

COMMENT

COMMENTARY TO PROFESSOR GUIBERNAU

NATIONAL MINORITIES AND INDIGENOUS PEOPLE

Professor Guibernau proposed “three methods that States can use to protect the cultural heritage and desire for self-governance of national minorities: (1) ‘cultural recognition,’ (2) ‘political autonomy,’ and (3) ‘federation.’”¹ Based on a review of international instruments and jurisprudence of international monitoring bodies,² it is asserted in this Comment that alterations of the methods proposed above are possible and perhaps necessary when a *national minority* constitutes an *indigenous people*.

Although international human rights law traditionally regarded “indigenous peoples” as “minorities”³ entitled to general minority rights protection, indigenous people can today be regarded as entitled to enjoy both minority rights and the collective rights of peoples.⁴ This finds support in the text of General Comment 23⁵ on Article 27⁶ of the International Covenant on Civil and Political Rights (ICCPR) and in the views adopted by the Human Rights Committee (HRC or Committee) in the cases it has considered. In General Comment 23, the HRC underlined that the provisions in Article 27 applies in the case of indigenous communities. The Committee stated:

[O]ne or other aspect of the right of individuals protected under that article—for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of

1. Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT’L L. 1251 (2004).

2. There is also an extensive case law concerning indigenous peoples on national level that due to space limitation will not be dealt with in this paper.

3. The first document distinguishing the two concepts is the *Problem of Discrimination against Indigenous Populations: Report of Special Rapporteur Martinez-Cobo*, UN Doc. E/CN.4/Sub.2/L.566 (1972).

4. For a thorough review of the concepts “peoples,” “all peoples,” “nations,” and “minorities,” see GNANAPALA WELHENGAMA, *MINORITIES’ CLAIMS: FROM AUTONOMY TO SECESSION*, INTERNATIONAL LAW AND STATE PRACTICE 76–95 (2000).

5. *U.N. Report of the Human Rights Committee*, U.N. GAOR, 49th Sess., Annex 5, General Comment No. 23, at 107–09, paras. 3.2, 7, UN Doc. A/49/40 (1994) [hereinafter General Comment No. 23].

6. International Covenant on Civil and Political Rights, Dec. 19, 1996, art. 27, 999 UNTS 171, 179 [hereinafter ICCPR] (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”).

members of indigenous communities constituting a minority. . . . That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁷

A review of the cases that the HRC has considered reveals that the Committee has considered that indigenous peoples may constitute minorities for the purposes of Article 27, however, without losing their status as peoples.⁸ Unlike minorities, all peoples are construed to have the right to self-determination under international law.⁹ Though the question of indigenous peoples' right to self-determination is still somewhat disputed, one may note that the UN Draft Declaration on the Rights of Indigenous Peoples (Declaration) explicitly states in Article 3 that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁰

This provision above was linked to the establishment of autonomy or self-government regimes as a special way of accommodating the distinctiveness of the indigenous communities within the State (Article 31) in which they live. As the Declaration reflects the broad interpretation of indigenous peoples, Article 45 sets forth that what was meant was some

7. General Comment No. 23, *supra* note 5, at 107–09, paras. 3.2, 7.

8. For the connection between "minority rights" protected under Article 27 of the ICCPR and the "rights of indigenous peoples" under Article 1 of the ICCPR concerning the right to bring a complaint under the Optional Protocol II, see *Ominayak and the Lubicon Lake Band v. Canada*, Human Rights Committee, para. 13.3, Communication No. 167/1984 (March 16, 1990) (observing that peoples as such cannot, under the Optional Protocol of the ICCPR, make a complaint under the Optional Protocol because it provides for a procedure under which only individuals can claim that their individual rights have been violated. The Committee, however, decided to examine the complaint under Article 27, to the extent of the individual rights affected).

9. See, e.g., U.N. CHARTER art. 1, para. 2; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, art. 2, U.N. Doc. A/CONF.157/23 (1993); African Charter of Human and Peoples' Rights Oct. 21, 1986, art. 20, 21 ILM 58; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., art. 2, U.N. Doc. A/4684 (1961).

