René Kuppe and Richard Potz (Eds.)

Law & Anthropology

International Yearbook for Legal Anthropology
Volume 12

Martinus Nijhoff Publishers

Law & Anthropology
12

International Yearbook for Legal Anthropology

VOLUME 12

LAW & ANTHROPOLOGY

International Yearbook for Legal Anthropology

Volume 12

Edited by

René Kuppe
and
Richard Potz

On behalf of
The Working Group on Legal Anthropology
Vienna University Law School

"Indigenous Peoples, Constitutional States and Treaties or Other Constructive Arrangements between Indigenous Peoples and States"

Edited in cooperation with:

Bartolomé Clavero Salvador
Pablo Gutiérrez Vega
Luis Rodríguez-Piñero

MARTINUS NIJHOFF PUBLISHERS
LEIDEN / BOSTON

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

Printed on acid-free paper.

ISSN 0259-0816
ISBN 90-04-14244-4

Printed and bound in The Netherlands

CONTENTS

EDITORS' PREFACE

Chief Editor:
René Kuppe

Guest Editors:
Bartolomé Clavero Salvador
Pablo Gutiérrez Vega
Luis Rodríguez-Piñero

This new issue of *Law and Anthropology* encapsulates a selection of the most salient contributions presented at the International Expert Seminar on 'Indigenous Peoples, Constitutional States and Treaties or other Constructive Arrangements between Peoples and States', held in Seville under the auspices of the *Universidad Internacional de Andalucía* and the *Agencia Española de Cooperación Internacional*, on September 10-14, 2001. This meeting was inspired by the final recommendations of Miguel Alfonso Martínez's *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* [Final Report, E/CN.4/Sub.2/1999/20]. The original core contributions of the conference are flanked in this volume by additional papers elaborated on the occasion of a homonimous International Expert Seminar convened in Geneva in December 2003 by the UN Office of the High Commissioner for Human Rights. The connection between these documents is therefore not coincidental.

The conclusions reached in Seville in 2001 [E/CN.4/Sub.2/AC.4/2002/WP.9/ /En.][1] and those reached in Geneva in 2003 [E/CN.4/2004/111][2] vary, up to a certain extent, from those expressed earlier by Miguel Alfonso Martínez in his Final Report. Let it be recalled that, whereas the Seville and Geneva Seminars were conceived as Expert Seminars, Martínez's Final Report was fashioned according to a series of procedural constraints, as defined by the Sub-Commission's mandate, and went through an open and controversial scrutiny by the participants at the UN Working Group on Indigenous Affairs, and subsequently the Sub-Commission and the

[1] See Appendix 1 in this volume.
[2] See Appendix 2 in this volume.

R. Kuppe and R. Potz (eds.), Law & Anthropology, vii - ix.

Commission on Human Rights. As a matter of fact, our journey from July 1999 to December 2003 offers a valuable guidance on the role of experts' meeting within the broader UN human rights standard-setting process. Whatever – if any – the subtle differences between those documents may be, they certainly reflect the progress – if any – in this particular subject matter.

Building upon the Special Rapporteur's argument – where historicity ultimately became a discoursive trap – both the 2001 and the 2003 seminars emphasize that agreements between indigenous peoples and States are to be regarded as means to (re)settle the States/indigenous peoples interface on mutually recognized and consensual grounds. Recent cases of constitutional reform and, to a lesser degree, intra-state domestic negotiations have led to an unprecedented revitalization of freely expressed agreements, as a legitimate ground on which to base a new liaison between states and peoples.

Although the September 11, 2001 session was obviously suspended, the chronological coincidence of the Seville Seminar with one of the most striking, perhaps catalytic, events for the reconceptualization of contemporary international law did not divert the attention of panelists and attendants from what constitutes one of the main items in international relations' agenda for the past few decades: the emergence of a new international law regarding the *sui generis* legal and political standing of an allegedly *new* actor in the international arena, indigenous peoples. The papers selected for this volume of *Law and Anthropology* reflect the often problematic – and, at times, genuinely confrontational – encounter of political wills between States and indigenous peoples, whatever form this might have. The wide array of agreements and arrangements that have historically connected and still connect *host* States and *guest* indigenous peoples offer an unprecedented inventory of cross-cultural experiences. These experiences are to be taken into account with a view at reconciling distinctive cultures within a single, and sometimes restrictive, political domain.

As concerns the formal presentation of these contributions, we would like to point to the fact that some of them were originally written in Spanish (one of the working languages of the Seville Seminar along with English). The Editors have personally taken on the burden of translating some of the contributions. They also would like to thank Nazreen Kola, Caitleen Sainsbury, and Andrea Ormiston who with their excellent English skills have had a significant part in the final wording of the contributions of this book. All three of them have worked as interns at the Institute of Law and Religion (University of Vienna) as part of the Canadian government's Youth Employment Strategy (sponsoring organization was the Native Law Centre at the University of Saskatchewan).

The order of presentation of the contributions is based on a criterion of thematic affinity. Bartolomé Clavero points out the decadence of the constitutional reform avenue to satisfy the genuinely constituent wishes of indigenous peoples; treaties with peoples may in the future have unpredictable relevance. S. James Anaya focuses on the emergence of a new customary international law regarding indigenous peoples, partly fashioned by the contribution of indigenous peoples themselves; their

input stems from negotiational schemes masterly detailed in the contribution. Other contributions, such as Pablo Gutiérrez Vega's, seek to give an exploratory answer to the controversial phenomenon of what he calls the 'domestication' of indigenous peoples. The so-called process of retrogression as it may fit in future negotiations relies largely on the acceptance by Nation-States of, at least, a certain degree of peership for indigenous constituencies. As a result of those negotiational schemes, several international instruments have surfaced. For instance, the presentations of Lee Swepston and Luis Rodríguez-Piñero discuss ILO Convention No. 169 which is possibly the most effective catalyser of indigenous peoples' demands through international standards – and also the preamble for some negotiated constitutional reforms. A paradigmatic case of an international complaints procedure involving violations of the Convention, the *Huichol* case, is analysed in detail by Christina Binder. Magdalena Gómez Rivera and René Kuppe deal in detail with some constitutional reforms in Latin America, perceived both as a frustrated process of negotiation and as a valuable window of opportunity for the future. Roger Maaka masterly excerpts decades of expertise in 'making it work out': the Maori know-how regarding the implementation of historic agreements between States and indigenous peoples is a true benchmark in this area. Finally, Andrea Ormiston offers a rather personal account of the ongoing itinerary towards a full honouring of treaties with indigenous peoples and the necessity to recover negotiation on equal footing in order to address past grievances, and settle current and future differences.

TREATIES WITH PEOPLES OR CONSTITUTIONS FOR STATES: A PREDICAMENT OF THE AMERICAS

Bartolomé Clavero

The rights of Indigenous peoples, of peoples who do not form states and are pre-existing in their own territory, and that have preserved their own culture, can be recognised and currently are recognised through a variety of legal means. These means may be, by way of example, judicial decisions, statutes, by-laws, constitutions or treaties. I am not claiming that the medium is the message, or that the form determines the content. I do think, however, that the formal means by which Indigenous rights are recognised is not unimportant, and may even bear upon the substance of these rights. The very kind of instrument chosen for legal recognition, be it judicial, statutory, constitutional, or treaty-based, may determine the very position attributed to the Indigenous party. The effective reach of the right extended to an Indigenous party can be determined according to the kind of norm chosen. I will not focus on all the different kinds of documents formally acting as conduits for the registration and recognition of Indigenous peoples' rights in this paper, but only on the most significant two; the treaty form and the constitutional form. I will be dealing specifically with the Americas.

1. Treaties before Constitutions

Historically, the treaty precedes the constitution as a normative form in the basic sense currently attributed to the term, which emerged in the late 18th century, in the time of the independence of the United States. Before that, there had been a long standing, two-sided treaty making process involving European powers, both with Indigenous peoples and among themselves. Both sets of agreements may be formally designated as treaties, but a substantive difference exists between the two cases, treaties among European states or between European states and Indigenous peoples. This difference was very often concealed and not explicitly declared to the Indigenous contracting parties.

R. Kuppe and R. Potz (eds.), Law & Anthropology, 1-16.

Throughout the 17th and particularly during the 18th century, treaties and agreements celebrated among European powers were typically understood as the outcome of negotiation and consent on an equal footing. On the contrary, treaties or agreements signed between a European and an Indigenous party incorporated the presumption of the superiority of the former, including the reservation of a number of powers ranging from unilateral interpretation to unilateral cancellation. The treaty did not require the specification of this in express terms, as it was not considered subject to negotiation or assent. This was assumed by the European party as a result of cultural presumptions. European culture adopted the guiding responsibility, the alleged civilising and colonising burden. This reservation and the potential exercise of the retained powers was not only deemed a right, but also a duty, by Europeans themselves. It permeated the drafting and construction of treaties between colonial powers and Indigenous peoples. In the European party's language, this was articulated using the concept of sovereignty, a power that was presumed, retained and exercised by European peoples themselves.

Yet, the very mediation of a treaty entailed a certain degree of bilateralism and partnership, something extremely important even in face of the European cultural presumption. There was not only the understanding of one single party, the one who deemed itself superior, but also of the other party, who logically viewed itself as an equal partner (Williams, 1997). This, the Indigenous party, may have reasonably understood that practices such as mutual recognition through the exchange of gifts denoted a formal and fair recognition of a relationship, irrespective of any written stipulation, and surely of any unilateral presumption. The treaty did not relinquish its bilateral character because of being distorted, impaired or biased in the interpretation and understanding of one of the parties. The very existence of the treaty attested to a mutual recognition of respective rights, not only of Indigenous rights by European powers, but also of European rights by American Indigenous peoples, which was of course the primary question. However legitimised by the religious imperative of its civilising mission the European party might feel, as the outsider, it had no legitimacy before the Indigenous party. This legitimatisation was certainly attributed only by Indigenous assent.

If we re-establish a justly bilateral and not ethno-biased understanding of these treaties, then it follows that treaties might have been contracted even in cases in which the European party was not considering them at all. Europeans used them as a credential for entry into the Americas and subsequently denied their existence. I am referring to practices such as the already mentioned exchange of gifts or the mutual association by effective or fictive family relationships, without the requirement of written documents. They constituted true, implicit treaties, because of the recognition and partnership they actually implied. From the Indigenous party's perspective, this provided the legitimacy for the European party's presence. Gifts and treaties were then widespread, as widespread as the systematic cheating on the basis of the partial and biased understanding on the part of the Europeans. The treaties represented a mutual recognition on a formally equal basis.

Treaty making in a European context (written instruments, complementary to material or family exchange, implying reservation of powers) was a more common practice in British than in Hispanic colonialism, the two most important colonialist cases in America. The latter used and abused implicit treaties since the beginning, but also resorted to documentary register, particularly in the 18th century (Levaggi, 2002). It did so in order to gain the support of non-subdued peoples in relation to other colonial pressures**,** not because it changed its position with regard to the Indigenous standing (Weber, 1998). In any event, the Hispanics and the British alike, and all other Europeans present in America, bear and applied the same understanding derived from cultural presumption, with the effect of reserving unilateral powers. They assumed and retained sovereignty as the ultimate and thus first power that I have referred to (Williams, 1990).

2. Constitutions among Treaties

During the late 18th and early 19th centuries, the Americans were populated by independent states in which constitutionalism was flourishing based on the initiative of the non-Indigenous party. However different the Indigenous stance, all these constituent states had one thing in common: the error of confusing part of the national constituency for the whole nation. From the beginning this eliminated the possibility for bilateralism or partnership. In the European sense of the word, sovereignty was inherited and assumed by these Euro-American states. They felt encouraged and reinforced by their own constituent impulse. One part of the population, the colonial, (originally the outsider), appropriated the power of constituting itself as if it represented a human totality**.** The constituent power of the brand new states all assumed this. A part exercised its power over the whole. American constitutions were thus born of this original sin of tropism and unilateralism.

The most obvious example of this can be found in the case of the first American constitution. The United States became independent from the British policy of bilateralism exemplified by the 1763 Royal Proclamation, affirming Indigenous territory and setting the rules for a treaty-based relationship – though always upon the express grant from alien (British) *sovereignty* over the North-American continent. The United States constitution keeps silent about the Proclamation, because it is rejected. It is precisely against this Proclamation that independence has occurred, even though Euro-Americans would not like to recall this (Clinton, 1989). The encouraged and reinforced principle of sovereignty is now expressed in the unilateralism of the constitution itself. Another question relates to the decision to maintain a pragmatic setting for treaty-making. The famous Indian Commerce Clause allows indirectly for this by depicting *Indian Tribes* as entities closer to *foreign nations* than to the *several states* constituting the United States (US Constitution, art. 1, sec. 8.3). The proceeding or resumption of the treaty-making process was left open.

This umbrella allowed for the *de facto* continuation of a relatively bilateral policy of treaty-making throughout most parts of the 19th century, although with a stronger tendency to the cultural presumption of retention of powers on the Euro-American side, now the post-independent United States (Prucha, 1994). Facing conflict between Indigenous peoples and federal states or the federation, the constitutional jurisprudence or rulings by the Supreme Court soon formulated this policy in terms of substantial colonial continuity (Williams, 1990: 287-323; Norgren, 1996). The predominance of the United States constitution over the treaties signed with Indigenous peoples entailed the attribution to the federal party of unilateral powers concerning these bilateral instruments, absolutely beyond any sort of constitutional check and balance. Here we find again a lack of bilateralism and partnership, and find instead a tradition of colonial ancestry aggravated by the constitutional unilateralism.

Either because of shared backgrounds or by direct influence, similar and even more explicit assumptions may be found in early Latin American constitutionalism. I am not concerned with the distinctions, but rather with the inference of patterns. In these constitutional texts there may be the provision for '*tratados and negociaciones con ellos*', 'treaties and negotiations with them', the Indigenous peoples; or, as the very same constitutional text states, with '*los indios bárbaros*', 'the barbarian Indians', thus clearly implying the position of superiority assumed by the constituent party. The same early constitutional text, from Colombia (Clavero, 2000: 390-397), explains the requirements and objectives of treaty-making:

> Se les respetará [a los indios bárbaros] como legítimos y antiguos propietarios, proporcionándoles el beneficio de la civilización y religión por medio del comercio y por todas aquellas vías suaves que aconsejan la razón y dicta la caridad cristiana, y que sólo son propias de un pueblo civilizado y culto; a menos que sus hostilidades nos obliguen a otra cosa.
>
> (Translation): They [barbarian Indians] shall be respected as legitimate and ancient proprietors, and they shall be provided with the benefit of civilisation and religion by means of commerce and all those smooth ways advised by reason and dictated by Christian charity, which are proper of a civilised and cultivated people; unless their hostilities force us to do something different.

The point of departure is thus defined in the constitutional text. The state thereby constituted claims for territories that are effectively peopled and controlled by '*tribus errantes o de naciones de indios bárbaros*', 'wandering tribes or barbarian Indian nations', Indigenous peoples that had still not been subdued. So constitutions empowered states, and not peoples.

The above scenario may be well generalised to all American states keen on constitutionalism. Constitutional states incorporate alien territories. They assume that they are inhabited by uncivilised peoples, a sector of humankind lacking European culture and thus of civilisation in the European sense. The European party was particularly open to sharing its civilisation or, when necessary, imposing it by warlike means. Treaties are only part of peaceful methods. In this context, treaties are only relatively bilateral. The so-deemed 'barbarian peoples' are obliged to negotiate and to interact with a truly alien state, allegedly for their own benefit. If this disposition is lacking on the Indigenous part, it is considered hostile behaviour, thus entailing the conquest by the state as legitimate or just war. During the 19th and 20th centuries, these presumptions were also operating and practices developing not only among Latin American states, but in the United States as well.

This insistence on treaties and the imposition of hostilities is not common in expressly constitutional arrangements. The more common practise is that constitutions keep silent about the relationships between Indigenous peoples and states, particularly with regards to treaty-making and its warfare alternative. But both treaties and war are recurrent and compatible, and were particularly so throughout the 19th century, with mechanisms of relationships with the firmly established objective of acculturation, subjugation and domestication of Indigenous population, either gradually or forcibly. This did not only happen in Anglo-America, as we are generally aware of, but also throughout Latin America (Levaggi, 2000; Briones & Carrasco, 2000). The constitutional differences between these two components of Euro-America, differences based on the conception of territory and citizenship, are surely important, but secondary at that constituent stage.

Latin American constitutions, compared to their North American counterparts, are based on a relatively more clear idea of the state territory according to colonial borders, together with a comparatively more general understanding of their own citizenry, which includes the Indigenous population. Under this Latin American framework, treaty-making between a state and a people seems contradictory. Even in the case of the United States, which had a long and intensive experience of treaty making within domestic territories, this practice became abnormal over time (Prucha, 1994: subtitle). These agreements would be deemed to be treaties only in an improper sense, definitively without the equal footing, the entirely bilateral character or the particularly binding force of those subscribed among states. This shortcoming dates back to colonial origins, and truly has an absolute continuity, even aggravated in constitutional time.

3. Constitutions without Treaties

Constitutions of the Americas usually make no reference to treaties with Indigenous peoples. Today the exceptional case is that of Canada, which proceeded in 1982 to a constitutional recognition of the 'treaty rights of the aboriginal peoples.'

The literal reading [*in extenso*] (*Charter of Rights and Freedoms (original 1982 version)*, part I, sec. 25) may be useful:

> 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, including
>
> a.) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and
>
> b.) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.[1]

We already have elements to identify the duplicity. The constitutional recognition of treaty rights is included within the same colonial understanding of formerly British and now Canadian sovereignty (Kulchyski, 1994). There is no departure from a constitutionalism deeply entrenched in colonialism as concerns and affects the Indigenous party. Such recognition effectively produces novelties, but these are secondary to our present concern of identifying the intrinsic value of these two instruments, treaties and constitutions.

The inclusion of Indigenous peoples in the Charter of Rights and Freedoms may imply a beginning for a constitutional recapitulation that is also taking place, as will be discussed below, in other American states, but not in the United States. The constitutional jurisprudence originating in the Indian Commerce Clause, constitutional in appearance and colonial in substance, has progressively developed in the direction of degrading the Indigenous party and nullifying the effect of treaties. In the 20th century, the unilateral concession of citizenship has advanced in this regard. On the Indigenous part, and even in common language, there is still the tenet that there are *nations* recognised by *treaties*, *nations* that are even vested with *sovereignty* to afford itself a *constitution*, the constitutions of Indigenous *reservations*, but all of this is truly degraded, always subverted by federal harassment, by the fact that one side parts from an understanding of superiority, not of equality. At this stage, the United States has still not considered any amendment or reform that might address the colonial standing of Indigenous peoples as a constitutional challenge, and there is, to date, absolutely no indication that it is proposing to do so (Wilkins, 1997; Deloria & Wilkins, 1999).

In the Latin American context, from a number of constitutions recognising and securing Indigenous communal ownership in the early 20th century to new

[1] Paragraph 25(b) of The Canadian Charter of Rights and Freedoms was amended by the Constitution Amendment Proclamation, 1983, and now reads as follows:

'(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.'

constitutions, or amendments of the old ones affirming and proclaiming in recent years State multiculturalism on behalf of social pluri-ethnicity, there have been many attempts to at least diagnose the not so hidden cancer (Sánchez, 1996; Clavero, 2000; Barié, 2000; Aparicio, 2002). There are a wide range of constitutional formulas introducing novelties and opening up possibilities, from securing communitarian territoriality to considering State multiculturalism; from allowing for certain margins of Indigenous autonomy, to assuming the challenge of common reconstitution. However, these partial advances are not to be confused with the genuine establishment of a pluricultural state. This establishment is not possible while the ongoing colonial reality remains unacknowledged. Constitutional multiculturalism itself, typical in Latin America as a challenge of state reform (Assies; van der Haar & Hoekema, 1999; van Cott, 2000; Brysk, 2000), can be considered fraud if multiculturalism is constitutionally proclaimed for a society that remains colonial in nature.

With regards to the instruments, existing Latin American constitutions do not consider treaties or anything similar, or even the existence of historical treaties whose partnership could be recuperated or the possibility of future ones that could effectively allow new relationships in justly multicultural terms on an equal footing. The very constitutions thus recognising multilateralism as multiculturalism are still conceived under the assumption of the constituent determination of one party, the non-Indigenous. While the constitutions include the cultural premise of pluriculturality, they weren't created under such a premise. Pluralism is still not realised in relation to the principal element, which is the power constituting the political system and the legal order. These powers should be plural by virtue of a determination based on equal footing of the Indigenous and the non-Indigenous side, but this determination is still not only decided, but also articulated by the non-Indigenous party. Even though the rhetoric may be different, the very declaration of multiculturalism does not rule out the presumption of cultural superiority. The Mexican case is particularly illustrative in this regard. In 1994, an uprising in an Indigenous area resulted in a long process of negotiation which, as concerns rights, was channelled and developed directly by the principal parties of the pending re-constitution, the federal (in this case) and the Indigenous parties. This lead to a number of constituent agreements formally subscribed to by both sectors and finally presented to the institution vested with the capacity of constitutional reform, the federal Congress. This was in 2001. The Congress, the constituted constituent power, does not feel bound by the agreement. From its perspective, there is no treaty, nor is there the possibility of anything equivalent. With the ratification of a majority of state legislatures, it opts for another constitutional reform, radically contrary to the spirit of the one formally agreed upon. This is not even limited by an international instrument (ILO Convention No. 169), a treaty among states ratified by Mexico, requiring consultation to the Indigenous party for any state action that affects it. Or the constituent power simply takes for granted that this consultation has taken place, irrespective of the violated agreement. It understands that to do otherwise would be a way of unconstitutionally conditioning the instruments of sovereignty.

Notwithstanding the existence of an agreement, the constituent power is still not open to participation (Burguete, 1999; Gómez, 2000). I will come back to the said treaty among states ratified by Mexico, the famous ILO Convention No. 169.

The most recent Mexican amendment, made in 2001, attributes a constitutional value to local autonomy, which indeed may be of an Indigenous nature. At present, there are other cases of constitutional arrangements in American states of regional or county autonomy concerning the Indigenous population. As a matter of fact, they do not seem to constitute any important novelty in favour of the Indigenous party. They come to recognise and provide formal standing to many situations of peoples or communities resistant to state pressure in their own territories. In granting the State the power to constitutionally formalise autonomous arrangements, the State itself is empowered. Constitutional recognition and acceptance imply the state capacity to determine the relationships as a precondition for the exercise of autonomy. The said retention of constituent power understood as determining these 'legitimising' relationships bears a corollary of normative dependency. Today, constitutional instruments have this detrimental effect on the Indigenous party, even when they recognise rights and permit autonomies**.**

4. Treaties among Constitutions

The treaty I referred to in the case of Mexico is, of course, the 1989 *Convention on Indigenous and Tribal Peoples in Independent Countries* of the International Labour Organisation, better known as ILO Convention No. 169, the serial number attributed by an organisation that has negotiated the agreement of treaties with states since its origin in 1919. Convention No. 169 is a treaty among states, but it is also something else. States commit themselves by ratifying an agreement on the part both of governments and of workers and employers' organisations, as this is the trilateral constituency of the ILO, which acts as an international body with supervisory powers. On the relations with Indigenous peoples, ratifying states commit themselves to respect the convention and submit to the supervisory mechanisms of the ILO.

An inter-state treaty based on international mediation and operating under international scrutiny affirms Indigenous peoples' non-colonial standing. I am not concerned now with the substance of the rights according to the convention, but rather on the convention as a legal instrument and its formal implications. It is certainly more than an inter-state treaty, for the text was elaborated and its implementation enforced not only by governments, but also by other parties, employers and workers. But there is still something that does not fit. If the issue concerns Indigenous rights and the playing field is amplified, why does the Indigenous party not participate? One may answer that the ILO, the International Labour Organisation, has only a trilateral constitution that does not contemplate any possibility of expansion. Once again, this is precisely the problem. A partial constituent power is not questioned when new parties are being considered as subjects of rights. Not even the ILO itself applies the requirement of consultation

with Indigenous peoples that it demands from states. In fact, the Convention maintains a line of continuity with constitutional and colonial treaties between states bearing upon Indigenous peoples without relying on them to be a part of the treaty making process.

The ILO is not an exceptional case in the present international context. In the end, it is an agency of the United Nations, an organisation that does not recognise constituent subjects other than states themselves – the *nations* that form its constituency. This is not a double entendre in the sense that United Nations can mean either States or Nations. United *Nations* exclusively means the united *States*. States gather in a common international organisation, whereby 'international' has been assimilated to mean 'inter-state'. The ILO is an exception in this regard, inasmuch as its opens its constituency to non-governmental organisations, specifically employers and workers. However, it holds in common with its parent organisation the idea that states are the main constituents. At this stage, at the beginning of the 21st century, states are the main constituents of the United Nations, but they are no longer regarded as the exclusive constituents. The United Nations has also opened to non-governmental participation, including Indigenous representation. I will come back to this important point below.

It may be useful to recall that the United Nations, according to its constituent arrangement, also engages in treaty-making between states even when those concerned are also not states, such as the human individuals for instance. This is precisely the way in which a whole body of international human rights law came to be adopted and developed by United Nations from its founding in the 1940s. The UN human rights declarations and treaties are equally accorded between states and particularly address them. The treaties, or so-called covenants, are open to states' ratification, at least aiming at a more serious commitment.

The 1966 UN Covenant on Civil and Political Rights, surely the most important human rights instrument to date, is of particular interest to Indigenous peoples, although they are not expressly mentioned. Article 27 of the Covenant reads:

> 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 practise their own religion, or to use their own language.

The 1989 Convention on the Rights of the Child elaborated on this provision, expressly quoting it in Article 30:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such minority or who is Indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to

> profess and practise his or her own religion, or to use his or her own language.

These are treaties celebrated among states with no consideration whatsoever given to the possibility of other collective entities as subjects. The cited articles are carefully drafted, so that only individuals can be the subject of the right to a distinct culture, the *persons belonging to minorities*, even though this right may logically be exercised precisely in a collective way, *in community with other members of their group*. However, the group is not considered a possible subject of collective rights complementary or even necessary to the individual subject.

Even with the existence of the United Nations, human rights instruments, international jurisdictions and so on, there is still a sense of continuity with colonialism with regards to Indigenous peoples. As a result of its identification with human rights, the United Nations exhibits much more awareness about Indigenous peoples than individual states. It has not properly revised its statehood constituency, but it has widened de facto participation to include non-governmental organisations, and opened participation to Indigenous representatives. By recognising the problem and starting to consider the possibility of a specific instrument on the rights of Indigenous peoples, the United Nations has come to understand that there should be no consideration of the issue without the participation of the Indigenous party concerned (Hannum, 1990; Anaya, 1996; Palmisano, 1997; MacKay, 1999).

This is finally a beginning, although only a beginning, of a postcolonial history. In the face of enormous, primarily cultural difficulties associated with the continuing dominating mentality within many United Nations agencies, it is not easy to figure out which path should be followed (Tully, 1995; Kymlicka, 1995; Ivison; Patton & Sanders, 2000). The United Nations is currently debating different and allegedly complementary formulas of making the Indigenous voice present (like frequent representation in the Working Group of the Sub-Commission on Human Rights; a Special Rapporteur of the Commission; a Permanent Forum with consultative status before the Economic and Social Council, and so on). None of the proposals alone imply a revision of the state constituency of the United Nations, but as a whole they give rise to certain hopes. More specifically, the United Nations is considering the recuperation of bilateralism and partnership in treaties (Martínez, 1992-1990), as it is also discussing a Draft Declaration of the Rights on Indigenous Peoples that would presumably advance, if finally adopted, in a definitively postcolonial, and possibly also post-constitutional direction (Anaya, 1996: 207-216).

5. Treaties after Constitutions

The present Draft Declaration on the Rights of Indigenous Peoples starts by putting Indigenous Peoples on the same level as other peoples in an essential aspect: namely, the right to self-determination in all respects. This is really a solemn way to express a new starting point for a postcolonial history:

> Indigenous 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. (Draft Declaration, Art. 3)

The right is thus recognised to Indigenous peoples on an equal footing with other peoples, and therefore also with those constituting states – states to which Indigenous peoples actually belong. Yet the draft only provides for one specific option of exercising this right, namely that of remaining inside the state of which they are a part, but establishing an autonomy regime with a distinct minimum of powers and the correlative procedural requirements envisaged therein. The draft should instead deal with autonomy in a manner that is determined by Indigenous peoples themselves, and be not based on a unilateral constitutional decision subject to approval by the state or any international body.

With regards to the manner by which the right to self-determination is exercised, the draft does not explicitly exclude other options. It simply does not contemplate them, taking for granted the fact that the document is not designed to secure those other options. It provides international recognition and the guarantee of autonomy to those Indigenous peoples that have opted to remain within the state. In this case, the state retains sovereignty, but the sovereignty is based on a new understanding. As a result of this new understanding, sovereignty no longer implies the constituent power – the right to constitute the whole relation between the state and the Indigenous party – by unilateral determination of the state alone. The instrument that would come out of the eventual declaration would not be a unilateral constitution, but a bilateral treaty (or treaties) between peoples and states. This definitively announces a postcolonial future for treaties, giving them priority over constitutions.

Given the colonial bias which (contrary to the usual assumption) is more pronounced in constitutions than in treaties, it is logical that the Draft Declaration is silent on the issue of constitutions. On the other hand, the Declaration specifically addresses treaties. I quote from the preamble to the Draft Declaration: 'Considering that treaties, agreements and other arrangements between States and Indigenous peoples are properly matters of international concern and responsibility', and therefore the Declaration goes on to state in Article 36:

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements.

By speaking of the recuperation of genuine bilateralism or of partnerships of the past, *according to their original spirit and intent*, the Declaration may be paving the way for a different future.

In a future envisioned by this Draft Declaration, treaties would play a bigger role than constitutions. Or better yet, given that there is no return to history and surely not to pre-constitutional times, the latter, the constitutions, will have to identify primarily with the former, the treaties. Accordingly, by an imperative of human rights, the post-colonial era will also need to be post-constitutional. Even though not all have completed it, surely not those on the American continent, constitutions have exhausted their cycle as fundamental guarantees for Indigenous rights. Another road is being paved in the United Nations that begins with a formal issue, the form of normative instruments. This is the only issue I have concerned myself with in this essay.

Bibliography

Anaya, S. James

1996 *Indigenous Peoples in International Law*. Oxford University Press, New York.

Aparicio, Marco

2002 *Los pueblos indígenas y el Estado. El reconocimiento constitucional de los derechos indígenas en América.* Centro de Estudios de Derecho, Economía y Ciencias Sociales, Barcelona.

Assies, Willem; Gemma van der Haar & André Hoekema (eds.)

1999 *El reto de la diversidad. Pueblos indígenas y reforma del Estado en América Latina.* Colegio de Michoacán, Zamora.

Barié, Cletus Gregor

2000 *Pueblos indígenas y derechos constitucionales en América Latina. Un panorama.* Instituto Indigenista Interamericano, México.

Briones, Claudia & Morita Carrasco

2000 *Pacta Sunt Servanda: Capitulaciones, covenios y tratados con indígenas en Pampa y Patagonia, 1742-1878.* IWGIA, Copenhagen.

Brysk, Alison

2000 *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America.* Stanford University Press, Stanford.

Burguete, Araceli (ed.)

1999 *México: Experiencias de Autonomía Indígena.* IWGIA, Copenhagen.

Clark, Blue

1994 *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century.* University of Nebraska Press, Lincoln.

Clavero, Bartolomé

1999 'Lovelace versus Canada: Indigenous Rights versus Constitutional Culture' in: René Kuppe & Richard Potz, (eds.), *Law and Anthropology. International Year Book for Legal Anthropology* Vol. 10: 1-13.

2000 *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América.* Centro de Estudios Políticos y Constitucionales, Madrid.

Clinton, Robert N.

1989 'The Proclamation of 1763: Colonial prelude to two centuries of Federal-State conflict over management of Indian affairs' *Boston University Law Review* Vol. 69, 329-385.

Deloria, Vine & David Wilkins

1999 *Tribes, Treaties, and Constitutional Tribulations.* University of Texas Press, Austin.

Gómez, Magdalena

2000 'Iniciativa presidencial en materia indígena. Los desacuerdos con los acuerdos de San Andrés' in: Gabriel García Colorado & Irma Eréndira Sandoval, (eds.), *Autonomía y derecho de los pueblos indios.* Cámara de Diputados – Instituto de Investigaciones

Legislativas, México.

Hannum, Hurst

1990 *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights.* University of Pennsylvania Press, Philadelphia.

Harring, Sidney L.

1994 *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century.* Cambridge University Press, New York.

Ivison, Duncan; Paul Patton & Will Sanders (eds.)

2000 *Political Theory and the Rights of Indigenous Peoples.* Cambridge University Press, Cambridge.

Kymlicka, Will

1995 *Multicultural Citizenship: A liberal theory of minority rights.* Clarendon Press, Oxford.

Kulchyski, Peter (ed.)

1994 *Unjust Relations: Aboriginal Rights in Canadian Courts.* Oxford University Press, Toronto.

Levaggi, Abelardo

2000 *Paz en la frontera. Historia de las relaciones diplomáticas con las comunidades indígenas en la Argentina. Siglos XVI-XIX.* Universidad del Museo Social Argentino.

2002 *Diplomacia hispano-indígena en las fronteras de América. Historia de los tratados entre la Monarquía española y las comunidades aborígenes.* Centro de Estudios Políticos y Constitucionales, Madrid.

MacKay, Fergus

1999 *Los derechos de los pueblos indígenas en el orden internacional. Una fuente instrumental para las organizaciones indígenas.* APRODEH-FIDH, Lima.

Martínez, Miguel Alfonso

1992-1999 *Estudio sobre los tratados, convenios y otros acuerdos constructivos entre los Estados y las poblaciones indígenas*, Naciones Unidas, E/CN.4/Sub.2/1992/32; 1995/27; 1996/23 & 1999/20.

McGoldrick, Dominic

1994 *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights. With an updated Introduction.* Oxford University Press, Oxford.

Norgren, Jill

1996 *The Cherokee Cases: The Confrontation of Law and Politics.* McGraw-Hill, New York.

Palmisano, Giuseppe

1997 *Nazioni Unite e autodeterminazione interna. Il principio alla luce degli strumenti rilevanti dell'ONU.* Giuffrè Editore, Milan.

Pritchard, Sarah (ed.)

1998 *Indigenous Peoples, the United Nations and Human Rights.* Zed Books, London.

Prucha, Francis Paul

1994 *American Indian Treaties: The History of a Political Anomaly.* University of California Press, Berkeley.

Sánchez, Enrique (ed.)

1996 *Derechos de los Pueblos Indígenas en las Constituciones de América Latina.* COAMA-Disloque, Bogotá.

St. Germain, Jill

2001 *Indian Treaty-Making Policy in the United States and Canada, 1867-1877.* University of Nebraska Press, Lincoln.

Thornberry, Patrick

2002 *Indigenous Peoples and Human Rights.* Manchester University Press, Manchester.

Tully, James

1995 *Strange Multiplicity: Constitutionalism in an age of diversity.* Cambridge University Press, Cambridge.

van Cott, Donna Lee

2000 *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America.* University of Pittsburgh Press, Pittsburgh.

Weber, David J.

1998 'Borbones y bárbaros. Centro y periferia en la reformulación de la política de España hacia los indígenas no sometidos' *Anuario del Instituto Estudios Histórico-Sociales*, Universidad Nacional del Centro de la Provincia de Buenos Aires, 13, 147-171. (English version in: Christine Daniels, & Michael V. Kennedy (eds.), *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820.* Routledge, New York: 79-103.

Wilkins, David E.

1997 *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice.* University of Texas Press, Austin.

Williams, Robert A., Jr.

1900 *The American Indian in Western Legal Thought: The Discourses of Conquest.* Oxford University Press, New York.

1997 *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800.* Oxford University Press, New York.

THE MUNICIPALIZATION OF THE LEGAL STATUS OF INDIGENOUS NATIONS BY MODERN (EUROPEAN) INTERNATIONAL LAW

Pablo Gutiérrez Vega

1.- The Controversial Legal Status of Indigenous Nations throughout History: Preliminary Remarks[1]

Seldom does an essay start off with apologies. The reader must however excuse the profusion of legal aphorisms and Latin expressions that I use throughout the entire essay: few would hesitate to label this as pure pretentious erudition. Sound arguments of academic pertinence exist prior to what appears to be, at first glance, an attempt of academic ostentation. Is it, after all, absolutely necessary to resuscitate all these legal antiquities to be able to shed some light upon the so called *domestication* of indigenous nations? What is, by the way, the meaning of this expression? Only by mapping the reader upon the co-ordinates of this particular language, specifically the language of Modern International Law and its sequels, will I be in a position to verbalise the phenomenon of domestication in comprehensible vocabulary[2]. Paradoxically, in order to break the code, to decrypt the sometimes dense vocabulary of publicists, I will occasionally be forced to lead the reader through an apparently intricate labyrinth of technical idioms and votive borrowings from ancient Roman Law[3]. Surprisingly some of the most convincing pieces of publicists' legal discourse

[1] The use of the term 'nations' both for the title of this essay and subsequently, is not a coincidence. It is, in my opinion, preferable to other labels because it prevents flirting with anachronism (there is no such thing as an indigenous State, nor would it be acceptable to use the term 'people', for it has nowadays significant legal reverberations which might mischaracterize the subject of this contribution), and at the same time, it coincides with the name that (European) International Law and diplomatic practice granted extensively to those body polities up to the violent linguistic shift imposed by legal positivism. As it will be the case with similar language bottlenecks, my approach does not intend to attribute unilaterally a name to those human groups, but it exclusively avails itself of then-prevailing uses of the aforementioned term.

[2] As a guise of introduction I would like to anticipate that I have sought to write this essay under the vocational vests of an historian of the legal discourse, searching to emulate Pocock or Skinner's approach, yet in the more restrictive realm of the (Euro-American) Law of Nations.

[3] 'Habent rempublicam, curiam, aerarium, consensum civium et rationem aliquam pacis et federis': a

R. Kuppe and R. Potz (eds.), Law & Anthropology, 17-54.

have predominantly depended upon the conjuring effect of the conversion of apparently outdated archaisms into hypnotising neologisms.

The openly declared purpose of this essay is to attempt not to reproduce a series of stigmatised ethnocentric prejudices regarding the loss of sovereign rights of indigenous nations throughout the planet (the first of all these prejudices being that only Modern International Law vocabulary is capable of verbalising the phenomenon itself)[4]. For that precise reason this essay provides no hints as to defining what indigenous sovereign rights are. I am fully aware of the infeasibility of such an academic challenge for there are as many definitions of sovereignty as indigenous nations around the world[5]. Nevertheless it is legitimate to unveil the mannerisms

---

Cicero quotation by M. Viard at the 1889 session in Lausanne of the International Law Institute, to refer to the nations with whom Romans had made treaties. It is a quotation in support of his denial to consider the kingdom of the Egbas in Dahomey, Africa, as *territorium nullius.*

[4] No attempt is made either to assert the influence, if any, of non European perspectives of the Law of Nations upon the dominant paradigmatic mould of Eurocentric institutional practices, nor to trace the possible inputs and outputs, the interfaces between dominant and subaltern models of international cohabitation. Nevertheless, those attempts do exist. There is in fact a (not-so) new trend in specialized literature which falls under the broader agenda of anti-colonial international law scholarship, See, for instance Gathii, 1998, which reviews the following books: Prakash Sinha, Surya, *Legal Policentricity and International Law,* Carolina Academic Press, 1996; and Grovogui, Siba N'Zatioula, *Sovereigns, Quasi-sovereigns and Africans: Race Self Determination in International Law.* University of Minnesota Press, 1996. Although focused on the Asian and African experiences, thus emphasising that 'the process of decolonization was subject to a regime of international law complicit in the subjugation of non-European people', Gathii proposes a clear division between a weak and a strong strain of international legal scholarship, which virtually draws a line between post-colonial and anti-colonial perspectives. Whereas a weak form is basically integrationist, for it accepts that it would be possible to assimilate different civilisational experiences into a single international law, a strong form is more concerned about the structural adjustments of material conditions of the African and Asian peoples rather than 'the spiritual rehabilitation of the African'. The aforementioned classification is not related to the strength of the statement, but substantially to the methodological stand of the legal historian: it appears to separate the rehabilitative strain from the purely retaliatory drive. Is it applicable to the case of indigenous nations' international status? There is a clear hint in this book review directly related to those indigenous nations embarked on the treaty making process with European powers in the Western Hemisphere: 'A major theme explored in the immediate post-decolonization period from the weak strain of Afro-Asian international legal scholarship was that of the existence of trade, commercial and diplomatic links between pre-colonial African and Asian kingdoms and European societies prior to colonial conquest late in the eighteenth and early nineteenth centuries. This evidence was mobilized to argue that African and Asian kingdoms and societies participated in the formulation of customary international law and were not therefore newcomers to it'. For a more extensive review on the topic Onuma, 2000.

[5] This is particularly true if we bear in mind the background of various potential readers of this essay. Any Latin American jurist, or even a simple average reader, would be reluctant to admit (and fairly surprised to read) any kind of contemporary *residual* sovereignty as pertaining to indigenous communities living within the limits of his or her respective State. He or she would only admit prior *existence*, but not prior *sovereignty* of these very indigenous communities since the term *sovereignty* is still associated with exclusive jurisdiction over territory. Sovereignty is not (yet) a State monopoly in Anglo America, and there is supposedly a trace of residual sovereignty of Native Americans stemming from their previous juridical and political independence – as the widely spread formula 'nation-within-a-nation' accurately portraits. I do thank some of the panellists (mainly S. James Anaya, Bartolomé Clavero, Benedict Kingsbury, Rene Kuppe, Miguel Alfonso Martínez, among others) for their constructive remarks and incisive criticisms on my sketch oral presentation in Seville. It is perhaps not necessary though, to make reference as well to the various and manifold culturally driven evocations of terms, as tribes, groups or communities, which I occasionally use interchangeably although they are not fully deprived of political connotations according to the cultural background of the reader.

leading to the purported extinguishment of that indigenous sovereignty *according to (European) Classic International Law*[6]. I therefore proceed to move exclusively over the legalistic/doctrinal layer of cultural discourse, bearing in mind there are other significant layers worth being investigated elsewhere. Since a social constructivist approach to this topic might demonstrate that some indigenous nations have not *perceived* that they lost what dominant cultures were not even capable of naming, the alleged mutilation of sovereign attributes is meant to be dealt with from a strictly relational or inter-perceptional perspective. Such a methodological lens is not yet available in the quantitative methods' market of social sciences and it is therefore not possible to extrapolate the Native Hawaiians concept of *ea* to i.e. the Inuit situation[7]. Any other bilateral or multilateral comparative attempt would be equally illusory and scientifically useless. The crucial question yet to be answered in this case then is: when were the Maori aware they had surrendered their sovereignty to the British Crown if ever aware of it at all? Was it in 1840, as verbalised by the English version of the Treaty of Waitangi? Or was it in 1840 because of the precise wording of the Maori written or oral version of that compact? Or was it perhaps later on when they realized that the colonial dominant elite had denied the enjoyment of what they still perceived they had never surrendered? This latter option has been resolutely uttered as encompassing the most accurate Maori interpretation of the treaty of Waitangi and hence is to be construed as, from this social constructivist perspective, the *only* reality ('our Ancestors never surrendered our right to master our own destiny') worth being accounted for by Maori people.

Although initially I would like to look at the massive attack on doctrinal foundations of the *ius gentium* and the Law of Nations operated during the eighteenth and nineteenth centuries (chapter II), in chapter III I will concentrate on the myriad of subtle technical arguments supporting the retrospective negation of the status of indigenous nations[8]. It is this repository of expedients and discursive machinery

---

[6] 'Today we certainly know that European international law was just one of many regional and historical normative systems. We also know that various peoples in the non European world had their own world images and normative systems based on those world images […] What we have been told by the earlier studies is basically limited to *how the members of the European international law regarded the subjects of the non-European regional systems*. Very few studies have given room for the other side of the story, or the *inter perception* of the both sides.' Onuma, 2000, 62 (emphasis by the author).

[7] Not only because some Native Hawaiians have freely expressed their desire to appeal to international justice as a possible source of reparation for the illegitimate overthrown of the Hawaiian Monarchy (rendering, for instance, the Nunavut autonomy regime as a non satisfactory reparation scheme), but mainly because it is squarely impossible to restrict the meaning of *ea* to the simplistic semantic content of the Western notion 'sovereignty', see Clarkson, 2002.

[8] It is not possible to draw a dividing line leading to the genesis of (European) Classic International Law as a scientific discipline at the end of the nineteenth and the beginning of the twentieth century. Neither would it be acceptable to state that the Law of Nations replaced by one stroke the predominance of *ius gentium* over the time. As matter of fact, it can be said that they do represent two different and consecutive *moments* of legal naturalism, a religious and a secular one. Nevertheless, and exclusively for the chronological purposes of this essay, I will take *ius gentium* as operating on the sixteenth to mid-seventeenth century, whereas the Law of Nations should prevail since then to the end of the eighteenth century, leading up to the inception of International Law as a purported branch of Public Law and an embryonic scientific discipline. It is self-evident that, with regard to the alienation of the original pre-existing status of indigenous nations, the domineering imposition of the statocentric paradigm not only fails to explain the transitional period of force of the Law of Nations, but does not annihilate either the traces of

which constitutes the core issue of this contribution. If we hypothetically agree that it has been predominantly through the mutation of the ideological assumptions of the Law of Nations that indigenous nations were gradually deprived of their international standing, the terminological servitude which might initially appear as merely an argumentative mortgage ends up acquiring a fundamental role in explaining the *hows* of this phenomenon. The baroque paraphernalia of Classic International Law as it unfolded its performative effects at the end of the eighteenth and beginning of the nineteenth century owes more than is commonly acknowledged to the terminological and conceptual reservoir of Roman *ius gentium*[9]. At the crucial point of this new discipline's adolescence conceptual gaps could not be filled by diplomatic practice as promptly as colonial expansion required. Hence this pressing need called for the deployment of general principles of Roman Law which had previously been recovered and updated by the *Segunda Escolástica* (the so called Spanish School of International Law) in order to transform the epic rhetoric of divine inspiration into a more secular consumable pattern of natural reason inspiration. These aphorisms have survived the blows of legal positivism and still today constitute, besides an unpleasant hindrance for reading, the basic juridical grounds for international litigation in most territorial controversies between States.

In Modern Age Europe, Latin has lost its privileges as the prevailing *lingua franca* of legal language and culture, simultaneously to the decline of *ius commune* but it was still sheltering and underpinning branches of jurisprudence, such as the emerging Law of Nations, which lacked the *auctoritas* of time immemorial principles, namely that of *ius mercatoria.* Such lack of doctrinal foundations was overcome by the legal mannerism provided by some ancient Roman aphorisms. In a certain sense, Latin provided the *parole* whilst the trust of civilization provided the *langue.* The rhetoric of all those arcane jurists who orchestrated the progressive spoliation of the indigenous nations' international status still pays a remarkable tribute to Classic Latin legal terminology[10]. It could be said that some of the finest innovators of the new paradigmatic discourse to uphold world-wide colonialism, were some of the greatest *vulgarisateurs* of *ius gentium*. The Enlightenment's

aboriginal independence. Other salient scholars such as Grewe or Ziegler have though chosen to make this periodification according to the predominance over time of a certain (European) State or superpower.

[9] It is probable more accurate to refer to *jus fetiale* as the closest thing the Roman had to a body of public international law.

[10] Lesaffer has made a brilliant contribution with regard to the link between the medieval canon law principle of *pact sunt servanda* and the same principle in the light of the early modern international law. He argues that canon law opposed the formalism of classical Roman Law. According to his view, the prevalence of consensualism, over formalism is attributable firstly to the *ius gentium* mentors and, subsequently, to the predecessors of Classic International Law. Their technical arguments for the complete erasure of impediments ranged from the acceptance of the enforceability of *pacta nuda* (lacking any formality) to the transition from the quite strict *formula* procedure towards the less formal procedure of the *cognitio extraordinaria.* See Lesaffer, 2000. This outstanding contribution may be complemented with Hyland, 1997. Hyde, 1922, not only confirms the non-Roman origin of this aphorism (which originally was to be construed, according to Ulpian, as an exception and not as an obligation, *Nuda pactio obligationem non parit sed parit exceptionem*), but recreates the itinerary of this construct up to the Vienna Convention on the Law of the Treaties of 1969. He quotes Verdross to assert that the aphorism reached such a celebrity that it was agreed upon that there was no point in declaring that an agreement had to be honoured for it would be simply tautological.

publicists were not capable of a surgical cut with their predecessors but solely of a non traumatic variant of their doctrinal repertoire. Hence they respected the continent, *les formes juridiques* as Foucault would put it, whilst replacing the content of *ius gentium*'s legalistic discourse regarding indigenous nations.

Let us use one example which directly connects to chapter III of this essay. It is conventionally accepted that Latin American internationalists in the nineteenth century gave birth to the *uti possidetis iuris* formula, whereby successor States must respect the administrative layout set forth by the predecessor States. Having had a determinant – and quite strategic as far as the issue of this essay is concerned – application upon the dismemberment of indigenous nations in America, it rapidly became *ius cogens* and found glory during the decolonisation period in Africa and Asia early last century. Paradoxically the literal translation of such an aphorism – which had originally been devised for Private Law purposes and only then subtly transported into the reign of Public Law – is 'as you used to possess according to the law'. Originality thus stems not from the forced re-allocation of this aphorism from one province of jurisprudence to the neighbouring/antagonist one, but from the curious interpretation of such a principle by the so called Latin American International Law School. If there is no doubt about its triggering effect on the dislocation of indigenous nations what then is it that makes it worth being analysed from a use of the discourse point of view? Ethnodemography has already revealed certain evidence that radically contradicts what has been presented as a non removable piece of evidence of legal historiography. Historians now know that vast areas which were virtually swallowed up by the voracious appetite of colonial cartography and choreography – described as forming an indivisible part of the colonies – were actually out of the colonial range of military or political domination. Besides all this, it has also been proven that vast human communities and jurisdictions, though influenced by colonial contact (bi-directional whatsoever) maintained their foreign nature in the eyes of colonial powers and were accordingly acknowledged as such.

> In establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with the international legal implications of that term during the period under consideration.[11]

Irrespective of the theoretical debate about the original or derivative title of such communities, it is hardly deniable that those peoples, or nations as they were then commonly referred to, 'possessed the right' regardless of the decision taken elsewhere by those claiming to have inherited a virtual title. Neither the right nor its quality were contested by colonial agents or jurists until the very moment of the breaking out of hostilities by the belligerent Creole elites who were aiming for independence. However, if subsequently they deactivated that prior recognition by unilateral decision, there is no doubt that the circumstances on the basis of which

[11] Commission on Human Rights, First Progress Report, 1992, para. 138.

they had previously operated had not changed: the institutional and political morphology of those independent (indigenous) nations, those polities of their own right, had not been modified at the time of independence in the majority of cases. Lawyers, diplomats and colonial agents (gathered around the term *agents mediateurs* in Gruzinski's jargon) gradually proceeded to upgrade the requirements of what they previously were neither in a position nor under pressure to assess: the *locus standi* of indigenous nations. Controversies about their *locus standi*, that is, the place where one stands, although on a minor scale, became thus a perfect alibi to ground the anchoring point for the munipalization of the international status of indigenous nations on widely accepted legal aphorisms. This far reaching manoeuvre of linguistic engineering nearly led to the complete domestication of their international standing. I shall argue that the subtle yet manipulative input of legal discourse, in contrast to the cutting edge input of an explicit provision, was determinant. Throughout the formative period of International Law, several distinctive features of the European normative system crystallised in a rather chaotic scenario: confusion stemmed thus not simply from the disperse whereabouts of the source of the regulatory framework of the Law of Nations/*droit de gens* but also from the fact that legal erudite discourse featured the putative parenthood of the *nasciturus* International Law. Both conventional and customary representational practices were synchronised as far as the existence of indigenous nations was concerned. Bartolomé Clavero acutely underlines that, even in the baptismal times of Jeremy Bentham, it is misleading to acknowledge the Law of nations as an 'Inter-National' Law since it did not then operate among all nations (but among Nation-States) and since it lacked the attributes of enforceability which one might expect from any norm pertaining to other provinces of jurisprudence: it is a *rara avis* version of jurisprudence at its earliest stages of growing[12]. Metaphorically speaking one is tempted to conclude that the linguistic drive leading to the eradication of any international feature attributable to indigenous nations was made *in absentia* of norms: scholarship provided the sufficient *auctoritas* for this type of strain of discourse to be perceived as insurmountable.

I also endeavour to place the discussion on the same discursive ground on which the phenomenon of domestication of indigenous peoples unfolds. I will analyse the proceedings through which it gained the critical mass to overrule and impose itself upon other competing paradigms. Briefly summarised, it is a short account of how an international subject *supposedly* lost its subjectivity and became an object of the machinery it had somewhat contributed to devise. It is the one-sided, culturally biased history of a diachronic subject rather than the diachronic history of a subject strictly defined in terms of culture.

The mechanisms of legal technique employed by Classic International Law to eradicate any trace of indigenous presence from the international realm and reallocate it under domestic scrutiny and ward-ship, were various. Yet, there is a common denominator for most of them which consists of the retrospective refutation of basic assumptions of the classic doctrine, and/or by interpolating those arguments for the cause of civilisation.

[12] For the cross reference, see: Clavero, 1995.

If we firstly look at the respective phases and then try to reconstruct the manipulation, we shall be in a position to reasonably appreciate both the reversible nature of this phenomenon (in other words, the whole process could have been otherwise) and the extreme contingency of this severe rank degradation without honours (that is, the final outcome of the process is neither historically necessary nor predetermined in its origins). Indigenous nations were dismissed as members of the Society of Nations as if there was no other venue for the achievement of human welfare and progress, as if those cultures – allegedly non compliant with the unilaterally determined pattern for human improvement – personified an atavism contrary to progress.

The rehabilitation of that rank (which is far from being an adventurous hypothesis at present, whatever form it may take) should now seek to avoid falling into the same discursive trap, once accurately designed to convict indigenous peoples under the State's home arrest. It is again up to International Law to reconsider the required etiquette for those members in a position to determine the consensual content of this branch of Public Law: indigenous organisations now claim to have a right to contribute to the definition of these requisites as they once used to[13].

2.- The Technique(s): Interpolation of the Authoritative Doctrine and Inter-Temporality in Modern International Law

It would probably be convenient, from a purely argumentative point of view, to start this essay by drawing attention to what I have already called the domestication or *municipalization* of the legal status of indigenous peoples. It is, metaphorically, a script in which two non contradictory stories run parallel up to the point in which one of them shifts direction – by means of apostatising its immediate past –, and in so doing, violently derails the parallel story. If one considers the least contestable empirical cases of independent nations in America (Mapuches, Miskitos, Iroquois, Apaches …) or elsewhere (Maori), one easily witnesses a historiographic itinerary which accounts for a relation between peers on the grounds of conventional diplomatic practice through centuries, suddenly denied *ex post facto* by the dominant (European) side. Specialists have underlined the methodological limitations of grounding the explanation of this repeated theme exclusively on the biased record of the victorious side. It might be debatable to declare that moving the decision about pasture rights from the competence of an annual reunion between Chilean and Mapuche authorities (*Parlamentos*) to the competence of a Chilean agency constitutes the end of Mapuche international life. Scholars have even cast some

[13] At present time, it is noteworthy to point out the newest advancements at United Nations' level, namely as far as the elaboration of the Declaration on the Rights of Indigenous Peoples is regarded. The recent creation of the Permanent Forum of Indigenous Peoples shall certainly increase the degree of indigenous representativeness. It is still too early to know whether it may hinder the developments already achieved by the ad-hoc group (Working Group on Indigenous Populations, created in 1982) or, alternatively, whether it may contribute to unblock some of the apparently insurmountable legal entanglements.

doubts on the credibility of ethno-history to counteract the perverse effects of this retrospective denial. In this regard I am in accordance here with one of the leading specialists in the area, Miguel Alfonso Martínez, Special Rapporteur of the United Nations Commission on Human Rights[14]. Back in 1991 he pointed out the limitations of a one-sided relational perspective with regard to the history of treaties between indigenous peoples and States. Ethno-history, or even critical revisionism, has not yet proven its ability to accurately study the indigenous version of such derailment and is even being accused of hindering free expression. Whatever vehicle indigenous record may deploy of those episodes, I would like to emphasise the preparatory manoeuvres of the embryonic Law of Nations which paved the way – at the juncture of the eighteenth and nineteenth centuries – for the *coup de grâce* of legal positivism at the end of the nineteenth century.

> Yet, with rare exceptions, the discourses of law itself, including that on treaties and treaty-making in the context of European expansion overseas and that of their successors in the territories conquered, are not impervious to anachronism and *ex post facto* reasoning, thus condoning discrimination of indigenous peoples rather than affording them justice and fair treatment. ... A critical historiography of international relations clearly shows the dangers of this particular kind of reasoning, which projects into the past the current domesticated status indigenous peoples as it evolved from developments that took place mainly in the second half of the nineteenth century under the impact of legal positivism and other theories advocated by European colonial powers and their continuators.[15]

Whatever the *locus standi* of indigenous nations might have been at that crucial point of transition, from an amorphous collection of seldom respected practices towards a real scientific discipline, such a topic was somewhat absorbed by and diluted in the heterogeneity of normative systems operating simultaneously within European international normative system, let aside other cohabiting normative systems. Let it be said again that I contend that the domestication of indigenous nations did not invariably lead to the complete eradication of their presence in the genealogical tree of nations. However, this working hypothesis (there was no clear cut and

[14] Miguel Alfonso Martínez, a Cuban diplomat, is still at present a permanent member of the Commission on Human Rights and was appointed in 1989 to carry out a 'Study on treaties, agreements and other constructive arrangements between States and indigenous populations'. He produced a preliminary report, three progress reports and a Final Report in 1999 (E/CN.4/Sub.2/1999/20). There is particularly one Chapter in his Second Progress Report (III. 'From the status of sovereign peoples to that of vassals, wards or assimilated or marginalized peoples', in E/CN.4/Sub.2/1995/27) of particular interest for the purposes of this essay, in which he analyses in detail the phenomenon of domestication purely from a legal discourse point of view with particular emphasis on the manipulation of historiography. Later on he stated 'It is not possible to understand this process of gradual but incessant erosion of the indigenous peoples' original sovereignty, without considering and, indeed, highlighting the role played by "juridical tools", always arm in arm with the military component of the colonial enterprise', in Commission on Human Rights, Final Report, 1999, para. 195.

[15] Id., para. 101-102.

undisputable decision as to which should be the status accorded to indigenous nations, for there was simply no consensus as to how to trace the whereabouts of that single normative system) lays its foundations not only in the plurality of competing normative systems which is idiosyncratic of Early Modern European legal culture: in other words, which is the applicable set of norms for the determination of the status to be granted to an indigenous plenipotentiary/ambassador? Is it to be looked up in the *Derecho Indiano*[16] or in previous arrangements made with the corresponding indigenous prince? Our contention relies instead in the ambiguity and obscurity of the definition of the source, if only one, of norm-making. Notwithstanding the fact that granting legal force to conventional or non conventional norms of the Law of Nations is itself controversial during the eighteenth century and even beyond, it is still undeniable that the pattern of deprivation of international status was to resort to the tactics of *faits acomplis* by colonial agents, subsequently legitimised by jurists. *Ius cogens,* as the obligatory part of international norms, is a relatively recent term: it is meaningless for *ius gentium* publicists, as it is for their immediate heirs during the eighteenth century. Was it thus conceivable that morbid diplomatic practice (i.e. dishonouring treaties with indigenous nations) was superior to legal doctrine, namely the *pacta sunt servanda* aphorism, within the pyramid of norm-making instances? I do not support this view and hence argue that the Law of Nations was cunningly disowned for spurious, yet well known motivations, detrimental to the legal standing of indigenous nations. Only when positivism construed international legitimacy as exclusively relying upon customary practices accepted by the commonality of civilised States was it self evident that those doctrinal foundations had turned negligible for the purposes of defining the confines of the new discipline and the pedigree of the actors whose interactions were deemed customary-relevant. I borrow the idea here from the Italian jurist Stefano Mannoni who had this masterful reply to this fundamental enigma as presented at the crucial time of the inception of the discipline[17]. While reason and force seemed to be wrestling on the international circus to take the lead as *the* guiding principle of the yet-to-be-conceived discipline, diplomatic practice was being foreshadowed by what seems to appear as an arithmetic or game-theory: the less actors are involved in the game the less incentives exist to respect the rules those actors have imposed upon themselves. When colonial Euro-American States were compelled to honour, not only bilateral arrangements, but also a range of norms allegedly derived from the law of nature there was no doubt that only Euro-American publicists were culturally gifted to carry out that Promethean task, thus precluding other competing visions of the law of peace and war, as commonly referred to by non Euro-American nations. As soon as they subsequently elaborated the inventory of norm-making sources, indigenous nations

[16] *Derecho Indiano* is the specific normative system, originally extracted from the Castilian law, which is applicable to the government of the '*Reinos de Indias*' (The Kingdoms of Indies). It was firstly collected and systematized in a single volume in 1680 under the name '*Recopilación de las Leyes de los Reinos de Yndias'.* This particular branch of Castilian Crown law, and separated from it from 1614 when Castilian law failed to be automatically applicable to the Indies unless approved by the *Consejo de Indias*, possibly constitutes one of the first examples of domestication of indigenous nations for it included, collected and declared invariable, provisions about the legal status of foreign nations and their subjects.

[17] Mannoni, 2000.

no longer qualified as sources of international obligations. This circumstance was paradoxical at least from two different perspectives: 1) if indigenous nations had greatly contributed to the inception of international customary and conventional law, how could their practices suddenly become barbaric, thus intrinsically contrary to international law; 2) if there was no such a thing as a super-structural sovereign over sovereign States, and thus international law did not qualify as 'law' in Austin's sense, how could colonial powers request non European customary and conventional practices to meet rigid Austin's definition of law (the Anghie paradox, see *infra*). I shall offer illustrations of these discursive manoeuvres which range from the open retrospective denial of reciprocity with indigenous nations to the less frontal statement whereby Classic International Law mentors unilaterally declare a deadline beyond which States do not acknowledge validity of previous commitments made with indigenous nations.

It is commonly accepted that throughout the whole formative period of Classic International Law, jurists were forced to offer some answers to substantive questions deriving from colonial expansion such as the freedom of the seas or the titles to conquest. I argue that perhaps only, or at least to a greater extent than other schools of legal thought, the Spanish neo-scholastics (*Segunda Escolástica*) aimed directly at the core issue of indigenous legal standing when tackling with this latter topic. Their conclusions were far from being unanimously acknowledged but by no means did they deny the existence of princes among the aboriginal communities. What is even more relevant during a period in which the 'must' usually happened to overrun the 'might' in legal terms, is that they did not dismiss the possibility of respecting the integrity of these kingdoms and republics, provided certain imperative requests were fully satisfied[18]. The topic was taken as fully solved and remained virtually untouched until the debate over the titles of conquest re-emerged during the religious shifts in Early Modern Europe. It is crucial to emphasise that the refutation of the Spanish position at the titles of conquest's debate did not dwell on the topic of indigenous standing but in minor secondary aspects. Therefore it is not at all clear if the question gained a dominant role during the whole formative period of the Law of Nations as has been argued but, or if, on the contrary, it received only marginal

[18] However, such inherent characteristic of the evolution from the Law of Nations to International Law is not as determinant as some scholars seek to demonstrate: 'Scholars and activists have pointed to the works of the seminal scholars writing in the field of international law at the time of contact to make the argument that these treaties were viewed as having the force of law among the community of nations [...]. What is often overlooked by those who invoke the writings of Vattel, Grotius, and Vitoria to argue that international law has long viewed aboriginal societies as being "distinct political entities with territorial rights," [...] is that much of the body of early international law was infused with the influence of natural law and its prescriptive nature on how states ideally *should behave* towards these newly contacted indigenous communities. […] Positivist law is descriptive in nature and is concerned with describing how states *actually behave* in the international arena.' Factualism has definitely never been a legitimate cause for abrogating international obligations, but we still nowadays witness refined doctrinal attempts to disguise open breaches of international law as allegedly new sources of international law itself (as would be the case with new theory of 'instant international custom'): 'Throughout the 19th and 20th centuries states practiced the widespread abrogation of the rights of indigenous groups that were enumerated in the treaty-making process. Most contemporary legal scholars view this fact as reflective of the lack of political sovereignty and international standing of indigenous groups under international law.' Corntassel & Primeau, 1995, 357.

treatment. Controversy had been conveniently sedated[19]. This back line location of the issue certainly permitted the gradual accomplishment of a long process of dismantlement of well grounded assumptions about indigenous subjectivity. Let us recall that what is at stake is whether an international standard was ever formulated, and if so, when and on which grounds. I would argue that a dominant provision according to which indigenous nations had no international status whatsoever, did not come into being until the early twentieth century. Even at this point it was not consolidated in international practice[20]. A long standing historiographic commonplace, a *topos*, whereby indigenous nations belong to States' internal affairs thus fails to apprehend a counter-paradigmatic, yet from a postcolonial perspective fundamentally trustworthy version of the story[21].

Interpolation has made its way through social sciences as one of the most effective instruments of persuasion. The masters of rhetoric highly recommended to manipulate the past by means of repudiating retrospectively the most authoritative sources of knowledge. That might have been the case with the early mentors of Classic International Law if we analyse their interpretation of previous jurists' doctrines. As Anghie would put it, the need to reconcile naturalism and the emerging positivism derived in a repudiation of the former[22]. Emmerich de Vattel, or later on Maertens, did not refute *ius gentium*'s, albeit erratic, doctrines regarding indigenous standing as radically void or invalid, but underpinned their statements in a selective quotation of their predecessors. Paradoxically, Enlightenment's fathers of

---

[19] Conventional historical accounts rarely mention any relevant doctrinal dispute between Vitoria and Vattel. Such a chronological parenthesis is to be interpreted as implying either the dominance of the Spanish *jus inter gentes* specialists' contentions (thus the intractability of the international status of indigenous nations), either the dominance of colonial practice (basically non complying with doctrinal teachings) over the prevailing legal framework which would fulfil no specific task other than being purely cosmetic.

[20] The interchangeable use of the terms 'provision', 'norm' or 'international standard' that I make might imperil my preliminary methodological estrangement from the *ex post fact reasoning* scheme, which I have systematically denounced since it would retro-project non existing conceptual categories to the past, thus generating a non desirable anachronism. I argue, however, that a non ambiguous provision, an explicit statement driving from a then-prevailing authoritative source of norm-making, be it conventional or be it non conventional, is not traceable from the Euro-American historical record. Early Modern European legal culture, which most of the times sanctioned and occasionally prefigured some of the institutions and social practices, did not incidentally come to terms about this issue. S. James Anaya has accurately pointed out the ambiguity and uncertainties of Modern European legal culture to take a clear stand in this regard. However he advocates for the ultimate doctrinal triumph of the premises of positivism over the last remnants of indigenous sovereignty: 'These premises meant that Indian tribes and other indigenous peoples, not qualifying as states, could not participate in the shaping of international law, nor could they look to it to affirm the rights that once deemed to inhere in them by natural or divine law. States, on the other hand, both shaped the rules of international law and enjoyed rights under it largely independently of natural law considerations. It followed that states could create doctrine to affirm and perfect their claims over indigenous territories as a matter of international law and treat the indigenous inhabitants according to domestic policies, shielded from uninvited outside scrutiny by international law itself', Anaya, 1996, 19-20.

[21] For a comprehensive vision of a postcolonial methodological stand in history (namely within the sub-field of the so called *Frontier Studies*) see Boccara, 1999; and García, 1999.

[22] 'Positivist jurists generally commenced their campaign of articulating new, distinctive versions of international law by employing the traditional technique of sketching the histories of their discipline up to their own time, and then distinguishing themselves form their naturalist predecessors.' Anghie, 1999, 11.

