WHAT ARE INDIGENOUS PEOPLES?

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It was in June 1999 that Professor Patrick Thornberry participated in a Midnight Sun Conference on Indigenous Peoples’ Right to Self-Determination, organized jointly by the Sami Parliament in Finland and the Institute for Human Rights at Åbo Akademi University. His paper, as included in a book published one year later by the Institute, starts with the question ‘What is self-determination?’.

As that question has already been answered by him, this chapter will be about a different theme, namely: ‘What are indigenous peoples?’. The question is far from new, and many have given up their efforts to find an answer, either for pragmatic reasons or as a matter of principle.

For instance, the Draft United Nations Declaration on the Rights of Indigenous Peoples includes neither a definition of indigenous peoples nor even a provision that would specify the scope of application of the instrument. This does not mean that one, merely for that reason, would need to give up striving at a conceptual understanding of the legal meaning of the term indigenous peoples. In fact, at least three characteristics of the groups that appear to fall within the scope of application of the Draft Declaration can be inferred from its preamble:

Characteristics

1. ‘Distinctiveness, in the sense of being different and wanting to be different. This aspect of being indigenous is closely related to the importance given to the group’s self-identification as indigenous.’

2. ‘Dispossession of lands, territories and resources, through colonization or other comparable events in the past, causing today a denial of human rights or other forms of injustice.’

3. ‘Lands (located in a specific geographic area) as a central element in the history, identity and culture of the group, usually giving rise to traditional economic activities

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3 First recital of the preamble of the Draft Declaration.
4 See, article 8 of the Draft Declaration and article 1 (2) of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 72 ILO Official Bull. 59.
5 Fifth recital of the preamble of the Draft Declaration.
that depend on the natural resources specific to the area in question.\(^6\)

There are two important characteristics that do not appear to be reflected in the preamble to the (Draft) Declaration but that must be understood to form a part of the overall context of the Declaration and the notion of indigenousness within the instrument. These are:

4. **Being first** in the geographic area referred to as ‘lands’ above under item 3, at least in relation to the present dominant population.\(^7\)

5. **Lack of political control** in respect of the internationally recognized state that today exercises sovereignty in the area where the ‘lands’ are located.\(^8\) This dimension points to the situational or relational nature of indigenousness. \(^9\) In short, indigenous peoples can be said to be in a minority situation in relation to the dominant population, even in the rare instance they happen to be in the numerical majority.

**Biological Notions**

It is above all the last-mentioned criterion that results in a marked difference in the biology-based notion of indigenousness and the use of the same term in international law and human rights law. A standard dictionary entry for the adjective ‘indigenous’ would read:

‘1. Originating and living or occurring naturally in an area or environment. See Synonyms at ‘native’.
2. Intrinsic; innate.’\(^10\)

Such biological usage of the notion of indigenous does not include the dimension of a relationship of dispossession or subordination in relation to another group that arrived later. Nevertheless this criterion is essential in the legal usage of the term.

Although the Draft Declaration does not include a definition for the concept of indigenous peoples, there have been efforts towards a definition within the United Nations framework. The most commonly used is the ‘working definition’ formulated by Special Rapporteur of the Sub-Commission, José R. Martínez Cobo in his study of the Problem of discrimination against indigenous Populations:

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\(^6\) Fifth, sixth and eighth recital of the preamble. See, also, article 25 of the Draft Declaration.

\(^7\) See, article 27 of the Draft Declaration.

\(^8\) See, articles 37 and 39 of the Draft Declaration.


Indigenous communities, peoples and nations are those which, having a historical continuity [4] with pre-invasion and pre-colonial societies [2] that developed on their territories [3], consider themselves distinct [1] from other sectors of the societies now prevailing [5] in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.\textsuperscript{11}

**ILO Convention 169**

A third starting-point in the quest for a definition is ILO Convention No. 169 which includes in article 1 a complex provision on the scope of application of the convention:

1. This Convention 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.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Some parts of this provision will be commented upon later on in this chapter. At this point it suffices to state that above-mentioned characteristics Nos. 2, 3 and 4 are clearly visible in paragraph 1 (b), and characteristic No. 1 in paragraph 2. The relational

\textsuperscript{11} UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379. The numbers in brackets have been inserted by the present author and they refer to the five characteristics presented above in the discussion on the Draft Declaration.
dimension of characteristic No. 5 is implied in paragraph 1 (b) but is also apparent in most of the substantive provisions of the Convention which address the relationship between an indigenous people and the state, the latter being presumably in the hands of someone else.