10. Commission of Human Rights, *Draft Declaration on the Rights of Indigenous Peoples*, art. 3, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) [hereinafter *Declaration*]. In addition Article 2 requires respect for, *inter alia*, the integrity, social and cultural traditions of indigenous peoples and Article 7 protects the right of indigenous peoples to exercise control over their own economic, social and cultural development.

form of internal self-determination,¹¹ where indigenous peoples combined the right to participate fully, “if they choose,” in the political, economic, social and cultural life of the State (Article 4), notably in relation to matters of their direct concern (Articles 19 and 20).¹² The HRC’s views concerning Article 25 of the ICCPR on political participation suggest that no far-reaching standards can be derived from Article 25 as regards specific arrangements for autonomy or self-government by minorities or indigenous peoples.¹³ In a number of cases, however, concerning Article 27, the Committee has stressed the importance of facilitating effective participation in decisions that affect indigenous peoples. This includes, for example, issues related to culture, land or other natural resources including a duty for the State to consult indigenous peoples in such cases. In this regard the International Labour Organization (ILO) 169 Convention sets forth in Article 6(a–c) that governments shall:

- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative measures which may affect them directly;
- (b) establish means by which these people can freely participate, to at least the same extent as other sectors of the population, at levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which 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.”¹⁴

The special relation of indigenous peoples to a particular land, territory or resources has been recognized in several international

11. *Id.* art. 45 (providing that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.”).

12. *Declaration, supra* note 10, arts. 4, 19, 20; *see, e.g., Vienna Declaration and Programme of Action, supra* note 9, art. 20 (providing that “recognizing the inherent dignity and the unique contribution of indigenous peoples to the development and plurality of society’ through the ‘free participation of indigenous peoples in all aspects of society, in particular in matters of concern to them”).

13. Martin Scheinin, *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, in *THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETATIVE APPROACH*, 164 (Ted Orlin et al. eds., 2000).

14. C169 Convention on Indigenous Peoples’ Rights (ILO), June 7, 1989, arts. 6(a), 6(b), 6(c), at <http://www.ilo.org>.

documents.¹⁵ The UN Draft Declaration on the Rights of Indigenous Peoples deals with this relationship in several articles. Article 25 of the Declaration recognizes the spiritual and material relationships of indigenous peoples to their homelands and highlights that “land and territories” include the whole environment of “land, air, waters, coastal seas, sea-ice, flora, fauna and other resources.” Article 26 refers to the “right to own, develop, control and use the lands and territories . . . which they have traditionally owned or otherwise occupied or used.”¹⁶ Article 1(2) of the ICCPR and International Covenant on Economic, Social and Cultural Rights set forth that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.¹⁷

What alterations to the proposed methods does the right of indigenous peoples’ to internal self-determination give rise to when it is read in conjunction with the special relation of indigenous people to a particular territory or land and resources (based on historical connections and customary practices), which are crucial for the right to enjoy a particular culture or way of life or even decisive for the physical and cultural survival of an indigenous people?

From the outset it should be pointed out that there are many different mechanisms and arrangements for self-determination of an indigenous people within the framework of the Nation-State(s) in which it resides. Therefore the references below will only constitute examples. Henriksen points out that “concepts and degrees of indigenous self-government may vary considerably, depending on the actual circumstances and specific aspirations of indigenous peoples.”¹⁸ In this regard, “the right of self-determination should be regarded as a ‘process right’ rather than a

15. In cases where a people have been recognized as possessing the right to self-determination, one can contend that one element of that right has been the people’s relationship to a specific territory. For a review of documents in which the special relation of indigenous peoples to a particular land or territory has been recognized, see, e.g., *id.* arts. 13–16; Inter-American Commission on Human Rights, *Proposed Inter-American Declaration on the Rights of Indigenous Peoples*, art. 18, pmb. para. 5 (1997) at <http://www.cidh.oas.org/indigenous.htm>; see also *Preliminary Working Paper on Indigenous Peoples and their Relationship to Land: Report by Special Rapporteur Daes*, U.N. Doc. E/CN.4/Sub.2/1997/17 (1997).

16. *Declaration*, *supra* note 10, arts. 25, 26.

17. ICCPR, *supra* note 6, art. 1(2); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

18. John B. Henriksen, *Implementation of the Right of Self-Determination of Indigenous Peoples*, 3 INDIGENOUS AFFAIRS 14 (2001).

right to a pre-defined outcome.”¹⁹ Therefore, in a similar fashion, the methods proposed by Professor Guibernau cannot be sharply distinguished from each other but are rather tangled together as possible elements of indigenous peoples’ right to self-determination. Furthermore, whatever forms indigenous self-determination may take, it should be the outcome of negotiations between indigenous peoples and the State(s) in question, rather than methods imposed by States.

First, she discusses cultural recognition. Concerning indigenous peoples this could be considered as recognition of their right to enjoy a particular culture or way of life.

