The Rights of Minorities and Indigenous Peoples

por D. Patrick Thornberry

Conferencia pronunciada el 26 de mayo de 1998

Forum Deusto

Human Rights, Minorities and Indigenous Peoples: A Perspective on the Development of International Law

por D. Patrick Thornberry*

I wish to express my profound thanks to the organizers of the Deusto Forum for the opportunity to speak to you today. The scope of the presentation is confined to post-1945 developments, with the League of Nations mentioned only as a backdrop. I have been fascinated by the response of international law over centuries to the question of non-European «others» and the discourses of conquest, including those of Spain. But reflections on those developments and discourses are for another place, another time. In this year of the fiftieth anniversary of the Universal Declaration on Human Rights, I propose to look at the place of minorities and indigenous peoples in international human rights law. Minority rights and rights of indigenous peoples are an aspect of human rights law which nevertheless exhibit their own specific characteristics and to some extent may even strain its fabric. While celebrations of the UDHR are appropriate and justified, it is perhaps as well to recall that 1998 is also the 50th anniversary of the Convention against Genocide, and that, in the words of Jacques Derrida:

---

* Patrick Thornberry es Doctor en Derecho Internacional y uno de los grandes especialistas en los temas de minorías. Abogado en ejercicio desde 1974 y perteneciente también a la Asociación de Derecho Italo-Británico, es en la actualidad Profesor de Derecho Internacional de la Universidad de Keele (UK). Ha sido durante varios años Director del Centro de Investigación de Derechos de las Minorías en la misma Universidad. Ha sido colaborador y visitante de varias Universidades y realiza una importante labor como consultor legal y consejero de la Comisión Europea y Consejo de Europa. Es además consejero del Arzobispo de Chipre. Cuenta en su haber con una decena de monografías y ha publicado también numerosos artículos en revistas especializadas.

> «Never have violence, inequality, exclusion, famine, and ... economic oppression affected as many human beings in the history of the earth and humanity ... let use never neglect this macroscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated».[1]

It may be as well to add, that in the repertoire of oppression, the suffering of indigenous peoples and minorities has been disproportionately high, devastating the existence of many groups.[2] The world has suffered great cultural losses, as well as making gains, in the era of the United Nations, in the Age of Rights. This prompts us to consider whether, in Kant's question, the human race is continually improving? And whether the debate on human rights prompted by, among other things, this fiftieth year, can be interpreted as a «prophetic sign» —*signum prognosticum*— of humanity's moral progress, despite this century's evidence to the contrary.[3]

Three Phases of Rights

The human rights response to ethnic issues has fluctuated considerably since the founding of the United Nations and the emergence of the regional intergovernmental organizations. There are phases in legal dealings with the ethnic question. Each stage of development is at once the product and the progenitor of other life forms. This lecture links developments in minority rights with indigenous questions even though the trajectories of the two are not entirely congruent. There is however and will continue to be an interpenetration between the legal regimes for such groups in international law —they are not sealed into separate ethnic boxes. As a beginning, it is as well to intimate some idea of what we mean by minorities and indigenous

---

[1] J. Derrida (P. Kamuf, trans.), *Specters of Marx* (1994), 85, cited by S. Marks in «The End of History? Reflections on some International Legal Theses», 3 E.J.I.L. (1997), 449-77, 457.

[2] On the indigenous side, see The Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A Global Quest for Justice* (London and New Jersey: Zed Books, 1987).

[3] Discussed by Norberto Bobbio in *The Age of Rights* (Polity Press, Cambridge, 1996).

peoples. On the first term, the approach of Capotorti is typical of many efforts, describing a minority as:

> «A group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members —being nationals of the State— possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.».[4]

Article 1.1. of the ILO Convention on Indigenous and Tribal peoples states that the instrument applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions».

Article 1.2. adds that «Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply».

It must be observed that general international law has not advanced to a canonical definitions of terms —nor is there any consensus on what constitutes a «national» minority. Capotorti's views have been challenged by the UN Human Rights Committee. There is a politics of definition circulating around the recognition of indigenous peoples in the UN draft Declaration on the Rights of Indigenous Peoples, with (some) governments pressing for definition and the indigenous resisting. Some even refuse to use «peoples» preferring «populations» or just «indigenous people».

---

[4] F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991), paragraph 568.

