor in the region was estimated at some 132,600 people to a doctor, which was nearly 100,000 over the national average of 39,455 people per doctor (UNDP & World Bank, 1997). The situation has most probably worsened since then. Yet, the Delta provides about 80% of all government revenue in Nigeria.<sup>112</sup>

In limiting compensation to the immediate act of violations that the Nigerian government committed against the Ogoni people, the Commission might have been influenced by the provisions of the Charter, which do not give room for recognition of affirmative action. It only makes reference to non-discrimination in Article 19: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.' But still, the Commission could have given an expansive interpretation here. It is clear in its decision that the Ogoni people had not been treated equally. Therefore, there has been a domination, consciously or unconsciously, directly or indirectly, by the rest of the Nigerian state.<sup>113</sup> Thus, read together with Article 20, compensation should go further back to address past injustices. That is one of the prime essences of minority rights, as stated by Justice Abbie Sachs:

The central theme that runs through the development of international human rights law in relation to protection of minorities is that of preventing discrimination against disadvantaged and marginalised groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination.<sup>114</sup>

---

<sup>112</sup> Centre for Democracy and Development, *CDD Niger Delta Project* (Preamble), paragraph 1 <[www.cdd.org.uk](http://www.cdd.org.uk)>, Last visited 2 February 2003).

<sup>113</sup> Claude Welch: 'The communal pressures that have characterised the Niger Delta and many other parts of Nigeria are not only matters of ethnic self-determination but also complex expressions of economic and political disparities.' C. Welch, 'The Ogoni and Self-Determination: Increasing Violence in Nigeria', 33 (4) *The Journal of Modern African Studies* (1995) p. 635, at p. 635.

<sup>114</sup> *Gauteng School Education Bill of 1995*, (3) *SALR* 165 (CC) (1996) at 173.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

Thus, the vital question of affirmative action becomes crucial to dealing with past injustices which are related to continued marginalisation of an oppressed and disadvantaged group.<sup>115</sup>

### VII. RESOURCE CONTROL AND SELF-DETERMINATION

It is palpably clear that the Ogoni agitation and that of other minority groups in the Niger Delta are not for external, but internal self-determination. As noted in its Bill of Rights, the people are asking for 'political autonomy to participate in the affairs of the Republic as a distinct and separate unit by whatever name called, provided that this Autonomy guarantees the following: (a) political control of Ogoni affairs by Ogoni people . . .'.<sup>116</sup> The Ijaws proclaim in the Kajama Declaration that they 'agreed to remain within Nigeria but to demand and work for Self Government and resource control for the Ijaw people'.<sup>117</sup> The Egi people, in its Aklaka Declaration 'believed that their steady slide into extinction can only be reversed by Self Determination' as well as in the 'continued existence of Nigeria as a corporate unit'.<sup>118</sup>

The question that comes to confront us next is how these needs can be met or accommodated within the general constitutional, other legal or political framework of the country. The UN Human Rights Committee has reaffirmed in its General Comment on Article 1 of the ICCPR that 'States parties should describe the constitutional and political processes which in practice allow the exercise of this right'.<sup>119</sup>

Considering the fact that at the time the case was brought before the Commission in 1996, Nigeria was under military dictatorship and ruled by decrees with little or no respect for the rule of law and human rights; and the fact that when the decision was handed out in 2001, Nigeria had come under constitutional democratic rule, perhaps the Commission should have made reference to Nigeria's constitutional provisions and arrangements regarding to what extent Nigeria has 'recognised the rights, duties and freedoms enshrined in this Charter' and has 'undertake[n] to adopt legislative or other measures to give effect to them'.<sup>120</sup>

Indeed, a critical analysis of the 1999 Nigerian Constitution<sup>121</sup> reveals that it is defective in providing room for recognition and respect for minority rights. The 1999 Constitutions is rather considered a set-back to previous constitutional

---

<sup>115</sup> Detailed treatment on this subject below.

<sup>116</sup> Ogoni Bill of Rights, *supra* note 55.

<sup>117</sup> Paragraph 10 of Resolution.

<sup>118</sup> Aklaka Declaration: <[www.ndwj.kabissa.org/Declarations/declarations.html#Kaiama](http://www.ndwj.kabissa.org/Declarations/declarations.html#Kaiama)>, Last visited 7 April 2003.

<sup>119</sup> Human Rights Committee Report, UN GAOR, 39<sup>th</sup> Session, Suppl. No. 40 (A/39/40, Annex vi, P. 142, para. 1).

<sup>120</sup> Article 1 of the Charter.

<sup>121</sup> The Constitution of the Federal Republic of Nigeria was promulgated on 5 May 1999, and entered into force on 31 May 1999.

## KWADWO APPIAGYEI-ATUA

arrangements. Even more seriously, the Constitution is described as being overly centralized and reflecting more of a unitary, instead of a federal constitution:

- (1) The document is insensitive, fraudulent and antagonistic to the aspirations of the Niger Delta Peoples for self-determination and sustainable development;
- (2) For the bulk of Nigeria, it also failed the requirement of plural democracy, true federalism and fiscal federalism. For instance, out of over 100 articles, 68 are devoted to exclusive federal list and only 30 to the concurrent, with no provision for a residual list, which could be legislated upon exclusively by the States and Local Governments. The 30 articles of the concurrent list according to the document could always be countermanded by federal superiority should there be conflict.<sup>122</sup>

Thus, the minority groups in their various declarations, bills of rights, charters, etc rejected it.<sup>123</sup> Following calls for a constitutional review, a Presidential commission was set up.<sup>124</sup> Disappointingly, however, the Commission's Report has at best been received with mixed feelings and in some cases, outright rejection as a veiled attempt to promote legitimacy for the government while maintaining the status quo. Out of them, at least two contentious issues were isolated for criticism by Nigerian scholars, activists, politicians, and ordinary citizens alike. These are derivation/resource control and land use. For example, respecting revenue allocation, derivation and resource control, the report stated:

The derivation principle or formula from natural resources was accordingly rejected in several parts of the federation in preference for a return to fiscal federalism principle under which federating states (or

---

<sup>122</sup> Oronto Douglas, 'The Position of the Niger Delta on Nigeria's 1999 Constitution.' A position paper prepared to aid the discussions at a National Constitutional Workshop organised by The International Institute for Democracy and Electoral Assistance (I-DEA) and the Citizens' Forum for Constitutional Reform (CFRC), Abuja, 25–29 September 2001. Mr. Douglas is Deputy Director, Environmental Rights Action/Friends of the Earth, Nigeria. <[www.waado.org/NigerDelta/ConstitutionalMatters/OrontoDouglas\\_1999.html](http://www.waado.org/NigerDelta/ConstitutionalMatters/OrontoDouglas_1999.html)>, Last visited 7 April 2003.

<sup>123</sup> <[www.ndwj.kabissa.org/Declarations/declarations.html#Kaiama](http://www.ndwj.kabissa.org/Declarations/declarations.html#Kaiama)>, Last visited 7 April 2003.

<sup>124</sup> The Presidential Committee on the Review of the 1999 constitution was inaugurated by the Federal Government in October 1999. It submitted its report to the President in February 2001. This was to be followed by the Zonal presentations (submitted in Vols I and II), as outlined in the guidelines and representing the six main geo-political zones of the country. *Cf* Otiye Igbuzor, 'Constitution Making and the Struggle for Resource Control in Nigeria'.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

regions under the 1963 constitution) owned, controlled and developed the natural resources which were located on their land.<sup>125</sup>

Though the Committee recommended a substantial increase in the derivation formula beyond the 13 per cent minimum,<sup>126</sup> in its proposed bill for amendment in volume 2 of its report, Section 162(2) was repeated, word for word.<sup>127</sup>

A similar approach was adopted regarding the Land Use Decree. It was stated in the report that one of the most controversial pieces of legislation in Nigeria today was the *Land Use Decree of 1978* which was enacted to harmonize the various land tenure systems in Nigeria in order to facilitate and ease the acquisition of land for public purposes.<sup>128</sup> The report stated further:

The preponderant view in several parts of the country was that the Land Use Act was unduly oppressive and had in fact outlived its usefulness. Nigerians argued that it was mischievous of Government to have tied the Act with the constitution in the belief that it will ease the wrongful appropriation of the land, which naturally belonged to the people. They maintained that the right of the people to ownership of land was an inalienable right which government could not, by any pretentious trusteeship, take away from the people. The promulgation of the Land Use Decree was therefore seen as an anti-people and undemocratic action by the military Government.<sup>129</sup>

Yet, in spite of the above, the committee recommended a maintenance of the *status quo* as provided in Section 315(5) of the 1999 Constitution.<sup>130</sup>

Reaction to the report has been vehement. However, depending on which side of the fence one stood, the reaction was different. They can be divided generally into two groups, those reflecting the dominant elitist view, and those of the ordinary people who are members of the minority groups. Thus, in the words of Oronto Douglas,

The term 'resource control' is now subject to various interpretations, by politicians, politician-scholars, military-politicians, government and non-governmental organizations, corporate executives, contractors, diplomats and several interest groups. These diverse interpretations seek not to clarify but confuse the issue so that the communities and the people's

---

<sup>125</sup> At 43, Vol.1 of the Report. The report further stated that 'The twin issues of Derivation formula and resource control stand out and constitute the greatest test of the political will of the constitution review process to effect the desired restructuring of the Nigerian Federation so that justice is done to all stakeholders in the Nigerian Nation'. *Ibid.*

<sup>126</sup> As contained in section 162(2) of the 1999 constitution. See p. 44, Vol 1.

<sup>127</sup> As Section 169(2).

<sup>128</sup> At 64, Vol. 1 of the Report.

<sup>129</sup> pp. 64-65, Vol.1.

<sup>130</sup> O. Igbuzor, *supra* note 124

## KWADWO APPIAGYEI-ATUA

position on the matter is further compounded so as to delay an agreement or a resolution on the matter.<sup>131</sup>

The attempt by the elitist camp to capture the discourse on resource control and subject it to their own interpretation, is reflected in the controversial case brought by the Federal government against, initially, the eight littoral states<sup>132</sup> before the Supreme Court of Nigeria, in the case of *Attorney-General of the Federation v. Attorney-General of Abia State and 35 ors.*<sup>133</sup>

In this case, the Federal government invoked the original jurisdiction of the Supreme Court, under section 232(1) of the 1999 Constitution, praying for ‘a determination of the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the constitution of the Federal Republic of Nigeria 1999’.<sup>134</sup> The Federal government maintained that the southern (or seaward) boundary of each of these States is the low-water mark of the land surface of such State or the seaward limit of inland waters within the State, as the case so requires. Therefore, natural resources located within the Continental Shelf of Nigeria are not derivable from any State of the Federation. The eight littoral states<sup>135</sup> however claim that their territory extends beyond the low-water mark onto the territorial water and even onto the continental shelf and the exclusive economic zone. They maintain that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to the ‘not less than 13 per cent’ allocation as provided in the proviso to subsection (2) of section 162 of the Constitution. The other non-littoral states also applied to join the case, contending that the ‘not less than 13 per cent’ allocation applied to them as well.

It was held, among others, that ‘[T]he seaward boundary of a littoral state within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that state pursuant to section 162(2) of the constitution of the Federal Republic of Nigeria 1999 is the low-water mark of the land surface thereof or (if the case so requires as in the Cross River State with an archipelago of islands) the

---

<sup>131</sup> Oronto Douglas, ‘A Community Guide to Understanding Resource Control’. <[www.waado.org/NigerDelta/Essays/ResourceControl/Guide\\_Douglas.html](http://www.waado.org/NigerDelta/Essays/ResourceControl/Guide_Douglas.html)>, Last visited 7 April 2003.

<sup>132</sup> The other States later intervened and joined as Co-Defendants.

<sup>133</sup> SC28/2001. The 35 others represent the A-Gs of the remaining 35 states of Nigeria.

<sup>134</sup> Judgement By The Supreme Court Of Nigeria On the Case Brought By Nigeria’s Federal Government Against Littoral States Concerning Allocation of Revenues From ‘Off-Shore’ Petroleum Resources: <[www.waado.org/NigerDelta/Essays/ResourceControl/SupremeCourt.html](http://www.waado.org/NigerDelta/Essays/ResourceControl/SupremeCourt.html)>, Last visited 6 February 2003.

<sup>135</sup> Akwa Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers States.



## SELF-DETERMINATION V. STATE SOVEREIGNTY

seaward limits of inland waters within the state. And this shall be my judgment in respect of plaintiff's case'.<sup>136</sup>

The position of the federal State structures vis-à-vis the minority groups manifests itself through its argument before the court, *inter alia*, that the Continental shelf initially belonged to the communities indigenous to the states but that right had passed from the indigenous communities to the State itself.<sup>137</sup> As to how this transfer was effected, either through custom, constitutional arrangement, etc is not stated.

Oronto Douglas seems to hit the hammer right on the head, as he said:

Control of oil and gas resources by the states of the Niger Delta as opposed to the central government seem to be the driving force that defines the understanding of resource control here. The governors of the south-south states are the prime movers of this view and the advertised objective is to utilize the resources for the building of social infrastructure for the states. The position assumes that the issue of the federating units is settled and the states and the local governments are the other units of governance in the Nigerian federation and no more. Building a refinery or a power plant by some states is thus seen by some of them as resource control.<sup>138</sup>

The elitist views expressed above, confirmed by the Federal and State governments dispute before the Supreme Court, leaves out a different understanding and meaning of resource control which is related to local governance and autonomy. As Claude Welch puts it, 'Ogoni demands . . . reflect a long-standing emphasis on local autonomy in Africa'.<sup>139</sup> Yet, a review of the Nigerian Constitution reveals that the question of local autonomy is inadequately catered for. It is therefore myopic for the elite to take such a stance. Again, to refer to Welch, 'Nigeria remains marked by misleading federalism'.<sup>140</sup>

---

<sup>136</sup> Judge Kutiji argued further in support of his decision that 'Nigeria exercises sovereign power over its territorial waters as well as the Exclusive Economic Zone only as a result of treaties and conventions it had entered into and not because the area or areas form part of Nigeria in the first place'. In reaction to this, see the comment of Dafinone: 'The implication of these is that without these littoral states being within the Federation of Nigeria, international law could not have recognised Nigeria's sovereignty over these maritime zones. At any rate is there anything that is necessarily contrary to Nigeria's sovereignty over the territorial waters and Exclusive Economic Zone if these areas were part of the littoral states, which are part of Nigeria?' But the true position of the law seems to be rightly stated by David Dafinone, that 'Neither the States nor the Federal Government are owners of freehold interests in land in southern Nigeria except in the former colony of Lagos'. David Dafinone, 'The Supreme Court's Verdict on Resource Control: The Political Implications.' <[www.waado.org/NigerDelta/ConstitutionalMatters/OffShoreResources-SupremeCourt.html](http://www.waado.org/NigerDelta/ConstitutionalMatters/OffShoreResources-SupremeCourt.html)>, 5 May 2002, Last visited 12 February 2003.

<sup>137</sup> *Ibid.*

<sup>138</sup> O. Douglas, *supra* note 122

<sup>139</sup> Claude Welch, 'The Ogoni and Self-Determination: Increasing Violence in Nigeria', 33 (4) *The Journal of Modern African Studies* (Dec. 1995) p. 635, at p. 636.

<sup>140</sup> *Ibid.*

## KWADWO APPIAGYEI-ATUA

The closest that local communities come to, in terms of exercising their right in governance is through the local government structures. Yet, as is the case with the local government system, a top-bottom-structured colonial legacy, the system has not operated to offer real autonomy to the people on the ground.<sup>141</sup> Under the Nigerian Constitution, while Article 7(1) of the Constitutions recognises and guarantees the setting up of local government structures,<sup>142</sup> Article 7(2) stipulates it shall be the responsibility of 'a person authorised by law to prescribe the area over which a local government council may exercise authority'. And such a person shall, among others,

- a. define such area as clearly as practicable; and
- b. ensure, to the extent to which it may be reasonably justifiable that in defining such area regard is paid to –
  - (i) the common interest of the community in the area;
  - (ii) traditional association of the community; and
  - (iii) administrative convenience.

It is observed that from the start this procedure completely cuts off the involvement of local indigenous communities from the grassroots democratic process, contrary to what minority groups in the Delta have been demanding. For example, the Ogonis are asking for some form of political and economic autonomy.

Following the demarcation process, an established local government will be assigned 'a *duty* [Emphasis added] to participate in economic planning and development of the area referred to in subsection (2) of this section and to this end an economic planning board shall be established by a Law enacted by the House of Assembly of the State'.<sup>143</sup> The fact that this economic activity is designated as a duty, instead of a right, sends another clear indication that it is not in line with internal self-determination for minority groups, which is confirmed by the fact that it is the State legislation that will be in charge of setting up the proposed board. The functions of a local government council, spelt out in the Fourth Schedule of the Constitution, includes participation in the Government of a State regarding issues such as the (a) the provision and maintenance of primary, adult and vocational education; (b) the development of agriculture and natural resources, other than the exploitation of materials.<sup>144</sup> Exploitation of mineral resources is considered one of the 'major sectors of the economy' which is reserved to the Federal State.<sup>145</sup>

---

<sup>141</sup> *Ibid.*

<sup>142</sup> 768 local government authorities are already in place and recognised in the Constitution: Article 3(6).

<sup>143</sup> Article 7(3).

<sup>144</sup> Other functions spelt out for local government councils under the Fourth Schedule include (b) collection of rates, radio and television licences; (c) establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm; (d) licensing of bicycles, trucks, canoes, wheel barrows and carts; slabs, markets, motor parks and public conveniences; (f) construction and maintenance of roads, streets, street lightings, drains and other public

## SELF-DETERMINATION V. STATE SOVEREIGNTY

One therefore comes to the conclusion that the local government councils are not given any space to exercise autonomy over vital local issues that affect the development and well-being of minority groups. This, again, is contrary to the demands of such groups. For example, the Ogoni Bill of Rights asks for ‘The right to the control and use of a fair proportion of OGONI economic resources for Ogoni development’.<sup>146</sup>

Thus, it is only fair to conclude that the present constitutional arrangement does not augur well or lay the foundation towards ensuring control and management of local resources by minority groups and this is directly related to uneven underdevelopment of the region.

### **VIII: SELF-DETERMINATION, AFFIRMATIVE ACTION AND MINORITY RIGHTS**

Self-determination is about the past, the present and the future.<sup>147</sup> The past helps to determine the nature of the abuses that took place against a people and how that has stalled, disturbed and destabilized their development, individually and collectively. The present is about assessing how that disturbance and destabilization has occasioned a disproportionate imbalance in the development of that group, compared to others within the nation-state. And the future is about how to redress the current imbalance so as to enable the marginalized members of the society belonging to this group to be compensated for the past abuses in order to enable them to occupy their rightful place in the society and contribute to its overall development.

Thus, the issue of reparation must go further back and also be done in a community context; it must be people-oriented, rather than individual-based. That is, it should be geared towards redressing injustices done to an entire community. It calls for equality of results, not equality of opportunity. It thrives on substantive or *de facto* equality, not formal, *de jure* equality. It involves affirmative action, a paving of the way for the marginalized to catch up in a meaningful way with the rest of the society. This can only be done by providing special status (some permanent and others temporary) for the disenfranchised community until, as much as possible, ‘things return to normal’. The temporary status is deemed necessary and is designed as part of the process towards the setting up of the permanent status. It includes

---

highways, parks, gardens, open spaces, or such public facilities as may be prescribed from time to time by the House of Assembly of a State; (g) naming of roads and streets and numbering of houses; (h) provision and maintenance of public conveniences, sewage and refuse disposal; (i) registration of all births, deaths and marriages; (j) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State; and (e) establishment, maintenance and regulation of slaughter houses.

<sup>145</sup> Article 16 of the Federal Constitution. Refer below to the African Commission’s remark that the ‘Nigerian National Petroleum Corporation has the right to produce oil’.

<sup>146</sup> Article 20 (b) of the Ogoni Bill of Rights.

<sup>147</sup> Makonen, *supra* note25, at pp. 60–61.

## KWADWO APPIAGYEI-ATUA

reparation in a holistic, non-adversarial fashion. It involves recognition of and respect for economic, social and cultural rights, in the context of affirmative action. That is a right that one is entitled to enjoy in order to compensate for past injustices, not merely the provision of services.

Taking a cue from the Ghanaian Constitution, it is observed that it first recognizes formal equality in Article 17, thus:

1. All persons shall be equal before the law.
2. A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.
3. For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

However, sub-paragraph (4) of Article 17 stipulates further:

4. Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide –
  - a) for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society;
  - b) for matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
  - c) for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons; or
  - d) for making different provision for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of this Constitution.
5. Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter.

On the contrary, the Nigerian Constitution, like Article 19 of the African Charter, does not recognise affirmative action:

The State shall direct its policy towards ensuring that –

## SELF-DETERMINATION V. STATE SOVEREIGNTY

(a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.<sup>148</sup>

It is our contention that an affirmative clause is vitally needed in the Nigerian Constitution to help redress the huge imbalance that minority groups in the Niger Delta face.

One would have hoped that the Niger Delta Development Commission (NDDC) would be effective in dealing with the problems of the Niger Delta minority groups. However, from the start the people have greeted the idea with suspicion for a couple of reasons. First, was the fact that it was not the first time that such an attempt was made to redress the problems of the Niger Delta communities. These include, the setting up of the Nigerian Delta Development Board (NDDDB) in 1960, following the recommendations of the Willinks Commission, but whose other recommendations were not implemented.<sup>149</sup> Second, the creation of the Oil Mineral Producing Areas Development Commission in 1992<sup>150</sup> meant to give the Delta area priority in development but failed 'due to massive official corruption, inadequate funding, lack of focus as a result of lack of master plan, defined development objectives and strategies, unfavourable political climate etc';<sup>151</sup> and the creation of the Petroleum Special Fund (PSF) whose performance was lopsided against the oil producing areas.