International Law were in deep need of the authoritative potential still associated to Renaissance's authors. Thus, there was no base for scientific progress but upon the shoulders of naturalist jurists such as Grotius, for whom a distinction between civilised and uncivilised nations was of little use for the purposes of defining the boundaries and inhabitants of the province of *ius gentium.* Subsequent historiographic assessment of these latter – positivist – authors led to the misleading contention whereby the former – naturist – authors had disregarded indigenous nations as having any trustworthy rights to their lands as body polities. I would argue that this is the first of a series of interpolations dating back to the transitional period at the adolescence of Classic International Law[23].

Notwithstanding the risks of appropriating the *auctoritas* of one of the leading scholars for the purposes of sustaining my argument, I still believe that there are certain questions to which Vattel would have given a crystal-clear, negative, answer:
a) does the subscription of an unequal treaty, that is, creating non-reciprocal obligations to the Parties, jeopardise the juridical status of any of those Parties?;
b) does the adoption of a treaty, except in the case of explicit relinquishment of sovereignty, extinguish the sovereign status of either of the Parties?
The reason why we bring forward this simplistic questionnaire is because Vattel has been repeatedly quoted as the doctrinal pillar of an ideological drive backing up, for instance, the doctrine of extinguishment as devised by the jurisprudence of the United States Supreme Court, with regard to (indigenous) domestic dependent nations. It is hard to imagine again the argumentative itinerary departing from Vattel and leading to a theory according to which, indigenous nations once possessing sovereign rights, voluntarily sacrificed, immolated them at the moment of negotiating and subscribing a treaty with the Congress of the United States. By the same token, it is even more difficult to keep track of this argumentative thread precisely because the doctrine of natural law is highly dependent upon the continuity of the discourse and the intergenerational borrowing of doctrinal *auctoritas* among authors.

Nevertheless the ideological drive of positivism eventually wiped out any trace of international membership of the so-called 'wandering tribes'. Let us analyse for instance the case *Worcester v. Georgia,* probably the most influential ruling in the history of the Federal Indian Law in the United States of America[24]. This verdict led

[23] The first of which might be construed to be simply a misinterpretation. Corntassel & Primeau start by stating that 'Moreover, neither Portuguese nor Spanish as colonial powers normally interacted with indigenous populations via the treaty-making process', hence ignoring the some sixty treaties recently recorded by Abelardo Levaggi or David J. Webber, among others, in these areas. See Corntassel & Primeau, 1995, 359.

[24] One is tempted to reproduce the arguments of the concurring opinion, although not strictly in the judicial sense of the term, of some of the leading jurists of the American Bar at that time. Kent (former Chancellor), Daniel Webster, Ambrose Spencer (former Chief Justice of New York) among others stated upon request, prior to the opening of the trial, that the Cherokee nation was indeed a separate political body: 'Pour motiver leur opinion, qui ne concordait pas avec l'arrêt, ces juges, d'un grand prestige au tribunal et dans le pays, firent valoir que la nation Cherokee était une entité politique , non incorporée dans l'Union américaine, avec un territoire, une langue, une organisation et des autorités propres, distincte par suite a l'Union américaine; qu'on l'avait toujours entendu ainsi, à ce point que, toujours, on avait traité avec les tribus indiennes de puissance à puissance, au moyen de conventions solennelles négociées et discutées et qu'elles étaient libres d'accepter ou non. [In order to motivate their decision, non concurring

to a series of sentences by Chief Justice Marshall, namely the 'Marshall trilogy', in which the judge availed himself of the limited sources of that province of jurisprudence then known as the Law of Nations. He acknowledged among them and privileged the doctrine of Emmerich the Vattel.

> The Indian nations had always been considered as distinct, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power […] The very term 'nation', so generally applied to them, means 'a people distinct from others'. The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We applied them to Indians, as we have applied them to other nations of the earth: They are applied to all in the same sense.[25]

Is there anything in this paragraph casting doubts on the international status of the Indian nations? Is there any ambiguity about the equivalence granted by the United States Constitution to the Iroquois Confederacy and the Kingdom of Sweden? Why then did International Law become that 'irresistible power' which disputed, and eventually denied, the right to retain the natural rights of indigenous peoples, even when these nations, as was the case most of the times, were not defeated militarily or did not surrender but negotiated the terms of their cohabitation with the newcomers?

As I have sought to demonstrate, interpolation was carried out at the expense of Indian nations whenever positivist publicists declared that indigenous subjectivity had never been acknowledged, or whenever Vattel is cited (despite having inspired the verdict of Chief Justice Marshall) among those who were intellectually against the recognition of rights to indigenous nations whatsoever. As a matter of fact Vattel explicitly mentioned indigenous nations only once:

> Those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to

---

with the sentence, these prestigious judges within the tribunals and generally in the whole country, contended that the Cherokee nation was a political entity, not incorporated to the American Union, with a territory, a language, an organisation and their own authorities, distinct therefore to the American Union; that it had always been understood that way to such an extent that the interaction with the Indian Tribes had taken place at a Power-to-Power level through solemn covenants which had been negotiated and discussed and which those Tribes were free to accept]', Warren, Charles, *The Supreme Court in the United States History*, vol. I, as quoted by Octavio, 1930, 252 (translation from French to English by the author).

[25] Worcester v. Georgia, 31 U.S. 515 (1832), 559/60.

> civilize them, and have them instructed – those usurpers, I say, justified themselves by the pretext equally unjust and ridiculous.[26]

Those familiarised with the works of Grotius or Wolff on the justification of war need no further comments on terms such as 'usurpers' or 'ridiculous and unjust [pretext]': the Vatellian retrospective judgement of those historic episodes leading to the subjugation of American Indians is undoubtedly negative and leaves no space for ambiguities. However, Vattel's reading by some of his most salient contemporaries drew different conclusions:

> Vattel had just notions of the value of these aboriginal rights of savages and of the true principles of natural law in relation to them […] The colonists have not deviated from the precepts of the law of nature, in confining the natives within narrower limits.[27]

On the other hand, the principle of inter-temporality, as defined in the *Island of Palmas*[28] case, that is, the prohibition to judge a situation according to norms which were not yet in force at the time in which such situation took place, became an international standard in the twentieth century. For the self evident reason that the use of stratospheric layers for military purposes was not conceivable at the time of the French Revolution, it would be ridiculous to sue the Montgolfier brothers' heirs for having invaded the German territorial air space during their attempts to take off from French ground. For the purposes of this essay, it is implied that it is not legally plausible today to determine (or deny) the legal status of certain indigenous nations back in the seventeenth or eighteenth century (in order for instance to validate their relinquishment of territory) according to current political requirements. It would clearly constitute what Miguel Alfonso Martínez calls *ex post facto reasoning*. Indian representatives suing the State of Georgia before the United States Supreme Court for its non compliance of the treaties, were not liberation fighters as there was no right to self determination to be fought for. Nor did the numberless resistant Indian nations ever request the status of belligerent parties because there was no *Geneva* Convention to be honoured on the Great Prairies. Likewise, it is not admissible for Euro-American publicists on the brink of the twentieth century to avail themselves of the theories of Malthus, to determine unilaterally which claimant, the State of Georgia or the Cherokee nation, had the best title to the territory almost a century ago.

> [I]n disputes as to territorial titles it is sometimes necessary to know which State was pointed out by the law of a particular time as having the best claim to certain territory at that time.[29]

---

[26] Vattel, 1916, 116.

[27] Kent, James, *Commentaries on American Law.* 14th ed., 1896*,* 312/313, as quoted by Anaya, 1996, 70.

[28] *Island of Palmas* case, II *U.N. Reports of International Arbitration Awards* 831 (1928).

[29] Lindley, 1926, Preface vi.

To apply the principle of inter-temporal law to cases prior to the moment in which the principle became an international legal standard would be against the principle itself. Yet, the prohibition of retroactivity is, despite the inherent eurocentrism of the statement itself, common to most legal cultures and normative systems throughout history. It is still as derogatory for indigenous nations to be reminded by specialised literature that their ancestors were not 'fully' capable of understanding the binding nature of a compact (be it a 'native title' or a 'historical treaty') as to presume that their treaty making codes or diplomatic vocabularies lacked the sophistication that only Old Europe's quintessential *ius gentium* discourse might have provided[30]. In connection to territorial claims and however the formulation of the norm itself is commented above by one of the leading specialists in the field, it reveals that whilst being formulated, the norm was presumptive of the State-alike nature of all those potentially claiming a territory when it is not at all clear whether, at the time of gain or loss of territory, States were the exclusive owners/possessors of such territories. It is not actually clear whether States did actually exist at the time in which statehood was so vehemently requested. I shall come back to this topic later.

It is imperative to add that almost unrecoverable damages were inflicted upon indigenous standing when the grievance stemmed from a long meditated operation of retroactivity. That is the main strength of the inter-temporality manoeuvre. Most of the times such arbitrary proceedings consisted of a combinatory open breach of another well founded principle of the *ius gentium*'s terminological repository: the *pacta tertiis nec nocent nec prosunt.* This principle consists in declaring that a certain decision engages exclusively those committed by that engagement; third parties are not to be favoured nor disfavoured by such an engagement. As in the *quod ante nullum est* principle, this aphorism has been transported from the Private Law to the realm of Public Law by naturalist jurists and subsequently adapted by positivists in order to verbalise the non transferable effects of decisions taken by sovereign entities upon a third sovereign entity. The *pacta tertiis* principle has been sometimes invoked by States when a prior agreement between an indigenous and non indigenous

[30] For an alternative perspective, Williams, 1999. Williams breakthrough contribution is particularly enlightening when it comes to verbalise the jurisgenerative effects of rituals and storytelling for Native Americans, particularly for the Five Civilized Nations. For the purposes of this essay, the references to the use of Indian kinship terminology in treaty-making are of particular interest. Williams recalls the symptomatic episode taking place during a meeting of the Mohawks and the English governor, in which the former referred to the latter as 'brothers' whereas the latter referred to the former as 'children': 'Kinship terms were used in treaty making for a variety of purposes. Besides determining many of the minor protocols of council diplomacy, kinship terms were used to define the expected forms of behavior among treaty partners. In this sense, these terms could assume legal significance. […] The distinction between "brothers" and "children" carried significant import in the Iroquois language of diplomacy. [...] "Brothers" was the term used between formal equals in a relationship of connection. Such relations had duties to each other, but brothers did not presume a right to command one another [...]. Thus, the Indians would not simply let the term "children" slip by in the conversation. They responded definitively by handling the governor a belt of wampum to underscore their position that according to the Mohawks' long established treaty relationship with the colony, they had always been called "Brethren". That fact, in and of itself, had legal significance to the Mohawks. Like the rest of the terms of their treaty with New York, the term "brother", they explained, had been "well kept". Therefore, they admonished the governor, "[L]et that of Brethren continue without alteration"', Williams, 1999, 71-72.

sovereign instance might be detrimental to its interests but, paradoxically, it has never been accepted as a valid argument when those *pacta tertiis* substantially affect, as it has been the case in endless cases, indigenous political attributes. Nicaraguan *chargé d'affaires* in Europe solemnly declared in diplomatic correspondence that the Republic of Nicaragua was not bound by agreements between the king of the Miskitos and the British Crown on the grounds of this principle, thus acknowledging the equivalent footing of the king of the Miskitos to negotiate those *pacta*[31].

The Guadalupe-Hidalgo treaty in 1848 is another perfect illustration of this violent intrusion on the sovereign rights of indigenous nations to determine the political rights of their subjects: Mexico and the United States of America decided bilaterally that all the indigenous individuals inhabiting formerly litigious lands must decide to become either Mexican or American subjects and relinquish their previous political allegiance to their respective nations.

3.- Rank Degradation and Colonial Dispossession by Classic (European) International Law.

Our argumentative thread leads us to the beginning of the twentieth century in which the birth of the League of Nations resulted in the final definition of the elements of the international pedigree. As a matter of fact, and for the first time, the membership of this potentially world-wide international organisation was made dependent on the status as international subject. This status was evaluated previously by the founding members of the organisation. The almost simultaneous appearance of a series of mono-thematic publications during the second decade of the century comes as no surprise: *The Question of Aborigines in the Law and Practice of Nations,* by A. Henry Snow, in 1922; or *The Acquisition and Government of Backward Territory in International Law. Being a Treatise on the Law and Practice Relating to Colonial Expansion,* by M. F. Lindley, in 1926, are only a few examples of how the metropolis dealt with the topic during the inter-war period. There being no shadow of doubt as to the complacency of the Family of Nations with the colonial expansion, it still remains unclear how the status of indigenous nations was affected by the new annihilating impetus of imperialism: some openly declared 'anti-colonial' scholars, such as Grovogui, are quoted for having reputedly stated that (European) International Law actually engendered colonialism[32]. Along with this sudden flourishing of specialised literature in the United States and elsewhere, we also witness a contemporary analogous hyperactivity by international arbitration tribunals such as in the *Cayuga Nation* case (1926)[33], the already cited *Island of Palmas* case

[31] I have analysed the diplomatic tripartite correspondence among the United States, the British Crown and Nicaragua leading up to the 'Reincorporation of the Miskito Kingdom' in 1894 in a preparatory case study exercise prior to my Ph. Dissertation: '*Wilkanka sainmunan Miskito*. Historia diplomática de la Mosquitia', 2001 (on file with the author).

[32] See *supra* note 4.

[33] *Cayuga Indians (Great Britain) v. United States*, VI *U.N. Reports of International Arbitration Awards* 173 (1926).

(1928), or the *Eastern Greenland* case (1933)[34]. All these awards are commonly quoted because they constitute a precedent for different theories of Classical International Law, ranging from the inter-temporality principle (*Island of Palmas*), to the theory of effective occupation of the territory (*Eastern Greenland*): what might be the explanation for this unprecedented proliferation of often antagonistic statements coming from different sources of International Law? First of all, it demonstrates that the norm (shall we assume there has ever been such a norm denying indigenous international subjectivity) had not yet been clearly formulated or had not yet become an internationally accepted standard. Secondly, it shows a deliberate attempt to block the entry to the League of Nations of possible candidates coming from territories under fiduciary administration or even from within State boundaries. Thirdly, it represents a fundamental shift in legal doctrine with no further justification than the mere ideological consecration of the colonial enterprise. This shift refers to the previous doctrine of the Law of Nation whose most recent illustrations might be the arbitration award of the Austrian Emperor in 1881 with regard to the right to self determination of Miskito Indians in Nicaragua or the latest jurisprudence of the United States' Supreme Court[35].

In spite of domestic jurisdictions' acknowledgement of an *ad-hoc* status, a *tertius genus* for indigenous nations half the way between foreign States and subject vassals, in spite of arbitrary international instances having rendered explicit that State sovereignty could be divisible when indigenous personhood had to be respected, positivist publicists declared that there were no legal grounds for indulgence with the wandering tribes and subsequently stated that those amorphous human gatherings had never been regarded worth being considered peers by the rest of the members of the Family of Nations. It is important to underline that the argument was no longer that the Indians failed, in the 1920's, to meet the political and legal requirements of statehood, hence international personhood but, on the contrary, that they had never, throughout all their entire history – even prior to the colonial contact[36] – been regarded as constituting persons of International Law along the following terms:

> At the time of European explorations in the Western Hemisphere in the fifteenth and sixteenth centuries States were agreed that the native inhabitants possessed no rights of territorial control which the

[34] *Eastern Greenland* (Den. v. Nor.), *Permanent Court of Int. Justice*, Series A/B, 1933, 22.

[35] It is our conviction though that 1903 is probably the landmark of the diminishment jurisprudence of the United States' Supreme Court. That jurisprudence runs parallel to the Congress' termination policy, insofar as it reaches its peak with *Lone Wolf v. Hitchcock*, 187 U.S. 553, in which the Supreme Court held that the United States had the unilateral right to abrogate Indian treaties on the same basis as foreign treaties, by passing a later law in conflict with the treaty. Such position encompasses the quintessence of the phenomenon of domestication as operated by municipal legislatures. The manoeuvre can be better summarised as follows: a jurisdictional instance of one of the Signatory Parties decides unilaterally that it is legitimate to dishonour the covenant by means of issuing a counteracting statute by the domestic legislature.

[36] Such assumption is still dormant in the most recent advancements of domestic and international law. Native title for instance, in Commonwealth area jurisprudence, is worth being accounted for exclusively from the time of colonial encounter, and not before. Such critical date, according to the terminology of the inter-temporal law regime, is irrespective of any possession of the land prior to the colonial encounter thus disregarding pre-colonial standing.

> European explorer or his monarch was bound to respect […] the American Indians have *never* been regarded as constituting persons or States of international law.[37]

Such a move is consistent with analogous intellectual trends in specialised literature among which it is noteworthy to cite Lassa Oppenheim's theory on the constitutive nature of recognition, which implied that the grant of international subjectivity was thereby made dependent on the will of those States already forming part of the Family of Nations, or else Lorimer's creation of a concentric circles' layout of civilised, barbarian and savage nations. Additionally Lindley dared to offer a typology of publicists according to their respective intellectual empathy with indigenous (remnant) sovereignty.

Turning to the opinions of publicists who have taken up the subject since that time, we find that they can be grouped into three more or less definite classes, as follows:

> Class (I). – Those who regard backward races as possessing a title to the sovereignty over the territory they inhabit which is good against more highly civilized peoples.[38]

We see that, though they state their position in different ways, they do not differ materially among themselves. It appears that their opinions may be fairly said to amount this: that wherever a country is inhabited by people who are connected by some political organisation, however primitive and crude, such a country is not to be regarded as territorium nullius and therefore not open to acquisition by occupation.

> Class (II). – Those who admit such a title in the natives, but only with restrictions or under conditions.[39]

> Class (III). – Those who do not consider that the natives possess rights of such a nature as to be a bar to the assumption of sovereignty over them by more highly civilized peoples.[40]

According to Lindley, the following publicists fall into Class (I): Vitoria, Soto, Las Casas, Ayala, Brunus, Gentilis, Selden, Grotius, Pufendorf, Klüber, Blackstone, Heffter, Fiore, Woolsey, Pradier-Fodéré, Salomon, Bonfils, Jèze, Despagnet, Institut de Droit International.

---

[37] Hyde, 1922, 10 (emphasis added by the author).
[38] Lindley, 1926, 11.
[39] Id.
[40] Id.

Vattel, Phillimore, Martens, Pinheiro-Ferreira, and Bluntschli fall into Class (II), and Westlake, Hall, Lawrence, Dudley Field, Martens-Ferrao, and Heimburger into Class (III).[41]

Lindley argues that 'none of these opinions appears to provide satisfactory foundation for the formation of a rule of International Law'[42]. Is he referring to Class I and Class II, or simply to those opinions grouped under Class II? Should the latter be the case Lindley would presume that there is no such a thing as a partial or limited recognition of indigenous sovereignty which may be said to constitute the basis for the formation of a norm of International Law: either indigenous nations are sovereign over or within their territory or they are not. Should the former be the case Lindley resolutely defends the position according to which whatever rights possessed by 'backward races' are always overrun by those of more civilised nations. The second consequence of this categorisation of the publicists by Lindley is that there is no clear chronological pattern, as most of subsequent publicists assumed, by virtue of which *ius gentium* represents the highest peak in recognition of indigenous personhood at an international level, whereas Classic International Law landmarks the final denial of any trace of subjectivity. The ambiguity we have previously mentioned with regard to the formative period of International Law is still present and makes it almost unfeasible to formulate a clear cut declaration about the requisites for an indigenous nation to be granted the genealogical right to be part of the Family of Nations for one of the tightest requirements to be met by the candidate was precisely statehood. When raising the question 'What is a State', Lindley writes:

> No race is without organization of some kind and if, with Salmond, we regard as a State every society which performs the functions of war and the administration of justice, many peoples often regarded as savage would form a State. It is clear, however, that the writers who take as the criterion the existence of a State would not allow this wide meaning of the word.[43]

There is an almost invisible gap in publicists' argumentation which pays tribute to several unwritten assumptions fuelled by cultural prejudice. For instance, it is technically conceivable to admit that savage peoples do form or may become States but, for unknown or poorly detailed reasons, Lindley takes it for granted that none of his colleagues would ever accept that any existing savage tribe does actually form a State and thus deserves diplomatic reciprocity by other already existing non indigenous States. The more publicists search to define the norm, the more that gap widens.

> Even when the rule is put in terms of the States which are members of the Family of Nations or for the community of International Law, it is still not precise. The community within which International Law

[41] Id., 12-19.
[42] Id., 17. The phrase appears at the end of a subtitle listing the names of writers in Class (II).
[43] Id., 19.

> operates is not one with definite limits. Some States may be within it for some purposes but not for others, and the difficulty remains to determine which of them is within it for this particular purpose.[44]

It is openly admitted that some States might be beyond the range of International Law. This might imply that even in the unlikely case that any of the indigenous peoples would be regarded as enjoying the status of a State, International Law might possibly not be applicable to its acts or else to acts pursued against it. These Classic International Law publicists' ideological manoeuvres prove that the norm was still not clear at the beginning of the twentieth century. Unlike the formative period's jurists, most of these authors do not try to legitimise their predecessors' doctrine, but seek to adapt the topic to the new conceptual framework of the debate (statehood, theory of constitutive recognition, applicability of International Law, enforceability of obligations assumed by or with non-State actors …). I shall come back to this topic in the conclusive chapter.

Let me develop some of the more technical arguments brought forward by specialists. For the purpose of determining sovereign rights over territories, publicists transposed certain Private Law principles to the sphere of Public International Law with a view to perpetrate precisely the inverse effect: by virtue of the transplantation of a Private Law institution to the Public Law realm, a Public Law subject transmuted into a Private Law object or, in more continental legal jargon, a juridical good[45]. That is the case with the *quod ante nullius est* principle whereby the occupation of a non owned estate, *res nullius*, leads under certain circumstances to the acquisition of the dominion of such estate. It is undoubtedly a Roman Private Law principle whose operation is restricted to interactions between individuals. The doctrine of *terra nullius*, criticised exclusively for having neglected the existence of indigenous populations in order to legitimise unlawful occupation, stems from a forced analogous interpretation of a Private Law institution. The formation of this norm is not sufficiently understood if seen merely as hiding the faster moving empirical facts under juridical garb. It is better understood if described as an operation performed at the expense of a population whose legal and political existence was perceived as negligible if seen against an allegedly far more ambitious background of humankind progress. There is nothing here that even slightly resembles the pattern of the formation of a norm in Early Modern times: the newest positivist *opinio iuris* according to which private dominion of the land led to public *imperium* over a territory served the interests of colonialism and openly superseded the predecessor naturalist *comunis opinion* which restricted the rights deriving from

---

[44] Id.

[45] For a comprehensive analysis of the impact of Canon Law upon *droit des gens,* see Muldoon, 1979; and Pennington, 1993; and, specifically on the treaty-making process, Lesaffer, 2000. All these contributions aim at determining the overall input of *ius commune* on *ius gentium,* thus refraining from making any utterance about the possible impact of other parallel normative systems on (European) Law of Nations/*droit de gens/derecho de gentes.* Yet, by so doing, they assume not only that (European) Treaty Law's nutrients were exclusively European but also that (European) Treaty Law was a superseding, overarching superstructure which borrowed no elements from non European societies.

occupation to the dominion of the land and, by no means to the jurisdiction over the inhabitants of the territory.

Moving to other fields of the juridical battle on the legitimate titles over Indian territories brings the reader, be it in North, Central or South America, in contact with a particular juridical liaison between the colonial power and the indigenous nation: the treaty relations. Publicists searching to lay the foundations for a lasting international norm on indigenous subjectivity during the Classic International Law period, faced, at the beginning of the twentieth century, a series of cases which were no exceptions to the rule but virtually the most statistically relevant sample of relations between colonial intruders and indigenous body polities[46]. Treaties often embraced the minimum survival requirements for living on each side of the porous frontier between indigenous and non indigenous societies.

> First of all, in the case of treaty relations, one notes a general tendency to contest whether treaties involving indigenous peoples have a standing, nowadays, in international law. This point of view, which is widespread among the legal establishment and in scholarly literature, [...] has been basically grounded alternatively on three assumptions: either it is held that indigenous peoples are not peoples according to the meaning of the term in international law; or that treaties involving indigenous peoples are not treaties in the present conventional sense of the term, that is instruments concluded between sovereign States (hence the established position of the United States and Canadian judiciary, by virtue of which treaties involving indigenous peoples are considered to be instruments *sui generis*), or that those legal instruments have simply been superseded by the realities of life as reflected in the domestic legislation of States.[47]

Miguel Alfonso Martínez underlines two of the most common explanations for understanding the degradation of indigenous nations' standing through the deactivation of the validity of treaties. The first two arguments brought forward are in line with what we have called retrospective legal reasoning, according to which indigenous nations either were not, at the time, entitled to sign a treaty (because they were not States) or alternatively are not today peoples according to contemporary International Law. This lack of legal standing of one of the covenantees, be it

---

[46] It has been argued, namely by African and Asian indigenous peoples along with *Métis* people (such as in Canada), that the emphasis on treaty-making as the sole identifying feature of indigenous peoples would be misleading and ultimately detrimental for there is a series of indigenous nations which never settled their relations with occupant societies by means of this type of arrangements. As matter of fact, even for those specialists in native treaty making this circumstance is to be contextualised: 'The pervasive application of treaty-making over time in North America gives clear evidence of broad European recognition of the international personality of the indigenous peoples of that time and place. Treaty-making, however, was not the source of that international legal personality, nor was it the source of Indian sovereign and territorial rights. As political communities created by the original inhabitants, Indian societies possessed inherent, preexisting sovereign rights and conducted political relations in their own interests on the international plane.' Berman, 1992, 131.

[47] Commission on Human Rights, Final Report, 1999, para.115.

original or derivative, renders all these legal instruments void. The third argument speaks of the enforceability of a fully operative legal instrument, that is, even if we acknowledge that a formally binding international covenant was once completed, factual circumstances ('*realities of life*') have subdued formal obligations and deprived the covenant of any meaningful content. This very last option assumes though that once upon a time there was a indigenous Signatory Party whose legal standing was indisputable. Yet, the strength of factualism prevails over whatever other kind of consideration and renders, as in the previous cases, the text, spirit and intent of the covenant void. Technically speaking there is one principle which might possibly justify this latter discursive manoeuvre: the *rebus sic stantibus* clause whereby obligations are enforceable insofar as the circumstances which framed and led to the signature of the covenant are substantially the same. There is a rather curious attempt to combine this principle with a more recent one: the evolutionary nature of International Law. In a way, it might be argued that the principle according to which International Law is constantly evolving towards an ultimately quintessential version of itself, remains valid only within the philosophy of history's project of Modernity. As a matter of fact the clause *rebus sic stantibus* performs an aseptic duty whereby juridical atavisms, such as remnants of indigenous sovereignty, are to be immolated for the glory, and on the cathartic altar, of International Law[48].

As for the requirement of statehood for indigenous nations at the time of creation of the obligations stemming from the treaty, it is at least questionable bearing in mind that it would be anachronistic to presume that the colonial counterparts conveyed such statehood: was the Universal Catholic Monarchy which negotiated a series of *Parlamentos* with the Mapuches in the eighteenth century a State in the strict Weberian sense of the term? Were the Dukedom of Parma or the Great Elector of Saxony State alike? Was such lack of State attributes ever questioned as to cast doubts on their juridical aptitude to sign treaties? Again, these purely instrumental queries serve the purpose of indicating some of the most salient draconian conditions imposed upon indigenous nations to qualify as states against the backdrop of a non State-like international scenario.

[48] Lesaffer (2000) draws the attention as well to the importance of the debate around this principle in the formative period of (European) Classical International Law, thus underlining the ambiguities of some apparently intractable pieces of evidence of colonial international literature: 1) obligations stemming from compacts with non European political entities fell invariably under the umbrella of non enforceable natural law; and 2) the *rebus sic stantibus* as the landmark of the evolutionary nature of International Law was determinant to counterfeit the validity of compacts with non State actors. '[O]ne of the main points were [sic!] early modern treaty doctrine contradicted contemporaneous contract law was in the discussion on the *clausula rebus sic stantibus.* Whereas Grotius still opposed the *clausula* which has been defended by Albericus Gentilis, most authors on international law after Grotius came to accept, however grudgingly in many cases, the inevitability of the clause in the reality of international politics [...]. The *clausula rebus sic stantibus* had its roots in Roman moral philosophy. Seneca (4 B.C - 65) had first expressed the idea. The very first mentioning of the doctrine in a legal context was in a gloss on Gratian so that it can be said that as a juridical concept it was introduced into contract law by canonist doctrine [...]. It was Bartolus who afterwards introduced the idea into the Roman law tradition [...].' Lesaffer, 2000, 191.

4. A Plight for a (Post-Colonial) Retrocession of Status. Conclusions

Since I have previously argued that the whole phenomenon of domestication is both contingent and reversible, it would be probably advisable to present some of the evidence leading to this exploratory conclusion before I try to summarise the rest of my other quite disputable hypothesis. Let me first explain the choice of a name, or more precisely the discarding of an alternative qualification for a purely voluntaristic, for the time being, process of rehabilitation. Miguel Alfonso Martínez terms the historical translation of the phenomenon of domestication mainly with regard to its effects

> *a process of retrogression*, by which they [the indigenous peoples] have been deprived of (or saw greatly reduced) three of the four essential attributes on which their original status as sovereigns nations were grounded, namely their territory, their recognized capacity to enter into international agreements, and their specific forms of government.[49]

Yet, and for purely argumentative purposes, I will use the term *retrocession* – and not 'retrogression' – to refer to the redemptive process whereby contemporary International Law is, and probably shall continue to, gradually reintroduce both (still caricatured) indigenous characters (subjects) and (alienated) scripts (relational practices), back on diplomatic stage. As a matter of fact, it is not to be taken for granted that the new attributes of indigenous sovereignty, as those associated to the so called 'modern treaties', must necessarily coincide with the attributes they were deprived of at the time of spoliation. Insofar as those attributes reinstall indigenous groupings on an equal footing, to say the least, with dominant cultures with a view to decide – jointly or separately with the latter – their own patterns of development, retrocession shall be satisfactorily accomplished. Furthermore, it is not at all inconceivable that indigenous groupings might finally accept the current definition of the right to self determination as a dignifying substitute for prior sovereignty, as long as such right is construed as an utterance of restitution, and by no means as a gracious reversible allowance by State-promoted institutions. International Law's ways are to be, from this perspective, no longer inextricable for indigenous peoples.

Any further steps call for some additional elaboration of the definition of prior sovereignty as currently identified in domestic and international jurisprudence. Let us recall again that this is a definition *ex parte* (European) International Law in which indigenous insight has been only limitedly incorporated. Therefore, it only shows the starting point of a voyage which has to be travelled backwards by International Law, yet with no predefined departure line but the acknowledgement of the colonial

[49] Commission on Human Rights, Final Report*,* 1999, para.105.

burden still pending as a Damocles sword over the whole (retrocession) process. Prior sovereignty has been referred to as purely 'a measure of independent juridical existence in the international field', according to Alexandrowitz, 1967, 149, or else as the prerequisite for the assignation of a native title (namely for territorial recovery purposes)[50]. In both cases, it incorporates a regenerative legal process in which whatever conceptual meaning is given, it renders false most of the assumptions on which the domestication's mentors have long operated. If indigenous nations had 'a measure of juridical existence at the international level' at the time of independence, the whole emancipation process in Latin America leading to the formation of Nation-States is barely a non binding *pacta tertiis* with no immediate effect on the international status of the Saramacas, the Hopi or the Abipones. Likewise, most of the pending territorial disputes grounded on the *uti possidetis iuris* nowadays need to be immediately revised in light of this contention: the Rio San Juan dispute, still open nowadays by Costa Rica and Nicaragua, is the ancestral land of the Miskitos and the Rama peoples, whose prior jurisdiction over such segment of territory has not been up to date relinquished.

It would be far from realistic to assume that the prior sovereignty theory shall be placed at the centre of the postcolonial legal retrocession that international practice is going through in present time. Some domestic legislatures have acknowledged the pre-existence of indigenous nations to the existence of the State itself, and even upgraded the obligations deriving from the States' predecessors arrangements with native polities prior to the State formation to constitutional rank. But at least, and in the light of the present state of the art in International Law, it is conceivable to declare that the non international standing of indigenous nations has failed to be a presumption *juris et de jure*, and has become a presumption *juris tantum*. Although the burden of the proof still corresponds to indigenous groups, it can be said that for certain, yet limited, international purposes indigenous groups have regained terrain[51]. I argue that the prior sovereignty theory is manifold: it might occasionally, should there be no other available intuitive criteria, draw the line between an indigenous nation and a minority for only the former enjoyed 'a measure of juridical existence at international level' (Alexandrowitz, 1967, 149), be it through the treaty making process or otherwise in the past, whilst the latter did not. Additionally, it clearly describes the circumstances according to which the granting of the rights is to be made: it is a matter of being reimbursed a right not an *ex novo* allowance. It entails that the reimbursement of collective rights recreates a, otherwise foreshadowed, constituency within the host State which is entitled to (re)negotiate with the utmost

[50] The *Delgamuukw* case, a decision of the Supreme Court of Canada in 1997, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., is probably the best illustration of an instrumental, yet purportedly useful, conceptual resettlement of the meaning of prior sovereignty for those indigenous nations whose relation with the dominant culture is not framed by a treaty.

[51] This is surprisingly not a commonly shared opinion: 'However, to legitimize beyond any doubt the ways and means used to take issues that originally belonged to the realm of international law away from it and to justify making them subject solely to domestic legislation unilaterally passed by the States and adjudicated by domestic non-indigenous courts, States should produce unassailable proof that the indigenous peoples in question have expressly and of their own free will renounced their sovereign attributes.' Commission on Human Rights, Final Report, 1999, para. 194.

good faith its relation with the State itself. Such resettlement of their respective positions does not automatically encroach upon the collective rights of the components of the State itself, but calls for a redress of the sacramental damages resulting from the protean materialisation of the nation building process.

It is still useful to return to the arguments leading to the consideration of native tribes as independent nations were instrumental or purely spurious: the accurate diagnosis of the causes of such manoeuvres might be prophylactic from a historiographic point of view. In that regard, Miguel Alfonso Martínez declares that the whole research project carried about for almost two decades served no other purpose than paving the way for a new relationship between indigenous peoples and States[52]. Other specialists broaden the protean challenge posed by colonialism to International Law to its most scientifically remote threshold[53].

However, there is still a common thread in current specialised literature and academic discussion according to which prior sovereignty has no pragmatic translation in present times[54] or is simply disposable from the political discourse, along with the right to self determination (sic)[55]. Brownlie is a good illustration of this line of reasoning. Whilst he makes a impeccable plea on behalf of Maori's prior sovereignty:

> There can be no doubt, however, that the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make an agreement which was valid on the international plane. Moreover, there is evidence that, in the decade prior to the conclusion of the Treaty, the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law. [...] In any event, the British regarded Waitangi as a real treaty and it appears in authoritative collections such as the *British and Foreign State Papers* and *Hertslet's Commercial Treaties*. Moreover, the fact that *subsequent* developments in international law doctrine denied treaty-making capacity to what were described as 'Native Chiefs and Peoples' is irrelevant. [...] Facts have to be appreciated according to the principles of international law prevailing at the material time.[56]

---

[52] Commission on Human Rights, Final Report, 1999, para.17, is devoted in its third part to 'the potential value of all those instruments [the treaties] as the basis for governing the future relationships between indigenous peoples and States'.

[53] '[T]o understand the relationship between international law and colonialism in order to formulate more adequately the potential of the discipline to remedy the enduring inequities and imbalances that resulted from the colonial confrontation.' Anghie, 1999, 8.

[54] For a more comprehensive panorama on the most recent contributions on this field, refer to Tennant, 1994.

[55] Corntassel & Primeau (1995, 362) argue that such strategy should be relinquished 'first, that they [indigenous peoples] refrain from using phrases such as "self-determination" and "sovereignty" and instead focus upon gaining state guarantees of the maintenance of cultural integrity'.

[56] Brownlie, 1992, 8-9. Emphasis in original.

He subsequently counterfeits the legal significance of the compact on the basis that the validity of the treaty itself is paradoxical. Briefly, this position, not entirely supported by the author, incarnates the quintessence of the argumentative domestication process by jurists.

> Its execution meant that the separate international identity of the Confederation of Chiefs was extinguished and the procedure of implementation of the reciprocal promises was transferred from the plane of international law to the plane of internal public law.[57]

The climax of the whole argumentative plea, starting off with a blunt recognition and ending up with the forced re-allocation of the obligations from the realm of international law to that of domestic law, is the 'anomaly' or 'abnormality' claim[58].

> The Treaty of Waitangi does not fit into the normal pattern, that is, of external treaty obligations [...] it is not binding upon the Crown as a valid *international treaty*: for New Zealand it is not a treaty in force. Its result was the disappearance of one of the international persons involved in the transaction. Consequently the Treaty does not have the same legal status *in public international law terms* as the recent international conventions concerning human rights. However, the internal relations of the Treaty are very similar to those of a currently valid international agreement. Its enforceability depends upon statutory recognition of the rights protected by its provisions.[59]

This impeding circumstance supposedly stems from the Crown's constitutional law which, as a matter of fact, has not changed since the subscription of this compact. The Crown is not bound by conventions unless developed by statutes: it is roughly the fundamental pillar of the British political system, the King in Parliament principle already in force after the Glorious Revolution back in the seventeenth century, that is prior to the signature of the Treaty of Waitangi. What is it then that made the Treaty of Waitangi perfectly recognisable as an international instrument in 1840, and subsequently not so eligible as a valid international treaty? Obviously, the argument of 'political opportunity' ('Captain Hobson[60] was intelligent enough to make native chiefs believe that he was accepting them as his peers, whilst he was actually not thinking that') is not only puerile but recalls unacceptable notions of racial backwardness which are simply out of the question.

---

[57] Id., 9.

[58] Some recent works operate along this line of argumentation, right from the title of the books: Prucha, 1994.

[59] Brownlie, 1992, 26.

[60] Captain William Hobson was sent by the British Government to place Maori territory under British rule.

> This remains true independently of the predominance, nowadays, of more restricted, State-promoted notions of 'self government', 'autonomy', 'nationhood' and 'partnership' – if only because the 'legitimization' of their colonization and trade interests made it imperative for European powers to recognize indigenous nations as sovereign entities.[61]

Our second illustration about the prophylactic virtues of an international rank rehabilitation by International Law moves from the doctrinal layer to the institutional practice. The Mexico government representatives at the OAS Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations have declared their will to modify the current wording of article XXII of the Draft Project[62]. We are in a position now to know there are a series of international compacts signed by the Mexican government, or its authorised agents, with the Comanches or the Navajos whose pure existence might legally engage the Mexican government far beyond what it is politically willing to accept, should this Proposed American Declaration finally be approved[63]. There is a quite thrilling legal, yet not unimaginable, scenario for the Mexican government in which instead of graciously granting mutilated rights of political autonomy at municipal level, as has been the case with the newest frustrated constitutional reform, it would be bound to honour a treaty signed more than a century ago, whereby it must return vast tracts of land to the genealogical heirs of indigenous nation. Previous Mexican governments had been obliged to sign truces to ensure their own political survival.

As several other cases show, the reversibility process of the domestication phenomenon is to a certain extent already in motion, be it by means of the self-determination venue – which might possibly incarnate the aspirations of free decision in matter of indigenous exclusive regard of several peoples – be it by virtue of a recovery of spoiled rights through a freely adopted resettlement of positions between States and indigenous peoples. This latter case has itself multiple variants which are extensively explored by other authors of this volume: it ranges from the so called and still rather controversial 'modern treaties' (i.e. the Mikmak in Canada), to the right to

---

[61] Commission on Human Rights, Final Report, 1999, para. 111.

[62] See Permanent Council of the Organization of American States GT/DADIN/doc.9/01, 12 January 2001, Committee on Juridical and Political Affairs, (Original: Spanish), Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations, page 30. While the representative of the indigenous peoples, Darwin Hall, suggested at this meeting the adoption of the wording of Art. 36 of the UN Draft Declaration on the Rights of Indigenous Peoples, Mexico suggested deleting the whole of the section.

[63] We could shortlist a series of treaties signed by the Mexican Government with the Navajo (1839), the Comanches (1822, 1843, 1856) or the Apaches (1850). There is even a decree issued on 1868 by the Mexican Government entitling the *Inspector General de las Colonias Militares* to '*celebrar la paz con las tribus de indios bárbaros* [to accord peace with the tribes of barbarian Indians]', for further details see specifically 'Los indios fronterizos del norte: Unos modos de vida refractarios a la integración' (Chapter VIII) in: Ferrer & Bono, 1998, 545-618. There is as a matter of fact a group of historians and ethnohistorians such as Martha Rodríguez, Cynthia Radding and David J. Webber whose recent empirical findings throw some light on the existence and interpretation of these compacts on the Mexican northern frontier. For the complete text of Art. XXII, see *infra*, note 64 and accompanying text.

be consulted in its veto-like variation. Legal discourse is not though completely sterilised from its time immemorial cultural prejudice against indigenous peoples, and publicists are tempted to reproduce some of the subtle compromising techniques postcolonial discourse seeks to eradicate. Again the debate at the OAS Working Group regarding Article XXII 'Treaties, acts, agreements and constructive arrangements' in late 2001 evokes the intentions to exile the right of indigenous peoples to the observance of valid treaties, as far as possible from the vicinities of International Law. The munipalization ghost wanders around (again) the not-so-precise whereabouts of indigenous rights ...

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and constructive arrangements, that may have been concluded with states or their successors, as well as historical Acts in that respect, according to their spirit and intent, and to have states to honour and respect such treaties, agreements and constructive arrangements as well as the rights emanating from those historical instruments. Conflicts and disputes which cannot otherwise be settled should be submitted to competent bodies.[64]

To start with, there is no agreement as to the inclusion of the adjective 'historical', be it as a determinant of 'acts' or 'rights'. It comes as no surprise then that the negative of the States' representatives at the Working Group to accept an open dialogue with the past is coincidental with the proposal to add another meaningful adjective to the wording of the text: 'domestic'. Whilst the Executive Secretariat proposed the reference to '[c]ompetent *domestic* bodies' (emphasis added by the author), the United States representatives offered a (far from transactional) alternative wording.

> States should take all the necessary steps *under domestic law* to implement obligations to indigenous [peoples/populations] under treaties and other agreements negotiated with them and, *where appropriate*, to establish procedures for resolving grievances arising under such treaties and agreements in accordance with principles of equality and justice.[65]

Notwithstanding the pending issue of the label to be applied to the subject itself (be it the demographic notion of 'populations' or be it the more politically meaningful term of 'peoples'), the United States' proposal shifts from the terrain of rights to the terrain of obligations without any guarantee of enforceability. The proposal wording perpetuates the domestication/municipalization of treaty-based rights, and leaves no hope for the emancipation of indigenous rights, and particularly

---

[64] 'Proposed American Declaration On The Rights Of Indigenous Peoples' Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session, Article XXII.

[65] Emphasis added. See Permanent Council of the Organization of American States GT/DADIN/doc.9/01 12 January 2001, *supra* note 62.

their breaches, from its traditional confinement under State's *domiciliary* arrest: only domestic law is applicable to the case, and competent domestic instances are exclusively obliged to redress grievances where appropriate. It is obvious that according to this wording, the appropriateness of the resolution of grievances, along with the establishment of the corresponding procedures fall under the sole competence of the State. The proposal goes hand in hand with the dominant arguments of the newest authoritative doctrine in Federal Indian Law, which declares the Marshall notion of sovereignty to be obsolete and reiterates the 'irresistible power' as the ultimate explanation of the domestic nature of Indian tribes[66].

When the French social scientist Foucault placed the change of paradigm in European legal discourse somewhere in an imprecise point between Medieval and Early Modern Age he emphasised that the shift was incarnated by the use of the technique of enquiry (*indagatio* in Latin, *enquête* in French) by German and Roman Law during medieval times, in contrast to the use of the technique of examination (*examen* both in French and Latin) by the Modern Europe's 'disciplinary' societies[67]. The Foucaultian argument is transferable to the Law of Nations' legal discourse dynamics. The 'technical' input of the breakthrough in legal discourse is directly connected to the hermeneutical intentions of publicists belonging to those two successive phases. The Medieval publicists' enquiry about the legal standing of heathen savage peoples beyond the limits of the Empire was *apofantica*[68] – quoting again Foucault. On the other hand, the examination by the positivist publicists of the arguments of their predecessors was performative, therefore disciplinary. In this latter case it sought to construct a certain consumable truth for the purposes of colonialism. Lindley performed, from this perspective, the role of the international orthopaedist by means of anticipating the failed *virtù* of aboriginal nations without even considering whether an enquiry about the statehood of the Iroquoises was pertinent for the purposes of his examination test. As Arbitrator Huber stated while explaining the doctrine of inter-temporal law:

> As regards the question of which of different legal systems prevailing at successive periods is to be applied in a particular case (the so called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principles which subjects

---

[66] 'Running through the anomalies of Indian treaties and going directly counter to the notion that a treaty is an *international* agreement between independent sovereign states was the hard fact that the Indians were ultimately a domestic issue for the United States. This was evident from the start, as Indian affairs were made the responsibility of the War Department (and later the Interior Department) rather than the State Department.' Prucha, 1994, 14-15.

[67] Foucault made several speeches in 1973 at the University of Rio de Janeiro prior to the publication of one of his masterpieces, *Surveiller et punir.* The work of Foucault has been occasionally defined as the work of a legal historian. As a matter of fact, Foucault made a clear cut statement as for the intimate relation between hermeneutics and legal history. Although the emphasis is mainly placed, throughout his work, on Criminal Law, it might be easily extrapolated to other branches of jurisprudence such as the Law of Nations. In a certain sense it does coincide with the main working hypothesis of this essay. Foucault, 1998.

[68] *Apofantica* is the branch of Modern Logics which deals with the operations aiming at the prevention of logical nonsense.

> the act creative of a right to the law in force at the time the right arises, demands the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[69]

The historical sovereignty approach is certainly pierced by the transversal issue of inter-temporal law: indigenous nations' diachronic nature derives from the ever mutating perception by (European) International Law and the subsequent juridical consequences attached to such mutation. There are indeed certain exploratory conclusions which might be contended along this line of reasoning in the light of the winding process of municipalization of indigenous nations' status.

First of all, it is not plausible to accept that indigenous international standing was eroded gradually and synchronically, as International Law was unfolding: obvious as it may seem there has never been an explicit provision contending the retrospective general annihilation of indigenous sovereignty but several attempts to exile them from the neighbourhood of the Family of Nations. As we have already seen, those two, or even three debates were parallel or at most tangent (mutually reinforcing) and, by no means secant (mutually excluding), nor were they outlawed by an outright provision vested in an international norm according to then-prevailing criteria. Even at the peak of the hostilities towards the international affinity of indigenous nations, legal positivism never managed to issue a conventional norm (according again to then-prevailing sources of norm-making), with a view to eradicating any residual indigenous sovereignty from the surface of Classical International Law. As a result, it might be argued that the process was altogether historically dysfunctional.

Secondly, an immaculately uninterrupted line of reasoning, leading inexorably to the decapitation of indigenous nations, is far from being easily traced in publicists' legal discourse: ambiguities, votive borrowings and linguistic servitudes do arise throughout the entire chronological spectrum of the domestication process, thus encroaching upon what might have been accepted as a lineal thread not subject to variations. Scholars have proceeded on the uncertainties of their predecessors in a cumulative, yet unstable pattern, of *ex post facto* reasoning, whereby evidence consisted allegedly of self-serving acts of (non indigenous) Parties at a stage when it was evident that a dispute (about the *locus standi* of the indigenous nation) existed.

However, and in third place, I sought to individualise the rhetorical mechanisms employed to that end (that is the deactivation of international standing), but for different purposes (be it the *apofantic* intentions of legal theologists to deduce from the law of nature whether indigenous nations were to be deemed worth being treated as peers; be it the more transformative vocation of Enlightenment and positivist publicists to unilaterally modify the conditions on which any of such judgements might be possibly made), and concluded that the sovereignty test was, on the brink of the consolidation of Classic International Law, outrun by a new catalogue of requirements for the entry to the Family of Nations, hence leaving the issue of sovereignty itself intact. It is not at all clear that the scrutiny of the past by Euro-American historiography had shown that positivist publicists took it for granted that

[69] Arbitrator Max Huber, in the *Island of Palmas* case, see *supra* note 28.

indigenous nations lived outside the realm of legality. Moreover, it is equally self-evident that the controversy about the sovereignty of indigenous nations was conveniently supplanted by the more manageable topic of the membership in the Family of Nations (thus leaving the question of participation in International Law unresolved). Controversy itself, be it real or fictional, is to be regarded as an almighty discursive instrument to be resorted to, shall the circumstances call for it. Several tensions around the concept of quasi-sovereignty, with regard to indigenous nations, virtually confirm the non-accomplished stage of the debate at the crucial date on which sovereignty failed to be the *Leitmotiv* of the discussion. It was precisely at that moment when positivist publicists declared that there were three perfectly discernible issues at stake: 1) sovereignty; 2) participation in the International Law regime; and 3) membership of the Family of Nations. Indigenous nations, formerly protagonists and catalysts of the central, even foundational, issue of the Law of Nations (out of which other subtopics arose), were underscored for the benefit of newcomers. The most innovative outcome of this division for the purposes of the process of domestication, was the common assumption whereby those characteristics were not mutually exclusive and might be present in different proportions in different situations. So, concerning the idea of 'States which are not full members of the International Family', Lindley writes:

> Even when the rule is put in terms of the States which are members of the Family of nations or for the community of International Law, it is still not precise. The community within which International Law operates is not one with definite limits. Some States may be within it for some purposes but not for others, and the difficulty remains to determine which of them is within it for this particular purpose.[70]

Anghie supports this view[71]. He reiterates the fact that the assertion by positivist International Law of non-European otherness status revealed that some actors might be sovereign States operating partially (Siam) or totally (Alghiers) outside the realm of legality, or simply awaiting the entry in the community of civilised nations (the Ottoman Empire), whilst other non State actors might be operating within the realm

[70] Lindley, 1926, 19.

[71] 'The tribes remain outside the realm of international law, *not so much because they lack sovereignty*, but because they are wanting in the other characteristics essential for membership in international society. It follows, despite positivist preoccupations with sovereignty doctrine, that "society" and the "family of nations" are the essential foundations of positivist jurisprudence and of the vision of sovereignty that it supports. In the final analysis, non-European states are lacking in sovereignty because they are excluded from the family of nations. The novel manoeuver of focusing on society enabled positivist jurists to overcome the historical fact that by and large, *non European states were previously regarded as sovereign, that they enjoyed all the rights accompanying that status, and that their behavior constituted a form of practice and precedent that give rise to rules and doctrines of international law* […] Within the positivist universe, therefore, the non European world is excluded from the realms of sovereignty, society and law. Each of these concepts, which acted as founding principles to the framework of the positivist system, was precisely defined, correspondingly, in ways that maintained and policed the boundary between the civilized and the uncivilized.' (emphasis added by the author), Anghie, 1999, 28-32.

of legality (trade companies) or virtually on the verge of the community of nations (indigenous nations).

As a matter of fact, the lion's share of the colonial positivist doctrine during the twentieth century relied on the project of re-entry of non-European societies, an allegedly emancipatory initiative which paradoxically left aside those body polities, indigenous *guest* nations, whose juridical existence in the international field had been more complicated to jeopardise in the past: the latest stage of this waterfall effect was the appearance of the notion of (internationally relevant) 'people' whose utility for indigenous nations is still under close scrutiny. In this ultimate regard, this essay is deliberately confrontational but in a rather limited manner, due to the enormous distances in research experience and erudition, with Corntassel & Primeau's and Anaya's (to a lesser extent) approach to the historical sovereignty strategy to pursue political claims[72]. The contemporary historical sovereignty agenda is probably the initiative which owes more to, and depends to a larger extent upon the progress of post-colonial historiography, namely with regard to the domestication process. The three main objections to this agenda are: 1) the doctrine of inter-temporal law; 2) the theory of recognition; 3) a normative trend towards stability through pragmatism over instability. Corntassel & Primeau backed up Anaya's threefold contention and ended up by suggesting the removal of any conceptual tie between indigenous peoples and the right to self determination.

From my point of view, the argument # 3 prevails over (thus rendering superfluous) arguments # 1 and # 2: it is only because International Law sought –and to a certain extent managed – to create (an image of) stability at a certain moment that indigenous nations no longer qualified as members of the international community. Both arguments # 1 and # 2 are purely instrumental, hence tributary, to the triumph of pragmatism over the then-prevailing normative system (understood again as the inter-relational practices between independent actors). Even the mildest or weakest postcolonial trend does not accept the normative outcome of the International Law linguistic drive leading to the spoliation of legal standing as a non movable or irreversible contention, even if it might have led to confusion or instability.

As for argument # 1, I argue that should the doctrine of inter-temporal law – one of the most appreciated taming techniques of the publicists we have already referred to – have to be applied to its last consequences, it would certainly lead to the conclusion that indigenous nations' legal standing survived severely injured the vicissitudes of the inception of Modern International Law: if indigenous footing with regard to European powers had to be construed as the 'juridical fact' to be appreciated in the light of the law contemporary to it, it is doubtful that such law (whatever form it took), wiped away any trace of indigenous subjectivity, at least until the creation of the United Nations Organization back in 1945.

As far as the argument of recognition (# 2) is concerned, it equally entails an inter-relational supremacy built on the perpetuation of stability through pragmatism.

[72] As a matter of fact, there is a protracted, yet unaccomplished, dialogue in the *Human Rights Quarterly* between these authors regarding the capacity of the historic sovereignty approach to advance indigenous claims. See Anaya, 1991; and Corntassel & Primeau, 1995.

Pragmatism is a parsimonious euphemistic variant of factualism and consists of the nemesis of law as the appropriate reservoir of all those inter-relational practices. Besides the insurmountable circumstance that indigenous nations were repeatedly recognised as peers, specifically, but not exclusively, throughout the treaty-making process, it goes without saying that the doctrine of recognition pre-emptively selected, on rather spurious grounds, those expected to make the selection itself. Moreover, the theory of constitutive recognition coincides in times with the bifurcation of the debate about the legal standing of indigenous nations. It deals primarily with the acceptance into the family of nations and/or the enjoyment of the benefits of the (European) International Law regime.

Finally, let it be said that the domestication process, that is, the manoeuvre which sought to expel indigenous nations from the international arena, thus preventing them from litigation at that level according to rules common to equal characters, occurred precisely when the divorce between Public and Private Law constituted the landmark of the genesis of the Nation-State. This chronological coincidence is not therefore accidental: the transposition from the autonomous not contested standing by the Law of Nations to the reclusion within the more restricted degenerative limits of 'internal affairs', deprived indigenous nations from any capacity to recreate their own historical account and stigmatised dependence.

With a view to use a commonly employed formula in the most recent international draft documents, I will just conclude by saying that none of these contentions are meant to jeopardise any other rights possessed or recognised by indigenous peoples[73]. This essay has merely an aseptic purpose, that is, to detect discursive mannerisms which might compromise the rehabilitative pilgrimage that current International Law is to perform according to the latest episodes that it has gone through: some have declared it the quest for a renewed inter-societal law; some prefer to proceed beyond multiculturalism and admonish vehemently about the clash of civilisations. As far as indigenous nations are concerned, be it from a weak or a strong perspective, International Law is requested to offer some creative resettlements of past grievances through complete re-enfranchisement of constituent rights. Juridical independence, shall it be an acceptable label for the otherwise unassailable concept of sovereignty, entails that there is a constituent body which acknowledges no supreme scrutiny over the desire of the people regarding its representational practices. For that precise reason it would be illegitimate for a European researcher to move beyond the avoidance of stagnant, still dominant, practices of discrimination towards indigenous nations by the International Law advocates, mentors and practitioners.

[73] 'Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire'. The wording is coincidental both in the 'UN Draft Declaration on the Rights of Indigenous Peoples' (art. 44) and the 'Proposed American Declaration On The Rights Of Indigenous Peoples' (art. XXIII).

Bibliography

Alexandrowitz, Charles

1967 *An Introduction to the History of the 'Law of Nations' in the East Indies, 16th 17th and 18th Centuries,* Clarendon, Oxford, 1967,

Anaya, James S.

1991 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' *Human Rights Quarterly* Vol. 13, 403-411.

1996 *Indigenous Peoples in International Law*. Oxford University Press, New York, 1996.

Anghie, Anthony

1999 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' *Harvard International Law Journal* Vol. 44, 1-80.

Berman, Howard

1992 'Perspectives on American Indian Sovereignty and International Law, 1600 to 1776' in: Lyons, Chief Oren & John Mohawk (eds.), *Exiled in the Land of the Free. Democracy, Indian Nations and the U.S Constitution.* Clear Light Publishers, Santa Fe, 125-188.

Bitterli, Urs

1982 *Los 'salvajes y los 'civilizados'. Encuentro de Europa y Ultramar.* Fondo de Cultura Económica, México, Primera edición en español, 1982.

Boccara , Guillaume

1999 'El poder creador: tipos de poder y estrategias de sujeción en la frontera sur de Chile en la época colonial' *Anuario de Estudios Americanos* Tomo LVI/1, 65-94.

Clarkson, Gavin

2002 'Not Because they are Brown, but Because of *ea*: Why the Good Guys Lost in Rice v. Cayetano, and why They Didn't Have to Lose' *Michigan Journal of Race and Law* Vol. 7, 317-359.

Clavero, Bartolomé

1995 *Il diritto della societá internazionale.* Jaca Book, Milan.

Commission on Human Rights

Study on treaties, agreements and other constructive arrangements between States and indigenous populations:

First progress report submitted by Miguel Alfonso Martínez, Special Rapporteur, E/CN.4/Sub.2/1992/32.

Second progress report submitted by Miguel Alfonso Martinez, Special Rapporteur, E/CN.4/Sub.2/1995/27.

Third progress report submitted by Miguel Alfonso Martinez, Special Rapporteur, E/CN.4/Sub.2/1996/23.

Final report submitted by Miguel Alfonso Martinez, Special Rapporteur, E/CN.4/Sub.2/1999/20.

Informe del Seminario de Expertos sobre las experiencias practicas en materia de derechos y reivindicaciones sobre tierras indígenas. Relator José Alwyn Oyarzun, Whitehorse, 1996, E/CN.4/Sub.2/AC.4/1996/6.

Corntassel, Jeff J. & Tomas Hopkins Primeau

1995 'Indigenous "sovereignty" and International Law: revised strategies for 'self determination' *Human Rights Quarterly* Vol. 17, 343-365.

Ferrer, Manuel & María Bono

1997 *Pueblos indígenas y Estado nacional en México en el siglo XIX.* Universidad Nacional Autónoma de México, México.

Foucault, Michel

1998 *La verdad y las formas jurídicas.* Gedisa Editorial, Barcelona.

García, Claudia

1999 'Interación étnica y diplomacia de fronteras en el reino mikitu a fines del siglo XVIII' *Anuario de Estudios Americanos* Vol. LVI/1, 95-121.

Gatii, Thuo

1998 'International Law and Eurocentricity (Review Essay)' *European Journal of International Law* Vol. 9, 1ff.

Hyde, Charles Cheney

1922 *International Law Chiefly as Interpreted and Applied by the United States.* Volume One. Little, Brown, and Company, Boston.

Hyland, Richard

1997 *'Pacta sunt servanda*. Una reflexión' in Petit, Carlos, (ed.), *Del ius mercatorum al Derecho Mercantil. III Seminario de Historia de Derecho Privado.* Marcial Pons, Madrid, 359-381.

Lesaffer, Randall

2000 'The Medieval Canon Law of Contract and Early Modern Treaty Law' *Journal of the History of International Law* Vol. 2/2, 178-198.

Lindley, M.F

1926 *The Acquisition and Government of Backward Territory in International Law. Being a Treatise on the Law and Practice Relating to Colonial Expansion.* Longman, London.

Mannoni, Stefano

2000 *Potenza e ragione. La scienza del diritto internazionale nellla crisi dell'equilibrio europeo.* Giuffre, Milan.

Motta, Ricardo

2001 'Maîtres chez eux' sovranità domestica e diritti ancestrali delle prime nazioni in Nuova Francia e Canada' *Materiali per una Storia de la Cultura Giuridica,* año XXXI, n. 1, giugno, 2001, 211-231.

Muldoon, James

1979 *Popes, Lawyers and Infidels: The Church and the Non-Christian World 1250-1550.* Liverpool University Press. Liverpool.

Octavio, Rodrigo

1930 'Les Sauvages Américains devant le Droit' *Recueil des Cours (Académie de Droit International de La Haye)* Tome 31, 177-289.

Onuma, Yasuaki

2000 'When was the Law of the International Society Born?' *Journal of the History of International Law* Vol. 2/1, 1-66.

Pennington, Kenneth

1993 *Popes, Canonists and Texts: 1150-1550.* Aldershot, London, 1993.

Prucha, Francis P.

1994 *American Indian Treaties. The History of a Political Anomaly.* University of California Press, Berkeley.

Snow, Alpheus Henry

1972 *The Question of the Aborigines in the Law and Practice of Nations. Including a Collection of Authorities and Documents.* Metro Books, Northbrook. (first edition 1922).

Tennant, Chris

1994 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993' *Human Rights Quarterly* Vol. 16, 1-57.

Vattel, Emmerich de

1916 *The Law of Nations or the Principles of Natural Law*. Classics of International Law Series, Carnegie, Endowment for Peace, Washington, 1916 (G. Fenwick translation of 1758 ed.), 116.

Williams, Robert. S.

1999 *Linking Arms Together. American Indian Treaty Vision of Law and*

Peace, 1600-1800. Routledge, New York.

Bibliographical references recommended by author for futher reading:

Alexandrowitz, Charles H.
1960 'Treaty and diplomatic relations between European and Asian powers in the Seventeenth and Eighteenth centuries' en *Recueil des Cours de la Academie de Droit International de La Haye,* 1960, Vol. 2, 207-321.

Clavero, Bartolomé
2000 *Ama Llunku, Abya Yala: Constituyencia indígena y Código ladino por América*. Centro de estudios Políticos y Constitucionales, Madrid.

HISTORICAL ANOMALIES, CONTEMPORARY CONSEQUENCES: INTERNATIONAL SUPERVISION OF THE ILO-CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES (No. 169)*

Luis Rodríguez-Piñero

I. Introduction

More than ten years after coming into force, the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169)[1] has been celebrated, reflected upon and evaluated in light of its important role regarding the recognition and protection of the rights of indigenous peoples in the present international legal system.[2] Convention 169 has had a tremendous

* Research for the drafting of this Article was possible thanks to a research grant at the Center for Research and Study on Social Anthropology (CIESAS), Mexico City, within the framework of the Programme for Grants for Foreign Students of the Secretary of Foreign Relations, Government of Mexico

[1] Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169), adopted by the 76th Session of the International Labour Conference, Geneva, June 27, 1989 (entered into force Sept. 5, 1991) [hereinafter, 'Conv 169']. As for this writing, the list of states parties to Conv 169 is as follows: Argentina (2000), Brazil (2002), Bolivia (1991), Colombia (1991), Costa Rica (1993), Dominica (2002), Denmark (1996), Ecuador (1998), Fiji (1998), Guatemala (1996), Honduras (1995), Mexico (1990), Norway (1990), The Netherlands (1998), Paraguay (1993), Peru (1994), Venezuela (2002).

[2] Scholarly work on Conv 169 from an international legal perspective is still limited. *See*, generally, S. James Anaya, 'Indigenous Rights Norms in Contemporary International Law' 8 *Arizona Journal of International and Comparative Law* 1, 1991, at 6-15; *Indigenous Peoples in International Law* (Oxford, Oxford University Press, 1996), 47-54; Russel Barsh, 'Revision of ILO Convention No. 107' 81 *American Journal of International Law* 756, 1987; 'Making the Most of ILO Convention No. 169' *Cultural Survival,* Spring 1994, 45; 'An Advocate's Guide to the Convention on Indigenous and Tribal Peoples' 209 *Oklahoma City University Law Review* 15, 1990; Howard H. Berman, 'The ILO and Indigenous Peoples: Revision of Convention No. 107' 41 *International Commission of Jurists: The Review* 58, 1988; B.K. Roy Burman, '"Indigenous" & "Tribal" Peoples and the UN & International Agencies' *Rajiv Gandhi Institute for Contemporary Studies Papers* No. 27, 1995; Scott Leckie, 'Indigenous peoples, Recent Developments in the International Labour Organization' 16 *Studie- en Informatiecentrum Mensenrechten* 22, 1986; Natan Lerner, 'The 1989 ILO Convention on Indigenous Populations: New standards?' in Y. Dinstein & M. Tabory (eds.), *The Protection of Minorities and Human Rights* (London, Martinus Nihjof, 1992); Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No.

R. Kuppe and R. Potz (eds.), Law & Anthropology, 55-91.

effect on state practice. The Convention has further played a central role in the shaping of a normative regime specifically focused on the rights of indigenous peoples at the international level.

One of the often overlooked issues in the academic discussion and public education about the Conv 169 is the supervision of its implementation by relevant international institutions.[3] The need to secure a minimum level of international protection for indigenous peoples through effective mechanisms constituted a key point stressed by the International Labour Office – the organisation's secretariat – to provide an ex-post justification of its internal decision to revise the previous 1957 convention.[4] Because of its specific institutional affiliation, Conv 169 is currently the object of international review by the ILO's system of monitoring the application of international

---

169 of 1989' 15 *Oklahoma City University Law Review* 677, 1990; 'The Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption' in C. Price Cohen (ed.), *Human Rights of Indigenous Peoples* (New York, Tansnational Publishers, 1998); Sharon Venne, 'The New Language of Assimilation: A Brief Analysis of ILO Convention No. 169' 53 *Without Prejudice* 60, 1990.

In addition to this scholarly literature, an increasing number of handbooks provide better evidence of the Convention's important impact on the ground. *See e.g.*, Magadalena Gómez, *Derechos Indígenas. Lectura Comentada del Convenio 169 de la Organización Internacional del Trabajo* (Mexico City, Instituto Nacional Indigenista [INI], 1995); Virginia Leary, *La utilización del Convenio No. 169 de la OIT para proteger los derechos de los pueblos indígenas* (San José de Costa Rica, Instituto Interamericano de Derechos Humanos, 1999); Henriette Rasmussen & Chandra Roy, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (Geneva, International Labour Office, 2000); Chandra Roy & Mike Kay, *The International Labour Organization: A Handbook for Minorities and Indigenous Peoples* (London, Anti-Slavery International and Minority Rights Group International, 2002); Gabriela Olguín Martínez, 'Guía legal sobre la utilización de los Convenios y recomendaciones de la OIT' *Guías para. la Defensa de los Derechos Indígenas,* No. 3 (San José de Costa Rica, OIT, 2001); Lee Swepston & Manuela Tomei, 'The ILO and Indigenous and Tribal Peoples' in Lydia van de Fliert, (ed.), *Indigenous Peoples and International Organisations* (Notthingam, Russell Press, 1994); *Indigenous and Tribal Peoples: A Guide to Convention No. 169* (Geneva, ILO, 1996.

[3] On the actual working of the existing ILO's supervisory procedures as applied to Conv 169 *see* Bernard Duhaime, 'Assessment of the Options for Indigenous Peoples to Monitor Application of ILO Convention No. 169' *Rights & Democracy, Publication series* (2000); Fergus MacKay, 'A Guide to Indigenous Peoples' Rights in the International Labour Organization' *Forest Peoples Program (FPP) Briefing Paper*, July 2002; Gabriela Olguín, *Mecanismos de control de la OIT en materia de derechos indígenas. Aplicación internacional del Convenio 169* (Mexico City, Ce-Acatl, 2000).