The First Phase

In the first UN phase, following the collapse of the League of Nations «dwindled into a ghost not fit to cope»,[5] minority rights were not an explicit concern of those who drafted the foundation documents of human rights law. The League of Nations developed a repertoire of instruments and procedures to deal with minority issues in a limited group of mostly Central and East European States. Rights of inhabitants, rights of nationals and of minorities belonging to nationals, were specified, and the minority rights aspects internationalized. The approach was humanitarian and pragmatic and the results were ambivalent. The system was caught up in the strains of inter-war politics, and despite much good work on the minutiae of rights, the system was undermined from within and without the nation-States. There is no specific reference to minorities in either the UN Charter or the UDHR. The ethnic issue was not neglected but was expected to make its way through the new principles of human rights on the basis of non-discrimination on grounds such as «race, sex, language or religion». The omission of minorities from key instruments had significant effects in the latter half of the century. Human rights, a continuation and instantiation of the meta-narrative of the Enlightenment, were set to characterise the UN age. The approach was centred on the individual person (in gendered language), the concern was global, the promise was limitless. The great leveller of non-discrimination and the possibilities of equality of opportunity opened up by it, would make attention to the rights of particular groups supererogatory. So League ideas of protecting specific groups were elbowed aside. In the buccaneering age of rights, desires to express local identities seemed regressive and anachronistic. The key was the development or consolidation of secure national identities, essentially monolithic, homogeneous, constrained and stable. The nation-building momentum increased with the addition of a raft of new States to United Nations membership. Many of the States were conglomerates which would either stand whole or fall apart. Hence the urge to «construct» peoples from the arcane geometries of the colonial powers. In the UN Charter, the approach was sanctified by the principle of the sovereign equality of States, non-interference in the domestic affairs of States, and the principle of self-determination. This last principle fast became a right of the whole «people» in a colonial territory to

[5] Robert Browning, Childe Roland to the Dark Tower Came [1855].

independence. Western States did not protest too much against the erosion or destruction of local identities. Entities such as minorities and indigenous peoples, located between State and individual, were lined up for excision with Occam's razor.

There were other straws in the wind. The United Nations set up a subordinate body of the Commission on Human Rights entitled the Sub-Commission on Prevention of Discrimination and Protection of Minorities [the Sub-Commission]. The use of the term «minority» in the Sub-Commission's title was important for the future. The Council of Europe incorporated the phrase «association with a national minority» into the non-discrimination clause (article 14) of the European Convention on Human Rights [ECHR]. A small spread of bilateral treaties engaged locally with the minorities issue; the arrangements are still there, supplemented by an explosion of «bilateralism» in the 1990s. The UN General Assembly adopted resolution 217C(III) on the same day as the UDHR, declaring that the United Nations could not remain indifferent to the fate of minorities. There was a curious crossover between the drafting of the UDHR and the drafting of the Genocide Convention. It seems fairly clear that the omission of any article on cultural genocide from the Genocide Convention affected the UDHR. Cultural genocide was unacceptable to those who drafted the Convention precisely because of implications it would have had for nation-building processes. Its unacceptability was promoted by arguments about the inability to define the elements of cultural genocide. So genocide was understood as essentially physical and biological. The element in Article II(e) of «forcibly transferring the children of the [«national, ethnical, racial, or religious»[6]] group to another group» is all that remains of the concept of cultural genocide, unless one extends the idea of «mental harm» in Article II(b) to cultural damage. In this first phase, indigenous peoples were locked into policies associated with indigenism —integration, assimilation or civilisation of the Indians. Such policies were not dissimilar from assimilationist policies pursued against minorities. The themes emerged with some force in the work of the ILO which, with the co-operation of much of the UN system, produced ILO Convention No. 107 of 1957 on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries. «Integration» meant assimilation. In the eye of the Convention, the indigenous were

[6] Article II.

vulnerable societies mostly on the way to disappearance. The Convention would smooth the dying pillow. Their cultures and languages were not permanent, enduring features of the human landscape. These «populations» would integrate, learn the national language, be educated by state functionaries or missionaries with delegated powers, and be developed in ways that were good for them. Twenty-seven states ratified Convention 107. Nevertheless, there is some equivocality here. The term «populations» in the title of the Convention could be seen as a tilt towards the collective, to the ethnic unit. And the recognition of indigenous land rights in the Convention was also an introduction to a broader appreciation of the characteristics of the peoples, and ultimately the indigenous association of land with culture and community, resources and subsistence, and the spirituality of place.

The Second Phase

From, say, the late 1970s, approaches to the ethnic question were changing. The minority rights international law programme was *in statu nascendi*, spurred by the publication of the Capotorti report in 1977 with associated academic writings.[7] The International Covenants were in force, with the crucial Article 27 of the Covenant on Civil and Political Rights [ICCPR]:

> «In those States where 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».