Thus, it is not surprising that one of the conclusions of the Group Session on Governance, Democratisation and Development was this:

It would appear that the NDDC was set up to address the symptoms and not the root causes. There is also the fear that it is a mere political tool to give a semblance of goodwill towards the nation's treasure base and to assuage the conscience of the perpetrators of continued exploitation of the area. To achieve sustainable development and lasting peace, there is need to address the root causes of marginalisation, inequities, environmental degradation and the absence of political will to truly develop the region.<sup>152</sup>

It therefore recommended that 'development of the area will require a consistent and sincere demonstration of political will and policy implementation from and by the highest government authorities and political leaders *i.e.* the President, National Assembly, political parties and others'.<sup>153</sup>

---

<sup>148</sup> Article 17 (3).

<sup>149</sup> NDDC site <[www.nddconline.org/conference/messages/5.shtml](http://www.nddconline.org/conference/messages/5.shtml)>, Last visited 22 March 2003.

<sup>150</sup> By the Babangida administration and given a certain percentage of oil revenue to develop the area.

<sup>151</sup> *Ibid.*

<sup>152</sup> <[www.nddconline.org/conference/messages/10.shtml](http://www.nddconline.org/conference/messages/10.shtml)>.

<sup>153</sup> *Ibid.*

## KWADWO APPIAGYEI-ATUA

Other thorny issues remain. They include:

- i. The continued existence of what the Session called ‘unjust, inequitable and obnoxious laws,’ such as certain Constitutional provisions, the *Land Use Decree*, the *Petroleum Act*, etc;<sup>154</sup>
- ii. The issue of accountability, and the fear of under-funding and non-remittance of funds to the NDDC as and when due by the Federal Government.<sup>155</sup>
- iii. Clear identification of the role of the NDDC *vis-a-vis* the continuing role of the three tiers of Government;
- iv. Guaranteeing minority protection in employment and project execution in the NDDC;
- v. Setting up of an Ombudsman office at the local level where people can have access to call to order all companies contributing to environmental damage and social pollution, and corrupt government officials.

The other aspect of affirmative action involves the setting up of permanent structures, which will enable the marginalized communities to protect the benefits that the implementation of the affirmative action programme will accrue to the community and, equally importantly, to be in a position to have greater control over their resources and thereby avert future abuses. Thus, the permanent aspect of affirmative action calls for recognition of some form of political autonomy. It is interesting to note that the Nigerian government sees the agitation for resource control by the minority groups as an attempt at secession. The Nigerian government’s position is an echo of the position taken by African leaders at the time of independence. They saw self-determination as simply independence from colonial rule. Therefore the notion of internal self-determination was in palpable breach of the sanctity of state sovereignty and invoking it was interpreted as a veiled attempt by centrifugal forces to threaten state sovereignty.

---

<sup>154</sup> *Ibid.*

<sup>155</sup> A fear confirmed by the grievance expressed by The Royal Fathers, under the aegis of Traditional Rulers of Oil Mineral Producing Communities of Nigeria (TROMPCON). ‘Unimpressed with the performance of the Niger Delta Development Commission (NDDC) in the last three years, traditional rulers of oil bearing communities yesterday voted unanimously for a comprehensive restructuring of the commission’s administrative hierarchy as well as increased funding to enable the agency meet the desired goals for which it was set up.’ They described a little above ten billion naira allocation provided by the Federal Government for NDDC in the 2003 budget as inadequate and its administrative structure too unwieldy to permit the actualisation of the commission’s assignment of stimulating sustainable development in the Niger Delta. *ThisDay*, 30 January 2003, <allafrica.com/stories/200301300467.html>. Also, see ‘Turmoil in Nigeria’s oil town, <news.bbc.co.uk/1/hi/world/africa/2886241.stm>, Reported on 25 March 2003.

## SELF-DETERMINATION V. STATE SOVEREIGNTY

The Federal government's position on resource control is expressed thus by Douglas:

To the federal government resource control advocacy and its meaning is a call for war or a break up of Nigeria. Government leaders believe that an agitation for control of resources is nothing but 'separatist tendencies' that must not be tolerated, but crushed. Government does not favour dialogue on this matter even though its agents preach peace. The federal government sees the setting up of NDDC by the government as a way out of the problems in the Niger Delta.<sup>156</sup>

But the important question to confront is this: will taking such a move amount to igniting the powder-keg and disturbing the already volatile political situation in Nigeria or is the lack of political will to take such a measure that is actually responsible for the current volatile political and economic mess that Nigeria finds itself in? The author believes it is the latter. In this regard, it is important to refer to Shivji that 'if a nation is not oppressed, that is to say, it is treated democratically and accorded equality, both the reason and rationale for secession disappear'.<sup>157</sup> In the same vein, it is appropriate to refer to the Declaration on the 50<sup>th</sup> Anniversary of the United Nations, paragraph 3 under the Peace Theme, which while reaffirming the right to self-determination, continues that the right:

[S]hall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

On this note, one can refer to the ground-breaking attempt made by Ethiopia to include in its Constitution a provision which recognises the rights of nations, nationality or people to internal self-determination<sup>158</sup> and more remarkably, even to secession as well:

(1) Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.

(2) Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.

---

<sup>156</sup> Douglas, *supra* note 122

<sup>157</sup> Shivji, *supra* note 28, at p. 74.

<sup>158</sup> Probably, meaning the right to form its own state, guaranteed under Article 47 of the Constitution or to form a loose association within an existing federal State.

## KWADWO APPIAGYEI-ATUA

(3) Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.<sup>159</sup>

It is time African leaders and African jurisprudence on minority rights recognised that state sovereignty and issues of internal self-determination by peoples within a state can sit side by side. In the peculiar situation of the fragile nation that Africa finds itself in, some forms of internal self-determination, to promote cultural, language, religious, economic and other interests of oppressed minority groups are key. Adopting such a position is vital in maintaining stability, security and development on the continent, in view of the haphazard manner in which nations, kingdoms, peoples and tribes were irresponsibly massed together to form so-called modern nation-states.

### IX. CONCLUSION

The lack of recognition of minority rights by the Organisation African Unity and the strict adherence to the *uti possidetis* principle has resulted in a serious disservice in pushing for an effective agenda towards the promotion of minority rights in Africa. This position was reaffirmed in the African Charter, which as the Charter sceptics/pessimists rightly projected, led to an initial hesitancy on the part of the African Commission to deal with economic, social and cultural rights and group rights communications brought before it. However, in the famous Ogoni case, the Commission moved a step further in deciding against Nigeria for breach of economic, social and cultural rights and group/third generation rights. Even more spectacular was the Commission's adventurous attempt to determine abuse of right to food and housing while these rights are not specifically enshrined in the Charter. While the decision is significant in many respects, in reality, however, all it does is to give with one hand and take back with the other.

One cannot deny the fact that the issue of self-determination is a critical one, especially in Africa. One may be sympathetic to the dilemma that the Commission might have faced which caused it to take five years to resolve. On the one hand, it might have felt that it was time to move on and make inroads in the self-determination question in order to leave Africa behind. The highly successful attempt by MOSOP to present its case before international public opinion and win, weighed in at the back of the mind of the Commissioners. At the same time, it did not want to open the floodgate for minority rights claims. Having said that, however, the Commission's decision ended up not advancing the case of minority rights as some commentators have argued. In fact, in some ways, it reversed some of its own decision on economic, social and cultural rights. It is hoped that perhaps with the

---

<sup>159</sup> Article 39 of the Constitution of the Federal Democratic Republic of Ethiopia, adopted 8 December 1994. The original document is in Amharic, the official working language of the Federal government. The process towards secession is outlined in Article 39 (4) and (5).



## SELF-DETERMINATION V. STATE SOVEREIGNTY

establishment of the African Court on Human and Peoples' Rights greater progress will be made in advancing the course of minority rights which hinge on respect, promotion and fulfilment of economic, social and cultural rights.



## SOUTH AFRICA

### SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

*Vinodh Jaichand\**

to say that self-determination should be guaranteed is to state the problem, not its solution. Timo Makkonen<sup>1</sup>

#### 1. INTRODUCTION

Reports of bombs going off in Soweto<sup>2</sup> and Bronkhorstspuit<sup>3</sup> may signal the rise of right-wing Afrikaner malcontent with the new democratic order in South Africa.<sup>4</sup> In April 2002, police uncovered large caches of arms and explosives. It was reported that the organisation calling itself the 'Boeremag' had planned to strike during the World Conference on Sustainable Development in Johannesburg using 90 kilograms of ammonium nitrate from ordinary commercial fertiliser packed in canisters.<sup>5</sup> A bomb twice that size caused mayhem in Bali. It was reported that the 'far right's primary demand, in so far as there is any ideological purpose behind its new mobilisation effort, is for a Volkstaat or the restoration of a Boer republic'.<sup>6</sup> Further reports have indicated that the police arrested suspected ringleaders who had planned to detonate a 'pick-up truck packed with 348 kg of explosives and two bags of nuts and bolts . . . intended mainly for a crowd of mainly black people at a football match'.<sup>7</sup> The response from the State has been swift, with a number of accused persons appearing in court. The trials are expected to take up to three years to conclude.

---

\*Vinodh Jaichand BA (UDW); LL.B (Natal); LL.M (Miami); LL.M; JSD (Notre Dame). Deputy Director, Irish Centre for Human Rights, National University of Ireland, Galway.

<sup>1</sup> T. Makkonen, *Identity, Differences and Otherness* (Faculty of Law of the University of Helsinki, Helsinki, 2000) p. 79.

<sup>2</sup> One woman who was asleep in her house was reported to have been killed by shrapnel.

<sup>3</sup> A Buddhist retreat was the target because the Boeremag would not tolerate 'heathen temples' according to the *Mail and Guardian* of 5 December 2002.

<sup>4</sup> 'The Rise of the Boer al-Qaeda', *Mail and Guardian*, 1 November 2002.

<sup>5</sup> August 2002.

<sup>6</sup> *Mail and Guardian*, *supra* note 4.

<sup>7</sup> 'SA stadium atrocity thwarted', *Mail and Guardian*, 16 December 2002. The *Mail and Guardian* reported on 15 January 2003 that a police informant told the court that there was a plan to blow up the Vaal Dam to cause anarchy. 'Right winger tells court of "Night of Terror".'

## VINODH JAICHAND

The demand for a Volkstaat can be traced to 1994 during the two-stage constitutional negotiations between the South African Government and the African National Congress<sup>8</sup> and the subsequent certification of the Constitution of the Republic of South Africa.<sup>9</sup> Section 235 of the Constitution of the Republic of South Africa Act Number 108 of 1996 sets out the self-determination provisions specifically as:

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

If the right to self-determination exists in the South African Constitution, why is there the need to resort to the reported means to achieve this? I intend to outline the brief history of the negotiation process in South Africa's transition from apartheid to a democratic State. I will also deal with the provision relating to minority rights in the South Africa constitution and in international law and address the fears of some white Afrikaners before attempting to answer this question.

## 2. THE NEGOTIATING PROCESS

Section 235 of the Constitution of the Republic of South Africa arose from Constitutional Principle XXXIV of the Interim Constitution of South Africa of 1993,<sup>10</sup> which was a transitional constitution, a bridge from the old to the new regime, until the legislative body was elected on 27 April 1994. A number of Constitutional Principles, from which no future constitution could depart, were set up by the negotiating forum to ensure the integrity of the process. The Constitutional Court had the power to certify that the text of that constitution was in keeping with the Constitutional Principles for it to have legal force. The full text of Constitutional Principle XXXIV is as follows:

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination shall not be construed as precluding, within the framework of the said right, any constitutional provision for a notion<sup>11</sup> of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

---

<sup>8</sup> Hereinafter referred to as the ANC.

<sup>9</sup> *In Re Certification of the Amended Text of the Constitution of the Republic of South Africa* (2) SA 162 (CC) (1997).

<sup>10</sup> Act Number 200 of 1993.

<sup>11</sup> The Shorter Oxford Dictionary defines a notion as 'an opinion, theory, idea, view, or belief held by one or more people'.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

2. The Constitution may give expression to any particular form of self-determination provided there is substantial support within the community concerned for such a form of self-determination.
3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

The process of negotiation between and amongst the people of South Africa from apartheid to a democracy was a relatively short period that was punctuated by numerous tense and difficult moments during which concessions had to be made.<sup>12</sup> After the release of Nelson Mandela, rapid progress was made towards setting up of the Convention for a Democratic South Africa (CODESA) to negotiate a new constitution. While CODESA was not able to deliver the new constitution, and talks stalled for various reasons, it did produce a Declaration of Intent that set up the principles for future negotiations:

- a. that South Africa will be a united, democratic, non-racial and non-sexist state in which sovereign authority is exercised over the whole of its territory;<sup>13</sup>
- b. that the Constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;<sup>14</sup>
- c. that there will be a multi-party democracy with the right to form and join political parties and with regular elections on the basis of universal suffrage on a common voters roll; in general the basic electoral system shall be that of proportional representation;<sup>15</sup>
- d. that there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances;<sup>16</sup>

---

<sup>12</sup> See generally H. Corder, 'Towards a South African Constitution', 57:4 *The Modern Law Review* (1994) p. 497.

<sup>13</sup> Compare with Constitutional Principle I: 'The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races'.

<sup>14</sup> Compare with Constitutional Principle IV: 'The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government'.

<sup>15</sup> Compare with Constitutional Principle VIII: 'There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and in general, proportional representation'.

<sup>16</sup> Compare with Constitutional Principle VI: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

VINODH JAICHAND

e. that the diversity of languages, cultures and religions of all people of South Africa shall be acknowledged;<sup>17</sup>

f. that all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality before the law.<sup>18</sup>

We agree:

1. that the present and future participants shall be entitled to put forward freely to the Convention any proposal consistent with democracy;

2. that CODESA will establish a mechanism whose task it will be, in co-operation with administrations and the South African Government, to draft all texts of legislation required to give effect to the agreements reached in CODESA.

We, the representatives of political parties, political organisations and administrations, further solemnly commit ourselves to be bound by the agreements of CODESA and in good faith to take all steps as are in our power and authority to realise their implementation.

We, the South Africa Government, declare ourselves to be bound by agreements we reach together with other participants in CODESA in accordance with the standing rules and hereby commit ourselves to the implementation thereof with our capacity, power and authority.<sup>19</sup>

The CODESA agreement was signed by nineteen political groups, including the then Government of South Africa, parties represented in the tricameral Parliament<sup>20</sup>, representatives of 'non-independent homelands'<sup>21</sup>, delegations from the 'independent homelands' of Transkei, Venda and the Ciskei, representatives of the

---

<sup>17</sup> Compare with Constitutional Principle XI: 'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged'.

<sup>18</sup> Compare with Constitutional Principle II: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to, *inter alia*, the fundamental rights in Chapter 3 of this Constitution' and with Constitutional Principle V: 'The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender'.

<sup>19</sup> Corder, *supra* note 12, p. 497.

<sup>20</sup> Republic of South Africa Constitution, Act Number 110 of 1983 (setting up separate chambers in Parliament for whites, 'Coloureds', and 'Indians' each dealing with their 'own affairs'. Africans were excluded and expected to exercise their right to vote in their respective homelands).

<sup>21</sup> These were designated homelands which were not granted 'independence' by the South African Government but functioned as such, for example, KwaZulu.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

African National Congress (ANC), South African Communist Party (SACP) and the Natal/Transvaal Indian Congress. Absent from this group was the Inkatha Freedom Party (IFP) led by Chief Buthelezi and the white right-wing Afrikaner parties who used this as a negotiating strategy.

CODESA set up a number of Working Groups, which achieved a range of chequered results. One commentator referred to this as the 'interrelationship of self determination issues with process issues' in which the process debate constituted indirect negotiation of the self-determination issues.<sup>22</sup> For our purposes, we need to focus on Working Group Two whose mandate was the formulation of constitutional principles. The major issue was that the Government of South Africa and the ANC could not agree on the size of the majorities necessary in an elected constitution-making body for the adoption of a new constitution.<sup>23</sup>

In this pre-independence period, the Government of South Africa insisted on the most important aspects of the new constitution to be agreed upon or subject to change only by very large majorities (70 to 75 per cent) before the constitution-making body was elected.<sup>24</sup> The position of the ANC was that only a duly elected constituent assembly with largely a free hand to write a new constitution would be legitimate and acceptable.<sup>25</sup> This position threatened to derail the emergence of any negotiated result. As a result the reconvened meeting of 15 May 1992<sup>26</sup> achieved nothing of substance and dissolved on 16 May 1992 with peace looking like a distant possibility.<sup>27</sup>

In the aftermath of the collapsed talks, the ANC called for a mass boycott as a demonstration of the size of its support. Almost in retaliation there was a massacre of 48 poor people in Boipatong which was believed to have been carried out by IFP supporters.<sup>28</sup> Violence flared up with regularity, culminating in the Bisho killings in

---

<sup>22</sup> C. Bell, *Peace Agreements and Human Rights* (OUP, Oxford, 2000), p. 123.

<sup>23</sup> Corder, *supra* note 12, p. 498.

<sup>24</sup> Bell, *supra* note 22, p. 125. She comments: 'Although the parties were agreed that a weighted majority be required for the adoption of the Constitution, they disagreed on what the precise weighting should be. The NP [National Party] wanted a weighting that would in practice require their support, while the ANC wanted a weighting that would prevent the NP from stalling the process. The ANC were also concerned that a deadlock breaking device be agreed to, especially in the event of a high weighting, again so that the drafting of the Final Constitution should not be frustrated by the NP, thus making the Interim Constitution with its power-sharing arrangements effectively permanent'.

<sup>25</sup> Corder, *supra* note 12, p. 498.

<sup>26</sup> This ill-fated meeting is sometimes referred to as CODESA II.

<sup>27</sup> According to Corder, the large majority obtained by the Government of South Africa in a white-only referendum 'served to harden its negotiator's stance in the misguided belief that it could hold on to power'. *Supra* note 12, p. 499.

<sup>28</sup> P. Bouckaert, 'South Africa: The Negotiated transition from Apartheid to Nonracial Democracy' in M. C. Greenberg *et al.* (eds.), *Words Over War* (Rowman and Littlefield Pubs., Maryland, 2000), p. 247.

September 1992 by Ciskeian Defence Force soldiers of 28 people in a march called for by the ANC.<sup>29</sup>

Hopes of continued talks were revived when the Government of South Africa and the ANC signed the Record of Understanding in which 400 prisoners were released. It was promised that the security around hostels would be tightened.<sup>30</sup> The carrying of weapons in public gatherings was outlawed.<sup>31</sup> It was also agreed that the elected constitution-making body could have up to two chambers. Further undertakings were given by both parties with regard to a fixed timeframe for the negotiations for the new constitution and adequate deadlock breaking mechanisms during the negotiating process.<sup>32</sup>

As a result of an internal debate in the ANC on the possibility of making concessions on power sharing for a fixed period, reassurances on regional interests, the security forces and civil servants,<sup>33</sup> bilateral talks between the Government of South Africa and the ANC restarted. A joint proposal for power sharing and the acceptance of a five-year interim government of national unity was announced.<sup>34</sup> This left the IFP out in the cold and they joined with the white right-wing Conservative Party together with the 'governments' of Boputhatswana and Ciskei to form the Concerned South African Group (COSAG).<sup>35</sup>

The constitutional conference was restarted in March 1993 with the Pan African Congress (PAC), the Afrikaner Volksunie and the traditional leaders joining the process started in CODESA. Rather than referring to this event as a further sequel to CODESA, it was called the Multi-Party Negotiating Process (MPNP). It is worth noting that the IFP did not join the conference but the KwaZulu 'government' took up the seat of the Natal traditional leader. Decisions were taken on a consensus basis, or, in the alternative, when there was 'sufficient consensus'. Since the IFP was outside this process, it believed that sufficient consensus could not be achieved at the negotiating forum if it did not take part. It was unsuccessful in an application to the Supreme Court in August 1993 when it tried to block the agreement on the election date.<sup>36</sup>

The election date was set for 24 April 1994. It was agreed that an Interim Constitution would be in place and the final Constitution would be drafted by the duly elected constituent assembly. All the necessary legislative and constitutional amendments would be passed by the tricameral Parliament. The constituent

---

<sup>29</sup> Corder, *supra* note 12, pp. 499–500.

<sup>30</sup> These were single-sex residences for African workers who were not permitted to live with their families in urban areas under apartheid. The IFP strongholds were in hostels that housed labour for the mines.

<sup>31</sup> Assegais, shields, knobkerries and axes were brandished in IFP marches while guns were seen in other marches.

<sup>32</sup> Corder, *supra* note 12, p. 500.

<sup>33</sup> The SACP Chairperson, Joe Slovo, broached this subject.

<sup>34</sup> See Bell, *supra* note 22, pp. 127–132 for further details.

<sup>35</sup> Corder, *supra* note 12 p. 500.

<sup>36</sup> *KwaZulu Government v. Mahlangu* (1) SA 626 (T) (1994).



## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

assembly would be bound by the thirty-four Constitutional Principles when it drafted the final constitution. The Constitutional Principles were a key safeguard to ensure that the checklist produced during the negotiations was met.<sup>37</sup>

By this stage COSAG metamorphosed into the Freedom Alliance which was made up of mainly the IFP, the 'governments' of Boputhatswana and Ciskei, the white right-wing Conservative Party, while several white ultra right-wing parties such as the Herstigte Nasionale Party (HNP), the neo-Nazi Afrikaner Weerstandsbeweging (AWB) were also part of the Afrikaner Volksfront. The IFP used spoiling tactics throughout the negotiations 'while its fellow organisations on the white right openly and repeatedly threatened civil war if their key demand of a white ('Afrikaner') State was not conceded'.<sup>38</sup> As a further concession to the white right wing, it was agreed as a transitional arrangement to provide for the over-representation for whites for a limited period on the united local government bodies. But there was still recalcitrance on their part. With violence increasing, it was agreed to concede to the demands of the white right wing by providing for more legislative and financial powers to the provinces, to curtail parliament's power to legislate concurrently for provinces, to provide for a Volkstaat Council with an additional constitutional principle to the right to self-determination,<sup>39</sup> to provide for the double ballot and to extend the period for the registration of parties and submission of candidate lists.<sup>40</sup>

The result of these concessions was dramatic as the Freedom Alliance fell apart with the Afrikaner Volksfront split into two. One faction opted to register as a political party called the Freedom Front while the other searched for the holy grail of the Volkstaat with little success and modest support from a group of supporters in the provinces of Orange Free State, Transvaal and Northern Natal. After a flurry of calls for international mediation,<sup>41</sup> and nine days before the election, Chief Buthelezi announced that the IFP was joining the elections. This concession was granted in return for the recognition of the institution, status and role of the king of the Zulus in the constitution of the province of Natal. The elections were held on 27 April 1994 and certified to be 'substantially free and fair' with the ANC winning 62.65 per cent, National Party 20.39 per cent and Inkatha 10.54 per cent. Of the Afrikaner parties, only the Freedom Front gained seats.

---

<sup>37</sup> Bell, *supra* note 22, p. 125.

<sup>38</sup> Corder, *supra* note 12, p. 503.

<sup>39</sup> Constitutional Principle XXXIV.

<sup>40</sup> Constitution of the Republic of South Africa Amendment Act, Number 2 of 1994.

<sup>41</sup> Bouckaert, *supra* note 28, p. 247.

### 3. CONSTITUTIONAL PROTECTION OF THE RIGHTS OF MINORITIES

There are at least two international law definitions of minorities, one by Francesco Caportorti<sup>42</sup> and another by Jules Deschenes.<sup>43</sup> Caportoti, in a UN study, defines a minority as :

A group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language.

In 1985, Deschenes' study was completed, at the request of Human Rights Commission, and the definition is not much different to Caportorti's:

A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.

In reaching the conclusion that neither one of the experts 'was capable of arriving at criteria upon which membership in a minority could be established', Makkonen<sup>44</sup> observed that the differences were that Deschenes refers to 'citizens', 'numerical minority' and 'achievement of equality in fact and in law', while Caportorti refers to 'nationals', 'numerically inferior' and to 'preservation of culture, traditions, religion and language'. Both exclude non-citizens as well as dominant minorities.

It is significant, from the South African perspective, that no one can deny that white Afrikaners are a numerical minority or are numerically inferior but during apartheid they 'forced the less dominant majority into behaving like minorities'.<sup>45</sup> The current reality is that the whites are still the economically dominant power though they might be politically less dominant. This fact becomes critical when we consider that the aim of the minority, in Deschenes' definition, is 'to achieve equality with the majority in fact and in law'.<sup>46</sup> Consequently, the South African

---

<sup>42</sup> F. Caportorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities of 1977, UNP Sales No. E.91.XIV.2.

<sup>43</sup> J. Deschenes, Promotion, Protection and restoration of human rights at the national, regional and inter-regional levels: Prevention of discrimination and protection of minorities, E/CN.4/Sub.2/1985/31, paragraph 181 (1985).

<sup>44</sup> Makkonen, *supra* note 1, p. 89.

<sup>45</sup> J. Castellino, 'Order and Justice: National Minorities and the Right to Secession', 6 *Int'l Journal of Minority and Group Rights* (1999) p. 402.

<sup>46</sup> See H.A. Strydom, 'Minority Rights in South Africa', 19 *Loyola Los Angeles Int'l and Comparative Law Journal* (1997) pp. 891-92 who adopts a dismissive approach to the

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

Constitution grants a number of rights to all South Africans, minorities included, which protect language; language and culture; cultural, religious and linguistic communities; education; and the right of the accused to be tried, or be given information, in a language he or she understands. Underpinning these rights is the right to equality.

Section Six<sup>47</sup> provides for 11 official languages for South Africa, listed in order of usage, apparently to highlight those least used.<sup>48</sup> Another reason could be historical, that is, to avoid giving prominence to Afrikaans as the alphabetical leader, keeping in mind the student uprising against it as the language of the then oppressor.<sup>49</sup> As the fifth most used language nationally, can Afrikaans be called a minority language? In provinces like the Western Cape, Free State, Gauteng and Northern Cape it is the language of the majority.

---

Capotorti (and perhaps the Deschenes) 'non-dominant' qualification when he states: 'Once we link the need for protection to extraneous considerations such as dominance or non-dominance, this equal and common citizenship ideal is refuted. From a legal rights perspective, the sole question is whether a group has a right or interest which inherently qualifies for protection. Nonetheless, the manner in which the state provides protection for certain groups may of course differ, despite the principle of equity receiving due recognition'.

<sup>47</sup> 6(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3)(a) The national government and provincial governments may use any particular official languages for the purpose of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preference of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must-

(a) promote and create conditions for the development and use of-

- (i) all official languages;
- (ii) the Khoi, Nama and San languages; and
- (iii) sign language; and

(b) promote and ensure respect for-

- (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
- (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

<sup>48</sup> Strydom, *supra* note 46, p. 897.

<sup>49</sup> 16 June 1976.

While there is indeed a large number of official languages, the Section provides for elements of pragmatism by taking into account usage, expense, regional circumstances and the needs and preference of the community. Subsection (4) addresses the imbalance of past practice by calling for all languages to enjoy parity of esteem and equal treatment. The promotion and function of creating conducive conditions is allocated to the Pan South African Language Board. In the case of the historically diminished languages, there is an additional special treatment, apart from equality, to elevate the status and advance the Khoi, Nama and San languages.

Under the right to a fair trial, an accused person has the right to be tried in a language he or she understands, or to be given access to language interpretation so as to understand the proceedings.<sup>50</sup> Whenever the accused needs information during the proceedings, such information must be given in a language he or she understands.<sup>51</sup>

Section 30 protects collective language usage rights and the right to participate in the cultural life of their choice.<sup>52</sup> The only *proviso* is that the usage or participation must be consistent with the Bill of Rights.

Section 31 protects the collective right of persons to enjoy culture, practise religion and to speak one's language with others.<sup>53</sup> These rights may be undertaken individually or in conjunction with associations. There is little doubt that Article 27 of the International Covenant on Civil and Political Rights (ICCPR) influenced this Section, but with a *proviso* reflecting a domestic concern: that the exercise of these rights must be consistent with the Bill of Rights.

The right to education may be included in this discussion.<sup>54</sup> The right to basic education extends to everyone. Further education, however, may be progressively

---

<sup>50</sup> 35(3) Every accused person has a right to a fair trial, which includes the right-  
(k) to be tried in a language that the accused understands or, if that is not practicable, to have proceedings interpreted in that language.

<sup>51</sup> 35(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

<sup>52</sup> 30 Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

<sup>53</sup> 31 (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

(a) to enjoy their culture, practice their religion and use their language; and  
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>54</sup> 29 (1) Everyone has the right-  
(a) to a basic education, including adult basic education; and  
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

available and accessible through reasonable measures undertaken by the State. The right to receive education in all official languages or in the language of choice depends on where that education is reasonably practicable. The State is obliged to consider all reasonable alternatives for effective access including single medium schools, taking into account equity, practicability and redressing the imbalance created by apartheid policy.<sup>55</sup> The observations of Makau wa Mutua, are material for understanding the context of this provision:

Prior to 1990, the State in its education budget spent eleven times more money on each white pupil than on each black pupil; by 1994 the State still spent four times as much for the education of a white as for a black child. Only eleven percent of blacks graduate from high schools as compared with seventy percent of whites. The pass rate for matriculation in 1994 was ninety-seven percent for white students and less than fifty percent for black students.<sup>56</sup>

Private education may be established and maintained at the expense of the citizen, provided that the independent institutions do not discriminate on the basis of race, are registered with the State and maintain at least the standards compared to public schools. Such independent schools may qualify for State subsidies.

It must be noted that the protection of minority rights was agreed to by the ANC fairly early in the negotiations even in the absence of right-wing Afrikaner demand. The CODESA Declaration of Intent contained an 'acknowledgement' of the languages, cultures and religions of all people of South Africa. Constitutional

---

order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

- (a) equity;
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
- (a) do not discriminate on the basis of race;
  - (b) are registered with the state; and
  - (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

<sup>55</sup> This practice appears to be in keeping with the decision in *Minority Schools in Albania Advisory Opinion*, where the majority of the court explained the meaning of equality in law and fact as follows: 'Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.' Permanent Court of Justice, 1935 Series A/B-No.64.

<sup>56</sup> 'Hope and Despair for a New South Africa: The Limits of the Rights Discourse', 10 *Harvard Human Rights Journal* (1997) 63, p. 72.

## VINODH JAICHAND

Principle XI elevated the acknowledgement to ‘the right to protection’ and ‘the creation of conditions for their promotion’.

Chapter 9 Section 185 of the Constitution, which is linked to Sections 30 and 31, provides for a State Institution Supporting Constitutional Democracy that has been named the Commission for The Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>57</sup> This provision, also, was a concession granted to the Afrikaners in order to make the 1994 election more inclusive.<sup>58</sup>

The function of the Commission includes the duty to promote respect for cultural, religious and linguistic communities and for peace, friendship, humanity, tolerance and national unity among the communities. It may recommend the establishment or recognition of a cultural council. The Commission may also monitor, investigate, research, educate, lobby, advise and report on matters concerning the rights of cultural, religious and linguistic communities. With regard to a human rights issue, the Commission may report the matter to the Human Rights Commission to act on. Additional powers may be granted to the Commission by legislation. On 10 March 1999 it was announced in Parliament that the Volkstaat Council was to disband at the end of March 1999 and that the issues pursued by the Council would be ‘taken forward through the Section 185 “Cultural Rights Commission”, to be established later [that] year’.<sup>59</sup>

---

<sup>57</sup> 185 (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are-

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

<sup>58</sup> Strydom, *supra* note 43, p. 901.

<sup>59</sup> Third Annual Session, Second Parliament, Parliament of the Republic of South Africa. Announcements, Tablings and Committee Reports, Item K, 10 March 1999. Schedule 6 of the Constitution of the republic of South Africa, Act Number 108 of 1996, in section 20(5)(a) provides for this eventuality:

‘The Volkstaat Council established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a member of the Council when the new

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

What is clear from this range of protection of minority rights is the preoccupation with egalitarianism arising from the notorious history of apartheid, which privileged the minority at the expense of the majority. The new order guarantees against reverting back into that terrible era with a number of qualifications to the minority rights granted. This assurance was clearly articulated in Section Seven:

- 1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- 2) The state must respect, protect and fulfil the rights in the Bill of Rights.
- 3) The rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill.

The Constitution liberated South Africa from its past and sought redress of the inequalities that still beset the society. The CODESA Declaration of Intent translated itself easily into some Constitutional Principles, while other Constitutional Principles were the product of deals struck by the political exigencies and were in turn cautiously transferred into the Constitution. Hugh Corder observed this as a clear sign of distrust: 'It is as though there is a belief that over-elaboration of legal stipulations can ensure that parties play by the rules of the political game, so that, where there is a danger of a future majority government abusing its position, many safeguards are built into the law'.<sup>60</sup>

In order to ensure that the planned liberation from apartheid did take place irrespective of whoever was in power, the ANC negotiators ensured that the Equality Clause in the Bill of Rights expressly recognised that by calling for positive action and defining unfair discrimination:

9.
  - (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
  - (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
  - (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy,

---

Constitution takes effect, continues to hold office in terms of the legislation applicable to-  
(i) any amendment or repeal of that legislation; and  
(ii) consistency with the new Constitution.'

<sup>60</sup> Corder, *supra* note 12, p. 523.

## VINODH JAICHAND

marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The affirmative action policy has been targeted as dreaded reverse discrimination by right-wing Afrikaners, despite the fact that the practise of apartheid was essentially an affirmative action programme. Discrimination *per se* is not prohibited in South African law, but *unfair* discrimination is. However, the fear of not being able to hold on to any vestiges of power and the ‘wobble-room’ created in the Constitution caused some white Afrikaners to embrace the Bill of Rights with much adoration. At the same time other factions held out until the eleventh hour of negotiations to cut the deal on the Volkstaat. One commentator reached the following conclusion:

While the rights discourse had the power to galvanize the oppressed and garner the sympathy of some segments of the middle and upper class during the struggle against official apartheid, the Mandela government’s near total dependence on rights discourse as the tool for transformation of apartheid is a mistake. First, the double-edged nature of rights language has already become evident in South Africa. The new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic status quo.<sup>61</sup>

#### 4. PERCEPTIONS OF MARGINALISATION OF WHITE AFRIKANERS

Some Afrikaner critics of South Africa’s liberal democracy point to the emerging practice of the new South African Government. To dismiss them as the utterances of those who yearn for the past may be too simplistic.<sup>62</sup> However, some perspective is necessary for the understanding of those who now feel marginalised.<sup>63</sup> It must also

---

<sup>61</sup> wa Mutua, *supra* note 56, p. 67.

<sup>62</sup> Strydom, *supra* note 46, p. 874, comments as follows: ‘Not to be dismissed, though, are the varied reactions against the present dispensation and especially against the manner in which it is implemented. To belittle the reaction as an inability to accept the fundamental changes in society or as an attempt to secure past privileges is not only misplaced in many instances, but may also be a deliberate disregard for the interests and aspirations of certain sections of society.’

<sup>63</sup> R.M. Fields, ‘In Search of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights in South Africa and the United States’, 16 *Boston College Third World Law Journal* (1996) p. 75: ‘Despite the failure to construct a consistent definition or international standard of protection, an overriding characteristic of minorities in a majority society is their existence in a ‘disadvantageous situation.’ This situation is described as those circumstances



## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

be kept in mind that there are many countries in which the government is not entirely representative of the whole population.<sup>64</sup>

Professor Hercules Booysen<sup>65</sup> summarised some of the Afrikaner sentiment as follows:

Considering certain aspects of the government's policy, it is clear that despite the human rights and democratic ideals recited in the 1996 Constitution, the current government is as insensitive towards the right to self-determination of the people as any previous government. The government's insensitivity is clearly evidenced in many of its policies. For example, the government has deliberately 'cleansed' the civil service of Afrikaners<sup>66</sup> and has appointed in their place, blacks who are unable or refuse to speak Afrikaans to serve Afrikaans cities and regions. The government has also forced Afrikaans speaking universities and schools to become double medium (using both languages) or only English speaking,<sup>67</sup> and has allowed traditional<sup>68</sup> Afrikaner communities to be over-populated, and swamped with non-Afrikaners.<sup>69</sup> Finally, the government has grouped different communities together with the sole purpose of allowing non-Afrikaners to govern Afrikaner communities.<sup>70</sup>

Professor Booysen's solution to all of this is that a federal constitution would have been a more appropriate vehicle for the aspirations of minorities like the Afrikaners. He warns that with its 'failure to provide for the right to self-determination and minority rights, the 1996 Constitution may achieve the opposite effect – a state of total oppression, or perhaps even political violence'.<sup>71</sup>

He claimed that none of the constitutional systems since the Union in 1910, neither the Republic Constitution of 1961 nor the tricameral system of 1983,

---

where persons belonging to a minority group are required to exert greater efforts than those members of the majority to participate in everyday life.

<sup>64</sup> Makkonen, *supra* note 1, p. 70 (quoting Hannikainen).

<sup>65</sup> H. Booysen, 'South Africa: In Need of a Federal Constitution for its Minority Peoples', 19 *Loyola of Los Angeles Int'l and Comparative Law* (1997) p. 806.

<sup>66</sup> This appears to be a refusal to accept the new equality principle in practice.

<sup>67</sup> Compare this emotive statement with Section 29(2) of the Bill of Rights which sets out the right and the rationale for it.

<sup>68</sup> The meaning of 'traditional' is unclear.

<sup>69</sup> Strydom, *supra* note 46, p. 888, observes that: 'Education has and continues to be one of the most contested and politicised issues in South Africa. The social engineering and experimentation that education was subjected to under apartheid rule is partly responsible for the intensity of this debate. In post-apartheid South Africa, education has once again fallen prey to the manipulating and exploitative strategies of political opportunists. As a result, educational issues are a highly divisive influence and are easily instrumentalized in pursuit of cheap political gain.'

<sup>70</sup> Strydom. *Supra* note 46, p. 883. This is a direct result for all people in the new South Africa. The Accord on Afrikaner Self-Determination between the Freedom Front, the ANC and the Government of South Africa purportedly supports a non-racial South Africa.

<sup>71</sup> Booysen, *supra* note 65, p. 789.

## VINODH JAICHAND

attended to all the needs of South African people, but the homeland policy for blacks did achieve *de jure* independence from South Africa,<sup>72</sup> even though no other country in the world recognised the homelands as independent countries. His solution is summarised in the following words:

If a proper homeland federation, or even a confederation, had been founded among the different homelands and the rest of South Africa, a constitutional structure that reflected South Africa's cultural and ethnic diversities would have been created. Yet, despite academic discussion suggesting a homeland confederation, this possibility was never realised.<sup>73</sup>

Another commentator, Professor Strydom, analysed the new language of transformation in which the dominant feature is in the African cultural value system.<sup>74</sup> He identified three principles. First, the composition of everything, including non-state institutions, has been determined by the majoritarian principle, which ignores regional peculiarities. Secondly, there has been a call for the Africanization and democratization in the education field, which means that all transformation had one particular cultural and racial bias.<sup>75</sup> Finally, critical remarks by whites are dismissed as Euro centric and racist. He continues as follows:

These attitudes ultimately lead to the alienation and marginalization of groups that do not form part of the dominant culture and create relationships of domination and subordination – something that should be quite familiar to the new governing elite. Where this poses a real or perceived threat to the rights and interests of communities, the tendency exists to seek protection from a familiar and enclosed 'cultural' environment and to reinforce it with political mechanisms. This is perhaps the true tragedy of the present situation in South Africa: the old and the

---

<sup>72</sup> The purpose of the homeland policy was to ensure that the rest of South Africa would be available for whites. The homelands received recognition from no other country in the world except South Africa. See generally J. Dugard, 'South Africa's Independent Homeland: An Exercise in Denationalization' 10 *Denver Journal of Int'l Law and Policy* (1980) p. 11 and H.J. Richardson III, 'Self-Determination, International Law and the South African Bantustan Policy', 17 *Columbia Journal of Transnat'l Law* (1978) p. 185.

<sup>73</sup> Booyesen, *supra* note 65, p. 793. This statement ignores the full meaning of Constitutional Principle I and reflects some Afrikaners' need to be separated from other South Africans. This may well have been one reason for the split in the Afrikaner ranks because, in spite of the claim being made in the name of all Afrikaners, some were candidates for the elections in 1994.

<sup>74</sup> Compare this with the previous dominant feature of minority Afrikaner tradition imposed on the majority.

<sup>75</sup> Compare this with the Christian National Education policy that was foisted upon all, even if an individual were not Christian, Afrikaner or white.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

new communicate with the same vocabulary and employ the same strategies. The symbiosis is nearly perfect.<sup>76</sup>

There is a suggestion in the words quoted above that, in the process of nation building, much of the Afrikaner culture is being diluted or assimilated into the African culture through institutionalising the linguistic and cultural differences into constitutional mechanisms. The lament for missed opportunities had been heard before in the search for a place for human rights in South African constitutional law. The South African Law Commission issued the Report on Group and Human Rights in 1989 under the leadership of Judge Pierre Olivier in which the stress was not on individual human rights but on group rights and the rights of communities. It was an attempt to find a system of human rights that would resonate with separate development for groups in keeping with the ideology of apartheid. The Report finally recommended individual protection rather than group protection of human rights.

Professor Booysen's definition of Afrikaners was stated in the following terms: 'Boers and Afrikaners denote the same people. Both groups' ancestors are descendants from the Netherlands and other European countries and both groups speak Afrikaans, a language derived from Dutch.'<sup>77</sup> Contrast this statement with the reaction of Harold Parkendorf, a political commentator who speaks Afrikaans, who was quoted in the Parliamentary debate on Afrikaners: 'To have a debate about Afrikaners seems almost absurd. Which Afrikaners? Who is an Afrikaner? Who will speak on their behalf? Hopefully, there will never be a debate about Afrikaners again. They are not separate enough from the rest of South Africa to be discussed as such.'<sup>78</sup>

In the various attempts to define groups whose existence has been presumed to be readily and objectively established there has been little success. The definitions start on the assumption of the existence of objective group characteristics. They fail to see how identities are constantly being formed and reformed in complex social processes. The best example of this is apartheid South Africa's attempt to grasp this nettle through the passing of the Population Registration Act which required all South Africans to be classified into one of three main racial categories: White, Bantu or Coloured.<sup>79</sup> The category of Coloureds included the subgroups of Indian and Asian. Classification into these categories was based on appearance, social acceptance and descent. A White person was defined as 'in appearance obviously a white or generally accepted as a white person'. A person could not be considered white if one of his or her parents was not white. A person may be regarded as 'obviously white' if one would take into account 'his habits, education, speech and deportment and demeanour'. No attempt was made to classify an Afrikaner as a

---

<sup>76</sup> Strydom, *supra* note 46, p. 879.