[4] Among the key elements in the discourse articulated by the International Labour Office in order to legitimise its own decision to draft a new convention was the need to secure a minimum level of international protection for indigenous peoples through effective mechanisms. This was connected to a general sense of threat within the ILO's bureaucracy prompted by the UN standard-setting activities concerning indigenous issues, and with a generalised mistrust towards the effectiveness of the UN treaty-monitoring bodies. *See e.g.*, Internal note, Ian Lagregren to Valticos and De Givry, Sept. 4, 1975, at 1. ILO Historical Archives, CL 51 (1); Lee Swepston, 'Further note on the question ILO/UN relations on indigenous populations' Memorandum, Feb. 29, 1984. *Ibid.*, ACD 4/107 (2). According to this line of institutional discourse, the ILO encompasses a highly effective system of international standard supervision that could play a key role in the international defense of the rights of indigenous peoples. In fact, the revision of Conv 107 was depicted as a measure of protection, even of a *provisional* nature, called to fill the gap left by the absence of mechanisms for the protection of indigenous rights during the period in which the United Nations was drafting an international declaration – and, eventually an international convention – on the rights of indigenous peoples. *See* Lee Swepston, memorandum, 'Revision of Convention No. 107: Relation with other organisations' Oct. 29, 1984, at 1. *Ibid*., ACD 4/107 (2).

labour standards. This practice allegedly enhances the practical effect of the instrument, while contributing to the development of new meanings and interpretations of the text.[5]

The objective of this article is to provide an assessment of the effect of Conv 169 on the operation of ILO's supervisory machinery, and finally a consideration of the impact of the Convention on the protection of indigenous peoples' rights under contemporary international human rights law. The article first presents a background of the written and unwritten rules of the ILO system of supervision of standards. After reviewing the practice of the Committee of Experts regarding Conv 169under the ILO reporting procedure, the article analyses the cases of 'representations' – the organisation's main complaint procedure – involving alleged violations of the Convention.

II. The ILO System of Supervision of Standards

Before examining the ILO's supervisory practice in relation to the rights affirmed in Conv 169, it is necessary to analyse the organisation's system of supervision of international labour standards.[6] The pure fact that such an introduction is necessary, constitutes evidence of the limited knowledge about this supervisory system among relevant actors, including the organisation's own constituency.[7]

With over eighty years of history, the ILO's normative control system has been characterised by its great complexity and high degree of specialization,[8] possibly linked

---

[5] The practice of international human rights bodies and other authoritative actors contribute to the development and crystallisation of new normative meanings and expectations of consistent behavior in relation to pre-given – though dynamically evolving – international standards. *See*, Anaya, *Indigenous Peoples in International Law*, *supra* note 2, at 48-58 (discussing the role of standard-setting initiatives and international implementation procedures in the emergence of international customary rules concerning indigenous peoples). This dimension is particularly relevant, in light of the role played by Conv 169 in the development of new norms in international customary or general law. In this regard, the Convention has been seen as 'part of a larger body of increasingly consistent practice at the international and domestic levels' S. James Anaya and Robert 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* 33, 2001, at 54, and as a reflection of 'a new and still developing body of customary international law', Anaya, 'Indigenous Rights Norms in Contemporary International Law' *supra* note 2, at 10.

[6] *Vid*. K.T. Samson, 'The changing pattern of ILO supervision' *International Labour Review*, 118 (5): 569-587, 1979; Lee Swepston, 'Supervision of ILO Standards' 13 (4) *The International Journal of Comparative Labour Law and Industrial Relations* 327-345, 1997; 'Human Rights Complaint Procedures and the International Labour Organisation' en Hurst Hannum (ed.), *Guide to International Human Rights Practice*, Philadelphia, Pennsylvania University Press, 1992, 2nd edition; Lee Swepston & M.E. Tardu, 'Part one: Complaints procedures of the International Labour Organisation' in *Human Rights: The International Petition System*, vol. III, *Complaint procedures of the specialised agencies and various UN bodies*, New York, Oceana Publication Inc, 1985; Nicolas Valticos & Geralfo W. Von Potobsky, *International Labour Law*, Deventer, Kluwer Law & Taxation Publishers, 1995, 2nd revised edition; Francis Wolf, 'Human Rights and the ILO' in Theodor Meron (ed.), *Human Rights: Legal and Policy Issues* (Oxford, Clarendon Press, 1984), vol. II.

[7] *See Third item on the agenda: Possible improvements in ILO standards-related activities – The supervisory system of the ILO*, ILO Doc. GB.280/LILS/3, 280th Session (Geneva, March 2001), at para. 27 (singling out the 'inadequate knowledge' of the supervision system as one of the main barriers for its efficient use).

[8] Swepston, 'Supervision of ILO Standards' *supra* note 6, at 327.

to its extreme level of bureaucratisation, and its often criticized lack of practical results.[9] The system of supervision of international labour conventions and recommendations is the outcome of an intricate historical evolution plagued with crisis and deep re-structuring, generally related to the permanent need to rationalise and economise the monitoring tasks in order to face the surplus in the system's workload.[10] Currently, the system is undergoing another cyclic period of uncertainty and transformation.[11]

1. Reporting v. Complaint Procedures

The ILO's mechanisms of supervision are conventionally divided into two categories: ordinary and extraordinary. First of all, reporting or permanent procedures are based on a stable communication between member states and the organisation's competent bodies, based on the documentary evidence supplied by the former on a more or less periodic basis.[12] Among the different reporting mechanisms,[13] the most significant has proved to be the examination of the periodic reports submitted by states on the application of ratified conventions by the ILO Committee of Experts on the Application of Conventions and Recommendations.[14]

---

[9] *See infra* notes 52-59 and accompanying text.

[10] Samson, 'The changing pattern of ILO supervision' *supra* note 6, at 570.

[11] At present, the adoption of the ILO Declaration on the Fundamental Principles and Rights at Work, *infra* note 13, which includes its own system of permanent supervision, had led to a process of in-depth revision of the organisation's general system of supervision of standards. This revision was formally initiated in November 2000 and is expected to be concluded in 2003. *See*, generally, *Possible improvements in ILO standards-related activities, supra* note 7, at paras.1-5.

[12] Wolf, 'Human Rights and the ILO' *supra* note 6, at 276

[13] To be sure, the ILO's Constitution foresees four different procedures of permanent or reporting supervision. *See* Constitution of the International Labour Organisation, Oct. 9, 1946, 15 U.N.T.S. 35 (originally Article 408 of the Treaty of Versailles, June 28, 1919) [hereinafter, ILO Constitution], Art. 22 (reports on ratified conventions); Art. 19(5)-(6) (reports on non-ratified conventions and recommendations); Art. 19(5), (reports on submission obligations); Art. 35 (reports on application of conventions and recommendation to 'non-Metropolitan territories'). On the working of these procedures, *see* ILO, *Handbook of Procedures relating to International Labour Conventions and Recommendations*, (Geneva, ILO, 1997) [hereinafter, '*Handbook of Procedures*'], at paras. 33-41 (reports on ratified conventions); paras. 42-51 (reports on ratified conventions and recommendations); paras. 11-17 (submission). The Handbook of Procedures, as well as the full text of international labour standards and the comments of the ILO's competent supervisory bodies may be found in ILOLEX, Database on International Labour Standards, available at: http://www.ilo.org/ilolex/english/index.htm [hereinafter, 'ILOLEX'].

These four procedures have been complemented over the years with special procedures *ratione materiae.* In particular, the reporting system was revised with the adoption of the Declaration on Fundamental Principles, which defines an additional reporting procedure. ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference on June 18, 1998, 86th Session of the Conference, ILO Doc. CIT/1998/PR20A. The Annex of the Declaration defines a *sui generis* system of supervision of the international labour conventions deemed 'fundamental' related to freedom of association and the effective right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. *Id.*, at para. 2. The new follow-up mechanisms consist of 'annual reviews,' integrated by government reports on progress achieved on *not yet ratified* ILO fundamental conventions, *id.* Annex, II, B, at paras. 2-4; and the so-called 'global report,' elaborated by the Secretariat with a view to 'provid[ing] a dynamic global picture relating to each category of fundamental principles and rights.' *Id.* Annex, III, A, at para. 1.

[14] On the composition, functions and working methods of the Committee of Experts *see Handbook*

Created in 1926 in order to assist the ILO's Governing Body in the permanent supervisory task assigned to it by the organisation's constitution, the Committee of Experts gradually took over the main responsibility for the reporting procedure. The Committee is composed of 20 experts named periodically in their 'personal capacity' and 'among completely impartial persons of technical competence and independent standing,' taking into account an even geographical representation.[15] According to Article 22 of the ILO Constitution, the Committee examines, *inter alia*, the 'simplified' or 'detailed reports' that states members are required to submit to assess their compliance with ratified conventions, which makes Conv 169 just one little wave within a sea of international labour standards.[16] Published on a yearly basis, the Committee's 'individual observations' summarise the main points of concern raised by the application of a given convention by state parties, complemented with 'direct requests' that are confidentially addressed to the state.[17]

The final say within the reporting procedure is with the Conference Committee on the Application of Standards, a special committee of the annual International Labour Conference, which shares the tripartite character of the convention.[18] The Conference Committee routinely adopts the Committee of Experts' annual report, and discusses those cases of special concern – at least in the ILO's eyes. The states concerned are invited to participate in the committee's session – which they would typically do – and respond to the issues singled out by the experts.

The procedures of permanent supervision constitute the most salient dimension of the entire ILO's supervisory system, and receive a relatively higher level of interest and institutional resources within the organisation. This is due, in part to the close contact between the technical-operational and the legal-supervisory activities;[19] and partly due to

---

of Procedures, supra note 13, at paras. 52-58. *See* also Ernst Haas, *Beyond the Nation-State: Functionalism and the ILO* (Standford, Standford University Press, 1964), 255-259 (discussing the decision-making processes of the Committee of Experts).

[15] *See Handbook of Procedures*, *supra* note 13, at para. 53. According to the organisation's Handbook, the Committee's 'fundamental principles' are those of 'independence, impartiality and objectivity.'

[16] *See* ILO Constitution, *supra* note 13, Art. 22 (stating state members' commitment to 'to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party'). Since 1958, the organisation has interpreted this provision as not necessarily generating the obligation of submitting reports on a yearly basis, but rather 'an obligation for Members to respond to the Office.' *See Possible improvements in ILO standards-related activities, supra* note 7, at para. 8.

[17] *See Handbook of Procedures*, *supra* note 13, at para. 53 (k). General observations are published in Part II of the Committee of Experts' annual report, and are typically used either 'in more serious or long-standing cases of failure to fulfill obligations' or 'in cases of progress, where a government has taken the measures called for by earlier comments of the Committee.' *Id*., note 6. On the other hand, direct requests, which are not published, 'may relate to matters of secondary importance or technical questions or seek clarification to enable a more full assessment of the effect given to obligations.' *Id.,* note 9.

[18] On the functions and composition of the Conference Committee on Application of Standards, *see* International Labour Conference, General Standing Orders, adopted Nov. 21, 1919, at the First Session of the Conference, revised and consolidated at the 27th Session, 1945, amended at the 87th Session, 1999, Art.7 (attributing the Committee, *inter alia*, the examination of 'the measures taken by Members to give effect to the provisions of Conventions to which they are parties').

[19] *See infra*, notes 43-45 and accompanying text.

an alleged reputation of 'independence, objectivity and impartiality' of its main actor, the Committee of Experts, throughout the years.[20]

Apart from the reporting procedures, the ILO's supervisory machinery also encompasses a number of extraordinary or complaint procedures. While the ILO Constitution anticipates only two of these procedures – the representation and the complaint[21] – other procedures have been developed through the organisation's practice over the years.[22] Among the instruments of extraordinary normative control, the representation has been the only mechanism invoked in relation to the application of Conv 169.[23]

The two constitutionally foreseen extraordinary procedures possess a number of similar characteristics. In contrast with the reporting procedure, both the representation and the complaint procedures are of inquisitorial or quasi-judicial nature, and only provide standing for a narrowly defined number of actors.[24] In addition, both procedures fall under the responsibility of the Governing Body, the ILO's tripartite executive, which automatically makes them political in nature.[25] In practical terms, the representation and the complaint represent two different levels in a same scale measuring the pressure exerted by the organisation against a state failing to comply with the obligations derived from the ratification of an international labour convention.[26] The representation is the least powerful tool against non-complying states and, for this reason, it does not represent a suitable mechanism for cases of gross and systematic human rights violations. However, it represents one of the most flexible and simplified examples of international human rights complaint procedures.

The representation procedure is regulated under Article 24 of the ILO Constitution, which provides the following outline of its functioning:

---

[20] Samson, 'The changing pattern of ILO supervision' *supra* note 6, at 585.

[21] ILO Constitution, *supra* note 13, Arts. 24-25 (representation procedure); 26-29 and 31-34 (complaints procedure).

[22] *See* Wolf, 'Human Rights and the ILO' *supra* note 6, at 276f. On the subject of freedom of association, the ILO encompasses two main complaint procedures. *See*, generally, Lee Swepston, 'Human Rights Law and Freedom of Association: Development through ILO supervision' 137 (4) *International Labour Review,* 169, 1998; *Handbook of Procedures*, *supra* nota 13, at paras. 79-82; ILO, *Digest of Decisions and Principles of the Freedom of Association Committee* (Geneva, ILO, 1996), Annex I, available in ILOLEX, *supra* note 13.

[23] *See infra* notes 117-153 and accompanying text.

[24] By virtue of the ILO Constitution, representations can be filled by 'industrial association of employers or of workers,' ILO Constitution, *supra* note 13, Art. 24, while the commission of inquiry procedure might be started either by the Governing Body or by a delegate to the International Labour Conference – belonging to either the states', employer's or workers' group, *id.* Art. 26(4).

[25] The Governing Body is composed by 56 chairs of which, by virtue of a criterion of 'corrected' tripartite representation, half of them belong to member states, and the other half is distributed evenly among employers' and workers' delegates. The Governing Body's main functions are the supervision of the general functioning of the organisation, the definition of the agenda of the International Labour Conference, and the approval of the general budget. The supervision of international labour standards is only a secondary aspect of the Governing Body's activity. *See* ILO Constitution, *supra* note 13, Art. 7.

[26] This pressure ranges from the publication of the proceedings in the case of the representation, *id.*, Art. 25, to the intervention of the International Labour Conference or even of the International Court of Justice in the case of the commission of inquiry procedure, *id*., Arts. 29-32 (intervention of the ICJ), 33 (intervention of the ILC).

> In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.[27]

The procedure developed under Article 24 was adopted by the Governing Body in 1980, and does not add any substantive restriction to the flexible terms of the above constitutional provision.[28] The examination of the representation is transmitted to an *ad hoc* committee of the Governing Body, integrated by one representative of each of the three functional groups represented in this forum.[29] After the Governing Body's adoption of a preliminary admissibility decision, this tripartite committee is responsible for 'drafting' the conclusions and recommendations in the specific case. According to the usual practice, these conclusions and recommendations are automatically adopted by the Governing Body,[30] which may also decide to publish the entire proceeding or defer it to the Committee of Experts for follow-up.[31]

As stated, the Article 24 procedure is characterized by a relatively high degree of flexibility. This is particularly evident in the procedure's admissibility criteria. In terms of standing, the only requirement is that the representation should be filled by a non-governmental member of any 'industrial association of employers or of workers'; however flexible this criterion may be worded, it becomes an obvious hindrance when the rights being claimed are those of an indigenous group.[32] In contrast to similar international procedures, a representation does not require the exhaustion of national remedies to be deemed admissible.[33] But the flexibility of the procedure also creates a

---

[27] *Id.*, Art. 24.

[28] *See* Standing Orders concerning the procedure for the examination of representations under Articles 24 and 25 of the Constitution of the International Labour Organisation, ILO *Official Bulletin*, Vol. LXIV, 1981, Series A, No. 1, at 93-95 [hereinafter, 'Procedure for the examination of representations']. *See* also *Handbook of Procedures*, *supra* note 13, at paras. 74-75.

[29] Procedure for the examination of representations, *supra* note 28, Art. 3(1). According to the existing procedure, '[n]o representative or national of the State against which the representation has been made and no person occupying an official position in the association of employers or workers which has made the representation may be a member of this committee.' *Id.*

[30] No records are kept of the Governing Body's meetings regarding the representation procedure, which, by virtue of the Standing Orders, have a private character. *Id.,* 7(3). If not already represented at this forum, the Governing Body may invite the government concerned to participate in such meetings, even though without a right to vote on the decisions concerning the representation. *Id.*, Art. 7(1), (2).

[31] The single follow-up mechanism foreseen in the ILO Constitution is the publication of the representation and the government's response – if any – in case this response is not 'received within a reasonable time' or 'not deemed satisfactory by the Governing Body.' ILO Constitution, *supra* note 13, Art. 25.

[32] *See infra* note 119.

[33] *Cfr., e.g.,* the admissibility requirements set forth in relation to individual complaints brought before the UN Human Rights Committee, Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976), Art. 5(2)(b). *See* also the requirement of exhaustion of domestic remedies in the Inter-American system of human rights. American Convention on Human Rights, Nov. 9, 1969, OAS Treaty Ser. No. 36, 114 U.N.T.S. 123 (entered into force July 18, 1979), Art. 46 (1)(a).

certain degree of ambiguity – and hence of legal uncertainty regarding its actual operation.[34]

Similar to the 'commission of inquiry' procedure of Article 26,[35] the representation procedure has historically been used infrequently, but this trend has reversed in recent years.[36] The stunning spread of Article 24 cases has leaded to a true restatement of the ILO's policy of supervision of standards. If twenty years ago the organisation had as a 'policy thrust' the 'further development of these means of action,'[37] now the situation has changed to the point that the Governing Body is considering ways to reduce the number of representations submitted by 'tightening the receivability criteria.' As it will be seen, the adoption of Conv 169 has contributed to the popularisation of the Article 24 procedure, even among those who were not originally intended to be safeguarded by that mechanism.

2. The Working of the System

The ILO' reporting and complaint procedures described above share a number of common features that relate to the structure, ideological apparatus and political dynamics of the organisation as a whole. First of all, like most of the ILO's ruling bodies, the system of normative control has a predominantly *tripartite* character, within the framework of the institutional culture of collective dialogue and bargaining.[38] While it is the states' behaviour that is the subject of scrutiny by employers' and workers' organisations. Other member states can also legitimately play an active role in the organisation's supervision procedures at all stages. The single exception for this rule is the Committee of Experts, whose members do not represent any specific functional group, but rather are selected on account of their 'first-hand experience of different

[34] Duhaime, 'Assessment of the Options for Indigenous Peoples to Monitor Application of ILO Convention No. 169' *supra* note 3, at 4. *See infra* note 137 and accompanying text.

[35] The commission of inquiry procedure has been so been so far applied in few instances. Between 1919 and 1960, only one single complaint was filed against a state member, and, up to date, only six complaints have been deemed admissible by the Governing Body. Article 33 of the ILO Constitution, *supra* note 13 (Conference's request to state members to take measures against the violating state) has only been invoked once, in relation to allegations of forced labour in Myanmar. *See* Kimberlly Ann Elliott, 'The ILO and Enforcement of Core Labor Standards' *International Economics Policy Brief* 00-6 (2001), at. 8f.

[36] If, by 1979, only 14 representations had been declared admissible by the Governing Body, the pace of presentation of representations grew exponentially during the decade of the 1980s and reached an average of 10 cases per year. *See* Swepston & Tardu, 'Part one: Complaints procedures of the International Labour Organisation' *supra* nota 6, at 6; Swepston, 'Supervision of ILO Standards' 1997, *supra* note 6, at 327. This pace has remained steady throughout the 1990s.

[37] Samson, 'The changing pattern of ILO supervision' *supra* note 6, at 579.

[38] On the role of tripartism in the working of the ILO reporting procedures, *see* generally *Handbook of Procedures, supra* note 13, at paras. 59-62; ILO, 'Note on the Role of Employers' and Workers' Organizations in the Implementation of ILO Conventions and Recommendations' ILO Paper D.40.1987, 1987. The participation of the ILO's non-state members in the different supervision procedures has also given rise to a set of specific international labour standards. *See* ILO Convention (No. 144) concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, adopted in June 21, 1976, 61st Session of the Conference (entered into forced on May 16, 1978), and ILO Recommendation (No. 152) concerning Tripartite Consultations to Promote the Implementation of International Labour Standards and National Action relating to the Activities of the International Labour Organisation, adopted in June 21, 1976, 61st Session of the Conference (providing for tripartite consultations at the domestic leveling relation to standard-setting and implementation of these standards).

legal, economic and social systems.'[39] The ILO Constitution grants employers' and workers' organisations the privilege of participation in the reporting procedure.[40] Furthermore, The International Labour Conference's role in the supervision activity is *naturally* tripartite, and employers' and workers' delegates play a prominent role in the discussions of the Conference Committee on Application of Standards.[41] In addition, as mentioned earlier, the organisation's non-governmental members have the standing required to undergo the relevant complaint procedures.[42] The participation of the workers' and employers' groups in the system does not place them on an equal footing with states; however, it defines a system of 'checks and balances' in which the states' ability to merely pretend they are complying with their international legal obligations is effectively constrained by the scrutiny of those groups. In turn, the tripartite character of the procedures of norm control is meant – at least in theory – put the emphasis on the dialogue among social actors at the domestic level to ensure compliance.

A second characteristic of the system of control falls into the realm of discourse, but produces important substantive effects. According to the functionalist philosophy of the organization,[43] the ILO's system of normative control is not a jurisdictional system. The function of the control system is thus not to 'present accusations against governments or condemn them,' but rather to assist them in the fulfilment of the obligations derived from the ratification of binding conventions.[44] For the ILO, an organisation rooted in an institutional culture conceptually and in time prior to the modern international human rights regime, the contours and implementation of international labour standards are inextricably linked to the idea of diverging 'levels of development.' Connected with this is the historical relationship between the organisations' operative action ('technical co-operation'), on the one hand, and standard-setting and supervision activities on the other. This is a salient characteristic of the ILO's system of supervision that allegedly distinguishes it from other international procedures.[45]

---

[39] *Handbook of Procedures*, *supra* note 13, at para. 53.

[40] By virtue of the ILO Constitution, the most representative employers' and workers' organisations should receive copies of the information received under the different reporting procedures. ILO Constitution, *supra* note 13, Art. 23(1). In addition, the ILO Handbook of Procedures expressly empowers these organisations to submit their comments to these reports. *Handbook of Procedures*, *supra* note 13, at para. 61. According to the Handbook, the 'Committee of Experts and the Conference Committee have stressed the value of such comments as a means of assisting them, in particular, in assessing the effective application of ratified Conventions.' *Id.*

[41] *See supra* note 18 and accompanying text.

[42] *See supra* note 24.

[43] On the ILO as an example of functionalism in the international organisation, *see* Haas, *Beyond the Nation-State*, *supra* note 14, at 133-136 (discussing the ILO as a case of 'functional logic of integration').

[44] *See Possible improvements in ILO standards-related activities*, *supra* note 7, at para. 34.

[45] *See* Jean-Michel Bonvin, *L'Organisation international du travail: Étude sur une agence productrice de normes* (Paris, Presses Universitaires de France, 1998), at 263; Elliot, 'The ILO and Enforcement of Core Labor Standards' *supra* note 35, at 9. In the terms of a recent ILO report:

> The key to increasing the effectiveness of supervision, and responding to the constituents' wish to improve the application of Conventions, is to improve the assistance given to them to overcome problems … [T]he Committee of Experts regularly encourages governments to have recourse to the Office's assistance to resolve problems, and many of them do so, in a formal or informal way. In principle, the Office responds to all such requests for assistance, *and this close link between supervision and assistance is*

A third non-written characteristic of the ILO's system of supervision is the important role of the International Labour Office. The ILO Constitution generally attributes to the Secretariat the 'duties required of it [by the Constitution] in connection with the effective observance of Conventions.'[46] However, there are reasons to think that the Office's actual role in the normative supervision goes far beyond this minor reference. To understand this, it is necessary to evaluate the ILO's institutional design.

The enhanced responsibility of the Secretariat in the system of control is related to the organisation's general system of decision-making, famously depicted by Robert W. Cox as a 'limited monarchy.' Writing in 1974, Cox contended that both the East-West axis of the Cold War confrontation, and the North-South axis, derived from the process of decolonisation, had given form to a distinct political system within the organisation, which, while forcing the Governing Body to consider political issues beyond the organisation's institutional objectives, it amplified the Secretariat's range of decisions. As a result, the Director General and some sectors of the bureaucracy became brokers in the organisational decision-making process, while the Governing Body, the original controller of the Office's activities, focused mostly on representation.[47] Even though the political environment has dramatically changed since then there is still some pressure on the ILO's main principles – such as tripartism or the idea of social protection – at the same time as states gradually disengage themselves from active participation in the decision making processes of the organisation.[48] Meantime, the Secretariat's accumulated power of intervention simply accommodates to the commonplace Weberian prophesy: all large-scale organisations become increasingly bureaucratic.

Under the 'limited monarchy' model, the Secretariat holds an extensive power of initiative regarding the organisation's normative agenda, including both standard-setting and implementation activities. The Office has an active voice in the Committee of Experts' permanent monitoring activities, where it more and more seems to turn its task of 'qualified secretariat'[49] into a role of an 'expert over the experts.'[50] The Office's

---

one thing that distinguishes the ILO from other international supervisory systems.

Possible improvements in ILO standards-related activities, supra note 7*,* at 42 (emphasis added).

[46] *See* ILO Constitution, *supra* note 13, Art. 10.2(c). Accordingly, the Constitution prescribes that the governments should 'report to,' *id*., Art. 20; that representations are to be 'made to,' *id.,* Art. 24; and that member states may fill a complaint 'with' the International Labour Office, *id.,* Art. 26(1).

[47] *See* Robert W. Cox, 'ILO: Limited Monarchy' in Robert W. Cox & Harold K. Jacobson, *The Anatomy of Influence: Decision making in International Organisation* (New Haven & London, Yale University Press, 1974).

[48] On the effect of globalisation on social standards *see*, generally, ILO, *Social Justice in the Global Economy*, Geneva, ILO Social Policy Lectures, 2000. On the institutional response to this changing environment, *see* ILO, *ILO Activities on the Social Dimensions of Globalization: Synthesis Report, 2002; Sixteen Item on the Agenda: Report of the Working Party on the Social Dimensions of Globalization*, ILO Doc. GB. 285/16, 285th Session (Geneva, November 2002).

[49] *See Handbook of Procedures*, *supra* note 13, at 54 (j) ('[t]he qualified secretariat which is necessary to the work of the Committee [of Experts] is placed at the disposal by the Director General of the ILO').

[50] The Committee is an amorphous gathering of experts that fall short of having a unified voice. It meets only once a year, in a particularly intensive way. It is composed by a very heterogeneous group of individual experts with very different backgrounds, not always familiar with the work of the organisation, and not always sharing the same level of commitment in the performance of their task. As a result, the Committee lacks any meaningful initiative as a collective. To an important extent, the actual working of the

intervention is allegedly even more substantial in the proceedings before the Governing Body 'a political, not an expert body,' particularly in the case of the representations.[51] The scope of the Secretariat's intervention in the different procedures of supervision varies according to a number of variables, such the place of the specific standards in the internal hierarchy of the international labour code or the political saliency of the issues under consideration. Whatever the level of this intervention, the Office's role in the ILO's system of supervision – due to limited accountability in relation to the organisation's decision-making bodies – is a very powerful factor in the working of the system, as the case of Conv 169 clearly demonstrates.

3. The Effectiveness of the System

The evaluation of the organisation's control mechanisms has traditionally been left aside by academic criticism, also due to the organisation's loss of relative weight throughout the years.[52] According to the organisation's own assessment, the system is 'one of the most evolutioned systems of norm control within the multilateral system,'[53] and even 'the most effective within the UN system';[54] furthermore, 'it is likely to be seen as essential, far into the future'.[55] In the absence of further research on the issue, there is no sufficient data as to endorse these assertions or to conclude the opposite.

However, there are distinguishable signs of decay in the organisation's system of normative control. The ILO's supervisory machinery is a highly bureaucratised system, whose excessive working charge, directly connected to the historical overproduction of standards, is gradually leading to its collapse.[56] In this context, the organisation's current discourse is plagued by references to the 'bottle-necks' of the system of supervision and different proposals for an integral reform of its mechanisms are floating around.[57]

---

system is the result of the dialogue of the individual expert, in charge of a group of Conventions or subjects, with the ILO official in charge, who presents a draft of preliminary findings. *See Handbook of Procedures*, *supra* note 13, at 54 (e).

[51] According to a non-written, but already established practice, the ILO officials draft the conclusions and recommendations to be presented before the Governing Body under the special procedures. Swepston, 'Supervision of ILO Standards' *supra* note 6, at 339. With respect to the representation procedure, the Governing Body will typically adopt the views of the tripartite committee responsible for examining specific representations without further discussion. The extent to which the tripartite committee will elaborate on the Office's proposal will allegedly vary according to the level of expertise and information of the committee's specific members.

[52] The ILO's most ambitious attempt to date to evaluate their effectiveness of its system of supervision dates back to the late 1960s. *See* E.A. Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience* (London: Stevens & Sons; Dobbs Ferry, N.Y.: Oceana Publications, 1966). For a more recent and less ambitious assessments, *see Possible improvements in ILO standards-related activities*, *supra* note 7; *Fifth Item on the Agenda: Examination of standards-related reporting arrangements*, ILO Doc GB. 282/LILS/5, 282nd Session (Geneva, November 2001).

[53] *Possible improvements in ILO standards-related activities*, *supra* note 7, at para. 3.

[54] Leary, *La utilización del Convenio No. 169 de la OIT para proteger los derechos de los pueblos indígenas, supra* note 2*,* at 37 (translation from Spanish is my own).

[55] Swepston, 'Supervision of ILO Standards' *supra* note 6, at 344.

[56] By way of illustration, only for the year 2000, the total figure of state periodic reports expected to arrive to Geneva amounted to 2.550, of which only a 29% were received before the due deadline. *See Possible improvements in ILO standards-related activities*, *supra* note 7, at para. 13.

[57] *Id*., at para. 21.

Moreover, the suspicion that the states' periodic reporting has become a mere formal procedure, with little or no effect on their actual behaviour, is now voiced out loud.[58]

Ultimately, the effectiveness of the control system is also a matter of organisational policy. In a time of severe budgetary constraint, the policy of normative control entails a hierarchisation of objectives and actions; a distribution of the scarce human and material resources; the articulation of political relationships with state members and non-governmental constituency; and a conceptual construction concerning the content of rights and their violations. The gradual stratification of the international labour code – best exemplified in the recent adoption of the Declaration on Fundamental Rights and Principles at Work – results in a greater impact of the function of control on those areas and those mechanisms considered as a priority within the organisation.[59] As it will be discussed in the following pages, the place of Conv 169 in an organisation such as the ILO has a number of substantive effects in the international supervision of its implementation by the relevant bodies.

II. Convention No. 169 and the ILO-System of Supervision: A Historical Anomaly

The insertion of the rights of indigenous peoples within an organisation with a structure and objectives such as those of the ILO – the result of an intricate history that goes back to the organisation's foundational times – is problematic. The adoption of the ILO Conv 107,[60] the first international convention regarding indigenous peoples as distinct groups – which ironically aimed at suppressing all distinct traits that distinguished them from the 'national society'[61] – was chiefly a symbolic gesture adopted under the influence of the ongoing Andean Indian Programme and its pledge for 'development.'[62] It did not represent a conscious act to recognise legally binding

[58] *Id*., at para. 18.

[59] *See supra* note 13.

[60] Convention (No. 107) Concerning the Protection and Integration of Indigenous, Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 40th Session, .328 U.N.T.S. 247 (entered into force June 2, 1959) [hereinafter, 'Conv 107']. The Convention was coupled with a recommendation – non-legally binding – , which incorporated a number of provisions in which there was no consensus at the moment of drafting the Convention. *See* Recommendation (No. 104) Concerning the Protection and Integration of Indigenous, Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 40th Session.

[61] The Convention explicitly aimed at 'developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.' Conv 107, Art. 2(1).

[62] The Andean Indian Plan was a vast, multi-national and multi-agency development programme launched under the ILO's leadership in the framework of the UN Expanded Programme of Technical Assistance. The Programme, aiming at the 'integration' and 'development' of the poor Indian peasant communities of the Andean region, was the threshold for the adoption of Conv 107, thus marking the entry of indigenous peoples in contemporary international law. For a discussion on the

Andean Indian Plan and its impact on the ILO's standards on indigenous peoples from the perspective of one of the main responsible in its launching, *see* Jeff Rens, 'The Development of the Andean Programme and Its Future' 88 (6) *International Labour Review* 547, 1963; *Le Programme andin: Contribution de l'OIT à un project-pilote de coopération technique multilatérale* (Brussels, Bruylant, 1987).

standards that would coerce the states' behaviour in relation to indigenous peoples, and surely did not reflect any existing concern on the part of the ILO's constituency, beyond typical assertions of abstract principles of equality and social justice. The subsequent drafting of Conv 169, a revised version of the earlier convention, did not respond to any specific concern regarding the rights of indigenous peoples on the part of the members of the organisation, but was rather a reaction of the organisation's bureaucracy to the emerging UN's standard-setting initiatives in the early 1980s.[63] As a result, according to Virginia Leary, '[t]he ILO's adoption of conventions on indigenous peoples [Conv 107 and Conv 169], conventions which are not limited to labour issues, might be interpreted as an *anomaly*.'[64] This historically anomalous character results in a number of consequences for the ongoing supervision of Conv 169.

The first consequence is self-evident. Despite the actual importance of Conv 169 in shaping the contours of the emerging indigenous peoples regime in contemporary international human rights law, the Convention falls short of being on top of the organisation's agenda. Indigenous peoples' rights – distinctly articulated around principles of cultural integrity, self-government and land and resource rights[65], – do not fall within the organisation's core issues. Irrespective of the ILO's self-legitimising discourse, concrete actions, such as the onset of the Andean Indian Plan in 1953 or the drafting of Conv 107 in 1957 did very little to leave an imprint in the organisation's institutional memory. Subsequently, the adoption of Convention 169 has not helped to transform the organisation's interests, ideology and internal structure; nor has it – with some limited exceptions – contributed to increasing the expertise of the organisation's bureaucracy and supervisory bodies on indigenous affairs. Within the framework of an extensive normative corpus such as the International Labour Code – consisting of more than 150 conventions currently in force[66] – and at a time of increased hierarchisation of international labour standards, the provisions enshrined in Conv 169 are simply not considered of 'fundamental' importance by the ILO.[67] The Convention's place in the Code ultimately defines where it is ranked within the priorities of the organisation's policy of norm control and regarding the distribution of the scarce resources for supervision.

Another consequence of the anomalous insertion of the Indigenous and Tribal Peoples Convention within the ILO's institutional design is the lack of involvement

---

[63] *See supra* note 4.

[64] Leary, *La utilización del Convenio No. 169 de la OIT para proteger los derechos de los pueblos indígenas*, *supra* note 2, at 17 (emphasis on the original).

[65] *See* Anaya, 'Indigenous Rights Norms in Contemporary International Law' *supra* note 2; at 15-38; *Indigenous Peoples in International Law, supra* note 2, at 97-109 (classing the existing and emerging international norms concerning indigenous peoples under the categories of nondiscrimination, cultural integrity, land and resources, and social welfare and development, and self-government).

[66] At the time of writing, the International Labour Code is integrated by 157 conventions that have not been shelved or otherwise repealed by the organisation, and are thus fully in force and generate the reporting obligations on the part of ratifying states. The complete list and texts of conventions adopted by the ILO (both shelved and in force) is available in ILOLEX, *supra* note 13.

[67] On the notion of 'fundamental convention' *see* ILO Declaration on the Principles and Rights at Work, *supra* note 13. Conv 169 is officially classified under the heading of 'special provisions for special categories of workers' – on the same footing as children, youth, women, disabled or migrant workers – , but not as a human right text. *See* ILOLEX, *supra* note 13, 'Subject list.'

of the direct beneficiaries of the instrument in the organisation's decision-making processes, including those pertaining to the supervision of that instrument. As seen above, the participation of employers and workers is quintessential to the drafting and supervision of international labour standards because of their stake in the implementation of those standards. In contrast, indigenous peoples do not have a formal say in the process of examination of periodic state reports on the implementation of Conv 169, and they do not have formal standing to bring complaints before the ILO's competent bodies. Deviating from the trend towards an enhanced level of indigenous participation in international bodies and fora in relation to the issues that affect them[68], the ILO provides no mechanism for indigenous participation in the supervisory machinery and other related aspects of the organisation. No formal channels of communication exist with the existing international bodies where indigenous peoples are currently represented. Ironically, Conv 169's call for states to develop 'with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples' does not seem to apply to the ILO itself.[69]

The question is not only important from a political and exemplary perspective. The lack of participation of the peoples concerned in the ILO's control mechanisms has an impact on to the checks and balances on which these mechanisms are based. Neither employers' nor workers' delegates generally possess specific knowledge or have an interest in indigenous issues.[70] At this stage, it has become crystal-clear that the indigenous and the labour agenda no longer concur – if they ever did – , and that employers' organisations typically support states in their claims to take control over indigenous lands and natural resources. The main effect of the lack of interest or simply the lack of technical expertise on the part of employers' and workers' organisations in issues related to Conv 169 is the excessive representation afforded to state members, which are not limited by the system of checks of balances operating in other areas of the organisation's activity.[71] Ironically, the only proposal made by the organisation in order

---

[68] *See* Anaya, *Indigenous Peoples in International Law*, *supra* note 2, at 111-112.

[69] Conv 169, *supra* note 1, Art. 2(1).

[70] As expressed by a delegate to the 2000 session of the International Labour Conference in relation to the application of Conv 169 in Mexico:

> [N]either one of the larger employers' and workers' organizations in Mexico seemed to have taken any interest in this case as their views had not been made known to the Committee of Experts so far**.**

Intervention of the workers' delegate at the Conference Commission on Application Standards, in ICCIT: *Individual Observation on the Indigenous and Tribal Convention, 1989 (No. 169), Mexico* (2000), available in ILOLEX, *supra* note 13.

[71] By way of example, Gordon Bennett supplied the following description of the working of the Conference Committee on Application of Standards in relation to the supervision of Conv 107:

> [T]he Conference is usually an anticlimax. The Conference is a large, public assembly, and often the discussion is both perfunctory and politically conceived. The Conference Committee is also a public and political body … and its importance resides at least in part in the opportunity it provides employers' and worker's delegates to ventilate grievances against Member States … But the Committee has only two weeks in which to digest a

to put a remedy to this situation is that indigenous peoples should group into employers or workers associations.[72]

The lack of participation by indigenous peoples and organisations in the ILO's institutional framework co-exists with their relative lack of connection in informal, unofficial terms. After more than two decades of intense activism in international institutions and fora, the global indigenous movement has acquired an important level of familiarity with the key rules, procedures and actors in the UN human rights system, in which they have successfully operated and established themselves in order to place their distinct concerns and problems on the agenda of the international community.[73] In sheer contrast, indigenous peoples and support organisations are far less acquainted with the ILO's written and non-written practices, and, most importantly, lack stable channels of communication and political liaison with the relevant actors within the organisation's constituency and bureaucracy. To be sure, the relative isolation of the ILO with respect to non-governmental actors differs from its own constituency and is indeed one of its distinguishable traits of the organisation, not only in this way, but practically in all its realms of activity.[74] Moreover, the traumatic experience of the process that led to the adoption of Conv 169 has surely not operated as a stimulus for the indigenous movement to build bridges towards the organisation.[75] This has obvious consequences for the working of the ILO's system of supervision in relation to the Indigenous and Tribal Peoples Convention. While the experience in the implementation of the earlier convention shows that the ILO's constituency might be successfully approached by non-

---

> heavy case load, and to a large extent it must rely on the report of the Committee of Experts as the basis of discussion ... The tripartite structure of the General Conference and of the Conference Committee prevents either from becoming an ideal forum for the protection of indigenous rights. Employers and workers are there to argue or co-operate with each other about conditions of work; the plight of aboriginal communities is something outside their common experience, and unlikely material for a tripartite debate.

Gordon Bennett, *Aboriginal Rights in International Law* (London, Royal Anthropological Institute of Great Britain and Ireland, 1978), at 45.

[72] *See* Duhaime, 'Assessment of the Options for Indigenous Peoples to Monitor Application of ILO Convention No. 169' *supra* note 3, at 3.

[73] On the role of the international indigenous movement in the emergence of the contemporary international legal regime on indigenous peoples, *see* Anaya, *Indigenous Peoples in International Law*, *supra* note 2, at 45-47.

[74] *See* Haas, *Beyond the Nation-State*, *supra* note 20, at 206-208 (discussing the Office's 'reserve' attitude towards non-governmental organisations).

[75] The process of revision of Conv 107, leading to the adoption of Conv 169, was widely criticised by influential sectors of the indigenous movement, both in procedural terms (the process of revision allowed an enhanced, but only limited participation to indigenous representatives) and in terms of substance (the revised convention was perceived as falling short of accommodating indigenous movements' demands, starting with the affirmation of the right to self determination). *See*, Berman, *supra* note 2, 'The ILO and Indigenous Peoples: Revision of Convention No. 107' (criticising the Office's initiative in the revision process as disregarding the ongoing UN standard-setting process on indigenous issues); Venne, 'The New Language of Assimilation' *supra* note 2 (denouncing that the revision of the elder convention has not deprived it from its ultimate assimilationist aims, while obstructing the indigenous peoples' path to self-determination). The disregard towards the Convention has been consistent on the part of indigenous groups of North America and Australasia – a leading force in the international indigenous movement – which have discouraged the ratification of the instrument by its own countries based on the allegation that it would diminish the level of protection already attained therein.

governmental organisations in order to foster an increased monitoring of states' practice in specific cases,[76] the absence of close working relationships between the indigenous movement, support organisations and the ILO in relation to the supervision of Conv 169 contributes to the lack of expertise, informed knowledge and specific concern on the part of the ILO's supervisory bodies.

Thirdly, the actual lack of specific expertise on indigenous issues does not only apply to the organisation's constituency, but also in the ILO's main supervisory body, the Committee of Experts. Committee members do not typically possess specific knowledge on the complex set of issues arising from the application of the Convention, and their expertise on labour and social issues do not necessarily involve an expertise in the rudiments of the international human rights system.[77] Writing in the early 1970s in relation to the earlier convention, Conv 107, Gordon Bennett noted that

> The Committee of Experts lacks *anthropological* expertise; the emphasis it has traditionally placed on the assessment of degrees of legislative (rather than factual) compliance with Conventions does not meet the needs of the 107 Convention; and in any event aboriginal rights fall wholly outside the normal purview of the ILO.[78]

The international legal approach to indigenous peoples has shifted dramatically since Bennett wrote these lines, in that protection of indigenous peoples is no longer considered an anthropological question, but rather a human rights question.[79] However, his conclusion seems to be still fully valid, and the adoption of Conv 169 has brought about little change in this status quo.

The interplay of the relative lack of importance of Conv 169 within the ILO's institutional framework, the breach of tripartism in the supervision of the instrument, and the actual lack of technical expertise on the part of the organisation's relevant supervisory bodies has as an effect on the reinforcement of the 'limited monarchy' system described above. The anomalous placing of the Convention under the ILO's patronage grants the Secretariat with an important – in fact, essential – role in designing the contours of the implementation policy with regard to Conv 169. The Office's 'qualified secretariat' may

---

[76] *See infra* notes 87-93 and accompanying text.

[77] In its present composition, the ILO's Committee of Experts does not include members with a specific expertise in issues pertaining to the rights of indigenous peoples, beyond the existing general knowledge in their countries of origin – which does not necessarily ensures an objective perception of indigenous issues. In particular, the professional curriculum of the individual expert currently responsible for examining the application of Conv 169, Mrs. Blanca Esponda does not indicate any substantive experience in this specific area before her nomination to this position. A prestigious Mexican expert in non-discrimination, Mrs. Esponda has combined her academic carrier as Professor of International Law with her political carrier, becoming President of the Mexican Senate in 1989. For the names and biographies of the current members of the Committee of Experts, *see General Report of the Committee of Experts on the Application of Conventions and Recommendations*, *2002,* available in ILOLEX, *supra* note 13, at 2.

[78] Bennett, *Aboriginal Rights in International Law*, *supra* note 71, at 46 (emphasis added).

[79] For a discussion of the transition from a indigenist policy approach to a human rights approach in the historical development of the contemporary regime on indigenous peoples' rights, *see* Bartolomé Clavero, *Derechos indígenas y cultura constitucional en América Latina* (Mexico City, Siglo XXI Editores, 1994), at 65-67.

fill the gaps of the Committee of Experts' expertise and focus on indigenous affairs. This role may be more important in relation to the tripartite committees responsible for examining the representations alleging violations of Conv 169 under Article 24 of the ILO Constitution. The members of these committees, selected among the Governing Body delegates, may generally lack the information, skills and concern to make substantive decisions on specific cases arising from the application of the Convention, thus turning the Secretariat's suggestions into actual decisions. The important role of the ILO's Secretariat in the process of international implementation of Conv 169 is not necessarily something negative in terms of the protection of the rights affirmed in the instrument. Actually many of the ongoing initiatives related to the implementation of the Convention are marked by the typical drive of the organisation's bureaucracy.[80] However, the Office's intervention is far from being neutral. It involves substantive legal judgements, institutional dynamics, policy strategies; and general political considerations stemming from the relationship between state members and the organisation at large; elements that may not necessarily be consistent in all cases with the ultimate objective of maximising the effectiveness of the supervision.

In conclusion, the elements described above define the framework in which the competent ILO's supervisory bodies operate in relation to Conv 169. The anomalous position of an instrument such as Conv 169 in an organisation such as the ILO places it in contradiction with some of the basic elements of the ILO's system of supervision. The specific challenges faced by the system may challenge its effectiveness in relation to the Convention. The remaining sections of this Article analyse the specific challenges involved in the supervision of the Convention under the organisation's reporting and the complaint procedures.

III. Convention 169 and the ILO Reporting System

The first government reports on the application of the Conv 169 were due in 1992, one year after the Convention's entry into force with the registration of the first two ratifications by Norway and Mexico. Since then, the Committee of Experts has regularly reviewed the reports submitted by the state parties to the Convention, and has published a considerable amount of jurisprudence concerning the application of the Convention in those countries in the form of 'individual observations,' published in its annual reports.[81] Under the general 'technical,' 'gradual' approach of the ILO's procedures of supervision, the Committee's observations do not normally break new ground in terms of fostering innovative interpretations of the Convention, but they constitute important evidence of the organisation's interpretation of the instrument.

A full understanding of the Committee of Experts' practice in relation to Conv 169 may be gained in light of the previous experience of the supervision of its predecessor,

---

[80] Encouraging initiatives of the ILO's Secretariat under the scope of application of Conv 169 include the Project to Promote ILO Policy on Indigenous and Tribal Peoples, funded by DANIDA, aiming at promote the ratification of Conv 169 and to increase awareness of its standards, particularly in Asia and Africa. *See* Rasmussen & Roy, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), supra* note 2, at 83-85

[81] *See supra* note 17 and accompanying text.

Conv 107. After all, the adoption of the Indigenous and Tribal Peoples Convention in 1989 was preceded by over two decades of periodic supervision of Conv 107 by the Committee of Experts, a supervision that still continues, after the adoption of the new instrument.[82] Many of the issues involved in the supervision of the latter can be discerned from this current experience.

The adoption of Conv 107 was perceived as an incongruity by the ILO's constituency, which was particularly weary of the possible problems derived from the implementation of a convention with such characteristics. Indeed, the nature of the instrument, couched in terms of recommendations of indigenist policy and not creating precise legal obligations on the part of ratifying states, constituted the first example of a new species of international labour standards: the so-called 'promotional' conventions, a *rara avis* half way between a legally binding convention and recommendations, setting forth objectives of governmental policy.[83] The first ten years of the Committee of Experts' supervision of Conv 107 were characterised by this 'promotional' reading of the instrument. The Committee tended to focus accordingly on administrative, economic and material aspects of the implementation, while often disregarding more strictly legal or political issues. The 'integral', all-encompassing character of the Convention contributed to the dispersion of the supervisory work into a myriad of different programmes and policies. This was not effectively countered by the ILO's supervisory machinery usually building on normative control and a hierarchy of its goals. As noted by Bennett, this more policy based approach constituted one of the major barriers to the effectiveness of the international supervision of the Convention. 'Inevitably,' writes Bennett, 'the policing of promotional Conventions is at best a desultory affair, and in

[82] Conv 107 continues to be in force for those states that ratified the instrument and have not denounced it expressly or by ratifying the new convention, Conv 169. *See* Conv 107, *supra* note 62, Art. 36(1)(a) (stating that 'the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention'). As for this writing, the list of state members to Convention No. 107 is as follows: Angola (1976); Bangladesh (1972); Belgium (1958); Cuba (1958); Dominican Republic (1958); El Salvador (1958); Ghana (1958); Guinea-Bissau (1977): Haiti (1958); India (1989); Iraq (1986); Malawi (1965); Pakistan (1960); Panama (1971); Portugal (1960); Tunisia (1962). The application of Conv 107 is still examined by the ILO's supervisory bodies, but taking into account the new standards promoted by Conv 169. *See* Anaya, *Indigenous Peoples in International Law*, *supra* note 2, at 155-156.

[83] The Committee of Experts once defined 'promotional conventions' in the following terms:

> [Some] Conventions by their very nature contain essentially provisions intended to guide the policy and action of governments in a given field. These are above all the so-called 'promotional' Conventions, the main purpose of which is to encourage implementation of a programme of action with a view to realising the objectives they proclaim.

ILO, *International Labour Conference, 64th Session: Report of the Committee of Experts on the Application of Conventions and Recommendations*. *Report II (Part II). Individual Observations,* Geneva, ILO, 1978, at 16.

Promotional conventions were object of a detailed examination on the Committee of Experts' general observation in 1974. The Experts listed under this category the 'instruments on equal remuneration, employment policy, equal opportunity and treatment in employment and the protection of indigenous populations.' ILO, *International Labour Conference, 59th Session: Report of the Committee of Experts on the Application of Conventions and Recommendations*. *Report II (Part II). Individual Observations,* Geneva, ILO, 1974, at 521.

practice little or no effort is made to supervise instruments which fall into this category.'[84] The language used by the experts in relation to Conv 107 was typically vague, while the principles of flexibility and gradual supervision were simply confused with the routine, formalistic exchange of information on policies and empirical realities that the organisation knew little of – and only moderately cared – about. According to Bennett's account, 'the vague particulars requested [were] unlikely to embarrass governments in default of their obligations?'[85]

A second phase regarding the supervision of Conv 107 started in the mid 1970s as a result of internal changes within the organisation's bureaucracy and, most importantly, as a reflection of an emerging international concern about the threats to indigenous peoples' cultural and physical survival all over the world. The second period of the Convention was characterised by an enhanced surveillance of member states on the basis of the provisions focusing on the 'protection' of indigenous peoples, while tending to disregard its 'integrationist aspects. This period was also characterised by an intense deployment of existing mechanisms of supervision – particularly in cases of gross violations of the human rights of indigenous peoples – under the unchallenged leadership of the organisation's bureaucracy. Throughout this period, the ILO resorted widely to the recently launched mechanism of 'direct contacts',[86] which contributed to closer working relationships with states that were party to the Convention and brought about visible outcomes in some cases.[87] Effectively co-ordinated by Geneva, the ILO's regional offices in the field intensified the exchange of information with the organisation's supervisory bodies, while having actively created important political linkages with the governmental actors concerned on issues related to the application of the Convention. The Regional Office for the Americas in Lima (Peru) constituted an important centre of operations in this regard, and played a key role in the processes of legislative and institutional reform in a number of countries.

---

[84] Bennett, *Aboriginal Rights in International Law*, *supra* note 71, at 47.

[85] *Id.*, at 44.

[86] According to the ILO Handbook of Procedures, the direct contact procedure 'enables the examination by a representative of the Director-General of the ILO with representatives of the country concerned of problems affecting the ratification or implementation of Conventions or the discharge of obligations relating to Conventions and Recommendations.' *See Handbook of Procedures, supra* note 13, at para. 86. The current procedure includes a number of procedural requirements It has been developed in the practice of the ILO's supervisory bodies. *Id.*

[87] The first direct contacts on issues directly related to Conv 107 took place in Colombia, Ecuador and Paraguay in 1976. *See* Luis H. Segovia, 'Informe de la Misión al Paraguay (15-17 Septiembre 1976)' ILO Archives ACD 8/2/47/107; Juan Malo, 'Informe de Misión No. 5/80' (1980), ILO Archives 8/2/14/107. Both direct contacts and technical advisory missions – whose differences tended to become gradually blurred – existed during the following decade. *See* Malo, *supra*; Héctor Bartolomei de la Cruz, 'Report of Mission (August 16-18, 1982)' ILO Archives ACD 8-2-2-107; ILO, *International Labour Conference, 67th Session: Report of the Committee of Experts on the Application of Conventions and Recommendations*. *Report II (Part II). Individual Observations,* Geneva, ILO, 1981, at 160. *See* also ILO, *International Labour Conference, 70th Session: Report of the Committee of Experts on the Application of Conventions and Recommendations*. *Report II (Part II). Individual Observations,* Geneva, ILO, 1984, at 275 (mission to Pakistan in 1984, which allegedly 'enabled the Committee to form a better understanding' on the situation of the tribal peoples); ILO, *International Labour Conference, 76th Session: Report of the Committee of Experts on the Application of Conventions and Recommendations*. *Report II (Part II). Individual Observations,* Geneva, ILO, 1989, at 363 (mission to Bangladesh, which allegedly 'enabled the Committee [of Experts] to have a far better understanding of the manner in which the Convention is currently applied').

In addition, as a result of increased international activism of NGOs, the labour movement started to show some degree of concern regarding indigenous issues, both at the international and domestic levels.[88] The relative involvement of union groups contributed to the gradual – though always restricted – saliency of the Convention within the organisation's work, gaining a significant place in the annual discussions of the Conference Committee on Application of Standards.[89] The intervention of the International Labour Conference in the supervision of the Conv 107 resulted in the reformulation of the parameters of its supervision, and contributed to one of the most active phases of the international defence of the rights of indigenous peoples. Year after year, the Committee analysed cases involving gross violations of the rights of indigenous and tribal peoples, such as the systematic repression perpetrated by the Bangladeshi army over the hill tribes in Chittagong Hill Tracks or the serious threat to the survival of the Yanomami people in the Brazilian Amazon as a result of the massive invasion by *garimpeiros* (gold miners).[90] In turn, the discussions regarding Conv 107 in the International Labour Conference had an important effect on the supervisory work of the Committee of Experts. The ILO's constituency itself started to pay some attention to the activities of the Committee and even called for an intensification of their efforts in some specific cases.[91] In this supportive atmosphere, the Committee intensified its supervisory work, reaching levels previously unknown in the Committee's normal, 'technical' approach to normative control.[92] As a result of these dramatic changes in the patterns of supervision the pressure exerted by the ILO's supervisory bodies became an integral part

[88] Domestic trade unions played an important role of denunciation in countries such as Colombia during the 1970s or Brazil during the 1980s. International workers' organisations such as the reputed International Confederation of Free Trade Unions (ICFTU), particularly active in the cases of Brazil and Bangladesh; the Latin American Central of Workers (CLAT); or the International Federation of Plantation, Agricultural and Allied Workers (IFPAAW, affiliate of the ICFTU), that intervened actively in the case of India; or organisations of domestic character, such as the historical British TUC (Trade Union Congress). The commentary submitted by the ICFTU in 1985 on the case of Brazil – based on information supplied by Survival International – was, according to an authorised observer, the first act of involvement of a workers' organisation in the supervision of the provisions of Conv 107 in many years. *See*, Internal Minute, Swepston to Dao (July, 7, 1985). ILO Archives ACD 8/2/9/107, Jacket 3.

[89] In 1975, almost twenty years after its adoption, the Convention was brought for the very first time to the discussion of the Conference Committee on Application of Conventions and Recommendations. According to a workers' delegate, '[t]he protection of the weaker sections of the population, notably aboriginal and tribal population, should be the subject of *close and rigorous attention*.' *See* ILO, *International Labour Conference, 60th Session: Record of Proceedings*, Geneva, ILO, 1975, at 708 (emphasis added).

[90] For the most recent observations of the Conference Committee on these cases, *see* ILCCR: *Examination of individual case concerning Convention No. 107, Indigenous and Tribal Populations, 1957. Brazil* (1999), available in ILOLEX, *supra* note 13; ILCCR: *Examination of individual case concerning Convention No. 107, Indigenous and Tribal Populations, 1957. Bangladesh* (1987), *id.*

[91] According to one delegate to the 1987 Conference, discussing the case of Brazil, 'the Committee [of Experts] must emphasise the seriousness of the problem.' *See* ILO, *International Labour Conference, 73th Session: Record of Proceedings*, Geneva, ILO, 1987, at 24/63.

[92] In some cases, the individual observations of the Committee of Experts on Conv 107 raised serious political concerns among state parties to the Convention. By way of illustration, the governments of India and Bangladesh, harassed by international public opinion, declared in 1986 that 'the Committee of Experts should not play the role of suspicious analyst, but should relay on the information provided.' *See* ILO, *International Labour Conference, 72th Session: Record of Proceedings*, Geneva, ILO, 1986, at 31/49.

of the international campaign for the defence of indigenous rights in a number of countries.

The first dealings of the Committee of Experts with Conv 169 were problematic because of the 'promotional' approach typical of the first phase of Conv 107, that stretched the 'technical' character of the reporting procedure in a way not likely to have an actual effect in constraining state behaviour. Indeed, the actual text of Conv 169, a 'partial revision' of the older Convention, shares a few of the elements of the latter, including an emphasis on the deployment of state policies and institutions specifically targeted at the 'development' of indigenous groups.[93] Possibly the best example of the Committee of Experts' ability to promote an outdated reading of a renewed text is the general observation published in 1994 in the wake of the armed insurrection in the Mexican state of Chiapas – a true landmark in the indigenous movement in the time of globalisation. While Chiapas prompted a massive mobilisation of the international public opinion, the Committee of Experts' perplexing reading of the situation was as follows:

> The Committee notes that the absence of basic protections for indigenous workers' rights and working conditions was one of the origins of the outbreak of violence among the indigenous peoples of Chiapas State beginning in early 1994. While […] noting the encouraging information in the most recent report, the Committee hopes that the Government will keep it informed of the […] practical steps taken to improve the situation. Of these, one of the most important is frequent and effective labour inspection. Noting that the Government has not ratified the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Committee encourages the Government to continue the efforts it has already made to improve the working situation; to provide detailed information on the number and results of inspection visits carried out among rural indigenous workers; and to have recourse if necessary to the technical assistance of the International Labour Office.[94]

The same suggestion was reiterated in subsequent observations during the following years.[95] In this context, Virginia Leary has sensibly pointed out that 'it is still

---

[93] *See e.g.* Conv 169, *supra* note 1, Art. 2(2)(c) (affirming that governments should develop 'co-ordinated and systematic action … to eliminate socio-economic gaps); Art. 7(2) (affirming the 'improvement of the conditions of life and work' as a 'matter of priority in plans for the overall economic development'); Art. 19 (provision of lands and resources to indigenous peoples under national agrarian reform programs); Art. 20 (recruitment); Arts. 21-23 (vocational training programmes); Arts. 24-25 (social security and health services); Art. 26-30 (education programmes).

[94] *See* CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Mexico* (1995), available in ILOLEX, *supra* note 13, at para. 5

[95] *See* CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Mexico* (1996), *id.*; CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Mexico* (1997), id. at paras. 6-7 (reiterating the call for the Mexican government to ratify Convention No. 129 and the offer of technical assistance in this regard).

difficult to determine the *practical effects* of this dialogue [between the ILO and the government] about the condition of indigenous peoples in Mexico.'[96]

The 'promotional' reading of Conv 169 in the initial steps of the supervision of the Convention was prompted by the political saliency that the Convention rapidly gained, which served since its inception as a true catalyst for the political mobilisation of indigenous peoples and dramatic institutional reforms[97]. The need to appease the states' concerns regarding the implication of the instrument they had ratified – a necessary precondition for the establishment of a minimum relationship of 'technical' co-operation – and, most importantly, the important list of states that were still pending to ratify the instrument[98] – may have acted as an effective constraint on the Committee of Expert's activity, under the pervasive influence of the ILO bureaucracy's own policy considerations.

However, since the late 1990s, the Committee of Experts gradually widened the approach and scope of its observations, relaxing the focus on social and labour issues and putting an emphasis on the truly central elements of the instrument, such as indigenous land rights;[99] the adverse impact of development projects on indigenous lifestyles and economies;[100] and indigenous participation, consultation and autonomy.[101] In the

---

[96] Leary, *La utilización del Convenio No. 169 de la OIT para proteger los derechos de los pueblos indígenas*, *supra* note 2, at 78, note 1 (discussing the impact of the ILO's reporting system in the case of Mexico) (translation from Spanish is my own).

[97] CEACR: *General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1999,* available in ILOLEX, *supra* note 13, at para. 101 (noting that the 'Convention has … had a great influence in many countries even before its ratification').

[98] Important latecomers in the process of ratification of the Conv 169 were, for instance, Brazil (2002), Ecuador (1998), and Venezuela (2002). Other countries with a relatively large indigenous population within their border are not – and do not currently show any specific interest to become – parties of the Convention, such as Australia, Belize, Canada, Chile, Finland, New Zealand, Nicaragua, Panama, the Russian Federation or the United States; not to speak of other African or Asian countries where the discussion on the definition of 'indigenous' still continues – including countries such as Bangladesh, India, Pakistan, still parties to the older Convention.

[99] *See e.g.* CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Colombia* (1994)*,* available in ILOLEX, *supra* note 13; CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Colombia* (1996), *id*.; CEACR, *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Costa Rica* (2001)*, id.,* at para. 2; CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Mexico* (1999)*, id.,* at para. 8; CEACR, *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Peru* (1994)*, id.*, at paras. 1-10.

[100] *See e.g.* CEACR: *Individual Observation: Costa Rica* (2001), *supra* note 99, at para. 3 (requesting information on proposed plans to construct a hydro-electric dam that would displace indigenous peoples, in light of the procedural requirements set forth in Art. 16 of the Convention); CEACR: *Individual Observation: Mexico* (1995), *supra* note 94, at para. 3 (noting with satisfaction the cancellation of a hydro-electric project at the Alto Balsas); CEACR: *Individual Observation: Mexico* (1999)*, supra* note 99, at para. 11 (requesting information on the effects of mining and logging activities in the Tarahumara range and the impact of mega-projects in the Tehuantepec ishmus over indigenous communities inhabiting those areas); CEARC: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Colombia* (2001)*,* available in ILOLEX, *supra* note 13, at para. 2 (commenting on the denial of an environmental license to a mining company as a result of the participation of the indigenous peoples concerned); CEARC: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Peru* (1999), available in ILOLEX, *supra* note 13, at para. 7 (requesting information of the consultations to indigenous peoples in grants of permission for mineral exploitation in areas inhabited by indigenous peoples).

meantime, the Committee has sought to maintain its attention on social and labour issues, which do not constitute the distinctive core of the Convention, but nevertheless fall within the organisation's normal realm of interest and expertise.[102] In addition, the Committee of Experts has aptly tended to focus their attention on general issues involving legislative and administrative reform in states party to the Convention – as opposed to the dispersion that characterised the Committee's activity in relation to the earlier Convention. As expressly pointed out by the experts' in their general comment about the supervision of Conv 169,

> The application of the Convention is extremely complex and may have a profound impact which may even go even to the heart of the constitutional order of ratifying States. Its ratification may imply the adoption of new national standards, or the adaptation of the existing standards to define under the Convention a new relation between

---

[101] *See e.g.* CEARC: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Denmark* (2001), available in ILOLEX, *supra* note 13 (noting that the Home Rule Government of Greenland provides 'a very large degree of autonomy' for the indigenous people of the island); CEACR: *Individual Observation*: *Mexico* (1999), *supra* note 99, at para. 2 (noting with interest 'the broad-based process of consultation on the rights and participation of indigenous peoples' launched by the Mexican government); CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Mexico* (2002), available in ILOLEX, *supra* note 13, at para. 5 (requesting information of the participation of indigenous peoples' representatives in the process of adoption of constitutional reforms). But *see*, CEACR: *General Report of the Committee of Experts, 1999*, *supra* note 97 (stating that 'one of the fundamental precepts of this Convention is that a relationship of respect should be established between indigenous and tribal peoples and the States in which they live, a concept which should not be confused with autonomy or political and territorial independence from the Nation-State'). This flawed statement might be however due to a poor translation of the original Spanish text, which uses the term '*autarquía*' – as distinct to '*autonomía*.' *See* CEACR: *Informe General de la Comisión de Expertos en Aplicación de Convenios y Recomendaciones*, *1999*, available in ILOLEX, *supra* note 13, at para. 100.

[102] *See e.g.* CEACR: *Individual Observation: Mexico* (1995), *supra* note 94, at para. 4 (commenting on information supplied by the Instituto Nacional Indigenista [INI] on allegations of coercive recruitment, non-waged labour and absence of freedom of organize); CEACR: *Individual Observation: Mexico* (1996), *supra* note 95 (commenting on the need to provide 'the full protection of the national labour law' to indigenous peoples); *Individual Observation: Mexico* (1997), *id.*, at paras. 4-6 (restating the suggestion of technical assistance 'to reinforce the protection of the rights of indigenous workers); CEACR: *Individual Observation: Mexico* (1999), *supra* note 99, at paras. 14-19 (commenting on various issues referring to recruitment and conditions of work, discrimination, child labour, protection of wages, maternity protection, labour inspectorate and migrant work); CEARC: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Paraguay* (2000), available in ILOLEX, *supra* note 13, at para. 2 (commenting on cases of ill-treatment of indigenous workers and forced labour in the Chaco)

However, the Committee of Expert's consolidated practice of commenting on specific labour-related under Conv 169 might require critical examination. The emphasis on the labour and social rights of indigenous peoples qua distinct cultural and social groups should be sufficiently justified; otherwise the issues arising from discrimination of indigenous workers might also be examined in the context of the non-discrimination conventions. In addition, an excessive emphasis on the rights of indigenous workers might convey the wrong message that the Convention is primarily concerned with social and labour rights – as the great bulk of ILO standards – tending to disregard more fundamental aspects of the Convention with regard to indigenous collective rights. Ultimately, it might be argued that issues related to the fundamental rights of indigenous peoples at work might be more effectively promoted in the framework of the ILO's enhanced system of permanent supervision of fundamental conventions. *See supra* note 13.

governments and national societies with indigenous and tribal peoples.[103]

Under this approach, as an example, the Committee has encouraged the process of demarcation of indigenous lands under the 1991 Colombian Constitution;[104] it has inquired about newly adopted legislation in Bolivia directly affecting indigenous peoples;[105] and it has closely monitored the intricate process of legal and constitutional reform in Mexico throughout the decade 1991-2001.[106]

A key role in the supervision of the Convention under the reporting procedure has been the involvement of worker's organisations acting under the channels expressly provided for within the reporting system.[107] Labour unions, acting on their own behalf or on behalf of indigenous groups and support organisations, have routinely communicated relevant information on the main issues arising from the implementation of Conv 169 in their own countries to the Committee of Experts.[108]

---

[103] CEACR: *General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1999, supra* note 97, at para. 100.

[104] *See*, CEACR: *Individual Observation: Colombia* (1994)*, supra* note 99 (noting specially 'the extension of land rights to these peoples, in a systematic and concentrated fashion'). *See e.g.* CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Colombia* (1996)*,* available in ILOLEX, *supra* note 13 (noting 'the continuing process of demarcation of indigenous territories').

[105] CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Bolivia* (1995)*, id.* (citing the 1994 constitutional amendment, that affirms the multi-ethnic and pluri-cultural nature of the Republic); CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Bolivia* (1999)*, id.,* at para. 1 (requesting detailed information on Act No. 1551 and Act No. 1702 of 1996 on Popular Participation; Forest Act No.1700 of 1996; and the Mining Code, Act No. 1777 of 1997).