For many years the article bore the main burden of expressing a general international treaty standard on minority rights. Other references, such as Article 5.1.(c) of UNESCO's Convention Against Discrimination in Education, were locked into the non-discrimination paradigm, and even more grudging in their acceptance of minority rights.[8] Then the international community witnessed the slow

[7] Capotorti, *op.cit.*

[8] According to Article 2(b), it shall not constitute discrimination is separate educational systems or institutions are set up «for religious or linguistic reasons», if participation is optional and the education conforms to standards for

movement of a UN draft Declaration on Minority Rights, which, in one of history's small ironies, was submitted to the UN by Yugoslavia in 1978. ILO Convention 107 gradually made way for the more participation oriented and less assimilationist Convention No. 169 on Indigenous and Tribal Peoples, work on which began in the mid-1980s.[9] The CSCE/OSCE had made reference to national minorities in the Helsinki Final Act in 1975. There was enough in this to ground a steady elaboration of principle as the CSCE juggernaut rolled on through the succeeding decades. The CSCE processes also struck at Central and Eastern Europe, the historic depositary of minority rights in international law. Liberals were becoming more curious about minority rights, digressing on individual and collective rights, looking afresh at neglected aspects of political community.[10] The universal rights/non-discrimination package was coming to appear as insufficiently nuanced for every group everywhere. Equality and non-discrimination could, while accepted as the vital first step in the protection of minorities, also function as part of a totalising project, complementing other aspects of the homogenization of States. In the work of the Committee on the Elimination of Racial Discrimination, the Convention on that subject would eventually become more sensitive to cultural differences, and less obsessed with combating the Apartheid type of segregation. The doctrine of Apartheid exercised a pernicious influence on the understanding of minority rights. The subtleties of differentiating between State-imposed racial segregation and group demands for a measure of separate recognition in cultural spheres in order to guarantee cultural existence and survival were often lost.

---

education at that level. Article 5.1.(c) provides that it is «essential to recognize the right of members of national minorities to carry on their own educational activities» which may include schools and own language teaching provided that «this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty» ; caveats are also inserted on the standard of education and the optional nature of the schools.

[9] L. Swepston, «A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989», *15 Oklahoma City University Law Review*, (1990), 677-714.

[10] Developments are captured in V. Van Dyke, *Human Rights, Ethnicity and Discrimination* (London and Westport: Greenwood Press, 1985).

The Third Phase

The international law lift-off for minority rights arrived at the end of the 1980s. By that time, the concern with political decolonization in Africa and Asia had largely ebbed away and the focus shifted on to economy and development. Self-determination as a concept had become linked with human rights, now understood as reciprocally related. The unravelling of the Soviet Union and Yugoslavia revealed discrete peoples, with sharply differentiated identities, claiming self-determination as their turn, turning to violence to achieve it «like knavish crows ... all impatient for their hour».[11] Identity and culture emerged as key post-modern themes, overriding consciousness of class as the authentic mediator of social relations. The politics of ethnicity and nationalism were the surrogate bodies, the carriers of the new consciousness into social action. They unleashed satisfaction, euphoria and violence in equal measure. Suppressed nations began to obey the first law of intertribal relations «do unto others what has been done to you».[12] Liberal theory woke up to a world of shattered communities and found that history had not ended.[13] As new entities revealed themselves like a series of Russian dolls, international organizations moved to «do something about» minorities; the CSCE/OSCE and the UN were quick off the mark, the Council of Europe slower. The UN can always employ a range of instruments of hard and soft law, whereas the Council of Europe prefers to proceed by the cumbersome but steady treaty method and set up treaty bodies to ensure consistent implementation. Two major treaties have resulted from the work of the Council of Europe: the European Charter for Regional or Minority Languages 1992 [the Languages Charter] and the Framework Convention for the Protection of National Minorities [the Framework Convention], opened for signature in 1995. The OSCE was perhaps better adapted than the Council of Europe for «rapid reaction», a virtue of using the non-treaty but «politically binding agreements» which are at the core of the OSCE enterprise. In terms of standards, the OSCE Copenhagen Document of the Human Dimension [the Copenhagen Document] still represents something of a high-water mark in the recognition of minority rights. The OSCE also adopted a

---

[11] William Shakespeare, *Henry V*, Act 4, Scene 2.

[12] Michael Walzer, «The New Tribalism», in *Dissent*, Spring 1992, 169.

[13] An excellent spectrum of essays is presented in W. Kymlicka (ed.), *The Rights of Minority Cultures*, (Oxford University Press, 1995).

specific «mechanism» for minorities —the High Commissioner on National Minorities, to date a highly personalised office occupied by the charismatic Mr Max van der Stoel. For indigenous peoples, the ILO put in place its empowering Convention 169 on Indigenous and Tribal Peoples in 1989. The Convention opens something of a gap between instruments on minorities and those on the indigenous —such indigenous-specific instruments are more comfortable with the language of collective rights. Even the UN Convention on the Rights of the Child contained identity references, obligatory in 1990, and included the following adaptation of Article 27 of the ICCPR:

> «In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language».[14]

Besides applying the ICCPR norm to children, the provision employs gender-neutral language and yokes together minorities and indigenous peoples.