<sup>77</sup> Booysen, *supra* note 65, fn. 13.

<sup>78</sup> Report of the Government of the Republic of South Africa on the Question of Afrikaners, National Assembly, Cape Town, 24 March 1999.

<sup>79</sup> Number 30 of 1950.

subgroup of White. A Bantu would be expected to be a member of an aboriginal tribe or race. A Coloured is one who is not White or Bantu. There were various subgroups of Coloured and a catch-all subgroup called 'Other Coloured'. Similarly, there were early attempts to ascertain what constituted a minority. The Permanent Court of International Justice stated that the existence of a minority is a question of fact. 'The question just remains: what are the "facts" that are to be taken into account, and what to do in case people disagree on the meaning or relevance of these "facts"?' asked Makkonen.<sup>80</sup>

Would a so-called 'Coloured' person who speaks Afrikaans be an Afrikaner or Boer? If only white Afrikaners are considered, that qualification would constitute unfair discrimination in terms of Section Nine of the Bill of Rights. The words 'other European countries' appear to be vague. Would a Portuguese or Austrian who speaks Afrikaans be an Afrikaner?

This suggestion is not as farfetched as it appears at first sight. An Austrian Ministry of Interior report dated 22 August 2000 speaks of right-wing extremism in Austria where it is revealed that some have fled to South Africa in order to avoid prosecution under the anti-Nazi laws. The report names a Cape Town book club that provides refuge and arranges jobs for such persons, usually as tour guides for German-speaking tourists. Another report published in Vienna confirms these details and links the HNP to the neo-Nazi group who romanticise the actions of Wilhelm Ratte, an individual convicted for the use of arms when he occupied Fort Schanskop as a method of protesting against the alleged deprivation of the rights of the Boers.<sup>81</sup> The Austrian right-wingers have been reported to have associations with the American Ku Klux Klan.

If membership to such a group is tacitly or expressly permitted by South Africa, what would its obligations be under the International Convention on the Elimination of All Forms of Racial Discrimination, especially under Article 3 which calls on States Parties to prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under their jurisdiction?

The First Interim Report of the Volkstaat Council, created in the post-CODESA but pre-1996 Constitution period, avoided the definition of Afrikaners.<sup>82</sup> Instead it spoke of citizenship:

The following persons are entitled to citizenship of the Afrikaner Volkstaat:

- a) All South African citizens who actively share, practice, exercise and maintain the Afrikaans language, culture and traditions, or who identify therewith.

---

<sup>80</sup> Makkonen, *supra* note 1, p. 95.

<sup>81</sup> 'South Africa: Area of retreat for German speaking rightwing extremists?' 36 *INDABA*. *INDABA* (2002) *INDABA*. *INDABA* is the quarterly magazine of the Southern Africa Documentation and Co-operation Centre, located in Vienna, Austria.

<sup>82</sup> May 1995, pp. 79–80.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

- b) who by descent belong to the Afrikaner people or have been assimilated into the Afrikaner people;
- c) who feel bound to the protection, exercise and maintenance of the Afrikaans language, culture and traditions;
- d) who actively propagate an Afrikaner Volkstaat; and
- e) who are accepted as Afrikaners by their fellow Afrikaners.

### 5. AFRIKANER RELIANCE ON INTERNATIONAL HUMAN RIGHTS LAW

Professor Booysen represented the Volkstaat Council before the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution*.<sup>83</sup> The argument put forward was that if the dispute on the right to self-determination were to be heard by the Constitutional Court, it should be decided by objective criteria as determined by international law. The Constitutional Court did not deal with this argument, confining itself only to the certification process in terms of the Constitutional Principles.

In a symposium on minority rights, Professor Booysen cited the United Nations Declaration on Granting of Independence to Colonial Territories and Peoples supposedly in support of his argument that 'people determine their political status and freely pursue their political development' by totally ignoring one salient fact: that this Declaration deals with the granting of independence from *colonial domination*.<sup>84</sup> Therefore, this Declaration does not advance his legal case because there is no evidence of colonial domination. He concluded that a 'government cannot force upon [the people] an unwanted form of self-determination' and cited the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>85</sup> in support of that assertion.<sup>86</sup> This conclusion is more political than legal.

Is there a settled *corpus* of law on self-determination that would permit objective criteria to be drawn upon to settle such cases? Professor Strydom also referred to the 'universally accepted' concept of self-determination when he stated:

By making Charter law the point of reference, the implementation of Constitutional Principle XXXIV will have to be considered against the background of international law developments. Furthermore, section 231(4) of the Interim Constitution and section 232 of the 1996 Constitution make customary international law an integral part of South African law. Recently the South Africa government became a signatory to

---

<sup>83</sup> (4) SA 744 (CC) (1996), (10) BCLR 1245 (CC) (1996).

<sup>84</sup> G.A. Res. 1514, UN GAOR, 15<sup>th</sup> Sess., UN Doc. A/L 323 (1960).

<sup>85</sup> G.A. Res. 2625, UN GAOR, 25<sup>th</sup> Sess., UN Doc. A/8082 (1970).

<sup>86</sup> Booysen, *supra* note 65, p. 803.

## VINODH JAICHAND

the International Covenant on Civil and Political Rights (1966). This new framework and the developments that have taken place open up various possibilities for minority rights protection.

Most of the advancement on the contemporary law on minority rights, in fact, has occurred outside the United Nations system, such as the Framework Convention for the Protection of National Minorities (1995) in the Council of Europe.<sup>87</sup> In his analysis of the history of United Nations Charter provisions on self-determination and minority rights, Professor David Wippman concluded that the final choice was for a general system respecting universally applicable individual rights supported by a strong prohibition against discrimination based on race, ethnicity, language or religion. In doing so, the United Nations avoided 'the internally divisive effects of conferring special rights on minority group members, and of singling out particular countries on which to impose obligations concerning the conduct of their domestic affairs not generally demanded of all states'.<sup>88</sup>

Any reliance on the United Nations system for a solution would be ill advised because the threshold question remains: 'Are the Afrikaners a people?' for them to qualify for the right to self-determination under international law. After an extensive examination of this issue by Dr. Castellino, he concludes that the right to self-determination, as envisaged in Article One of the ICCPR, belongs to a whole people.<sup>89</sup> This conclusion is reinforced in Section 235 of the Constitution of the Republic of South Africa Act, which speaks of the 'right of the South African people as a whole to self-determination'. Therefore, this line of argument does not support the Afrikaner cause.

If the Afrikaners made a communication, after exhausting all available domestic remedies under the First Optional Protocol of the International Covenant on Civil and Political Rights, the treaty monitoring body would be the Human Rights Committee.<sup>90</sup> The Human Rights Committee has already ruled in the *Mikmaq Tribal Society* case that minorities were not a people.<sup>91</sup> In any case, the issue of minority rights is determined under Article 27 of the ICCPR which states: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. Articles 15 and 30 of the Constitution of the Republic of South Africa appear to cover South Africa's obligation under the ICCPR very adequately.

---

<sup>87</sup> See D. Wippman, 'Symposium: Human Rights on the Eve of the Next Century: Aspects of Human Rights Implementation: The Evolution and Implementation of Minority Rights' 66 *Fordham Law Review* (1997) p. 597.

<sup>88</sup> *Ibid.*, pp. 602–03.

<sup>89</sup> Castellino, *supra* note 45, pp. 396–98.

<sup>90</sup> Ratified by South Africa on 28 November 2002, under Articles 1 and 2.

<sup>91</sup> UN Doc. A/39/40 (1984) 200.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

South Africa ratified the African Charter on Human and Peoples' Rights and a complaint may be sent to the African Commission on Human and Peoples' Rights ('African Commission').<sup>92</sup> Assuming that the complaint is admissible,<sup>93</sup> the African Commission might well decide the matter in the way it did in *75/92 Congres du Peuple Katangais/Zaire* in the 8<sup>th</sup> Annual Activity Report: 1994–1995.<sup>94</sup> The communication was sent by the leader of the Katangese Peoples' Congress requesting the African Commission on Human and Peoples' Rights to recognise the group as a liberation movement, because such recognition would make it eligible for support from States Parties for the independence for a region, Katanga.<sup>95</sup> The group might well have relied on Article 20(3) for their claim: 'All people shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural'.

The African Commission recognised that all people have a right to self-determination, as stated in Article 20(1).<sup>96</sup> The African Commission went on to say that there is some controversy as to the definition of peoples and the content of the right to self-determination. The case was not based on a right of all of the people of Zaire, but for the Katangese, who consist of one or more ethnic groups, as a group. The African Commission was of the opinion that self-determination may be exercised in numerous ways but always within the principles of sovereignty and territorial integrity. As such the African Commission called on the people of Katanga 'to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire'. Therefore it is unlikely that the case of Afrikaner self-determination, by analogy, is likely to be successful.

In summary, the case of the Afrikaner right to self-determination under international human rights law would need to overcome the hurdle of whether they are a people under colonial domination. To be eligible for rights as a minority, Afrikaners would have to prove that their cultural, linguistic and religious rights are deprived by the action of the State. Even if claims are made that they are an 'indigenous' group, this can be dismissed as political rhetoric, because that could be easily disproved.<sup>97</sup>

---

<sup>92</sup> On 9 July 1996.

<sup>93</sup> Under Article 56, several requirements for admissibility are set out, including the fact that all local remedies, if they exist, must have been exhausted.

<sup>94</sup> Institute for Human Rights and Development, *Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights*. Banjul. <[www.AfricanInstitute.org](http://www.AfricanInstitute.org)>.

<sup>95</sup> Hereinafter referred to as the African Commission.

<sup>96</sup> 'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.'

<sup>97</sup> Jose Martinez Cobo (Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities) defines them 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

## 6. IMPEDIMENTS TO SELF-DETERMINATION

As stated previously, in order to draw the right-wing Afrikaner into the constitution making process at the eleventh hour, the ANC agreed to Constitutional Principle XXXIV, which the apartheid state passed in 1994.<sup>98</sup> The Act dealt with all the major concessions to the right-wing Afrikaners.<sup>99</sup> Chapter 11A of the Interim Constitution made provision for the establishment of a Volkstaat Council whose composition, function and powers were spelled out:

- 184A (1) The establishment of a Volkstaat Council is hereby authorised.  
(2) The Council shall consist of 20 members elected by members of Parliament who support the establishment of a Volkstaat for those who want it.  
(3) The Council shall conduct its affairs according to the rules made by the Council.

### Functions of the Council

184B(1) The Council shall serve as a constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat, and shall for these purposes be competent:

- a) to gather, process and make available information with regard to possible boundaries, powers and functions and legislative, executive and other structures of such a Volkstaat, its suggested constitutional relationship with government at national and provincial level, and any other matter directly relevant to the establishment of such a Volkstaat;  
b) to make feasibility and other relevant studies with regard to the matters referred to in paragraph (a);

---

distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of that 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'. Clearly, the Afrikaners cannot prove the first leg of this definition, namely, that of 'historical continuity with pre-invasion and pre-colonial societies that developed on their territories...'

<sup>98</sup> Constitution of the Republic of South Africa Amendment Act, Number 2 of 1994.

<sup>99</sup> Concessions included, but were not limited to, the following: the name of the province of Natal was changed to 'KwaZulu-Natal'; the legislative powers of the provinces were extended; greater powers were given to provinces over financial matters; provinces were allowed to adopt constitutions for their own legislative and executive functions; the Volkstaat Council was established; provision was made for separate ballot papers for national and provincial elections; boundaries, powers and functions of the provinces were entrenched; and provisions were made for self-determination for a community sharing a common cultural and language heritage.



## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

c) to submit representations and recommendations to the Constitutional Assembly and the Commission on Provincial Government with regard to the possible establishment of a Volkstaat and any matters in connection therewith; and

d) to perform such other functions as may be prescribed by an Act of Parliament.

(2) The procedures to be followed by the Council in the performance of its functions under subsection (1) shall be prescribed by an Act of Parliament.

(3) The procedures provided for in this Constitution with regard to the finalization of the provincial boundaries shall not be construed as precluding the establishment of such a Volkstaat, and in the event of the acceptance of the concept of the Volkstaat, alternative provision shall be made by an Act of Parliament for the finalisation of the boundaries of any affected province or provinces.

The purpose of the Volkstaat Council was to advise the Constitutional Assembly on the creation of a 'homeland', or on territorial self-determination, for Afrikaners. Most of the right-wing Afrikaners boycotted the two-stage constitutional process and as a result were unable to establish their credibility and legitimacy amongst the negotiating partners. As the door threatened to shut on them, they agreed to the establishment of the Volkstaat Council. They delivered this news in politically charged language and raised the expectation of their followers such that many believed they were going to get their own 'homeland' to live in it under their own laws: 'The Volkstaat must be a cultural home for the Afrikaner, in the same way as Israel is for the Jews. It must be a place where our children and grandchildren can maintain their political self-determination to ensure the survival of the Afrikaner nation as a cultural group'.<sup>100</sup>

Even the name chosen for this advisory council was emotive: 'Volkstaat', which translated as the 'Peoples' State'. It must have been clear to the members of the Council that if the Volkstaat territory was founded, it would be an integral part of South Africa because of Constitutional Principle I which provided that the new State would be one sovereign State.<sup>101</sup> However, the First Interim Report of the Volkstaat Council signalled a clear intent when it stated that the proposed Volkstaat reserved the power to declare itself independent from the Republic of South Africa if there was 'suppression or negation of the Afrikaners' right to self-determination'.<sup>102</sup>

The new State of the Republic of South Africa was to be underpinned by strong egalitarian principles of non-racialism and non-sexism. It must have been clear that all the laws of the rest of South Africa would apply to them, including the policy of affirmative action as a means of achieving equality. Thus, the territorial self-

---

<sup>100</sup> As quoted in Strydom, *supra* note 46, pp. 876–877.

<sup>101</sup> See note 11, *supra*.

<sup>102</sup> May 1995, p. 72.

determination sought could never replicate itself in any form of 'neo-apartheid'. The First Interim Report of the Volkstaat Council appeared to deviate from this view when it stated:

A programme of affirmative action threatens the individual rights of those not qualifying as beneficiaries under the programme and cannot be reconciled with fundamental rights. Such a programme can be only a temporary measure and should be completed in one year. The concept of affirmative action should not be incorporated in the new constitution.

It went on further to say that individual 'cases of affirmative action must be dealt with by legal process and should not take place on the basis of discretionary government action'.<sup>103</sup> These statements do not take cognisance of the effects of apartheid on the majority of the people of South Africa for a sustained period.

The Volkstaat Council proposed the introduction of a federal provincial system marking out a specific territory within the former Boer Republic's historical boundaries where Afrikaners comprised the majority. It recommended that this area of 3.2 per cent of the whole country be a constituent State within South Africa.<sup>104</sup> However, the Constitutional Assembly was not convinced and did not accept the proposals mainly because that territory was disputed even amongst some Afrikaners. Some believed the Volkstaat should be in the Northern Cape, others that the old Boer Republic should be reinstated, while yet others wanted the whole of South Africa to be the Volkstaat.<sup>105</sup> Constitutional Principle XXXIV.2 calls for 'substantial support within the community concerned' not 'some' support. The Second Report of the Volkstaat Council tabled some support for a Volkstaat, but for many varied reasons.<sup>106</sup>

A further explanation for the non-acceptance of this proposal was that the federal option had been discussed and dismissed much earlier in the negotiations when the right-wing Afrikaners chose to be outside the process. It is also clear that if substantial support were achieved at that stage, the tenth (Volkstaat) province may well have been accepted because of the legal space created for it. However, it is theoretically possible to achieve self-determination through an amendment of the Constitution. That is, if two-thirds majority support can be found in the National Assembly and the support of six provinces in the National Council of Provinces, the Volkstaat may come into being.<sup>107</sup> Prior to that, extensive negotiations with the affected provinces, on the loss or gain of territory, must result in their consent for the creation of any new province. The ANC Government was reported as having sixty-five per cent of the National Assembly as its members.<sup>108</sup> After the elections

---

<sup>103</sup> May 1995, p. 64.

<sup>104</sup> Booysen, *supra* note 65, p 796.

<sup>105</sup> First Interim Report of the Volkstaat Council, May 1995, p. 94.

<sup>106</sup> September 1995.

<sup>107</sup> Chapter 4, Section 74(1) of the Constitution of the Republic of South Africa Act, Number 106 of 1996.

<sup>108</sup> 'Defectors Swarm to Ruling Party', *Mail and Guardian*, 4 April 2003.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

on 14 April, 2004, the ANC obtained nearly seventy percent which makes the possibility very remote.<sup>109</sup>

Some of these issues were addressed by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution 1996*.<sup>110</sup> It was argued that Constitutional Principle XXXIV did not impose an obligation on the Constitutional Assembly as the other Constitutional Principles did. Therefore, Constitutional Principle XXXIV had to be interpreted in the light of agreements and memoranda produced by the Freedom Front, the ANC and the South African Government in 1994.<sup>111</sup> The Constitutional Court did not agree with this argument and stated that the proposed Volkstaat had to be pursued 'constitutionally' through representations to the Constitutional Assembly and the Commission on Provincial Government.<sup>112</sup>

In reply to the contention that the 1996 Constitutional text did not comply with Constitutional Principle XXXIV, the Constitutional Court disagreed:

Our task is simply to test the terms of the NT [new text] against the CPs [Constitutional Principles]. Whatever subjective hopes any parties might have had as a result of the insertion of CP XXXIV, its language for present purposes is clear. Its basic thrust is that constitutional provision for the notion of the right to self-determination by any community sharing a common cultural and language heritage within a territorial entity shall not be precluded, notwithstanding the fact that South Africa is one sovereign state, as required by CP I [Constitutional Principle I]. This is clearly a permissive rather than an obligatory provision. The only mandatory provision in the CP is that if a territorial entity has in fact been established in terms of the IC [Interim Constitution] before the NT is adopted, then such entity must be entrenched in the NT. No such entity had in fact been established, so no obligatory entrenchment is made.<sup>113</sup>

## CONCLUSION

The reported acts of the 'Boeremag' cited at the beginning of this article may in fact be the first demonstrations of the intent to campaign politically for the Volkstaat as a liberation movement. At best, they might be seeking attention for a cause that appears to have been forgotten. Or the acts themselves may constitute the launch of a long-term struggle in which new heroes are created for that cause.

One submission before the Volkstaat Council appears to bear this out:

The Afrikaner must try to manipulate the balance of power in South Africa in his favour by means of political, economical and even military

---

<sup>109</sup> 'Mbeki: There is life after elections', *Mail and Guardian*, 17 April 2004.

<sup>110</sup> (4) SA 744 (CC) (1996), (10) BCLR 1245 (CC) (1996).

<sup>111</sup> Paragraph 215.

<sup>112</sup> Paragraph 216.

<sup>113</sup> Paragraph 218.

## VINODH JAICHAND

power so that the government will accept and get used to the idea that secession and independence are in fact a solution. Such a process can be facilitated, speeded up and stand a greater chance of success if there is foreign support for it.<sup>114</sup>

Dr. Luyt argues for the creation of a legitimate cause through the use of propaganda. Usually propaganda does not necessarily require an examination of the law and facts, but rather highlighting the plight of a group of people. A repetition of the plight is necessary for the cause to take root. This would account for not fully substantiating claims that the Afrikaners are a 'people' in terms of the right to self-determination, or a 'minority', or even 'indigenous', if it would assist the cause.

A different view is found from Dr. C.J Jooste,<sup>115</sup> a member of the Volkstaat Council since 1994, who is of the opinion that Afrikaner resistance to the circumstances about which they feel aggrieved are not yet that serious to attract high-level attention. He believes that the constitutional possibilities need to be investigated and exhausted, even though the initial assessment points to legal uncertainties. However, the many conflicting demands, expectations and destinations of Afrikaners undermine their own cause. He concludes that the current thinking about a Volkstaat does not have a domestic and international appeal and the idea is 'not ready for export'.<sup>116</sup>

Another explanation for these acts of violence might be to give notice of their impotence in the lack of forward momentum on self-determination and minority rights, as the call for nominations for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities<sup>117</sup> was made on 11 February 2003 by the South African Government, more than seven years after the insertion of Constitutional Principle XXXIV.<sup>118</sup> Since the mandate of the Volkstaat Council has been transferred to this Commission for further progress, it is important that this Commission begin work soon and the chosen Commissioners demonstrate the seriousness of purpose to win over those who doubt the Government's will on this matter.<sup>119</sup>

In hindsight, it might be concluded that the Volkstaat Council's Reports were perceived as bargaining too aggressively for the Afrikaner right to self-

---

<sup>114</sup> N. Luyt, 'The Internationalisation of the Afrikaner's Struggle for Self-Determination', submitted to the Volkstaat Council in 1997.

<sup>115</sup> C.J. Jooste, 'Afrikaner Claims to Self-determination' (Freedom Front, Pretoria, 2002), p. 72.

<sup>116</sup> *Ibid.*

<sup>117</sup> In the Joint Meeting of the Provincial and Local Government Portfolio and Select Committees held on 2 October 2001 to discuss the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Bill, white Afrikaners were represented by three organizations: Group of 63; Federasie van Afrikaanse Kultuurvereniging; and the Afrikanervryheidstigting. A fourth, the Afrikanerbond, made its submission by tabling a document.

<sup>118</sup> Government Gazette, *supra* note 117. The closing date was 30 April 2003.