[106] *See* CEACR: *Individual Observation, Mexico, 1995*, *supra* note 94, at 1 (noting the amendments of the Federal Penal Code, Federal Code of Penal Procedure, the General Education Act and the Agrarian Act in the framework of the 1991 constitutional amendments); CEACR: *Individual Observation, Mexico, 1997*, *supra* note 95, at para. 2 (noting the broad process of consultation with indigenous peoples concerning legal and constitutional reform); CEACR: *Individual Observation; Mexico, 1999, supra* note 99, at para. 2 (discussing the process of negotiation between the Mexican government and the Zapatista National Liberation Army [EZLN]; the proposals of the Commission on Reconciliation and Peace-Building [COCOPA]; and the signing of the 1996 San Andrés Peace Accords); CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Mexico* (2002), available in ILOLEX, *supra* note 13, at paras. 4-5 (discussing the 2001 constitutional amendment on indigenous questions, which 'generated a great deal of controversy,' and requesting detailed information on the compatibility between the amendment and Conv 169).

[107] *See supra* note 40 and accompanying text.

[108] *See e.g.* CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Colombia* (1999), available in ILOLEX, *supra* note 13, at para. 4 (acknowledging receipt of human rights violations, including massacres in indigenous communities in Sierra Nevada de Santa Marta); CEACR: *Individual Observation: Mexico* (1999)*, supra* note 99, at paras. 1*,* 4, 11-17 (commenting on report received by the Authentic Worker's Front [FAT] 'in a number of occasions, with a special issues on development projects with adverse effects on indigenous populations and working conditions of indigenous workers); CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989: Mexico* (2000)*,* available in ILOLEX, *supra* note 13*,* at paras. 4-5 (commenting on the complete information received by the FAT alleging violations of indigenous land and resource rights, and noting the 'apparent lack of a dialogue between the Government and the indigenous peoples'); CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Peru* (2001), *id.,* at paras. 1-10 (discussing 'only' the observations presented by the Central Confederation

In some countries this practice has crystallised in the form of so-called 'alternative reports' on the application of the Convention.[109] The information thus supplied to the Committee has helped flag issues of special concern and to counter-balance the information contained in government reports which – considering the lack of alternative sources of information at the disposal of the ILO's supervisory bodies – would have otherwise remained unchallenged. In a number of instances, the supplementary information provided by workers' organisations – which are automatically forwarded to the states concerned for their comments – have actually redefined the terms of the dialogue between the Committee of Experts and the states party to the Convention.[110]

However, the same attention does not seem to be accorded to indigenous peoples and organisations directly addressing the organisation unless they can fall under the category of a workers' organisation. Even though the Committee of Experts has consistently stressed the importance of the participation of indigenous peoples in the supervision of the Convention, this participation seemed to be deferred to domestic mechanisms. However, the individual observations published annually by the Committee seem to have obliterated any reference to information supplied directly by indigenous groups, thus relegating them to become mere objects of the reporting procedure.[111] The actual practice of the ILO's bureaucracy seems to confirm that the organisation is not ready to provide legitimacy to the information directly supplied by indigenous communities and organisations – possibly the result of the typical bureaucratic concern on state members' reaction.[112] This trend does not

---

of Workers of Peru [CUT] under Article 23 of the Constitution concerning a case of land taking); CEACR: *Individual Observation: Paraguay* (2000), *supra* note 102, at paras. 2-3 (commenting on the information provided by the World Confederation of Labour [WCL]).

[109] *See e.g.*, CEARC: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Guatemala* (2002), available in ILOLEX, *supra* note 13, at 2 (commenting on the 'Second Alternative Report' on the application of Conv 169, submitted by the Central Organisation of Rural and Urban Workers [CTC] and drawn up 'in consultation with' the Council of Mayan Organisations of Guatemala [COMG] and the National Indigenous and Rural Coordinating Organisation [CONIC]).

[110] *Cfr., e.g.* CEARC: *Individual Observation: Colombia* (1994), *supra* note 99 (noting 'with interest the Government's first detailed report on the application of the Convention' and underlying the Colombian 'efforts over recent years to recognise the rights of the indigenous peoples of the country'), with CEARC, *Individual Observation: Colombia* (1999), *supra* note 108, at paras. 1, 5 (acknowledging receipt of information provided by 'various representative organisations' and criticising the little information supplied by the government report).

[111] In this regard, the Committee of Experts welcomed Norway's initiative to involve the Saami Parlament – a semi-governmental body of consultative character – in the elaboration of reports under the Article 22 procedure. *See* CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Norway* (1995), available in ILOLEX, *supra* note 13 (stating that the Committee 'welcomes warmly the dialogue between the Government and the Sami [*sic*] Parliament on the application of the Convention'). *See* CEACR: *Individual Observation: Colombia* (1999), *supra* note 108, at para. 3 (citing Decrees Nos. 1396 and 1397 of August 8, 1996, establishing the Committee on the Human Rights of Indigenous Peoples and the National Committee for Indigenous Territories, allowing for the participation of indigenous peoples); CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Mexico* (2000), available in ILOLEX, *supra* note 13, at para. 5 (offering the Office's technical assistance 'in establishing a dialogue … in the application of the Convention').

[112] The active involvement of indigenous peoples and support NGOs in the ILO's reporting procedure was key to enhance the supervision of Conv 107 since the mid 1970s. The ILO's Secretariat has

only contradict the Secretariat's earlier policy on this regard, but further discounts the standard practice of other human rights monitoring bodies.[113]

Notwithstanding the important move in the right direction of the Committee of Experts' observations towards 'taking Convention 169 seriously', it seems clear that these observations do not have a full meaning in isolation, but rather as part of a broader system of supervision which, according to the organisation's own credo, is – or should be – 'holistic.'[114] This system is meant to complement the authoritative comments of the expert body with activities such as technical assistance to the governments concerned with the definition of the legislative and administrative framework required to make the rights affirmed in the Convention effective, including the direct contact mechanism and various forms of co-operation through regional offices and multi-disciplinary teams. In addition, the reporting system further relies on the intervention of the organisation's constituency through the Conference Committee on Application of Standards, which, by granting the expert comments with a more political backing, contributes to flagging issues before international public opinion.

While the experience derived from the supervision of Conv 107 since the mid 1970s and onwards seems to suggest that the bringing together of the different pieces of the ILO's reporting system may contribute to the enhancement of international monitoring of indigenous rights in member states. In the case of Conv 169, the system has apparently not yet worked at full capacity. The implementation of the Convention has only been the object of specific discussion at the Conference Committee at two occasions – both in relation to Mexico – , and no substantive follow-up seems to have followed

---

underlined that these channels of informal communication are coherent with the participatory approach emanating from the Convention itself. According to the first ILO's guide of the Convention,

> Another possibility is that indigenous organizations can send their information directly to the ILO: If communications by authentic indigenous organisations contain verifiable information – e.g. laws, regulations, or other official documents such as land titles – the Committee of Experts can of course use such information directly without getting into problems of the standing of a complainant organisation.

Swepston & Tomei, *Indigenous and Tribal Peoples, supra* note 2, at 30. The second ILO guide also stresses the fact that indigenous 'can … send information directly to the ILO … [t]rough any workers' or employers' organisations ... [and also] can send information themselves'. *See* Rasmussen & Roy, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), supra* note 2, at 79.

This notwithstanding, in practice the ILO officials tend to disregard the information supplied directly by indigenous organisations and NGOs if it does not backed by a workers' organisation. *See e.g.*, Email from Christian Ramos-Veloz (ILO, San José, Costa Rica) to Thalía Vega (Center of Human Rights Miguel Agustín Pro Juárez, Mexico), 'Re: Reforma constitucional sobre Derechos y Cultura Indígena' August, 14, 2001, on file with the author (stating that the communication submitted by over a hundred Mexican indigenous communities and NGOs should be taken up by a worker's organisation and citing Art. 23 of the ILO Constitution to support this requirement). *See* 'Envían solicitud a la OIT y a relator de la ONU para que intervengan ante el gobierno: Rechazo de 100 ONG y particulares a la reforma' *La Jornada,* August 11, 2001.

[113] *See e.g.*, Anaya, *Indigenous Peoples in International Law*, *supra* note 2, at 153-154 (discussing the 'informal oversight mechanism' developed in the practice of the UN Working Group on Indigenous Populations).

[114] *Possible improvements in ILO standards-related activities*, *supra* note 7, at 9 (stating that 'the obligation to submit reports must not be seen in isolation').

these discussions.[115] The mechanism of direct contacts has been expressly invoked by the Committee of Experts and the Conference Committee only once, precisely in relation to labour inspectorates in the state of Chiapas.[116] The relationships between the ILO's constituency and the NGO movement does not appear to be strong enough to be picked up as a concern in the organisation's decision-making bodies. In the meantime, the relationship between the ILO's supervisory bodies and the regional offices falls short of bringing about the same synergetic effects it used to produce in the past. Without the necessary backing of the other parts of the system, the Committee of Experts' efforts, in the supervision of the Conv 169, may face the reasonable risk of becoming wishful statements with little or no effect on the actual lives of the peoples whose rights the Convention is meant to promote at the international level.

IV. The Cases of Representations Alleging Violations of Convention No. 169

While the supervision of Conv 169 by the ILO Committee of Experts was preceded by the experience of over two decades with the supervision of the earlier convention, the resort to the representation procedure set forth in Article 24 of the ILO Constitution to promote the observance of indigenous peoples' rights is unprecedented, and from an international legal standpoint, constitutes one of the most interesting and promising developments concerning the Convention.

When the first representation was brought before the International Labour Office by a Huichol (Wixárrika) community in 1993, it was dismissed on the grounds that the community did not have formal standing under the Article 24 procedure. The representation was filed again some years later under the 'cover' of a supportive labour union, and was effectively examined by a tripartite committee of the Governing Body, which published its conclusions and recommendations in 1998.[117] As of this writing, a total of 7 representations have been deemed admissible and examined by the Governing Body.[118] This figure amounts to an average of one representation on alleged violations of Conv 169 per year. This is a remarkable figure since the average number of representations with regard to *all* conventions is approximately six per year – which

---

[115] *See* ILCCR: *Examination of Individual Case Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Mexico* (1995), available in ILOLEX, *supra* note 13 (discussing the 1994 Chiapas uprising); ILCCR: *Examination of Individual Case Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Mexico* (2000), *id.* (discussing the Governing Body's conclusions on two Article 24 representations, which evoked problems in carrying out effective consultations with indigenous peoples).

[116] *See* CEACR: *Individual Observation: Mexico* (1994), *supra* note 94; ILCCR: *Examination of Individual Case: Mexico* (1995), *supra* note 115.

[117] *See Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education*, ILO Docs. GB. 270/16/3, 270th Session (Geneva, November 1977), (Admissibility), GB. 272/7/2, 272nd Session (Geneva, June 1998) (Merits), available in ILOLEX, *supra* note 13 [hereinafter, '*Huichol Case*'].

[118] For a summary and commentary on the individual cases of representation examined by the Governing Body in relation to Conv 169, *see* MacKay, 'A Guide to Indigenous Peoples' Rights in the International Labour Organisation' *supra* note 3, at 26-51.

has turned the Convention into one of the most frequently invoked instruments. All these representations were filed by workers' unions, and most of them were filed on behalf of an indigenous community or organisation.[119] This creative instrumentalisation of the procedure is possible due to the lack of a required link between the petitioner and the alleged violation – one of the flexible traits of the procedure.[120]

---

[119] The representation on the Huichol case was filed on behalf of the Union of Huichol Indigenous Communities of Jalisco (UCIHJ). *See Huichol Case, supra* note 117, at para. 11. The second representation against Mexico was filled on behalf of the Uxpanapa Indigenous Council (CIUX). *See Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers*, ILO Docs. GB. 273/15/6, 273rd Session (Geneva, November 1998) (Admissibility) and GB.276/16/3, 276th Session (Geneva, November 1999) (Merits), available in ILOLEX, *supra* note 13 [hereinafter '*Cerro del Oro Case*'] at para. 14. The representation brought in against Bolivia was expressly filled on behalf of the Confederation of Indigenous Peoples of Bolivia (CIDOB), and its affiliates, the Coordinating Body of Ethnic Peoples of Santa Cruz (CPESC), the Central of Indigenous Peoples of Beni (CPIB), and the Indigenous Central of the Amazon Region of Bolivia (CIRABO). *See Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Bolivian Central of Workers,* ILO Docs. GB. 272/8/1, 272nd Session (Geneva, June 1998) (Admissibility); and GB. 274/16/7 (Geneva, March 1999) (Merits), *id.*, at para. 9. The National Indigenous Organisation of Colombia (ONIC) allegedly supported the two representations filled against Colombia. *See Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT),* ILO Docs. GB. 276/17/1, 276th Session (Geneva, November 1999) (Admissibility); and GB. 282/14/3, 282nd Session (Geneva, November 2001) (Merits), *id.* [hereinafter, '*U'wa et al. Case*']; *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association,* ILO Docs. GB. 277/18/1, 277th Session (Geneva, March 2000) (Admissibility); and GB. 282/14/3, 282nd Session (Geneva, March 1999) (Merits), *id.* [hereinafter '*Urrá Case*']. The representation alleging violation of the Convention by Ecuador was filled on behalf of the Federation of the Shuar People of Ecuador (FIPSE). *See*, *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Libres* [*sic*] *(CEOSL)*, ILO Docs. GB.277/18/4, 277th Session (Geneva, March 1999) (Admissibility) and GB. 282/14/2 , 282nd Session (Geneva, November 2001) (Merits), *id.* [hereinafter, '*Shuar Case*'], at para. 10.

One of the recent representations alleging violations of the Convention by the process of Constitutional reform in Mexico was filled on National Indigenous Plural Assembly for Autonomy (ANIPA). *See* ILO Doc. GB 282/15/3, 282nd Session (Geneva, November 2001) (Admissibility); ANIPA, 'Reclamación de ANIPA ante la OIT' Press Release, Sept. 4, 2001. A second representation counted with the support of the Human Rights Center Miguel Agustín Pro Juárez and the Lawyers' Network for the Rights of Indigenous Peoples (RADPI). *See* ILO Doc. GB. 282/15/4, 282nd Session (Geneva, November 2002) (Admissibility). The full text of the representation filed by the Center Pro and the RADPI is available at: http://members.tripod.com/inchala_enlinea/comple/comple10.htm. Yet a third representation was filled on behalf of the Chiapas Community Defenders Network (RDC). *See* ILO Doc. GB.283/17/1, 283rd Session (Geneva, March 2002) (Admissibility); RDC 'Complaint Before the International Labour Organization by the Chiapas Community Defenders Network' Press Release, Oct. 26, 2001; 'Exige la Red de Defensores Comunitarios a la OIT rechazar las reformas en material indígena' *La Jornada,* November 1, 2001.

[120] *See* Swepston & Tardu, 'Part one: Complaints procedures of the International Labour Organisation' *supra* note 6, at 15. *See* also *Shuar Case*, *supra* note 119, at para. 29 (stating that 'the procedure for the examination of representations … do not require the complainant organisation to have a direct connection with the events that constitute the complaint'). This disconnection between claim and

Notwithstanding the unavoidable requirement of standing, the flexible terms in which the procedure is couched have allowed the examination of cases that would have hardly been examined under other international procedures. This is particularly evident in terms of the lack of a time requirement under the Article 24 procedure, which has allowed for the examination of cases in which an important lapse of time existed between the factual situation which was the object of the representation and the filing of the representation itself. As an example, in a case concerning the relocation of an Innuit community in Greenland in the late 1950s, the committee examined the issue on the understanding that 'the consequences of the relocation that persist following the entry into force of Conv 169 still need to be considered.'[121] In addition, as pointed out above, the procedure does not require the exhaustion of domestic remedies as a condition of admissibility. This unique feature of the procedure has paved the way for a variety of legal situations that may determine the impact of the Governing Body's conclusions and recommendations in the specific case.[122] Moreover, as expressly noted by the ILO's supervisory machinery in the Huichol case, 'the examination of a representation by the Governing Body sometimes becomes a relevant circumstance in a decision being handed down in a national legal procedure on a specific aspect of the application of ratified Convention.'[123]

The first representation regarding Conv 169 – filed, as stated, by a Mexican labour union on behalf on a Huichol (Wixárrika) indigenous community – constituted a major test of the potentials and pitfalls of the Article 24 procedure in relation to the Convention, and shed light on the organisation's own policy standpoints in this regard. Touching upon the Convention's true core, the petitioners alleged that Mexico had violated the land rights of the San Andrés Cohamiata Community when the Mexican government failed to

---

claimant allows a great deal of scenarios, such as the possibility of an international industrial association to act against various governments at the same time; or of an international industrial association to denounce a state in which it does not have representation. *See* Swepston & Tardu, *supra* at 19, note 32 (citing the representation filled by the International Confederation of Free Trade Unions against the Netherlands in 1955, even though none of its members was active in that country). In theoretical terms, nothing prevents a domestic organisation to bring in a representation against a state party different of its own.

[121] *See* ILO Doc. GB.277/18/3, 277th Session (Geneva, March 1999), GB. 280/18/5, 280th Session (Geneva, March 2001) [hereinafter '*Uummannaq Case*'], at para. 29. However, the Committee also acknowledged that 'the provisions of the Convention cannot be applied retroactively, particularly with regard to procedural matters, such as whether appropriate consultations were held in 1953 with the peoples concerned.' *Id. See* also *Cerro del Oro Case*, *supra* note 119, at para. 36 (stating that 'the effects of the decision that were taken at that time [1972-74] continue to affect the current situation of the indigenous peoples in question, *both in relation to their land claims and the lack of consultations to resolve those claims')* (emphasis added).

[122] None of the cases filled up to date had exhausted domestic resources. In some cases, procedures under municipal law had not even been started. *See* Cerro del Oro Caso, *supra* note 119; *Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples' Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP),* ILO Doc. GB.270/16/4, 270th Session (Geneva, November 1997) (Admissibility); GB.273/14/4, 273rd Session (Geneva, November 1998) [hereinafter, '*Peruvian Act Case*']. In other cases, the representation ran parallel to domestic legal proceedings. *See e.g.*, *Huichol Case*, *supra* note 117, at para. 13; *Uummannaq Case*, *supra* note 121, at para. 13. In others, the domestic proceeding had already been exhausted. *See e.g.*, *U'wa et al. Case*, *supra* note 119, para. 19 (concerning Decree No. 1320), para. 25 (concerning the case of the Troncal del Café Highway).

[123] *Huichol Case*, *supra* note 117, at para. 31.

recognize San Andrés as a distinct indigenous community belonging to the wider Huichol territory. The community had been segregated from the Huichol territory as a result of the agrarian reform policies implemented during the 1960s, and when filing the representation, was immersed in a protracted legal proceeding within the Mexican agrarian courts. The response of the tripartite committee responsible for examining the case – acting under the ILO bureaucracy's influence – was both mild and disappointing. The committee avowed that 'it does not claim to issue an opinion on the resolution of individual land disputes under the Convention' but rather, 'to ensure that the appropriate means of resolving these disputes have been applied and that the principles of the Convention have been taken into account in dealing with the issues affecting indigenous peoples.'[124] Moreover, in relation to the specific land claim involved in this case, the tripartite committee noted that 'there [were] procedures in place to resolve land disputes', while expressly declining to evaluate whether or not these procedures were adequate in relation to individual claims.[125] The dismissal of the petitioner' demand for intervention in their particular land claim case was coupled with a number of nebulous recommendations, mainly based on the literal wording of the Convention, for the Mexican government to 'take measures in appropriate cases to safeguard the right of the peoples concerned' and to examine 'the possibility of assigning additional land to the Huichol people.'[126] The reaction that followed the conclusions and recommendations closing the procedure prompted a deep feeling of deception among the groups that took the main initiative in the case,[127] which disparaged the procedure as a 'legal absurdity.'[128] The feeling of disillusionment prompted by the Wixárrika/Huichol was diffused in other realms of the indigenous movement in Mexico. Moreover, the opinion spread that the ILO imposed 'padlocks' on indigenous peoples,[129] while bringing about 'scarce results' for the defense of their rights.[130]

The main message that the ILO wanted to convey in the first representation concerning Conv 169 is that the organisation is simply not a land claims court. Like other international human rights procedures, the ILO generally favours decision-making at 'more local levels as possible' – a corollary of the principle of non interference in matters pertaining to the domestic jurisdiction of states.[131] This preference may be perfectly comprehensible, particularly in light of the complex set of issues typically involved in indigenous land and resource rights cases. Moreover, in the Huichol case, the legal strategy used by the plaintiffs of focusing on the specific

---

[124] *Id.*, at para. 32.

[125] *Id.*, at para. 41. The Committee added that 'it perceived that [procedures to resolve land claims] are accessible to indigenous communities' and that in the case under consideration it appeared that 'land claims are being examined in depth.' *Id*.

[126] *Id*., at para. 45 (a), (b)(iii).

[127] Letter from the Union of Jalisco Huichol Communities to Mr. Hector Bartolomei de la Cruz (ILO) June 18, 1998) (on file with the author); Secretaría Técnica de la Red Nacional de Organizaciones de Derechos Humanos, Todos los Derechos para Todos, 2000, 'Los 176 frentes del territorio huichol' *La Jornada,* April 1, 2000.

[128] *Id.* (translation from Spanish is my own).

[129] Personal interview with Imelda Gómez, Indigenous Peoples Organisation of Chinantla, Tuxtepec, Oax. (México), Oaxaca, July 20, 2001 (translation from Spanish is my own).

[130] 'Los 176 frentes del territorio huichol' *supra* note 127 (translation from Spanish is my own).

[131] Anaya, *Indigenous Peoples in International Law*, *supra* note 2, at 151.

details of the land claim was probably not an effective one – partly due to the pioneer character of the action. However, the decision of the tripartite committee responsible for examining the representation might be criticized for failing to delve deeper into the factual elements of the case, and for not scrutinizing the legal arguments submitted by the Mexican government. While the Committee's conclusion that the Mexican agrarian court system was prima facie consistent with the Convention requirements was based on mere suppositions, the formal statement that the Governing Body's committees should not discuss the functioning of domestic land claim procedures in specific cases there is a cause for concern that in the future, situations of serious violations of the Convention land and resource right provisions will be left untouched.[132]

The cold reception of the first representation on the ILO's part might be discerned as a more or less conscious policy decision that tends to discourage the generalization of this kind of cases, a probable scenario at a time of enhanced international legal action on behalf of indigenous groups.[133] This takes place within the context of a system of supervision that, as pointed out above, typically favours a 'gradual' and 'technical'

---

[132] *Cfr.* the ILO's decision in the *Huichol Case* with the recent decisions in the inter-American human rights system regarding indigenous peoples land rights. In the *Dann Case*, a case involving the Western Shoshone land claim in the State of Nevada, United States, the Inter-American Commission on Human Rights evaluated the legal proceeding under US domestic law with regard to the specific land claims of the Dann sisters and other Western Shoshones, and concluded that 'these processes were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests'. *See* IACHR, *Mary and Carrie Dann*, Case 11.140 (United States), Report No. 75/02 (Merits), *Annual Report of the Inter-American Commission on Human Rights 2002*, OAS Doc. OEA/Ser.L/V/II.117, Doc. 1, rev.1 (2003) [hereinafter '*Dann Case*'], at 139. The Inter-American Commission, acting under the American Declaration on the Rights and Duties of Man (provided that the United States have not ratified the American Convention on Human Rights) further stated that

> [The Commission has] an independent obligation to evaluate the facts and circumstances of a complaint as elucidated by the parties in light of the principles and standards under the American Declaration. This includes such matters as *the adequacy of the procedures through which the petitioners' property interests* in the Western Shoshone ancestral land were purported to be determined. While proceedings or determinations at the domestic level on similar issues can be considered by the Commission as part of the circumstances of a complaint, they are not determinative of the Commission's own evaluation of the facts and issues in a petition before it. This is particularly significant in cases such as the present, where neither the courts nor the state itself regarded the matters raised in the case as human rights issues, but rather as questions regarding land title and land use.

Id., at 164 (emphasis added). In the *Awas Tingni Case*, the first case concerning indigenous land rights brought before the Inter-American Human Rights Court closely examined the existing legal and administrative regime for the demarcation of indigenous communal lights. *See* I/A Court H.R., *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits), Series C No. 79, at paras. 116-127 [hereinafter, '*Awas Tingni Case*']. In light of its analysis, the Court found that there was 'no effective procedure for delimitation, demarcation and titling of indigenous communal lands, *id.* at para. 127, and ordered, as a remedial measure, the adoption of 'the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores', *id.* at para. 173(3).

[133] *See e.g.* Anaya, *Indigenous Peoples*, *supra* note 2, at 151-170 (discussing cases of utilization of international complaint procedures for the defense of indigenous peoples' rights).

approach to supervision and hence puts a greater emphasis on reporting rather than on complaint procedures.[134] This general preference for reporting procedures is being reinforced in a time of re-evaluation of the organisation's general policy of supervision that includes suggestions for the reduction of existing bottlenecks by deterring the resort to complaint procedures.[135] Needless to say, these general considerations of the ILO's policy of supervision have an amplified effect with regard to Conv 169, an instrument that falls short of being on the organisation's list of priorities.

The experience of the representations that followed the Huichol case seem to confirm the ILO's initial tendency to discourage a generalization of this kind of cases. Notably, in the case of the Cerro de Oro Dam in Mexico, involving a forced removal of Chinantec communities that had not been properly relocated, where a tripartite committee of the Governing Body failed to provide any substantial conclusions in view of the 'contradictory assertions' submitted by the parties. The committee did not undertake any request for further information or evidence in order to solve these apparent contradictions, but rather referred the case to the Committee of Experts 'in order to allow it to give an informed opinion on this matter with a greater knowledge of the facts', thus blurring the differences between reporting and complaint procedures for the sake of procedural economy.[136] In other instances, the lack of certain rules concerning specific aspects of the procedure were also used as negative incentives for the retort to the representation mechanism under the Indigenous and Tribal Peoples Convention.[137]

---

[134] *See supra* notes 43-45 and accompanying text.

[135] *See supra* notes 36-37 and accompanying text.

[136] *Cerro del Oro Case*, *supra* note 119, at para. 43. In 2002 the Committee of Experts addressed the Mexican government a direct request concerning the follow-up of the case. *See*, CEACR, *Individual Observation*: *Mexico* (2002), *supra* 106, at 6. But the Mexican government has failed to report progress on the legal issues arising from the present case, supplying only general information on ongoing development plans in the region. *See* ILCCR: *Examination of Individual Case: Mexico* (2000), *supra* note 115.

[137] This might be discerned, for instance, in the ILO's random suspension of the Committee of Experts' procedure in relation to countries against which representations have been filled while the Governing Body examined these representations. *See e.g.*, CEACR: *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989. Peru* (1998), available at ILOLEX, *supra* note 13, at 2 (stating that 'in accordance with its usual practice, the Committee is postponing its examination of the Government's first report to await the outcome of the representation'). This is a non-written practice that is not provided for in the relevant procedure, and that allegedly aims at respecting the impartiality of the tripartite committee responsible for examining the representations. This argument obviously disregards the actual functioning of the system, including the pervasive role played by the ILO's Secretariat in both reporting and complaint procedures. The practice of suspension the reporting procedure obvious entails a negative effect of the working of this system, whose 'technical' and 'gradualist' approach relies heavily on the possibility of establishing continuous flows of communication and co-operation between the ILO and states. In addition, the suspension unfairly places on the representation's complainant the burden of deciding the advisability or not of that suspension.

In the case of the representations on alleged violations of Conv 169, the reporting procedure has not been suspended in all cases, which suggest the existence of a certain degree of arbitrariness in this decision. However, in more recent cases, the practice seems to have been gradually dismissed, allowing for the parallel examination of states reports by the Committee of Experts and the examination of specific representations under the Article 24 procedure. *See e.g.*, CEARC: *Individual Observation: Mexico* (2002), *supra* note 101, at 1 (acknowledging receipt of two representations against Mexico but nonetheless examining the government report at the present session in view of the fact that 'the tripartite committee which will be responsible for the examination of these representations will not be established until the next session of the Governing Body').

The first cases of representations were also characterised by what could be regarded as an excessively formalistic reading of Conv 169's provisions. The case of the Peruvian Act on Coastal Communities is particularly illustrative in this regard.[138] The claimants alleged that the Act violated the land provisions of the Convention because it deprived coastal indigenous communities of a number of existing legal safeguards and it promoted the individual allotment of community lands.[139] The tripartite committee, established to examine the Convention, expressly pointed out that the 'ILO's experience with indigenous and tribal peoples has shown that when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of indigenous community rights tends to be weakened and communities generally end up losing all or most of the lands.'[140] Indeed, a norm in favour of the collective ownership of indigenous lands might be implicitly read in the Convention, in light of developing international standards.[141] However, the tripartite committee fell short of suggesting that the Peruvian act's promotion of individual forms of ownership violated the Convention but rather attacked the procedural aspects of its adoption.[142]

However, in more recent cases, the ILO's supervisory machinery has seemingly lost its previous discomfort regarding representations on alleged violations of Conv 169, making substantive steps in the direction of providing an effective response to the cases under examination. Tripartite committees of the Governing Body have found violations of the Conventions in a number of cases involving indigenous peoples' right of consultation affirmed in the Convention,[143] unambiguously characterised as 'the hallmark of this instrument.'[144] These cases, involving countries such as Bolivia, Ecuador and Colombia, typically referred to the disrespect of the

---

[138] *See* Act respecting the Establishment of Title to the Land of the Peasant Farmers' Communities of the Coastal Region, Act No. 26845 of 26 July 1997; *Peruvian Act Case*, *supra* note 121 at para. 9.

[139] *Id.*, at para. 10.

[140] *Id.,* at para. 26.

[141] It might be argued that, even though the Conference Committee on Conv 107 failed to include the collective character of indigenous property rights over lands and resources, this element is implicit in the Convention's provisions, which all together define a *sui generis* regime. The Convention calls governments to 'respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with their lands or territories … and in particular the collective aspects of this relationship.' Conv 169, *supra* note 1, Art. 13. The collective character of indigenous property rights has further been affirmed by other international bodies. *See e.g.*, *Awas Tingni Case*, *supra* note 132, at para. 149 (emphasizing that 'for indigenous communities the relation with the land is not merely a question of possession and production but has a material and spiritual element that must be fully enjoyed to preserve their cultural legacy and pass it on to future generations'). The Court referred consistently to the 'communal lands' belonging to the Awas Tingni Community members. *Id*., *passim*. However, the collective character of indigenous property rights operates primarily vis-à-vis states, and does not necessarily preclude the existence of indigenous systems based on individual ownership in relation to their own communities.

[142] The tripartite committee responsible for examining the *Peruvian Act Case* attacked the act on grounds not that it fostered the individual allotment of indigenous communal lands, but rather because of the procedure set forth in that act 'ruled the possible participation of community-institutions in the decision-making process.' *Peruvian Act Case*, *supra* note 122, at para. 31. In addition, the committee emphasized that indigenous peoples had not been consulted in the legislative process leading to the adoption of the act. *Id*.

[143] Conv 169, *supra* note 1, Arts. 6, 15(2), 16(2), 17(2), 22(3), 27(1).

[144] *Uummannaq Case*, *supra* note 121, at para. 43.

procedural requirements set forth in the Convention in relation to the exploration and exploitation of underground wealth by private enterprises acting under the governments' license. Moreover, the tripartite committees responsible for examining the representations on Conv 169 have tended to bring in the requirement and principle of consultation in their recommendations, even in cases in which it was not included in the original petition.[145] Unlike previous cases involving land rights that have generally required a thoughtful investigation of their factual and legal background, allegations regarding the right to consultation have effectively lead to more or less clear findings regarding its fulfilment or otherwise regarding the procedural requirements set out in the Convention. As Anaya has aptly pointed out, the different cases of representations alleging violations of the right to consultation have given grounds to an emerging body of jurisprudence concerning the content and scope of this right.[146] In turn, the findings of violations have lead to recommendations of specific remedies. In one case, involving a process of consultation, a tripartite committee demanded Bolivia to undertake consultations with a specific organisation, on behalf of which the representation had been filled.[147] In a similar case concerning Colombia, a Governing Body's tripartite committee went as far as recommending the repeal of Decree No. 1320, regulating the exercise of the right of consultation in relation to natural resource exploration and exploitation activities, because it failed to meet the procedural requirements set forth in the Convention.[148]

ILO complaint procedures are seldom criticized for their lack of effectiveness in practical terms, a critique which is surely grounded in relation to other implementation procedures involving international institutions.[149] However, the experience of the first

---

[145] *See id.*. *See* also *Peruvian Act Case*, *supra* note 122, at para. 31.

[146] *See* S. James Anaya, *Indigenous Peoples in International Law* (2nd revised edition, 2003, forthcoming in Oxford University Press), at 243-244 (discussing the jurisprudence arising from the conclusions and recommendations of the Governing Body's tripartite committee in relation to the Convention). *See* e.g. *Shuar Case*, *supra* note 119, at 38 (stating that '[a] simple information meeting cannot be considered as complying with the provisions of the Convention); para. 39 (stating that the process of prior consultation entails 'that the peoples involved should have the opportunity to participate freely at *all levels* in the formulation, implementation and evaluation of measures and programmes that affect them directly') (emphasis added); para. 44 (requiring that the consultation process should be develop 'with the indigenous and tribal institutions or organizations that are truly representative of the communities affected'). *See* also *U'wa et al. Case*, *supra* note 119, at para. 90 (emphasising that the requirement that the consultation should be 'prior' involves that 'the communities affected [should be] involved as early on as possible in the process, including in environmental impact studies').

[147] *Shuar Case*, *supra* note 119, at 45(b) (urging the Ecuadorian government to contact the Federation of the Shuar People of Ecuador FIPSE 'for the purpose of establishing and maintaining a constructive dialogue which will allow the parties concerned to find solutions to the situation facing this people').

[148] *U'wa et al. Case*, *supra* note 119, at para. 94 (a). The Governing Body's recommendation in this case was fuelled by a previous ruling of the Colombian Constitutional Court that suspended the application of the Decree in relation to the Embera-Katio communities affected by the construction of the Troncal del Café highway. *Id.* at para 13.

[149] *See* MacKay, 'A Guide to Indigenous Peoples' Rights in the International Labour Organisation' *supra* note 3, at 52-53 (drawing a comparison between the ILO procedures and those of the Inter-American System of Human Rights). Mackay concludes that 'it may be more advantageous for Indigenous peoples in a OAS [Organisation of American States] member state to seek enforcement of their rights in the IACHR

representations brought before the ILO concerning breaches of Conv 169 further shows that this mechanism is capable of having a more definitive effect than the organisation's permanent, 'gradual' supervisory procedures – however limited this effect might have been. At a minimum, the conclusions stemming from an authoritative international organization, such as the ILO committee, finding violations of the rights enshrined in the Convention by a given state typically have a certain political effect. The effect of these conclusions, in terms of fostering actual changes may mainly depend – provided the lack of effective follow-up mechanisms on the ILO's end – on the articulation of domestic legal and political processes.[150] In addition, confirming the notion that the Article 24 procedure may be 'a valuable method to raise issues which otherwise would not have received the attention of the ILO body in sufficient depth,'[151] the cases of representation under Conv 169 have proven have an effective influence on the reporting procedure – reaching even the debates of the Conference.[152]

As a consequence, surmounting some initial uncertainty, the accumulation of cases under the representation procedure has evinced the potentials of this procedure in relation to the supervision of Conv 169. This has been particularly evident in cases of the procedural requirements of prior consultation, but will surely extend to other aspects of the instrument, including substantive aspects.[153] While some of the structural features of the procedure – further reinforced by an accumulated institutional culture tending to favour the 'technical' approach of supervision to the detriment of contending mechanisms – limit its effectiveness in practical terms, the procedure also encompasses a number of possibilities that may be imaginatively explored in order to foster more active monitoring of states' compliance with the Convention's provisions, while adapting routine practices to the specificities of cases involving the rights of indigenous peoples.[154]

[Inter-American Commission on Human Rights] rather than in the Committee of Experts.' *Id.*, at 53. *See* also Duhaime, 'Assessment of the Options for Indigenous Peoples to Monitor Application of ILO Convention No. 169' *supra* note 3, at 5 (discussing the relationship between the ILO and the UN system as regards supervision).

[150] *Id.*, at 10 (stating the need for 'combining several initiatives … as part of a global strategy integrated to a much wider political plan [that] could be more effective in the long-term').

[151] Swepston & Tardu, 'Part one: Complaints procedures of the International Labour Organisation' *supra* note 6, at 6.

[152] *See e.g.*, CEACR: *Individual Observation: Mexico* (1997), *supra* note 95, at para. 8 (discussing the *Huichol Case*); CEACR: *Individual Observation: Peru* (1999), *supra* note 100, at paras. 2-6 (summarising the Governing Body's conclusions in the *Peruvian Act Case* and endorsing its conclusions).

[153] *See* Anaya, *Indigenous Peoples in International Law* (2nd edition), *supra* note 146.

[154] To be sure, the standing order regulating representations under Article 24 of the ILO Constitution includes more participatory channels at Governing Body's disposal. Tripartite committees responsible for examining representations may, for instance, a representative of the complaint association to appear before it and furnish 'further information,' and nothing prevents the complainant organisation to invite an indigenous representative to participate on its behalf. *See* 'Procedure for the examination of representations', *supra* note 28, Art. 4. This participation may constitute a way to surmount the problems derived from incomplete or contradictory information typically arising in this kind of cases, and also a meaningful and imaginative way of overcoming the negative symbolic effects of the Art. 24 procedure as applied to indigenous peoples.

V. Conclusion

This article has provided an assessment of the impact of Conv 169 on the protection and promotion of the rights of indigenous peoples from the perspective of the ILO system of supervision. This assessment analyses other elements of the ILO system in order to provide a more balanced evaluation of the role of the Convention in the contemporary international regime on indigenous peoples' rights – an evaluation that goes beyond triumphalism and self-satisfaction.

More than a decade after the instrument's entry into force, the experience of the ILO's reporting and complaint procedures dealing with Conv 169 suggests the existence of a cleavage between the Convention's significant role in generating a series of key legal and political dynamics, both in state parties and elsewhere, and its actual supervision by the competent bodies within the organisation. Conv 169 stands today as a 'historical anomaly' in an organisation whose lack of interest and technical expertise has not been substantively altered by the adoption of the instrument back in 1989. The anomalous institutional adscription of the Indigenous and Tribal Convention does not go without effect in relation to the supervision of the Convention. As this article has sought to demonstrate, the supervision of Conv 169 conflicts with some of the key features of the ILO's system of control of international standards, including the accumulated technical expertise in social and labour issues, and the system of 'checks and balances' introduced by tripartism. In practical terms, the anomalous position of the Convention within the ILO's supervisory bodies undermines the effectiveness of the system, while granting the organisation's Secretariat an unprecedented sphere of intervention. In the meantime, the lack of formal and informal channels of communication between the ILO's supervisory bodies and indigenous peoples constitutes a significant hindrance to the furtherance of an enhanced supervision of the Convention, while constituting a permanent source of delegitimisation of the instrument and its mechanisms of monitoring before these peoples.

Nevertheless, the above analysis has further shown that there are a number of positive developments in the practice of the ILO's supervisory bodies that seem to suggest a trend towards a more effective supervision of the Convention. The Committee of Experts has seemingly moved from institutional dynamics derived from the earlier Conv 107 to focus more on the core human rights aspects of Conv 169 and has strengthened a number of ongoing reforms within member states that head in the direction of the standards set forth in this instrument. The extent to which the ILO's reporting system will prove to have a lasting effect will ultimately depend on the organisation's capacity to articulate the different systems that integrate it, as evidenced by the supervision of Conv 107. In addition, the gradual accumulation of cases under the representation procedure evinces both the organisation's concerns and the significant potentials of this mechanism in relation to Conv 169. The inherent limitations of this instrument may provide a space for the deployment of legal and political strategies that will tend to protect the rights affirmed in this instrument. In any event, the capacity of the ILO's supervisory bodies to foster an effective application of the Indigenous and Tribal Peoples Convention will ultimately rely on

the organisation's capacity to realise that, despite its anomalous history and its evident pitfalls, Conv 169 constitutes a fundamental element of the contemporary human rights system.

THE ILO SYSTEM OF PROTECTION OF INDIGENOUS PEOPLES' RIGHTS: THE CASE OF THE HUICHOL OF MEXICO

Christina Binder

A. Introduction

It is certain, indigenous peoples have become an increasing issue of international concern. At national, and above all at international level, states as well as intergovernmental and non governmental organisations have started taking indigenous peoples' interests into consideration. The International Decade of the World's Indigenous Peoples is celebrated between 1995 and 2004, the Working Group on Indigenous Populations proposed a Draft Declaration on the Rights of Indigenous Peoples[1] in 1994 and, most recently, the Permanent Forum on Indigenous Issues held its first session in May 2002. In short and polemically stated, it is quite 'modern' to care about indigenous peoples' claims and demands.

Although initiatives to protect indigenous peoples are taken, problems still remain. The most important impediment being that the majority of the international activities undertaken are legally non binding.[2] Even if the initiatives previously mentioned demonstrate the 'good will' of states to take indigenous claims in consideration and have political and symbolic value, today, states still remain reluctant to put too powerful tools (such as enforceable rights)[3] in the hands of indigenous peoples.

[1] *Draft United Nations Declaration on the Rights of Indigenous Peoples*, agreed upon by the U.N. Working Group on Indigenous Populations at its 11th session, Geneva, July 1993; adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its Resolution 1994/45, August 26 1994, U.N. Doc. E/CN.4/1995/2/, E/CN.4/Sub.2/1994/2/Add. 1 (1994).

[2] For instance, the (Draft) UN-Declaration on the Rights of Indigenous Peoples is still discussed in the Human Rights Commission. Even this Declaration, which anyhow would not be binding, cannot be adopted because of the resistance of states.

[3] To have rights would present the advantage to be able to refer to concrete minimum standards which are enforceable before courts.

R. Kuppe and R. Potz (eds.), Law & Anthropology, 92-113.

In this context, the Conventions No 107[4] and 169[5] (Conv 107; Conv 169) of the International Labour Organisation (ILO) constitute notable exceptions. They are the only legally binding Conventions today where the rights of indigenous peoples are concerned, and enable and empower indigenous peoples to claim their rights on the basis of justiciable treaties. The consequences and benefits for indigenous peoples appear to be far reaching. Rights are granted in the Convs 107 and 169 and simultaneously extensive normative standards are set up; the ILO monitoring system should ensure state compliance with them.

However, can we immediately assume that Convs 107 and 169 are valuable instruments to adequately defend indigenous interests? Some questions remain and are to be answered here: how and to what extent are the standards established in the ILO Conventions implemented by the ILO supervisory bodies? Can a state really and effectively be held accountable by ILO organs, if it violates indigenous rights?

This paper is going to examine the aforementioned questions by analysing the case of the Huichol communities in Mexico.

After this introductory part A, part B will provide a general survey of the protection that is offered to indigenous peoples by ILO instruments and bodies. A short historical overview will explain the background of the ILO and the assistance it provides. Equally, the normative standards set up in Convs 107 and 169 will be reviewed in brief. A more detailed survey will then be given of the ILO monitoring system: the state reporting system will be discussed and the complaint avenues ('representations' and 'complaints') will be mentioned.

In part C the representation of the Huichol communities[6] against Mexico will be discussed in order to study the effectiveness of the ILO complaint mechanisms in a concrete case[7]. Therefore, the normative potential of the (land rights) provisions of Convs 107 and 169 will be outlined with respect to the Huichol Case, and the practical application of these provisions in the jurisprudence of the tripartite Committee will be reviewed. Can the Huichol communities rely on the ILO supervisory mechanisms and bodies to enforce their land claims against the Mexican State? It will be argued that the norms of Convs 107 and 169 offer quite extensive protection to indigenous peoples' lands and should actually empower the Huichol

---

[4] *Convention (No 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted 26 June 1957 by the General Conference of the International Labour Organisation (ILO), 40th session, entered into force 2 June 1959.

[5] *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 27 June 1989 by the General Conference of the ILO, 76th session, entered into force 5 September 1991.

[6] More precisely, the National Trade Union of Education Workers (SNTE) had brought in a representation under Art 24 of the ILO Constitution (ILO Const) in 1996 which was alleging the non observance of Conv 169 by Mexico with respect to the Huichol communities of Jalisco.

[7] *Report of the Committee set up to examine the representation alleging non-observance by México of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education,* 1998 (Docs: GB.270/16/3 and GB.272/7/2), (also available at http://www.ilo.org through ILOLEX, site last visited 31 March 2004) (*National Trade Union of Education Workers against México*).

communities to win their claims against Mexico. The ILO supervisory organs however, appear not to apply the mighty articles of the Conventions to their full strength.

A concluding summary D will resume the arguments listed up above and situate the observations the tripartite Committee made in the Huichol Case, in the overall context of the ILO supervisory system. In so doing, part D will to some extent moderate and soften the criticisms, which are brought forward in part C against the portrayed weak interpretation of the tripartite Committee. Thus, how can the ILO system benefit indigenous peoples?

B. Theoretical Overview: The ILO System of Protection of Indigenous Peoples' Rights

When we deal with the protection of indigenous peoples at international level, what appears surprising at first glance, is the fact that the only legally binding Conventions concerning indigenous rights, which exist today, have been adopted by the ILO; an organisation therefore, whose main mandate is situated in the field of labour and working conditions.

One major reason for this protection is certainly the historical concern of the ILO to ensure the rights of indigenous workers. Another explanation why indigenous interests are better protected by the ILO than by other international organisations, is the tripartite structure of the organisation: in its major decision making bodies, the International Labour Conference (ILC) and the Governing Body,[8] the distribution of votes between workers' associations, employers' organisations and governments is 1:1:2. (Every member state has four votes, including one worker representative, one employer representative and two governmental representatives.) Consequently, the decisions of the ILO do not only reflect state views, but also those from other sections of society.[9] In fact, in the past, it was mainly the trade unions and the workers' delegates who have been willing to defend the interests of indigenous peoples in the forums of the ILO.

Therefore, even if the ILO system of protection of indigenous rights is not ideal (the main concern of the organisation being focused on the improvement of labour standards), the ILO nonetheless offers quite ample possibilities to introduce indigenous visions and views, and establishes ways to take indigenous concerns into

[8] The ILC can be considered as the general assembly of the ILO: it meets once a year. Every three years, the ILC elects the Governing Body. Being composed of 56 members (28 government representatives, 14 workers' representatives and 14 employers' representatives) the Governing Body serves as ILO's executive council. Another ILO body would be the International Labour Office, the permanent secretariat of the ILO, which is based in Geneva. It is presided by the Director General, who is elected by the Governing Body for a period of five years.

[9] See in this sense Olguín Martínez: 'El carácter Tripartito de la Organización [...] permite la elaboración de programas y políticas que no son exclusivamente del interés nacional de los Estados.' (G. Olguín Martínez, *Los Mecanismos de Control de la OIT en Materia de Derechos Indígenas.* México, Ce-Acatl, 2000, 17.)

consideration. The case of the Huichol communities in Mexico will illustrate and elaborate on this idea below.

1. History: with Special Consideration of Conventions No 107 and 169

Historically, the ILO started to care about indigenous peoples in the 1920s: a time, when the misery of the native workers attracted the attention of the organisation. Accordingly, the first ILO Conventions referring to indigenous peoples were the Forced Labour Convention[10] (No 29) adopted in 1930 and Convention (No 50) on the Recruiting of Indigenous Workers[11] (1936). These Conventions tried to remedy the exploitation of indigenous workers and improved their weak position in the labour market.

When this protection focusing on working conditions was considered insufficient by the ILO, Conv 107 was adopted in 1957.[12] Conv 107 takes a broader, already more inclusive and ample approach regarding indigenous rights. Thus, the Convention tries to tackle the problems of indigenous peoples in society in general: it deals with the living and working conditions of indigenous peoples, the promotion and protection of their social, economic and cultural rights, and engages in the protection of their traditional lands. Despite this protection offered, the maintenance of the cultural identity of indigenous peoples is however not considered to be a value *per se*:[13] the final aim of Conv 107 being to progressively integrate indigenous peoples into national society.[14] The Convention itself has rightly been criticized for

---

[10] *Convention (No 29) concerning Forced or Compulsory Labour*, adopted 28 June 1930 by the General Conference of the ILO, 14th session, entered into force 1 May 1932.

[11] *Convention (No 50) (Shelved) Recruiting of Indigenous Workers Convention*, adopted 20 June 1936 by the General Conference of the ILO, 20th session, entered into force 8 September 1939.

[12] Conv 107 was ratified by 27 states and remains in force in the 19 states, which have not yet adopted Conv 169 (as of 31 March 2004): Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia. (In the other countries, Conv 107 was automatically denounced as a result of the ratification of Conv 169.) The list of ratifications is available at: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107; site last visited 31 March 2004.

[13] For instance, Conv 107 uses the expression 'populations' as contrary to the term 'peoples' which is employed by Conv 169. The terminology indicates the different approaches taken by the two Conventions. Conv 107 considers indigenous 'populations' to be non lasting 'phenomena' who are to be integrated into the majority population. Conv 169, however, refers to ethnically distinct peoples with an own cultural identity, which is to be maintained.

[14] See for instance Art 2 Conv 107: 'Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and *their progressive integration into the life of their respective countries.'* [emphasis added by author]

its paternalistic and assimilatory approach[15] and in the 1980s a revision was considered necessary,[16] which in the end lead to the adoption of Conv 169 in 1989.

Despite the insufficient participation of indigenous peoples in the process of revision[17], the provisions of Conv 169 reflect indigenous peoples' interests and aspirations to a significant extent. In contrast to Conv 107, Conv 169 is guided by the idea to recognise indigenous peoples as distinct peoples. Its main philosophy is the respect for indigenous traditions, cultures and ways of life. Consequently, the provisions of Conv 169 offer a broad variety of different rights: they establish the right to participation with a certain notion of self management (Arts 6, 7)[18] and quite far reaching land rights (Arts 13-19). Lastly, Conv 169 even acknowledges the need for special measures in order to address the special cultural characteristics of indigenous peoples (Art 4)[19].

As to the wording of Conv 169, the apparent weak formulations (such as 'as appropriate', 'in appropriate cases' or 'to the extent possible')[20] of some of its articles have been criticized.[21] However, one should underline that such terminology is employed, because Conv 169 has to cover the situations of indigenous peoples around the world, as diverse as they might be; it in no way weakens the normative content of the Convention.[22] As will be argued below in the case of Mexico, governments are bound by the different articles, and their margin of appreciation in the interpretation of Conv 169 remains minimal. It is instead the ILO supervisory organs who – by means of their jurisprudence – are supposed to adapt the various

---

[15] L. Swepston, for example, deplores the 'patronising attitude towards these population groups [indigenous peoples] – referring to them as "less advanced"' of Conv 107. (L. Swepston, 'The Adoption of the Indigenous and Tribal Peoples Convention, 1989 (No 169)' (1990) 5 *Law and Anthropology* 222. See also M. Hinz, 'ILO Convention 107: Legal and Anthropological Remarks' (1990) 5 *Law and Anthropology,* 202ff.

[16] Especially the UN *Study of the Problem of Discrimination against Indigenous Populations* (UN Doc. E/CN.4/Sub.2/1986/7/Add.3) prepared by UN Special Rapporteur Martinez Cobo (1971-86) and the establishment of the UN-Working Group on Indigenous Populations in 1981 as well as the increasing mobilisation of indigenous peoples themselves had lead to this shift of perspective.

[17] Notwithstanding a certain possibility to contribute to the process of revision via workers' and employers' delegations and NGOs, the overall indigenous participation and their possibility to influence the final outcome were limited. (See C. Roy & M. Kaye, *The International Labour Organisation: A Handbook for Minorities and Indigenous Peoples*. London, MRG, Anti Slavery International, 2002, 21. See equally, L. Swepston*,* 'Indigenous Peoples' Voices: Indigenous Participation in ILO Convention No. 169' this volume.)

[18] In this context it has to be noted however that, contrary to the Draft UN-Declaration on the Rights of Indigenous Peoples, Conv 169 does not provide for an explicit right to autonomy: its main focus being the protection by the state. (See in this respect R. Plant, *Land Rights and Minorities*. London, MRG, 1994, 7).

[19] Art 4 Conv 169: '1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and the environment of the peoples concerned.' (See for more details ILO, *Recent Developments Concerning Indigenous and Tribal Peoples.* Geneva, ILO, November 2002, 1.)

[20] See for instance Art 4(1), Art 7(1), Art 14(1) Conv 169 etc.

[21] See for instance R. Barsh, who deplores the 'relatively imprecise' character of Conv 169 (R. Barsh, 'An Advocate's Guide to the Convention on Indigenous and Tribal Peoples' (1990) 15 *Oklahoma City University Law Review* 211).

[22] See L. Swepston, 'Indigenous Peoples' Voices', supra note 17.

provisions of Conv 169 to the specific country situations. In short, Conv 169 offers an ample system of reference and its provisions should constitute a good normative basis to hold states accountable.

The assumption is that due to its comprehensive system of standards, Conv 169 is broadly used as an instrument of reference at the international level. For instance, the standards set up in Conv 169 were used as a basis for the peace negotiations between the Government of Guatemala and the Guatemalan National Revolutionary Union (*Union Revolucionaria Nacional Guatemalteca*, URNG) at the beginning of the 1990s. They equally provided the legal foundation for the negotiations between the Mexican Government and the *Ejército Zapatista de Liberación Nacional* (EZLN) in 1996. In addition, Conv 169 is employed as a yardstick for the distribution of development assistance: especially some European countries such as Denmark and the Netherlands make this use of the Convention.[23]

Furthermore, Conv 169 can be employed as a binding set of standards against which the performance of those states, which have ratified the Convention, can be measured.

Therefore, in the following section, the ILO supervisory mechanisms will be examined and the possibilities of the ILO supervisory organs to monitor the states' compliance with Convs 107 and 169, will be discussed.

2. ILO Monitoring System/ Supervisory Mechanisms

The ILO supervisory mechanism[24] comprises of a state reporting system (Art 22 of the ILO Constitution (ILO Const)) as well as of two contentious procedures: the so called representations (Art 24 ILO Const) and the complaints (Art 26 ILO Const).

2.1. State Reporting System[25]

Actually, most of the ILO supervisory system is based on a regular state reporting mechanism, but equally relies on the dialogue between the ILO bodies and the states, which must be entered into when discussing such reports. According to Art 22 ILO Const, member states have to submit reports on the steps they have undertaken to implement the Conventions to which they are parties.[26] A first report has to be submitted one year after ratification and a second report is due two years

[23] See in this context, M. Tomei & L. Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*. Geneva, ILO, 1996, VIII.

[24] This supervisory mechanism is the same for all ILO Conventions. Only the reporting cycle regarding state reports varies from one to five years. (The interim period depends on the importance of the respective Convention for the ILO.) See also footnote 26.

[25] For further reference regarding the state reporting system see: ILO, *Explanation of the Regular System of Supervision*, available at: http://www.ilo.org/public/english/standards/norm/enforced/supervis/regsys2.htm (site last visited 3 April 2004).

[26] As to Art 22 ILO Const, states should report every year. However, this reporting requirement set forth in 1919 (when the Constitution was adopted) proved to be unfeasible. That's why the Governing Body gradually extended the intervals between the reports in order to reduce the reporting burden placed on governments as well as the workload of the supervisory bodies. Since 1994, under the regime of most Conventions, states have to report every five years. (For further reference, see ibid.)

later. Subsequently, under the regime of Convs 107 and 169, states have to report every five years. Furthermore, the Committee of Experts on the Application of Conventions and Recommendations[27] (Committee of Experts, CEACR) has the competence to request additional reports outside the periodic reporting cycle; this can happen, if there appear to be gross human rights violations in a specific country, or if an employers' or workers' organisation alleges that a state party is not complying with its obligations under a Convention.[28]

Based on the information that is provided by governments in their reports, as well as taken from all other verifiable sources,[29] the Committee of Experts analyses whether the situation in a specific state is in conformity with ILO standards. The Committee then draws its conclusions on a country by country basis; its comments take the form of observations which are published in annual reports; or they are framed in direct requests and are addressed directly to the governments concerned.[30]

What's more, on the basis of the reports issued by the Committee of Experts, another body, the Conference Committee on the Application of Conventions and Recommendations[31] (Applications Committee) selects some countries for a further and deeper discussion of their specific situation. Here, the representatives of the respective countries are invited to appear in front of the Applications Committee to talk about their country situations.[32] The conclusions of the Applications Committee are put into a report,[33] which is subsequently submitted to the International Labour Conference where it is discussed in plenary session before it is adopted.

Consequently in this manner, the state reporting system is likely to promote and further indigenous interests in various respects. On the one hand, the monitoring activity exercised by the ILO organs can help indigenous peoples to strengthen their position against governments that are reluctant to recognise their claims. (Especially

---

[27] The Committee of Experts is composed of 20 independent members who are appointed by the Governing Body on the suggestion of the Director General for a period of three years (which is usually renewed).

[28] These 'comments' are regularly submitted in the form of a written communication and can come from local, national or international organisations. (See for further reference, C. Roy & M. Kaye, *ILO Handbook for Minorities*, supra note 17, 25 and 27.)

[29] Consequently, indigenous peoples have different possibilities to present information to the Committee of Experts. They can either ask an employers' or a workers' organisation to inform the Committee about specific problems. (Employers' and workers' organisations can submit their own comments to the governmental reports. For further reference see the ILO *Explanation of the Regular System of Supervision*, supra note 25.) In addition, indigenous peoples can directly approach the Committee, which is competent to consider any information based on concrete evidence such as laws, regulations or judicial decisions.

[30] See also L. Swepston, 'Indigenous Peoples' Voices', supra note 17.

[31] In fact, also the Applications Committee is tripartite in its structure: governments, employers' and workers' groups are represented.

[32] Most of the time, it is the countries having major problems, which are examined closely. Accordingly, during the violent uprising in Chiapas, the Mexican Government was questioned by the Applications Committee in June 1995. (See C. Roy, M. Kaye, *ILO Handbook for Minorities*, supra note 17, 38).

[33] This report consists of two parts: part one is a general report, while part two discusses specific country situations in detail.

the political pressure which is put on states whose representatives are asked to appear in front of the Applications Committee is considerable!) On the other hand, because of the scrutiny exercised by ILO bodies, states have fewer possibilities to violate indigenous rights.

Furthermore, the state reporting system is useful to governments willing to consider indigenous interests and supports them to better realise indigenous rights. As the ILO Committees tend to indicate quite clearly to governments, what specific action is needed to comply with a Convention, the governments can draw on the information received by the ILO supervisory bodies. They can resolve the issues indicated by the Committee of Experts in its reports or benefit from the dialogue with the Applications Committee. The technical co-operation programmes, which are offered by the ILO, further enhance these possibilities.

2.2. Complaints Procedures

In addition, complaint avenues are available to enforce the rights, which are guaranteed in the ILO Conventions: a failure of a government to comply with a Convention it has ratified can be alleged either via a representation or by means of a complaints procedure.

As regards *representations* (Art 24 ILO Const), they can be submitted either by a workers' or by an employers' organisation.[34] The claim has to be brought to the International Labour Office. The Director General acknowledges the receipt of the representation, informs the respective government about it and then submits it to the Governing Body.[35] If the Governing Body considers the representation receivable and formally properly submitted, a three member Committee[36] (tripartite Committee) is set up to examine the matter. This tripartite Committee then produces a report, on the basis of the information received,[37] which is discussed and adopted by the Governing Body in its next session. (The government concerned is invited to attend this discussion, which is held privately.[38] Afterwards, the Governing Body decides whether it is going to publish the representation and any government reply. (Most representations are published.)

[34] See Arts 24 and 25 ILO Const, as well as the *Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organisation*, as revised by the Governing Body at its 212th Session (March 1980) (Standing Orders). Below, the representation procedure will be discussed in detail with the Huichol Case.

[35] See Arts 1 and 2 (1) of the Standing Orders.

[36] Art 3 of the Standing Orders. The three members of the tripartite Committee are chosen by the Governing Body from within its members and include a representative of the government, one of the workers' and one of the employers' group.

[37] In addition to the information it received from the complaining group, the tripartite Committee invites the government to submit its information according to Art 4 (1a and c) of the Standing Orders. The Committee can also visit the respective country on the request of the government concerned.

[38] Art 7 of the Standing Orders.

A *complaint* (Art 26 ILO Const)[39] may be submitted by another state on the application of a Convention which both states concerned have ratified. It may also be initiated by the Governing Body itself, on receipt of a complaint from an employer or trade union delegate to the Conference or on its own motion.[40] Once the complaint is received, the Governing Body can either communicate with the government concerned or immediately appoint a Commission of Inquiry to investigate the matter. (Trade Unions and NGOs can directly submit information to this Commission, a fact, which could be quite useful to indigenous peoples). The findings of the Commission are then sent to the Governing Body and are published.

If a state does not comply with the recommendations it has accepted[41] in the complaints procedure, the Governing Body can urge the International Labour Conference to take the necessary action to secure compliance: possible sanctions would be the suspension of ILO membership or the withdrawal of technical assistance. (The representation procedure on the contrary mainly works with the political pressure to publicise potential state violations.)

Consequently, and especially because of the sanctions it provides for, the complaints procedure could be a powerful tool to protect indigenous peoples' interests against states. Up until now however, the possibilities offered by the complaints procedure to defend indigenous claims have never been explored. Whereas ten representations have been filed with respect to Conv 169, no complaint has ever proceeded further.[42] (The rare use of the procedure could *inter alia*[43] be explained by the fact that indigenous peoples have only limited possibilities to influence and lobby the entities [states and ILO organs], which are competent to bring in complaints. Indigenous peoples have more opportunities to approach the institutions competent to file representations, which are workers' or employers' organisations situated inside a country.)

In fact, the considerable number of representations, which have been lodged recently,[44] are an indication that indigenous peoples and their legal representatives are just starting to realise the potential, the ILO complaint mechanisms propose in defence of their interests. Much is to be expected in the forthcoming years.

---

[39] For further information concerning the complaints procedure see: ILO, *Article 26 Complaints Procedure*, available at http://www-ilo- mirror.cornell.edu/public/english/ standards/norm/enforced/complnt/index.htm (site last visited 3 April 2004).

[40] For instance, if a government does not comply with the conclusions and recommendations of the tripartite Committee in the representation procedure, the Governing Body may equally initiate a complaint. See L. Swepston, 'Indigenous Peoples Voices', supra note 17, 56.

[41] The government concerned can also challenge the recommendations; in that case, the respective case will be brought before the International Court of Justice.

[42] Information as of November 2002; see ILO, *Developments Concerning Indigenous Peoples*, supra note 19, 4.

[43] The complaints procedure has been used very seldom in general. Until November 1998, only 26 complaints had been made under Art 26 ILO Const. (ILO, *Use of Complaints Procedure, in Practice*; available at: http://www-ilo-mirror.cornell.edu/public/english/standards /norm/enforced/complnt /a26_use.htm (site last visited 4 April 2004.)

[44] For a deeper discussion of the jurisprudence of the tripartite Committee, see C. Roy, M. Kaye, *ILO Handbook for Minorities*, supra note 17, 38.

3. Summary

More generally, one can conclude that the different means, the ILO organs have to monitor a state's performance, should complement one another. Whereas the state reporting system scrutinises a state's compliance with ILO treaties regularly and can therefore be employed especially to tackle structural problems and difficulties on a long term basis, the complaint avenues can also be utilised to draw attention to serious cases of non compliance in a more punctual and specific manner. As a result, both options should be forceful tools to pressurise a government to bring national law and practice into greater conformity with ILO standards.

However, how does this work in practice?

After this theoretical survey of the different supervisory mechanisms, the '*mise en pratique*' – the practical application of the ILO norms and standards – will now be discussed with the case study of the Huichol communities in Mexico. What is the effective and concrete protection offered by the ILO supervisory organs?

C. Practical Application: the 'Case' of the Huichol Communities of Mexico

1. Overview

1.1. Mexican Legal Framework[45]

It is not by accident that the state of this case study is Mexico: a country, whose politics with regard to indigenous peoples can be considered quite ambiguous, janus-faced and ambivalent. Approximately 10 percent of the Mexican population is indigenous.[46] However, it took the Mexican authorities until 1991 to admit the multicultural character of the Mexican State in Art 4[47] of the Constitution (Mexican Constitution, mex Const). Before this constitutional reform of Art 4, Mexico was – according to its Constitution – a 'mono-cultural ethno-national state', without any legal recognition of the indigenous peoples living there. However, even Art 4

[45] The Mexican legal framework is described as it was at the time, when the representation was decided, in the 1990s. The Constitutional Reform of 2001 (enacted under President Fox), which brought some changes to the Mexican Constitution and to its provisions concerning indigenous peoples, is therefore not taken into consideration. (Anyhow, the provisions concerning land rights remain largely unchanged also after the reform.)

[46] Source: Instituto Indígenista Interamericano, *Indicadores Socioeconómicos de los Pueblos Indígenas de México*. México D.F., I.N.I., Dirección de Investigación y Promoción Cultural. Subdirección de Investigación, 1993.

[47] Art 4 mex Const: 'La Nación Mexicana tiene una composición pluri-cultural sustentada originalmente en sus pueblos indígenas. La ley protegerá y promoverá el desarrollo de sus lenguas, culturas, usos, costumbres, recursos y formas especificas de organización social, y garantizará a sus integrantes el efectivo acceso a la jurisdicción del Estado. En los juicios y procedimientos agrarios en que aquellos sean parte, se tomarán en cuenta sus prácticas y costumbres jurídicas en los términos que establezca la ley'.

remained an unfulfilled promise. Until its derogation by Art 2 in 2001,[48] it had never effectively protected the rights of the Mexican indigenous peoples: laws to regulate Art 4 had never been passed by the Mexican authorities.

Equally, the Mexican provisions of protection of land rights talk more about protection than they actually grant in practice. The Mexican Constitution establishes in Art 27 VII[49] that the lands of indigenous 'groups' (sic!) have to be protected 'by law'.[50] Such a regulatory law has however never been passed,[51] and a direct protection of indigenous lands in domestic norms has never taken place due to the missing regulation of the relevant provisions.

Consequently, the most important provisions concerning the land rights of indigenous peoples are to be found in agrarian laws and regulations. In fact, in Mexico, under the agrarian reform of 1917 (and subsequent reforms), lands were formally recognized and collectively titled to communities still in possession of their lands (the so called '*Comunidades*'); lands were also allocated to groups of (landless) peasants applying for them ('*Ejidos*'). Most indigenous communities are peasant communities in Mexico: their lands are recognized under the agrarian reforms with different, 'agrarian label'.[52]

As to international treaties of protection, both Convs 107 and 169 have been ratified by Mexico.[53] They are incorporated into the Mexican legal system by Art 133 mex Const[54]. In the Mexican legal doctrine, Conv 169 is considered to be self-executing and directly applicable Mexican law.[55] However, the rights granted in the

---

[48] Since the constitutional reform of 2001, the rights of indigenous peoples are not protected under Art 4, but under Art 2 mex Const.

[49] Art 27 mex Const is generally dealing with the rights on lands and natural resources in Mexico.

[50] Art 27 VII mex Const: 'La ley protegerá la integridad de las tierras de los grupos indígenas.'

[51] The Agrarian Act of 1992 (which is regulating and detailing the other paragraphs of Art 27 mex Const) refers in its Art 106, when it comes to the protection of indigenous lands, back to a(nother) regulatory law of Arts 4 and 27 VII mex Const (which has never been passed). (A kind of circle, which turns round the protection of indigenous lands, but forgets to protect them in the middle of the ring). M. Gómez – referring to the missing regulatory laws – talks about a 'vacío de protección de los grupos indígenas', M. Gómez, 'Derecho Indígena', in M. Gomez (ed.)*, Derecho Indígena: Seminario Internacional realizado en el Auditorio 'Fray Bernardino de Sahagún' del Museo Nacional de Antropología e Historia en la Ciudad de México del 26 al 30 de Mayo de 1997,* México D.F., I.N.I., AMNU, 1997, 276.