Minority Rights are Human Rights

The integration of these relatively new instruments on minority and indigenous rights with international law has its own difficulties. The rights are not a single issue enthusiasm.[15] Applying this to indigenous rights, Brownlie caustically observes that:

> «[m]any writers —scholars, as the Americans like to say, are specialists in human rights, rather than general international law, and specialists in indigenous peoples rather than human rights. Some, at least, of these super-specialists suffer from super tunnel vision. it does not seem to occur to them that their subject of special interest belongs to a much wider world of normative development ...».[16]

---

[14] Article 30. See also Articles 2, 8, 20, 23, and 29 for further aspects of culture and identity.

[15] Points made in I. Brownlie, edited by F.M. Brookfield, *Treaties and Indigenous Peoples*, (Oxford: Clarendon Press, 1992).

[16] *Ibid.*, 63.

The Framework Convention puts it more gently:

> «The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation».[17]

This is not the League of Nations revisited. In that period, there was a blank space outside the minorities system; an absence of rights guaranteed to individuals by international law. In the new system, it is difficult to say where minority rights begin and end. General human rights apply to members of minorities as they apply to everyone. Clauses in international instruments on the basic principles of non-discrimination and equality are also for general application and directly implicate minorities. Minorities also participate —or should— in general self-determination processes, though they are not named as the holders of the right, which is the province of «peoples».[18] Indigenous peoples regard themselves as more than minorities and claim self-determination.[19] Nevertheless they pushed forward the boundaries of minority rights, notably in the context of Article 27 of the ICCPR.[20] Most of the leading ICCPR cases on Article 27 concern indigenous peoples, starting with *Lovelace v Canada* in 1981. The articles or paragraphs on minority rights in the general texts such as the ICCPR or the UNESCO Convention on Discrimination in Education must read coherently with all the rights.[21] The pre-existing format of human rights and the minority rights superimposed on it generate a host of questions. The new rights generate more controversy than most. They have as much force as other rights, and like all rights, exist in a state of (one hopes, creative) tension with the rest, including generalized principles such as non-discrimination.[22] The relationship between the various registers of principle will engage the international community for

---

[17] Article 1.

[18] See the essay by the present author in Tomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff, 1994).

[19] Article 3 of the UN draft Declaration on the Rights of Indigenous Peoples.

[20] A. Spiliopoulou-Akermark, *Justifications of Minority Protection in International Law* (Uppsala: Iustus Forlag, 1997).

[21] *Supra*.

[22] Consult N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff, 1991.

some time to come. For international law, it is not a question of moving from a norm of non-discrimination to one of minority rights. Both norms are simultaneously valid.

Issues and Perplexities

Complex issues pervade the canon of ethnic rights. One is the relationship between the individual and the collective, arguments through which the modernist tendency to work through binary opposites in manifest. Human rights law insists that collective rights should not undermine individual rights; but the converse is also true. This leads, in *Lovelace*, *Kitok*[23] and other cases, to soft metaphors of «balance» between the communal and individual «rights». Just as individuals may be destroyed by exclusion from community, so are communities destroyed by excessive exercises in self-identification by those claiming membership of particular communities. Can anyone leave - «exit» the community? Can the community expel individuals who claim membership? And where are the limits of communal self-expression or cultural authenticity? Are communities permitted to discriminate in terms of gender, or disability? Who speaks for the «community»?[24] The situation may easily arise where leaders claim the force of «tradition» for their exclusive rights to voice the communal opinion, drowning any dissent within the community in a deep pool of tradition. There are affinities with the generalized discourses of cultural relativism in these perplexities, with their picture of primordial attachments and essentialized communities ranged in opposition to universalizing discourses such as human rights. All of these questions reflect on rights which are recognised in one way or another in contemporary international law: the communal right to exist[25]; the individual right to self-identify.[26] The texts also affirm that individuals

---

[23] Before the UN Human Rights Committee, *Kitok v Sweden*, Communication No. 197/1985, Views of the Committee in UN doc. A/43/40 (1988).

[24] See the useful discussion on M.J. Perry, «Are Human Rights Universal? The Relativist Challenge and Related Matters», *19 Human Rights Quarterly*, (1997), 461-509.

[25] See for example Article 1 of the UN Declaration on the Rights of Persons belonging to ... Minorities, promulgated by UN general Assembly resolution 47/135, 18 December 1992.