<sup>119</sup> See *supra* note 56.

## SELF-DETERMINATION AND MINORITY RIGHTS IN SOUTH AFRICA

determination by the National Assembly in 1995, almost to the detriment of hard-won Constitutional Principles and a nearly completed constitution. Perhaps the decision by the Afrikaner leaders to remain outside the CODESA and Multi-Party Negotiating Process was ill advised. But Section 235 of the Constitution of the Republic of South Africa has left the door to reasonable proposals on self-determination still open. In the absence of clear support from international human rights law for the right to self-determination (or the notion of the right to self-determination), it might be best to follow the historically tried-and-tested route, a negotiated solution.



## KENYA

### INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

*Albert K. Barume*\*

#### INTRODUCTION

The Ogiek constitute one of the few hunter-gatherer communities of East Africa. They believe that the Mau Forest, over 290,000 hectares wide and situated approximately 255 km from Nairobi, is their homeland. Like most African indigenous peoples, the Ogiek suffer from a lack of constitutional and legal protection of their rights; most importantly, their right to land. However, the sustained and continuing violation of their rights has placed the Ogiek among the most active indigenous peoples battling for their land against their governments.

While lobbying and advocacy form part of the strategy, it is primarily through legal challenge that the Ogiek seek to defend its rights. This strategy is particularly challenging in a country like Kenya, where the judiciary is not always impartial.

This paper discusses the Ogiek's fight for indigenous status and their lands by addressing the socio-political and legal context in which their current situation must be understood. It shows that Kenya moved from a settlement colony to become an independent, self-governed state without regard for its indigenous communities' claims. There has been almost no change as far as indigenous rights are concerned; rather, it could be said that the situation has progressively worsened in terms of protection of indigenous communities.

The Ogiek are currently challenging the Kenyan government through a number of lawsuits. Central to these lawsuits is the claim that there cannot be protection for their indigenous way of life without recognition of their land rights in the Mau Forest. Instead of focusing on all the outstanding lawsuits, this chapter focuses on one of the most prominent claims as an illustration of the negative impact of the lack of constitutional and legal protection for the land rights of the Ogiek. Accordingly, this paper is divided into three sections. The first examines the context; the second, the constitutional and international framework of the Ogiek's land claim; and the third, the community's court battles.

---

\* Albert K. Barume is an Africa-oriented human rights lawyer. He holds an LLM & a PhD in international human rights law from the Human Rights Centre of the University of Essex, where he focused his research on legal protection of indigenous rights in Africa. He has written a book and a number of articles on indigenous rights in Africa. Since February 2003, Albert K. Barume has worked as Deputy Director of the forestry law enforcement project of Global Witness in Cameroon.

## 1. SOCIO-POLITICAL AND LEGAL CONTEXT

### 1.1. Settlement and Colonial Period

In order to control Uganda, then seen as a strategically significant country due to its being the source of the Nile's headwaters, the British government considered control of Kenya to be essential. Enormous resources were consequently injected into Kenya through various projects, such as the building of the first Kenyan railway.<sup>1</sup> In 1888, the private company engaging in this process in Kenya became an arm of the British Crown and was named the Imperial British East Africa Company ('IBEAC').<sup>2</sup> By 1895 IBEAC had become incapable of carrying out its missions and, consequently, surrendered its responsibilities over Kenya to the British Foreign Office. By 1901, the British government lost interest in Uganda and as a result, in Kenya. Understandably, the issue of 'how to develop sufficient local export production to generate freight revenues to make the railways pay and tax revenues to support the developing state apparatus . . .' became a compelling challenge. As a solution the British Foreign Office decided to make Kenya pay part of the bill by making it a colony of settlement.<sup>3</sup>

Following the arrival of settlers in Kenya, native communities either became 'squatters' or 'reserves' residents.<sup>4</sup> In both cases, communities enjoyed a severely limited 'right of occupancy' over their lands. A colonial agent, quoted by Okoth-Ogendo, stated:

---

<sup>1</sup> B. Bernan, *Control and crisis in colonial Kenya* (Ohio University Press, Athens, 1990) p. 50; R. L. Tignor, *The colonial transformation of Kenya* (Princeton University Press, New Jersey, 1976) p. 18; H.W.O., Okoth-Ogendo, *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (African Centre for Technology Studies, Nairobi, 1991) pp. 7–9; K. Kanyinga, *Redistribution from above: The politics of the land rights and squatting in Coastal Kenya* (Nordiska Afrikainstitutet, Uppsala, 2000) pp. 34–35; M.M.E.M. Rutten, *Selling wealth to buy poverty* (Verlag Breitenbach Publishers, Fort Lauderdale, 1992), p. 173.

<sup>2</sup> The IBEAC was created in 1887, as a commercial private company with the mandate to help the government to gain control through either treaties or conquests over Kenya; see also Tignor, *supra* note 1, p. 16; Kanyinga, *supra* note 1, pp. 34–35; Rutten, *supra* note 1, p. 171.

<sup>3</sup> Kanyinga, *supra* note 1, p. 35; and Bernan, *supra* note 1, p. 51.

<sup>4</sup> Okoth-Ogendo, *supra* note 1, p. 53. The term 'reserve' meant part of lands set apart by the colonial system for dispossessed indigenous communities. These lands were later called 'Trust Lands'. See also S. Wanjala, *Land law and disputes in Kenya* (Oxford University Press, Oxford, 1990) p. 3; Rutten, *supra* note 1, pp. 176–177 (showing that for the Maasai, for example, after being displaced from their lands, two reserves were set up for them in the Rift Valley. One was the Laikipia plateau, 12,350 km square wide and the second in the South of Ngong 11,250 km square. These two reserves did not represent the best of the traditional Maasailand, as put by Rutten. Later, the total surface of the Maasai reserve was extended up to 24,000 km square, but still was not even the half of the traditional Maasailand, which was estimated up to 55,000 km<sup>2</sup>. From 1912, the Maasai were later moved from the north to the South into one single reserve.) *Ibid.*, p. 181.



## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

I am afraid that we have got to hurt their (the natives) feelings, we have got to wound their susceptibilities and in some cases I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move natives from land on which, according to their own customary law, they have an inalienable right to live, and settle them on land from which the owner has, under that same customary law an indisputable right to eject them.<sup>5</sup>

[Colonial agents were to make alternative arrangements] . . . for Africans, where settlers were to take over and, [and] . . . if an African cultivator did not want to leave the land, he would either agree or “bunch up” or shift to an area reserved for African settlers.<sup>6</sup>

It is within such a context that the settlement policy was adopted, with a number of assumptions including that ‘an excessive livestock population was destroying the vegetation and soil . . .’,<sup>7</sup> that ‘customary systems of land tenure [were] inimical to the goals of increasing agriculture output and rural income . . .’,<sup>8</sup> and that the traditional economy was to be ‘transformed if the process of modernization [was] to go forward . . .’<sup>9</sup> towards a modern economy.<sup>10</sup>

By the 1930s, Kenyan native communities’ grievances over lands had reached a peak. The reserves had become congested and incapable of responding to their needs and claims.<sup>11</sup> Very quickly, the colonial authority realized the political explosiveness of the situation.<sup>12</sup> In an attempt to diffuse these tensions, the Kenyan Land Commission<sup>13</sup> was set up in 1931 to hear claims by native communities over lands and possibly compile some rule over the then disappearing ‘pre-colonial land tenure system’.<sup>14</sup> Unfortunately, this did not respond to native communities’ claims. The dashed hopes of native communities prompted what is known as the Mau Mau uprising, which led to more legal attacks on the native communities’ notion of collective ownership of lands. It is clear that ‘land alienation in Kenya resulting in displacement of farmers by European settlers [was] the flashpoint of the Mau Mau movement . . .’<sup>15</sup>

---

<sup>5</sup> Okoth-Ogendo, *supra* note 1, p. 58

<sup>6</sup> Tignor, *supra* note 1, p. 30.

<sup>7</sup> *Ibid.*, p. 10.

<sup>8</sup> J. Glazier, *Land and the uses of tradition among the Mbeere of Kenya* (University Press of America, Boston, 1985) p. 2.

<sup>9</sup> *Ibid.*

<sup>10</sup> Okoth-Ogendo, *supra* note 1, p. 141.

<sup>11</sup> Kanyinga, *supra* note 1, p. 41.

<sup>12</sup> Okoth-Ogendo, *supra* note 1, p. 55.

<sup>13</sup> The Kenyan Land Commission heard thousands of claims from native communities and compiled a 1,200 page report of evidence and memoranda. See G. Kitching, *Class and economy change in Kenya* (Yale University Press, New Haven, 1980) p. 282.

<sup>14</sup> *Ibid.*

<sup>15</sup> Glazier, *supra* note 8, p. 5.

ALBERT K. BARUME

While native communities' new way of re-claiming their lost lands was radical and extreme, so also was the government's legal response to the land-based crisis. In the context of a declared state of emergency in 1952, the government adopted radical legal measures in relation to land.

The fact that the Mau Mau movement was based on native communities' claims to regain control over their lands prompted a drastic change in the colonial government's attempt to probe into customary land rights, as attempted through the Kenyan Land Commission.<sup>16</sup> The colonial government's willingness to radicalize the mechanism of individual ownership of lands<sup>17</sup> was unambiguously stated in a government plan-paper quoted by Glazier:

In the past, the Government policy has been to maintain the tribal system of tenure so that all peoples have had a bit of land to prevent the African from [land insecurity] . . . In the future . . . former government policy will be reversed and able, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class. This is a normal step in the evolution of a country . . .<sup>18</sup>

On the legal front, the 1902 *Kenyan Crown Land Ordinance* (Crown Land Ordinance) declared most lands 'Crown Land' because it was framed on the assumption that 'Africans owned land only in terms of occupational rights and that the chiefs and heads of clans did not hold any sovereignty over their land'.<sup>19</sup> As put by Maini, commenting on *Joan Baptista Countinho v. Lands Officers*,<sup>20</sup> the rationale behind this argument was that 'there did not exist a valid custom by virtue of which . . . tribes . . . either collectively or by individual members, can assert a right of ownership over or alienate land . . .'.<sup>21</sup> Accordingly, the Ordinance extended the scope of the term 'Crown Land' to include 'all lands occupied by the native tribes and all land reserves for the use of any members of any native tribes', thus paving the way for large-scale settlement of Europeans and other foreign farmers in Kenya.<sup>22</sup> Unlike the settlers, who could hold titles of 'conclusive evidence' of absolute and indefeasible proprietorship,<sup>23</sup> native communities were recognized with

---

<sup>16</sup> Kanyinga, *supra* note 1, p. 39; Okoth-Ogendo, *supra* note 1, p. 59.

<sup>17</sup> Kanyinga, *supra* note 1, p. 39.

<sup>18</sup> Glazier, *supra* note 8, p. 215.

<sup>19</sup> *Ibid.*, p. 11. The Foreign Office, whilst still considering all 'unoccupied lands' as belonging to the indigenous communities, requested an expert legal view on the issue. On December 13, 1899, the view from London was that Her Majesty has power of control over 'waste and unoccupied land' in protectorates and that, if Her Majesty considers it appropriate, could declare such lands 'Crown Lands'.

<sup>20</sup> 7 EALR 180. The case involved nine tribes of Mombasa claiming a collective right to land.

<sup>21</sup> K. M. Maini, *Land law in eastern Africa* (Oxford University Press, Oxford, 1967) p. 27.

<sup>22</sup> *Ibid.*, p. 15.

<sup>23</sup> Section 23 of the Ordinance No. 26 of 1919 ('The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all . . . as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner').

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

a 'right to occupation' on reserves, thus becoming 'tenants at the will of the Crown'.<sup>24</sup>

To this effect the *Crown Land Ordinance*<sup>25</sup> stated that '[i]n all dealings with Crown Land regard shall be [given] to the rights and requirements of the natives, and in particular the Commissioner shall not sell or lease any land in the actual occupation of the natives'.<sup>26</sup> The Ordinance also stated that 'the Commissioner may grant leases . . . but land in the actual occupation of natives at the date of the lease shall, as long as it is actually occupied by them, be deemed to be excluded from the lease'.<sup>27</sup>

These provisions were later reinforced by the *Crown Lands Bill* of 1908, which provided that the Governor (formerly the Commissioner) should not sell, lease or dispose of 'any Crown land which in his opinion is required for the use or support of the members of the Aboriginal native tribes of the protectorates'. Similarly, the *Native Trust Lands Ordinance* of 1930 provided: 'In respect of the occupation, use, control, inheritance, succession, and disposal of any Trust Land, every tribe, group, family, and individual shall have all the rights which they enjoy, or may enjoy, by virtue of existing native law and custom . . .'.<sup>28</sup> This right was so limited in scope, however, that it could not accommodate indigenous cultures. It did not include 'any right to minerals in or under the said land, or to waters of any river or lake . . .'.<sup>29</sup> Moreover, providing that they held a license to do so, natives living within the reserves could only remove 'common minerals',<sup>30</sup> which were defined as including, 'clay, country rock, gravel, lime, sand, shale, shingle, murrum, mineral water, brine, dolomite, kaolin, etc . . .'.<sup>31</sup>

In addition, native communities were not allowed to grow crops, such as coffee, within the reserves, as stated by the 'Native Grown Coffee Rules of 1934'.<sup>32</sup> The

---

<sup>24</sup> Kanyinga, *supra* note 1, p. 38.

<sup>25</sup> Ordinance No. 21 of 1902; *see also* in CAP.280, in which this Ordinance is reproduced for reference purposes.

<sup>26</sup> Section 30 of the Crown Land Ordinance.

<sup>27</sup> Section 31.1 of the Crown Land Ordinance, CAP.280.

<sup>28</sup> The Ordinance No. 9 of 1930 repealed Part IV of the Crown Land Ordinance, as well as Section 69 of the Trust Land Act, 1939, CAP.288. It was passed following reports of a number of Commissions set up to look into, amongst others, the issue of protection of land right in reserves. One of these commissions was the East African Commission, better known as the 'Ormsby-Gore Commission'. This Commission, from 1924 to 1925, made several observations and recommendations amongst which it noted that land dispossession remained an important issue troubling most indigenous communities. *See also* Okoth-Ogendo, *supra* note 1, p. 55.

<sup>29</sup> Section 3 of the Crown Land Ordinance.

<sup>30</sup> Provision 1 of the Trust Land (Removal of Common Minerals) Rules, CAP.288, Rev. 1970. p. 23.

<sup>31</sup> Trust Land Act, CAP.288.

<sup>32</sup> Tignor, *supra* note 1, p. 52.

ALBERT K. BARUME

*Forests Act* of 1942<sup>33</sup> came with more limitations to the scope of the ‘right of occupancy’ by stating that:

In a nature reserve, no cutting, grazing, removal of forest produce or disturbance of the flora shall be allowed except with the permission of the Chief Conservator . . . Hunting, fishing, and the disturbance of the fauna shall be prohibited except in so far as may be permitted by the Chief Conservator . . .<sup>34</sup>

The *Trust Land Act* required that native communities be consulted on any development to occur on the reserves.<sup>35</sup> However, this consultation did not seem to happen in all cases.<sup>36</sup> In the *Kakamega Goldfields* case, for example, the Kavirondo Trust Land was alienated by the Government to a mining company, without the consent of native communities, which were not compensated.<sup>37</sup>

As a matter of consequence, by 1926, European settlers had acquired 463,864 acres in Kenya, three times more than in Tanzania.<sup>38</sup> Within the Kenyan Kikuyu District of Kiambu-Limuru alone, more than 60,000 acres of land had been alienated by that time.<sup>39</sup> The Kenyan colonial system achieved such enormous results in such a short period of time because of the use of violence. ‘Punitive expeditions’ were carried out to crush native resistance against settlement schemes.<sup>40</sup> Apart from the Maasai community, which entered into several treaties with the colonial authority,<sup>41</sup> native communities were facing ‘the effect of the . . . military strength in a series of campaigns, called euphemistically . . . punitive expeditions, which were designed . . . to punish dissident African groups . . .’<sup>42</sup> Some of these expeditions created more than 1,500 victims.<sup>43</sup>

---

<sup>33</sup> Forest Act, CAP.385, Laws of Kenya.

<sup>34</sup> Section 2 of the Forests Act, CAP.385, defines the term ‘forest produce’ as including ‘bark, beeswax, canes, charcoal, peppers, earth, fibres, firewood, fruit, galls, grass, gum, honey, leaves, limestone, litter, moss, murrum, peat, plants . . . resin, rushes, rubber, sap, seeds, spices, stone, timber, trees, wax, withies, and such other things as the Minister may by notice in the Gazette declare to be forest produce . . .’.

<sup>35</sup> Section 13(2)(b) of the Trust Land Act, CAP.288 (‘The council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting . . . at which the proposal is to be considered’).

<sup>36</sup> Wanjala, *supra* note 4, p. 3.

<sup>37</sup> Maini, *supra* note 21, pp. 53–56.

<sup>38</sup> Tignor, *supra* note 1, p. 25.

<sup>39</sup> Rutten, *supra* note 1, p. 174.

<sup>40</sup> Tignor, *supra* note 1, pp. 20–21; Reutten, *supra* note 1, p. 171.

<sup>41</sup> In 1904 and 1911 some Maasai communities signed treaties, agreeing thus to leave their homelands and were settled in reserves. Roughly 11,200 owning more than two million stock lost their lands to 48 European settlers. For a more elaborate account, see Okoth-Ogendo, *supra* note 1, p. 30; Rutten, *supra* note 1, pp. 181, 464.

<sup>42</sup> Tignor, *supra* note 1, p. 21.

<sup>43</sup> *Ibid.*

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

### 1.2. First Years of Independence

By the late 1960s the new Kenyan political elite had come under enormous pressure from various communities denouncing the unfairness of the colonial land policies, and reclaiming their lost lands.<sup>44</sup> This pressure was coupled with a growing feeling of insecurity among European settlers who had become more willing to sell their land and leave Kenya. In a sort of 're-Africanization'<sup>45</sup> of the Kenyan state apparatus 'there was an opening up of the former White Highlands of Kenya to African cultivators by settlement schemes, through which Africans were given access to land bought from departing European farmers . . .'.<sup>46</sup>

In terms of legal reform, following the Lawrence Mission, the *Trust Land (Amendment) Act*, of 1968 was passed. It was followed by the *Land (Group Representatives) Act*,<sup>47</sup> the *Land Adjudication Act*,<sup>48</sup> and the *Wildlife (Conservation and Management) Act*.<sup>49</sup> Together they put in place the institution of 'group ranches', which defined a 'group' that was meant to be the holder of the 'right of ownership' as 'a tribe, clan, section, family or other group of persons'.<sup>50</sup>

Clearly, the term 'group' as meant by the two Acts could include not only an aggregate of individuals who might have belonged to the same clan and lineage, but also any other gathering of culturally unrelated individuals whose lands had come to be closer for a variety of reasons. The latter possibility could, for example, be the case when a member of a community who had secured an individual title over a part of the community land had sold his/her right to a non-community member.

The 'group ranches' were also in exclusive use by their members, another indication that the two Acts were far from resurrecting the customary land tenure within the ranches.<sup>51</sup> The disguised individually based ownership of land under the

---

<sup>44</sup> At the eve of the Kenyan independence, two major political groups emerged. On the one hand, there was the KANU (Kenyan African National Union) made up essentially of Kikuyu and Luo, the two biggest ethnic groups of Kenya. On the other hand, there was the KADU (Kenya African Democratic Union) made up essentially of small pastoralist communities, such as the Maasai, Luhya, etc. In all the pre-independence negotiations, the latter wanted to have their land rights constitutionally protected, as individuals and as communities. In this sense, the passing of the *Land (Group Representatives) Act* of 1968 could be considered as a compromise reached by both these parties. See also Kanyinga, *supra* note 1, pp. 47–52.

<sup>45</sup> *Ibid.*, p. 44

<sup>46</sup> Kitching, *supra* note 13, p. 316.

<sup>47</sup> Land (Group Representatives) Act, CAP 287.

<sup>48</sup> Land Adjudication Act, 1968, CAP 284.

<sup>49</sup> It has been shown throughout the previous parts that one of the colonial strategies for accessing native lands was to destroy any sort of collective holding of lands. This was done through a range of measures, such as the abolition of the traditional institutions on which the system was built, the individualization of land holding and similar measures.

<sup>50</sup> Land Adjudication Act, CAP 284, Vol. VII, Laws of Kenya.

<sup>51</sup> Rutten, *supra* note 1, p. 474; T. Cheeseman, *Conservation and the Maasai in Kenya. Tradeoff or lost of mutualism*, Website of Environmental Action, at

scheme of 'group ranches' was, however, unveiled by a number of its functioning mechanisms. For example, each group ranch was managed by a limited number of its members called 'group representatives' who were said to 'hold any property which they hold as such, and to exercise their powers as such, on behalf and for the collective benefit of all the members of the group, and fully and effectively to consult the other members of the group on such exercise . . .'.<sup>52</sup>

The elected members were not necessarily the elders, heads of clans or lineages as had previously existed in the traditional communities. In case of death of a representative, a replacement was to be made according to the constitution of a group; if this was not done within two months, a government minister could 'in writing, replace [such a] member with another member of the group . . .'.<sup>53</sup> A group could even be dissolved, in which case every individual member regained his or her part of the lands.<sup>54</sup>

As Rutten puts it, this alien mode of designation for managing the groups' lands constituted a major problem because it provided an opportunity for wealthy and influential individuals, who were not always members of the original communities that owned the lands, to access local resources.<sup>55</sup> Group members who brought in larger areas of land played a prominent role in the running of groups' affairs. As stated by the *Land (Group Representatives) Act*, 'members of a group who together own assets registered in the group's register whose value exceeds one-half of the value of the assets registered in respect of all the group's members . . .'<sup>56</sup> could, for example, call for an extraordinary meeting any time.