[52] It is important to note however that the Mexican agrarian laws do not recognise the lands of indigenous peoples *per se*. Lands are recognized per community and a community has to include a majority of persons of indigenous origin in order to have their lands protected. (Decisions are taken by majority rule in the communal assembly.) If this is not the case and the indigenous peoples represent a minority in the respective community – as in the case of the Huicholes – their lands will not receive adequate protection.

[53] Conv 107 entered into force the 1 June 1960 in Mexico and was replaced by Conv 169 the 5 September 1991.

[54] Art 133 mex Const: 'Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, […] serán la Ley Suprema de toda la Unión.' Regarding the incorporation of Conv 169 see also A. Arcos, *Las velas Tateikietari … invocando la lluvia y la lucha de un pueblo.* México D.F., Tesis de Maestría UAM, 1999*,* 78.)

[55] See for instance Olguín Martínez: 'el Convenio número 169 es auto aplicativo y auto ejecutivo'. (G. Olguín Martínez, *Mecanismos de Control de la OIT*, supra note 9, 26). A study realized by the Agrarian Attorney General's Office *(Procuraduría Agraria)* analysing the scope of Conv 169 in Mexico

Convs 107 and 169 still remain to be realised in Mexico. Their implementation is missing; regulatory laws that would concretise them have never been passed.

In short, as one is going to see subsequently in the case of the Huicholes, the policy of the Mexican State with respect to indigenous peoples is characterised by big phrases and words, which are so giant and abstract that indigenous peoples cannot use them to claim their rights. One could characterise the Mexican policy with regard to indigenous peoples as '*paraître*' rather than '*être*': it seems to be more than it actually is. Mexican authorities talk more about protection ('lipservice') than they actually grant.

1.2. Mexico and Conventions No 107 and 169

In this sense, the extensive provisions of Convs 107 and 169 (especially those of Conv 169) would provide a good framework to hold Mexico responsible. The '*paraître*-policy' of the Mexican State (adopting laws and ratifying Convs 107 and 169 without implementing them) presents a perfect opportunity for international supervision. Mexico has agreed to common standards ('*paraître*' part), now it can be held accountable for the missing implementation (the '*non-être*').

This is what pushed the Huichol communities of Jalisco to initiate the 'Huichol Case', which is one of the representations submitted under Art 24 ILO Const. More precisely, in January 1997, the National Trade Union of Education Workers ('*Sindicato nacional de trabajadores de la educación*, *Radio Educación*', SNTE, Radio Education) brought a representation before the ILO bodies on behalf of the *Huicholes Tateikietari of Jalisco* (Huicholes), alleging violations of their rights, especially their land rights, guaranteed under Conv 169. The facts of the case are as follows.

2. Facts of the Case : 'Story' of the Huicholes[56]

In the 1960s (1963), lands (22.000 ha)[57] of the Huichol village San Andrés Cohamiata were fusioned with and integrated into 3 mestiss (*mestizo*) communities of the region.[58] The 2000 Huicholes living on these lands since time immemorial were by this act separated from their mother community San Andrés, consequently establishing them as minorities in their (new) communities. Mexican law holds that lands are titled per community as a whole. The minority status of the Huicholes leads to the situation that their lands have never officially been recognized as their property

---

(Study analysing the Scope of Conv 169) concludes: '[...] The Convention forms part of Mexican positive law and may be invoked as grounds for a claim brought before the national authorities.' (The Mexican Government referred to the study in the Huichol Case (*National Trade Union of Education Workers against México*, supra note 7, para 23.)

[56] The facts are taken from the communication brought in by the Huicholes according to Art 24 ILO Const. (See H. Bartolomei de la Cruz, *Reclamación* [Representation under Art 24 ILO Const] *de los Huicholes*, 1993).

[57] See *National Trade Union of Education Workers against México*, 1998, supra note 7, para 12.

[58] San Andrés itself had achieved an incomplete titling and recognition of its lands (75.000 ha) in 1965. (See ibid., para 14).

and have never been titled as their (indigenous) lands, but have only been documented as part of the territory of the mestiss communities. The 2000 Huicholes, as part of the mestiss villages, lack any (exclusive) official title over their lands. Consequently, the Huicholes in question are subject to the decisions taken by the – mestiss – majority of the community where the destiny of their communal lands is concerned; some even had to physically leave their lands that were handed over to mestiss settlers. Partly due to this, their right to cultural identity and integrity is gravely violated, causing the 2000 Huicholes to live in worsening conditions, through violations of individual and collective rights.

A part of the segregated Huicholes, the Huichol community of Tierra Blanca, tried to proceed before the Mexican Agrarian Courts in the 1990s to achieve an official recognition of their lands. However, the Mexican authorities refused to issue a communal title to the lands of Tierra Blanca with the argument that the respective lands were already titled to another community (San Juán Peyotán, one of the mestiss ones). The communal status and the official recognition of their lands were therefore denied to the community of Tierra Blanca in 1996.[59]

What protection is offered by Convs 107 and 169 against these interferences with the lands, the Huichol communities have inhabited since time immemorial?

3. Normative Potential of Conventions No 107 and 169

The most relevant provision in this context is Art 14 Conv 169[60], which is protecting the rights of ownership and possession on lands traditionally occupied by indigenous communities. However, the difficulty to be taken into consideration for the possible protection of the Huichol lands under Art 14 is the fact that some Huicholes physically lost their lands already in the sixties, before the entry into force of Conv 169 in 1991. Consequently, different lines of argument are possible and the notion of traditional occupancy has to be examined more closely.

---

[59] The refusal of the Mexican Agrarian Court to title the lands of Tierra Blanca was due to the fact that according to Art 164 of the Agrarian Act of 1992, lands that already belong to third persons cannot be titled. (See A. Arcos, *Las velas Tateikietari,* supra note 54, 103). (And the lands of Tierra Blanca had in 1963 – illegally, ignoring the traditional occupancy rights of Tierra Blanca – been joint and titled as lands of the mestiss villages).

As to Mexican laws, this refusal to title the lands of Tierra Blanca can nevertheless be regarded as pretext. According to a line of jurisprudence in Mexico, wrongly titled lands can be changed, if there is a legal motive for it (*Jurisprudencia 132/ explanatory note/ interpretation of Art 252 of the Agrarian Act*). Applied to this case, the communal title, which the mestiss villages – wrongly – gained in the 1960s, could be rectified as it violated traditional property rights of the Huichol peoples living there. The refusal of the Mexican authorities to grant communal status to Tierra Blanca can therefore be regarded as missing will of the Mexican authorities.

[60] Art 14(1) Conv 169: 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities […]'.

3.1. Land Rights: Full Ownership

In fact, Art 14(1) Conv 169 protects the property rights of indigenous peoples on lands, which 'they traditionally occupy'. Therefore, according to Art 14(1), the Huichol communities have full rights of ownership on lands they are still settling on.

Furthermore, it can also be argued that the Huicholes have their (full) ownership rights on lands they already had to give up. In fact, even if the verb 'occupy' seems to presuppose an effective and actual possession, some authors[61] also subsume recently lost territories within the scope of protection of Art 14(1) 'if a sufficient link with the present can be established'. Consequently, the Huicholes, who still have a cultural link to all of their lands, (mainly because of their spiritual sites and religious places) should enjoy their full property rights that are protected under Art 14(1) even on lands they previously lost in the 1960s.

Another line of reasoning would be to apply Conv 107, which was valid at the moment of expropriation: Conv 107 was ratified by Mexico in 1960. In fact, the land rights granted and protected in Art 11 Conv 107 are comparable to those of Conv 169[62] and it could be argued that for the alleged expropriations of lands that mainly occurred in the 1960s, the protection offered by Conv 107 must still be valid.[63]

A condition for the applicability of Conv 107 is of course that the violations of the land rights of the Huicholes have not fallen under the statute of limitations. However, the Huichol communities (especially Tierra Blanca) had already tried to claim their rights before Mexican courts at the beginning of the 1990s and judicial proceedings that are pursued stop the expiration of the time limit. It can therefore be argued that in any case, the ownership rights under Conv 107 can still be claimed and therefore give the communities at least the right to demand adequate compensation.

Accordingly, as to the protection offered by Convs 107 and 169, it is the Mexican State who committed the failure not to title, or to issue a 'wrong/double' title to the mestiss communities in the 1960s. Depending on the line of argument, the land rights of the Huichol communities are protected under Art 14(1) Conv 169 (or under Art 11 Conv 107). If third parties got other titles in the meantime, the Huicholes would at least have the right to compensation (at best in form of assignation of other lands) for violation of their property rights.

---

[61] See for example J. Anaya, *Indigenous Peoples in International Law*. New York, Oxford, Oxford University Press, 1996, 106; M. Tomei, L. Swepston, *Guide to ILO Convention No 169*, supra note 23, 18.

[62] Art 11 Conv 107 is *de facto* identical with the protection offered by Art 14(1) Conv 169 with respect to full ownership rights: 'The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.'

[63] Also in the representation *Radical Trade Union of Metal and Associated Workers against Mexico* (1998) (GB.273/15/6), the Committee of Experts had found provisions of Conv 107 applicable (*Report of the Committee set up to examine the representation alleging non-observance by México of the Indigenous and tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers against Mexico* [GB.276/16/3], para 40). In this case, a forced relocation of 5000 indigenous Chinantec families had been proceeded in the State of Oaxaca 1972 because of the construction of a dam.

3.2. Land Rights: Partial Ownership

A third line of argument (which is used by the tripartite Committee) is to support at least partial rights of ownership of the Huichol communities by asserting their rights on land, not exclusively occupied by them. The second part of Art 14(1) Conv 169 opens this possibility by stating: 'In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities'. The Huichol communities still have access to the totality of their lands, which they need to survive and which are clearly linked to their culture. Therefore, as a minimum right, these lands fall within the ambit of protection of the partial rights of ownership under Art 14(1).

It is important to note in this context that these rights of partial ownership are subjective property rights (comparable to *ususfructus* for example).[64] State measures, as indicated by the second sentence of Art 14(1) ('measures shall be taken'), clarify and support the rights of partial ownership, but in no way limit the subjective rights to purely objective state duties.

3.3. Related Positive State Obligations

The land rights (both of full and of partial ownership) of the Huichol communities are further strengthened by Art 14(2) Conv 169 which poses the duty on governments to 'take steps as necessary […] to guarantee effective protection' of the lands in question. It is a duty of result: the obligation to guarantee an outcome, forced onto states by Art 14(2). In other words, a state has to undertake all the necessary actions to allow the communities to enjoy their land rights. In the Huichol Case this would include the titling of lands not claimed by third persons, as well as the recognition of partial property rights on territories to which the communities traditionally have had access (in form of a servitude for instance). It also requires the demarcation of the lands in question. If the lands are already titled (to the mestiss communities) 'effective' protection should mean compensation.[65]

Additional protection for the land rights of the Huicholes can be reached with reference to Art 14(3) Conv 169, obliging states to establish 'adequate procedures within the national legal system to resolve land claims by the peoples concerned'. Independently of whether the Huicholes lost their lands in the past or whether they are still in possession of them, their claims must always be treated in an adequate way, by competent bodies, and in a fair procedure. Thus, the notion of 'adequateness'

---

[64] The plural of the term 'rights of ownership and possession' in Art 14(1) Conv 169 clearly indicates that also partial rights on land are property rights. See C. Krause & G. Alfredsson: 'The reference is to "rights" in plural, thus implying that the property rights may be complete or partial' (C. Krause & G. Alfredsson, 'Article 17' in: G. Alfredsson & A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement.* The Hague, Boston, London, Nijhoff Publishers, 1999, 374.

[65] Compensation can, in this case, be viewed as a minimum right and last 'shadow' of the property right. As K. De Feyter states it, 'Compensation is the bottom-line of the recognition of indigenous peoples' rights in international law.' (K. de Feyter, *World Development Law: Sharing Responsibility for Development.* Antwerpen, Groningen, Oxford, Intersentia, 2001, 156). 'Effective protection' means therefore also compensation in case of loss by the fault of the state.

referred to in Art 14(3) introduces a quality standard or yardstick to judge the action taken by the Mexican State. The mere existence of a procedure is therefore, as to the wording of Conv 169, not enough to comply with Art 14(3).

Consequently, according to ILO standards, the Huichol communities would have at least the right to demand that their land claims are adequately dealt with. The corresponding obligation of the Mexican State would be to examine the foundation of the actual land claims of the communities (as the one of Tierra Blanca). It would include an examination of the titles issued to the mestiss communities in 1963 in view of the fact, whether they violated rights of traditional occupancy of the Huichol communities. (If they did, Mexican laws foresee and establish a possible reconsideration of the titles issued.)

3.4. Résumé

In short, Convs 107 and 169 contain a huge potential of standards and norms to measure the action of the Mexican State against.[66] The land rights of the Huichol communities – either of partial or of full ownership – are protected under the ILO Conventions as subjective rights of the communities, and enforceable before courts.[67] They are group entitlements rather than only state obligations, and give the communities a tool to engage in proceedings against the Mexican State.

The granting of titles and lands to third parties in the 1960s and the refusal to title the communal lands in the 1990s constitute therefore violations of the rights of the Huichol communities. As to the present analysis, the Mexican State has clearly violated the land rights of the Huichol communities protected under Art 14 and Art 11 of Convs 169 and 107 respectively.

However it still has to be asked, how does the tripartite Committee deal with the claim of the Huichol communities in the light of these standards?

4. Actual Standard of Protection of Convention No 169 in the Interpretation by the Tripartite Committee[68]

In reference to the opinion brought forward in this article, the tripartite Committee uses the strong text of Conv 169 in a rather disappointing way to protect the lands of the Huichol communities.

---

[66] It is therefore, especially where the provisions regarding land rights are concerned, that Conv 169 loses its 'promotional character', which has been criticized for instance by L. Swepston, 'Adoption of the Indigenous Peoples Convention', supra note 15, 227.

[67] As to the direct applicability of Conv 169 in Mexico, see the *Study analysing the Scope of Conv 169*, supra note 55.

[68] See *National Trade Union of Education Workers against México*, 1998, supra note 7.

4.1. Direct Protection of Indigenous Lands under Art 14 Conv 169

a. Protection under Art 14(1)

Dealing with the representation of the Huichol communities, the tripartite Committee finds Art 14(1) applicable,[69] but it does not use it with its whole force. The Committee views Arts 13 and 14 of Conv 169 exclusively in the light of Art 2(1)[70], which contains state obligations rather than subjective rights.[71] The Committee thereby considers the strong articles of Conv 169 concerning property rights (Arts 13, 14) merely in the light of the general policy or spirit of Conv 169, and takes the strength of the property *rights* out of Art 14.

In addition, the Committee explicitly states that it does not intend to enter into the consideration, whether the demands of the Huicholes as individual claims and disputes are justified. The Committee does 'not claim to issue an opinion on the resolution of individual land disputes under the Convention'[72] and thereby falls short to pronounce itself about the legal status of the lands of the Huichol communities in question.

Instead of examining the specific land claims brought forward by the Huichol communities, the Committee refers only to a general governmental obligation to take measures to safeguard the rights of partial ownership of the communities. 'Pursuant to the second sentence of paragraph 1 of Article 14, the Government would be obliged to take measures, in appropriate cases, to safeguard the right of the peoples concerned to use lands not exclusively occupied by them.'[73] This is not the language of individual rights. The weak standpoint taken by the Committee is further underlined by its formulation used to frame the corresponding obligation of the Mexican Government. As to the Committee, the Mexican Government 'would be obliged'[74] to take measures of protection concerning the lands of the Huichol

[69] The Committee admits that the Huicholes have justified claims, stating that 'it is obvious that they have exercised rights over the land in question either through possession and use of the land which is the subject of the representation or by holding titles dating back to the colonial era' (Ibid., para 35). With reference to the titles issued to the mestiss communities, the tripartite Committee finds that the Huichol communities have not the exclusive use of the lands, but have ' traditionally had access [to them]'. The second part of Art 14(1), which is granting partial rights of ownership, is therefore, as to the Committee, applicable. (Ibid., para 39).

[70] Art 2(1) Conv 169 stipulates the duty of governments to develop co-ordinated policies to protect the interests of the peoples in question.

[71] 'The Committee considers that the provisions of the Convention dealing with land, and specifically Articles 13 and 14 [...] must be understood in the context of the general policy set forth in Article 2(1) of the Convention, namely that governments shall have the responsibility for developing, […] coordinated and systematic action to protect the rights of these peoples [...].' (*National Trade Union of Education Workers against México*, 1998, supra note 7, para 34).

[72] Ibid., para 32.

[73] Ibid., para 39.

[74] Ibid.

communities. It is the second conditional ('would be'), which is employed, the weakest time element and modus of verb, which linguistically exists.[75]

In short, the Committee interprets Art 14(1) Conv 169 in a way as to transform the subjective rights contained in it (the land rights of the communities) into general formulated objective governmental duties.

b. Adequateness of Procedures (Art 14(3))

Similar powerless statements can be found when the tripartite Committee examines the adequacy of Mexican procedures to resolve the land claims of the communities under Art 14(3) Conv 169. In paragraph 41 of its conclusions, the Committee refers to and deals with these procedures. However, the Committee explicitly states that it does not intend to enter into the consideration whether they are adequate[76] and refuses any qualification as to whether the Mexican procedures deal properly with the claims of the communities. Even worse for this case, reading between the lines and implicitly stated, the Committee accepts the Mexican procedures.[77] This is a statement, which – as to the facts of the case (the Mexican authorities had denied Tierra Blanca their communal title in spite of the fact that the mestiss villages had got their titles illegally in the 1960s) – does not seem to reflect reality.

Once again, the Committee does not use the provisions of Conv 169 in their full force. The possible yardstick to measure governmental action, explicitly laid down in the text of Art 14(3) in the necessary 'adequateness' of procedures, is openly ignored by the Committee.

Accordingly, the final observations of the tripartite Committee with respect to the land rights of the communities are rather weak. In its recommendations (dealing with the alleged violations of Art 14 Conv 169), the Committee states that the Government shall take measures to, 'in appropriate cases'[78], safeguard the land rights of the Huicholes in areas where they traditionally had access.

The Committee thereby misuses the formulation, which – as we explained above – was introduced to adapt Art 14 to the variety of different situations of indigenous peoples world wide, and in doing so leaves a wide margin of appreciation to the Mexican Government to decide when it 'is appropriate' to safeguard the land rights of the Huicholes. Thus, the Committee does not use Art 14 in a way as to find a necessary assignation of new lands to the Huichol communities, for example under the title of compensation for unduely lost lands. The subjective individual rights of

---

[75] Present time and formulations like the government 'is' obliged or 'shall' take measures would be much more appropriate to formulate imperative state duties

[76] 'The Committee notes that there are procedures in place to resolve land disputes, and that while it is not the intention of this Committee to determine whether or not these procedures are adequate with respect to individual claims, it perceives that they are accessible to indigenous communities and that, with respect to this case in particular, it appears that such land claims are being examined in depth.' (*National Trade Union of Education Workers against México,* 1998, supra note 7, para 41).

[77] The Committee gives reason to the Mexican State by declaring that the respective procedures established by the government can be reached and taken by the Huicholes in question. (See ibid.).

[78] Ibid., para 45.

the communities to their lands as contained in Art 14 Conv 169 are *expressis verbis* not examined by the Committee.

4.2. Protection of Indigenous Lands via Arts 4 and 19 of Conv 169

However, some protection of the lands of the Huicholes (under due omission of their 'rights') is reached with reference to the necessary protection of the cultural identity of indigenous peoples, which is equally contained in Conv 169. The Committee finds in its observations that the Huicholes, whose lands are not recognized, suffer grave human rights violations[79] and asks the Mexican Government to adopt measures to remedy this situation. In the Committee's eyes, these measures 'might include the adoption of special measures'[80] under Art 4 Conv 169 'to safeguard the existence of these peoples as such'[81]. In this context, the Committee equally 'would like to draw [the] attention [of the Government] to Art 19 of the Convention [No 169]'[82]. It suggests the Mexican Government to assign lands in agrarian programmes under Art 19 Conv 169.[83]

The Committee therefore argues land grants to the Huicholes via the 'deviation' of Arts 4 and 19 of Conv 169. These provisions however, once again only establish general state duties and no subjective rights and entitlements as the possible assignation of lands will not be a form of compensation for violations of the subjective land rights of the Huichol communities under Art 14. In the interpretation of the Committee, the allocations of land are necessary to stop other human rights violations (like cultural identity) of the Huichol communities.

Finding a necessary land assignation under Art 14 would have the advantage that the Huicholes could claim an exact amount of property (to be defined according to the area lost) under the title of compensation. Since the Committee finds a governmental duty to allocate lands to the Huichol communities under Arts 4 and 19, the governmental margin of appreciation will be much bigger in defining the amount of the area to be allocated. The origin of the land-claim sees no subjective entitlement from the Huicholes but envisages lots of 'good will' on the part of the Mexican Government.

5. Summary

As one can see from the above illustration, the decision of the tripartite Committee in the Huichol Case is disappointing in the sense that it does not utilise the normative potential which is contained in Conv 169.

---

[79] '[T]he Committee would like to express its concern about the allegations of the organisation which made the representation to the effect that the Huicholes seeking the reintegration of the land at issue live in conditions which "violate the most elementary individual and collective rights" since, being a minority compared to the other inhabitants, they have not been recognized in land censuses with the result that they have no legal rights to the land which they occupy'. (Ibid., para 42).

[80] Ibid.

[81] Ibid.

[82] Ibid., para 43.

[83] See ibid.

One of the main strengths of Conv 169 is the fact that its Art 14 confers subjective property rights to the indigenous communities on lands they traditionally occupy. Art 14 Conv 169 specifically gives the respective communities a powerful tool and entitlement to require state action. According to the text of Conv 169, the Huicholes could claim titling, demarcation or – in the worst case – compensation. This would be especially necessary in this case, where the Mexican authorities have proved that they are not willing to conform to indigenous interests.

By interpreting Art 14(1) increasingly in the sense of state obligations, and in the light of general policy rather than as an instrument conferring subjective rights, the Committee again has given ample possibility to the Mexican authorities to deal with the rights of the Huicholes more or less at their guise. The Committee has not taken the possibility to fix with its jurisprudence the standards and the normative potential offered in Conv 169. (It could have defined for example what exactly 'adequate' procedures (Art 14(3)) means.). On the contrary, the Committee has interpreted the Convention in a way as to dilute its normative content.

One could say, the Committee has supported the Mexican State in its policy of showing, more than doing ('*paraître'* rather than '*être'*), with this decision on the Huichol Case. Once again, now it is up to the government to either provide the Huicholes with additional lands or not. Conv 169 (particularly Art 14) offers some 'tools' in the form of land rights to the Huichol communities; however, the decision of the tripartite Committee has to some extent taken this power out of their hands. It appears again that the Huichol communities are at the mercy of the Mexican Government to, 'in appropriate cases' undertake measures to safeguard their land rights.

D. Conclusion

The Huichol Case leaves the analyst with some unease. However, does the rather disappointing way in which the tripartite Committee applies the strong provisions of Convs 107 and 169, minder the overall importance of the ILO supervisory system? Does the interpretation of the tripartite Committee signify – drastically stated – a powerlessness of the ILO system, which leaves indigenous peoples without protection?

It appears unjustified to argue such suggestions. Firstly, one should not forget the general importance and significance of the Conventions – as standard setting instruments at international level. (As mentioned above, Conv 169 especially is used as a document of reference for peace negotiations, or as a provider of guidelines for development co-operation.)

Furthermore, the impact of Conv 169 is considerable in concrete cases ('representations'), and reaches further than the findings of the tripartite Committee would suggest. In fact, it is not only the jurisprudence of the Committee (its textual interpretation of legal norms) that makes the ILO such a prominent and important protector of indigenous rights. It is rather the ILO system of supervision in its

entirety, which entails a high degree of state compliance with ILO treaties. In other words, even (from the legal point of view) rather weak interpretations of Conv 169 can be useful, if a reasonable 'follow up' is provided.

More precisely, the state reporting system complements the ILO complaint avenues because it installs the possibility to monitor the implementation of the findings of the tripartite Committee (as well as of the Commission of Inquiry).

In the aftermath of the Huichol Case for example, the Committee of Experts asked Mexico in subsequent state reports very directly about the action it had undertaken to comply with the requests of the tripartite Committee with respect to the situation of the Huichol communities.[84] In the observations which were published in 1999[85] and 2000[86], the Committee of Experts requested the Mexican Government to name the exact measures undertaken to safeguard the rights of the Huichol communities. Mention of the Huichol Case is made equally in the observations published in 2002[87]. In short, the Committee of Experts ensures the follow up to the findings of the tripartite Committee in permanent scrutiny.[88]

In addition, the technical co-operation offered by the ILO provides a positive incentive, and supports the respective state to comply with ILO standards.[89] The ILO therefore, does not limit itself to require state action, it also assists the particular state in a positive way to meet its standards. In this sense, the Committee of Experts suggests in its observations of 2000 that 'the Government could request the technical assistance of the International Labour Office in establishing a dialogue, and in examining in depth the problems being raised by indigenous communities, and by workers' organisations, in the application of the Convention.'[90]

Summing up, it is by means of this complementary character of the ILO supervisory system (a 'follow up' and a backing of the complaint avenues are provided by the state reporting system and the technical co-operation programmes)

---

[84] In fact, the Mexican State had to deliver additional reports every one to two years, instead of every five years, as would have been required under the periodic reporting system. (CEACR, *Individual Observation concerning Convention No 169, Indigenous and Tribal Peoples*. 1989 Mexico (ratification: 1990), Published: 1999, 2000 and 2002 respectively.)

[85] The Committee of Experts even uses the wording of the tripartite Committee: '8. [T]he committee requests […] to inform it of measures taken or contemplated to provide redress for the situation of the Huicholes, who represent a minority in the area in question and have not been recognized in any agrarian census, measures which might include the adoption of special measure to safeguard the existence of these peoples as such and their way of life to the extent that they themselves wish to preserve it; […]' (CEACR, *Observations of 1999*, supra note 84, para 8).

[86] CEACR, *Observations of 2000*, supra note 84, para 2.

[87] CEACR, *Observations of 2002*, supra note 84, para 6.

[88] A similar 'follow up procedure' is adopted by the ILO supervisory bodies with respect to the representation which was made by the *Radical Trade Union of Metal and Associated Workers against Mexico*, 1998, supra note 63, para 45.

[89] As to the ILO technical co-operation activities, which take indigenous and tribal peoples as their specific focus, the 'Project to Promote ILO Policy on Indigenous and Tribal Peoples' and the 'Interregional Programme to Support Self-Reliance of Indigenous and Tribal Peoples through Cooperatives and Self-Help Organizations (INDISCO)' should be mentioned here. For further reference, see ILO, *Developments Concerning Indigenous Peoples*, supra note 19, 5.

[90] CEACR, *Observations of 2000*, supra note 84, para 5.

that the rather weak interpretations of the tripartite Committee appear in another light. Ideally, complaints indicate the concrete problems and state reports ensure – among other things – the effective implementation of the relevant decision, which often requires long term structural changes of the legislative or judicial system. The technical assistance given by the ILO bodies supports states materially to carry out the required modifications. As stated by Tomei and Swepston 'the basic principles of ILO's supervisory procedures are dialogue and persuasion. These measures work because they are means of helping governments to achieve the goals they have voluntarily adopted on ratification.'[91]

Consequently, the recommendations of the tripartite Committee are greatly enhanced by the effectiveness of the ILO supervisory system as a whole and one cannot judge the comments of the tripartite Committee in the Huichol Case in isolation. It is only in the context of the entire ILO system that one is able to estimate the possible effect of its findings. In short, the from the legal point of view previously criticised decision in the Huichol Case, gathers a new strength from this overarching perspective. That is why, finally (taking all the different components of the ILO system into account), one can conclude that the ILO protects indigenous rights extensively and perhaps as far as politically viable.

[91] M. Tomei, L. Swepston, *Guide to ILO Convention No 169*, supra note 23, 28.

INDIGENOUS PEOPLES' VOICES: INDIGENOUS PARTICIPATION IN ILO CONVENTION NO. 169

Lee Swepston

ILO's Indigenous and Tribal Peoples Convention, 1989 (No, 169) entered into force in 1991, one year after its second ratification. We can now[1] begin to assess the way in which it is being applied, through the tool of the comments of the ILO's supervisory bodies and a study of the legislative history of the Convention.

This paper will concentrate on how indigenous and tribal peoples themselves intervened, or are intervening, in three different but related areas: in the adoption of the Convention, in its supervision at the national and international levels, and concretely in its application by ratifying States. The result we will find is that this participation is fully provided for, but does not always happen, and that there is still much to do in this area. Nevertheless, the tools are there and can be developed through a combination of determination by the indigenous peoples and continued openness on the part of the ILO.

I. Listening when adopting Convention No. 169

When the ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169) was being considered for adoption, great priority was given to listening to representatives of the peoples who were to be affected by it. From the point of view of indigenous representatives, it was not the best possible process, but it was what was achievable at the time, and it has not yet been equalled in an international standard-setting context at the same level of discussion.[2]

[1] This article develops a talk given in Seville in September 2001. Some of the references have been updated in July 2003, prior to publication.

[2] There has, of course, been a high degree of participation by indigenous representatives in the formulation of the Draft Declaration on Indigenous Rights in the UN, up to the present point when it is being considered in a working group of the Commission on Human Rights, with final responsibility exclusively in the hands of governments in the Commission, ECOSOC and the General Assembly. It remains to be seen whether the UN will be able to allow indigenous representatives full entry into the

R. Kuppe and R. Potz (eds.), Law & Anthropology, 114-126.

The ILO's decision in the mid-1980s to revise its Indigenous and Tribal Populations Convention, 1957 (No. 107), was based in large part on what we were hearing from indigenous representatives, through the then-new United Nations mechanisms that were for the first time giving them a voice in the international community. This in itself represented a change from the earlier situation: No indigenous representatives were consulted when the ILO adopted Convention No. 107 in 1957, and there was no representative group that might have been consulted. Nor did any representative indigenous organization participate when the UN launched its studies of indigenous populations[3] in 1972 (with the possible exception of the Nordic Sami Council). If either the ILO or the UN had wanted to consult indigenous representatives, we would have had to help such groups establish themselves at the international level where UN-system organizations may interact with non-governmental organizations (NGOs). Convention No. 107 was adopted in the same manner that all other development initiatives were taken by the international system at the time: 'top-down', meaning that international civil servants and governments in Geneva or New York decided what was good for the targets of development. In this the ILO was not alone – the rest of the UN system took part in the adoption of C107 in 1956 and 1957, and it took us all many years to recognize the need to listen as well as to tell.

As with many paternalistic decisions, the results were positive in many respects. Convention No. 107 provides many important protections for indigenous and tribal peoples that would not otherwise be available to them, and on countries that are still bound by that Convention and where indigenous or tribal peoples are under threat the Convention and its supervision can provide some real assistance. This has applied, for instance, in Brazil and India.[4]

It was not until the mid-1970s that the indigenous and tribal peoples began to voice their concerns on the international stage. A 1977 UN meeting in Geneva was the first large international gathering of indigenous organizations. There has been a remarkable development in the 25 years since then: indigenous peoples have done what no other movement has ever done, and forced an adaptation of the international agenda, even if they have not always been able to control the adaptations that have been made. The national sovereignty arguments continue to prevail in that respect.

When the UN Working Group on Indigenous Populations began in 1982, it was able to allow free entrance of indigenous representatives to a degree previously unheard of for NGO representatives. It could do so because the Working Group was

---

process in a way which will reproduce the direct and indirect participation of indigenous representatives in actually drafting the ILO Convention precisely at the level at which it was being adopted.

[3] Note that the ILO adopted the term 'peoples' in 1989 when it adopted Convention No. 169, while most UN references are still to 'populations'. In addition, the ILO uses 'indigenous and tribal' to describe the coverage of its instruments and policies, as opposed to 'indigenous' alone – this covers both groups whose rights derive from earlier occupation, and those who live in similar circumstances but have no verifiable claim to earlier occupancy than other parts of the national population.

[4] Brazil ratified Convention No. 169 in July 2002, after the talk on which this article is based. It thereby 'automatically' denounced Convention No. 107, as is provided for in both instruments.

designed to be merely a forum for talking – and when they actually tried to indicate the concerns they had in their own countries instead of speaking to what was called 'issues', States would not tolerate such a thing and removed the first chairman, Asbjorn Eide, from the Sub-Commission and thus from the Working Group. But the development of the voice of the indigenous peoples was too stubborn, and Madame Erica Daes, who became the new Chairperson/Rapporteur of the Working Group, carried on listening with the support of the other members of the Working Group.

Three years later, the ILO acted on the discontent expressed by indigenous peoples and others and started moving to revise its 1957 Convention. It took into account also the opinions expressed in other international organizations, including the Martinez Cobo report prepared in the Sub-Commission, which itself was transmitting the feelings of indigenous representatives, who were still not being listened to entirely in their own right.

In 1986 the ILO Meeting of Experts was convened to consider the need to revise Convention No. 107. When it met, without this issue having been discussed publicly among the ILO's constituents, it was not at all evident that the decision would be that the ILO ought to devote considerable time and resources to this effort. The ILO's tripartite structure, with employers' and workers' representatives comprising all its bodies, until then had rarely gone beyond these constituents when giving serious consideration to standard setting. However, for the first time in ILO (or UN) history, the Meeting of Experts included two representatives of non-governmental organizations as full members on a body directly related to standard-setting, one indigenous and the other 'indigenist'. And the ILO Governing Body also accepted that the meeting should make room for significant indigenous and NGO presence in the discussions, over the objections of some ILO delegates who found it difficult to tolerate new ways of handling such matters. The Meeting of Experts, with indigenous representatives advising, informing and prodding them, decided unanimously that Convention No. 107 had to be revised to give greater respect, and greater voice, to indigenous and tribal peoples themselves, even if the meeting did not always agree on all the changes that should be made.[5]

The NGO representation in the Meeting of Experts was, as already indicated, partly indigenous – the World Council of Indigenous Populations was the titular member – and partly international NGOs that worked for the benefit of these peoples. This was the last time indigenous representatives allowed outsiders to speak for them, though it was reasonably successful then. When the ILO began in 1988 the process that would result in the adoption of Convention No. 169 the following year, the picture had changed and non-indigenous NGOs were at the back of the room

[5] The report of the Meeting of Experts is reproduced in large part in the first of the reports constituting the Travaux Préparatoires for Convention No. 169: Appendix I, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI(1), International Labour Conference, 75th Session, Geneva, 1988. The rest of the Travaux are (with the same title) Report VI(2) to the same session, and Reports IV(1) and IV(2) to the 76th session, 1989. The proceedings of the Conference Committee, and the discusisons in the plenary of Conference as the reports and the Convnetion were adopted, can be found found in the Proceedings of the Conference for these two sessions.

listening, while indigenous NGOs were half way to the front speaking for themselves. And by mechanisms explained elsewhere, ways were found to get their interventions directly into the deliberations, sometimes sponsored by others but always in their own words. This was of course not entirely satisfactory, but it was better than not listening at all.

Consultations leading up to the adoption of Convention No. 169.

The ILO process allows for discussions both inside the ILO, and among its constituents to formulate their own positions. While this is normally intended for workers' and employers' organizations, indigenous peoples proved it could also stretch to themselves. A series of consultations was held in Latin America, under the sponsorship of the World Council of Indigenous Populations, which was fed directly into the process. The secretariat, bound by ILO rules, was able to note the results of these consultations in drawing up the preparatory documents, but for the most part had to submit the results of these discussions as information documents – but it was ensured that these views were directly available to the delegates. A few countries – Canada is the best example – took the ILO's suggestion and incorporated the indigenous and tribal peoples in their countries in formulating their own reactions to the drafting process.

In the meetings themselves the secretariat, with the approval or acquiescence of the other participants, found ways to give indigenous representatives the floor on every question before them. All delegations, including employers' and workers' delegations as well as those of governments, were asked to include indigenous representatives, and many of them did. NGOs other than employers' and workers' organizations have the right to take part in ILO meetings, under fairly strict conditions, and these were strained to the limit to allow a very wide participation. Indeed, the workers' group in the adoption discussions submitted amendments to the draft instrument that were given to them by the indigenous caucus.[6] This was not full or direct participation in the way indigenous representatives wanted it then or would accept today. It was a step along the way, and was well worth doing

Has the situation changed fundamentally since then? In the United Nations, in the discussion of the UN draft declaration on indigenous rights, the draft that emerged from the Working Group and the Sub-Commission was approved by most indigenous representatives, who took a direct part in formulating it, and they are now advocating its adoption in the form that they approved then. But in the Commission on Human Rights' Working Group, while indigenous representatives can speak quite freely, it is governments and only governments that have the last word. And the draft Declaration will have to go through two more increasingly exclusionist stages once it

[6] For a fuller explanation, see: Swepston, 'The adoption of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)' 5 *Law and Anthropology: Internationales Jahrbuch für Rechtsanthropologie*, 1990.

is adopted by the Commission – ECOSOC and the General Assembly – before it can be adopted, strictly on Government votes.[7]

II. Indigenous participation in supervision of Convention No. 169

It is necessary to have a basic explanation of the ILO's diversified system of supervision. The existing procedures fall into two main groups, relying respectively on the examination of reports and on consideration of complaints.

Procedures Based on the Examination of Periodic Reports

Most ILO supervision takes place on the basis of regular reporting and dialogue with the ILO's supervisory bodies. Governments are required to report at intervals of between one and five years on the Conventions they have ratified. Convention No. 169 is among the majority of ILO Conventions, with reports required every five years unless the supervisory bodies ask for an early report. Under Art 23 of the ILO Constitution, employers' and workers' organizations have the right to submit their own comments on these reports – and this has been used fairly extensively in some countries for trade unions to submit comments on behalf of indigenous organizations or communities.

The reports supplied by governments on the application of Conventions and of Recommendations are examined in the first instance by the *Committee of Experts on the Application of Conventions and Recommendations,* which is composed of 20 independent persons. The Committee often addresses comments and questions to governments on how they are applying the Conventions concerned. The Committee's comments take the form either of 'observations' contained in its printed report or of 'direct requests' addressed directly to the governments concerned.[8] The reports of the Committee of Experts are submitted to a tripartite *Committee on the Application of Standards* at each session of the International Labour Conference. This body discusses with the representatives of the governments concerned selected cases of important discrepancies noted by the Committee of Experts.

As examples, in 2003 the Conference Committee had a long and detailed discussion of the application by Paraguay of Convention No. 169, resulting in a request from the Government for ILO assistance to overcome its serious difficulties. In 2000 there was a discussion on the application of C169 by Mexico. The fact that there have been two such discussions in the last four years may not seem enormous,

[7] One place there has been a tremendous change in this respect in the UN system is in the creation of the Permanent Forum on Indigenous Issues, whose membership includes indigenous representatives. This of course postdates the meeting at which these remarks were delivered, so is not dealt with in detail here.

[8] All the Committee's observations, as well as the rest of the supervisory material mentioned here, are contained in the interactive data base *ILOLEX*, available on-line or on CD-ROM.

but the Committee is able to select for detailed discussions only about 25 cases per year from among 700 or so Committee of Experts' observations on 180 Conventions.

It is very important that indigenous peoples take an active part in the regular supervisory process. In an effort to promote this, the Governing Body of the ILO adopted a special provision – Part VIII – when establishing the 'Report Form' for the Convention as it came into force. Under this, it asked governments to consider involving indigenous representatives in drawing up the reports under the Convention. This is modelled on basic ILO principles of tripartism, otherwise used for employers' and workers' organizations connected with reporting under Art 23 of the ILO Constitution. It has not been done for any other ILO Convention, but most of them deal with the formal sector workforce where there is at least a presumption that trade unions and employers' organizations can and will intervene on behalf of those directly affected.

The most advanced use of this provision has been Norway, which asked the Norwegian Saami Parliament to participate as a full partner in the Convention's supervision. Because of this agreement, the Saami Parliament can intervene, sending information which will enjoy the same standing in the ILO's processes as though it came from an employers' or workers' organization. This direct participation of trade unions and employers' organizations, extended in this case to the Saami Parliament, is something that no other international supervisory system allows.[9]

A second, though different, instance is Denmark, for which the Convention applies to Greenland. The Government indicated in its first report that it was drawn up 'in consultation with the Home Rule authorities', who actually prepare the reports, which are then vetted in Copenhagen before being sent to the ILO.

Though it has been regularly suggested, no other country has taken a similar step. In Costa Rica, however, the Government has indicated that it consults indigenous peoples' organizations in formulating its reports. This would be a desirable path for governments and indigenous organizations to pursue.

A second way in which indigenous representatives can take part in supervision is through the provision of information to the Office. It is only rarely that the ILO supervisory bodies will acknowledge directly that they have obtained information from NGOs which are not workers' or employers' organizations – though it does happen – but solid and verifiable information is always welcome whatever the source. In some cases, indigenous representatives have submitted 'shadow reports' regarding their country's application of Convention No. 169. For instance, the ILO has received 'alternative' reports for each of the first two Government reports from Guatemala on Convention No. 169. Even if it cannot be officially acknowledged, factual information is taken into consideration, independent of its source, especially if contains items such as regulations, government orders, etc., which governments

[9] It can be compared to the ability of NGOs to participate in the UN human rights bodies, usually done by passing information to a member of a treaty body or in a written submission to a charter-based body. However, those UN bodies are not obliged to take account of them, as the ILO is for workers' and employers' organizations, and for the Saami Parliament under C169.

'forget' to send. General allegations of violations, on the other hand, are of little use to a fact-based supervisory system such as the ILO's.

The other way in which indigenous representatives take part in supervision is by a less direct route, using workers' organizations (and possibly employers' organizations as well) to transmit information, and allegations, which is how the alternative reports on Guatemala are in fact being transmitted.

The ILO has been criticized because it does not grant direct access to indigenous and tribal peoples' organizations to submit complaints and other communications with the same force as those received from workers' and employers' organizations. I agree that this is frustrating, probably unjust and less than open – but I do not see a set of circumstances likely to result in a change of this rule.

Procedures Based on the Examination of Complaints

The ILO Constitution also makes provision for two kinds of contentious procedures. The procedure of *complaint* under Art 26 of the Constitution allows complaints to be filed by any member State against another member State on the application of a Convention which both have ratified, leading to the examination of a case by a Commission of Inquiry. This procedure may also be initiated by the Governing Body on receipt of a complaint from a delegate to the Conference or on its own motion (*inter alia*, when seized of a representation by an employers' or workers' organization under the procedure described below). Commissions of Inquiry receive written submissions, hear witnesses and, when necessary, make on-the-spot visits. The Art 26 procedure has not been used for Conventions Nos. 107 and 169.

Representations may be made under Art 24 of the Constitution by employers' or workers' organizations, alleging failure by a government to apply a Convention it has ratified. This procedure has been used fairly extensively in the case of Convention No. 169.[10] Representations are considered by a three-member committee specially appointed by the ILO Governing Body, consisting of members from the Government, employer and workers' benches of the Governing Body. The regular supervisory machinery normally suspends examination of the questions concerned for one year while a representation is being examined.

The method described above of indigenous organizations' securing assistance from workers' or employers' organizations to submit information to the ILO, can also be used to submit representations under Art 24 of the ILO Constitution. This is being used successfully in several Latin American countries in relation to Convention No. 169, as Luis Rodríguez-Piñero's article in this volume indicates, though frankly it threatens to overwhelm a finely balanced and already over-burdened supervisory system in the ILO. It may turn out to be destructive if used too intensively. The potential positive effects are greater concentration by the ILO on the countries on

[10] The session of the ILO Governing Body following the Seville meeting, in November 2001, completed the examination of three representations concerning Convention No. 169 – two on Colombia and one on Ecuador – and declared receivable two more concerning Mexico. As of July 2003, three are pending concerning Mexico. A complete listing can be found on the ILO web site.

which representations are submitted, and relatively precise decisions. The negative effects may include neglect of other supervisory work because of limited ILO resources, and even denunciation of the Convention by a country which is frequently the target of representations. This is a tool that should be used as a rapier, not as a bludgeon.

III. Participation and Consultation: Essential elements of Convention No. 169

We have been speaking of the role of indigenous and tribal peoples' participation in international supervision of the Convention. But it is far more important as a way of applying the Convention internally, in ratifying States.

Provisions of the Convention

In the ILO Convention as it was adopted, there are a number of provisions that provide for the involvement of indigenous and tribal peoples in the application of the Convention at the national level. The indigenous representatives in the adoption discussions were not always satisfied with these formulations, because they tended to use terms such as 'as appropriate', or 'in a form appropriate to circumstances', and they leave the final decision-making power on most questions up to governments. There are of course good reasons for such formulations, frustrating as they may be. The form in which consultations would take place with sophisticated North American Indians who run multimillion dollar casino operations, is necessarily different from that which would be adopted for an Amazonian tribe making first contact with the outside world. It must be remembered that the Convention was aimed at covering the situations of all indigenous and tribal peoples around the world, and that it could not contain direct 'one size fits all' instructions.

Art 6 is the core provision.

> 1. In applying the provisions of this Convention, governments shall:
> (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
> (b) establish means by which these peoples can freely participate, to at least the same degree as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which may concern them;

> (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
>
> 2. The consultations carried out in application of the Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Art 6 is supplemented directly by Art 7, para. 1 of which states that indigenous and tribal peoples

> shall have the right to decide their own priorities for the process of development ... and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

The article goes on to call for studies to be carried out

> whenever appropriate ... in consultation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. (para. 3)

The spirit of participation is developed further throughout the Convention, and in fact is even greater in the later articles. This is an interesting example of a principle having been developed in the adoption of early articles, and then becoming increasingly accepted by delegates during the discussion for inclusion and even expansion in later articles.

Art 15 recognises 'the right of these peoples to participate in the use, management and conservation' of natural resources pertaining to their lands. In cases in which States retain the ownership of these resources, 'governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced' before allowing exploration or exploitation of these resources.

Art 16 provides for the right of indigenous and tribal peoples not to be removed from their lands, but when it is considered necessary 'as an exceptional measure', removal shall take place 'only with their free and informed consent'. And when this consent cannot be obtained, further steps of consultation and participation are provided for before a government can remove an indigenous people without its consent.

Art 17 provides for consultation of indigenous and tribal peoples 'whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community'.

Art 22 requires measures to be taken 'to promote the voluntary participation of the peoples concerned' in vocational training programmes, in adapting general vocational training programmes to their particular needs, and to carrying out studies, again with their participation, to make these adaptations.

The development of the consultation and participation principle during drafting is shown most clearly in Art 25, para. 1:

> Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with the resources to allow them to design and deliver such services under their own responsibility and control, so that they may attain the highest attainable standard of physical and mental health.

Art 27 concerning educational services goes on to provide that these services 'shall be developed and implemented in cooperation with them to address their special needs', and that the authorities 'shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the *progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate*.' (emphasis added)

These latter two provisions indicate that the Conference was contemplating indigenous and tribal communities taking full responsibility for health and education, though with safeguards. The preparatory materials show that responsibility was to be transferred only if indigenous peoples wanted these responsibilities, and only if they were in fact ready to assume them – and that the State would continue to provide financing for these activities as it would for other citizens.

Development through ILO supervisory bodies

The ILO supervisory bodies have relied a great deal on Art 6, which has taken on increasing importance in the application of the Convention. Nevertheless, it has not yet been used as much in supervision as it is likely to be in the future, as the lack of consultation is something which will emerge only when it does not happen. In the nature of government reporting, they are certain to tell the Committee of Experts that they consult freely and fully, and the contrary is likely to emerge only as indigenous and tribal representatives tell the ILO that consultations are not taking place.

On the application of Art 6 itself, both the ILO's principal supervisory body – the Committee of Experts on the Application of Conventions and Recommendations – and special tripartite committees established by the Governing Body to examine complaints (i.e., Art 24 representations as described above), have regularly found problems in governments' consultation procedures. Almost all the representations have found that there is a fundamental problem of lack of consultation and

participation underlying the more precise problems cited in reports. The following cite the 'outstanding' observations and direct requests by the Experts – i.e., those on which it is awaiting an answer in the governments' next due reports.[11]

In *Colombia*, the Committee of Experts found in 1999 that the procedures leading up to the construction of the Urra hydroelectric project, which was set to flood much of the territory occupied by the Embera-Katio community, had not included adequate consultation with the indigenous communities concerned, and therefore contravened Art 6. This case then became the object of a constitutional complaint[12] and the Experts made the following comment in their observation[13] adopted in December 2000:

> [T]he Committee notes that several questions regarding this situation, particularly in respect of the alleged failure to consult with the populations concerned and the irremediable damage caused to their environment, are being examined in the context of two representations made under article 24 of the Constitution, which were deemed receivable by the Governing Body. Noting that these representations are expected to be examined by the Governing Body in 2001, in accordance with established practice, the Committee will not examine these matters at the present session. It therefore requests the Government to send additional information on matters relevant to the representations when sending its report in 2002.

At the same time, the Experts took note of information in the Government's last report according to which the General Directorate of Indigenous Affairs participated in 50 consultation procedures and issued 163 certifications of the existence of indigenous communities during the reporting period. The Experts went on to ask, under Art 7, that the Government 'provide information on the extent to which in practice the indigenous communities participate in the formulation, implementation and evaluation of plans and programmes which may affect them directly', signalling that it has already asked this question without receiving an answer.

The Committee asked similar questions of *Costa Rica* in its direct request of 2000. It noted with interest the 'Government's statement in its report that within the

---

[11] Copies of all supervisory comments made by the ILO on the application of this or other Conventions (since 1985) can be found under ILOLEX on the ILO's web site at www.ilo.org. Reports on the application of both Conventions Nos. 107 and 169 are due from ratifying States in September 2003 (except Brasil, Dominica and Venezuela, which ratified the Convention only in 2002 – their first reprots will be due in 2004.)

[12] While a number of representations have been filed under Convention No. 169, no Art 26 complaints have been received.

[13] The Committee of Experts adopts two kinds of comments. *Observations* are published in the Committee's regular report to the Conference (Report III, Part IA), and may be discussed by the Conference Committee on the Application of Standards at each annual session. *Direct requests* are not published in the same form, though they are sent to governments and appear on the CD-ROM version of the ILOLEX data base of ILO supervisory materials.

consultation process and in the Legislative Assembly account has been taken of indigenous representation', but it 'requests the Government to send specific information on the manner in which indigenous representation is assured in practice'. As concerns draft legislation which would affect indigenous peoples directly, the Experts asked for 'additional information on the methods used to consult the indigenous peoples and on the practical means used implement conclusions which resulted from the consultations'.

It is in *Mexico* that the Committee of Experts has made the most use of Art 6. In a 1999 observation, commenting on two representations that had been concluded, the Experts noted that the

> complaints had alleged a continuing lack of resolution of land claims arising from the displacement of indigenous peoples following the construction of a dam beginning in 1972. ... Both these representations resulted in concern being expressed by the Governing Body over an apparent lack of real dialogue between the Government and the indigenous communities to discuss their situation and to find answers to their problems in the consultative spirit on which this Convention is based.

The Committee went on to note another communication it has received from a workers' organization under Art 23 of the Constitution[14] indicating that

> although the Government had carried out consultations with indigenous representatives on constitutional reforms which would affect them, it had ignored the results of such consultations. ... The Committee is concerned ... by the apparent lack of a dialogue between the Government and the indigenous peoples which would contribute to resolving the problems affecting them.

Throughout the accompanying direct request on the application of Convention No. 169, the Committee made further questions on the consultation process, asking for precise answers and more information. These questions resulted in Mexico being called before the Conference Committee on the Application of Standards in June 2000 to answer direct questioning on the application of the Convention, with particular reference to consultative processes. This discussion appeared to allay some fears that the ILO was simply meddling, and a national seminar on the application of the Convention was organized, and took place in mid-2001.[15]

---

[14] Meaning that it is handled in the context of regular supervision and not by the representation procedure.

[15] This seminar took place only shortly after the Constitutional Reforms on indigenous peoples in Mexico were adopted, and suffered from the fact that these reforms were rejected by a large part of the indigenous population of Mexico.

As concerns *Peru*, the Committee of Experts noted in an observation in 2000 that there were serious questions concerning the inclusion of over 100,000 hectares of indigenous land in an irrigation project, apparently without the agreement of the community concerned. It recalled at length the Convention's provisions on consultation, and asked the Government to 'send information on any prior consultations held with the community before the issuing of the Decree in question. It also requests information on the mechanisms established to allow the community to participate in the development of plans which affect them', including the irrigation project in question.

In the same comments the Committee of Experts asked the Government of Peru to send information on any measures taken to ensure the participation of the community concerned in the use, management and conservation of the resources found on its lands, as well as in the benefits brought by the project.

Consultation and participation have also been the elements most frequently invoked in the Art 24 representations so far considered. This will have to be the subject of a separate paper, but it can safely be said that the Governing Body has uniformly considered that governments do not take fully into account the views of the indigenous and tribal peoples within their countries, when making decisions concerning them.

Concluding remarks

This paper is intended to present the concepts of consultation and participation in the ILO's standards-related work with indigenous and tribal peoples. This same spirit is carried through in the ILO's field assistance to these peoples, avoiding the 'top-down' approach of the 1950s to 1970s, and relying instead on a determination of what indigenous peoples themselves indicate that they need. Similarly, when the ILO is called in to advise governments on the development of policies relating to indigenous and tribal peoples, a fundamental concept is the need for the participation of these peoples in the development of any such policies.

The ILO's policies, whether those used in the adoption of the Convention or contained within it, could surely be improved upon in an ideal world. Nevertheless, they constitute a good faith effort to ensure the fullest possible participation of indigenous and tribal peoples in the design and implementation of policies and programmes concerning them. The ILO's supervisory bodies have insisted that this same principle be applied by member States, and are likely to continue to have this kind of question raised in virtually all countries that ratify Convention No. 169.

THE EMERGENCE OF CUSTOMARY INTERNATIONAL LAW CONCERNING THE RIGHTS OF INDIGENOUS PEOPLES

S. J. Anaya

Largely as a result of their own advocacy at the international level, indigenous peoples are now distinct subjects of concern within the United Nations, the Organization of American states, and other international institutions. While the terminology of *indigenous peoples* remains contested, it nonetheless has become widely used. In general, the term indigenous is used in association with groups that maintain a continuity of cultural identity with historical communities that suffered some form of colonial invasion, and that by virtue of that continuity of cultural identity continue to distinguish themselves from others.

It can hardly be disputed that, through their efforts over the last three decades especially, indigenous peoples have been able to generate substantial attention to their demands among international actors. This can be seen in several concrete developments, including ongoing discussions aimed at adoption of declarations on the rights of indigenous peoples by the United Nations and Organization of American States. These discussions among representatives of states and of indigenous peoples now center on drafts documents that were produced by specialized UN and OAS bodies. Thus far the discussions have proceeded sluggishly, with states resisting much of the language in the drafts on the grounds that it goes too far, while many indigenous representatives and their advocates remain insistent that the drafts be adopted in their current formulations or without any change that would weaken the articulated standards.

But despite the gap in positions over the draft declarations, the multilateral discussions that have been proceeded in relation to the proposed declarations over several years have helped to generate a discernible consensus on core principles of indigenous peoples' rights. This consensus is further evident in the multiple other developments of the last two decades within international and domestic venues. This is not to say that the level of consensus on indigenous peoples' rights is entirely satisfactory or that there is a sufficient commitment by authoritative actors to implementing that consensus. But it is important to understand that such a consensus exists, however much it may still be in its early stages of development, lest

R. Kuppe and R. Potz (eds.), Law & Anthropology, 127-139.

opportunities be lost for building on that consensus and making it operational, even in advance of formally adopted instruments. It is further useful to understand this developing consensus, not just as a political phenomena with potential future legal consequences, but rather also as representing emerging customary international law.

I. The Elements of Customary International Law

Under modern legal theory, processes that generate consensus about indigenous peoples' rights build customary international law. As a general matter, norms of customary law crystallize when a preponderance of states and other authoritative actors converge on a common understanding of the norms' contents and generally expect future behavior in conformity with those norms. Two points of reference traditionally determine the existence and contours of customary law. These including a material element, demonstrated by past uniformities of conduct, and a psychological element, also called *opinio juris*, demonstrated by a sense of obligation to conform to expected patterns of behavior.[1] What counts fundamentally is not rhetoric, such as statements made before international bodies, but state practice in the form of actual conduct on the part of states in their international relations. Within this traditional view, customary international law exists when a pattern of state behavior generates a certain threshold of understanding about the content of a rule, along with widespread manifestations of consent to be bound to the rule, this sense of obligation being the so-called *opinio juris*.

Today, however, actual state conduct is not the only or necessarily determinative indicia of customary norms. With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and expectation about rules. The developments toward consensus about the content of indigenous rights simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to articulated norms. It is thus increasingly understood that explicit communication among authoritative actors, whether or not in association with concrete events, is a form of practice that builds customary rules.[2] Furthermore, conforming conduct will strengthen emergent customary rules by enhancing attendant subjectivities of expectation.[3]

Contributing to the movement toward consensus on indigenous peoples' rights is the fact that the relevant international discourse arises largely within the international system for the protection of human rights. Within this system, long standing and broadly accepted human rights principles lay the groundwork for emerging customary law in particular areas that touch upon human rights. There is an

---

[1] M.S. McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*. 269 (1980).

[2] *See id*. at 272-73.

[3] *See generally* Joseph Gabriel Starke, *Introduction to International Law*. 38-39 (19th ed. 1989).

element of what might be called normative spillover in the activities of international institutions that are focused on human rights. That is, certain basic, already widely accepted human rights principles inevitably form the backdrop of multilateral discussions concerning human rights. These include human rights principles articulated in the UN Charter such as the basic principles of equality, nondiscrimination, and self-determination. Thus, for example, when discussion about the rights of women occurs, the basic principle of equality informs that discussion, and that basic principle has spillover into the articulation of the more particularized norms that relate to an understanding of the rights of women. When discussion about the rights of indigenous peoples occurs, the normative essence of the principle of self-determination – which is simply that people have the right to control their own lives and destinies – has certain spillover to an understanding of the rights of indigenous peoples. If it is indeed a principle of human rights that people should be able to control their own lives on an equal basis, then it follows more easily that indigenous peoples should be able to retain and develop their own cultural expressions and methods of organization.

Another factor that leads to the development of new customary international law, especially observable in the area of human rights, is a shift in the source of obligation from consent to consensus. The obligation to uphold human rights, including indigenous peoples' rights, is less and less a matter of affirmative consent to human rights norms on the part of states, and more and more a matter of consensus on the part of the participants in the norm-building and norm application process. Multilateral discourse plays a large role in human rights discussions within international institutions. It can be readily observed that the international actors in an institutional setting do not always wait for an indication of affirmative consent on the part of a state to a human rights norm before they hold that state accountable under the norm. To the extent that there is a consensus, for example, on the right not to be tortured, the international community can be seen as willing to act upon that right independent of some affirmative act of state consent. The same can be said of certain precepts that have taken hold regarding the rights of indigenous peoples, including their right to a collective existence as such.

There has been a discernible movement internationally toward a convergence of reformed normative understanding and expectation concerning the rights of indigenous peoples. Under the theory just sketched, this movement is constitutive of customary international law. Relevant norm-building international practice, which has been substantially driven by indigenous peoples' own efforts, has entailed information gathering and evaluation that leads to multilateral discussion and articulation of policies and norms. The participation of indigenous peoples themselves in this international standard-setting has caused it to progress at a much faster pace than it might otherwise would have and to reflect to some degree indigenous peoples own values and perspectives. Additionally, domestic initiatives against the backdrop of international concern for indigenous peoples in some measure strengthen and give further content to the developing international norms. The remainder of this paper will highlight several international and domestic

developments that are forging a convergence of international opinion on the content of indigenous peoples' rights and shaping a new body of customary international law.

II. International Practice

1. ILO Convention No. 169

The International Labour Organization's Convention (No. 169) on Indigenous and Tribal Peoples[4] is international law's most concrete manifestation of the growing responsiveness to indigenous peoples demands. International treaties of this sort formally bind states that are parties to them, and they also contribute to the development of customary international law insofar as they build, beyond the treaty parties, consensus about norms and attendant subjectivities of obligation. Multilateral treaties whose terms are intended to apply generally over given subject areas, such as ILO Convention No. 169, inevitably contribute to the development of customary international law.

Adopted and opened for ratification in 1989, Convention No. 169 builds upon the discussions concerning indigenous peoples and their rights that have taken place within the United Nations since the early 1980s. The ILO developed and adopted its Convention No. 169 as a revision of its earlier Convention No. 107 on the same subject. Representatives of thirty-nine governments participated in the ILO committee that developed Convention No. 169, in addition to the worker and employer delegates that are part of the organization's 'tripartite structure of governance'. Special arrangements were made to allow limited participation by indigenous representatives in the committee deliberations. The full International Labour Conference, the major policy making body of the ILO in which all member states are represented, adopted the Convention by an overwhelming majority of voting delegates. None of the government delegates voted against adoption, although a number abstained, primarily out of concerns about perceived ambiguities in the text rather than on the basis of articulated objections to the core principles of the Convention.

An international treaty that already has entered into force and been ratified by several states, ILO Convention No. 169 of 1989 represents a marked departure from the philosophy of integration or assimilation underlying the earlier ILO convention. The basic theme of Convention No. 169 is indicated by its preamble, which recognizes 'the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.' Upon this premise, the Convention includes provisions advancing indigenous cultural integrity, land and resource rights, and non-discrimination in

[4] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force September 5, 1991).

social welfare spheres; and it generally enjoins states to respect indigenous peoples' aspirations in all decisions affecting them.

Several indigenous rights advocates – mostly from industrialized countries with fairly well developed legal regimes concerning indigenous peoples – have expressed dissatisfaction with Convention No. 169, viewing it as not sufficiently constraining of government conduct in relation to indigenous peoples' concerns. But whatever its shortcomings, the Convention succeeds in affirming the value of indigenous communities and cultures, and in setting forth a series of basic precepts that follow generally from indigenous peoples' articulated demands. Convention No. 169, furthermore, provides grounds for invoking international scrutiny of the particularized concerns of indigenous groups, pursuant to the ILO's fairly well developed mechanisms for implementing the standards expressed in ILO conventions. These mechanisms include required periodic reporting by states, ILO committee review of the reports, and complaint procedures.

Since the ILO adopted Convention No. 169 in 1989, indigenous peoples' organizations and their representatives increasingly have taken a pragmatic view and expressed support for the its ratification. Indigenous peoples' organizations from Central and South American have been especially active in pressing for ratification. In certain countries that have ratified Convention No. 169 – particularly Bolivia, Mexico, Colombia, and Norway – indigenous groups already have invoked the Convention in domestic and ILO proceedings with some success in their efforts to gain redress for problem situations.

Although relatively few states have ratified Convention No. 169, the territories of those that have – most of them being in the Western Hemisphere – comprise a substantial part of the indigenous world. The failure on the part of other states to ratify the Convention can likely be attributed more to political inertia than to a rejection of the Convention's essential terms. Even those states that have expressed difficulty with the Convention typically have pointed out certain limited problematic aspects of the Convention while manifesting agreement with its core precepts.

2. Toward UN and OAS Declarations on Indigenous Peoples' Rights

As already suggested, ILO Convention No. 169 is part of a larger body of international developments concerning indigenous peoples. Most prominent among these other developments are the ongoing efforts within the United Nations and Organization of American States to develop declarations on the rights of indigenous peoples.

A draft of a United Nations Declaration on the Rights of Indigenous Peoples[5] was produced and adopted in 1993 by the UN's five-member Working Group on Indigenous Populations, which is part of the no denominated Sub-Commission on Promotion and Protection of Human Rights, an expert body. Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s and that lead to its draft of a declaration on indigenous rights. The draft declaration is now before the Sub-Commission's parent inter-governmental body, the UN Commission on Human Rights, which in 1995 established its own working group to consider the draft.

The focus within the UN on indigenous issues during the 1980s and 90s spawned initiatives in other international arenas, including that which lead to ILO Convention No. 169 and the initiative within the OAS to develop its own declaration on the subject. Having been authorized by the OAS General Assembly to develop a 'juridical instrument' regarding indigenous groups, the OAS Inter-American Commission on Human Rights adopted in 1997 a Proposed American Declaration on the Rights of Indigenous Peoples.[6] The Proposed American Declaration has taken up by a working group of the Political and Juridical Committee of the OAS Permanent Council.

The UN and OAS draft texts that are currently under consideration are similar in terms of scope of coverage and in the nature of the rights affirmed. Like the ILO's Convention No. 169 on Indigenous and Tribal Peoples, both draft texts embrace a philosophy that, in contrast to earlier dominant thinking, values the integrity of indigenous communities and their cultures; and the texts identify indigenous groups and individuals as special subjects of concern for the states in which they live and for the international community at large. Further like the ILO Convention, the draft UN and OAS texts presuppose that indigenous peoples will exist as parts of the states that have been constructed around them, but with robust group rights, including rights relating to land and natural resources, culture, and autonomy of decision-making authority. The draft UN and OAS texts are more sweeping than ILO Convention No. 169 in their articulation of such rights; the UN text is the most far reaching, going so far as to articulate 'a right of self-determination' for all indigenous peoples.[7]

With the increase in international attention to the articulation of indigenous peoples' rights has come an expanding core of international opinion on the content of those rights, a core of opinion substantially shaped by indigenous peoples'

---

[5] Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993; adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26 1994, U.N. Doc. E/CN.4/1995/2/, E/CN.4/Sub.2/1994/56, at 105 (1994).

[6] Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-Am.Comm. on Human Rights Feb. 1997, in: 1997 Inter-Am. Com. H.R. Annual Report, OEA/Ser.L/V/III.95.doc.7, rev. 1997, pp. 654-676 (proposal by the Inter-Am. Comm. H.R.). This proposed text was a revision of an earlier draft, which the Inter-American Commission had published in September of 1995. See OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995).

[7] *See* Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra*, art. 3.

contemporary demands and supported by years of official inquiry into the subject. This is reflected at least partly in the text of ILO Convention No. 169 and confirmed in the discussions over the UN and OAS declarations. Since Convention No. 169 was adopted in 1989, government comments directed at developing UN and OAS declarations on indigenous rights generally have affirmed the basic precepts set forth in the Convention; and indeed, despite continuing contentiousness between indigenous peoples and states over the language of the declarations and certain of the declarations more far reaching provisions, some government comments movement toward greater accommodation of indigenous peoples' demands.

3. The Articulation of Norms Concerning Indigenous Peoples in other International Instruments

Numerous other international developments, including resolutions adopted at major UN conferences over the last several years, manifest responsiveness to indigenous peoples demands and contribute to a developing international consensus on indigenous peoples' rights. Resolutions adopted at the 1992 United Nations Conference on Environment and Development include provisions on indigenous people and their communities. The Rio Declaration, and the more detailed environmental program and policy statement known as Agenda 21, reiterate precepts of indigenous peoples' rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development. The Vienna Declaration and Programme of Action, adopted by the 1993 United Nations World Conference on Human Rights, calls on states to respect the diversity of indigenous peoples and 'their distinct identities, cultures and social organization,' and it urges greater focus within the U.N. system on the concerns of indigenous peoples. Resolutions adopted at the 1994 UN Conference on Population and Development, the Fourth World Conference on Women in 1995, the 1996 World Summit for Social Development, and the Second United Nations Conference on Human Settlement in 1996 (Habitat II), and numerous other such declarations adopted at the regional level similarly include relevant provisions on indigenous peoples and affirm prevailing normative assumptions in this regard.