[26] See Article 1.2. of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (above).

may not be compelled to use minority rights, nor compelled by the State to renounce them[27]. In the case of indigenous peoples in particular, the normative structure of individual human rights, while reinforcing aspects of personal security, may leave their communities vulnerable. Hence their conversation with the international community, and their interrogation of the language of human rights to assess its true potential. Hence their support for «radical» texts such as the draft UN Declaration on Indigenous Rights with its deployment of collective rights language, and their aspiration to a strengthened presence in the UN —not quite equal to States, but an integral part of the whole apparatus.[28]

Kymlicka[29] has argued that, once we accept group-differentiated rights —as international law does, its matters less who holds the rights. But this is not how minority groups and the indigenous —and governments— perceive it. It does matter. Communities may be imagined or fictive, but they command the affections and loyalties of human beings. Their rights are our rights. Many groups do not individualise rights, though they recognise individuals. And so collective rights in the form of for example, ownership of lands, mean something. But it is also true that individual rights can often lead groups more easily through the thickets of international and national law. There are often compromises to be made between purity of aspirations and representation and playing the rights game —and sometimes the best may be the enemy of the good.

---

[27] See for example Article 3.2. of the UN Declaration on Minority Rights ; and Article 3.1. of the Council of Europe's Framework Convention, both of which relate to the exercise of rights by members of minorities as matters of choice by individuals. Paragraph 32 of the Copenhagen Document of the OSCE Human Dimension bites deeper in providing that «To *belong to a national minority* is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice» (present author's emphasis).

[28] The implicit reference here is to the idea of a Permanent Forum in the UN for indigenous peoples, a proposal stemming from the Vienna Declaration of the World Conference on Human Rights in 1993. The idea continues to be supported by UN bodies, including the General Assembly and the Commission on Human Rights. In resolution 1998/20, the Commission decided to set up an Ad Hoc Working Group «to elaborate and further consider further proposals for the possible establishment of a Permanent Forum».

[29] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1996), ch. 3.

Rights of Minorities

So which minority or indigenous rights have been brought to human rights and which have not? The language of minority rights in its many variants employs fundamental concepts such as group existence and identity. It also elaborates principles of participation in cultural, social, economic and public life. Development processes are also affected by the movement in minority rights.[30] The new law greatly concerns itself with education and language. It values reciprocity of learning between minority and other communities in the State. The law implicates group participation in the design of national curricula. It seeks to amplify the scope of minority language teaching on schools and ensure access to all levels of education. International standards demand respect for traditions and customs unless specific practices within them contravene human rights principles,[31] a determination which is not to be made lightly. The UN Declaration on Minority Rights does not «confront» cultures as if they were aberrations from nature, but will deconstruct them when the occasion demands to condemn unacceptable practices. As the Human Rights Committee reminds us, culture manifests itself in many forms,[32] and multiple manifestations are accommodated in one way or another by the newly installed norms. The texts have also sought to revalue community, place and individual names.[33] The rights also increasingly penetrate the public realm, in affirming for example the right to use a minority language before public authorities. Minority rights do not incorporate the principle of self-determination, although contemporary readings of that principle respect their participation in self-determination processes: the democratic face of self-determination, the «internal aspect» associated with human rights. Neither do minority rights appropriate the spaces of autonomy.[34] Autonomy is referred to in key texts such as the

---

[30] These *topoi* emerge and re-emerge in the instruments on minority rights —the UN Declaration on Minority Rights carries most of them.

[31] For some typical issues, see the *Follow - Up Report on Traditional Practices Affecting the Health of Women and Children*, Special Rapporteur Mrs. Halima Embarek Warzazi, UN Doc. E/CN.4/Sub.2/1997/10.

[32] Paragraph 7 of the General Comment No. 23 (1994) of the Human Rights Committee on Article 27 of the International Covenant on Civil and Political Rights, in UN Doc. A/49/40, Vol. I, 107-110.

[33] Notably Article 11 of the Framework Convention.

[34] H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990).

CSCE/OSCE Copenhagen Document, but does not appear in the UN declaration, nor in the General Comment of the Human Rights Committee on Article 27 of the ICCPR. Autonomy is not mandated by international law as a solution to minority problems. In some areas of the world, such as Central Europe, the word «autonomy» provokes disputes among neighbours,[35] though no one is quite clear what it means. What governments tend to fear is the territorial variety. Picking out an autonomy as a defined area on the map can lead to new forms of sub-State recognition and thus to claims of self-determination and secession. So international law has been careful to escape such implications, refusing to translate the variety of local applications into a general mandate. The prognostications of commentators and activists of minority rights about the inevitability of the move to «group rights» have not been borne out in any dramatic fashion on the autonomy front.[36] Collective rights elements have insinuated themselves in more subtle ways into the corpus of human rights.