Second, she discusses political autonomy. Some indigenous peoples realize their right to self-determination through territorial autonomy,²⁰ which usually implies also political autonomy. “Territorial autonomy may be implemented only if the group in question lives within a geographically well-defined territory and constitutes a considerable majority there.”²¹ In cases where territorial autonomy has not been reached, the preferred solution is political participation, consultation and co-determination procedures where representative indigenous institutions can participate in the decision-making concerning issues that affect the people who they represent.²² Political participation can also be realized

19. *Id.* at 16.

20. The Greenlanders were given political and territorial autonomy by the 1979 Greenland Home Rule Act, which established the Greenland Home Rule Authorities—a publicly elected Assembly (*Landsting*) and an Executive body (*Landsstyre*). There has been a gradual transfer of power to the Authorities giving them extensive power and control over domestic affairs. For further details, see *id.* at 19. Denmark does not consider the indigenous Greenlanders as a national minority and the Greenlanders do not consider themselves as a national minority. *But see* Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Denmark*, paras. 17–18, Council of Europe Doc. ACFC/INF/OP/I(2001)5 (pointing out that “the fact that a group of persons may be entitled to a particular form of protection cannot by itself justify their exclusion from other forms of protection. . . . Accordingly, the Committee considers that the a priori exclusion of Greenlanders . . . from the implementation of the Convention is not compatible with it.”).

21. Kristian Myntti, *The Right of Indigenous Peoples to Self-Determination and Effective Participation*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 85, 116 (Pekka Aikio & Martin Scheinin eds., 2000).

22. The Sami indigenous people, whose homelands (*Sápmi*) cover part of Norway, Sweden, Finland and Russia has in the three Nordic countries through the Sami Parliaments possibilities to political participation on national level. The Sami Parliaments in the three Nordic countries have somewhat different powers, but they all act as advisory bodies to the national parliaments and can propose legislation regarding Sami issues. The powers do not extend to actual decision-making on the use and management of the traditional Sami land. The governments of Finland, Sweden and Norway have recognized the Sami as an indigenous people. When ratifying the Council of Europe Framework Convention for the Protection of National Minorities, the respective governments recognized that the Sami people constitute a national minority in the respective countries. Note however that, in Norway, the Sami do not regard themselves as a national minority. *See* Norwegian Ministry of Local Government and Regional Development, *Initial report submitted by Norway pursuant to Article 25, Paragraph*

through cultural autonomy,²³ which “refers to a non-territorial self-administration of linguistic and cultural matters of a group. Cultural autonomy does not normally include legislative powers, though it may presume a body representative of the group.”²⁴

Cultural autonomy is different from territorial autonomy in three ways: a) the management of affairs in cultural nature [e.g. the development and enjoyment of culture, the practicing of traditional indigenous livelihoods, use of language, education etc.] is allocated to culturally different groups as opposed to a territorially defined group; b) it applies only to cultural aspects; and c) it applies only to those who belong to that cultural group.²⁵

Third, she discusses federations. Many indigenous peoples no longer constitute a majority within their traditional lands or territories, which makes it more difficult to realize indigenous self-determination in the proposed form. There are examples, however, where federative systems offer solutions for indigenous self-determination in the form of cultural (including linguistic), territorial, and judicial autonomy.²⁶

The above shows that it is today possible to find several different ways to accommodate diversity through means of democratic participation or autonomy solutions within the common territory. In that respect

I of the Framework Convention for the Protection of National Minorities, para. 1.1 (2001), at www.odin.dep.no/archive/krdvedlegg/01/07/europ024.pdf (last visited Nov. 7, 2004) (“The Sami people in Norway are also a national minority in terms of international law. However, the Sami Assembly (*Sámediggi*) has declared that it does not consider the Framework Convention to be applicable to the Sami people, since as an indigenous people the Sami have legal and political rights that exceed those covered by the provisions of the convention.”).

23. See, e.g., Fin. Const., § 17; Act on Sami Parliament, No. 974, § 9 (1995) (Fin.); Sami Language Act, No. 1086 (2003) (Fin.). These sources establish the legal framework for cultural (including language) autonomy of the Sami indigenous people within a defined Sami Homeland. The state authorities are obliged to negotiate with the Sami Parliament on all far-reaching and important measures that may directly affect the Sami people, or that relate to any of the following matters: 1) community planning; 2) the management, use, leasing and assignment of State land, conservation areas and wilderness areas; 3) applications for mining licences; 4) legislative or administrative changes pertaining to traditional Sami occupations and livelihoods; 5) the development and teaching of and in the Sami language in schools, and in the social and health service; and 6) any other matter affecting the Sami language, culture or their position as an indigenous people.