The International Covenants

Two further international human rights instruments need to be brought into the discussion, namely the International Covenants of 1966 (henceforth ‘ICESCR’ and ‘ICCPR’).\(^\text{12}\) This might seem odd to the reader as neither instrument includes any reference to the notion of indigenousness. However, article 27 of the ICCPR includes a provision on the rights of persons belonging to ethnic, linguistic or religious minorities, and both Covenants proclaim in their common article 1 that the right of self-determination belongs to ‘all peoples’. On the basis of the practice of the Human Rights Committee, the body entrusted with the task of interpreting the ICCPR, it can be asserted that the groups qualifying as indigenous peoples under the Draft Declaration, under the Martinez Cobo definition or under ILO Convention No. 169, generally fall under the protection of ICCPR article 27 as 'minorities' and that at least some of them also constitute 'peoples' for the purposes of article 1 and are beneficiaries of the right of self-determination.

Hence, the ICCPR and the ICESCR do not give support to a position according to which indigenous peoples are a specific category between minorities and peoples, not entitled to the right of self-determination. Indigenous groups that are in a minority situation, i.e. subject to a greater or lesser degree of dispossession or subordination by another now dominant group, are entitled to protection as minorities under ICCPR article 27. At the same time, those of these groups that are ethnically, linguistically, geographically, historically and politically – all things considered – sufficiently distinct from the dominant population to qualify as ‘peoples’ under public international law, are entitled to the right of self-determination under common article 1. In the same breath, it must however be emphasized that in most cases the ultimate form of exercising the right of self-determination, unilateral secession, is not available to indigenous peoples. Instead, they usually have to satisfy themselves with other arrangements that allow for their exercise of the right of self-determination, including autonomy and land management regimes based on the role of freely chosen political structures of the indigenous people itself.

Although ICCPR article 27 does not employ the notion of ‘indigenous peoples’, much of the law developed under the provision has been related to claims by such groups. In General Comment No. 23 the Committee emphasized the applicability of article 27 in

\(^{12}\) International Covenant on Economic, Social and Cultural Rights, 999 UNTS 3 (ICESCR), and International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR).
respect of indigenous peoples. In particular, the notion of ‘culture’ has been interpreted as affording protection to the nature-based way of life, land rights and economy of indigenous peoples. In the terms of paragraph 7 of the general comment:

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

Moving now to the question of the right of self-determination. and having earlier referred to ILO Convention No. 169, it needs to be clarified that the fact that this convention does not include a clause on the right of self-determination does not mean that indigenous peoples would never qualify as beneficiaries of that right. Article 1, paragraph 3, of ILO Convention No. 169 should be taken as meaning what it says, namely that the use of the term 'peoples' in that Convention does not have 'any implications' as regards the rights which may attach to the term 'peoples' under public international law. Just as the reference to 'peoples' in the ILO Convention does not have positive implications in respect of turning into peoples groups that otherwise would fall short of the distinctiveness required under international law, the same reference does not have the negative implication of denying the status of a people to a group that irrespective of the ILO Convention qualifies as a people under public international law. The reason for article 1 paragraph 3 in the ILO Convention is the broad and inclusive criteria for indigenous and tribal peoples in the preceding parts of article 1. This broad remit results in the Convention being applicable to a number of minorities and groups that would not qualify as peoples under public international law. Nevertheless, within that broad scope of application of the ILO Convention, there is a smaller group of indigenous peoples that also qualify as 'peoples' under international law.

As already mentioned earlier in this chapter, a people’s right to self-determination does not automatically entail a right of unilateral secession (statehood) for every group that qualifies as a distinct people. The right of secession is recognized only under specific conditions, for instance as was done by the Supreme Court of Canada in the Quebec Secession Case:

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful

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13 General Comment No. 23 (50) by the Human Rights Committee, UN Doc. HRI/GEN/1/rev.5 pp. 147-150, paragraphs 3.2 and 7.
access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.14

In the context of the case, it is clear that by 'external self-determination' the Supreme Court of Canada was referring to the possible unilateral secession by the province of Quebec from the union of Canada. It should, however, be emphasized that there might be other 'external' forms of self-determination that are not subject to the very demanding conditions international law attaches to secession, for instance the right to represent internationally an indigenous people in relevant international negotiations or conferences.15

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

The word ‘people’ is not defined in article 1 or elsewhere in the International Covenants. Hence, the Covenants leave room for different interpretations as to whether the whole population of a state party constitutes ‘a people’ in the meaning of common article 1, or whether several distinct peoples exist in at least some of the States Parties to the two Covenants. The Human Rights Committee’s pronouncements in relatively recent Concluding Observations, on reports by countries with indigenous peoples, reflect an understanding that at least certain indigenous groups qualify as ‘peoples’ under article 1. As this approach was first made explicit in the Committee's concluding observations on Canada, a quotation is justified:

"The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains ‘the most pressing human rights issue facing Canadians’. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires,"