Rights of Indigenous Peoples

There is a difference between the texts on minorities and those on indigenous peoples. Preoccupations about culture, identity, education, language, and participatory processes are mostly shared. The indigenous texts are less constrained on the collective/individual rights spectrum —inclining greatly to the former, with variable «safeguards» in the name of general human rights. For many groups —mainly but not exclusively indigenous— land is an essential part of culture. But whereas the texts of minority rights dabble in the currency of shared rights in the area of toponymy, language education, and freedom from gerrymandering which would lower possibilities of exercising political and cultural rights, the texts on indigenous peoples are replete with land rights. Many indigenous groups regard the text sections on land rights as the essence

[35] Hence the famous «1201 question» —a reference to that recommendation of the Parliamentary Assembly of the Council of Europe, which contained, in Article 11, a guarded affirmation of a right to autonomy. Hungarian diplomacy in particular attempted to transcribe 1201 into its bilateral treaties with neighbouring States and convert it into binding domestic law. Various strategies were adopted in the ensuing row to downgrade the importance of the recommendation.

[36] N. Lerner, «The Evolution of Minority Rights in International Law», in C. Brolmann et al.(eds.), *Peoples and Minorities in International Law* (Dordrecht: Kluwer, 1993), 77-101.

of their struggle for survival. As the Human Rights Committee has recognised, some groups may have no existence outside a territory.[37] Denial of access to such a territory, dislocation, dam-building, deforestation, logging, mining, fires and floods, may all destroy whole communities. The UN draft Declaration deploys the language of ethnocide and cultural genocide to catch the essence of such processes and phenomena in their effects on communities. And whereas minority rights do not trespass on the territory of the international law principle of self-determination, the indigenous texts do. As a collective movement, indigenous peoples have mounted a frontal challenge to the «orthodoxy» of self-determination, by questioning and subverting that concept in the name of general human rights. After all, if «all peoples» have the right of self-determination, why not indigenous peoples? They insist on the concept as the best vehicle to carry their claims and aspirations, despite the admonitions of some to let it go.[38] They do not generally equate self-determination with secession. Views among them vary greatly. The expression of its basis by Australia in a UN drafting exercise on indigenous rights captures the spirit of their claims:

> «Australia considers that self-determination encompasses the continuing right of peoples to decide how they should be governed, the right to participate fully in the political process and the right of distinct peoples within a State to participate in decisions on, and to administer, their own affairs .... sovereign independence is not feasible for every self-defined «people» ... A concept of self-determination within existing State boundaries, involving the full observance of individual and group rights, holds out a better hope of ensuring stability, human development and human security ...».[39]

A Challenge to States?

Through the 1990s the international community addressed the challenge of exploded ethnicity by depositing sheaves of documentation on the table. The instruments are not a collection of

---

[37] «There is no place outside the Tobique reserve where such a community exists» - Human Rights Committee in *Lovelace*, paragraph 15.

[38] Article 3 of the UN draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

[39] Statement of the Australian delegation to the Working Group of the Commission on Human Rights charged with the elaboration of a declaration on indigenous rights, Geneva, 21 November 1995.(on file with author)

timeless truths but have a history and reflect configurations of power. They are, like other texts, «situated». The link between the pragmatic and the humanitarian appears particularly close in the case of minority rights. Oppression of identifiable groups is visible and can engage their kinsfolk; oppression of individuals can be more like the silent operations of nature. The peculiar tension in the texts on minority rights is that they attempt to ameliorate the tensions but may also create them by rendering the groups potentially even more visible. Hence the international law of minority rights places the rights in a political setting. This explains why so many texts contain safeguards about national unity and territorial integrity. Minority rights were always «international» in their potential consequences, with a sharp political edge, spilling over State boundaries. The politics of indigenous rights are «the same but different». One of the chief characteristics of indigenous politics at the international level is self-organization. Indigenous organization was spurred on by the example of decolonization of the Empires of the West, by the civil rights struggles of the 1960s, by the Cold War with the mutual probing between East and West of internal human rights issues, by problems with the concept of development and its neglect of indigenous factors,[40] by an alliance (sometimes) with environmentalists,[41] and the growth of international human rights law including its sharp focus on racism.[42] The style and ethos of indigenous rights movements links in with transformations of political community at the sub-national level and has prompted them. The challenge to States is different from that posed by minorities in some respects. It is not (typically) about fears of secession (though it is also true that this appeals only to some minorities) but it is about resources and territories. The peoples have learned the language of human rights, and they are in process of adapting it through painful struggle. Indigenous peoples are empowered by rights but also transformed by them. Pristine innocence of this world seems to be an option open to very few groups.

---

[40] Hence the attention given by, for example, UNCED - the Rio Conference on Environment and Development to indigenous issues.

[41] The two viewpoints are not always in harmony: A. Gray, *Between the Spice of Life and the Melting Pot: Biodiversity, Conservtion and its Impact on Indigenous Peoples* (Copenhagen: IWGIA, 1991).

[42] The United Nations is now into its Third Decade to Combat Racism and Racial Discrimination - the first decade was proclaimed by General Assembly resolution 3057 (XXVIII), of 2 November 1973. In addition, there have been two World Conferences to Combat Racism and Racial Discrimination, held at Geneva in 1978 and 1983.