24. Myntti, *supra* note 21, at 116.

25. Asbjørn Eide, *Cultural Autonomy: Concept, Content, History and Role in the World Order*, in *AUTONOMY: APPLICATIONS AND IMPLICATIONS*, 251, 252 (Markku Suksi ed. 1998).

26. In 1991, the Canadian government signed a self-government agreement with the indigenous Inuit people of Nunavut. The agreement provides for self-government over a territory of around two million square kilometers, i.e. a land base sufficient to enjoy a particular culture or maintain a way of life. The Nunavut Authorities are composed of a publicly elected Assembly, a cabinet and a territorial court. The Legislative Assembly can make laws in relation to a number of subjects, *inter alia* 1) the management and sales of land; 2) property and civil rights in Nunavut; 3) education; 4) preservation, use and promotion of the Inuktitut language; 5) agriculture. For further information, see Henriksen, *supra* note 18, at 20.

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“the notion of ‘people’ is no longer homogenous”²⁷ and this is reflected in the modes in which indigenous peoples’ rights, including the right to self-determination, can be realized. What stands out is the special link between land or territory and the indigenous peoples, a decisive factor concerning their right to enjoy a particular culture or lifestyle and a definitive factor that, besides their right to self-determination, distinguishes them from other populations,²⁸ including groups qualifying as national minorities. These are the factors that alter the proposed methods.

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27. Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. OF INT’L L. 178, 179 (1992).

28. See Jérémie Gilbert, *The Treatment of Territory of Indigenous Peoples in International Law*, in JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* 200 (2003).

REPLY TO ANNIKA TAHVANAINEN

These comments are based on a series of misquotations and the use of half sentences from my paper which result in a substantial misinterpretation of my arguments.

As I have argued in the paper, it is crucial to establish a distinction between the concepts of nation, state, and nationalism. The commentator attributes the six characteristics I set up when defining the “nation,” to a “nation without state.” This reflects a misunderstanding on her part because my definition of the “nation” is independent of whether the nation in question has or does not have a state of its own.

When dealing with my definition of nations without states, Tahvanainen omits my main definition and jumps into some other features sometimes cutting my sentences and depriving them of full meaning. For instance, I define “nations without states as nations which in spite of having their territories included within the boundaries of one, or more states, by and large do not identify with them.”¹

I do not argue that “the stateless communities must have the explicit wish to rule themselves” as Tahvanainen writes. On the contrary, I have written in my paper that “Self-determination is sometimes understood as political autonomy, in other cases it stops short of independence and often involves the right to secede.”² The misunderstanding and confusion of the commentator is evident. She misquotes my paper and mixes up parts of sentences with the result of attributing to me ideas which do not correspond to my position as expressed in the paper.

I am accused of employing a “static” definition of the nation; such an assertion neglects that in my view “Nations are not unique and fixed, and throughout history it is possible to record the disintegration of some nations . . . and the creation of new ones.”³

I am also accused of assuming that nations are homogeneous. On the contrary, I assume that nations are not homogeneous and this applies both to nation-states and nations without states. In the paper I write: “The nations or parts of nations included within a single state do not share similar levels of national awareness.”⁴

I do not argue that nations without states have a “uniform desire for independence” as the commentator attributes to me. On the contrary, I clearly state that the desire for self-determination could be either

1. Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT'L L. 1251, 1254 (2004).

2. *Id.* at 1255.

3. *Id.* at 1257.

4. *Id.*

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manifested through the desire for political autonomy or secession, and that it varies according to each particular case.⁵

Tahvanainen argues that “the union of Scotland and England in the early eighteenth century—and the concurrent loss of Scotland’s independent statehood—was made possible in part because of the lack of strong cultural distinctions between the English and the lowland Scots.” This is only a limited picture of a fuller story.⁶

I have discussed at length the issue of First Nations.⁷ Only space limitations have prevented me from developing this topic in this Article. As I have argued elsewhere, although there are substantial differences between “Western nations without states” and “Native nations,” I maintain that in both cases we encounter cultural communities with a consciousness of forming a group, memories of a common past and the desire to decide upon their own political future, which may take different forms including cultural recognition, political autonomy, federation and, in some cases, independence.

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5. *Id.* at 1255.

6. For a full picture of the complex political and cultural impact of the union of crowns and the conflict it brought about see J.K. Mackie, *A HISTORY OF SCOTLAND* 261 *passim* (1991) ; M. Lynch, *SCOTLAND: A NEW HISTORY* 246, 324 (1998).

7. Montserrat Guibernau, *Nations and Nationalism in Native America*, in *NATIONS WITHOUT STATES* (Montserrat Guibernau ed., 1999).