4. Authoritative Interpretations of Widely Ratified Human Rights Treaties of General Applicability

Apart from the above developments, the rights of indigenous peoples can be seen as part of international law on the basis of relevant provisions of widely ratified human rights treaties of general applicability. These treaties create binding obligations for state parties, as well as contribute to the development of normative consensus that constitutes customary international law. Article 1 of the International Covenant on Civil and Political Rights affirms that '[a]ll peoples have the right of self-determination.' The UN Human Rights Committee, which is charged with monitoring compliance with the Covenant, has stated that the right of self-

determination affirmed in article 1 protects indigenous peoples, *inter alia,* in their enjoyment of rights over traditional lands and resources, and that the unilateral extinguishment of an indigenous group's ancestral rights in land is proscribed by article 1. In commenting upon Canada's most recent report under the Covenant, the Committee recommended that, in relation to the aboriginal people of Canada, 'the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.'[8]

The Human Rights Committee has most frequently relied on article 27 of the Covenant in pronouncing on the rights of indigenous peoples. Article 27 of the Covenant states, '[i]n 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.' In its General Comment on article 27, the Committee held this provision of the Covenant to establish affirmative obligations on the part of states with regard to indigenous peoples in particular, and it interpreted article 27 as covering all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.[9] This interpretation of article 27 is confirmed in the Committee's adjudication of complaints submitted to it by representatives of indigenous groups pursuant to the Optional Protocol to the Covenant.

In *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*, the Human Rights Committee determined that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band.[10] The Committee found that the natural resource development activity compounded historical inequities to 'threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.'[11] The Committee has also found that indigenous religious and cultural traditions are protected by articles 17 and 23 of the Covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the Committee determined that these articles had been violated by France when its territorial authority allowed the construction of a hotel complex on indigenous

---

[8] *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, 07/04/99, CCPR./C/79/Add.105.

[9] Human Rights Committee, General Comment No. 23 (60) (Art. 27), adopted April 6, 1994.

[10] Communication No. 167/1984, Hum. Rts. Comm. A/45/40, Vol. II, annex IV.A, para. 32.2.

[11] *Id.* at para. 33. *See also* Länsmann et al. v. Finland, Communication No. 511/1992, Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994) (*Länsmann I*) (reindeer herding part of Sami culture protected by article 27); J.E. Länsmann v. Finland, Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1-2.4, 10.1-10.5 (*Länsmann II*) (Sami reindeer herding in certain land area is protected by article 27, despite disputed ownership of land; however, article 27 not violated in this case); Kitok v. Sweden, Communication No. 197/1985, Hum. Rts. Comm., A/43/40, annex VII.G (1988) (article 27 extends to economic activity 'where that activity is an essential element in the culture of an ethnic community').

ancestral burial grounds.[12] For its part, the OAS Inter-American Commission on Human Rights has similarly invoked provisions of the International Covenant on Civil and Political Rights, particularly its article 27, in examining the human rights situations of indigenous groups.[13]

The primary terms of reference for the Inter-American Commission are in the American Convention on Human Rights. This international treaty also is the basis of legal entitlements and corresponding state obligations favorable to indigenous group demands. The Commission has interpreted article 4 of the American Convention, which broadly affirms the right to life, as requiring that states take measure to secure the natural environments of 'indigenous peoples [that] maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein.'[14] More directly supporting indigenous peoples' rights in lands and natural resources is the right to property affirmed in article 21 of the Convention. The Commission itself has filed a complaint against Nicaragua for violation of indigenous land rights before the Inter-American Court of Human Rights, the OAS judicial body that formally has the power to issue legally binding decisions against states that have recognized its competence. In this case, Nicaragua is alleged to have violated article 21 of the Convention by granting a logging concession on the traditional lands of the indigenous Mayagna community of Awas Tingni, and by otherwise failing to recognize and secure property rights on the basis of traditional indigenous land tenure.

Another important international treaty is the International Convention on the Elimination of All Forms of Racial Discrimination. Like the two other human rights treaties just mentioned, the Convention Against Discrimination nowhere specifically mentions indigenous groups or individuals. Yet it also has been held to have particular implications in favor of indigenous peoples. The Committee on the Elimination of Racial Discrimination (CERD), which promotes implementation of this Convention, has issued a General Recommendation that identifies such implications. In its General Recommendation on Indigenous Peoples, CERD has called upon state parties to take special measures to protect indigenous cultural patterns and traditional land tenure, in order to avoid the kind of discrimination that has deprived indigenous peoples of the enjoyment of their distinct ways of life.[15]

---

[12] Francis Hopu v. France, Communication No. 549/1993, CCPR/C/60/D/549/1993 (views adopted 29 July 1997).

[13] *See, e.g.*, The Miskito Case, Case 794 (Nicaragua), Inter-Am.C.H.R., *Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 10 rev. 3, at 76-78, 81 (1983); The Yanomami Case, Case 7615 (Brazil), Inter-Am C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 at 24, 31 (1985); Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev., at 03-04 (1997).

[14] *Id.* at 106.

[15] CERD, General Recommendation XXIII(51) concerning Indigenous Peoples, adopted at the Committee's 1235th meeting, on 18 August 1997.

III. Domestic Practice

The international developments and interpretations of existing international instruments just described are reinforced by an increasingly well defined and consistent pattern of domestic legal practice that favors the survival of indigenous communities and cultures. In addition to adopting new legislative regimes, a growing number of states have adopted or amended their constitutions in ways generally consistent with the international practice concerning indigenous peoples. For example, Brazil amended its constitution in 1988 to accord greater protections to Indians and their land.[16] Article 231 of the amended constitution recognizes the social organization, customs, languages, beliefs, and traditions of the indigenous peoples and their rights to lands they have traditionally occupied. The 1991 Constitution of Colombia provides indigenous peoples with distinct constitutional status. Indigenous peoples form a special constituency for the election of central government representatives.[17] They have the right to self-government according to their customs and traditions within their lands, including the administration of justice. Cultural, social, and economic integrity is protected generally by article 330 of the constitution.

The Ecuadorian Constitution of June 1998 contains several provisions regarding indigenous peoples' rights. In Title III, article 84, of the Constitution, Ecuador recognizes and guarantees to indigenous peoples collective rights to maintain and develop their cultural and economic traditions, conserve community lands, and maintain possession of ancestral community lands. Article 84 of the Constitution further commits the State to promote indigenous peoples' practices of bio-diversity management, traditional forms of social organization, and collective intellectual property. Indigenous peoples are protected from displacement from their lands and are guaranteed the right to participate in official legislative bodies, with adequate financing from the state, in the formulation of priorities in plans and projects for the development and improvement of their economic and social conditions.[18]

Canada also includes within its legal system constitutional affirmation of indigenous peoples' rights. Canada's Constitution of 1982 maintains that 'existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'[19] This legal guarantee encompasses aboriginal title as enforceable substantive rights and hereby limits legislative acts that would restrict or extinguish indigenous peoples' aboriginal property rights.

In many countries, such as Australia, new or augmented legal protection for indigenous peoples' has resulted from judicial decisions. In the High Court of

---

[16] CONSTITUIÇÃO tit. VIII (Braz.).

[17] CONSTITUCIÓN POLÍTICA Arts. 171, 176 (Colom.).

[18] CODIFICACIÓN DE LA LEY DE DESARROLLO AGARIO Art. 43 (Ecuador.).

[19] CAN CONST. (Constitution Act, 1982) pt. II (Rights of Aboriginal Peoples of Canada), sec. 35(1).

Australia's decision in the case of *Mabo v. Queensland*,[20] contemporary international human rights law was specifically invoked to uphold indigenous land and resource rights on the basis of historical patterns of use or occupancy. In response to *Mabo*, the Australian federal government passed the Native Title Act in 1993. The main purposes of the act are to recognize and protect native title and to create a national tribunal where claimants can pursue their land claims. Although recent amendments to the Native Title Act have somewhat limited the protections for native title, the Act remains a substantial legal safeguard for indigenous land tenure.

The interrelation between international and domestic legal developments concerning indigenous peoples can be seen especially in the now regular practice of states to report to international bodies on their respective domestic laws and initiatives. Much, if not most, of this reporting occurs apart from any specific treaty obligation. The government practice of reporting on domestic developments has been a regular feature of annual meetings of the United Nations Working Group on Indigenous Populations and of meetings of the working group's parent bodies, including the UN Commission on Human Rights and is Sub-Commission on the Promotion and Protection of Human Rights. The oral and written statements of governments reporting domestic laws and initiatives to international bodies are indicative of customary international norms in two respects. First, the accounts of state conduct provide evidence of behavioral trends by which the contours of underlying standards can be discerned or confirmed, notwithstanding the difficulties in agreement on normative language for inclusion in written texts. Secondly, because the reports are made to international audiences concerned with promoting indigenous peoples' rights, they provide strong indication of subjectivities of obligation and expectation attendant upon the discernable standards. Evident in the government statements is the implied acceptance and the pull toward compliance of certain normative precepts grounded in general human rights principles.

IV. The Contours of New and Emerging Customary Norms

The specific content of a new generation of international customary norms concerning indigenous peoples is still evolving and remains somewhat ambiguous. Yet the norms' core elements increasingly are confirmed and reflected in the extensive multilateral dialogue and decision processes focused on indigenous peoples and their rights. These core elements can be summarized as follows:

Self-determination. Although several states have resisted express usage of the term self-determination in association with indigenous peoples, it is possible to look beyond the rhetorical sensitivities to a widely shared consensus of opinion. That consensus is in the view that indigenous peoples are entitled to continue as distinct groups and, as such, to be in control of their own destinies under conditions of

[20] *Mabo v. Queensland* No 2 (1992) 175 C.L.R. 1, 69 (Austl.).

equality. This principle has implications for any decision that may affect the interests of an indigenous group, and it bears generally upon the contours of related norms.

Cultural Integrity. There is today little controversy that indigenous peoples are entitled to maintain and freely develop their distinct cultural identities, within the framework of generally accepted, otherwise applicable human rights principles. Culture is generally understood to include kinship patterns, language, religion, ritual, art and philosophy; additionally, it increasingly is held to encompass land use patterns and other institutions that may extend into political and economic spheres. Further, governments increasingly are held, and hold themselves to, affirmative duties in this regard.

Lands and Resources. In general, indigenous peoples are acknowledged to be entitled to ownership of, or substantial control over and access to, the lands and natural resources that traditionally have supported their respective economies and cultural practices. Where indigenous peoples have been dispossessed of their ancestral lands or lost access to natural resources through coercion or fraud, the norm is for governments to have procedures permitting the indigenous groups concerned to recover lands or access to resources needed for their subsistence and cultural practices, and in appropriate circumstances to receive compensation.

Social Welfare and Development. In light of historical phenomena that have left indigenous peoples among the poorest of the poor, it is generally accepted that special attention is due indigenous peoples in regard to their health, housing, education and employment. At a minimum, governments are to take measures to eliminate discriminatory treatment or other impediments that deprive members of indigenous groups of social welfare services enjoyed by the dominant sectors of the population.

Self-government. Self-government is the political dimension of ongoing self-determination. The essential elements of a *sui generis* self-government norm developing in the context of indigenous peoples are grounded in the juncture of widely accepted precepts of cultural integrity and democracy, including precepts of local governance. The norm upholds local governmental or administrative autonomy for indigenous communities in accordance with their historical or continuing political and cultural patterns, while at the same time upholding their effective participation in all decisions affecting them left to the larger institutions of government.

Special duty of care. Full implementation of the foregoing norms, and the safeguarding of indigenous peoples' enjoyment of all generally accepted human rights and fundamental freedoms, are the objective of a continuing special duty of care toward indigenous peoples. With heightened intensity over the last several years, the international community has maintained indigenous peoples as special subjects of concern and sought cooperatively to secure their rights and well-being. Additionally, it is ever more evident that authoritative international actors expect states to act domestically, through affirmative measures, to safeguard the rights and interests of the indigenous groups within their borders. Any state that fails to uphold a duty of care toward indigenous peoples and allows for the flagrant or systematic breach of the standards summarized above, whether or not admitting to their character as

customary law, risks international condemnation. The terms 'trust' or 'trusteeship' are not commonly used in contemporary international discourse concerning indigenous peoples. Today, the principle of a special duty of care is largely devoid of the paternalism and negative regard for non-European cultures previously linked to trusteeship rhetoric. Instead, the principle rests on widespread acknowledgment, in light of contemporary values, of indigenous peoples' relatively disadvantaged condition resulting from centuries of oppression. Further, in keeping with the principle of self-determination, the duty of care toward indigenous peoples is to be exercised in accordance with their own collectively formulated aspirations.

V. Conclusion

It is evident that indigenous peoples have achieved a substantial level of international concern for their interests, and with this concern there is substantial movement toward a convergence of international opinion about the content of indigenous peoples' rights. As the preceding discussion demonstrates, a pattern of international practice exists that tends towards recognizing and affirming the international understandings of indigenous peoples' rights. Consistent with developments at the international level, this pattern of domestic legal practice confirms an expanding consensus already sufficient and widespread enough to constitute customary international law, or at least emerging customary international law.

Even under traditional theory, the activities of the United Nations and other international institutions can be seen as contributing to the development of customary international law regarding the rights of indigenous peoples. The statements, treaties, and declarations emanating from or within international organizations about indigenous rights may prompt consistent patterns of state behavior, and in that way they lead to customary international law. However, it is not sufficient to describe the elaboration of treaties, resolutions, and other communicative activities of international actors simply as precursory to or evidence of customary international law. Rather, such resolutions and activities *themselves* generate customary international law. The multiple, interrelated discursive activities that have taken place in international and domestic arenas themselves build understanding and consensus about norms on a transnational level, and they do so upon a foundation of already widely accepted principles. As consensus about the content of norms concerning the rights of indigenous peoples emerges among the various relevant actors in the world community, including non-state actors, so too does the expectation of compliance with the norms, thereby contributing to the formation of a new customary international law.

THE WAITANGI TRIBUNAL: A TREATY RELATIONSHIP AT WORK

Roger C.A. Maaka

1.

The discursive premise, on which this paper is centred, is that treaties between indigenous peoples and colonial/settler communities embody the notion of an ongoing relationship. Although no single action or development can cover the complexities of what is a multi-tiered relationship, there are pivotal initiatives that symbolise and epitomise the state of the relationship. The Waitangi Tribunal in New Zealand is one such development. As the expected outcome of the conference where this paper was presented was to 'provide indigenous peoples with legal and discursive materials in order to manage their relations with states,' the paper focuses on a very specific example of indigenous peoples/state relationships. The relationships between Maori and the Crown are considered within the paradigm of treaty claims and settlements and the work of the Waitangi Tribunal. While the Tribunal is a creature of state legislation it is not simply an organ of the state. Its style of operation and interpretation of issues has been considerably influenced by its Maori members.

The work of the Tribunal falls squarely into the purview of the final report on the *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (June 1999) by Miguel Alfonso Martinez, Special Rapporteur for the United Nations. It demonstrates both the 'contemporary significance of such instruments' (para 17. [ii]), and the 'potential value of all those instruments' (para 17. [iii]). In more specific reference the Special Rapporteur notes a desire by indigenous peoples and certain government officials to establish a new relationship (para 262.) The Tribunal is part of this move and, as noted in the report, its work is founded on the fact that the Treaty of Waitangi is seen as a valid document (para 274.) even though there are different understandings of its content (para 280.).

In Aotearoa, a treaty (the *Treaty of Waitangi*) was signed in 1840, allowing for the creation of New Zealand as a nation. After the signing, the influence of the Treaty rapidly diminished and by 1877 the Treaty had been declared a 'simple nullity' (*Wi Parata v The Bishop of Wellington and the Attorney-General* [1877] 3 NZ Jnr [NS] SC 72.). The Treaty remained irrelevant to the business of state until 1975 when the Treaty of Waitangi Act was passed. This Act allowed Maori to lay claims against the Crown for breaches of the Treaty and established the Waitangi Tribunal to hear these claims. After a period of trial and error, the Act was amended in 1985. The

R. Kuppe and R. Potz (eds.), Law & Anthropology, 140-151.

amendment empowered an expanded tribunal to hear claims in retrospect, back to signing in 1840. From this time, the Tribunal has been one of the vehicles by which New Zealand has given substance to the treaty relationship between its Pakeha and Maori citizens.

The Waitangi Tribunal was established as a response to a decade or so of political agitation by Maori for recognition of their rights as *tangata whenua*, (original occupants, lit. 'people of the land') the indigenous people, and the other party to the Treaty of Waitangi. The Act allowed for Maori[1] to claim against the Crown for current breaches of the Treaty and established the Waitangi Tribunal to hear these claims. The tribunal consisted of three people, a Judge, a prominent Maori citizen and one other and the claims that came before the tribunal were mainly concerned with such issues as the pollution of tribal fishing grounds. The influence of the tribunal in its early stages was limited, not only in capability, (three part-time members) and powers (restricted to current breaches) but it was regarded by many Maori as a token gesture by the Crown to defuse the more radical elements of Maori political activism (Boast, 1993: 226; Durie & Orr, 1990**)**. A decade later in 1985 the Act was amended to allow Maori to claim retrospectively for breaches of the Treaty dating back to the signing in 1840. The composition of the tribunal was also amended, with the numbers increased to a Chief Judge and six others. The Act was amended again in 1988 increasing the membership to sixteen members in addition to the Chief Judge. With the increase of members[2] the tribunal had a greater capability to hear more claims and more importantly the Maori influence became central to the tribunal's methods of operation.

The tribunal is a permanent commission of enquiry that examines claims by Maori, either as an individual or as a group against the Crown for breaches of the Treaty. Claimant/s must demonstrate that they have been prejudiced by laws and regulations or by acts, omissions, policies or practices of the Crown since 1840 that are inconsistent with the principles of the Treaty of Waitangi (*The Treaty of Waitangi Amendment Act 1985*, 6, [1]). Once the claim has been heard the tribunal publishes its findings in an official report to the Minister of Maori Affairs. If the claim is substantiated the tribunal will make recommendations to government in its report. With the exception of former Crown owned land[3] the government is not bound by the tribunal's recommendations.

Members are appointed to the tribunal by the Governor General on the recommendation of the Minister of Maori Affairs and in consultation with the Minister of Justice. In recommending members the Minister of Maori Affairs is obliged to 'have regard to the partnership between the 2 parties of the treaty' [4.(2A)(a)]. This direction is usually interpreted as the membership of the tribunal being 50% Maori and 50% Pakeha. The other aspect that the minister is obliged to 'have regard … [for] a person's knowledge of and experience in the different aspects of matters likely to come before the tribunal' [4.(2A)(a)]. This direction results in the

[1] A claim can be made by an individual Maori or a group of Maori.

[2] The numbers were increased to sixteen in 1986.

[3] That is land formerly owned by the government and then passed on to State-owned enterprises to be sold on to private buyers. Land once owned by New Zealand railways falls into this category.

membership being a combination of lawyers, academics, elders, and people with experience in business and public life. A member is appointed for a term of three years and they may be reappointed. For a tribunal to be convened a minimum of three members (a presiding officer [who must be a qualified solicitor] and two others) are required, one of whom must be a Maori member.

The claims that come before the tribunal can be divided into three types: historical claims for past government actions, contemporary claims for current government actions and conceptual claims for the ownership and control of natural resources. The Office of Treaty Settlements, divides the historical land claims into the following categories: confiscations (*raupatu*), pre-1865 purchases, and post-1865 purchases. The confiscations refer to lands confiscated from tribes under the Land Settlements Act 1863. The pre-1865 purchases refer to the land transactions that took place prior to the establishment of the Maori land court and the post-1865 purchases are those that were effected under jurisdiction of the Maori land court (Office of Treaty Settlements, 1999: 11-20). Conceptual claims on the other hand are usually related to contemporary concerns and focus on contemporary interpretations of the treaty principles. The claims for the preservation of the Maori language (Wai 11) and the Indigenous flora and fauna (Wai 262), are examples of conceptual claims. Both of these claims reflect the contemporary concerns of the loss of the language and the protection of the environment respectively. The scope of the claims varies considerably from brief short single-issue claims to very extensive claims that involve a wide range of issues. One of the smaller claims was the Pakakohi and Tangahoe settlement claims (Wai 142 and Wai 758) where the hearing lasted three days hearing and the report was produced within fourteen days. An example of an extensive claim is the Ngai Tahu Claim (Wai 27) which was the first of the large regional claims; 150 years of history was surveyed, and 900 submissions from 262 witnesses and 25 corporate bodies were received, the hearing lasted three and half years (Ibid.: xix). The extent and scope of claims is not indicative of the complexity, as the smaller claims can be just as complex as the more extensive ones.

The Treaty of Waitangi was written in English and then translated into Maori, with the majority of Chiefs signing the Maori version. The Tribunal in its enquiries is obliged to take into account both versions of the Treaty and come to decision where the two versions differ [The Treaty of Waitangi Act 1975, 5.(2)]. As there are two language versions of the Treaty and different sets of understandings of what the Treaty meant and signed, particularly in the modern era, emphasis has been given identifying and defining Treaty principles. In a conference paper that I co-authored with Augie Fleras (Maaka & Fleras, 2001) we considered these principles, and the following section is a modified version of those considerations.

2.

Reference to Treaty principles first appeared in the 1975 Act, however the Act did not specify the nature or scope of these principles. To rectify this situation, the Tribunal was charged with promulgating the Treaty principles with which to evaluate Maori claims, assess pending legislation, and propose redress for historical wrongs

(Havemann & Turner, 1994). A comprehensive and complete set of principles may never be formulated, especially since the Tribunal has dealt with only a limited number of cases and has not as yet speculated about principles in cases that have yet to be heard (Hayward 1998). Four major principles have been articulated, namely, the overarching principle of reciprocity, the partnership principle, the active protection principle, and the autonomy principle. These principles derive their legitimacy from the different versions of the Treaty text and have been employed to rationalise Treaty claims settlements while paving pathways for the future. A host of sub-principles may be discerned, including tribal self-regulation, redress, duty to consult, options, impartiality, and mutual benefits, each of which may be subsumed under broader principles.

First: The Overarching Principle - the Principle of Reciprocity

The overarching principle that encompasses all other principles is the notion of reciprocity. A Crown right to governance is secured in exchange for the right of Maori to retain full control over their resources as well as the authority to protect their possessions (*rangatiratanga*). Under the overarching principle of reciprocity, Maori may have ceded sovereignty but only in exchange for reciprocal Crown protection of *tino rangatiratanga* (Maori rights to and of self-determination) (Wai 55: 201). The Crown acquired the right to make laws by virtue of its claims to sovereignty, as claimed by the Manukau Report (Wai 8), but only on the condition that Maori retain *rangatiratanga* and control over land, identity, and political voice. The obligation to protect Maori interests remains unabated (also, Wai 84: 284), according to Justice Richardson, in the *NZ Maori Council v Attorney General* case (1987 NZLR page 673):

> ... The Treaty must be viewed as a solemn compact between two identifiable parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from indigenous people for its acquisition of sovereignty and in return it gave certain guarantees.

Under this overarching ideology several sub-principles can be discerned:

- The bilateral sub-principle: When making decisions or exercising its power, the Crown must take into account both the Treaty as well as the Treaty partnership.
- The sub-principle of mutual benefit: Each party must gain from the Treaty transaction.
- The sub-principle of impartiality: The Crown by its actions must not allow one set of claimants to take advantage over others (Wai 350).
- The sub-principle of options: The Treaty is thought to provide Maori with the options of continuing in their customary ways, assimilation, or finding a third alternative between the two worlds (Wai 22).

Second: The Principle of Partnership

In establishing the foundation for a continuing relationship between Maori and Crown based on pledges, promises, and mutual benefits to each other, the partnership principle confirms a belief that two peoples can live on one land. But not any partnership will do: The Treaty as a charter or covenant establishes a partnership that requires both Maori and Pakeha to act toward each other reasonably, in mutual cooperation and trust, and with the utmost good faith. Nor can Maori be considered the junior partners in the relationship; advocated, instead, is an equal partnership around an association of fundamentally autonomous political communities, each sovereign yet sharing sovereignty.

Third: The Principle of Active Protection

In assuming the right to govern, the Crown has a duty to actively protect *rangatiratanga* rights as set out in article 2 of the Treaty of Waitangi. Protection that is re-active entails the removal of laws, barriers, and constraints that inhibit or deter Maori actions. Proactive protection includes 'affirmative' measures to actively preserve and enhance Maori resources and *taonga* (treasured possessions) (Wai 304: 100). Several sub-principles follow from the active protection principle:

- The sub-principle of fiduciary obligations: Crown obligations as a sovereign power go beyond a moral or magnanimous commitment; they entail fiduciary obligations to protect *rangatiratanga* rights (Wai 55). Included as part of the Crown's mandatory (fiduciary) obligations to Maori is the protection of Maori *mana* (chiefly influence, prestige and power) to control *taonga* in accordance with Maori custom and cultural preferences (Wai 55). Any developments or actions that may negatively impact on Maori *taonga* are seen as violating article 2 guarantees, and must be dealt with accordingly.
- The sub-principle of a hierarchy of interests: A hierarchy of interests in the allocation of resources and jurisdictions has been proposed (Wai 26: 150). First priority is assigned to the Crown and its obligation to manage these resources in the interests of conservation or national interests, before tribal interests reflect a *rangatiratanga* right to preferential access, and finally commercial or recreational interests.
- Sub-principle of a duty to consult: Issues and decisions pertaining to Maori land and rights must not only have regard for the Treaty but also entail an appropriate level of meaningful consultation (Wai 32: 31).

Fourth: The Principle of Autonomy

One of the most recent of Treaty principles to be formulated is the principle of autonomy. The Taranaki Report (Wai 143: 5, 6) clearly captures the centrality of

autonomy in interpreting Treaty principles and Maori perception of history (Maaka & Fleras 2001, also see Hancock & Gover, 2001).

3.

The method of operations was one of the aspects of change that came about with the expanded tribunal; the Tribunal now goes to the people, rather than people coming to the tribunal. Taking the claim to people means hearing the claim at a location of the claimant's choice, which usually means in their tribal territory and on their own *marae*[4]. This means that claimants can be heard not only in their own language and in the surroundings in which they are familiar and comfortable but even more importantly under their customary protocol. Operating in this way has a tremendous effect on the perceptions and the balance of power. The local people are at home and can dictate proceedings. Legal professionals, who are very comfortable in the courtroom with all of its trappings of power, find themselves in a situation where they are the strangers and are expected to accept the rituals of the local people the reverse of the normal situation. All of this has been achieved without the due process of law being adversely affected.

The tribunal is ritually welcomed onto the *marae* by the local people in a ceremony that culminates with a shared meal. Just prior to the commencement of the hearing the *kaumatua* (elders) of the *marae* formally pass the *mana* (prestige) of the *marae* to the presiding officer of the Tribunal. This means that he/she has full control of the *marae* for the purposes of the hearing, to ensure that customary curtesies are not offended, the presiding officer with guidance of the elder on the Tribunal constantly confers with the elders of the marae. This acknowledgement of custom is therefore not tokenism, the influence of the Maori members has meant that the Tribunal takes cognisance of custom in its deliberations. In other words the message given by the claimant group in its oratory, songs and ritual are observed and taken into account as part of the people's story and therefore evidence in their claim. The overall effect of this is to soften the more formal and legalistic aspects of a hearing. Another, largely unheralded factor is the presence of a highly respected elder on the panel, his or her presence is noted and often commented on by the claimants. Because of the high esteem that they are held in, they are able to establish a rapport with the claimant community thus giving the Tribunal acceptability and credibility. As one of the objectives of a claim is to remove the 'sense of grievance' this approach assists in the claimants feeling that they have been heard. Because the Tribunal is commission of inquiry, it is an inquisitorial rather than an adversarial procedure (such as a Court) and is able to accommodate custom.

Having a claim heard through the Tribunal process is not a remote process, the claim belongs to the claimants and they are involved at all levels. They plan their

[4] For Maori the *marae* is probably the most important single cultural institution. Traditionally the *marae* was where all important community issues were publicly discussed and decisions made. It was and continues to be the focal point of a Maori community. In modern usage, the word *marae* incorporates, the meeting house, the dining hall and any other associated buildings. Strictly speaking the *marae* proper (the *marae* atea) is the open space in the front of the meeting house.

claim, they instruct their legal counsel, and they participate in the research and presentation of evidence. A claim hearing provides a chance for groups to have their history researched in detail and the opportunity to participate and witness the presentation of oral and academic versions of their history and traditions in one venue and in one sequence. Their tribal story is also recorded in a way that it will be accessible to future generations and will be able to survive into the future. In this sense the claims process is an empowering experience.

4.

Aside from operational issues there are a number of other aspects of the Tribunal that work well. A former director of the Tribunal noted in a public lecture that the Tribunal has been successful in gaining acknowledgement of specific the indigenous rights of Maori and in combining legal, political, and mediatory practises. This has been achieved in part through the membership being composed equally of Maori and non-Maori and conducting its proceedings in a bi-cultural manner[5]. Even in a critical or 'deliberately unsentimental' look at the Tribunal, Richard Boast, a legal historian states, 'the Tribunal has managed to achieve and retain a remarkable level of legitimacy and respect' (Boast, 1993: 224) and describes the Tribunal's effect in raising the profile of Maori grievances and revising the writing of New Zealand's history as 'a stunning success'. (Id.: 225; also see Durie & Orr, 1990).

To Andrew Sharp, author of the authoritative work *Justice and the Maori*, the Tribunal has had a major role in educating the nation about the treaty issues, the cumulative effect of which has positioned the Treaty central to policy making in New Zealand. He goes on to argue that the Tribunal's main role is that of a 'collector of evidence' the weight of which has obliged the government to negotiate the major fisheries claim without a hearing (Sharp 1997: 389-391). He also argues that because of the success of the Tribunal, the government, in order to control the process, has ensured that settlements are a political rather than a legal process (Id.: 391).

The Tribunal then, has been successful in the way it operates on the ground and as such has gained a degree of credibility among Maori through the way it operates. It is a status that cannot be taken for granted – something that the Tribunal is well aware of. In its bid for efficiency the Tribunal's Governance Group is taking pains not to destroy the special quality or culturally appropriate ambience that it is able to bring to the hearing process (Te Rirориro, 10 March 2001). The cumulative effect of the Tribunal's reports has been to successfully raise the profile of treaty issues and, to a degree, have them accepted as valid by government. While the Tribunal and its work are positioned in this paper as a positive example of how states and indigenous peoples may engage constructively it would be misleading to present the Tribunal as a flawless example or that it does not have its fair share of critics.

One of the most common criticisms of the Tribunal is that it is very slow in producing results. As noted by Sharp prolonged delays serve to exacerbate rather

[5] Lecture notes of an address given by P. Mikaere to a Contemparary Maori Society class at the University of Canterbury, 12 August 1990.

than relieve the sense of grievance felt by the claimants (Sharp 1997: 389). The Tribunal works within the due process of the law, which is an inherently slow process. As well as that the vast extent of some of the casebook claims; geographically, historically and in the range of issues, means that the process will be a long one. For instance, in the Ahuriri ki Mohaka enquiry, the first casebook to be heard, the hearings commenced in 1997 and were not completed until 2000, and the report finalised in 2004.

In his article Boast (1993) argues that the fact that hearings are heard on the *marae* should not be over stated as the hearings in the meetinghouse are not that different from those in a courtroom[6]. He presses the theme that the Tribunal is still just another commission of enquiry and emphasises the fact that there are other alternatives of court action and direct negotiation to resolving treaty grievances. Boast, in pointing out that the Tribunal is simply a commission of enquiry with no extraordinary powers, demonstrates one of the strengths of the Tribunal; it is a vehicle through which Maori and the Crown can consider treaty grievances within the rule of law. To date (2004), the alternatives of court action and direct negotiations have not been a widely exploited means of settling claims.

These criticisms from writers who by and large consider the work of the Tribunal in a positive light reveal the enormous expectations that are placed on the Tribunal and its work. The Tribunal cannot resolve all treaty-related grievances and it is but one facet of a multi-facetted relationship and process. The most appropriate question then is, is it a positive process, does it enhance the relationship between Maori and the Crown and does it assist in improving the situation for Maori in society? It is argued in this paper that the Tribunal does both of these things, enhances the relationship Maori and the Crown and assists in advancing the cause for Maori.

In addition to expectations, Boast raises a more profound point; treaty settlements place the focus on compensation and reparation and do not address the issue of Maori rights to sovereignty. He ponders the need to enter into a 'dialogue between sovereigns' rather than an exchange between Maori *supplicants* and the state. The claims before the Tribunal are symptomatic of the direct result of breaches of the Treaty both implied and specific. So no matter how positive the work of the Tribunal it is only one step in the process of relationship-building or relationship-repair (see Maaka & Fleras, 2004). Treaty settlements are pivotal in the exercise of identity building and resource mobilization (ibid.) and they do not in themselves address the underlying causes that eventuated in a broken relationship in the first place, some of which will be addressed below.

Underlying this discussion on the Tribunal and its work is the premise that indigenous peoples are sovereign by virtue of the fact that they are the descendants and inheritors of the pre-colonial societies. The settler dominions that evolved into modern nation-states were superimposed on existing indigenous communities and their properties. Therefore, the descendent communities are not extraneous or

[6] This of course is a matter of opinion, I hold that the view that Boast underestimates the influence that the venue has on hearings.

peripheral to the Nation-State but are integral to it. In other words indigenous populations cannot be justifiably considered simply as 'problem' groups that are relics of the pre-colonial past – they need to be seen as part of the contemporary national fabric. Nor should these peoples be seen as analogous to other minorities that exist in any one settler dominion. New Zealand without Maori would not be New Zealand, as Canada without First Nations, Inuit or Metis peoples would not be Canada. The converse of this position is the understanding that these communities cannot function effectively outside of the State.

Conclusion

The position and rights of indigenous peoples are not analogous to those of immigrant populations. The basis of Indigenous peoples' rights is that they are the descendants and inheritors of the original inhabitants of what is now a Nation. The fact that a nation state has been established on what were their traditional territories assumes that either they freely gave away their customary rights to their territory or their lands were appropriated through military-cum-political action (colonisation). Colonial states in turn were established either through imposition (for example Australia) or through accommodation (in the form of treaty or some similar instrument), as was the case in New Zealand. Therefore, the position of the indigenous communities that formed as a result of colonisation is entirely different from those groups of peoples who arrived and settled after the creation of the Nation. In liberal democracies such Australia, Canada, New Zealand and the USA there is an increasing pressure for the discourse of the rights and position of indigenous peoples to be subsumed by that of the more recent phenomenon of multiculturalism. This development undermines the unique status of indigenous peoples as first peoples and allows governments to circumvent their fiduciary responsibilities to these peoples.

Indigenous peoples are not problems for the State to solve, but partners with a stake in the future of the State The unique status of indigenous peoples is implicit in founding documents such as treaties. These founding documents legitimised, in the eyes of the international community if not in law, the creation of a nation. Under the all persuasive agendas of independence and nation building, the promises both specified and implied in founding treaties were diminished and minimised. The rights of the indigenous peoples were subject to political expediency of the macro-political agendas of the colonising nation-builders. The contemporary challenge is to breathe life into these documents, to regard then as blueprints for the future rather than relics of the past. This would recognise the special status of indigenous population as first peoples (the 'citizens plus' argument) and facilitate their participation in the ongoing exercise of nation building.

Colonialist paradigms need to be deconstructed and replaced with constructive means by which indigenous communities can engage with and participate in all aspects of national life. For a state to constructively engage with their indigenous populations, all vestiges of colonialism need to be eradicated, through either the ratification of existing treaties or other types of formal agreements, or positively creating new agreements. From formal recognition the next step is to have the intent

of these documents permeating all public institutions (and ideally, private institutions as well).

Constructive arrangements such as treaties between indigenous peoples and states do not necessarily become constructive engagements. The constructive arrangement has too often been used simply as a device to legitimise the seizure of power or the establishment of power (Commision on Human Rights, 1999, paras 109-127). It is making the constructive arrangement work that will eventuate in a positive relationship. It is fair to say that prior to the *Treaty of Waitangi Act 1975* New Zealand did not try to make the Treaty of Waitangi work. It used all of the coercive powers of state to relegate the treaty to the past, to history, characterised as 'collective amnesia' by the historian Orange (1988). The establishment of the Waitangi Tribunal was an attempt to rectify this situation, it was another constructive arrangement. The fact that the Tribunal as a process works assists in defusing the anger that Maori have about their grievances not being heard. This is in spite of the fact that there may be a degree of dissatisfaction by claimants, if they are not totally successful with their respective claims. So, the Tribunal has become a point of constructive engagement.

Once established the Tribunal became an indicator of Maori/Crown relationships, and therefore it needs to be successful. While the struggle for funding can be seen as a feature of institutional life, it can also be regarded as an indicator of the level of importance the government places on the Tribunal's work. If the Tribunal is under-resourced to the extent that it struggles to operate effectively or its recommendations ignored to the point that the Tribunal loses credibility, the relationship between Maori and the government will be severely damaged. The alternative of treaty claims simply being referred to the court would not allow for any type of reconciliation and therefore is not a viable alternative.

However, the engagement only remains constructive as long as the process is maintained and continues to positively evolve. Not only in terms of operational efficiency but more importantly building a constructive partnership for the future. This means using the Tribunal and its hearing processes as a springboard for constructive engagement between the Crown and Maori. It also means engaging in a dialogue as equals and discussing the implications and practise of *tino rangatiratanga*. As noted at the beginning of this paper it is only one step, albeit the first and seminal step along the path towards a post-colonial future.

Bibliography

Boast, Richard P

1993 'The Waitangi Tribunal: "Conscience of the Nation", or Just Another Court?' *University of New South Wales Law Journal* 16(1): 223-244.

Durie, E.T. & G.S. Orr

1990 'The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence' *New Zealand University Law Review* Vol 14 No 1: 62-81.

Hancock, F. & K. Gover

2001 He Tirohanga o Kawa ki te Tiriti o Waitangi: a guide to the principles of the Treaty of Waitangi as expressed by the courts and the Waitangi Tribunal, Te Puni Kokiri (The Ministry of Maori Development), Wellington.

Hayward, Janine

1998 'The Treaty of Waitangi, Maori and the Evolving Crown' *Political Science* 49(2): 153-72.

Havemann, Paul & Kaye Turner

1994 'The Waitangi Tribunal: Theorising its Place in the Re-Design of the New Zealand State' *Australian Journal of Law and Society* 10: 165-194.

Maaka, Roger & Augie Fleras

2001 '*Relations-Repair*: Constitutionalising Indigeneity/Indigenising the Constitution' Paper presented to the 'Re-thinking Indigenous Self-Determination' conference, hosted by the Centre for Democracy University of Queensland, 25-28 September 2001.

2004 *The Politics of Indigeneity: Challenging Indigenous Peoples-State Relations in Canada and Aotearoa New Zealand*. Otago University Press, Dunedin, in press.

Orange, Claudia

1988 *The Treaty of Waitangi.* Allen and Unwin, Wellington.

Sharp, Andrew

1997 'The Waitangi Tribunal in New Zealand politics 1984-96' in: Raymond Millar (ed.), *New Zealand Politics in Transition.* Oxford University Press, Auckland, 386-394.

International and National Reports and Acts of Parliament

1986 *The Treaty of Waitangi Amendment Act.*

Commission on Human Rights

1999 *Study on treaties, agreements and other constructive arrangements between State and indigenous populations.* Final report, submitted by Miguel Alfonso Martínez, Special Rapporteur 22 June 1999, E/CN.4/Sub.2/1999/20.

Office of Treaty Settlements

1999 *Healing the Past, Building a Future: a Guide to the Direct Negotiation of Treaty of Waitangi Claims.*

Waitangi Tribunal Reports Wellington: GP Publications.

1985 Wai 8 Manukau Report.

1986 Wai 11 Te Reo Maori.

1988 Wai 22 Muriwhenua Fisheries Report.

1990 Wai 26 Allocation of Radio frequencies.

1990 Wai 32 Nga Rangiteaorere.

1991 Wai 27 Ngai Tahu Report.

1993 Wai 304 Ngawha Geothermal Report.

1993 Wai 350 Maori Development Corporation Report.

1995 Wai 55 Te Whanganui-A-Rotu Report.

1995 Wai 84 Turangi Township Report.

1995 Wai 143 Taranaki Report.

2000 Wai 758 and Wai 142 The Pakakohi and Tangahoe Settlement Claims.

Waitangi Tribunal/Te Ropu Whakamana i te Tiriti o Waitangi

1999 *Business Strategy. For the Provision of Services to the Waitangi Tribunal*. Wellington: Department of Courts.

Waitangi Tribunal/Te Ropu Whakamana i te Tiriti o Waitangi

2001 *Te Rironiro: The Waitangi Tribunal Division's fortnightly newsletter for staff and tribunal members, 10 March.*

REFLECTIONS ON THE RIGHTS OF INDIGENOUS PEOPLES IN THE NEW VENEZUELAN CONSTITUTION AND THE ESTABLISHMENT OF A PARTICIPATORY, PLURICULTURAL AND MULTIETHNIC SOCIETY

René Kuppe

The very stupid ones do not say what they say,
for saying land they say mother,
for saying mother they say softness,
for saying softness they say devotion.
They are so confused by their feelings
that we, the good people we are,
being in the right
call them savages!

(Gustavo Pereira in the National Constituent Assembly of Venezuela, responding to critics of the rights of Indigenous peoples.)

Pluralism and the Law

It is a well known fact that Latin American countries are mosaics composed of a large number of ethnic groups and cultural traditions. Each individual legal system can develop various responses to these pluralist realities. The most common response that characterised Latin American policy on indigenous peoples of the 20th century was not completely 'indifferent' towards the socio-cultural realities of the Indigenous societies. Rather, it has been a model that has the purpose of equalising and integrating cultural differences, while pretending at the same time to realise an abstract concept of formal equality for all citizens.

At present we are confronted with the potential rise of a new paradigm, wherein it is generally admitted that:

R. Kuppe and R. Potz (eds.), Law & Anthropology, 152-174.

* 'during the last two decades, we have seen that Latin American governments have been confronted with Indigenous claims, forcing them to discuss the issue of legal pluralism in legislative debates' [1];

* the basic aim of Indigenous organisations is 'to delineate a sphere of autonomy where state power cannot penetrate'[2];

* and finally in Latin America, 'the majority of the constitutions have undergone a reform process that leads to the recognition of the multi-cultural and pluri-ethnic character of the societies' [3].

This paper will consider in detail these developments and reforms, which have been recently realised in Venezuela.

Venezuela - A Backward Standard of Legislation in Indigenous Affairs

In Venezuela, we see a country with a significant delay in the aforementioned developments, which, in essence, should be leading away from the outdated model of the mono-cultural nation-state. Even in the late 1990s, one could say that Venezuela maintained a very backward legal framework concerning Indigenous peoples. The national constitution of 1961, still in force until very recently, equalized in Article 77 the members of Indigenous groups with the socio-economic and political rank of rural peasants. This view was expressed in particular by the Agrarian Reform Law, enacted on March 5, 1960. At the same time, this Law was the only legal framework allowing, to a certain extent, the regulation of Indigenous land rights. However, the application of this law the following weaknesses:

* the granting of land titles was directed and controlled by Agrarian law agencies;

* the granted land areas had a very limited geographical extent and did not include the traditional territories of Indigenous ethnic groups;

* there were no land titles granted to Indigenous groups in large parts of the national territories where 'Areas under Special Administration'[4], such as National Parks, had been established;

* land titles based on the Law of Agrarian Reform could only be received by Indigenous groups who had constituted themselves as 'Indigenous enterprises', copying the 'peasant enterprises' as the legal organisation requirement for non-Indigenous beneficiaries of the Agrarian reform.

By applying this legal framework, only 18.95% of the Indigenous population (approximately 19,062 persons) of the Venezuelan state of Amazonas have been

---

[1] Milka Castro Lucic/María Teresa Sierra, 'Presentación: Derecho Indígena y Pluralismo Jurídico en Amércia Latina' *América Indígena* Vol. LVIII, Numbers 1-2, 1998, 7-16, at 7.

[2] Donna Lee Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America*. Pittsburgh 2000, at 1.

[3] Castro Lucic/Sierra, 'Presentación', see *supra* note 1, at 7.

[4] A legal concept introduced by the 'Ley Orgánica para la Ordenación del Territorio' (August 11, 1983), Art. 15.

beneficiaries of land titling processes, while a large majority of the 81,552 Indigenous persons of the same state have never benefited from the agrarian reform process (according to statistics recorded in 1996)[5]. Furthermore, the areas granted only have a geographical extension of 1.19% of the region under discussion[6].

In effect, agrarian reform has been a social process that has transformed the Indigenous population into peasants[7], manifesting in this way the official policy of integration, and even ethnocide.

Although I won't go into great detail about why Indigenous peoples have received such a minimal degree of recognition by the constitutional and legal system of Venezuela, I would like to mention a few reasons. The Indigenous population of the country constitutes only about 1.5% of the total national population, which in absolute numbers is 315,815 persons (according to the 1992 census). The 30 Indigenous peoples are geographically dispersed in remote areas of the country, and, until recently, they have had no effective or representative organisation that has cared for the recognition of their rights. It was only in 1989 that the first Indigenous organisation established itself at the national level. The 'National Indian Council of Venezuela' (CONIVE) does not purport to be a grassroots-organisation but, rather, a framework of action and representation for the existing regional Indigenous organisations of the country. There are also a number of various important regional organisations such as the 'Indigenous Federation of Bolivar State' (FIB), founded in 1973, and the 'Regional Organisation of Indigenous Peoples of Amazonas' (ORPIA), in existence since 1993. Also, there are a large number of smaller organisations, which are of communal or local relevance. As a result of their weak personal capacities, their very limited resources and the marginal position of the Indigenous sector in general, these organisations were never able to influence the debate about the recognition of Indigenous rights in a significant way. During the early nineties, there was some discussion of a parliamentary initiative on a 'Comprehensive Law on Indigenous Communities, Peoples and Cultures', but the Indigenous movement itself could not influence the subject of the bill, which included some pivotal weaknesses. That is, the draft did not substantially change the old land rights model based on the Agrarian Reform Law, and it failed to apply any legal standards developed by international instruments such as the ILO Convention No. 169. Finally, the draft remained within the bureaucracy of the legislative process and was never approved as law. In spite of this, an interesting and unexpectedly rapid development began at the end of the 1990s.

[5] See the table 'Reconocimiento legal de tierras a indígenas de la Amazonía, por países y población beneficiaria', prepared by Roque Roldán, in: Tratado de Cooperación Amazónica – Secretaría Pro-Tempore (ed.), *Tierras y Areas Indígenas en la Amazonía*. Lima 1997, at 185.

[6] Id.

[7] Luis J. Bello, *Los Derechos de los Pueblos Indígenas en Venezuela*. IWGIA Document 26 (Spanish series). Copenhagen 1999, at 14.

Indigenous Participation in the Project of a New National Constitution

In February of 1999, the 10th constitutional president of Venezuela assumed leadership of the government. The change of the Head of State also resulted in a change of the broader political discourse and raised the expectations of the weak, popular sectors of the country, amongst them the Indigenous peoples. Hugo Chávez Frías was the first candidate for presidency to address Indigenous groups in his election campaign through a document entitled 'Fulfilling a Historical Promise'. Herein, he promised 'to pay historical debts to more than half a million Indigenous people'.

The first important political project initiated by the Chávez government was the drafting and approval of a new political Constitution of the Republic. According to various decrees, the new Magna Charta was to be drafted within a National Constituent Assembly (in Spanish: *Asamblea Nacional Constituyente*, ANC), which was established on August 3, 1999.

Initially, the ANC was to be composed of 103 members, 76 of whom should be elected in 24 regional electoral districts (that corresponded to the Federal political units of Venezuela) and 24 were to be elected in a single national election unit[8]. For the purposes of this article, it is interesting to note that the Indigenous communities, considering their exceptional legal status, were to be represented in the Assembly by three members elected 'according to their ancient customs and practices'. This right of participation was provided for in order to ensure that cultural pluralism, predominant in various regions of the country, could find sufficient expression in the work of the Assembly[9].

The planned fundamental change of the national Constitution of Venezuela, based on a broader participation process, opened up a historical opportunity for Indigenous peoples: their specific rights as first nations of the country could be recognised, for the first time, on a Constitutional level. And ultimately the anachronistic model of a uniform nation state, on which the 1961 Constitution had been based, could be left behind.

Between March 21 and 25, 1999, an extraordinary Indigenous Assembly in Ciudad Bolívar took place under the auspices of the national Indigenous organisation CONIVE in order to comply with the presidential decree. After four days of intense debate, three Indigenous representatives were elected for the Constituent Assembly. The elected persons were well-known Indigenous leaders, with sufficient political experience and international contacts, and in two cases with important leadership functions on regional levels:

1. As the representative for the 'Southern Region' (the states Amazonas and Apure) Guillermo Guevara, a member of the ethnic group *Hiwi* and coordinator of the Amazonian Indigenous organisation ORPIA, was elected;

[8] Later, the number of regional representatives was raised by Decree to 104, so that the ANC had a total of 131.

[9] *Gaceta Oficial* (of Venezuela), Number 36.658, March 10, 1999.

2. As the representative of the 'Eastern Region' (the states Bolívar, Delta Amacuro, Sucre, Anzoátegui y Monagas) José Luís González, a member of the ethnic group *Pemón* and President of the regional Indigenous organisation FIB, was elected;

3. As the representative of the Northwestern Region (especially the state Zulia) Nohelí Pocaterra, a member of the ethnic group *Wayú*, an Indigenous woman well-known in public national life, and former holder of several functions in the international organisation World Council of Indigenous Peoples, was elected.

Although the majority of the Indigenous representatives had voted in favour of these three representatives, who could contend with their majority support, the National Election Council later modified the legal framework that had been decreed by the president, saying that the election of the Indigenous representatives had to be based on rules decreed by the Election Council itself[10]. The position taken by this agency was due to the influences of traditional political forces in the country, especially the 'old' political parties Acción Democrática and COPEI, both in strong opposition to a political emancipation process of the Indigenous peoples, and supporting smaller Indigenous factions that were acting under the influence of these political parties. The Election Council did not validate the result of the Indigenous Assembly, but in July 1999 six hundred delegates of the Indigenous peoples re-elected the same persons as their representatives in another Assembly, which had been established according to the criteria of the National Election Council.

The drafting process of the new constitution began within twenty-one Special Commissions of the Constituent Assembly. Initially, the issue of Indigenous peoples was supposed to be treated within a Commission for social affairs merely as a matter of discrimination. However, as a result of the personal intervention of the Indigenous constituent deputy Nohelí Pocaterra before the President of Venezuela, a 'Commission on the Rights of Indigenous Peoples' was finally established. Besides the three elected representatives of Indigenous peoples, there were nine other Commission members nominated, mostly experts on Indigenous or minority issues. This structure ensured that the points of view of the Indigenous peoples were taken into account in the Constitution making process. The Indigenous representatives began to work with the slogan 'we can not remain invisible', coined by Nohelí Pocaterra[11] in reference to the fact that Indigenous rights had thus far been completely neglected and ignored within the Constitutional life of the country.

Basic Constitutional Claims of Indigenous Peoples

The work done by the Commission seized upon the main ideas that had been developed at the many constitutional meetings, congresses and workshops. These

[10] *El Nacional*, March 30, 1999, Desplegado oficial, page D/7.

[11] 'Los indígenas no quieren ser invisibles en la Constitución', Inter-Press Service (IPS) – Vienna, September 6, 1999.

fora included Indigenous participation, and were held in various parts of the country, allowing for a platform where special attention could be given to the developments of Indigenous peoples' rights in other parts of the continent as well as in the international context.

During this complex process of political emancipation some basic claims were raised, claims which should lay the foundation for the recognition of Indigenous peoples' rights:

* First, the Indigenous groups insisted on being recognised as 'peoples'. This recognition is the expression of their ethnic identity, it emphasizes the fact that Indigenous groups possess specific cultural and socio-economic characteristics, and that they want to maintain a continued and permanent existence as distinct human societies[12]. A consequence of the condition of being peoples is their demand to be subjects of political rights, which will give them sufficient control over their relationships with the states in which they live and with the international community. In other words, the condition of Indigenous groups as being 'peoples' does not mean the foundation of new and independent states, but, rather, shall facilitate control over present and future development under the auspices of the Indigenous ethnic groups.

* The second claim was the recognition of their territories, 'territory' being the legal expression for the relationship of Indigenous peoples with their ancient geographical regions. The significance of 'territories' to Indigenous peoples warrants some further explanation.

Territory refers to a geographical space under cultural influence and socio-political control of an Indigenous people[13]. At the same time, it is the basic condition for their lasting existence as a people. Therefore, the relationship to the territory should be maintained in the future, or even *ad infinitum*.

The notion of territory refers to the natural resources and the specific Indigenous system of resource management[14]. It further implies that it is ruled by an autonomous Indigenous legal system.

For these reasons, the concept of 'territory' is very distinct form the concept of 'land', because the latter means a *parcel within* the territory, which can be owned by a physical or a legal person, under the rules of private property law[15].

* A third basic claim of Indigenous peoples was political autonomy. The autonomy claim was intended to lead to the re-claiming of political rights based on

---

[12] Convention No. 169 on Indigenous and Tribal Peoples of the International Labour Organisation, the most important international instrument involved in the regulation of Indigenous peoples' rights. The convention also uses the term 'peoples', which is 'rooted in the recognition of Indigenous and Tribal peoples as permanent societies.' Office of the International Labour Organisation (ed.), *Pueblos Indígenas y Tribales*: *Guia para la aplicación del Convenio núm. 169 de la OIT*. Geneva. 'Transparency 3: Comparison between Convention No. 107 and Convention No. 169'.

[13] Inter-American Institute for Human Rights (*Instituto Interamericano de Derechos Humanos*) (IIDH), 'Los derechos de los pueblos indígenas' – Document for discussion. Prepared by a committee of experts with regards to a process of preparation by the Organization of American States for a regional instrument on the rights of Indigenous peoples. 1994, at 4-5.

[14] Willem Assies, 'Indigenous peoples and reform of the State in Latin America' in: Willem Assies, Gemma van der Haar/André Hoekema (eds.), *The Challenge of Diversity: Indigenous Peoples and Reform of State in Latin America*. Amsterdam 2000, 3-21, at 15.

[15] IIDH, 'Los derechos de los pueblos indígenas' see *supra* note 13, at 5.

the exercise of self-determination[16]. Autonomy refers to the legal powers employed to exercise control over social life in Indigenous territories. These powers are to be compatible with the proper cultural normative criteria of the Indigenous society, and based on autochthonous social or legal rules. Autonomy provides power to Indigenous societies to control, as collective units, decisions that effect the territories and the natural resources existing therein, that is, in their management, their use, benefits achieved in sharing as well as in connection with their exploitation. Autonomy is the legal connection between an Indigenous people and the social, economic and cultural life that exists within their own territorial space.

* The fourth important claim of Indigenous peoples was the recognition of proper legal systems. This claim directly referred to a public function that had previously been considered the central and exclusive task of the national state: it consists of the power to define criteria, which are applied in the solution of legal conflicts and in the control of procedures that are realised for the purpose of the solution of these conflicts. Thus, the recognition of Indigenous legal systems means that Indigenous authorities have the power to apply their own rules, and that they are autonomous when exercising their tasks. As a result, not only are Indigenous persons judged by the standards of their own legal systems[17], the social control of the people over their territorial space is strengthened.

Based on these basic claims, the Commission considered in September 1999 several draft articles including that were to be included in the new Constitution of Venezuela[18].

Starting from a preambular section that expressed the recognition of the pre-existence of Indigenous peoples, and re-affirmed the pluriethnic, multicultural, plurilingual and plurilegal character of the country, there were several far reaching Indigenous rights stated, such as:

* state recognition of the existence of Indigenous communities and peoples, and their legal personality;

* recognition of Indigenous legal systems;

* recognition of Indigenous original rights on their anciently and traditionally occupied territories and lands;

* inalienability of Indigenous territories and lands, and their collective property rights over lands and territories;

* the right to use, administer, conserve and benefit from the natural resources existing in these territories, according to their own priorities;

* free consent concerning projects to be exercised within Indigenous territories;

---

[16] Héctor Díaz-Polanco, 'Derechos indígenas en la actualidad' *Memoria*. Tomo 117, November 1998, México.

[17] Vicente J. Cabedo Mallol, 'La Regulación Constitucional del derecho indígena en Iberoamérica' Unpublished manuscript, Instituto Intercultural para la Autogestión y la Acción Comunal, Valencia 2000, at 42.

[18] 'Propuestas de los pueblos y organizaciones indígenas de Venezuela a la Asamblea Nacional Constituyente', under consideration by the Commission on the Rights of Indigenous Peoples, September 9, 1999.

* the right to maintain and develop Indigenous economic models 'based on reciprocity, solidarity and interchange' and their participation in the national economic life;

* recognition of several cultural rights, such as the right to maintain their world-view, their own education, the access to a system of intercultural and bilingual education, and the right to 'integral health', according to 'their own ways of thinking and world-view';

* recognition of the official character of the Indigenous languages in those federal units where they are spoken;

* specific representation of Indigenous peoples in local, regional and federal legislative bodies;

* a special framework for the exercise of political autonomy, to be organised by the establishment of councils constituted according to Indigenous use and custom[19].

The Polemic Debate about the Constitutional Rights of Indigenous Peoples

The problems that were produced by the National Election Council in connection with the election of the Indigenous members of the ANC was only a prelude to the polemics that began at the end of the month of October 1999, when the Commission on the Rights of Indigenous Peoples presented its draft proposal to the ANC Plenary. During this time, the Indigenous representatives had to face the rather hostile mood expressed within the Constituent Assembly itself.

An Assembly member, Angela Zago, (from the Commission on Citizens' Participation) said that 'according to legal experts', the allocation of specific territories for Indigenous peoples would create international conflicts, because any ethnic group, based on a certain part of the land, could appeal to international bodies 'with the constitution in their hands' to claim independence[20].

Another member of the ANC stated that the recognition of 'the pre-existence of rights, and the declaration that the modern Indians were the hereditary followers of the ancient times, would be a historical absurdity and the territorial suicide [of Venezuela]'[21].

A public appeal was made to the members of the ANC to eliminate any part of the constitutional text that could place into question national territorial integrity. Reference was also made to a former report, written and submitted by the Legal Department of the Ministry of Foreign Affairs, which had recommended in 1996 that

---

[19] With respect to this autonomy, the September 1999 project mentioned above included two alternative formulas:

The first stipulated that 'Indigenous territories are territorial political entities of public law which have a special legal status within the indivisible Venezuelan state ...'. The alternative formula stated that 'Indigenous regions are territorial political entities of public law which have a special legal status within the indivisible Venezuelan state ...'.

[20] 'Discrepancias sobre derechos indígenas complica el dabate constituyente' *El Nacional*, November 2, 1999. The polemics about the term 'peoples' started after the draft of the first article of the Indigenous' rights chapter had been presented for formal discussion within the ANC, on October 12, 1999.

[21] 'La mayor demembración territorial de nuestra historia' *El Nacional*, November 7, 1999.

it would be inconvenient to ratify Convention No. 169 of the International Labour Organisation, because this Convention uses the term 'Indigenous peoples'. The report had also stated that specific Aboriginal rights over natural resources could not be recognised, since the relevant domestic law of Venezuela 'does not make distinctions concerning the race of citizens'[22].

The attacks against Indigenous rights were so strong that a technical 'mediating' commission was appointed, composed of members of the Indigenous Peoples' Rights Commissions and the Commission on the Defence System and the Armed Forces, from which many of the objections were made. This 'mixed' technical commission was formed to debate a possible modification of the draft constitutional Chapter on indigenous peoples' rights, to ensure that it would not jeopardize the sovereignty and territorial integrity of Venezuela[23]. The commission finally modified the draft text in order to find a new version based on minimal consent within the mixed commission. First, the changed text, instead of recognising territories, recognised 'habitats' of Indigenous peoples. A second important change was the recognition of Indigenous 'peoples' with the same understanding and limits as was stated by ILO Convention No. 169. The president of the ANC, Luis Miquilena, achieved, through a single vote on all the eight articles of the chapter on Indigenous rights (*en bloc* voting), the complete approval of the chapter in first reading. Nevertheless, those opposed to the project began a hostile campaign in the mass media, making their opposition publicly known. For the first time in the history of Venezuela, the issue of Indigenous peoples received broad public attention as a result of this public polemic.

The press paid a great deal of attention to the opinion of the 'National Council of Security and Defence' (in Spanish: *SECONASEDE*), controlled by adversaries of the president within the Venezuelan army, but generally an institution not very well known in the broader public. SECONASEDE had issued a report which affirmed that the new Constitution, when approved, would limit the application of national law. The authors of the report complained that, instead, the new Indigenous rights would allow Indigenous peoples to apply methods of punishment or oppression not provided for by Venezuelan criminal law. This would result in inconsistencies in the administration of justice within the country. These attacks against the constitutional project were signed by the secretary of SECONASEDE, Rear Admiral Francis Loria Méndez[24]. Other high ranking military officials, like the retired generals Fernando Ochoa Antich, Rubén Medina Sánchez, Vice-Admiral Rafael Huizi and, foremost, General Francisco Visconti, one of the leaders of the military upheaval from Nov. 27, 1992 and President of the ANC Commission on the Defence System and the Armed Forces, were in strict opposition to the Indigenous rights articles, because of the perceived threat to the sovereignty and territorial integrity of Venezuela[25]. It was

[22] 'Técnicos del MRE reprueban concepto de pueblos indígenas' *El Universal*, November 3, 1999.

[23] María Eugenia Villalón, 'Do Differences Engender Rights? Indian and Criollo Discourses over Minority Rights at the Venezuelan National Constituent Assembly' *Social Justice: Anthropology, Peace and Human Rights* Vol. 3/Nrs. 1-2, 2002, 8-40, at 20.

[24] 'Seconasede teme creación de un Estado multiétnico' *El Nacional*, November 18, 1999..

[25] 'Discrepancias sobre derechos indígenas complica el debate constituyente' *El Nacional*, November 2, 1999.

reported that control over the natural wealth of approximately half of the geographical area of Venezuela would be handed over to a minority fraction of the population, that is, to a mere 1.4 percent of the population[26]. It was also reported that no distinctions among Venezuelan citizens had ever existed, and as a result of the newly established distinctions, the country would 'retrocede to the ancient times of the General Captainship [colonial administrative regime, noted by the author] and [therefore] possibly produce ethnic conflicts that do not exist any more in Latin America'[27].

The statements voiced against the constitutional recognition of the rights of Indigenous peoples grew stronger every day, and were raised by the national private business federation FEDECAMARAS[28], by traditional political parties, and by other declared political adversaries of President Hugo Chávez. To provide an example, the parliamentary section of the Christian Democratic Party (COPEI) organised a public forum with the heading 'Why say NO to the Constitution', in which the international law expert, Adolfo Salgueiro, repeated the view that the recognition of lands anciently and traditionally occupied by Indigenous peoples could endanger the territorial integrity of Venezuela since the demarcation of these lands included the elements of establishing a new nation[29]. The Minister of Foreign Affairs of Venezuela, José Vicente Rangel, felt it necessary to publish press advertisements pointing out the absurdity of the attacks against the recognition of Indigenous rights. Rangel's advertisements also stated that, on the contrary, the recognition of Indigenous rights was a guarantee that human rights could be enjoyed by Indigenous Venezuelans; the advertisements further stated that none of the articles of the new Constitution would impose any burdens on Venezuelan sovereignty, and, finally, that the Ministry would recommend the adoption of ILO-Convention No. 169 to the National Congress[30].

The targets of the attacks against Indigenous rights were the central claims of Indigenous peoples as expressed in the draft which had been presented by the Commission on the Rights of Indigenous Peoples. The adversarial campaign lasted throughout the constituent process, even when some of the basic rights of Indigenous peoples had been modified or even eliminated within the plenary debates of the ANC, which was conducted during the first week of November 1999. The campaign was launched against the recognition of Indigenous groups as 'peoples', against their territorial rights, their autonomy and against the official status of their legal systems. In summary, their main arguments were that:

---

[26] 'Si ANC aprueba artículos 122 y 123 – Indígenas controlarán el 48,76% de la nación' *El Globo*, November 13, 1999.

[27] Id.

[28] 'Fedecámaras hará campaña por el "No" en referéndum constitucional' *El Nacional*, November 23, 1999.

[29] 'Venezuela podría perder 54% del territorio con la nueva Constitución' *El Nacional*, December 2, 1999.

[30] 'Posición del Ministerio de Relaciones Exteriores sobre los Derechos de los Pueblos Indígenas', signed by Minister José Vicente Rangel, *El Nacional*, November 9, 1999.

* recognition of Indigenous rights would undermine the national unity, integrity and sovereignty of Venezuela;

* recognition of Indigenous rights would lead to a dangerous division within the 'people of Venezuela';

* recognition of 'customs and customary Indigenous law' would allow the application of methods of punishment distinct from Venezuelan law and even from 'international human rights'; and

* the state would be limited in its possibilities to exploit natural resources in extended portions of the country.

These arguments were expressed in legal language which heavily emphasized the legal reasons for opposing the recognition of Indigenous peoples' rights. The experts, like Carolina Galli, lawyer of the Environmental Ministry and member of the Legal Council of the Ministry for Foreign Affairs, warned that national unity would be endangered and that Indigenous peoples could claim independence from Venezuela[31].

Economic vs. Indigenous Interests

Members of the ANC who were opposed to Chávez, especially those from the Commission on the Defence System and the Armed Forces accused Indigenous representatives of being ignorant victims of a manipulation campaign led by obscure foreign interests. The Indigenous communities were said to have undergone a heavy process of acculturation, due to their relationships with international religious and environmental organisations. One report prepared by members of this commission reads: 'One can feel the fine influence of trans-national organisations and capital, who want to keep our (Venezuelan) sovereignty away from frontier regions, and hope for the claim of Indigenous sovereignty over these territories'[32]. Those statements were made to convince the public that strong foreign governmental and trans-national economic interest groups were acting behind an innocent 'green' environmental façade, supporting Indigenous leaders in their claim of autonomy, but in reality interested in the natural resources situated in their territories.

Hence, the Indigenous representatives did not only have to argue that their own claims were legally sound and explain that they were not manipulated victims of an international conspiracy, they also had to convince the public that they were fighting for the authentic interests of their people. In fact, these kinds of reproaches against Indigenous peoples are not at all new in Venezuela. Indigenous communities frequently have been easy targets of all kinds of 'disqualification campaigns', as described by the respected human rights organisation 'Programa Venezolano de Educación-Acción en Derechos Humanos (PROVEA)'[33]. The primary purpose of these campaigns was to create negative public opinion about the recognition of

[31] 'Venezuela corre el riesgo de perder más de la mitad de su territorio' *El Nacional*, November 25, 1999.

[32] Id.

[33] See, PROVEA (ed.), *Informe Anual – Situación de los Derechos Humanos en Venezuela, 1996/1997*. Caracas, 232.

Indigenous rights. According to these campaigns, Indigenous peoples are sometimes infected by subversive forces of Colombian drug dealers or guerrilla fighters[34], influenced by environmentalists, religious or international human rights organisations, and sometimes their interests are manipulated by 'fraudulent' representatives, who are 'extremists and indoctrinated by Marxism' themselves, as was expressed by a newspaper article that tried to convince the reader that Indigenous peoples of Venezuela themselves should be opposed to the new constitutional rights[35].

As seen from a very superficial point of view, the main concern of the campaign against the recognition of Indigenous rights was the unity of Venezuela, and the lack of authenticity of Indigenous claims.

Nevertheless, the attacks were launched by some of the most powerful economic forces in the country. One of the main adversarial voices, the ANC member Jorge Olavarria, had been the main promoter of a campaign against the Indigenous Piaroa people in the mid-eighties[36], when the oligarchic land-holder class of Southern Venezuela had aggressively opposed the titling process of Indigenous lands. The fore-mentioned report of SECONASEDE was heavily based on arguments made by the lawyer Isabel Bacalao Romer. As an officer of several public agencies, this woman has had a long record of defending mining interests and claims of non-Indigenous land holders against Indigenous groups.

The very hostile position of FEDECAMARAS concerning land control of Indigenous peoples was due to the fact that traditional economic groups were afraid that their interests would be negatively affected by such recognition. Senator Alexander Luzardo, a University professor and well-known environmentalist, stated that the critics opposed to Indigenous rights 'brought to light hidden elitist racism', and showed 'the old patterns of a simplified nationalism'[37]. Nevertheless, one has to add that these racist-nationalist tendencies are the ideological expression of very specific economic interests of the national elite, which is to maintain an open access to natural resources within the national territory. A new pluralist regime based on power-sharing and the strengthening of political authorities and not under the direct control of these elites is very much opposed by them.