What Next?

The developments in minority and indigenous rights will take specific paths. For minorities and indigenous peoples, the Human Rights Committee and CERD, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, and other UN treaty-bodies will to continue to develop the normative content of long-established human rights. The UN Working Group on Minorities should gather momentum after a cautious start in its first three years —the Commission on human Rights has granted the Group an open mandate. The Working Group can assist in the development of an international minority movement analogous to the international self-organization of indigenous peoples —though it may be surmised that minorities are more diverse in characteristics and aspirations than the indigenous. All branches of the United Nations will continue the process of sensitisation to ethnic issues mandated by the UN Declaration on Minorities and the World Conference on Human Rights. Phenomena of racial and religious intolerance, xenophobia and racism will continue to occupy Special Rapporteurs and other «mechanisms». At the Council of Europe, the work of the Advisory Committee under the Framework Convention should bring fresh impetus to understanding and applying minority rights in Europe (and perhaps outside since the Framework Convention is not confined to European States). The integration of such texts —and others such as the Language Charter— with general international law and human rights is the work of generations, not appropriate for soundbites or snap judgements. The standards are in place, but they do not deal adequately with some of the pressing questions of minority rights. Hence for example, the Foundation on Inter-Ethnic Relations based in The Hague has convened reflection groups of international lawyers and education and language specialists, to elaborate The Hague Recommendations on the Education Rights of National Minorities,[43] and the Oslo Recommendations on Linguistic Rights.[44] The Hague Recommendations are being processed by the UN for possible «universalization», beyond the limits of the OSCE. The ethnic dimensions of migration, transboundary co-operation, local and regional self-government, and demographics will further reveal themselves in the work of the Council of Europe and other organizations.

[43] 1997.
[44] 1998.

Discrimination against the Roma will not disappear but it will attract increasing international opprobrium.

For indigenous peoples, two great ambitions predominate: the adoption by the UN General Assembly of the draft Declaration on the Rights of Indigenous Peoples, and the incorporation of the Permanent Forum for Indigenous Peoples into UN structures. The former is an extremely radical document which incorporates the claims of indigenous peoples to self-determination as well as multiple forms of autonomy and own institution control, an indigenous citizenship, extensive provisions on land and resources, and a reconsideration of the historic treaties by which domination over them was secured and protection guaranteed. States are fighting the draft tooth and nail, using some old tricks. They demand definition as the price of progress, and attempt to reduce self-determination to autonomy, accusing the indigenousness of selfish unconcern with the rights and fate of others. The governments generally pretend that international law of self-determination and human rights is fixed and immutable, or fixed and immutable enough to disallow indigenous claims particularly in the realm of collective rights. The Americas should also see their own Declaration on Indigenous Rights under the aegis of the OAS come into play before too long. Indigenous rights are written all over the international agenda at present, from the programmes of the World Bank to the development policies of European States.[45]

The above are imminent developments, but what of the broader agenda? There clearly needs to be further reflection and activation of the standards, and improvement of mechanisms to guarantee respect for rights. I am speaking primarily about international mechanisms. In a sense, these are supplementary to national mechanisms where the rights will touch the lives of individuals. On the other hand, many peoples are blocked at home from finding justice and reach out to the international community for redress. And monitoring by and through international organizations needs to continue, despite perceived tendencies to «nationalize» international law, and to drive justice and equity off the agenda.[46] There is also a need for education in tolerance

[45] The speaker is in the process of writing a book on indigenous peoples and human rights for Manchester University Press.

[46] P. Alston, «The Myopia of the Handmaidens: International Lawyers and Globalization», *3 EJIL* (1997), 435-48.

and intercultural respect. Minority rights depend also on the development of a vibrant democracy and civil society, respecting the rule of law. In the age of rights, there has, it has been suggested, a turn away from responsibility.[47] There are difficulties in locating this in the structure of international law with its generally vertical approach to responsibility, only approaching the personal in the area of war crimes and genocide. In the case of minorities, the demand for responsibility has often degenerated into a demand for loyalty.[48] However laudable the objective of loyalty, it is not laudable to impose extra layers of responsibility on often fragile groups. Loyalty must be earned, not demanded, and certainly not demanded as a condition for the enjoyment of fundamental rights.