Concerning the scope of this 'right of ownership', the *Land (Group Representatives) Act* did not repeal the *Government Land Act*, which declared the State to be the sole and absolute owner of land. This is to say that, in recognizing the 'right of ownership', the *Land (Group Representatives) Act* did not actually restore the pre-colonial full ownership that native communities enjoyed over their lands, but meant almost the same as 'the right of occupancy' enjoyed on reserves. Thus, the 'right of occupancy' over the reserves during the colonial period and the first years of independence, remained the 'right of ownership' under the scheme of 'group ranches'.

The Act states that 'all unrestricted minerals (other than common minerals)<sup>57</sup> under or upon any land are vested in the Government . . .'.<sup>58</sup> This is true, for

---

<[www.environmentalaction.net/kenya/kenya\\_policy\\_failure.html](http://www.environmentalaction.net/kenya/kenya_policy_failure.html)>.

<sup>52</sup> *Land (Group Representatives) Act*, Section 8.2.

<sup>53</sup> *Land (Group Representatives) Act*, Section 9.

<sup>54</sup> *Land (Group Representatives) Act*, CAP.287, Section 22 (stating 'notwithstanding the dissolution or purported dissolution of a group, the persons who immediately before the dissolution or purported dissolution were officers of the group shall be deemed to continue'.).

<sup>55</sup> Rutten, *supra* note 1, pp. 293–294.

<sup>56</sup> *Land (Group Representatives) Act*, CAP.287, Section 15(3)(b).

<sup>57</sup> *Trust Land Act*, CAP.288, Section 2. The 'common minerals' that could be extracted by group members included clay, country rock, gravel, lime, sand, shale, shingle, murrum, mineral water, brine, dolomite, and many others exhaustively listed by the *Trust Land Act*.

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

example, in the case of mineral oil<sup>59</sup> and even water.<sup>60</sup> To enjoy any of these resources, members of group ranches need a license or authorization from the authorities. Members of group ranches enjoy rights, such as the rights to graze, pasture and water under certain conditions.<sup>61</sup> However, this set-up was not to last, because pressure from international donors coupled with an emerging potentially profitable conservation sector prompted Kenya to abandon the mechanism of group ranches and to embrace a free market type of land management.

### *1.3. Free-Market and Conservation-Oriented Land Management*

It would be difficult to comprehend why the conservation laws and other land-related legislation recently passed in Kenya seem aimed at severely affecting the collective right to land of native communities, unless the following three main observations are kept in mind.

First, the group ranches had been severely criticized by the major international financial institutions and other international donors, who argued that its mechanisms of land holding were not accommodating the free market system and therefore were not economically worth being sustained.<sup>62</sup>

Secondly, throughout the 1980s, the conservation sector emerged as having the potential of being ‘. . . Kenya’s largest earner of foreign exchange . . .’, and it proved to be just that.<sup>63</sup> Tourism overtook ‘coffee as the main net foreign exchange earner’.<sup>64</sup> This sector also demonstrated the potential of attracting international investment and similar foreign assistance from institutions such as the World Bank, which is said to have provided tens of millions of US dollars to the Kenyan conservation sector in recent years.<sup>65</sup> These factors together prompted a number of actions by the Kenyan political elite. For example, in 1985 the Ngong Hill forest was officially gazetted.<sup>66</sup> In 1989 the Kenyan president publicly burned ten tons of

---

<sup>58</sup> Land (Amendment of laws), Act No. 39 of 1968, Section 11.

<sup>59</sup> Land (Amendment of laws), Act No. 39 of 1968, Section 12 (stating that ‘all unrestricted mineral oil under or in any land is vested in the Government . . .’).

<sup>60</sup> Land (Amendment of laws), Act No. 39 of 1968, Section 13 (stating that ‘the water under or upon any land is vested in the Government . . .’).

<sup>61</sup> In the terms of Section 13 of the Land (Amendment of Laws), Act No. 39 of 1968, the Government could grant right on water to any person. *See also* Land (Group Representatives) Act, CAP.287, Section 2.

<sup>62</sup> Cheeseman, *supra* note 51.

<sup>63</sup> *Ibid.*, N. Miller, ‘Land use and wildlife in modern Kenya’, in R. Yeager, and N. Miller (eds.) *Wildlife, wild death: Land use and survival in Eastern Africa* (State University of New York Press, New York, 1986) p. 68.

<sup>64</sup> Rutten, *supra* note 1, p. 323.

<sup>65</sup> Miller, *supra* note 63, p. 78; Cheeseman, *supra* note 51, p. 10.

<sup>66</sup> Rutten, *supra* note 1, p. 317.

ivory.<sup>67</sup> The same year, the Kenyan Wildlife Service (KWS)<sup>68</sup> was created with wide ranging powers in order to derive the most out of the sector.<sup>69</sup>

Thirdly, '80 percent of Kenya's wildlife lies outside the parks. Amboseli National Park, [for example] contains only 6.5 percent of the 6000 km square Amboseli ecosystem . . . [It is therefore argued that] without these surrounding areas, wildlife populations are unsustainable . . .'.<sup>70</sup> Put differently by Miller, 'protected game animals and human populations generally favour the same territory . . .'.<sup>71</sup> In other words, if Kenyan wildlife and its ecosystem were to be preserved at all costs, conservation interests would have to be balanced with not only the rights of communities living within the concerned areas, but also the rights of communities and people found in the surrounding areas.<sup>72</sup> Some have even argued that growing human and livestock populations are regarded as threatening to the wildlife.<sup>73</sup>

On the legal front, since the 1976 *Wildlife (Conservation and Management) Act*, as amended in 1989, there has not been an important land law or related legislation passed in Kenya. Accordingly, as far as communities' rights to lands are concerned, the right of 'occupancy' stated by the *Trust Land Act*<sup>74</sup> and the right of 'ownership' recognized by the *Land (Group Representatives) Act*<sup>75</sup> remain strictly speaking, the only Kenyan legal attempts to address the claims of native communities for their right to lands. Communities that are still living on Trust Lands enjoy rights which, despite containing some communal aspects, would not be considered as amounting to a collective ownership of land.

As seen before, the creation of group ranches constituted a failed attempt to revive some sort of collective holding of land by communities. The failure of the scheme to protect communities' lands against outsiders and other competing interests was not, however, the only factor that prompted the current progressive abolition of the scheme of 'group ranches' in Kenya.<sup>76</sup>

Pressure also came also from several other stakeholders; firstly from financial institutions, such as the World Bank, which 'openly condemned [the system of] preventing other Kenyans, [not belonging to a given ranch] . . .' from acquiring or using ranch lands.<sup>77</sup> In the same vein, it was argued that the scheme of 'group

---

<sup>67</sup> Cheeseman, *supra* note 51.

<sup>68</sup> Wildlife (Conservation and Management) (Amendment) Act of 1989, Act No.16 of 1989, Section 3.

<sup>69</sup> Miller, *supra* note 63, p.11.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, p. 96.

<sup>72</sup> Rutten, *supra* note 1, p. 319.

<sup>73</sup> *Ibid.*, p. 318

<sup>74</sup> CAP.285, Laws of Kenya.

<sup>75</sup> CAP.287, Laws of Kenya.

<sup>76</sup> E. Mwangi, 'Fragmentation of the commons: The Transformation of property right in Kenya's Maasailand', Paper presented at a Workshop on political theory and policy analysis, Spring 2001 Colloquia, at <[www.indiana.edu/~workshop/colloquia/spring2001\\_colloquia.html](http://www.indiana.edu/~workshop/colloquia/spring2001_colloquia.html)>.

<sup>77</sup> Rutten, *supra* note 1, p. 476.



## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

ranches' was failing to provide land security, which constituted a determinant factor for farmers' accessibility to the financial market. Furthermore, the group ranches were allegedly run by incompetent and corrupt managers.<sup>78</sup> There was also growing pressure from conservation interests, which considered the scheme of 'group ranches' as a way of strengthening the claims of communities over the very same lands on which most of the wildlife and other resources in need for protection are found.<sup>79</sup>

Unsurprisingly, in 1984 the government finally succumbed to pressure and reacted. Due to the fact that neither the *Land Adjudication Act* nor the *Land (Group Representatives) Act* contained rules regarding dissolution of 'group ranches', the Land Adjudication and Range Department designed mechanisms that were to preside over the subdivision of 'group ranches' into individual plots of land.<sup>80</sup>

According to the rules of subdivision, the decision was to be taken by at least 60 percent of the concerned ranch members. Then the group ranch, whose members had so decided, would apply for an authorization for subdivision to the 'Divisional Land Control Board'.<sup>81</sup> After the required consent of the Registrar of Group Representatives, a demarcation process would take place before each member could apply for individual titling and the seal of the subdivision by a resolution adopted during a general meeting of all the ranch members.<sup>82</sup> The rules have never been sent to parliament to be passed into law, though they continue to preside over increasing numbers of group ranches' subdivisions.

Rutten suggests that within the Kajiado District<sup>83</sup> alone, by '1990 almost 80 percent of the ranches had decided to get rid of the group ranch structure and become individual land owners instead'.<sup>84</sup> Within the Maasai lands of Olkinos, Emboloi, Empuyiankat, Kitengela and Poka, for example, more than 757 Maasai had received privately owned lands by this time.<sup>85</sup> 'None of those who allowed this process [of dissolution of group ranches] to start fully realized the possible negative side effect it could have for a large number of . . . people, their children, their . . . ecology . . . their livelihood, economy. . .'.<sup>86</sup> Mostly because once divided into plots of individually owned pieces of land, former group ranches could be alienated to outsiders. Several accounts of events reveal that, once a subdivision of a group ranch

---

<sup>78</sup> *Ibid.*, p. 301.

<sup>79</sup> Cheeseman, *supra* note 51, p. 8.

<sup>80</sup> The Land Adjudication and Range Department of the Kenyan government was in charge of overseeing the running of group ranches, and therefore should have designed measures and rules for the abolition of the scheme.

<sup>81</sup> 'Divisional Land Control Board' was a governmental body that was said to be in charge of overseeing the use, occupation, and control of land within an administrative area.

<sup>82</sup> For more details on the nine steps leading to dissolution of a group ranch, see Rutten, *supra* note 1, pp. 301–303.

<sup>83</sup> Kajiado District is a Maasai populated area of Kenya.

<sup>84</sup> Rutten, *supra* note 1, p. 303.

<sup>85</sup> *Ibid.*, pp. 477, 481.

<sup>86</sup> *Ibid.*, p. 484.

is complete, the majority of those who gain access to these lands are non-members of the selling communities, including private companies, rich politicians, civil servants and businessmen.<sup>87</sup>

Furthermore, the individually owned plots that began to appear, in most cases, seemed incapable of accommodating the lifestyle of many. This discrepancy was particularly true as individualization brought with it practices such as fencing, which clearly go against the pre-existing customary norm of 'non-exclusive use' of lands.<sup>88</sup> This failure was further compounded by the increase in the number of livestock that has made some individuals' ranches unviable.<sup>89</sup>

Thus, the last vestige of both the Olkinos and Emboloi communities' holding of land in Kenya has begun to disappear. A few group ranches still exist in Kenya, but they are also likely to be divided as pressure for individualization continues to build, particularly from the younger generation of the few communities that still hold on to the system of group ranches. However, considering that 'the official policy of the Kenyan Government [seems to consist of systematically] extinguishing customary tenure through . . . adjudication of rights and registration of title, and its replacement with [the] system . . . of freehold',<sup>90</sup> it would be a mistake to believe that the scheme of 'group ranches' would continue for long.<sup>91</sup>

## 2. CONSTITUTIONAL AND INTERNATIONAL FRAMEWORK

The Constitution of Kenya does not use either the term 'indigenous' or 'minorities'. Its general provision against discrimination could be considered as the closest provision to indigenous people: '[N]o law shall make any provision that is discriminatory either of itself or in its effect.'<sup>92</sup> It defines the term 'discriminatory' as:

affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made

---

<sup>87</sup> *Ibid.*, p. 300.

<sup>88</sup> *Ibid.*, pp. 480, 483. There are obvious changes in the way of Maasai life style. The wage labourer is said to be playing an increasingly big role. They now have, for example, livestock of camels and other previously unknown types of animals. These are changes in pasturing techniques.

<sup>89</sup> *Ibid.*, p. 479.

<sup>90</sup> O. W. H. Okoth-Ogendo, 'Land policy development in the east Africa: A survey of recent trends', Paper for the DFID Workshop on 'land rights and sustainable development in sub-Saharan Africa', (Berkshire, Feb. 16-19, 1999), p. 5.

<sup>91</sup> Wanjala, *supra* note 4, p. 11.

<sup>92</sup> Article 82(1) of the Kenyan Constitution.

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

subject or are accorded privileges or advantages which are not accorded to persons of another such description.<sup>93</sup>

In addition the Kenyan Constitution does not recognize the notion of land rights based on immemorial occupation and use, known as 'aboriginal title' or 'native title' of its indigenous communities over their lands. It devotes the whole of its Chapter IX to 'Trust Lands',<sup>94</sup> a term used to refer to lands managed by a government-appointed 'County Council' which, as shown earlier, has not been known to champion collective land rights of Kenyan indigenous peoples.

By providing under this same section that 'no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law', the Kenyan Constitution makes it unequivocally clear that it does not give much consideration to the land rights of indigenous communities, which are principally based on customary law.

Though Kenya ratified the *International Covenant on Civil and Political Rights* (ICCPR) on 1 May 1972 it never enacted a law specifically protecting indigenous peoples. Thus the protection of indigenous peoples' land rights that has taken place in the context of Article 27 has not been reflected in Kenya. The Human Rights Committee stressed the importance of this aspect in 1994 in its General Comment No. 23 on Article 27, concluding that:

[O]ne or other aspects of the rights of individuals protected [under this Article] – for example to enjoy a particular culture – may consist in a way of life which is closely associated with a territory and its use of resources. This may particularly be true of members of indigenous communities constituting a minority . . . With regard to the exercise of the cultural

---

<sup>93</sup> Article 82(3) of the Kenyan Constitution.

<sup>94</sup> Article 114 of the Kenyan Constitution defines the Trust Lands as: (1) Subject to this Chapter, the following description of land are Trust land- (a) land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Act as in force on 31st May, 1963), and which was on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board; (b) the areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement Areas and the boundaries of which were described respectively in the Fourth, Fifth, Sixth, and Seventh Schedules to the Crown Lands Ordinance as in force on 31st May, 1963 communal reserves by virtue of a declaration under section 58 of that Ordinance, the areas of land referred to in section 59 of that Ordinance as in force on 31st May, 1963 and the areas of land in respect of which a permit to occupy was in force on 31st May, 1963 under section 62 of that Ordinance; and (c) land situated outside the Nairobi Areas (as it was on 12th December, 1964) the freehold title to which is registered in the name of a county council or the freehold title to which is vested in a county council by virtue of an escheat: Provided that Trust land does not include any estates, interests or rights in or over land situated in the Nairobi Area (as it was 12th December, 1964) that on 31st May, 1963 were registered in the name of the Trust Land Board under the former Land Registration (Special Areas) Ordinance.

## ALBERT K. BARUME

rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them . . . The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States' parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole.<sup>95</sup>

The Human Rights Committee has gone even further in several decisions involving indigenous peoples similar to the Ogiek of Kenya; suggesting that the scope of the right protected under Article 27 includes rights over ancestral lands on which such communities' cultures depend.<sup>96</sup> The individual petition mechanism is not, however, available to the Ogiek since Kenya is not party to Optional Protocol I to the ICCPR.<sup>97</sup> Nor has Kenya complied with its reporting obligation as required by Article 40 of the ICCPR. Since its initial report submitted in 1979, Kenya has four overdue reports that should have been submitted in 1986, 1991, 1996 and 2001, respectively.

At the regional level Kenya has ratified the *African Charter of Human and Peoples' Rights*, which, unlike the ICCPR, does not require the ratification of a separate international instrument for individuals to petition before the African Commission of Human and Peoples' Rights (the 'Commission' or 'African Commission'). However, the Commission has shown little interest in engaging indigenous issues. In 1993, for example, the Commission was debating the Nigerian report at the very same time as the Ogoni's request for control over their lands was

---

<sup>95</sup> Human Rights Committee, The rights of minorities (Art. 27): 08/04/94; CCPR General comment 23 (General Comments).

<sup>96</sup> See *Lovelace*, (*Lovelace v. Canada* (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40), p. 166, UN Doc. A/36/40 (1981).); *Kitok*, (*Kitok v. Sweden*, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40), p. 221, UN Doc. A/43/40 (1988).); *Ominayak*, (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990).); *I. Lansman*, (*I. Lansman et al. v. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992.); *J. Lansman*, (*Jouni Lansman et al. v. Finland (Communication No. 671/1995)*, CCPR/C/58/D/671/1995.); *Apirana Mahuika (Apirana Mahuika et al v. New Zealand)*. (Communication No 547/1993) CCPR/C/70/D/547/1993, 15 November 2000); and, *Äärelä and Näkkäläjärvi Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi v. Finland*. (Communication No 779/1997) CCPR/C/73/D/779/1997, 7 November 2001.).

<sup>97</sup> The first Optional Protocol to the ICCPR allows individuals to petition their governments before the Human Rights Committee for no respect, violation or no protection of their rights, as protected by the Covenant.

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

being brutally dealt with by the Nigerian government, but not a single Commissioner raised questions about Ogoni rights.

However, in its 28<sup>th</sup> session of 6 November 2000, the African Commission adopted a 'Resolution on the Rights of Indigenous People/Communities in Africa'. In the terms of this resolution, a 'Working Group on the Rights of Indigenous People/Communities in Africa' would be established, with the mandate to examine the the scope of their rights. In addition, the working group would:

study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to:

- the right to equality (Article 2 and 3)
- the right to dignity (Article 5)
- protection against domination (Article 19)
- on self-determination (Article 20) and
- the promotion of cultural development and identity (Article 22) . . .

Some believe that the Kenyan government's agreement to host one of the Working Group's consultation meetings in January 2003 constitutes a change in its attitude to indigenous issues. The Ogiek have been exploring the option of accessing the African Commission with their cases if their actions in domestic courts continue to suffer setbacks.

In addition to being a member of the United Nations and the African Union, Kenya is an active member of the Commonwealth, which could be seen as a means of redressing the historical injustices suffered by indigenous peoples. This inter-state organization brings together countries that have made the most significant steps towards a better protection of indigenous rights. It could even be argued that these countries share the common law tradition which recognizes the principle of immemorial occupation and use of lands as a source of rights. This is what the Australian High court upheld in the *Mabo* case upholding what is called 'native title' or 'aboriginal title'.<sup>98</sup>

---

<sup>98</sup> Aboriginal title has been defined as 'a right to land, one vesting in a community that occupied the land at the time of colonisation . . .'. T. W. Bennet and C. H. Powel, 'Aboriginal title in South Africa revisited' 15 *South African Journal of Human Rights*(1999) p. 449, see also <[www.firstpeoples.org/land\\_rights/southern-africa/summary/aborig%7E2.htm](http://www.firstpeoples.org/land_rights/southern-africa/summary/aborig%7E2.htm)>. The doctrine relates to the idea of 'pre-sovereignty occupation' of lands (A. D. Plamer, Evidence 'not in a form familiar to Common Law Courts: Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*' 38 *Alberta Law Review* (2001) 1040, February 2001, p. 1046. In the *Mabo* case, the Australian High Court ruled 'that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty'. *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1, p. 57. See also J. Cassidy, 'Sovereignty of aboriginal peoples', 9 *Indiana International and Comparative Law Review* (1998) p. 65. Cassidy argues for example that: 'the sovereignty of indigenous populations has long been a matter of great dispute and continues to be one of the most burning issues in domestic and international law today . . .'. The doctrine of aboriginal title questions also the

The question that is implied here is whether the notion of ‘native title’ can be seen as relevant in a country like Kenya. One could argue that the *Berlin Act* of 1885 that created the current African states<sup>99</sup> did not extinguish pre-existing rights in accordance with the spirit of its Article 35, which provided for the obligation of colonial powers ‘to protect existing rights (*droits acquis*)’ or acquired rights,<sup>100</sup> including those of indigenous peoples.<sup>101</sup> Professor Bayona-Ba-Meya, then giving his opinion as a member of the International Court of Justice in the *Western Sahara* case, also referred to the Berlin Conference’s principle of respect for pre-existing rights. He argued that pre-Berlin Conference, African entities enjoyed sovereignty over their lands given that: ‘the ancestral tie between the land, or mother nature . . . and [the idea that] the man who was born there from, remains attached thereto . . . must one day return thither to be united with his ancestors, . . . is the basis of the ownership of the soil, or better, of sovereignty’.<sup>102</sup>

Justice Brennan also quotes Professor Bayona-Ba-Meya’s opinion relating to the Berlin Conference of 1885 in the *Mabo* case.<sup>103</sup> He concludes that ‘a mere change in sovereignty does not extinguish native title to land’<sup>104</sup> if ‘a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs’.<sup>105</sup>

The Privy Council, another highly respected legal institution among Commonwealth countries such as Kenya, has also ruled in favour of the notion of ‘native title’ in cases involving African communities. In the 1919 *Re: Southern Rhodesia* case, the *Ndebele* community of Southern Rhodesia<sup>106</sup> argued that its right

---

notion of *terra nullius* already negated in the *Western Sahara* case before the Permanent Court of Justice, which in an Advisory Opinion asserted that the land, on which Spain, Morocco and Mauritania all claimed to have sovereignty, was not *terra nullius* prior to Spanish colonisation, but that the concerned land belonged to its inhabitant indigenous tribes: ‘territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius* . . .’. The Court also rejected the ‘cultivation test’, which implied that only use of land for cultivation could be regarded as land occupation. In other words hunting, gathering, and other modes of land use were recognized as proof of occupancy. International Court of Justice (ICJ) Reports (1975), p. 16. See also Harris, this volume; Kinane, this volume.