As we have outlined before, all these polemics could not prevent the inclusion of Indigenous rights into the new constitution, but some significant changes were created which seriously weakened the guarantees as had been originally envisioned. The final version of the articles concerning Indigenous rights was incorporated in the text of the Constitutional bill that was approved by the people of Venezuela with a majority of 71 percent in a general referendum held on December 15, 1999.

---

[34] Id.

[35] 'El NO de las etnias' *Opinión*, December 2, 1999.

[36] El CONIVE, 'Hoja Informativa, No 2' November 10, 1999.

[37] Luis Córdova, 'Chávez defiende nuevos derechos indígenas' Inter-Press Service (IPS) – Vienna, December 9, 1999.

New Indigenous Constitutional Rights

The new Constitution of the Bolivarian Republic of Venezuela includes a list of Indigenous peoples' rights that could be considered the most progressive in the continent. The Magna Charta is founded on the pluricultural and multiethnic character of the Venezuelan nation[38], and this must be understood as an important qualitative advancement considering the assimilist orientation of the old Constitution from 1961. In a Chapter on 'The Rights of Indigenous Peoples', the existence of 'the Indigenous peoples and communities' is recognised, however it leaves out any explicit reference to their legal personality[39]. Hand in hand with this recognition, the Constitution also recognises their 'social, political and economic organisation, their cultures, uses and customs, languages and religions, their habitat and original rights over the lands that they have anciently and traditionally occupied and that are necessary for developing and guaranteeing their ways of life'[40].

With reference to these rights over lands, the Constitution provides for the obligation of the state for demarcating these lands with participation of Indigenous peoples within two years after the entry into force of the constitution[41]. There is further a guarantee of the collective, inalienable, inprescriptible, unattachable and non-transferable ownership over these lands[42]. Nevertheless, the Constitution does not immediately recognise the ownership over these lands, but rather outlines the elements of any further legislation implementing these rights.

The Constitution states that the utilization of the natural resources within Indigenous habitats shall be done without impairing the cultural, social and economic integrity of Indigenous peoples, and that this exploitation is further subject to prior information and consultation with the concerned Indigenous communities. It must also create benefits for Indigenous peoples, according to (further) legislation[43].

The new Constitution starts from a new pluralist philosophy concerning economic rights of Indigenous peoples, because it includes a guarantee stating '[t]he Indigenous peoples have the right to maintain and promote their own economic practices based on reciprocity, solidarity and exchange; their traditional productive activities, their participation in the national economy and the right to define their priorities [in economic development].'[44] The registration of patents (by third parties) over ancient Indigenous knowledge is forbidden[45].

The Constitution also establishes the rights of Indigenous peoples to political participation, because there is a guarantee of special Indigenous representatives in law making bodies on federal, state and local levels with Indigenous populations. Specifically, the Constitution provides for three Indigenous deputies in the National

[38] *Constitución de la República Bolivariana de Venezuela*, 1999, preamble.
[39] Id., Art. 119.
[40] Id.
[41] Id., and 12 Transitory Provisional Article.
[42] Id., Art. 119.
[43] Id., Art. 120.
[44] Id., Art. 123.
[45] Id., Art. 124.

Assembly, the supreme legislative organ of the Republic[46]. Political participation rights are an important means through which Indigenous peoples can play a direct role in official legislative processes that may affect their interests.

There are also important new constitutionally recognised cultural rights, like proper Indigenous education and a public education system with an intercultural and bilingual character; an integrated health system which considers the medical practices and cultures of Indigenous peoples; and the official use of their languages[47].

The advancements of the new Bolivarian Constitution of Venezuela are the result of Indigenous leaders' efforts in all geographical Indigenous regions of the country to integrate their ideas on rights and development into the new Magna Charta.

Indigenous Goals and the New Constitution

Comparing the substance of the new Constitution as it entered into force with the different drafts that had been developed by participative procedures during the early phase of the ANC[48], one can certainly detect the impact of the public polemics launched against the rights of Indigenous peoples.

Before we consider the several weaknesses apparent in the final outcome of the Constitutional process, it must be noted that Indigenous peoples might be more successful in achieving broader rights through secondary legislation. At present, the drafting of several laws defining Indigenous peoples' and communities' rights is well under way. (The author is involved as a legal consultant in the elaboration of a national Comprehensive Law on Indigenous Peoples and Communities, and the current draft of this law would overcome some of the weaknesses of the New Constitution, as far as the Constitution does not forbid better legal standards for the rights of these people). Nevertheless, the important point that must be borne in mind in the following discussion is that we are considering the limits of Indigenous peoples' *constitutional* rights, in the technical sense of the word.

One of the most important advances that would have been made if the original claims of Indigenous peoples were implemented is the recognition of their territories. Nevertheless, the new Constitution ignores the concept 'Indigenous territory', and uses the new term 'Indigenous habitat' instead. A critical comment on the new constitutional arrangement describes the term as follows:

> 'habitat' makes reference to a biological space or surroundings, but not necessarily refers to the territorial occupation or geographic area under the cultural influence of a people.[49]

---

[46] Id., Arts. 125 and 186.

[47] Id., Arts. 121, 122 and 9.

[48] For example, the document 'Propuestas de los pueblos y organizaciones indígenas de Venezuela a la Asamblea Nacional Constituyente', *supra* note 18.

[49] PROVEA (ed.), *Informe Anual - Situación de los Derechos Humanos en Venezuela, 1999/2000*. Chapter: 'Derechos de los pueblos indios', Caracas, 267-285, at 268.

And there is an even more striking difference between 'habitat' and 'territory' that does not just relate to the different geographical extensions of both concepts: if we start from an understanding, according to which the territorial rights as they were claimed would include control over natural resources and the validity of autochthonous Indigenous law[50], we see that the guarantees now included in the Constitution fall short of this original goal. Collective ownership, as guaranteed in Art. 119 of the Constitution, refers explicitly only to the 'land'[51], but in view of natural resources in the Indigenous habitats, their communities only have a Constitutional guarantee to prior information and consultation, and the exploitation must also create benefits for Indigenous peoples. There is no explicitly recognised ownership over resources, and no guarantee of free consent concerning decisions on the use and exploitation of these resources.

The Bolivarian Constitution does not recognise the self-government of Indigenous peoples as such. Only the Constitutional Chapter on the 'Municipal Public Regime' includes an article stating:

> The legislation that will be created in the future to develop the constitutional principles relating to the municipalities and other [public] local entities, shall establish various regimes for their organisation, government and administration; [this legislation] should also include the definition of their power and resources, [and] take into consideration the conditions of the population, the economic development […] and the historical, cultural and other relevant aspects. Particularly, the legislation will establish the options for the organisation of a local government and administration system that is adequate for Municipalities with Indigenous populations.[52]

Stating this, the collective right of Indigenous peoples to develop their own political structures for self-government is not recognised, instead there is only *permitted* legislation on national or state levels for establishing a particular municipal government system in regions where Indigenous groups live.

Unfortunately, for several reasons, one can doubt that a municipal regime is the political structure most appropriate to furthering the autonomy claims of Indigenous peoples within the political structure of a state[53].

First, the possibility to create a municipal Indigenous self-government system depends on secondary legislation by the state, and this is in contradiction with the principle of self-determination. And yet it has been noted that it is self-determination that justifies political autonomy[54].

---

[50] See *supra* notes 13 and 14, and accompanying text.

[51] See the document 'Propuestas de los pueblos y organizaciones indígenas de Venezuela a la Asamblea Nacional Constituyente', *supra* note 18, in which Art. 3 guarantees the collective property of 'the territories and lands' of Indigenous peoples.

[52] *Constitución de la República Bolivariana de Venezuela*, 1999, Art. 169.

[53] See Ricardo Colmenares Olívar, *Los Derechos de los Pueblos Indígenas.* Caracas 2001, at 87.

[54] See *supra* in the main text..

Secondly, the new constitutional framework does not clearly and unequivocally provide for the creation of 'Special Indigenous Municipalities', in a sense that the geographical extension of these should correspond to traditional Indigenous regions or territories, nor that their population should be Indigenous in its majority. Art. 169 can only be read in a way that an *accommodation* of the government and organisation structures of a municipality would be permitted in cases where a certain quantity of Indigenous population lives within its frontiers.

In this regard it must be mentioned that the national legal framework about the municipal regime[55] requires a few elements for the establishment and organisation of Municipalities, like a minimum number of 10,000 inhabitants and the capacity to raise funds. There is a striking contrast between such legal requirements and the social reality of most Indigenous communities in Venezuela that could render difficult the future creation of 'Special Indigenous Municipalities'. So, even a reformed municipal regime in the future will not guarantee sufficient recognition of the original Indigenous authorities and ways of government. Especially if the anti-Indigenous political forces gain more strength, there is a great danger that Indigenous political structures will be incorporated into the system of the non-Indigenous political public administration, and Indigenous local groups will continue to live as demographic minorities within municipalities that have been established and are controlled by non-Indigenous interests[56].

The constitutional polemics also made an impact through the manner by which the right of Indigenous authorities to make effective their justice institutions, based on their ancient traditions and according to their proper rules and proceedings, was recognised. According to Art. 260, this power is limited to their habitats and only affects their own community members. Certainly it is an important progress that the members of Indigenous societies have a constitutional right to be legally judged according to their own juridical values. But Indigenous peoples can not claim the collective constitutional right to exercise these jurisdictional functions over non-members of their societies. Nevertheless, Indigenous peoples could have a legitimate interest in extending their jurisdiction over non-members, in cases where the acts of these persons might have affected the interests of Indigenous societies, or when the rights of individual members of Indigenous peoples might have been severely violated by outsiders. Jurisdiction over non-members could strengthen the communitarian – especially legal – institutions of Indigenous peoples, and would also prevent the intervention and taking over of key legal functions within these communities by policemen, judges, and other agents of the non-Indigenous legal system within Indigenous territories[57]. Facing the adversarial attacks against the

[55] Statuatory Law of Municipal Regimes (*Ley Orgánica de Régimen Municipa)l* (June 15, 1989).

[56] According to studies in other Latin American countries, the recent decentralization policies of Latin American States resulted in the strengthening of state political structures and institutions at the local level Thus, paradoxically, a policy of 'democratization' and 'popular participation' degenerated the traditional institutions of Indigenous communities; see, for example: Juliane Ströbele-Gregor, 'Ley de participación Popular y movimiento popular en Bolivia', communication of the Congress of the German Association of Investigation on Latin America (ADLAF), October 1997.

[57] Raquel Yrigoyen Fajardo, 'Reconocimiento constitucional del derecho indígena y la jurisdicción

recognition of Indigenous constitutional rights, and particularly by considering the fears of the regional non-Indigenous population of the state of Zulia to be subject to the 'barbarian and revenge-oriented system' of the Wayú Indigenous peoples[58], the Indigenous jurisdiction was finally limited to so-called 'internal affairs'.

Facing the counter appeals that a recognition of Indigenous groups as 'peoples' could establish a legal mechanism to provoke their separation from Venezuela, there had to be integrated into the Constitutional text a 'safety' proviso[59], stating in clear words that the Indigenous peoples 'are part of the nation, state and people of Venezuela' within an indivisible sovereign political entity. It is further declared that the term 'people' used in the Constitution must not be understood in the meaning it is given in international law. Seen from the perspective of Indigenous claims, this safety proviso would not have been necessary – they never had fought for political independence from the republic – and the proviso also makes very little legal sense. As we have discussed above, the recognition of 'peoples' underlines the fact that Indigenous societies are social entities that are culturally distinct from the social mainstream and have a political permanency, based on their specific ethnic identity. They are not only a demographic phenomena. As peoples, they claim self-determination in the sense that they have a right to decide their own cultural ways of life, and their essential resources necessary for sustaining this way of life must not be taken away. However, this does not mean that they desire to separate from the state in which they live[60].

The right of peoples, including Indigenous peoples, to self-determination, is based on the idea that all peoples without discrimination have a just claim to control their own destiny[61], and is founded on several principles of modern international law[62]. The formula of Art. 126 of the Venezuelan constitution excludes the self-determination consequences implied by the fact that Indigenous societies have a character *as peoples*. It has a discriminative undertone, because it takes away, at least in a declaratory way, a collective right that is universally recognised for all peoples. The human rights organisation PROVEA is stating that the safety proviso can even be read as expressing an disrespectful view of the Constitution concerning Indigenous peoples[63].

---

especial en los países andinos (Colombia, Perú, Bolivia, Ecuador)' *Revista Latinoamericana de Política Criminal* Year 4, Nr. 4 (General subject: 'Criminal justice and Indigenous communities), 1999, 129-140, at 134-35.

[58] The author thanks Nohelí Pocaterra, Indigenous assembly member from the state of Zulia, for this information.

[59] *Constitución de la República Bolivariana*, Art. 126. This formula was approved by a mixed commission composed of representatives of the Commission on the Rights of Indigenous Peoples and Defence and Armed Forces Commission; the article is the direct result of the debates on the rights of Indigenous peoples within the ANC.

[60] Vladimir Aguilar Castro, 'Derechos Indígenas, Soberanía e Integración Territorial', manuscript, Universidad de los Andes, Mérida, Venezuela 1999, at 2.

[61] See: James Anaya, *Indigenous Peoples in International Law*. New York, Oxford 1996, at 75.

[62] Id.

[63] PROVEA (ed.), *Informe Anual – 1999/2000*, *supra* note 49, at 270.

A Schedule for Evaluating the Constitutional Rights of Indigenous Peoples

We have shown above that the new political Magna Charta of Venezuela is the response to a 'challenge of diversity'[64], the product of a process of growing political awareness of the Indigenous movement and the factual result of a broader change in the political landscape that has made possible a change in favour of popular movements and participation. Many details of this change, its institutional framework, the mostly polemical discourses around a reform of the 'nation-states' model towards Indigenous peoples and the specific result, the way in which Indigenous rights are recognised in the Venezuelan constitution has many parallels in other countries of the continent[65]. These recent changes in Latin America have been referred to as a significant progress, leaving behind an outdated model of a 'nation-state', and giving way to a model of a pluralist 'pluricultural and multiethnic' state. This new model pretends to give the same legal standing, without discrimination, to different cultures, ways of life and social organisation.

In order to evaluate whether or not the new pluralist state model really gives the same legal standing and the same public weight to ethnic differences, I want to refer to an interesting theory presented in an instructive essay by Philip Pettit[66] where he discusses three different types of arrangements by which a democratic state can establish a response to the multicultural challenge and to guarantee that ethnic minorities (or Indigenous peoples) are treated without negative discrimination[67].

According to Pettit, a state can:

* either guarantee to the members of minorities the 'minimal right' to be specifically consulted about state legislation and decision-making (what would at least include the possibility of making legal appeals against any decision taken without consultation) (*Arrangement 1*);

* or make specific legal exemptions or provisions in favour of minorities, because, as Pettit explains, the values of the majority can be represented in many public fields, like religious holidays or the education system, so there ought to be a compensatory recognition of minority practices, so that minority members might not have majority practices thrust upon them (*Arrangement 2*);

* or even recognise that the minorities have decision making powers on those issues that affect the minority, with other words, allow the establishment of political autonomy on minority affairs (*Arrangement 3*).

In each case, the arrangement applied in a democratic and representative society should depend on the extent to which it can guarantee a real recognition of diversity, and depending on whether or not it will be sufficient to ensure that the minority are

---

[64] See the title of the book: Assies/van der Haar/Hoekema (eds.), 'The Challenge of Diversity' *supra* note 14.

[65] See, for example, Van Cott, *The Friendly Liquidation of the Past, supra* note 2.

[66] Philip Pettit, 'Minority Claims under Two Conceptions of Democracy' in: Duncan Ivison/Paul Patton/Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*. Cambridge 2000, 199-216, at 213.

[67] Pettit does not explicitly distinguish between 'Indigenous peoples' and 'ethnic minorities' as two concepts with distinct legal implications. Nevertheless, for his purposes, the distinction is irrelevant.

treated as equals by the state in which they are integrated. The arrangement's capacity to reach this goal depends very much on the historical, political, psycho-social and ethical relations between the dominant-majoritarian societies and the minorities or Indigenous peoples.

It will be a sufficiently adequate remedy to recognise the participation rights of minorities, without any formal restrictions of the government, in those cases where the minority culture

> is much respected in a society, and that while there is a rivalry of interests between its members and those in the mainstream, still it is a matter of more or less common awareness that no-one is likely to resent those interests being taken fully into account by government.[68]

If these favourable – and possibly very exceptional – conditions which justify Arrangement 1 do not prevail, it would be necessary to establish Arrangement 2. As I have outlined above, according to this theory, the state should create a legal framework permitting special minority treatment, which would ensure that minority members will not be subject to general legal rules that would have a negative impact on them, because they are based on values of interests of the majority alone.

Finally, Pettit explains:

> There is also a further level of severity at which multiculturalism may make a challenge for democracy; a level that neither rights of consultation nor rights of special treatment will be sufficient to ensure that the minority are treated as equals by the state in which they are incorporated. In this situation the cleavage between the minority and the mainstream is so deep that the minority will not be assured of being treated as equals just because they must be consulted in the process of decision-making or just because the decisions taken must make special provisions in their favour.[69]

Under these circumstances of 'deep cleavage' between majority and minority, only an Arrangement of type 3, autonomy, will be plausible to guarantee the recognition of diversity without discrimination.

The theory presented by Pettit can be a useful background for evaluating the most important constitutional guarantees for Indigenous peoples, as stated by the new constitution of Venezuela.

Critical Summary Analysis

We may again consider the way by which the Bolivarian Constitution responds to the most important legal claims of Indigenous peoples.

---

[68] Pettit, 'Minority Claims under two Conceptions of Democracy' *supra* note 66, at 213.
[69] Id., 214.

We have seen that the new Magna Charta does not acknowledge 'Indigenous territories', but states that the State guarantees the collective, inalienable ownership over Indigenous lands, the demarcation of these lands and the creation of benefits by the exploitation of natural resources from their 'habitats'. In summary, it will be the responsibility of the national executive branch, 'with the participation of indigenous peoples' to realise and apply these legal guarantees. Indigenous peoples' rights over their lands also depends on secondary legislation, which would regulate their substance and the way of their application, because the relevant articles recognise these rights only 'according to' or 'subject to' the 'Constitution *or the law*' (emphasis added by the author).[70]

We find a very similar situation in the public political-administrative system: As also was referred to above, the new Constitution does not explicitly state that Indigenous peoples are entitled to self-determination. Any development of the Municipal system that might consider the particular condition of Indigenous inhabitants would be a weak substitute for actual and substantial indigenous self-government. This would depend on secondary legislation approved by the federal republic or the states[71]. Only through secondary legislation would a specific legal regime be provided that could accommodate the needs of Indigenous peoples, but it must be realised by the state's institutions.

As a result, matters like land rights or local self-government are not subject to the autonomous control mechanisms of Indigenous peoples, but their realization depends instead on a particular legal framework created by the state. In other words, we can identify a framework that corresponds to Arrangement 2, according to the theory advanced by Pettit. We find an even weaker legal arrangement if we consider the issue of decisions about the exploitation of natural resources within the indigenous habitats. The Constitution requires merely a participation right of concerned Indigenous communities, when it states that this exploitation 'is subject to prior information and consultation'[72]. In other words, the constitutional arrangement which is established corresponds to Pettit's Type 1 Arrangement.

A Type 3 Arrangement is only established in relation to the following basic Indigenous claim. The article on indigenous jurisdiction states:

---

[70] *Constitución de la República Bolivariana de Venezuela,* Arts. 119 and 120. The right to the demarcation of Indigenous habitats and land is outlined in the 'Ley de Demarcación y Garantía del Hábitat y Tierrras de los Pueblos Indígenas' (January 12, 2001).

[71] See the *Constitución de la República Bolivariana de Venezuela*, Art. 169, which states a requirement for legislation that develops the constitutional principles relative to municipalities.

[72] Id., Art. 120.

> The legitimate authorities of the Indigenous peoples will have the power to make effective in their habitats institutions of justice that are based on their ancient traditions […] according to their proper rules and procedures …'[73]

The Venezuelan Charta Magna stipulates that indigenous peoples may have their own legal system, autonomously applied by their own legitimate authorities within the limits of the Constitution, the law and the public order[74].

Even if the constitutional rules on Indigenous jurisdiction correspond to a model of Arrangement 3 in Pettit's terminology, there is a significant rule limiting this autonomy, because according to the same constitutional article, indigenous jurisdiction can only affect 'their own members'. In those legal cases that are situated in intercultural social contexts, where values and perspectives of mainstream and Indigenous culture could both enter, there is no guarantee that Indigenous law may be applied. This type of case would instead be subject to judgement under the ordinary legal system.

If we finally consider the adequacy of the models by which the Bolivarian Constitution responds to the challenge of cultural diversity, we have to consider the general socio-cultural context concerning Indigenous peoples' issues in Venezuela. The country has a long history of total neglect of political, civil, economic and cultural rights of Indigenous peoples and their members. For several reasons which cannot be analysed in depth in this context, President Chávez supported an exceptionally positive public atmosphere for facilitating a shift in the official political debate on Indigenous matters. This political shift was the *conditio sine qua non* for including Indigenous peoples' rights into the national Constitution. At the same time, the issue of Indigenous rights entered in public debates during the constituent process[75], and these debates have clearly shown the predominance of an enormous degree of extremely hostile public opinion against these fundamental Indigenous claims. These hostile positions are partially due to the ignorance and prejudice which prevail within mainstream society, but they are also rooted in the economic interests of the traditional oligarchic functional 'elite' of the country, that sees itself radically affected by a recognition of Indigenous peoples' rights. Defamatory campaigns, led by important information media, go hand in hand with a policy of public agencies still rooted in prejudice or indifference when facing the claims and needs of Indigenous peoples. It is a matter of fact that the constitutional changes did not shift the marginal status of Indigenous peoples, neither in the geographical sense, nor in their social and political standing. It could be seen as a paradox situation that

---

[73] Id., Art. 260.

[74] See id. The same article of the Venezuelan constitution mandates that a law must be passed to coordinate Indigenous legal jurisdiction with the general national legal system, but this law will not *establish* the Indigenous authorities to which Art. 260 refers. The constitution recognises that the legitimacy of these authorities is based instead on the autonomous legal and political system of Indigenous peoples.

[75] PROVEA (ed.), *Informe Anual – 1999/2000*, *supra* note 49, at 267.

Venezuela, in spite of the official pro-Indigenous position, is still a country with a rather anti-Indigenous social reality.

The Bolivarian Constitution states in its preamble that its purpose is to create a participative, multiethnic and pluricultural society, but can a constitutional framework like this give the same standing, the same equal treatment to the cultural values and normative criteria of the non-dominant cultures? Will it allow Indigenous peoples participation without discrimination in national political procedures?

Most of the constitutional Indigenous rights are recognised by a model that corresponds to Arrangement 2, in the sense explained above in this article. Arrangement 2 guarantees that minorities are not subject to a general public policy if this policy should have an adverse impact upon them, in cases where it is based on values or goals of the dominant culture. In a legal sense, minorities are exempt from the general legal framework, and have instead a right to a special legal treatment created by the state.

Nevertheless, according to what Pettit explains, the application of such a special treatment *by the state* will not sufficiently guarantee legitimate equal minority treatment if a situation of profound cleavage between majority and minority groups predominates. The 'cleavage' situation exists, as an example, when the inter-cultural relationships are dominated by prejudice, by severe forms of misunderstandings or by serious direct cultural or economic conflicts[76]. In these contexts, an Arrangement of type 2 does not seem to be sufficiently effective to overcome discrimination, and it would be more adequate to establish an autonomy Arrangement (type 3-Arrangement), in order achieve this goal[77].

In summary, considering the social reality of Venezuela, we may have enough reasons to doubt that most of the arrangements made by the Bolivarian Constitution are sufficiently strong to achieve their purpose – to actually create a participative, multi-ethnic and pluricultural society.

From this perspective, those constitutional regulations which only provide for a participation right of concerned Indigenous communities, as in the case of decisions on exploitation of natural resources, appear even more suspect. Exploitation in Indigenous territories is one of the most fundamental dangers threatening the cultural and social integrity of Indigenous societies, and in many cases, it can even be a menace for their physical survival, because of most extreme ecological destruction of their lands[78]. Resource exploitation is also the source of some of very intense conflicts between concerned Indigenous groups and economic forces of the dominant society. Can a participation right sufficiently defend Indigenous peoples facing these dangers?

Participation rights – in other words, the application of Arrangement 2 – will guarantee to a minority that their interests will find sufficient consideration when realised in a context of mutual understanding and respect, when the dominant society

---

[76] In many cases, these types of conflicts go hand in hand and mutually reinforce one another.

[77] See the arguments in Pettit, 'Minority Claims under Two Conceptions of Democracy', *supra* note 66.

[78] See, for example, the contributions in the publication: Latin American Mining Monitoring Programme (ed.), *Mining in Venezuela. Proceedings of the seminar 'Mining in Venezuela'* Bromley, England, 1998.

will not resist considering the values and views of the minority culture's members, and will give full weight to minority arguments when making decisions. Unfortunately, one has to doubt that these values of intercultural respect are common in the current Venezuelan reality. According to a report on the situation immediately after the entry into force of the new Constitution, the new rights of Indigenous peoples are still not being considered in a coherent way, and their participation rights are still neglected[79].

As explained above, the indigenous peoples indeed have a right to full autonomy in matters of legal conflict resolution, because their authorities will have the power to make effective in their habitats institutions of justice. Nevertheless, this legal autonomy only affects their members, so the resolutions of conflicts with an intercultural dimension, even if they affect very much the Indigenous group's interests, remain totally outside of a pluralist setting.

As an example, members of the non-Indigenous societies who are violating rules of an Indigenous people even within Indigenous territorial space, are only subject to the ordinary rules and jurisdiction of Venezuela. In other words, legal cases situated in an intercultural context are only subject to the non-Indigenous system of conflict resolution, and therefore we can say that the values and criteria of Indigenous (or minority) cultures do not carry the same weight as those of the non-Indigenous (dominant) society. An equal standing, without discrimination, would indeed be the very essence of realising the elements of what might be called a real pluricultural society. As a general conclusion, it seems that the rights of indigenous peoples, as they are now part of the new Bolivarian Constitution of Venezuela, are an important historical advance, but are not necessarily sufficient to guarantee the establishment of a participative, multiethnic and pluricultural society. Indigenous peoples had been very aware of the changes they needed and wanted, and these needs and wishes were expressed in their basic claims during the constituent process. Unfortunately, they faced strong resistance from powerful sectors of the majoritarian society, especially by the so called 'traditional elites', and therefore, Indigenous peoples had to accept the weakening of the arrangements by which their rights would be constitutionally recognised.

Venezuela can be useful as an instructive example for evaluating the reform processes in other Latin American states. It is an undeniable fact that important constitutional changes concerning the status and rights of indigenous peoples have taken place, and that many laws defining indigenous participation rights or even establishing new collective rights have been developed[80]. Nevertheless, one should not confuse these changes with the creation of a genuinely pluricultural and multiethnic society. Confusing every advancement on Indigenous rights with the model of a culturally pluralist society is not only an academic error, it also undermines the political agenda of indigenous peoples.

---

[79] PROVEA (ed.), *Informe Anual – 1999/2000*, *supra* note 49, at 267.

[80] See, for example, the collection of legal documents on the subject of Indigenous rights in the publication: Comisión Nacional de Derechos Humanos (ed.), *Derechos de los pueblos indígenas. Legislación en América Latina.* México 1999.

PENDING CONSTITUTIONALITY: AN ANALYSIS OF THE MEXICAN LEGAL REFORM PROCESS CONCERNING INDIGENOUS PEOPLES

Magdalena Gómez Rivera

Introduction

It has now become possible to reconstruct the juridification of Indigenous peoples' demands for legality with the support of legitimacy in Mexico[1]. However, a sophisticated inventory of defences has been built up by the Mexican state, thus rendering explicit (albeit on the grounds of euphemistic sovereignty and national unity) its gradual reluctance to substantially change the standing nature of the legal order or to advance pluriculturality as one of its constituent principles. With regards to the issues of Indigenous peoples, there is undoubtedly a great deal of ignorance, prejudice and discrimination by mainstream population and even by the state in Mexico. However, there is also a new and more profound awareness about the conflict that exists between neo-liberal goals as well as the desire to move towards globalization, and the need to acknowledge new subjects of law who demand constitutional autonomy. This autonomy shall be the basis for the establishment of fundamental rights in accordance with the recognition of these subjects as *peoples*, and must be rooted in their own forms of government. Some fundamental aspects of the content of the Indigenous demands need to be highlighted: their desire to be inserted in the public life of the Nation without sacrificing their own culture, access

[1] For details of this process of 'juridification' see some of the author's writings: 'Defensoría jurídica de presos indígenas' in: *Entre la ley y la costumbre,* edited by R. Stavenhagen and D. Iturralde*,* IIDH-III, 1990; 'Las cuentas pendientes de la diversidad jurídica: el caso de las expulsiones por motivos religiosos', presented at the '*Orden Jurídico y Formas de Control Social*'-*Colloquium*, Fortín Veracruz, 1992, based on the public hearing organised by the Congress of the State of Chiapas on the proposal to classify the crime of expulsions (see Report of the Congress, 1992); *Derechos Indigenas – Lectura comentada del Convenio 169 de la Organización Internacional del trabajo*, edited by INI, Mexico D.F., 1995, second edition; 'La pluralidad jurídica y la jurisdicción indígena', *El Cotidiano,* Universidad Autónoma Metropolitana, May, 1996; 'El derecho indígena en la antesala de la Constitución' in: *Economía Informa,* UNAM, September, 1996; see also the books co-edited by the author: *Donde no hay abogad*o, INI, Mexico D.F., 1990; *Derecho Indígena*, an edited collection of the contributions to an international seminar held in May, 1997, and published by INI-AMNU.

R. Kuppe and R. Potz (eds.), Law & Anthropology, 175-195.

to and full enjoyment of natural resources, and the possibility to participate in decision-making procedures regarding development projects and even the sense and destiny of the Nation. It is not, as we can see, a series of culturalist or paternalistic demands; nor could these demands be reduced or fulfilled by the simple provision of economic resources, the limited recognition of some selected cultural traditions, or the employment of teachers who speak the Indigenous mother tongue. This is the sole reason why a reform of the State itself has been brought forward.

We are fully aware that the Indigenous peoples have practised some forms of jurisdiction – that is, they have 'administered justice' which is traditionally the exclusive power of the State. They have established a system of norms and sanctions without being afforded any legislative competence in that regard, and the fact that such practices have not been formally documented by no means impairs their intrinsic legal nature. Furthermore, these people have governed themselves over time through a developed system of community and local governmental services (*cargos*). Therefore, they have survived under the threshold of legality. In the eyes of the law, Indigenous peoples are not entitled to perform these acts because they are considered 'individuals' who are expressly prohibited from engaging in such practices[2]. The bottom line is this: Functions carried out by Indigenous peoples, although increasingly diminished, belong to the public sphere – they are not mere private acts involving individuals. Thus the recognition and acknowledgement of these functions calls for a profound modification of the legal order.

At the international level, it is essential to proceed immediately by adopting at the United Nations (hereinafter referred to as the UN) the Draft Declaration on the Rights of Indigenous Peoples and the corresponding declaration by the Organization of American States (hereinafter referred to as the OAS). Domestically, in Latin America, it is necessary not only to recognise these rights constitutionally and develop them in the legislation, but also to radically change the states' public policies themselves. Such a change would require states to re-evaluate the impact of multilateral agreements on traditional economic activities, as these agreements often expose Indigenous territories and their natural resources to the appetites of national and international direct investment.

In order to illustrate how this phenomenon has unfolded within Mexico, I will offer an account of the process of juridification over the last decade from the 1992 reform to the more recent reform of 2001.

The Reluctant Constitutional Reform of 1992

By 1989, Mexico was no longer the Indigenous *avant garde* in Latin America. Home to one third of the overall Indigenous population in this region, Mexico had not yet given an explicit legal acknowledgement of its multicultural composition[3].

[2] Díaz Gómez, Floriberto, 'Principios comunitarios y derechos indios' in *México Indígena,* No. 25, December, 1988, pp. 32-37.

[3] Up to this date the fundamental framing norms in force were the extremely paternalistic and integrationist ILO Convention No. 107 and the law that created the Indigenist National Institute [*Instituto Nacional Indigenista*] in 1948 pioneering this assimilationist view.

This was made clear during the Latin American institutional arrangements prior to the celebration of the famous 'Fifth Centennial'. Those were the days of the fall of the Berlin wall, the break of current paradigms and the emergence of the ethnic phenomenon which was believed to be definitively buried and suppressed. The legal/constitutional gap was initially meant to be bridged by the ratification of ILO Convention No. 169[4] and the reform of Article 4, Paragraph 1 of the Constitution. In a de facto presidential system (although it is federal and republican according to the Constitution) a statement by the Executive Branch – on April 1, 1989 – was still required to launch a process which came to an end almost three years later with the final inclusion of the Indigenous peoples in the General Constitution of the United States of Mexico on January 28, 1992.

The reform was initially drafted and led by the Indigenous National Institute (*Instituto Nacional Indigenista*) through the Justice for the Indigenous Peoples' National Commission (*Comisión Nacional de Justicia para los Pueblos Indígenas*)[5]. It was through this process that the proposal to make an addition to the first Paragraph of Article 4 gained force. The consultation consisted of the organization of a series of forums involving different professional sectors and Indigenous groups. However, the most representative Indigenous organisations did not participate in the drafting of the proposal; expressing instead a desire to be distanced from the process as their propositions for the reformulation of Article 4 were not taken into consideration. Some of the Indigenous organisations even delivered to the Congress an alternative proposal to the one ultimately presented by the Executive. It is, however, important to point out that the consultation dealt, in the case of the anthropologists' association, with the possibility of either a wide or a restricted recognition of the Indigenous peoples and the historical roots of such recognition. In the case of the Indigenous groups, the debate centred on the proposal and its development. In real terms, no legal or constitutional public discussion whatsoever took place, neither during the drafting of the initiative nor during its processing by the Congress.

This circumstance casts some light on the historic exclusion of the Indigenous voice and their direct participation. It also helps explain limited Indigenous interest in these issues which, over time, the non Indigenous society has proved to have; namely those legal practitioners educated under the guidance of the positivist tradition adhering unconditionally to a homogeneous constitutional order. These practitioners are virtually glued to legal dogmas such as the formal equality of citizens in the eyes of the law and the blanket application of the principles of law. We might therefore conclude that the discussion over Article 4 became, after all, substantially ideological and remarkably marginal.

The process leading to the addition to Article 4 lasted for years, during which certain statutory and State Constitutions' reforms were approved. Among these legal

[4] ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, still the most relevant international instrument concerning the rights of Indigenous peoples.

[5] Created by President Carlos Salinas de Gortari in April 7, 1989 and presided over by the General Director of the Indigenist National Institute and integrated by academics, public officers and Indigenous individuals on their own accord.

adjustments, two reforms deserve further attention. Both the Federal and the Federal District Codes of Criminal Procedures' reforms of January 8, 1991 set forth the compulsory presence of a translator whenever the Indigenous individual was monolingual or 'could not sufficiently understand Spanish.' This reform also enabled Indigenous litigants to request a review of the proceedings should this requirement not be fulfilled, and also the possibility of issuing expert opinions on the cultural factors having an impact on the facts described as a criminal offence. This reform paved the way for the formal eradication of former practices, which consisted of the prosecution of Indigenous individuals in a language which they did not understand and on the basis of accusations which might be differently assessed in their own communities of origin[6]. The State Constitutions of Chiapas, Oaxaca and Hidalgo were reformed in a similar spirit, and the majority of states later proceeded similarly.

The most salient legal and political event prior to the constitutional reform, as a result of the President's personal commitment to support the initiative was submitted to the Congress four months later: the ratification of ILO Convention No. 169 by the Senate, based on a proposal of the Executive Branch on August 3, 1990. The ratification was ultimately registered on September 4th of that same year. Mexico moved to the front line from the back line (where it had placed itself in 1989), for not only did it become the first Latin American State to ratify ILO Convention No. 169, its ratification resulted, according to the ILO Constitution, in the entry into force of the Convention itself on September 4, 1991. The Senate stated then, without consulting those potentially affected, that 'the present Convention does not contain any provision contrary to our constitutional order nor does it hinder national sovereignty'[7].

Technically, Article 133 provides that the Constitution shall be the supreme law of the Nation[8]. Despite the relevance of the ILO Convention, it did not have any immediate effects within the ongoing reform process, nor did it alter the content of the reform process itself.

If we proceed with our account, it should be noted that the presidential initiative to include an *addendum* to Article 4 of the Federal Constitution was presented before the Congress on December 7, 1990. During the first session of 1991 the Congress kept a prudential distance with respect to the initiative. Even the Indigenous Affairs Commission showed some scepticism, which began to be interpreted as a silent opposition. The aforementioned initiative was finally approved by the Congress on July 3, 1991, during a historic session where the Mexican Left, led by the Democratic Revolution Party (*Partido de la Revolución Democrática,* hereinafter referred to as PRD), supported the presidential initiative. This move involved the sacrifice of the PRD's own proposal, which undoubtedly lacked sufficient support at that time. As a

[6] However, these new procedural elements have not been applied consistently over the last ten years after their formal entry into force.

[7] Report of the External Relations Commission, second section, June 26, 1990, formalized on August 3, 1990 and filed on September 4, 1990.

[8] Article 133 of the Mexican constitution states, in the relevant section: 'This Constitution, the laws of the Congress of the Union which emanate there from, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union ....'

result, it succeeded in preventing the Institutional Revolution Party (*Partido Revolucionario Institucional,* hereinafter PRI) from shielding itself behind the argument that an agreement with the left wing was not feasible, when it was self evident that the opposition to the initiative came from within the PRI itself. In contrast with this perspective, the National Action Party (*Partido de Acción Nacional,* hereinafter PAN) abstained at the Congress. PAN was opposed to an initiative that referred to Indigenous peoples as the exclusive foundation of pluriculturality. Instead, PAN insisted that both Indigenous and Spanish peoples provided the basis for pluriculturality. This reform was, after all, a competing version of Mexican history. And, returning to constitutionality, it had not been accurately understood that Indigenous peoples' inclusion in the constitution resulted ultimately in a formal recognition of the deprivation of the historical rights of Indigenous peoples.

Such is the genesis of the initiative which led to the legal opening of the constitutional realm of Indigenous issues. The text of the added paragraph contains legal technicalities designed to soften the constitutional impact. At this level and from this privileged legal rank, the pluricultural character of the Nation is declared to be rooted originally in the Indigenous peoples, but the provision itself delegates and relegates to 'the law' the regulation of aspects fundamental to Indigenous peoples expressed unequivocally in legislation outside of the constitution, ultimately secondary legislation. For instance, the law was entrusted to protect and promote the 'development of [their] languages, cultures, practices and customs, resources and specific forms of social organisation'; therefore diminishing the legal force of certain fundamental rights which would have otherwise deserved full constitutional recognition. Additionally, the aforementioned paragraph states that effective access to state jurisdiction is guaranteed to members of Indigenous peoples and, lastly, that Indigenous 'juridical practices and customs should be taken into consideration in agrarian lawsuits and proceedings according to the terms of a Law'. Aside from listing the elements and declaring the leading role of the Law, the reform remained virtually out of the Constitution.

The paragraph itself encapsulates an additional problem in stating that Indigenous practices and customs should be taken into consideration in agrarian lawsuits and proceedings 'according to the terms of a Law'. The reform of Article 27 of the Constitution (which established agrarian proceedings) had been approved three weeks earlier than the reform of Article 4 of the Constitution. In light of this chronological sequence it appears to be clear that the wording of the first paragraph of Article 4 must be construed in a restrictive way, as applying exclusively to agrarian issue.

In addition to the weak legal standing of the recognition of Indigenous peoples, one has to remember the content of the reform itself. The paragraph excluded any reference to the legal subjectivity of the Indigenous peoples, their right to autonomy, their political rights and those connected with the resolution of conflicts, among others.

There is still another element to be integrated with the reform of Article 4. As a matter of fact, the new seventh paragraph of Article 27 declared 'a Law shall protect

the integrity of the lands of Indigenous groups'. The Agrarian Law (which partially developed this provision) states 'the lands which correspond to Indigenous groups should be protected by the authorities, according to the Law developing Article 4 and the second indent of the seventh paragraph of Article 27 of the Constitution'. However, such a Law has never been approved.

In summary, the Constituting Power needed one whole year to complete this reform whereas the controversial reform of the historic Article 27 took less than two months. This last initiative was originally set in motion on November 7, 1991 and was published in the Official Gazette (*Diario Oficial*) on January 6, 1992. Only three weeks later the reform of the first paragraph of Article 4 was published.

A Political and Legal Account of the Mutilated Reform of 2001

For the last six years our country has witnessed the widest possible debate on Indigenous law and its constitutional recognition. The rich substance of the proposals and the fundamental demands of Indigenous peoples, expressed in the negotiating space between the National Liberation Zapatist Army (*Ejército Zapatista de Liberación Nacional,* hereinafter referred to as EZLN) and the Federal Government, constitute a programmatic inventory whose development could truly imply a breakthrough in Latin America, since it places the debate in the framework of a profound reform of the State; not only because of the approach or the nature of its proposals but also because of the unprecedented procedure agreed upon by the Parties[9]. Such a procedure would encourage the participation and direct influence of several sectors not directly linked with negotiating Parties, in open contrast with other experiences of dialogue and peace processes in the area.

In the complex dialogue process in Chiapas[10], one of the obstacles to achieving the objectives was the delay in the enforcement of the agreements reached on February 16, 1996, in the framework of the works of the Indigenous Culture and Law Round Table (*Mesa de Derecho y Cultura Indígena*), whose wording expresses the government's commitment to launching a constitutional reform with the purpose of recognizing and guaranteeing Indigenous rights and demands. The Federal Government, in contrast to the position of the national Indigenous movement and the EZLN did not support the newly reached agreements and has shown an erratic standpoint to the extent that it has even cast some doubts about the proposal of constitutional reform produced by the Pacification and Concorde Commission (*Comisión de Concordia y Pacificación*, hereinafter COCOPA), a proposal grounded on the assumption of a previous agreement of the Parties. The Government,

[9] For further details on these negotiation procedure, see below FN 10, and accompanying text.

[10] This negotiation has its legal basis in the Law for the Dialogue and Conciliation (*Ley para el Diálogo y la Conciliación*) issued by the Congress of the Union in March, 1995. On the basis of a prior agreement of all Parties a working plan was set up in order to address the causes which led to the armed conflict and define several task areas such as 'Indigenous culture and rights', 'Democracy and justice', 'Welfare and development' and 'Indigenous women'. Each issue was discussed separately in different forums.

disregarding the support of the EZLN to the COCOPA initiative and after consulting some constitutional law specialists, produced an alternative proposal which was immediately rejected by the EZLN and the national Indigenous movement. The counter-initiative was presented before the Senate for the first time on March 15, 1998.

The COCOPA initiative would modify certain articles, including Article 4 and Article 115 (which dealt with the internal self government of States and Free Municipalities as the basis of administrative organisation). COCOPA's Article 4 is based on the idea that 'Indigenous peoples' are a new subject of law, and the most important right of Indigenous peoples is the right to autonomy. Listed below are the elements included in the draft article which are associated with the elaboration of this right to autonomy, rooted in the culture of Indigenous peoples:

- The right to develop specific forms of economic, political, cultural and social organization;
- Recognition of their internal legal systems of regulation and sanction insofar these are not inconsistent with individual enfranchisements and human rights, namely those of women;
- More effective access to State jurisdiction;
- Collective access to the use and enjoyment of natural resources, except those belonging to the State;
- Promotion of the development of the various components of cultural heritage and identity;
- Interaction at the different levels of political representation, government and justice;
- Entitlement to arrange, in co-ordination with the individual community or with other communities, the most operational strategies to optimise indigenous peoples' resources, the impulse of regional development projects and, generally, the promotion and defence of their common interests;
- Free appointment of their representatives, both at the community level and at the local government level, according to their own traditions;
- Promotion and development of their languages and cultures, along with their cultural, religious, economic, social and political practices and customs.

After five years of debate, on December 5, 2000, President Fox presented the COCOPA proposal as an initiative for constitutional reforms to the Senate of the Republic. The proposal was a sign of hope for the Indigenous peoples of Mexico, as it appeared for the first time that their rights would be recognized by the State. However, all hopes were dashed on April 26, 2001 when the Senate approved a bill that fundamentally altered President Fox's original proposal. This altered version was later approved by the Federal Chamber of Deputies. Finally, the Permanent Commission of the Congress declared, despite the fact that the previous decision had been widely contested, that the constitutional reform was formally approved in July, 2001. The reform was published in the Federation's Official Gazette on August 14, 2001 and entered in force the day after.

The new text fundamentally undermined the constitutional recognition of Indigenous peoples. Article 2 of the reformed constitution clashes with the San Andrés Agreements, ILO Convention No. 169, the COCOPA initiative as presented by President Fox and the internal logic of the present constitutional structure. The Mexican Constitution is organised around two thematic blocks, one containing the fundamental rights and a second one laying out the institutional organisation of the State, including municipalities.

Article 2 includes in Section A the recognition of Indigenous peoples' self determination and autonomy, along with a number of other relevant rights, but it also includes language that subtly limits these rights. The most noteworthy limitation involves the delegation of the recognition of Indigenous rights to state legislatures, thus transforming it into a regional or local policy issue.

In Section B, the standard assimilation policy of Mexico is again reinforced through a number of social programs which had repeatedly proved to be paternalistic and ineffective throughout the reign of the PRI[11]. Undoubtedly there is a deeply rooted assumption among certain legislators whereby public policies lie at the centre of priorities as State obligations. This is the type of discourse employed in the explanatory notes to the draft[12], whereby rights are supplanted by state 'programs', thus preventing the government from being held legally responsible for the violation of rights.

Considerations of legal technique were not construed to be relevant when adding this amendment to the original COCOPA initiative, namely the basic circumstance that any Constitution has two main objectives: to set up fundamental rights and organize the State. The resulting obligations in terms of policies and programs must be included in legal statutes and the broader legal system..

Consequently, rights are taken to be nothing more than mere statements with regards to the obligations of the State. Let there be no doubt about the pressing necessity for building new roads or medical centers, the urgent need to grant more scholarships, or the general disregard for the severe deficit in the access of Indigenous peoples to the minimum threshold of welfare. It is precisely in gaining rights that peoples can re-constitute themselves and, hand in and with other sectors of civil society, can set in motion a State socially responsible and fully respectful of cultural diversity[13]. The legislators, however, decided that any enfranchisement of

---

[11] During a speech that left little room for doubt, senators reiterated at the *Exposé* their lack of conviction or attachment to rights by backing up the thesis according to which the issue of Indigenous peoples consists basically in a question of poverty: 'The report that the joint Commissions submits now to the consideration of the Plenary is, above all, an instrument to promote justice between and for Mexicans, on the grounds that a wide sector of the population has had no access to the development and welfare we are all entitled to'.

[12] Bill approved by the Chamber of the Senate on April 25, 2001.

[13] Senators point out on page 7 of the *Exposé* of the report that: 'The proposal of the joint Commissions not only recovers and integrates all the rights that the presidential initiative mentions, it goes far beyond and makes an effort to enrich it, in particular with regards to Section B of this proposal in which a series of Government actions are incorporated with the idea of reaching a compromise to set up a new pact between the Federal Government, civil society and Indigenous peoples, in line with the San Andrés Agreements'. Law makers forgot that the law which created the National Indigenist Institute in 1948 had created what they considered a novelty: the obligations for Secretaries of State to foresee a specific

new Indigenous rights that could lead to the consolidation of autonomy of Indigenous communities (as present in the COCOPA initiative) should be avoided.

Constitutionally recognising self-determination and autonomy and simultaneously denying the consequences of the exercising of such rights in the territorial areas where Indigenous peoples live shows a profound misunderstanding of the spirit and sense of a necessary reform of indigenous rights. There was a particular interest in suppressing in the initiative the proposed new content of Article 115. This proposal would have allowed people to exert their autonomy through communities or municipal associations, in order to reconstitute themselves as peoples. The right to establish community associations was not granted to Indigenous communities above the municipality level, and this was justified on the basis that it was already granted to the municipalities. However, this justification disregarded the fact that not all Indigenous communities wish to be transformed into municipalities and that some of them are located in various municipalities or in municipalities belonging to different states.

As far as the recognition of the communities as instances of *Public Law,* the original initiative was modified so that they were declared as instances of *public interest*, whose legal profile remained in the hands of state regulations.

The idea of concentrating in a single article the complete reform speaks to the underlying spirit of segregation of the reform itself instead of enabling the whole Constitution to articulate the plurinationality of the State, precisely as the PAN proposed, although such an initiative was eventually not supported during the decision making process. Thus, at the end of the process, the constitution was composed of one article for Indigenous peoples, with the remainder being for the non-Indigenous population[14].

Forbidding Discrimination with New Discrimination

The new constitutional text also includes an *addendum* to Article 1 which states as its explicit mandate the eradication any form of discrimination, however paradoxically, Constitutional reformers were the first to violate this mandate by producing Article 2. This article contradicts the presumption of innocence principle stated in the international system of human rights. As a matter of fact, the content of this article presumes the guilt of Indigenous peoples as it warns that the Mexican Nation is united and indivisible, should they decide to disrupt and tear it apart. It eliminates the COCOPA's wording whereby the right to self determination would be granted, being itself an expression of the autonomy 'as a part of the Mexican State'. On the contrary, these reformers state that autonomy 'shall guarantee national unity'[15]; that indigenous legal systems 'shall comply with the general principles of this Constitution'[16]; that the appointment of their local government authorities must

budgetary provision for Indigenous peoples – an obligation which has yet to be honoured.

[14] The PRD failed to change the decision of PRI and PAN, and hence it came as a genuine surprise when its group at the Senate voted in favour of the whole reform.

[15] General Part of Art. 2.

[16] Paragraph II of letter A of Art. 2.

be carried out 'respecting the federal pact and the sovereignty of the States'[17]; that indigenous customs and cultural specificities shall be taken into account in legal proceedings 'respecting the provisions of this Constitution'[18]. These limitations represent the political views of a salient PRI political leader, with respect to the presidential initiative of 1998 – which modified the COCOPA's initiative: 'a) It proposes provisions which, according to some constitutional interpretations, might constitute a breach of national unity insofar it presents a relation between the Mexican State, the Indigenous peoples and all Mexicans, when it only makes sense to establish relations among different entities; b) it contains norms which endanger the concept of intern sovereignty when referring to autonomy and self determination without restricting those concepts; c) it endeavours to solve a regional conflict with a constitutional instrument to be applied throughout the national territory and to the 56 identified ethnic communities regardless of the problems that are derived from its application in other States of the Republic, other than Chiapas; d) the proposed constitutional reforms present great difficulties for implementation through secondary laws. This would undoubtedly lead to more profound political conflicts arising from the failure to achieve consensus or necessary majorities for its approval. Therefore the demand made to the Federal Government will no longer be the enforcement of the San Andrés Accords but the violation of the Constitution.' He concluded: 'The enemies of the Mexican State and its national values are both outside and within our territory and the history of Mexico shows us the severe consequences of their combined destructive action.'[19]

The Undermining of Indigenous rights by Constitutional Reform

The refusal of the EZLN and the Indigenous National Congress (*Congreso Nacional Indígena*, hereinafter referred to as CNI) to accept the Senate's decision was predictable, and not because the CNI was not willing 'to change a comma' as it was maliciously pointed out, but rather because the COCOPA proposal was the outcome of official negotiations. The negotiation process itself was based on a federal law[20]. In other words, it was based on a decision by Mexican lawmakers and not based on the goals of the Zapatistas alone. The newly devised constitutional reform says a lot about the ideology and interests of the drafters, as well as their ignorance in the constitutional realm.

By setting up a series of limiting clauses in connection with so-called Indigenous rights the constitutional reformers forgot the implications that stemmed from the inclusion of Article 2 in the chapter devoted to fundamental guarantees. For instance, one of the rights which suffered to a greater extent as a result of those

[17] Paragraph III of letter A of Art. 2.

[18] Paragraph VIII of letter A of Art. 2.

[19] Salvador Rocha Díaz, the author of this docuement sent on April 13, 1998 to the President of the Republic, was then a senator. He had been Justice of the Supreme Court and is considered to have played a crucial role in the 2001 counter reform, when he was already a member of the Congress.

[20] See above FN 10.

limitations is the right to have access to the use and enjoyment of natural resources in their lands and territories. The Article states that such access would be enjoyed 'in full respect of the forms and modalities of land property and tenure as established in this Constitution and secondary legislation, along with the acquired rights of third parties or members of the community … '[21]. Allegedly the new constitutional rights are subordinated to secondary legislation, a statement which certainly casts doubts about the respect of the principle of normative hierarchy.

In addition, it is also incorrect to anticipate some conditions based on an assumed future and hypothetical effect on particular interests. In this regard, the Supreme Court of Justice has established and maintained on several occasions the thesis whereby constitutional guarantees, because of their legal nature, are commonly limitations for the public power and not limitations for the individuals, thus rendering it impossible for the latter to violate those guarantees, insofar as facts which execute and tend to deprive from life, liberty, property, possessions or other rights to other individuals shall be punished by the provisions of general law.

In real terms, the position of the PRI and PAN lawmakers is fairly similar to the position of the lawyers and attorneys of private land owners, made even worse by the fact that they are both judges and interested parties in the same proceeding. This is only an example of the distorted elements present in the reformed constitutional texts not to mention other negative aspects, like the absence of key concepts such as lands and territories which have been conveniently replaced by 'the places they [Indigenous peoples] inhabit and occupy'[22].

What is the point of such a strong and cohesive constitutional statement according to which the Mexican Nation has 'a pluricultural composition sustained originally by its Indigenous peoples'[23], if they are only to be welcomed as newcomers, claimants of rights which may interfere 'with the acquired rights of third parties'? Is the limit contained in the Paragraph 5 of the COCOPA proposal not sufficient by referring to the territories which peoples *actually* inhabit and occupy and not to those in which they *have* inhabited and occupied? Why are we hiding the fact that the demand includes the use and enjoyment of natural resources and not of their full property?

Conflict with the rights of third parties would arise only if Indigenous peoples could claim rights to territories and lands that they have inhabited and occupied in the past. Furthermore, according to the Supreme Court of Justice, third parties can defend their rights only if they prove that such a right has been violated.

The new wording constitutes a plain disadvantage for the rights of Indigenous peoples for it does not even foresee that third party interests need to have been previously proved in order to supersede any other interests. Any individual's interest now ranks higher than the rights of Indigenous peoples.

From the very opening of the paragraph which corresponds to natural resources the principle of constitutional supremacy is called into question. This paragraph states: 'To have access [to the use … of natural resources], in full respect of the

[21] Paragraph VI of letter A of Art. 2.
[22] This is the wording used in Paragraph VI of letter A of Art. 2.
[23] Second phrase of the General Part of Art. 2.

forms and modalities of land property and tenure, as established in this Constitution and secondary legislation'[24]. As we can easily see, not only is the recognition of constitutional rights subordinated to the Constitution as a whole but, contrary to the Constitution, the limitation of the aforementioned rights is additionally extended to the respect of secondary legislation, which undoubtedly should be reformed with a view to enabling the enactment and exercise of new constitutional rights. In this regard, the Supreme Court of Justice has clearly stated that 'the rule of the Constitution must always prevail, and whatever secondary legislation may be contrary to the Constitution itself, no authority shall obey them whatsoever'[25].

Needless to say, all constitutional norms have the same standing as parts of the Fundamental Charter, and include in this case the norms regarding Indigenous peoples. The Supreme Court has also declared that 'all constitutional norms have the same hierarchy and none of them can be declared unconstitutional. Therefore it is unacceptable that some of them shall not be enforced on the basis that they are incompatible with other constitutional provisions'[26]

In summary, there are still many legal limitations on the rights of Indigenous peoples. As a result, the realisation of Indigenous rights in Mexico remains to be seen.

The Autonomy of Indigenous Peoples and the Guardianship of the State

During the debate about the counter reform of the COCOPA initiative, the legislators who voted in favour insisted on minimizing the importance of the changes which resulted in a proposal to regulate on one hand the supposed autonomy of Indigenous peoples, and on the other hand the negation of that autonomy through the 'guardianship' of the state.

Throughout several modifications and mutilations this fundamental contradiction gains strength. The last paragraph of Section A of Article 2 on state actions is a perfect illustration of this. It is a change from a recognition of Indigenous communities as Public Law entities to a more generic reference in the following terms: 'The constitutions and laws of the federal entities shall establish […] norms for the recognition of Indigenous communities as entities of public interest'.

As we can see, the recognition of Indigenous communities is delegated to the federated entities as it is not directly placed under the Constitution. As a result, recognition is not a clearly established constitutional right. Paragraph IX of Article 115 of the COCOPA version is suppressed as a result, and is replaced by Article 2. Article 115 reads as such:

---

[24] Paragraph VI of letter A of Art. 2.

[25] Amparo Administrativo, 18 de abril de 1919, unanimidad de 9 votos, in: *Jurisprudencia de la Corte Suprema.* Tomo IV, Edición Fondo de Cultura Económica, Mexico, 1994, p. 878.

[26] Amparo en revisión, 2093/88-Octava Epoca, 7 de febrero de 1990, unanimidad de 20 votos, in: *Jurisprudencia de la Corte Suprema*. Tomo V, Edición Fondo de Cultura Económica, Mexico, 1994, p. 17.

> The right to self determination of Indigenous peoples shall be respected in each and every ground and level in which they hold valuable their autonomy. It may embrace one or more Indigenous peoples, according the specific and particular circumstances of each federated entities. The communities as Public Law entities and the municipalities shall have the faculty to freely associate with a view to co-ordinate their actions. The competent authorities shall make a gradual and slow transfer of resources to enable them to manage those public funds assigned to them. It is up to the State legislatures to determine, on a case-by-case basis, the functions and faculties which might be assigned to them.

This paragraph would enable the implementation of the Indigenous rights as stated in Article 2 of the Constitution. The COCOPA initiative refers to Public Law entities in a very accurate way, by means of understanding that all norms referring to the State or any other legal subject capable of exercising political power or relating to the State in a manner which would have them considered not to be an individual belong to the Public Law realm.

This is the autonomy dimension which was mutilated as a result of the substitution – orchestrated by the law makers – of 'Public Law entity' by 'entity of public interest'. César Jáuregui, a PAN senator, underlined that

> this acknowledgement was not feasible for the very concept is legal nonsense. Such a concept does not exist in our legal system, and is unlikely to be implemented for nobody really knows what is requested. All the legal system is public and Public Law entities could be either the family or the Senate of the Republic. They all belong to the same legal system. It is therefore up to academics, when classifying Public and Private Law, to determine the shape and content to be attributed to each one accordingly. We do, however, have in our legal system 'entities of public interest' which are related to the fact that the State must accomplish the objectives and purposes of the community as a whole.

He added,

> that implies that the State as a legal incarnation of society must involve itself in the development of the Indigenous peoples so that they can move forward from the state of indigence they are mostly drowned in towards improved stages in their quality of life.[27]

In his original phrase in Spanish, Jáuregi used, by referring himself to state of poverty, the word '*indigencia*' which in Spanish has the connotations of 'misery' or extreme poverty, but also is a concept related to social and familial uprooting. Felipe Calderón Hinojosa spoke along the same line of reasoning and proceeded with the

[27] Newspaper *Reforma*, 'Enfoque'-Supplement, May 6, 2001.

same basic misunderstanding: PAN members define the difference between Private Law and Public Law by referring to the material scope of validity's perspective. On the other hand, the COCOPA initiative places the issue on the grounds of personal scope of validity. The issue at stake here is the shift from the analysis of Indigenous peoples' and communities' actions as mere deeds of individuals to a new framework in which these communities are acknowledged as Public Law subjects. That is precisely the meaning of recognising them as new legal entities, bearing collective rights and placed under the umbrella of Public Law with regards to the type of rights, self determination and autonomy, assigned to them. To give another example, Francisco Fraile, PAN senator, stated: 'terms such as Public Law and public interest are being confused through the disregarding of the fact that the later refers to the catalogue of rights of a community under the surveillance of the State and the former to the kind of fruitful relations for the common welfare'[28]. As we can easily see, this 'scholarly' statement given by the PAN politicians on the aforementioned legal concepts seeks to conceal the desire of the Congress to establish guardianship over Indigenous peoples instead of recognizing their autonomy.

From Distorted Rights to Ignored Rights

In the final constitutional reform some important legal guarantees that were originally included in the COCOPA version are completely eliminated. A few of the most significant elements that were left out are described below. The right to 'acquire, operate and manage their own communication media' (Paragraph VII of Article 4 COCOPA version) was substituted by the inclusion of a state policy issue that is stated among other public policies in the following terms:

> To spread the communication network enabling communities through the construction and extension of tracks and telephone lines. Provide the necessary facilities for the communities to acquire, operate and manage their own communication media in full respect of the corresponding laws.[29]

A rule is also included stating that

> [t]he Federation, the States and the municipalities shall, […] within their respective abilities and in consultation with Indigenous communities, define and develop education programs of regional scope. Furthermore they must enhance the full respect and knowledge of the diverse cultures existing in the nation.[30]

[28] Newspaper *Reforma,* May 8, 2001.
[29] Paragraph VI of letter B of Article 2.
[30] Paragraph II of letter B of Article 2.

Any reference to Indigenous participation is now missing from Article 26, which is a rule regarding the obligation of the state to organize a system of democratic planning of national development. There are also no changes made to Articles 53 and 116, which regulate the territorial demarcation of electoral districts in Mexico. Instead, a Transitory Clause is included, according to which the location of Indigenous peoples and communities shall be taken into account for the demarcation of electoral districts 'shall it be feasible', 'in order to facilitate their political participation'. This is another example of a policy guideline being substituted for a constitutional right of Indigenous peoples, based in an inadequate context with regards to the constitutional text. In general, Transitory Clauses serve the purpose of clarifying the scope of the law they are related to, either through the establishment of a period of force or by determining those cases in which this law can be applied. Mexican law makers, however, show us that they can be additionally used as exit doors.

The Legal and Political Efficacy of ILO Convention No. 169 with regards to Mexico

Even though ILO Convention No. 169 was only known among Mexican Indigenous peoples after its ratification, the *Consejo de Pueblos Náhuas del Alto Balsas,* to mention one example*,* used this instrument to oppose several attempts to build a dam and rallied a number of intense mobilizations. On the other hand, the Indigenous Culture and Law Round Table within the dialogue process between the Federal Government and the Zapatista Army framed its proposals within the main legal concepts of the aforementioned convention. There is indeed a long way to go for its completion. For the time being, the Federal Government has exclusively informed the ILO about governmental programs without focusing on the legal and constitutional framework and without establishing any mechanisms for participation and consultation. There have even been open breaches of ILO Convention No. 144, (officially titled 'Convention 144 – Concerning the Tripartite Consultations to Promote the Implementation of International Labour Standards'), also ratified by the Mexican Government, which sets up the obligation of consultation of the covenants' application reports by the representatives of the Government, of the employers and workers.

The reading of the reports already submitted for revision[31] offers an accurate account of the policy concerning Indigenous peoples carried out by the Mexican Government in which Indigenous peoples are treated as objects of public assistance rather than subjects of law. The Government has not modified this obsolete pattern ten years after the entry into force of the convention, even though the paternalistic content of older ILO Convention No. 107 was meant to be replaced by ILO Convention No. 169.

[31] Countries which ratify conventions must submit regular reports to the ILO, which are then examined by ILO's supervisory bodies. See, for details, the article by Lee Swepston in this volume.

On the other hand, and in order to assess the possibilities of application of the said covenant, it is imperative to distinguish the instrument's impact on the international law from its impact on domestic law. As far as international law is concerned, the International Labour Organisation, the mother body of ILO Conventions, has its own mechanisms of control, and its constitutive norms enable the filing of a claim ('representation') on the grounds of its non application. The exemplary process carried out by AJAGI (translated to 'Jalisco Association to Support Indigenous Groups') on behalf of the Wirrárikas[32] to file a complaint backed up by the delegation D-III-57, a section of the National Trade Union of Education Workers (SNTE) shows the current limitations of the mechanisms of such international organisation. The ILO has a tripartite structure, in other words, in the standard setting and supervisory and decision making activities of this international organisation, not only are state representatives integrated, but also representatives from worker's and employer's organisations. Nevertheless, the ILO normally supports the views of member states and is vulnerable to the pressures of said states.

A meaningful illustration of this in institutional pattern is embedded in the statement of the committee entrusted with the aforementioned file in June 1998, in which it declares that the process is deemed to be over, for it has been previously dealt with by ILO's administrative council (the Governing Body, which receives opinions from the Expert Committee and forms resolutions).

> With regard to claims for the restitution of land, the Committee would like to point out that it does not claim to issue an opinion on the resolution of individual land disputes under the Convention or to make recommendations to the Governing Body for this purpose. The Committee considers that its essential task is rather to ensure that the appropriate means of resolving these disputes have been applied and that the principles of the Convention have been taken into account in dealing with the issues affecting indigenous and tribal peoples.[33]

As sharp as it might sound, the Committee assumed in whole the validity of the formal argument presented by the Mexican government and did not give an opportunity for the claimants to present counter-information.

Nevertheless, international law has not exhausted the internal mechanisms of the ILO, for international treaty law is fully applicable to countries like Mexico. The Vienna Convention on the Law of Treaties[34], as ratified by Mexico, states in Article 27 that a Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation. Thus, at present time the compulsory content of ILO Convention No. 169 or even the UN Covenant on Civil and Political Rights could be at issue since Mexico has accepted the jurisdiction of the Inter-American

---

[32] Indigenous people of Northern Mexico, in Spanish also known as *Huicholes*.

[33] Paragraph 32, Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education.

[34] UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679.

Human Rights Court. The legal principles of interconnection and universality and indivisibility of human rights render this manoeuvre possible.

Another dimension worth assessing is the impact of ILO Convention No. 169 on domestic law. According to Article 133 of the Mexican constitution, its ratification renders it supreme law. However it is absolutely clear that the Constitution is the supreme norm according to the hierarchy of norms' principle. Despite this, the Supreme Court has recently ruled that treaties over-rule federal law[35], that is, international treaties are superior to the rest of federal legislation resulting from the Constitution and consequently State legislation must also respect their content.

There is still another debate which was made visible by virtue of the experience of AJAGI's representation. It relates to the question of whether the convention is directly applicable or if it requires further legislation by the State Party. According to international law, a provision has direct effect if it is sufficiently detailed to allow for direct application. This is true for the whole of ILO Convention No. 169 and in particular for the Chapter on Lands and Territories, which is worded in a manner that is sufficiently precise, in contrast to other norms which establish the need for further legislative measures.

As far as the recent reform is concerned, a close-up comparative analysis of the content of the aforementioned ILO convention in light of the decision reveals that the former was not respected, especially with regards to the principle of consultation during the drafting of the text along with its provisions regarding lands, territories, natural resources, education, mass media or political participation. Even if the convention is internally limited by constitutional supremacy, the ILO is expected to review the Mexican constitutional reform and its elaboration procedure.