It has been widely observed that sovereignty is leaking out from the State in two directions —towards supranational organizations and to sub-State or sub-national groups.[49] The international movement in human rights has played a critical part in these developments. Human rights are a matter of international concern. The contemporary enhancement of minority and indigenous rights are not merely a consequence of the diffusion of sovereignty, they are also a proximate cause. If government legitimacy is linked to human rights, it is also linked to the treatment of ethnic groups.[50] Minority and indigenous rights lead to a de-centring of loyalty away from exclusive loyalty to the State. The individual, the family, the local community, the region, the «imagined community»[51] of race, tribe or nation, the State, perhaps the cosmopolitan community, or just humanity at large, circle round the affections as competing foci of loyalty for many contemporary human beings. Heavy nation-building projects are not in vogue; lightness[52] and self-expression are in. Simple majoritarianism is not any longer regarded as the best expression of democracy. Locality and

---

[47] See in general S. Avineri and A. de-Shalit, *Communitarianism and Individualism* (Oxford University Press, 1992).

[48] P. Thornberry, *International law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), *passim*.

[49] G.J. Simpson, «The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age», *32 Stanford Journal of International Law, No.2* (1996), 255-86.

[50] See the reflections on legitimacy in S. Marks, «The End of History? Reflections on Some International Legal Theses», *3 EJIL* (1997), 449-77.

[51] B. Anderson, *Imagined Communities: Reflections on the Spread of Nationalism* (London: Verso, 1983).

[52] Italo Calvino, *Six Memos for the Next Millennium* (London: Vintage, 1996).

place are important, and roots, and history. Authoritarianism is to give way to dialogic communities.[53] But there are also counter-intuitions. Governments still largely call the shots in international organizations, however much plagued by civil society and bureaucratic pressure. They still deny the existence of minorities and indigenous peoples on their territory and get away with it. The implementation of international human rights can easily be buried in the hidden recesses of State laws and procedures. Minorities and indigenous peoples can also be selfish, and become fundamentalist. The subversive effects on the state of the politics of minority recognition can in turn subvert ethnic groups. Ethnicity and cultural authenticity do not sit easily with claims for recognition within groups —of the rights of women, of dissenters.[54] Ethnicity can lead to ghettoes. So we speak from within some great battles for the soul of the age —an age of incomplete tendencies. It at least seems tolerably clear that human rights, while contending with other discourses, will continue as a favoured language to empower the disempowered and bridge the gap between the localities of this world, linking space and place. Minority and indigenous rights will succeed best if it becomes clearer that everyone has an interest in securing their respect, in some or other version of the common good. Perhaps something like Gramsci's pessimism of the intellect, optimism of the will, is an appropriate stance for the development of indigenous and minority rights. Whether the agenda of ethnic rights will emerge in a praxis of redemption, bringing peoples and their cultures to salvation, who knows. On this, we are more like Yeats's Caesar:

> «Our master Caesar is in the tent
> Where the maps are spread,
> His eyes fixed upon nothing,
> A hand under his head.
> *Like a long-legged fly upon the stream*
> His mind moves upon silence».[55]

Thank you all for your attention and patience.

---

[53] A. Linklater, *The Transformation of Political Community* (Cambridge, Polity Press, 1998).

[54] M.J. Perry, *op.cit.*

[55] W.B. Yeats, Long-legged Fly [1939].

Resumen

La conferencia trata de la situación de las minorías y los pueblos indígenas en las leyes internacionales. Normalmente se tiende a vincular los derechos de ambos colectivos bajo un mismo epígrafe aunque poseen características específicas. Así, mientras los textos relativos a derechos de las minorías se centran en respetos colectivos e individuales, derecho a la lengua o a la educación, los escritos de los pueblos indígenas están repletos de derechos sobre tierras. Para éstos, el derecho a la tierra es la esencia de su lucha por la supervivencia y reclaman la autodeterminación como el mejor vehículo para lograr sus aspiraciones. Por todo ello, el desarrollo de los derechos de las minorías y los pueblos indígenas han de tomar trayectorias propias.

Es de destacar los trabajos en pro de los derechos de las minorías que se están realizando dentro de las organizaciones internacionales de las Naciones Unidas, aunque algunas reivindicaciones pueden no favorecer a los pueblos indígenas. De ahí que estos pueblos tengan dos grandes ambiciones: la adopción de la Asamblea General de la Naciones Unidas del diseño de la Declaración de los Derechos de los Pueblos Indígenas y la incorporación de un Foro permanente para Pueblos Indígenas dentro de las estructuras de las Naciones Unidas.

Habría pues que trabajar en el desarrollo de mecanismos internacionales que garanticen el respeto de tales derechos. «Las organizaciones internacionales necesitan continuar, a pesar de la tendencia a "nacionalizar" las leyes internacionales». Se necesita en este sentido educar en la tolerancia y respeto multicultural, ya que los derechos de la minoría dependen del desarrollo de una democracia vibrante y una sociedad civil que respete las leyes.

Parece claro que los Derechos Humanos seguirán favoreciendo el fortalecimiento de todas las localidades de este mundo, y que los derechos de las minorías y los pueblos indígenas seguirán trabajando en lograr lo mejor, siempre que se consiga de una forma más clara que cada uno tiene un interés en asegurar su respeto.