<sup>99</sup> See also C. Weeramantry and N. Berman, ‘The Grotius lecture series’ *14 American University International Law Review* (1999) p. 1515.

<sup>100</sup> Article 35 of the Final Act of Berlin Conference, 1885. The Berlin Conference of 1885 was a gathering of most of the European colonial powers that resulted in the division of Africa into the current states.

<sup>101</sup> Article 6 of the General Act of Berlin, 1885.

<sup>102</sup> Cassidy, *supra* note 98, p. 168 (quoting Bayone-Ba-Meya).

<sup>103</sup> *Mabo and others v. Queensland* (No.2) (1992) 175 CLR 1 F.C. 92/014, per Brennan, J., p. 40.

<sup>104</sup> *Ibid.*, per Brennan, J., p. 61.

<sup>105</sup> *Ibid.*, per Brennan, J., p. 67.

<sup>106</sup> See Encyclopaedia Britannica, available at

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

to lands survived conquest. In reference to its claim, Lord Sumner, a member of the Judicial Committee of the Privy Council,<sup>107</sup> argued that 'it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forbore to diminish or modify them'.<sup>108</sup> Further:

According to the argument the natives before 1883 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveler, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement. . . pioneered by the Company.<sup>109</sup>

In a similar case, following a notice that certain lands of Lagos region of Apapa were acquired by the Nigerian colonial government, Chief Oluwa went to court claiming compensation in the name of his community which, he argued, was the owner of the lands in question. Acting on appeal, the Privy Council argued that:

no doubt there was a cession to the British Crown, along with the sovereignty, of the radical title or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected . . . It is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives.<sup>110</sup>

The Council went further arguing that 'a mere change in sovereignty is not to be presumed to disturb rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly'.<sup>111</sup>

---

[http://education.yahoo.com/search/be?lb=t&p=url%3An/ndebele\\_matabele\\_](http://education.yahoo.com/search/be?lb=t&p=url%3An/ndebele_matabele_) ('...Bantu-speaking people who live primarily around the city of Bulawayo, Zimbabwe. They originated early in the 19th century. as an offshoot of the Nguni of Natal, moving first to Basutoland (now Lesotho) and ultimately to Matabeleland (Zimbabwe). Under Lobengula, they grew in power, but were defeated by the British in 1893. Today they are a farming and herding people numbering 1.5 millions').

<sup>107</sup> The Privy Council was the supreme appellate tribunal for the British Empire, and had the duty of determining appeals from some 150 colonial, Indian, Admiralty, Vice-Admiralty, prize, ecclesiastical and consular jurisdictions.

<sup>108</sup> *Re: Southern Rhodesia* [1919] AC 211, pp. 233–234.

<sup>109</sup> *Ibid.*, p. 234. The legal contest was a result of a resolution in 17 April 1914 by the Legislative Council of Southern Rhodesia, which stated that lands in Southern Rhodesia had not been alienated by the British South Africa Company (a corporate that was said to conquer lands on behalf of the Crown).

<sup>110</sup> *Amodu Tijani v. Secretary, Southern Nigeria*, 1921, 2A.C. 399, per Viscount Haldane, p. 407.

<sup>111</sup> *Ibid.*

ALBERT K. BARUME

There are several other cases supporting this argument. The Privy Council took a similar line of reasoning in *Sobhuza II v. Muller and Others*, when a Swaziland chief went to court in the name of his community to claim that ‘the Crown had no rights to dispossess the natives of their lands’.<sup>112</sup> In relation to indigenous rights in Nigeria, Lord Denning argued in 1957 that, in dealing with the claims, the Court ‘will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected’.<sup>113</sup>

The decisions by the Privy Council continue to be highly regarded; in fact, the Judicial Committee of the Privy Council is still the final court of appeal in countries such as Jamaica & Mauritius.<sup>114</sup> In many states including Kenya, the decisions of this colonial legal relic still have persuasive authority.<sup>115</sup> In the Kenyan case *Chetankumar Shantkal Parekh v. The People*, the judge clearly referred to decisions by the Privy Council:

We propose to dwell on these cases in a short while but the clear position we have come to is that we agree with the Privy Council and the Appellate Division in Zimbabwe and will dispose of this appeal as they did theirs and we will reject the Kenyan approach, which coincided with Mr. Mwanawasa's. Our conclusion based on these cases which are of very high persuasive value and which dealt with provisions very similar, if not identical, to ours is that there is nothing unconstitutional in a provision which prohibits or restricts the grant of bail pending trial.<sup>116</sup>

In their concluding statement, Justice Ngulube and the two judges again referred to decisions of the Privy Council as enjoying a persuasive authority: ‘The decision of the Privy Council in *Attorney-General of the Gambia v. Momodou Jobe* (see

---

<sup>112</sup> [1926] AC 518-19. The Case was not won by the appellant; however, the ruling stated a number of interesting principles relating to control of land by indigenous communities.

<sup>113</sup> *Adeyinka Oyekan v. Mussendiku Adele*, 1957, 1 WLR 876, per Lord Denning, p. 880.

<sup>114</sup> K. Hight and G. Kahale III, ‘Decision British Commonwealth case note’ *88 American Journal of International Law* (1998) p 775. In *Pratt and Morgan v. Attorney-General for Jamaica* ([1993] 4 All E.R. 769), the appellants were asking for the Judicial Committee of the Privy Council to decide on whether the death row to which they had been subjected did not amount to an act of torture, inhuman, and degrading treatment.

<sup>115</sup> *Ibid.* The opinion that decisions by the Privy Council continue to enjoy persuasive authority in Kenya is that of many Kenyan lawyers met by the author of this paper. This view is also shared by the Kenyan Legal Aid Project One member of this Project is quoted saying that decisions by the Privy Council have helped them in several cases. The Weekly Law Reports CD-ROM ‘has literally transformed our practice enabling us to provide authorities for several constitutional cases, such as an application to release prisoners who had been awaiting trial for four years, based on Privy Council cases drawn from the Justis database. Given the lack of legal materials in Kenya it would not be too much an exaggeration to say that such CDs can make the difference between life and death for those on death row . . .’; see <[http://www.context.co.uk/news/archive\\_kenya.html](http://www.context.co.uk/news/archive_kenya.html)>.

<sup>116</sup> 1995/SCZ/Judgment No.11a of 1995. The case involved individuals who were refused bail and appealed against the refusal.



## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

*reference above*) was not brought to the Court's attention. If it had [been], the court would not have been able to distinguish the matter before it from *Jobe's* case as far as the effect of section 72(5) of the Constitution of Kenya was concerned'. Bennett and Powell argue that the doctrine of 'aboriginal title' is mostly relevant in countries that inherited English common law, because of the conception that despite acquisition of territories being vested in the crown, 'local land rights were preserved'.<sup>117</sup>

One could argue that despite not having constitutional and legal provisions specially designed to protect indigenous peoples, Kenya is under international obligation to provide protection and to respect the rights of its indigenous communities such as the Ogiek. Kenya could also be considered as being under the same obligation on the basis of the common law tradition recognizing immemorial occupation and use as a source of rights, as stated in the *Mabo case* and several decisions by the Privy Council.

### 3. THE OGIEK CASE

#### 3.1. Who Are the Ogiek?

At the commencement of their expulsion from the Mau forests around 1910, the Ogiek of Kenya were said to number far more than their current number (estimated to be up to 20,000 countrywide and 5,883 in the East Mau).<sup>118</sup> The Mau Forest, considered by them as their homeland, covers roughly 255,000 hectares situated about 170 kilometers northwest of Nairobi. This forest consists of seven blocks, namely the South West Mau (Tinet), East Mau, Mau Narok, Transmara, Maasai Mau, Western Mau, and Southern Mau. Apart from the Maasai Mau, all other parts of the Mau forest are either gazetted areas or are protected by Statute.

The forest constitutes an important powerhouse of Kenyan biodiversity, with endangered mammals such as the Yellow Backed Duicker and the Golden Cat.<sup>119</sup> In addition, more than 40 per cent of the Kenyan water supply also comes from this forest, its environmental role is beyond doubt.<sup>120</sup> The East Mau Forest is considered to constitute the main concentration of the remaining Ogiek people. It covers Sururu, Likia, Teret, Nessuit, Elburgon, Mariashoni, Kiptunga and Bararget stations, which comprise an area of approximately 900 square kilometers of forestland.<sup>121</sup> Culturally, the Ogiek are hunter-gatherers or former hunter-gatherer indigenous

<sup>117</sup> Bennett and Powell, *supra* note 98, p. 13.

<sup>118</sup> J.K. Sang, 'Indigenous peoples and conservation areas in relation to Ogiek in Mau Forest, Kenya: From principles to practice', paper presented at the conference on 'indigenous peoples and conservation areas in Africa . . .' (Kigali, Rwanda, September 2001), p. 4.

<sup>119</sup> J. K. Towett, 'Mau forest complex on the spot light', Report by the Ogiek Welfare Council (Nairobi, April 2002), p. 4.

<sup>120</sup> J. Astill, 'The Ogiek face eviction from their ancestral forest homelands', *The Guardian*, March 13, 2002.

<sup>121</sup> Sang, *supra* note 118, p. 2.

peoples who live on honey harvesting and hunting in the Mau Forest, which, until 1954, was set aside as a protected area in which no human settlement was allowed.<sup>122</sup>

### 3.2. *Ogiek as Indigenous Peoples*

Against the recognition of the Ogiek as indigenous peoples is the commonly expressed sentiment captured in the statement: 'Africa poses thorny problems of definition, because most Africans consider themselves indigenous people who have achieved decolonization and self-determination.'<sup>123</sup>

The United Nations' 'Study of the Problem of Discrimination Against Indigenous Populations', known as the Cobo Report, understands the term 'indigenous' as meaning communities with original pre-colonial rights over a land, with a non-dominant stature in relation to a wider society, a history of subjection to very particular discrimination and a cultural distinctiveness that the communities are willing to preserve.<sup>124</sup> ILO Convention 169, which could be considered, amongst other things, as having inspired the Cobo Report, had already underlined almost all of the guiding factors listed above, with particular attention to the principle of 'self-definition'.<sup>125</sup>

The Chairperson of the United Nations Working Group on Indigenous Populations, Dr. Erica-Irene Daes, insists that factors such as, 'experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist' are essential if one is to comprehend the wide spectrum

---

<sup>122</sup> Forest Act, CAP.385.

<sup>123</sup> R. Barsh, 'Socially responsible investing and World's Indigenous Peoples', First Nations Development Institute/First Peoples Worldwide, *see* First Peoples Worldwide, *at* <[www.firstpeoples.org/corporate/background.htm](http://www.firstpeoples.org/corporate/background.htm)>.

<sup>124</sup> Special Rapporteur Martinez Cobo, in the UN report that bears his name, states: '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 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.' U.N.Doc.E/CN.4/Sub.2/1986/7&Add.1-4. *See also* Study of the Problem of Discrimination Against Indigenous Populations, U.N.Doc/E/CN.4/Sub.2/1986/7/Add4.

<sup>125</sup> Articles 1 and 2 of ILO Convention 169: '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; peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic 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'.

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

that the term indigenous could cover.<sup>126</sup> This section seeks to briefly address the relevance of these guiding factors with regards to the Ogiek. In other words, do the Ogiek see themselves as indigenous? If so, what other guiding factors could be seen as applicable to them?

The principle of 'self-definition', as articulated by Article 2 of ILO Convention 169, recognizes the freedom of a community to define itself as 'indigenous'. This provision, however, does not specify a precise procedure to be followed by a community when declaring itself indigenous. Consequently, communities tend to proclaim their indigenosity through land claims, lobbying activities and presentations made at regional and international meetings relating to indigenous issues.

The Ogiek clearly consider themselves to be an indigenous people with a culture threatened by extinction. They have called for the recognition of their indigenous status on every possible occasion.<sup>127</sup> Several court cases examined below are based on claims that most of the Mau Forest is their motherland, which they have occupied and used since time immemorial. In a Memorandum to the Kenyan Parliament in July 1996, the Ogiek claimed again to have a 'birth right . . . [to their] ancestral land in the Mau Forest'.<sup>128</sup> A more recent submission in 2000 to the Njonjo Land Commission states: '[O]ur history has shown that we are environmentally friendly. Our land tenure system is also environmentally friendly . . . help us live in our ancestral land and retain both our human and cultural identities as Kenyans of Ogiek origin.'<sup>129</sup> In another report, they state: '[T]he Ogiek have occupied this forest from time immemorial and are customarily entitled to it . . . The excision [of the Ogiek from the Mau Forest] amounts to a death warrant and will lead to the extinction of our ancestral lands.'<sup>130</sup> Furthermore, representatives of the Ogiek are regular attendants of the sessions of the UN Working Group on Indigenous Populations, occasions which they continuously use to condemn the denial of their indigenous status by the Kenyan government.

Besides the issue of self-identification, the Ogiek display numerous objective-distinguishing characteristics of indigenous peoples. As a non-dominant community, the Ogiek represent less than one per cent of the national population of Kenya. Figures for 2001 indicate that Kenya has a population of over 29 million, divided as follows: the Kikuyu, 22 percent; the Luhya, 14 percent; the Luo, 13 percent; the

---

<sup>126</sup> E. Daes, Standards-setting activities: Evolution of standards concerning the rights of indigenous peoples, UN working paper E/CN.4/Sub.2/AC.4/1996/2, p. 21.

<sup>127</sup> Ogiek Welfare Council, A Memorandum submitted to all members of Parliament, July 1996, Nairobi, Kenya.

<sup>128</sup> *Ibid.*

<sup>129</sup> The Land Review Commission, known as the Njonjo Land Commission, was set up by the Kenyan government to assess, amongst others, various land claims by different communities. The Commission takes the term 'Njonjo' from its Chairperson's name, Charles Njonjo, a Kenyan Member of Parliament.

<sup>130</sup> Towett, *supra* note 119, p. 5.

Kalenjins, 12 percent; the Kisii, six percent; the Meru, six percent; 'other Africans', 15 percent; and non-Africans (Asian, European and Arab), one percent.<sup>131</sup> As one can see, the Ogiek (estimated to be up to 20,000), are not mentioned, possibly because of their significantly small numbers.

More significantly, the Ogiek show a direct link between their land and the survival of their culture, way of life and identity. Some opinions have shown that before the beginning of their expulsion from the Mau forests in the early 1900s, the Ogiek numbered far more than their current population.<sup>132</sup> Forced to face a new way of life outside their natural environment, the life expectancy of the Ogiek has drastically dropped. One Ogiek representative met by the author in 2001 underlined the fact that it has become difficult to find an Ogiek older than 60 years.<sup>133</sup> It is not only the number that has declined since the loss of their motherland. It is now known that members of the Ogiek community who moved southwards into Tanzania lost their original language and currently speak a dialect that is closer to the language of their neighbours, the Maasai.<sup>134</sup>

The Ogiek continue to use and occupy an important part of the Mau Forest, despite the risk of arrest, detention and even torture. A member of the Ogiek community met by the author on one occasion confirmed cases of rape of Ogiek women by forest guards as a means to force their husbands to leave the area. There have also been instances of burning down parts of the Mau forests. But no one knows whether these incidents have occurred as a result of action by members of the Ogiek community.

The plight of the Ogiek is mainly derived from their determination to resist their transformation into sedentary agriculturalists, which is not their cultural way of life. As developed in the following part on the legal struggle of the Ogiek, this transformation was the objective of the government of Kenya's 28-day notice in its bid to de-gazette 147,000 acres of Mau Forest so that it could be allocated to non-Ogiek and Ogiek for agriculture.<sup>135</sup> As Ben Cousins indicates, 'agricultural intensification . . . in some African countries is leading to reduction . . . of forest,

---

<sup>131</sup> See Population Reference Bureau, at [www.pbs.org/sixbillion/images/LHKenya.pdf](http://www.pbs.org/sixbillion/images/LHKenya.pdf): or see also, <[www.prb.org](http://www.prb.org)>.

<sup>132</sup> Sang, *supra* note 118, p. 4.

<sup>133</sup> Statement made by an elder Ogiek at Nakuru/Kenya during a training-discussion on the existing alternative ways for international action against the actions of the government of Kenya with regard to the Ogiek's lands. More than 50 members of the Ogiek community took part in this training organized by the Ogiek Welfare Council, a local non-governmental organization created by Ogiek, and the Forest Peoples Programme, a British non-governmental organization working with indigenous communities worldwide.

<sup>134</sup> Sang, *supra* note 118, p. 5.

<sup>135</sup> J. Kamau, 'Government degazettes Mau Forest, Ogiek move to court', at <[www.ogiek.org](http://www.ogiek.org)>, last consulted March 3, 2003.

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

bush and grazing . . . resulting in tensions between sedentary agriculturalists and mobile . . . other neighbouring communities'.<sup>136</sup>

### 3.3. *Ogiek Court Battle for their Lands*

The Ogiek have filed several lawsuits against the Kenyan Government's attempt to expropriate them from their lands. The process began in 1997 when they resisted the attempted 'scramble' of their lands. James Astill documented that by 1997, hundreds of title deeds on Mau Forestland had been handed over to non-Ogiek individuals.<sup>137</sup> In April 1997, Mr. Letuya, an Ogiek, was arrested for resisting the demarcation of his family land. This land and that of other Ogieks was consolidated onto one piece of land given to a senior government official, Mr. Wilson Kiprono Arap Chepkwony.<sup>138</sup> On 25 June 1997, the victims filed a Constitutional suit at the High Court of Kenya to stop the allocation of the East Mau forest by declaring these land allocations null and void (Case HCCA No.635/97). On 15 October 1997, the High Court issued an injunction stopping further allocation until the case was resolved in court. At almost the same time, the Ogiek of south-western Mau were ordered to leave their lands. In reaction to this, they filed a lawsuit known as the *Tinet Ogiek (S/Western Mau) v. the Republic of Kenya*<sup>139</sup>. The plaintiffs claimed that the unsustainable use of the environment by the Government endangered their right to life, as protected by the Kenyan Constitution.

On 22 March 2000, the High Court ruled in favour of the Government of Kenya, reasoning that although there was a:

failure to realize that the unsustainable utilization of . . . natural resources undermines . . . human existence . . . [and that] . . . a justice system, which does not uphold the efforts to protect the environment for sustainable development, is a danger to the enjoyment of human rights . . . The eviction is for the purpose of saving the whole of Kenya from a possible environmental disaster: It is being carried out for the common good within statutory powers.<sup>140</sup>

And, further, that:

the Government's 1991–1998 plan to settle all landless persons including some Ogiek people was purely on humanitarian grounds but the program did not materialize when it was later found that to go ahead would

---

<sup>136</sup> B. Cousins, 'Tenure and common property resources in Africa', in C. Toulmin and J. Quan (eds.) *Tenure and common property resources in Africa* (DFID/IIED/NRI, London, 2000) p. 168.

<sup>137</sup> Astill, *supra* note 120.

<sup>138</sup> Towett, *supra* note 119, pp. 20–21.

<sup>139</sup> Case HCCA No.228/99

<sup>140</sup> *Ibid.*

ALBERT K. BARUME

necessarily result in environmental degradation which would adversely affect the role of the forest reserve.<sup>141</sup>

By virtue of this decision, it would appear that the Kenyan High Court failed to link the expulsions of indigenous communities from their lands with the right to life of such communities' members, as an increasingly strong international jurisprudence sustains.

In 1999, a Bangladeshi High Court ruled in favour of members of a community in Dhaka whose houses were demolished after being evicted from their lands, on which a government project was implemented. The Court held that 'any person who is deprived of the right to livelihood, except according to just and fair procedures established by law, can challenge that deprivation as offending the right to life'.<sup>142</sup>

In *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors*, one of the hunter-gatherer indigenous communities of the Linggiu Valley in Malaysia alleged violations of, amongst others, its rights to life and lands following its government's agreement with Singapore to build a dam on its hunting and gathering lands. Citing a number of other cases in which the same view was upheld, the Malaysian Court of Appeal ruled that 'the lower court made the correct finding as to liability. It is a well established principle that deprivation of livelihood may amount to deprivation of life itself'.<sup>143</sup>

In the same vein, 'Indian Courts have expansively interpreted the scope of the constitutional right to life by forbidding all actions by both the state and citizens which disturb the environmental balance'.<sup>144</sup> This principle underpinned the ruling in *Indian Council for Enviro-Legal Action v. Union of India* – a case that involved a number of people inhabiting the village of Bichhri in Rajasthan, who alleged that the government of India was violating, amongst others, their right to life by failing to control and stop pollution caused by a local factory. The Court built an argument on 'the constitutional right to life, [to order] . . . appropriate governmental regulatory'

---

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ain O Salish Kendro (ASK) & Ors v. Government of Bangladesh & Ors*, Writ Petition No 3034 of 1999, 2 CHRLD (1999) 393. The case was filed by local human rights organisations concerned with the demolition by the government of Bangladesh, 'Basties' (slum-dwellings) in Dhaka. Following the demolitions, which took place without prior consent of the victims, all the inhabitants of the lands in question were expelled. For more information, see Interights, <[www.interights.org](http://www.interights.org)>; see also Pereira, this volume.