Epilogue: Indigenous Constitutional Controversies

The official reluctance to locate Indigenous rights within the framework of a broader reform of the State is self evident at this point. In case we were looking for additional evidence, the main drafters of the constitutional reform texts of 1992 and 2001 share somewhat of a 'confession' of their motivations. Back in 1992, drafters declared: 'The constitutional addition was never conceived as a change of the fundamental legal and political principles of the Mexican State, nor was it sought to

[35] The ruling states: 'During its former mandate, this Tribunal had adopted another position in its thesis P:C:/92 published in the Weekly Gazette of the Judiciary of the Federation, 60, December, 1992, p. 27, under the title *Federal laws and treaties have the same normative hierarchical standing.* However this Plenary Tribunal deems it appropriate to discard such argument and thus assumes that international treaties are to be understood as hierarchically superior to federal laws. This interpretation of Article 133 of the Constitution results from the fact that these international commitments are assumed by the Mexican State as a whole and engage all authorities before the international community. This explains why the constituent power has entitled the President of the Republic to adopt international treaties as Head of State and likewise the Senate intervenes as a representative of the federal units and through its ratification engages all public authorities' (Thesis issued by the Plenary of the Supreme Court of Justice of the Nation, Ninth Session, decision N. 1475/98, Air Traffic Controllers' National Trade Union, May 11, 1999).

address a reform so that everything would remain as before'[36]. Nine years afterwards, but still along the same line of reasoning, drafters stated:

> The decisive issue was that federal and popular representatives of the country considered a reform of the supreme law that would not conflict with the political and legal structure of the Mexican State to be the most appropriate one for the Indigenous groups and society as a whole.[37]

In conclusion, 2001 shall not be remembered as a landmark for the acknowledgement of Indigenous autonomy because mainstream policy makers in Mexico saw the COCOPA initiative as a direct result of radical Indigenous claims. The fact that the COCOPA initiative was already the result of negotiations fraught with a series of limitations and barriers and was not the unrestricted expression of Indigenous voices and will was never accepted.

Despite the washout of the counter-reform, the fact that the Indigenous movement has been re-energised and strengthened within the context of the Indigenous National Congress (a national umbrella association of Indigenous organisations) needs to be emphasised. Several organisations made themselves visible throughout the country and concluded that the new constitutional text is of no use and turns existing rights into pretexts to subtly introduce guardianship in an open breach of autonomy. Rejection of the counter reform has been made explicit both by political groups (EZLN, CNI, wide sectors of civil society) and within several formal political institutions, most notably in nine important states including Chiapas, Oaxaca, Hidalgo and Guerrero among others. In this latter case, the spokespeople have even been apprehended by authorities because of such statements. Unprecedented and historical responses have risen to the surface. In the Rarámuri case, 68 traditional authorities ('governors') reached a consensus on a common position and political agenda at national level and stood up law makers to stress their rejection of a reform which 'turned everything inside out'[38].

It is important to emphasise that for the first time in national history the Supreme Court received in one stroke an avalanche of 321 constitutional complaints initiated by municipalities mostly populated by Indigenous peoples: The complaints could only be filed by municipalities and not by the communities, as Indigenous communities lack any legal standing. Concerning this topic Juventino Castro y Castro, a justice of the Supreme Court recognized, in 1997, that

> all Mexican [federal and related] jurisprudential precedents are few in number and deserve no special attention. This proves that only a few

[36] Jorge Madrazo Cuellar, 'La adición del artículo cuarto constitucional' in: *Modernización del Derecho Mexicano,* Editorial Porrúa, México, 1994

[37] See artice by Alan Arias Martín, main advisor of the Senator Bartlett and vice co-ordinator at the Chiapas Dailoge and Negotiation Pool in 1998-2000: 'Una reforma minimalista' in: *Milenio Diario,* May 10, 2001.

[38] Meeting of traditional authorities, in Tarahumara country, May 27, 2001, analysing the decisions of the Mexican Congress concerning the COCOPA initiative.

> conflicts have been treated in this respect and unfortunately this does not imply an adequate management of such conflicts but, on the contrary, a low degree of struggle by Indigenous organisations to improve treatment for those fellow countrymen of ours in an unfavourable position.[39]

Indigenous peoples requested through their constitutional complaints that the Judicial Power review the way in which the constitutional reform of August 15, 2001 was put in place along with the violation of the right to consultation as provided by ILO Convention No. 169.

According to Article 135 of the Mexican Federal Constitution, constitutional amendments must be approved by a two thirds majority of the Federal Congress. The amendment must also be approved by a majority of State legislatures. Article 135 does not indicate that a two thirds majority is required in the decisions of the State legislatures, but a two thirds majority would be required in individual State legislatures for reform of State constitutions. It should therefore follow that the two thirds majority in individual State legislatures is a reasonable threshold for the reform of the Federal Constitution. In the case of a constitutional amendment, the majority of the States should approve the text and return it to the Congress in order to fulfill all the procedural requirements. However, in the case of constitutional reform with regards to Indigenous peoples in 2001, this process is full of irregularities. Some states did not specify in their approval the number of votes in favour and against the reforms, whereas others did not reach two thirds majority of the votes. Other states, even when prior publication of the reforms in the local official gazette is compulsory under state law, failed to do so or simply failed to deliver their decision to Congress before fulfilling this requirement.

In summary, there were many irregularities relating to the way in which the Federal Congress evaluated the decision-making process in state legislatures with regards to the amendments to the Federal Constitution. Additionally, none of the States, except Chiapas and to some extent Oaxaca, undertook any consultation with Indigenous peoples about the amendments. These are only a few examples of the unresolved issues which have been brought before the Court. Consequently, the Court has requested information from all State legislative bodies and the Congress of the Union. In practice, the principle of constitutional supremacy impedes claims of non-recognition of acquired rights when the opposing party refers to a constitutional source of power, such as the case of the power of the Legislative branch to reform the constitution however it decides. Facing these limitations, one could refer to a violation of procedural requirements, along with the violation of ILO Convention No. 169.

---

[39] *Report of the International Seminar of Justice Administration and Indigenous Peoples*, La Paz, Bolivia, 1998, pp. 123-124. Justice Castro y Castro explained during that seminar two jurisprudential precedents. The first one, a Supreme Court decision on appeal issued on September 5, 1990 reaffirmed the recognition of the guarantee of a public audience in favour of Indigenous communities whenever their communal lands or goods are claimed or affected by third parties. The second one, Constitutional decision (*amparo directo*) 4344/72, issued on April 4, 1973, rejected the idea that individuals of Indigenous race (sic) could be considered not criminally responsible.

From this perspective, the constitutional complaints allege the violation of due process as established by Article 135 of the Federal Constitution, which relates to constitutional amendments, in the case of the Constitutional Reforms on Indigenous peoples. The process of consultation on constitutional reforms which Indigenous peoples and communities themselves had carried out since 1994 were openly disregarded, and therefore this constituted a violation of Article 133 of the Constitution in relation to Article 6 of ILO Convention No. 169, which states that the concerned peoples shall be consulted, through appropriate procedures, whenever consideration is being given to legislative measures which might affect them directly.

Additionally Article 6, Paragraph 2 of the Convention points out that the consultation carried out should be undertaken with the objective of achieving agreement or consent to the proposed legislative measures. This requirement needs to be connected to Article 4 of the Convention, in accordance to which measures taken to enforce the Convention should not be contrary to the freely expressed wishes of the concerned peoples.

In regard to Article 6 of the Convention, which sets up procedural guarantees that must frame the legislative process wherever the rights of Indigenous peoples might be directly affected, Articles 14 and 16 of the Mexican Constitution state that the State is obliged to guarantee that no person shall ever be deprived of his rights without being given the opportunity to defend himself according to the formalities provided by law and in full respect of the right to due process. The ruling of the Supreme Court of Justice, in constitutional controversies, might have a general effect (*erga omnes*) insofar as the ruling has been approved by a majority representing at least eight votes of the Supreme Court Justices**;** otherwise, the ruling shall only have effect among parties (*inter partes*). In other words, only if eight Justices vote in favour of contesting the proceedings of this constitutional reform, would the reform have general effects (*erga omnes*) that is, it would suspend the entry into force of the reform temporarily if a review of the proceedings has been required, or declare it invalid definitively if such reform is seen to have had a substantial deficiency from the very beginning.

It is extremely important to understand that the Supreme Court cannot modify the *content* of the reformed articles, since this is part of the Judicial Power. The Court holds no authority to modify the substance of decisions already taken by the Constitutional Reform Power. This is one of the core problems of these complaints, and is strictly connected with the fact that international human rights covenants, an integral part of the supreme law of the land in accordance to Article 133 of the Constitution, are located hierarchically below the Constitution itself, thus hindering, for example, the enforcement of ILO Convention No. 169. Nevertheless, most of the controversies deal with the violation of the procedural requirements and also the violation of the principle of consultation as defined in the above mentioned Convention. The Supreme Court might reasonably conclude that, at the time in which the reform was being unfolded, such constitutional reform did not technically exist yet and therefore ILO Convention No. 169 should have been respected for it is located, according to the Court's own jurisprudence, above Federal laws. From this perspective, the Court could make room for the real implementation procedures of

international covenants and address the clear evidence that at present time Indigenous peoples are not extended any rights of defence as peoples against the State.

Decisions on constitutional controversies and unconstitutional actions against the counter reform will undoubtedly be an important precedent on the possibility of judicial implementation of rights stemming from an international covenant and its decision shall result in an advance or a setback. In any case, the ball will again be in the court of the Congress of the Union**.** No political agreement shall ever be reached on the basis of the COCOPA initiative, unless there is a fundamental shift in the current line of reasoning and political standing of the Congress of the Union. For this reason, the Congress itself must become sensitive to Indigenous philosophy, taking for instance as a valid point of departure the position of the Mexican indigenous Rarámuri people, which grounds conflict resolution in an ethic of outcomes, and not on the ethics of intentions. Irrespective of their willingness to cause damage or their good faith, persons among the Rarámuri are fully responsible for their actions[40].

During a seminar in Lima, Peru[41], fifteen years ago, we concluded that the only possibility for defending convicted Indigenous individuals was resorting to a judicial review of the criminal proceedings, since the cultural implications of the case were legally disregarded. The 1992 reform did not help to improve this situation. Today, we are facing the Supreme Court of Justice and again we are forced to build defence arguments against the counter reform exclusively on the grounds of violations of the proceedings. Although our arguments are supported by the ILO Convention No. 169, we are confronted with the principle of constitutional supremacy which renders this line of argumentation weak. Even if the Indigenous and pro-Indigenous social movement has reached a time of unprecedented strength in the country, even if an agreement has been signed with the participation of Indigenous peoples and even if allegedly a change of regime has taken place (after the final electoral decline of a political party ruling Mexico for the last seventy years), the position of the State has not changed. As long as the State perceives that any right acknowledged to Indigenous peoples constitutes a threat to its own existence, no agreements on a common ground for a new relationship between the State and Indigenous peoples will ever become feasible.

Final Note

On September 6, 2002, the Supreme Court of Justice decided not to analyse the Indigenous constitutional complaints, arguing that it was beyond its competence to review Constitutional reform procedures. This resolution closed the last domestic juridical remedy for the indigenous peoples of Mexico.

---

[40] Interview with Ricardo Robles, a Jesuit with 30 years of experience living in the *Tarahumara* territory.

[41] The seminar was organized by Rodolfo Stavenhagen in July, 1987. Its contributions were published in the book *Entre la ley y la costumbre,* IIDH-III, 1990.

(RE) WRITING HISTORY: A REPORT ON THE UNITED NATIONS EXPERT SEMINAR ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS POPULATIONS

Andrea Ormiston

> *[...] in the context of current United Nations practice and in accordance with existing international legal instruments and standards, the securing of effective international protection of minority rights remains very much confined to the realm of their individual rights. In addition, this overall issue is mainly dealt with as a matter pertaining to the internal jurisdiction of States [...] Yet, indigenous peoples justly attach considerable importance to the recognition, promotion and securing of their collective rights, this is, their rights as social groups. Equally, they seek the possible establishment of international mechanisms for the resolution of conflicts with State authorities, in particular, in connection with the rights recognized in, or acquired by means, of instruments with acknowledged international status, such as treaties.* Final Report on Treaties, Agreements and Other Constructive Arrangements, by Alfonso Martinez, Special Rapporteur[1]

> *We cannot re-write history, and only in rare instances can indigenous peoples be restored fully to their situations prior to colonization or other historic events.* Background Paper, by the Government of Canada[2]

[1] UN Doc # E/CN.4/Sub.2/1999/20, 22 June 1999 at 74-75, hereinafter cited as the 'Final Report'.
[2] 'Perspectives on Treaties, Agreements and other Constructive Arrangements between States and

R. Kuppe and R. Potz (eds.), Law & Anthropology, 196-210.

Preliminary Remarks

In August 2003 I was selected to participate in an international internship as part of the Canadian government's Youth Employment Strategy. The internship was funded by the Canadian Department of Foreign Affairs and International Trade. My sponsoring organization was the Native Law Centre at the University of Saskatchewan and my host organization for international placement was the Institut für Recht und Religion at the University of Vienna. Before I began my internship I had studied various aspects of Canadian human rights law, and this included the rights of Aboriginal peoples in Canada. Under the supervision of Dr. René Kuppe in Vienna, I researched how the rights of indigenous peoples are developing and being recognized in the international arena. Dr. Kuppe suggested that I attend an Expert Seminar on Treaties between indigenous peoples and states. What follows is a summary of my observations of this seminar and was also submitted as the final report for my internship.

In December 2003, the United Nations High Commissioner for Human Rights organized a three day Expert Seminar on 'Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations.'[3] Attending this seminar in Geneva was the culminating experience in my internship. Having spent the first months reading, researching, and discussing the international dimensions of indigenous peoples' rights, participating in this expert seminar was an opportunity to give shape to my original project topic: Finding international remedies to the legal injustices perpetrated against Canadian Aboriginal peoples.

History Must Not be Ignored

When I first heard of the 'UN Expert Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations' I mentally stumbled over the knotty title and was left wondering: Why is this not simply called the 'UN Expert Seminar on Treaties?', why is it necessary to specify that the relevant parties are 'States and Indigenous *Populations*?', what are 'Other Constructive Arrangements?' In short, the title alone spoke volumes to me about the diplomatic history that must have led to these very carefully crafted phrases, and I realized that the Expert Seminar I would be attending would be the newest chapter in a long story told by many different voices.

Participating in the Expert Seminar made the history of the international indigenous rights struggle even more palpably obvious. As a new-comer to the arena, I watched experts from across the globe greet each other as old friends, and I also saw the hostile evidence of deeply-entrenched animosities. I heard stories of those who came to the UN to demand their rights as indigenous people for the first time as young men, and who now pointed to their grey hairs as evidence of the longevity of

---

Indigenous Peoples' Background paper by the Government of Canada, UN Doc # HR/GENEVA/TSIP /SEM/2003/BP.17 at p. 14.

[3] For further details on the Seminar, including publications, see the website of the High Commissioner of Human Rights at: http://www.unhchr.ch/indigenous/treaties.htm.

their struggle. I bowed my head in common observance of those who had fought for the recognition of indigenous peoples' rights and who were no longer with us. All of this drew my attention to the fact that this seminar was part of a larger network of activities by the Indigenous Populations UN Working Group, by the Permanent Forum on Indigenous Issues, and a formidable network of independent experts and organizations concerned with indigenous rights[4]. The fact that the Study at the focal point of the Seminar took nine years in itself to complete is a testament to the breadth of this meeting's historical context.[5]

The Expert Seminar was first recommended in a resolution of the Sub-Commission on the Promotion and Protection of Human Rights (2002/19), which stated that before the end of the International Decade of the World's Indigenous Peoples, a seminar should be organized to more fully explore the implementation of the final report of the Special Rapporteur, Mr. Miguel Alfonso Martínez on treaties, agreements and other constructive arrangements between States and indigenous peoples. The Special Rapporteur's Final Report describes the role that treaties have played in the relationships between indigenous peoples' and States, and it also affirms the importance of treaties as mechanisms for achieving international recognition of indigenous peoples' rights.

Treaties figure prominently in the shared history of States and indigenous peoples; they have been tools to establish rights and responsibilities, and they have defined the parameters of economic, cultural and geographical relationships. Treaties have been the subject of great controversy and friction[6], but the current direction of the international indigenous rights movement seems to indicate that treaties can also be instrumental in forming new more equitable relationships between indigenous peoples and the States in which they find themselves. It has been recognized that the consensual nature of treaties and the fact that treaties are engineered to benefit both signatories, makes these legal documents particularly amenable to promoting harmonious, just and more positive relations between States and indigenous peoples.[7] The Special Rapporteur's Final Report contains several key recommendations with respect to existing treaties and the future of treaty making, but by way of cursory summary, the December 2003 Seminar was intended as a forum for experts to meet and discuss the implementation of recommendations such as the following:

- In absence of domestic implementation of treaties, an international body to monitor, administer and enforce registered treaties should be created;[8]

[4] A history which Mr. Martinez adumbrates in his Final Report at paras. 5-15, and which Sharon Venne explores in detail in her book, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples.* Theytus Books, 1999.

[5] See the Final Report, para. 21.

[6] See especially the Working Paper prepared by The International Indian Treaty Council, UN Doc # HR/GENEVA/TSIP/SEM/2003/BP.6 and the 'Response of the Treaty Four First Nations of North American to the International Treaty Study' (1995).

[7] See Conclusions of the Expert Seminar, UN Doc # E/CN.4/2004/111 at para. 3.

[8] Para.'s 308, 315, 316 and 322 of Mr. Martinez's Final Report.

- continued treaty making between States and indigenous peoples should be governed by principles that recognize the rights of the indigenous treaty-partners as established in international law;[9]
- confidence-building steps should be taken by indigenous and non-indigenous populations living in 'multiple' societies, such that harmonious relations can be fostered in these societies.[10]

While there is a history leading up to the Expert Seminar, there is also a history that led to my attendance there. From the moment I arrived at the UN I realized the importance and relevance of my own personal history. Who I was, where I was from, what brought me there, and who brought me there all contributed to my experience of the Expert Seminar, and so they will continue to shape this report. Although the scope of the Seminar itself was broad[11] I will focus on the portions most relevant to the relationship between the Aboriginal people and the State in Canada. To come full circle from my initial consternation at the title given to the Expert Seminar, I will divide this report into three parts, named after 3 phrases whose history I have been researching during my internship: 'Treaties', 'Agreements and Other Constructive Arrangements', and 'Indigenous Populations.' Following an overview of the Expert Seminar as a whole, I will use these three main categories to organize my observations and analysis on the salient points raised during the Seminar.

Overview

The Seminar was divided into three main topics:

- Existing treaties, agreements and other constructive arrangements;
- Modern-day treaties, agreements and other constructive arrangements;
- Implementation, monitoring and dispute resolution regarding these legal instruments.

Willie Littlechild was elected to chair the Seminar, and the floor was dominated by North American indigenous groups and by representatives from the Canadian federal government. One of the recurring themes in discussions on all three of the main topics was the legal force and effect of treaties that have been made between North/South American indigenous peoples and the States in which they find themselves. The question of whether these treaties are valid and binding international legal agreements was at the core of the assertion that indigenous peoples are sovereign nations and independent subjects in the international legal arena.

---

[9] See para.'s 298, 302-303 of the Final Report where Mr. Martinez notes how some of the current negotiating techniques of States are at odds with Indigenous peoples' rights.

[10] See para.'s 154-155 and 294-295 of the Final Report.

[11] Including nearly 40 indigenous rights *experts* from all over the world and representatives from approximately 20 states. For a full participation list see the Conclusions and Recommendations of the Seminar, UN Doc # E/CN4/2004/111, available online at: http://www.unhchr.ch/pdf/chr60/111AV.pdf.

Indigenous groups supported Mr. Martinez's conclusion that pre-existing treaties were made between sovereign nations, and that the status of the parties and the international force/effect of the treaties were recognized as such at the time. On this basis *inter alia*, indigenous groups from Canada and the USA rejected the notion of 'modern day treaties' as envisioned by States like Canada, since they do not recognize the sovereignty of Aboriginal peoples. While Canada argued that the treaty-making process must move forward through negotiation and settlement of land claims, indigenous representatives emphasized the importance of the history between States and Aboriginal peoples, and the fact that pre-existing treaties have not been nullified by the mere passage of time. Given the resistance States have demonstrated against accepting the full scope of indigenous rights and their refusal to recognize the binding nature of historical agreements, international intervention was called for to implement and monitor treaties.

The States who did actively participate in the Seminar (Canada & USA in particular) resisted or unambiguously denied that indigenous peoples have a claim to sovereignty. Canada and the USA showed their unwillingness to move beyond a hierarchical relationship where indigenous peoples are dependent nations existing within the borders of those States.

The conclusions reached at the Seminar have now been published as UN Document # E/CN.4/2004/111[12], and they can be summarized as follows:

The experts agreed that historic treaties, agreements and other constructive arrangements between States and indigenous peoples should be understood and implemented in accordance with the spirit in which they were agreed upon. To date States have not respected such treaties and this has led to dispossession of indigenous land and rights, and at times their very ability to survive.[13]

The experts support the initiatives of States to engage in negotiations or constructive arrangements with indigenous peoples regarding their treaty rights and obligations, however the negotiations must have legitimacy with both indigenous and non-indigenous participants, and they must always be in accordance with the principles of free, prior, and informed consent.[14]

The experts affirm the ability of indigenous peoples who have not entered into formal treaties with colonial powers and whose lands have been occupied on the basis of *terra nullius,* to claim status as nations.[15]

The recommendations of the Experts following the Seminar particularly relevant to the Canadian situation include the following[16]:

- That States respect existing treaties with indigenous peoples, and that where conflict arises dispute-resolution mechanisms be developed which are free from bias or political intervention, which respect the collective rights of indigenous peoples (including to land and

[12] Available online at: http://www.unhchr.ch/pdf/chr60/111AV.pdf; see also Appendix 2 of this volumes.

[13] At para. 2.

[14] At para. 4.

[15] At para. 5.

[16] Note this is an abbreviated list to fit the focus of this report, and that the full version of the recommendations can be found in paras. 7-21 of E/CN.4/2004/111.

resources), which include indigenous laws and norms, and which are developed with free, prior, and informed consent of all parties;

- that States must foster public education about the nature of treaties and indigenous peoples' international rights that arise from these agreements;
- that the Commission on Human Rights consider recommending that the Economic and Social Council requests that the United Nations Treaty Section of the Office of Legal Affairs locate, compile, register, number and publish all treaties concluded between indigenous peoples and States;
- that the Working Group on Indigenous Populations formulate guidelines on treaty making and enforcement, and also to draft a declaration on the rights of Indigenous Peoples before the end of 2004;[17]
- that the Convention on Biological Diversity undertake a study on the impact of treaty abrogation on the ways of life and biological diversity of territories specifically covered by a treaty, agreement or other constructive arrangement.
- And finally, with respect to the dissemination of information, the Experts recommend that the World Intellectual Property Organization catalogue the oral history of indigenous peoples on the making of treaties, agreements and other constructive arrangements; and that the Department of Public Information of the Secretariat provide information about indigenous peoples' treaties, agreements and other constructive arrangements, underlining that they are sacred agreements that define indigenous peoples' relationship with States and the international community.

Treaties

The first topic on the Seminar Agenda dealt with existing treaties, and this opened the floor to much discussion by indigenous groups and the Canadian State. Indigenous Groups made several interventions regarding the current reality of existing treaties in Canada.[18] Speaking for the Akaitcho Dene Treaty 8, Sharon Venne identifies the main problem with existing treaties in Canada as a lack of political will to implement treaties. She states that instead, the Canadian government is interested in extinguishing treaties and replacing them with other comprehensive agreements.[19] Venne notes that there are significant problems with the current

[17] The Experts particularly encourage the Working Group to affirm the importance of article 36 of the current draft declaration on the rights of indigenous peoples in its current text as approved by the Sub-Commission, in particular with respect to the right of self-determination, and the establishment of a competent international body directly to adjudicate treaty disputes unresolved through other mechanisms.

[18] Most notably by Sharon Venne of the Akaitcho Dene Treaty 8 and Wes George of the Federation of Saskatchewan Indian Nations.

[19] Background Paper prepared by Sharon Venne for the Expert Seminar on Treaties, Agreements and

enforcement of treaties in Canada, most of which are rooted in the fact that the State follows a Eurocentric implementation process that does not allow the full intent of the original treaties to be realized.[20] Some of the more notable obstacles are the favouring of the written over the oral versions of the treaties, and the fact that there were no appropriate mechanisms for implementation included in original treaties.

Venne also flags another major issue hindering treaty implementation in the Canadian context: the fact that in order to access the UN machinery for international remedies, internal domestic mechanisms must first be exhausted. Venne makes the important distinction, that while the Canadian government gives lip-service to fostering just relations with Aboriginal people, history demonstrates that there are no effective domestic mechanisms in place to deal with treaty violations or implementations. For example, she argues that the variety of different internal bodies created to deal with problems arising from treaty violations do not solve the problems they are intended to address.[21] The main thrust of Venne's position is that the inefficacy of domestic responses to treaty violations warrant an international system that ensures the collective rights of indigenous peoples are recognized.

The position taken by the Canadian government at the Seminar was that there are a multiplicity of internal domestic mechanisms in place to ensure harmonious relationships are built between indigenous and non-indigenous peoples. In their intervention the Canadian state maintained that it had done much to implement key recommendations in Mr. Martinez's Final Report, in particular:

Para. 252 which affirms the indigenous right to their lands and resources, including the ability to enjoy them in an independent or traditional way;

Para. 254 which states that it is necessary for the process for healing indigenous and non-indigenous relations to go beyond the legal sphere into alternative forms of problem-solving;

Para. 259 which stresses the need for domestic governments to act in accordance with international law.

With respect to para. 252, Canada claims that the current network of existing treaties, and new settlement techniques allow indigenous people to exercise these rights to at least some lands and resources.[22] At the heart of the Canadian argument is their claim to have done much with respect to para. 254, through assistance to Aboriginal peoples to access the Canadian justice system,[23] and through various

---

Other Constructive Arrangements between States and Indigenous Populations, Geneva, Dec. 15-17th 2003, UN Doc # HR/GENEVA/TSIP/SEM/2003/BP.11 at paras. 2, 4.

[20] Ibid. at 4, 6.

[21] For more information on these types of institutions in other countries see: 'Report on the Treaty of Waitangi 1840 between Maori and the British Crown,' prepared by Mrs. Claire Charters, UN Doc # HR/GENEVA/TSIP/SEM/2003/BP.15.

[22] 'Analysis of Principles, Processes and the Essential Elements of Modern Treaty-Making - The Canadian Experience,' prepared by the Government of Canada, Dec. 15-17th 2003, UN Doc # HR/GENEVA/TSIP/SEM/2003/BP.9 at pp. 5-6.

[23] 'Perspectives on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples,' prepared by the Government of Canada at p. 3, and p. 9 where in light of the interventions by Aboriginal groups at the Seminar, the Government uses the surprising language that

forms of alternative dispute resolution ranging from education initiatives to 'modern treaties' and comprehensive claim settlements.[24] With respect to para. 259, Canada claims to have fulfilled this recommendation by participating actively in efforts to establish 'internationally agreed rights' of indigenous peoples. However, the force of this commitment is somewhat negated by Canada's simultaneous position that this 'international agreement' has yet to exist.[25]

Canada also made the highly contentious claim that it supports para. 265 of Mr. Martinez's Final Report, which states that the Special Rapporteur found 'no sound legal arguments' to support the allegation by States that indigenous peoples have lost their juridical status as nations/peoples. Canada maintains that it supports para. 265 despite the fact that it unequivocally takes the position that Aboriginal people living in Canada are not sovereign nations. Instead Canada baldly asserts that 'We cannot re-write history'[26] and therefore it is best to approach the issue of indigenous and non-indigenous relationship with a forward-looking perspective. In other words, in the view of the Canadian state, violations of historic treaties should not be rectified in the same manner as violations of international treaties made between sovereign entities. Canada insists that domestic law, policies and practices must remain the primary focus and that international standards should only influence these internal mechanisms.

Not surprisingly, when Canada voiced this opinion at the Seminar it was met with vociferous and passionate resistance from indigenous experts. Sharon Venne was quick to point out that it is this kind of position that demonstrates the exact lack of political will to abide by existing treaties and to respect the existing rights of Aboriginal people that makes international intervention necessary. Venne attacked the Canadian insistence that history is not 're-writeable' as evidence of the State's refusal to correct the treaties and rights that it has violated in the past.

Although it is a truism that those violations cannot be erased from the history of Canadian Aboriginal relations, the correlative point that Canada is making (ie: that history should not be re-written such that indigenous peoples are restored to their status as sovereign nations) is deeply inconsistent with the spirit of para. 265 of Special Rapporteur's Final Report. While Canada is eager to show that it is willing to attempt a variety of mechanisms to mend the future of indigenous/non-indigenous relations, their position seems to be blatantly in opposition to the conclusions made by the Special Rapporteur that the injustices and oppression experienced by indigenous peoples is a direct result of the historic 'process of retrogression' by which States dispossessed indigenous peoples of their sovereignty.[27] From this perspective Canada is in direct opposition with the real nub of the Special Rapporteur's Report – which is essentially that international law needs to remedy that fact that indigenous peoples have lost their sovereignty to their detriment and to the

---

Aboriginal people 'enjoy' access to the Canadian Justice System.

[24] See ibid at p. 10 for the description of educational initiatives and p. 6-8 for other forms of dispute resolution. Note that the Modern Treaty making process will be considered in more detail in the following section.

[25] See ibid. at p. 13.

[26] See ibid. at p. 14.

[27] See Final Report at para. 105.

benefit of the States in which they live. It is difficult to imagine then, how Canada can substantively support para. 265 when it does not recognize that the violations leading to indigenous oppression in Canada are the very ones the State firmly refuses to correct.

Canada's position falls squarely in the domain of para. 105 of Mr. Martinez's Final Report, which criticizes the legal fallacy that international treaties between sovereign nations should simply lose their legal force and effect over the passage of time, or that indigenous nations have been somehow legally dispossessed of their sovereignty.[28] And yet it is clear from Canada's position at the Expert Seminar that the State wishes to present itself as a leader in the international community in the struggle to harmonize relationships between indigenous and non-indigenous peoples. To this end, their background paper makes recommendations as experts, using as examples such as The Office of the Treaty Commissioner, the Nisga'a Agreement and INAC educational initiatives to bolster the argument that there are successful domestic mechanisms in place to address treaty violation and implementation.[29] Although Canada may not have made such explicit gestures of resistance to the goals of the international indigenous rights experts as States like the United States of America[30], it is nevertheless difficult to see why Canadian Aboriginal/non-Aboriginal relations should be a laudable model for international legal standards – particularly given the lack of fundamental alignment with the central principles of the Special Rapporteur's Final Report, and the condemning testimony of all the indigenous experts from Canada.

The two major issues that I consider central to the conflicting positions of the Canadian State and Aboriginal experts on the issue of existing treaties are as follows: Firstly, are existing treaties binding international law? And secondly, are internal domestic mechanisms for addressing treaty violations in fact effective? With respect to the first question, the force and effect of treaties between indigenous and non-indigenous peoples is affirmed by the extensive research amassed in the Special Rapporteur's Final Report.[31] In addition, this Study also suggests that indigenous peoples have not lost their character as subjects of international law, as they were originally seen by non-indigenous treaty partners. The Canadian State produced little by way of significant dialogue on these points at the Expert Seminar. The sum of their arguments against the legal force of existing treaties and the sovereignty of indigenous peoples is the unsupported conclusion that these concepts do '[...] not reflect the domestic or international legal or practical realities of those agreements'.[32]

---

[28] The 'process of retrogression' is described further in paras. 265, 271-2.

[29] See 'Perspectives on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples,' prepared by the Government of Canada at pp. 8, 10 & 12.

[30] The extent of the United States of America's participation in the Expert Seminar was a 10 minute appearance by a government representative who voiced the USA's unequivocal objection to the conclusions and recommendations in Mr. Martinez's Final Report. The representative continued by attacking the foundation of the entire indigenous rights movement as faulty and unsustainable, and concluded by emphasizing that the USA considers indigneous peoples living within its borders as internal dependant nations.

[31] See Final Report at para. 271-272.

[32] See 'Perspectives on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples,' prepared by the Government of Canada at p. 14.

With respect to the second issue of the efficacy of the current domestic mechanisms, it seems that the Canadian State has a heavy burden to bear to support their claims that these internal structures are working to better indigenous/non-indigenous relations, particularly in light of the contrary opinions tendered by all Aboriginal Seminar participants from Canada. It seems there is much more information needed here to determine whether the plethora of government spending and programs are in fact achieving their stated goals. This will be discussed in more detail in the following sections, since 'Other Constructive Arrangements' form a large part of what Canada claims to be doing to further its international obligations.

Agreements and Other Constructive Arrangements

The Expert Seminar contributions dealing with Agreements and Other Constructive Arrangements predominantly focused on indigenous peoples with no treaty relationship to the States in which they live. However, the relevance to the Canadian context as mentioned above is the issue of 'modern treaty making' as envisioned by the Canadian government. Since Canada will not recognize the importance of addressing treaty violations as broken pacts between sovereign nations, its approach to remedying Aboriginal/non-Aboriginal relationships necessitates a 'forward looking' agenda. Thus Canada proposes to side-step any obligation to directly confront broken treaty promises, in order to focus on 'Agreements and Other Constructive Arrangements' such as comprehensive land claims and other settlement negotiations.[33] For example, Canada heralds the Nisga'a Agreement as an example of how Aboriginal and non-Aboriginal communities successfully negotiated self-government structures and land/resource rights.[34]

Although it is undeniably true that there must be a move away from Aboriginal people appealing for their rights through the Canadian justice system, there are also serious concerns with the process of negotiation and settlement claims as it currently exists. During the Seminar it was noted that these other constructive arrangements very often involve a bartering of Aboriginal rights for the land and resources that they need to physically and culturally survive. What indigenous rights experts pointed to as the evisceration of their rights was described during the Seminar by a Canadian government representative as an agreement by Aboriginal peoples to 'suspend exercise' of certain rights in exchange for other benefits such as land or resource entitlements. In my view the Canadian idea of agreeing to not engage certain rights comes dangerously close to what Mr. Martinez describes as 'non-negotiables' in treaty dispute resolution[35]. What, after all, is a right if it is not being practised? Is it ethical to use rights as currency for attaining lands or resources – and particularly when these very things are already the subject of pre-existing treaties?

---

[33] At least, this is my interpretation of their position flowing from the statement that they will 'not re-write history'.

[34] See 'Analysis of Principles, Processes and the Essential Elements of Modern Treaty-Making – The Canadian Experience,' prepared by the Government of Canada at pp. 6-7.

[35] For example the principle of extinguishment of 'Native title' as noted in para. 302 of the Final Report.

Although the Canadian background paper may give some examples of successful constructive arrangements between the State and Aboriginal peoples, there are still issues that plague the struggle to have collective Aboriginal rights in Canada realized through the 'modern treaty' making process. The Special Rapporteur draws attention to this point when he calls for careful assessment of the advantages and disadvantages to both indigenous and non-indigenous peoples when 'self-government' initiatives replace the full exercise of ancestral rights to governance.[36] Once again, many of the difficulties that arise here are related to the failure of States to recognize indigenous peoples' sovereignty. To name a few of the problems with the 'modern treaty' making process in the Canadian context that were identified at the Seminar[37]:

- There is a serious racism against Aboriginal people in Canada that arises from the wide-spread disinformation regarding the true history and legal rights of indigenous peoples. The racism is a massive barrier to effective negotiation and settlement because the process has little legitimacy for non-indigenous peoples.

- The negotiations are not governed by policies and procedures jointly developed between treaty partners, but rather by the non-indigenous groups only. These administrative approaches often undermine the negotiation process. Because Aboriginal sovereignty is not recognized, the process is also unbalanced because Eurocentric values prevail; for example, written versions of treaties are preferred over oral, Aboriginal partners are not consulted with respect to administrative policies, all negotiations are subject to State and not Aboriginal laws, and the philosophical starting point is always that Indigenous lands have been vested in the Crown.

- The state controls all funding for negotiation and the prospect of indebtedness can be serious duress for Aboriginal parties. There has been no or little attempt to implement the affirmation of Aboriginal rights that are achieved through the Canadian judicial system.

In summary there is a fundamental divide on the issue of 'Agreements and Other Constructive Arrangements' in Canada. While there are certainly aspects of the Canadian State's position on this issue that are constructive and helpful, the bridge that connects the two disparate opinions expressed at the Seminar is indigenous people's sovereignty. At this point, the major obstacle to crossing the bridge remains the fact that Canada will not move beyond a process of negotiation wherein Aboriginal peoples are acknowledged as anything more than internal dependant nations. Several of the conclusions and recommendations from the Seminar also address the fact that there is a lack of adequate international guidance on 'modern treaty' making at this time. For example, the Recommendations and Conclusions call on the Working Group on Indigenous Populations to

> formulate guiding principles on the elaboration, negotiation and implementation of treaties, agreements and other constructive arrangements, taking into account the importance of open, transparent,

[36] See the Final Report at para. 303.
[37] See Background Paper prepared by Sharon Venne, at pp. 2-5.

> equitable, inclusive and participatory avenues of redress, monitoring, arbitration and mediation.

and also to

> develop a working paper to follow up on mechanisms for resolving conflicts arising from treaties, agreements and other constructive arrangements.[38]

Hopefully these international bodies will produce guidelines for structuring the negotiation and settlement process that will incorporate both indigenous and non-indigenous administration, policies and philosophical underpinnings.

Indigenous Populations

Aboriginal people in Canada are more than likely familiar with the approach to rights-recognition whereby the State claims that if they do not know who you are, your rights cannot be recognized. The history of rights-recognition has been an excrutiatingly slow process as expensive litigation to define Aboriginal people, Aboriginal title and Aboriginal rights move slowly through the Canadian courts.[39] Similar problems of definition were at the centre of two important issues raised at the Expert Seminar. First, to return again to the title of the Expert Seminar, the fact that the term 'Indigenous Populations' is used as opposed to 'Indigenous Peoples' is a deliberate and politicized decision. Indigenous 'peoples' has an established meaning in international law as connoting a nation with collective rights. In contrast, 'populations' is a term that is more appropriate to describe groups of people living within the dominion of another nation. 'Populations' does not suggest a group of people with collective identity or rights and this word has been chosen in other national contexts in order to divert formal recognition of 'peoples' as nations who live within the confines of other States. For example, in Venezuela indigenous peoples fought to be recognized as 'peoples' and not as 'populations' in the revisions recently made to the Venezuelan constitution. In this case it was relevant that the meaning of 'peoples' implies a society culturally distinct from the social mainstream who possess a political permanency as a result of their specific ethnic identity.[40] Similarly, the Special Rapporteur notes the difference between the 'human rights of indigenous individuals' and 'the rights of indigenous peoples', and the impact of individual rather than collective rights.[41]

---

[38] See para.'s 11 and 12 of the Recommendations and Conclusions, UN Doc # E/CN.4/2004/111. The Special Rapporteur also notes several Canadian examples of 'modern treaty making' including the Nisga'a and the Lubicon Cree and laments the lack of time and resources available to research these processes thoroughly. See paras. 140-142 of the Final Report.

[39] See Background Paper by Sharon Venne, at p. 5, items 1-3.

[40] See René Kuppe, 'Reflections on the Rights of Indigenous Peoples in the New Venezuelan Constitution and the Establishment of a Participatory, Pluricultural and Multiethnic Society', in this volume.

[41] See Final Report at para. 65.

This terminology of 'populations' remains as a reminder of the discordant opinions in the international community regarding the sovereignty and legal status/personality of indigenous peoples. While the Special Rapporteur's Final Report identifies the primary obstacle blocking the recognition of indigenous rights as the 'process of retrogression' that led to States negating their sovereignty, the view persists amongst States that indigenous peoples are not sovereign nations, and therefore that they are objects rather than subjects of international law.[42]

There is a second definitional issue that also arose at the Expert Seminar. The Special Rapporteur concludes in his Final Report that for the purposes of his Study, most African and Asian groups claiming indigenous rights remedies are not appropriately categorized as 'indigenous'. He writes that the characteristic of being 'indigenous' is different from other minority groups or peoples who suffer state-oppression in States formed after a history of colonization.[43] This issue was hotly contested by African and Asian representatives in the sixteenth session of the Working Group on Indigenous Issues[44], however the Special Rapporteur reiterates in his Final Report his convictions that African and Asian groups should not have access to international indigenous rights remedies.

In summary his reasons for maintaining this position, despite strong opposition, is that peoples from Africa and Asia seriously risk balkanizing their newly formed States that are so newly formed, with their claims of sovereignty.[45] The Special Rapporteur relies on his findings that there are fundamental political and historical differences that distinguish the African and Asian peoples from North or South American indigenous nations, and this distinction coupled with the risk of instability to their newly formed States warrant their exclusion from international indigenous rights fora.[46] The distinction drawn by the Special Rapporteur is that while many State-oppressed peoples suffered the effects of colonization, the experience of decolonization in African and Asian countries has radically changed the concept of 'indigenous', because of a new political context where many new States were created.[47]

This issue of the African/Asian exclusion resurfaced at the Expert Seminar. Representatives from Kenya, Bangladesh and the Philippines all argued vigorously that the peoples in their countries were in fact 'indigenous' and as such they should not be limited to the Minority Rights UN international remedies. Devasish Roy, writing for the Taungya and Hill Tracts NGO Forum Organizations in Bangladesh argues that institutionalized international mechanism should also assist the indigenous peoples of the Hill Tracts in negotiating for democracy within their national political system, and that the Special Rapporteur's conclusions regarding the Africa-Asian *problematique* are spurious and ill-founded on methodological, legal, political, moral and practical errors.[48] The representative from Kenya, Joseph Ole

[42] See ibid. at paras. 209-210.
[43] Ibid. at para. 89.
[44] UN Doc. E/CN.4/Sub.2/1998/16.
[45] Final Report at para. 89.
[46] Ibid. at paras. 67-73.
[47] Ibid. at para. 68.
[48] Background Paper prepared by Mr. Devasish Roy, Taungya and Hill Tracts NGO Forum

Simel similarly argued that the Anglo-Maasai agreements and treaties deserve international attention. Mr. Semel contends that although the colonizers may have left in many African countries, the legacies of colonial power have been passed on to present governments which continue to disregard indigenous peoples rights with results that are similar to North and South America.[49] Unfortunately, the Africa-Asian *problematique* was also taken up by the American State representative who used the exclusion of African/Asian peoples from the indigenous rights forum to attack the legitimacy of the international indigenous rights movement as a whole, by claiming that it is incoherent and that no such thing as an identifiable collective of 'indigenous peoples' exists.

This definitional question will no doubt continue to be a problematic point in future endeavours, and in order to help assuage these questions, Canadian experts may also need to turn their minds (once again) to self-definition. The Special Rapporteur's Final Report raises colonization as one of the major touch-stones in the definition of 'indigenousness', and this was echoed at the Seminar when participants noted the fact that if it were not for colonization indigenous peoples would not be called 'indigenous'. In order to resolve these issues, and in order to strengthen the position of those who emphasize the collective nature of indigenous rights, experts will have to decide what the defining features of 'indigenousness' are in relation to colonization and other historical and political factors.

Concluding Comments

One of the most significant points raised at the Expert Seminar was the fact that this Seminar was intended to be between States *and* Indigenous Populations. Surveying the participation list it may appear that there was a balanced representation from both parties, however, in practise nearly all of the experts were indigenous peoples. Attendance from States was scant and nearly entirely non-participatory despite repeated encouragement to come forward with expert opinions. There was one notable exception: Canada. The Canadian delegation consisted of four different federal government representatives, and their participation in both the literature and the verbal presentations at the Seminar were substantial. This means that one of the problems facing indigenous peoples living in other States is not shared by those living in Canada. However, the obstacles facing indigenous peoples from Canada have their own unique dimensions due to the State's involvement in the international process. Although Canada has demonstrated its willingness to come to the table to contemplate international laws regarding indigenous peoples, there is still a formidable river running between the indigenous and non-indigenous positions – and

---

Organizations UN Doc # HR/GENEVA/TSIP/SEM/2003/CP.8 at pg. 3. Mr. Roy draws particular attention to the Chittagong Hill Tracts Accord of 1997 in his paper 'The Discordant Accord: Challenges Towards the Implementation of the Chittagong Hill Tracts Accord' 100 *Journal of Social Studies, Bangladesh* (2003) 4-57.

[49] See 'The Anglo-Maasai Agreements – A Case of Historical Injustice and the Dispossession of Maasai Natural Resources, and the Legal Perspectives,' prepared by Mr. Joseph Ole Simel Mainyoito Pastoralists Integrated Development Organization, UN Doc # HR/GENEVA/TSIP/SEM/2003/BP.7.

this is made more turbulent by lack of agreement on the fundamental issue of indigenous peoples' sovereignty.

The Expert Seminar is certainly not the last opportunity that we have to work towards resolving these issues. The Draft Conclusions and Recommendations from the Expert Seminar include several recommendations to ensure continuity of the work achieved on these issues. Among them is a suggested recommendation by the Economic and Social Council that a further seminar be held on treaties, agreements and other constructive arrangements from all regions. Furthermore, the Experts invited the Working Group on Indigenous Issues to develop a working paper to follow up on mechanisms for resolving conflicts arising from treaties, agreements and other constructive arrangements, and also to include as a permanent part of its agenda an item relating to treaties, agreements and other constructive arrangements between States and indigenous peoples.[50]

While the title of the Expert Seminar originally suggested to me a long history of struggle, the experience of attending in person and engaging with these issues in continued research has also intimated a long future of struggle ahead.

[50] See UN Doc. E/CN.4/2004/111 paras. 9(c), 10, 12.

Appendix 1:

CONCLUSIONS OF THE INTERNATIONAL SEMINAR ON 'INDIGENOUS PEOPLES, CONSTITUTIONAL STATES, AND TREATIES OR OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN PEOPLES AND STATES'.

Andalucia International University, Seville. September 10-14, 2001.

UN Doc E/CN.4/Sub.2/AC.4/2002/WP.9/En.

1. The 'Study on Treaties, Agreements and Other Constructive Arrangements between the State and Indigenous Populations' submitted by the Special Rapporteur Miguel Alfonso Martinez at the request of the United Nations Economic and Social Council (Final Report: E/CN.4/Sub.2/19999/20) constitutes an advance towards the recognition and the exercise of the rights of indigenous peoples. In this document, the Special Rapporteur outlines how these human groups live in conditions that have constantly led to the deprivation, reduction or limitation of their territories, resources and powers, not only as result of colonial policies applied by European States, but also by their successors, more prominently so by those in the American continent, which govern from Alaska to Patagonia.

2. The re-evaluation of past treaties, agreements and other constructive arrangements should not be undertaken in purely historical terms, or exclusively according to the colonial reading of such instruments. Their intrinsically plural nature should be recovered with a view to revalidate them as instruments that may suitably address issues of cultural balance, constitutional accommodation and jurisdictional remedy. Recent developments of the Tribunal of Waitangi/Te Ropu Whakamana i te Tiriti o Waitangi en Aotearoa/New Zealand offers a good example in this respect.

3. The difference between a purely historical interpretation and a contemporary revalidation of treaties and other constructive arrangements should be overcome by means of a re-balancing of their biased reading. Their present day understanding must integrate (and even privilege) the indigenous wording, which has suffered colonial denial, as well as from the breach and cancellation of the initial spirit of the agreements, which was based on principles of accommodation, exchange and cohabitation. Only on these bases will the universal human entitlements to refuse

being placed in positions of inferiority, or to refuse to relinquish free determination, be re-established as guiding principles for all parties involved, especially the indigenous one.

4. The binding force of existing constructive arrangements between Indigenous Peoples and Constitutional States should be recognised and understood, following the application of bilateral interpretation mechanisms, as is usual in the case of otherwise formal international treaties; this, with a view to effectively enable the necessary cultural adjustments, constitutional accommodations and jurisdictional remedies. The recent constitutional reform in Mexico constitutes both, a positive and a negative example in this trend. The process was initially based on a formal agreement between Indigenous and States' agents (San Andrés Sacam'chen Accords signed on February 16, 1996), that resulted in a proposal for a constructive arrangement in the form of a Constitutional Reform, but this finally ended up in the adoption of an antithetic text (*Diario Oficial de la Federación*, August 14, 2041). In light of such constitutional reform processes, international bodies should seek to afford the guarantees that are necessary to the enforcement of agreements of the kind we have mentioned, as a way to impede state determinations which go against them.

5. Despite the UN Declaration on the Rights of Indigenous Peoples has not reached the formal stages which could finally make it internationally binding, at present and with regards to constitutional and international practices and reflections on the matter, there are, nevertheless, a number of its operational orientations which can already be considered to be rules of customary law with regards to the rights it mentions. These principles should govern the relationship between constitutional States and indigenous Peoples, irrespective of whether they have been ratified as part of internationally binding legal instruments or otherwise translated into State constitutional norms. This growing tendency is best exemplified by statements such as that contained in the Preamble of the Indigenous and Tribal Peoples Convention, N° 169 of the International Labour Organization (hereafter ILO), adopted an June 27, 1989, at the 76th session of the International Labour Conference: 'Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions'. International bodies, such as the UN Human Rights Committee or, at a regional jurisdictional level, the Inter-American Court of Human Rights demonstrate their sensibility to these issues, albeit in an uneven and precarious way, without the support of appropriately specific legal bases. The latter tribunal has recently demonstrated its willingness to engage in this trend, by issuing a positive resolution in the case opposing the Awas Tingni Community of the Mayagna-Sumu People to the State of Nicaragua (sentence of August 31, 2001).

6. Convention N° 169 of the ILO establishes the obligation that its signatory parties consult indigenous peoples before adopting any legal measure that affects them directly. In the light of the principles of international customary law mentioned above, such an obligation entails that a minimum number of conditions and formalities ultimately guarantee the legitimacy of the overall process, and every effort should be made to ensure both parties – indigenous and governmental – an

equal footing treatment in the process. The principle of consultation and the adoption of decisions on its basis, presupposes the recognition of indigenous peoples as such, as autonomous peoples. If this were not the case – and given the limitations of the ILO's supervisory system – the rights recognised in the Convention could otherwise not be properly guaranteed and the effective exercise of consultation rights would, in practice, he equal to their mockery. Looking back at the last decade since its entry into effect, it can be said that indigenous frustrations have increased exponentially, like in the Guatemalan case. Indeed, in Guatemala the ratification of the Convention has been explicitly interpreted in restrictive terms, to the extent of having made relevant consultation provisions ineffective. This negative outcome should be considered in addition to the paralysis suffered by the 'Agreement on Identity and Rights of the Indigenous Peoples' that was formally adopted as part of the results of the peace negotiations carried out between the guerrilla and the Government, process which despite benefiting from the mediation of the United Nations and the International Labour Office, was developed in the absence of any direct participation by indigenous peoples.

7. Both the revalidation of historical treaties and current practices of constructive arrangements should give added value to the general recognition of the rights of indigenous Peoples in the UN context, and they explicitly form part of the prospective provisions contained in the current draft. They should not, for this reason, be understood to be able to substitute or contradict the recognised rights. The rights of indigenous peoples can neither be conditioned by, nor subjected to pre-existing historical agreements, which were often biased at their origin; nor should they be made exclusively dependent of contemporary arrangements, which are also often the outcome of unequal relations, even more so than in the past. Those peoples living within the boundaries of States which provide more room for the negotiation of treaties and other agreements should not disattend nor disown the more pressing agenda with regards to the international recognition of indigenous peoples, which would be applicable to a greater number of cases.

8. Treaties, agreements and constructive arrangements should neither be privileged nor considered to be the most important juridical tools towards the recovery of indigenous rights, as this may this lead to further discrimination. Indeed, as Miguel Alfonso Martínez pointed out in his 'Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations', the peoples that have suffered colonialism but have not had the possibility to engage in such agreements should not be left again in the position of disadvantageously doing so. Present or contingent historical circumstances should not be construed in a way such as to consider they condition or determine the scope of the recognition of the rights of the peoples which have resisted them.

9. Recent cases of constitutional reform and the renewal of political practices in Latin America under the democratic imperative have given rise to further cases of agreement and similar constructive arrangements. Whether adopted as a result of exogenous international commitments (i.e.: ILO Convention N° 169) or, alternatively, as a consequence of endogenous domestic processes, such agreements

should inspire more profound constitutional reforms elsewhere. Constitutions often contribute to persistent forms of colonialism by establishing and perpetuating adverse settings for indigenous peoples' demands. During the last few decades, a wide range of constitutional adjustments and reforms in Latin America (Panama, Guatemala, Nicaragua, Brazil, Colombia, Paraguay, Peru, Bolivia, Argentina, Ecuador, Venezuela, Mexico ...) clearly reveal this tendency. Cases of effective autonomy, such as those of the Kuna or the Embera-Wounaan in Panama, spill over otherwise obsolete constitutional provisions, and widen the perspectives of new developments. In Nicaragua on the other hand, a similar open-mindedness has not yet been achieved with respect to the Miskitu; and the fate of other indigenous peoples' status is still sealed within the narrower limits of the Constitution itself.

10. Constitutional or equivalent domestic legal changes, and in particular those benefiting from the superior legitimacy of having been freely convened by indigenous peoples, should be connected to the international legal system in ways which could provide sufficient guarantees to all parties involved. As long as the internal legitimacy and acceptance of agreements between States and Indigenous Peoples were not affected, the presence of international agencies would be extremely advisable. The establishment of appropriate jurisdictional mechanisms at an international – preferably regional – level; that adequately consider inter-cultural criteria for the peaceful settlement of conflicts arising from such constructive agreements would also be of great value. In order to achieve these objectives, international intervention needs to uphold, as its main priorities, the guarantee that equal consideration be given to both parties, along with the respect for the autonomous and freely determined will of indigenous Peoples.

11. As an international body specialised in labour matters, the ILO does not possess the specific capacity to recognise peoples rights, conversely, and given its wide ranging capacity in this respect, the United Nations faces a great challenge in the contemporary legal order. In effect, the maintenance of the international competence on indigenous rights' issues within the sole sphere of the ILO, might engender the suspicion that the latter is a mere alibi to cover and leave unexplained the delay with which the United Nations Organization is facing its pending duty, that of elaborating a Declaration on the Rights of Indigenous Peoples, which would finally equal the legal standing of all peoples of the humankind. It is easy to predict the lack of trust indigenous peoples would feel towards the comprehensive international system if this pending situation was neglected and perpetuated. Distrust would greatly exceed the punctual cases generated as a consequence of the failures of the Mexican and Guatemalan processes etched earlier.

12. Should the ILO seriously address the sound demands for recognition and autonomy that derive from the proper enforcement of the right to consent, as explicitly stated in its Convention N° 169, it might make a fundamental contribution towards the eradication of pending injustices with respect to indigenous Peoples. Recent developments within the UN context, such as the establishment of the Permanent Forum and the nomination of a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples could also move

things further along this line. These new facilities, however, should by no means lead to the cancellation of the Working Group on Indigenous Populations before the complete accomplishment of its mandate. This would be premature, particularly considering that the latter provides and (sic) unprecedented instance of indigenous representativeness and, in consequence, an involvement which is not afforded to the Permanent Forum. Neither should the creation of this or other forums delay the final adoption of the Declaration on the Rights of Indigenous Peoples by the diverse competent intergovernmental bodies that exist within the UN framework.

13. States express relevant decisions within the United Nations Organization. While proceeding on the basis of a newly developed language that recognises indigenous peoples, and although in a spirit of co-operation, they normally seek the latter's consent and agreement when elaborating and executing projects, it seems that such co-operative principles do not result in comprehensive governmental policies towards indigenous Peoples. It has been the case that several States, while acknowledging the constitutional accommodation of indigenous peoples' rights, simultaneously exhibit a reluctant position at international level, deliberately hindering and sometimes even coming to block the adoption of the Declaration on the Rights of Indigenous Peoples' current Draft. In order to overcome this alas commonly fraudulent double standard, it is extremely important to insist in the need to strengthen the links between the domestic constitutional order and the international – albeit not exclusively inter-state – order.

14. The ILO could broaden its scope for institutional action by facilitating the ratification of ILO Convention N° 169 to, both, purely cooperative States, and those States whose borders embrace and occasionally cut across indigenous Peoples. It should also be remembered that the ILO's tripartite composition – of government, trade union and employers' representatives – could easily become a cuatripartite body if the indigenous component were added. The extent to which indigenous people feel to be affected by their lack of access to representation within the ILO's decision-making and supervisory bodies should not be underestimated. Although this is commonly accepted as part of the traditional practice of most States, it goes without saying that this situation contradicts any imaginable constitutional rule. Thus, as far as the interpretation and enforcement of ILO Convention N° 169 goes, the International Labour Office should set in motion specific procedures for indigenous participation and/or seek expedient link with the corresponding UN forums.

15. Although the ILO does not include Convention N° 169 among its Fundamental Conventions, the Office of the United Nations High Commissioner for Human Rights does include it among those integrating the international human rights Charter. The said Convention should thus understood as a transitory and transactional compromise, reached in the absence of a more specific declaration, one which aims to make the presence of indigenous Peoples more visible and lively within the framework of international system of human rights. As an instrument entrusted with the role of clarifying the scope and specific interpretation of the International Covenant an Civil and Political Rights and that on Economic, Social and Cultural Rights (namely, their first articles), the Declaration on the Rights of Indigenous

Peoples should be granted the highest consideration in terms of universal – and not only regional – authority. Only then and on this basis would the principle of standing equality among all peoples actually come to operational effect.

16. Let us finally retake the principle set forth by the Draft United Nations Declaration on the Rights of Indigenous Peoples, in its article 36: 'Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties conerned'. The Preamble of the same Draft anticipates the scope and deepens the understanding of this principle: 'Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility': This may be understood to include 'Past; present and future' agreements, indeed.

Appendix 2:

CONCLUSIONS AND RECOMMENDATIONS OF THE SEMINAR ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS PEOPLES

UN Doc. E/CN.4/2004/111

1. The experts participating in the Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, meeting in Geneva from 15 to 17 December 2003, agreed upon the following conclusions and recommendations:

Conclusions

2. The experts note that historic treaties, agreements and other constructive arrangements between States and indigenous peoples should be understood and implemented in accordance with the spirit in which they were agreed upon. The experts also note that treaties, agreements and other constructive arrangements between States and indigenous peoples have not been respected, leading to loss of lands, resources and rights, and that non-implementation threatens indigenous peoples' survival as distinct peoples.

3. The experts consider that treaties, agreements and other constructive arrangements constitute a means of promoting harmonious, just and more positive relations between States and indigenous peoples because of their consensual basis and because they provide benefits to both indigenous and non-indigenous peoples.

4. The experts welcome the efforts being made by States to explore ways of redressing historical and contemporary injustices related to treaties, agreements and other constructive arrangements through negotiation and underline the principle of free, prior and informed consent. The experts agree that the negotiation processes should have legitimacy with both indigenous and non-indigenous parties to the treaties, agreements and other constructive arrangements.

5. The experts draw attention to the situation of indigenous peoples who have not entered into formal juridical relations with colonial powers and whose lands have been occupied on the basis of *terra nullius* ('land without owner") and affirm that such peoples should be able to claim status as nations should they so wish.

6. The experts recognize that indigenous peoples have a legitimate interest in the elaboration and implementation of multilateral and bilateral treaties among and between States in cases where their peoples may be affected negatively or positively by such agreements.

Reommendations

Governments

7. The experts call upon States to respect treaties, agreements and other constructive arrangements between States and indigenous peoples and, in cases where disputes arise, to establish effective mechanisms for the resolution of conflicts. Such conflict resolution processes should include, inter alia, the following elements:

(a) They should be developed with the free, prior and informed consent of the indigenous peoples concerned;

(b) They should include as an integral part of the process indigenous laws and legal norms;

(c) They should be independent and free from political interference;

(d) They should recognize the collective nature of the rights of indigenous peoples, including to their lands and resources.

8. The experts recommend that States promote, and educate the general public, particularly through the education system, on indigenous peoples' treaties, agreements and other constructive arrangements, underlining that such treaties are sacred agreements that define the nature of indigenous peoples' relationships with the family of nations.

Commission on Human Rights

9. The experts request the Commission on Human Rights:

(a) To consider recommending to the Economic and Social Council that a workshop be convened, drawing upon existing good practices of conflict resolution, with a view to exploring ways and means to develop a mechanism for resolving conflicts arising from treaties, agreements and other constructive arrangements in cases where the domestic conflict resolution processes have proven ineffective;

(b) To consider recommending to the Economic and Social Council the convening of a world conference on indigenous peoples, at which the question of treaties, agreements and other constructive arrangements between States and indigenous peoples, and inter alia the principle of *pacta sunt servanda* ('treaties must be kept"), the impact of treaty abrogation on indigenous peoples and remedies for such abrogation could be considered;

(c) To consider recommending to the Economic and Social Council that a further seminar be held on treaties, agreements and other constructive arrangements from all regions;

(d) To consider recommending that the Economic and Social Council seek an advisory opinion from the International Court of Justice in relation to treaties and agreements between States and indigenous peoples;

(e) To consider recommending that the Economic and Social Council request that the United Nations Treaty Section of the Office of Legal Affairs be charged with locating, compiling, registering, numbering and publishing all treaties concluded between indigenous peoples and States;

(f) To authorize the publication by the Office of the United Nations High Commissioner for Human Rights of the study on treaties, agreements and other constructive arrangements between States and indigenous peoples in a consolidated version in all official languages and including the recommendations of the present seminar;

(g) To recommend that the United Nations library receive, catalogue and publish an inventory of materials relating to treaties and agreements, including materials submitted to the Special Rapporteur on treaties, agreements and other constructive arrangements between States and indigenous peoples.

Working groups, treaty bodies and special procedures

10. The experts invite the Working Group on Indigenous Populations to include as a permanent part of its agenda an item relating to treaties, agreements and other constructive arrangements between States and indigenous peoples.

11. The experts recommend that the Working Group formulate guiding principles on the elaboration, negotiation and implementation of treaties, agreements and other constructive arrangements, taking into account the importance of open, transparent, equitable, inclusive and participatory avenues of redress, monitoring, arbitration and mediation.

12. The experts invite the Working Group to develop a working paper to follow up on mechanisms for resolving conflicts arising from treaties, agreements and other constructive arrangements.

13. The experts call upon the working group on a draft United Nations declaration on the rights of indigenous peoples to adopt the declaration before the end of the International Decade of the World's Indigenous People.

14. The experts affirm the importance of article 36 of the draft declaration on the rights of indigenous peoples in its current text as approved by the Sub-Commission, in particular its importance as a critical element of the right of self-determination, as well as the importance of its last sentence which calls for the establishment of a competent international body directly to adjudicate treaty disputes unresolved through other mechanisms, and call upon the working group to adopt the article.

15. The experts recommend that the United Nations human rights treaty bodies pay specific attention to obligations contained in treaties, agreements and other constructive arrangements signed between States and indigenous peoples, as non-compliance with these obligations have negative effects with regard to the rights protected under international human rights instruments.

16. The experts also recommend that the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people pay special attention to the question of treaties, agreements and other constructive arrangements in his official visits.

United Nations bodies and specialized agencies

17. The experts recommend that a study be undertaken by the secretariat of the Convention on Biological Diversity on the impact of treaty abrogation on the ways of

life and biological diversity of territories specifically covered by a treaty, agreement or other constructive arrangement.

18. The experts also recommend that the World Intellectual Property Organization begin cataloguing the oral history of indigenous peoples on the making of treaties, agreements and other constructive arrangements.

19. The experts further recommend that the Department of Public Information of the Secretariat provide information about indigenous peoples' treaties, agreements and other constructive arrangements, underlining that such treaties are sacred agreements that define indigenous peoples' relationship with States and the international community.

Office of the United Nations High Commissioner for Human Rights (OHCHR)

20. The experts recommend that OHCHR make available technical cooperation to assist indigenous peoples with their negotiations in relation to treaties, agreements and other constructive arrangements.

21. The experts also recommend that the report of the Seminar be made available to States, indigenous peoples and non-governmental organizations at the third session of the Permanent Forum on Indigenous Issues and the twenty-second session of the Working Group on Indigenous Populations.

LIST OF CONTRIBUTORS

James S. ANAYA is Samuel L. Flegty Professor at the University of Arizona James E. Rogers College of Law, and is one of the leading specialists in the field of indigenous peoples' rights in International Law. His book *Indigenous Peoples and International Law* (1996) is widely recognised as a landmark in specialised scholarly literature in this field. Within the framework of the Indigenous Law and Policy Program of the University of Arizona, James S. Anaya has represented several indigenous communities and Indian tribes inside United States and elsewhere, among which the renown of the Awas Tingni Community (Nicaragua) or the *Dann* case (United States) before the Inter-American Court of Human Rights and the Inter-American Commission, respectively.

Christina BINDER, Mag. phil., Dr. iur, studied law and literature at the Universities of Graz, Vienna and Innsbruck (Austria); she equally passed the European Master's Degree in Human Rights and Democratisation. Currently she works as Assistant Professor at the Department of International Law and International Relations of the University of Vienna. Her Ph.D. is dealing with the land rights of indigenous peoples in Mexico and Nicaragua.

Bartolomé CLAVERO SALVADOR is a professor of legal history at the Faculty of Law at the University of Seville, Spain. One of the main focuses of his work is the anthropological dimension of the study of legal history. He is currently working on the inconsistencies between the European legal tradition and the cultures of other (esp. indigenous) peoples. He has published some groundbreaking books on Western Constitutionalism and the rights of indigenous peoples in the Americas, like *Ama Llunku, Abya Yala: Constituyencia indígena y Código ladino por América* (2000).

Magdalena GÓMEZ RIVERA worked at Subdirección de Procuración de Justicia del Instituto Nacional Indigenista (INI) and at the Universidad Pedagógica Nacional, in Mexico. She has actively contributed to the consolidation of the Mexican Academy for Human Rights (Academía Mexicana de Derechos Humanos, AMDH), one of the most important Mexican human rights NGOs, founded in 1984. She is the co-ordinator of one of the most salient academic contributions in the field of indigenous rights over the past ten years, the book *Derecho indígena* (1997).

Pablo GUTIÉRREZ VEGA (MA, College of Europe, Belgium, 1998; BA, Universidad Autonoma de Madrid, 1997) is an Associate Professor of Legal History at the University of Seville. He is currently working on his Ph. D. on the domestication of the legal status of indigenous nations by International Law focusing on treaties between indigenous nations and the Spanish Crown in Latin America. He

R. Kuppe and R. Potz (eds.), Law & Anthropology, 222-223.

has been appointed as an academic expert to the recent 2003 UN Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples.

René KUPPE, Dr. iur., is Professor of Law at the University of Vienna Law School, Austria. He is doing research on indigenous peoples' rights, with a special focus on indigenous peoples traditional knowledge and natural resources and indigenous peoples' religious freedom rights. Between 2001 and 2003 he worked as a legal adviser of the three indigenous deputees of the National Assembly of Venezuela, and currently he is involved in a EU funded research project on 'Multicultural autonomy and sustainable development in Latin America'.

Roger C.A. MAAKA was Head of the Department of Maori at the University of Canterbury (NZ) and a member of the Waitangi Tribunal. He has published several studies on Maori society, including a study on the effects of urbanisation. He is currently Professor of Native Studies at the University of Saskatchewan, Canada.

Andrea ORMISTON is a graduated Canadian lawyer. She has done an internship hosted by the Institut für Recht und Religion at the University of Vienna, sponsored by the Native Law Centre at the University of Saskatchewan. As a practicing lawyer, Andrea wants to specialize in the rights of Aboriginal Peoples in Canada.

Luis RODRÍGUEZ-PIÑERO ROYO (Ph. D. European University Institute Florence, Italy, 2004; B.A. Universidad Autónoma de Madrid, 1997; LLB, Universidad Pontificia de Comillas, 1996) is a Research Fellow at the Law and Policy Program of the University of Arizona. He works with Prof. Anaya in the implementation of the Awas Tingni case in Nicaragua. Luis Rodríguez-Piñero has performed research in Mexico, Peru and Geneva on issues of Indigenous Peoples' policy. He is currently working on the publication of his doctoral dissertation, 'From Policy to Law: The International Labour Organisation and the Emergence of the International Regime on Indigenous Peoples'

Lee SWEPSTON is the Chief of the Equality and Employment Branch and the Human Rights Coordinator at the International Labour Office (ILO), Geneva. He is considered to be one of the catalysers of the transformation of ILO Convention No. 107 into ILO Convention No. 169 and has been ever since directly involved in the implementation of both conventions.