<sup>143</sup> *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors*, 2 MLJ (1998) 158, 2 CHRLD (1998) 281. The Court of Appeal mentioned in its argument the following cases in which the same view was upheld: *R Rama Chandran v. The Industrial Court of Malaysia & Anor*, 1 MLJ (1997) 145 (Mal FC); *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor*, 1 MLJ (1996) 261 (Mal CA); and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor*, 1 MLJ (1996) 481 (Mal CA) cited. For more information, see Interights, <[www.interights.org/cases](http://www.interights.org/cases)>; see also 2 MLJ (1998) 158, 2 CHRLD (1998) 281.

<sup>144</sup> C. Burch, *Constitutional environmental law: Giving force to fundamental principles in Africa* (Environmental Law Institute, Washington, 2000) p. 30; see generally Environmental Law Institute, <[www.eli.org/](http://www.eli.org/)>.

## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIK OF KENYA

measures.<sup>145</sup> In *Organization Indigena de Antioquia v. Corporacion Nacional de Desarrollo del Choco*, the Constitutional Court of Colombia also held that the rights to life, property and cultural integrity of an indigenous community were infringed on by the act of illegally cutting down trees on their lands.<sup>146</sup>

The Human Rights Committee implicitly hinted, in the *Lubicon Lake Band* case, that it considered that there is a relationship between indigenous communities' right to lands and the right to life of members of these communities. Considering:

the author's allegation that the Lubicon Lake Band was on the verge of extinction, [the Human Rights Committee] requested Canada, under rule 86 of procedures to take interim measures of protection to avoid irreparable damage to [the author of communication] and other members of the Lubicon Lake Band.<sup>147</sup>

The Committee seems to have recognized that there is what Julian Burger and Paul Hunt call a connection between indigenous communities' 'collective right to exist as a cultural entity' and the right to life of their members.<sup>148</sup>

The Inter-American Commission on Human Rights (Inter-American Commission) has also adopted a broad understanding of the right to life in its decision on a number of communications, including the case of the Yanomami indigenous community, whose lands were affected by a Brazilian government's highway project. In response to allegations of violating Article 1 of the American Declaration of the Rights and Duties of Man (American Declaration) regarding the right to life, the Inter-American Commission ruled that 'invasion was carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others'.<sup>149</sup> In a similar communication before the Inter-American Commission, members of the Miskito indigenous community alleged that the government of Nicaragua violated, amongst others, their right to life and the right of their community to exist as a distinct cultural entity, by expropriating their lands.<sup>150</sup> The case was received and is still

---

<sup>145</sup> *Ibid*: This publication also gives a long list of other cases in which the right to life versus environmental degradation was referred to by Indian courts.

<sup>146</sup> *Ibid*.

<sup>147</sup> *Lubicon Lake Band*, paragraph 29.3.

<sup>148</sup> J. Burger and P. Hunt, 'Towards the International Protection of Indigenous Peoples' Rights', 4 *NQHR* (1994) pp. 413-414.

<sup>149</sup> Inter-American Commission on Human Rights, Resolution No.12/85, Case No. 7615, 5 March 1985. See OEA/Ser.L/V/II.62 doc.10rev.1, October 1985.

<sup>150</sup> Following the political confusion that prevailed in Nicaragua in the 1980s, the Miskito indigenous community became a victim of forced relocation, assimilation and similar human rights violations. As a reaction to the Miskito's resistance to the new government policies, several human rights violations, including rape, murder and torture were committed against the Miskito. In February 1982, the Miskito people lodged their first complaint before the

ALBERT K. BARUME

ongoing before the Commission. In its Report on the Situation of Human Rights in Ecuador, the Inter-American Commission likewise concluded that, in relation to indigenous communities' right to land it is necessary to understand:

on the one hand, the essential connection they maintain to their traditional territories, and on the other hand, the human rights violations which are threatened when these lands are invaded and when the land itself is degraded. For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life and the geographic space necessary for the cultural and social reproduction of the group.<sup>151</sup>

More recently in May 2002 the African Commission held the Federal Republic of Nigeria accountable for, amongst other, the violation of the right to life in the context of the destruction of Ogoniland by the Shell oil company.<sup>152</sup>

In April 2000 the Ogiek peoples launched an appeal against the judgment of 22 March 2000. They also obtained a stay of execution pending the appeal. However, to the surprise of many, on 16 February 2001, the Kenyan government issued a 28-day notice to de-gazette twelve forest lands, including more than 100,000 acres of Mau Forest. A few days later, the Ogiek filed yet another lawsuit before the High Court with the aim of quashing the notice.

None of the Ogiek's court cases have been concluded so far. The Ogiek themselves appear to be seriously concerned with all the delaying tactics, which seem to constitute the government's strategy. On one occasion, 'more than 100 Ogiek elders jammed the corridors of the High Court to listen to [a] case'.<sup>153</sup> Ogiek's lawyers have expressed similar concerns relating to the lack of respect of court orders by government officials.<sup>154</sup>

---

Inter-American Commission of Human Rights. *See* Report on the Situation of Human rights of a segment of the Nicaragua Population of Miskito Origin, OEA/Ser.L/V/II.62, doc.26.(1984). *See also* F. MacKay, 'A guide to indigenous peoples' rights in the Inter-American Human Rights System', First draft, Forest Peoples Programme, p. 32, available at <www.forestpeoples.org>, last consulted March 10, 2003; Binder, this volume.

<sup>151</sup> Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev.1 (1997) p. 89.

<sup>152</sup> This case was filed in November 1995 following death penalties carried out on nine leaders of the Movement for the Survival of the Ogoni People, a movement that fight for the rights of Ogoni communities in Nigeria; *see also* Appiagyei-Atua, this volume.

<sup>153</sup> J. Kamau, 'Another false start for Ogiek case', available at <www.ogiek.org>, last consulted 3 March 2003.

<sup>154</sup> J. Astill, *supra* note 120, p. 2.



## INDIGENOUS BATTLING FOR LAND RIGHTS: THE CASE OF THE OGIEK OF KENYA

### CONCLUSION

Ogiek consider themselves as indigenous peoples and claim immemorial rights on the Mau Forest. The pre-colonial and post-colonial history of Kenya does not make the Ogiek's battle any easier. Kenya can continue to deny indigenous status to peoples like the Ogiek. But the Kenyan government should also understand that it is bound to enact affirmative laws for the sake of the cultural survival of some of its communities. Not only is Kenya party to the ICCPR, whose Article 27 is explicitly broad enough to encompass cultural and land claims of indigenous communities, but it is also a country of common law tradition, which considers immemorial occupation and use of lands as a source of special and strong rights to lands.

The Ogiek relied on these assumptions when, since 1997, they decided to count on the Kenyan judiciary for preserving their homelands from being allocated to outsiders. The obstacles facing these cases should not make one believe that the Ogiek have made wrong decisions. On the contrary, the Ogiek could become the community capable of bringing to the surface the entire iceberg of communities who are victims of similar abuses of rights in Africa. In the meantime, the Ogiek continue to defy the Government by refusing to comply with all the measures aimed at expelling them from the Mau Forest. Whatever the outcome of these Ogiek cases, they symbolize an emerging determination of many African indigenous peoples to bring to the surface the historical injustices from which they have all suffered.



## PART IV

# CONCLUSION



## CONCLUSION

International human rights law it seems, can only offer a modest route through which the violations that have taken place against identity-based groups may be remedied. As Thornberry has stated in his chapter in this book, the project for the spread of rights to hitherto ignored groups is only a 'modest amplification of community-oriented rights . . . reflecting a sharper understanding of the importance of community in the construction of personal and social identity, and of community membership as a focus for oppression'. Indigenous people are particularly marginalized in this context since the edifice of their exploitation was built, in most cases, by the divestment of their land through legal subterfuge, force or malappropriation.

This book, the result of an annual summer school that takes place each year in Galway in June, has sought to bring together scholars at different stages of their professional lives, writing from different ideological perspectives, and in very different conditions and settings. Yet it has sought to unite to provide a greater insight into issues concerning indigenous peoples today and the situations in which the violation of their rights occur. In seeking to frame this collection of essays particular attention has been paid to existing human rights and other organizational structures, to issues that continue to be at the forefront of the discussion of indigenous rights, and to the different theatres in which the discussion of the alleviation of indigenous rights continues to be of great relevance.

The first section sought to offer the basis that exists within the discourse of human rights laws, *vis-à-vis* the protection of this particularly vulnerable group. While international standards for the protection of human rights have been improving steadily since the framing of the Universal Declaration of Human Rights in 1948, in certain places and for certain specific groups, the effect of this developing body of law has been largely negligible. This could have been said in the particular context of indigenous peoples rights outside North America and Australia. While the issue of indigenous peoples has been long neglected by the United Nations, it was the International Labour Organization that first raised concern at a global level for the well-being of this potentially vulnerable people.

Since then the rights of indigenous peoples have been attracting greater and greater interest and scholarship; which augurs well for the prospects of groups who can lay real claim to being the first inhabitants of the land on which they live. However although there has been an undoubted increase in the visibility of indigenous peoples at international level, and despite the significant alleviation of the situation in which many indigenous peoples live, significant problems continue to abound. Any recent success has to be balanced against the lack of political will in terms of addressing some of the very serious issues that lie at the crux of the worldwide discrimination that occurs against indigenous peoples. This is no more well illustrated than in the situation where the Decade of Indigenous Peoples is due to end without many of the objectives set for this period being fulfilled.

## CONCLUSION

The decade of indigenous peoples when it was launched in 1993, aimed to draw attention to the plight of this vulnerable group.<sup>1</sup> Towards this end it emphasized that consultation with indigenous peoples was vital for progress. It also requested the Working Group to draft specific objectives that it called for – to be fulfilled in the quest for the fulfillment of indigenous peoples rights.

As the decade nears its completion a glance at the objectives ought to provide an important signpost to the extent to which the process has stagnated. It is worth reiterating that the following seven objectives were considered crucial to the success of the Decade:

1. The strengthening of international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, health, culture and education.
2. The specialized agencies of the United Nations system and other international and national agencies, as well as communities and private enterprises, should devote special attention to development activities of benefit to indigenous communities.
3. The education of indigenous and non-indigenous societies concerning the situation, cultures, languages, rights and aspirations of indigenous people. In particular, efforts should be made to cooperate with the United Nations Decade for Human Rights Education.
4. The promotion and protection of the rights of indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic and social life, with full respect for their cultural values, languages, traditions and forms of social organization.
5. Further the implementation of the recommendations pertaining to indigenous people of all high-level international conferences, including the United Nations Conference on Environment and Development, the World Conference on Human Rights, in particular its recommendation that consideration be given to the establishment of a permanent forum for indigenous people in the United Nations system, the International Conference on Population and Development and the World Summit for Social Development, as well as all future high-level meetings.
6. Adoption of the draft United Nations declaration on the rights of indigenous peoples and the further development of international standards as well as national legislation for the protection and promotion

---

<sup>1</sup> See A/RES/48/163 (1993)

## CONCLUSION

of the human rights of indigenous people, including effective means of monitoring and guaranteeing those rights.

7. The objectives of the Decade should be assessed by quantifiable outcomes that will improve the lives of indigenous people and that can be evaluated halfway through the Decade and at its end.<sup>2</sup>

It is particularly interesting to observe that the seventh objective calls for the monitoring of the extent to which the objectives of the decade can be assessed by quantifiable outcomes. While not seeking to comment in great detail on the extent to which these objectives have been fulfilled this short comment seeks to reiterate the approach taken in this collected work.

In seeking to analyze the issue of the current status of indigenous rights this book has sought to examine the progress of such rights from the context of specialized agencies who deal with these issues. Thus while Scheinin has examined the subtle change in the jurisprudence of the Human Rights Committee (HRC) *vis-à-vis* the treatment of indigenous and caste based groups within the Committee on the Elimination of all forms of Racial Discrimination (CERD). In so doing he has stressed what is perhaps the central tenet of human rights law: the quest for effective equality. He thus describes CERD as a potential mechanism seeking to reach out to individuals 'locked in a system from which they aspire to escape and which they find degrading, a system which involves a total lack of social mobility, for the status of an individual was determined by birth or social origin and could never change, regardless of personal merit'. While the HRC and the CERD are two of the classical human rights treaty based mechanisms that are studied in the context of the evaluation of indigenous rights, this picture needs to be complemented by a study of the work undertaken by the International Labour Organization who, as Swepston has demonstrated, *were* the first institution to engage this issue in any great detail. Of course one of the victories of the Decade of Indigenous Peoples has been the unveiling of the Permanent Forum on Indigenous Issues – with its special status in the human rights hierarchy. While it remains early to comment effectively on its functioning, Malezer has not only demonstrated its potential but has also documented the long road that indigenous peoples have traveled in seeking to effectively petition international organizations. The creation of the Permanent Forum arguably represents an end point in that particular journey, and also demonstrates that the notion of 'consultation' with indigenous peoples can be more than a mere rhetorical norm.

The second section of the book has been geared towards seeking to focus on what remain crucial and outstanding issues in the negotiation between states and

---

<sup>2</sup> See PROGRAMME OF ACTIVITIES FOR THE INTERNATIONAL DECADE OF THE WORLD'S INDIGENOUS PEOPLE (1995–2004) (para. 4), General Assembly resolution 50/157 of 21 December 1995, annex. Also available at <[www.unhcr.ch/html/menu6/fs9.htm](http://www.unhcr.ch/html/menu6/fs9.htm)>.

## CONCLUSION

indigenous peoples. While Schabas deals with the fundamental issue of the basic protection of indigenous peoples from genocide, Castellino has sought to examine the basis for indigenous identity in terms of land rights. These are issues that have been central to the manner in which indigenous peoples have negotiated the terms of peaceful coexistence with states that have sought to abrogate their rights. However a new challenge that is likely to be of increasing importance is the issue of intellectual property rights, and Harris has sought to present an Australian perspective on how this discussion has been addressed.

It is relatively easy, in the discussion of international human rights law, to merely focus on the standards and the potential panaceas they offer. To demonstrate the extent to which the issues are viewed in practice this book has relied on nine case studies. While these case studies examine particular developments in jurisdictions such as Canada (Kontos) and Australia (Kinane), where the issue of indigenous rights has been before the Courts for a considerable period of time, the final section of the book has also sought to draw attention to lesser known parts of the globe where the denial of indigenous rights continue to reverberate, away from the media gaze. The situation analyzed by Binder *vis-à-vis* Nicaragua has gained considerable attention of late through the case before the Inter-American Court. Similarly the question of Oaxaca in Mexico as examined by Anaya has merited media attention due to its potential for violent confrontation. While this attention has seen the issue of the rights of the particular peoples catapulted to mainstream awareness, policy has been slow to follow in the alleviation of their situations.

By contrast in other parts of the world the issues of indigenous rights violations often do not break the surface, and as a result fail to be analyzed. The five remaining case studies seek to focus on areas where indigenous rights remain pertinent though neglected. Gilbert has sought to demonstrate the extent to which the Indian Court system with all its deficiencies could prove an effective bulwark against the further encroachment of indigenous rights by the respective state governments in the Indian federal system. This is in sharp contrast to Barume's analysis of the situation of the Mau-Mau which casts light on the potential of the Kenyan court system in dealing with similar issues. As Appiagyei-Atua shows in his analysis of the situation of the Ngoni peoples of Nigeria, regional bodies such as the African Court of Human Rights also have crucial roles to play in the redressal of indigenous rights. In her analysis Pereira shows the extent to which political negotiation as a tool could be called upon, by narrating the situation of the Chittagong Hill Tribes in Bangladesh. The final case study by Jaichand reveals the dangers of categorization that exist – and in this sense warn us of the dangers of labels. In looking at the particular agitation of the Boers of South Africa he shows the dangers that could exist in the framing of identity based separatist rights that need to be heeded, especially in the framing of any specific right to self-determination for indigenous peoples.

Thus the book has sought to draw together several different strands in a bid to perform an audit of a kind in terms of indigenous peoples rights at the end of the World Decade on Indigenous Peoples Rights. Based on the findings of the various authors of this book the following conclusions are advanced.



## CONCLUSION

First, despite the increasing visibility of indigenous peoples at the international level the discussion on indigenous peoples rights appears to have stalled. No real progress has been possible on the Draft Declaration and as a result there is still no universal human rights binding standard on indigenous peoples rights despite regular reiterations of the importance of such a standard. That having been said there are important developments within the jurisprudence of the Human Rights Committee, and in the manner in which CERD is viewing its role as a bulwark against discrimination, that offer some light. In addition the ILO has continued to emphasize its role in indigenous peoples rights and institutions such as the World Bank have also begun to take heed. The creation of the Permanent Forum has been an important evolution in the discussion of indigenous rights, though it is still early to effectively analyze the extent to which it could be an important player in the international negotiation of indigenous rights.

Second, there are several issues that remain to be resolved in terms of the discussion of indigenous peoples rights. At the forefront of these is the discussion of land rights, as can be seen from several of the case studies. It does seem fundamental to the existence of indigenous peoples that the issue of land plays an important role in the discussion. However negotiations on the issue have very often resulted in a *zero-sum* game to the detriment of the discussion and progress on the issue. Closely linked to the issue of land rights is that of development as is illustrated once again in several of the case studies. It is clear that this, along with the discussion of intellectual property is part of the process of unraveling the issue of ownership and due for occupation and ways of life since time immemorial upon a given territory. Thus while the issue of genocide and protection based rights has been a significant one in terms of the evolution of an effective system for the protection of indigenous peoples' physical integrity, it now appears that the key issues for discussion in the coming period of negotiations is likely to be issues of identity – the extent to which this can be promoted and the extent to which it interacts with issues of real ownership of assets.

Finally, it seems clear that domestic courts have a crucial role to play in the alleviation at macro-level of indigenous rights violations. Several of the case studies have highlighted this succinctly while nonetheless pointing out the discrimination and lack of access that indigenous peoples often face with regard to this mechanism of redress. If the belief in human rights law is that the creation of standards is important then it follows from this that implementation and monitoring need to be given far greater emphasis. While the lack of a specific universal human rights based set of standards affects the flow of indigenous rights, domestic courts still provide an opportunity for many issues to be challenged. The issues of access to the courts remain crucial towards enabling and empowering indigenous peoples to examine this route to a greater extent; but where this access has been possible the domestic and regional courts remain an option that ought to be called upon to a greater extent.

*Joshua Castellino and Niamh Walsh*



---

## The Raoul Wallenberg Institute Human Rights Library

---

1. Göran Melander (ed.): *The Raoul Wallenberg Institute Compilation of Human Rights Instruments*  
ISBN 0-79233-646-1
2. U. Oji Umzurike: *The African Charter on Human and Peoples' Rights*  
ISBN 90-411-0291-4
3. Bertrand G. Ramcharan (ed.): *The Principle of Legality in International Human Rights Institutions; Selected Legal Opinions*  
ISBN 90-411-0299-X
4. Zelim Skurbaty: *As If Peoples Mattered; Critical Appraisal of 'Peoples' and 'Minorities' from the International Human Rights Perspective and Beyond*  
ISBN 90-411-1342-8
5. Gudmundur Alfredsson and Rolf Ring (eds.): *The Inspection Panel of the World Bank; A Different Complaints Procedure*  
ISBN 90-411-1390-8
6. Gregor Noll (ed.): *Negotiating Asylum; The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*  
ISBN 90-411-1431-9
7. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds.): *International Human Rights Monitoring Mechanisms; Essays in Honour of Jakob Th. Möller*  
ISBN 90-411-1445-9
8. Gudmundur Alfredsson and Peter Macalister-Smith (eds.): *The Land Beyond; Collected Essays on Refugee Law and Policy*  
ISBN 90-411-1493-9
9. Hans-Otto Sano, Gudmundur Alfredsson and Robin Clapp (eds.): *Human Rights and Good Governance; Building Bridges*  
ISBN 90 411 1776 8
10. Gudmundur Alfredsson and Maria Stavropoulou (eds.): *Justice Pending; Indigenous Peoples and Other Good Causes; Essays in Honour of Erica-Irene A. Daes*  
ISBN 90-411-1876-4
11. Göran Bexell and Dan-Erik Andersson (eds.): *Universal Ethics; Perspectives and Proposals from Scandinavian Scholars*  
ISBN 90-411-1933-7
12. Hans Göran Franck, Revised and edited by William Schabas: *The Barbaric Punishment; Abolishing the Death Penalty*  
ISBN 90-411-2151-X
13. Radu Mares (ed.): *Business and Human Rights; A Compilation of Documents*  
ISBN 90-04-13656-8
14. Manfred Nowak: *Introduction to the International Human Rights Regime*  
ISBN 90-04-13658-4 (Hb)  
ISBN 90-04-13672-X (Pb)
15. Göran Melander, Gudmundur Alfredsson and Leif Holmström (eds.): *The Raoul Wallenberg Institute Compilation of Human Rights Instruments; Second Revised Edition*  
ISBN 90-04-13857-9

16. Gregor Noll (ed.): *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*  
ISBN 90-04-14065-4
17. Ineta Ziemele (ed.): *Reservations to Human Rights Treaties and the Vienna Convention Regime; Conflict, Harmony or Reconciliation*  
ISBN 90-04-14064-6
18. Nisuke Ando (ed.), on behalf of the Committee: *Towards Implementing Universal Human Rights; Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee*  
ISBN 90-04-14078-6
19. Zelim A. Skurbaty (ed.): *Beyond a One-dimensional State: an Emerging Right to Autonomy?*  
ISBN 90-04-14204-5