15 For instance, section 6 of the Sami Parliament Act of Finland (Act No. 974 of 1995) recognizes this external form of self-determination to the Sami, to be exercised by the elected Sami Parliament.
inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.\textsuperscript{16}

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

\begin{quote}
It is clear that ‘a people’ may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to ‘nation’ and ‘state’. The juxtaposition of these terms is indicative that the reference to ‘people’ does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.\textsuperscript{17}
\end{quote}

\textbf{Meanings of ‘Indigenous Peoples’}

After this excursion into the realm of self-determination, it is time to return to the issue of defining the notion of indigenous peoples. The illustration below is aimed at clarifying the different meanings of the term ‘indigenous peoples’ when used as a legal term in relation to such existing treaties as the International Covenant on Civil and Political Rights and ILO Convention No. 169.

\textsuperscript{17} Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paragraph 124. In para. 139 of the opinion the Court refers to the importance of the rights and concerns of aboriginal peoples in the event of a unilateral secession by the province of Quebec, with an explicit reference to the issue of 'defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples'. However, as the Court came to the conclusion that the hypothetical right of self-determination of Quebec could not carry as far as to unilateral secession, it was 'unnecessary to explore further the concerns of the aboriginal peoples'.

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Illustration. Different meanings of the term indigenous peoples.

I = indigenous.

T = tribal.

The starting-point for drawing the illustration above is that the categories of ‘minorities’ and ‘indigenous peoples’ are not mutually exclusive. As the jurisprudence of the Human Rights Committee shows, one and the same group can simultaneously constitute a minority under ICCPR article 27 and a people under article 1 of the same treaty. Hence, in the illustration there is considerable overlap between the notions of minorities and peoples. At the same time, the illustration indicates that there are numerous minorities that do not qualify as peoples under common article 1; and that there are many peoples, primarily nation-building ones, that do not constitute a minority. The overlap of the two ovals represents groups that qualify simultaneously as minorities for the purposes of ICCPR article 27 and as peoples in relation to common article 1.

The lines marked with ‘I’ and ‘T’ relate to article 1 of ILO Convention No. 169, so that ‘I’ refers to indigenous peoples as described in article 1 (1) (b) and ‘T’ refers to tribal peoples in the meaning of article 1 (1) (a). Several observations need to be made as to how the two lines have been drawn.

Firstly, ILO Convention No. 169, or at least article 1 of it, represents a broad understanding on what groups should be entitled to the protection of the Convention as
indigenous peoples. Hence, line I extends into the oval representing minorities beyond the point where that notion overlaps with the other oval referring to peoples. This means that under ILO Convention No. 169, many groups that would not qualify as peoples under general international law or common article 1 of the Covenants are referred to as indigenous peoples. In line with this approach, article 1 of the Convention also includes paragraph 3 according to which the use of the term ‘peoples’ in the Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law. The fact that a group qualifies as an indigenous people under ILO Convention 169 does not, therefore, lead to the conclusion that the group in question would enjoy the right of self-determination.

Secondly, textually article 1 (1) (b) may be understood to also cover such groups that meet the criterion of being first in a territory but which today are not in a subordinated position in relation to another, dominant population group. Therefore, line ‘T’ has been drawn to extend into the oval representing peoples beyond the point of overlap with the oval representing minorities. However, in the view of this author such a textual reading would be a misunderstanding of the notion of indigenousness in human rights law. A reading of ILO Convention 169 as a whole makes it clear that this instrument also relies on the relational criterion for its scope of application: the material provisions in the Convention regulate the relationship between a state and an indigenous group residing in that state, systematically presuming that the state in question is in the hands of someone else, i.e. the dominant population.

Thirdly, the notion of tribal peoples in article 1 (1) (a) is a further extension to the notion of indigenous peoples. As there are in various parts of the world groups that were not first or at least cannot prove having been first, in a specific geographic area but that nevertheless are in a situation that in the context of human rights is analogous to indigenous peoples proper, the scope of application of the Convention has been deliberately extended to tribal peoples, i.e. groups that due to their situation deserve the same protection as indigenous peoples. As the logic of this extension is based on a relationship of subordination in respect of a dominant population group, there is no need to extend line ‘T’ to the right beyond the bordering line of the notion of minorities. Nevertheless, as there might be cases where a tribal people would qualify as a people under general international law or common article 1 of the 1966 Covenants, line ‘T’ has been drawn into the area representing the overlap between ‘minorities’ and ‘peoples’.

After these explanations, it is time to reflect on the characteristics of the different groups referred to in the illustration with the numbers 1 to 5. Together all these groups constitute ‘indigenous peoples’ in the broadest possible sense, including the extension of the term to groups that strictly speaking do not meet the criterion of ‘being first’ (tribal minorities and tribal peoples) but that are in relevant respects in a position analogous to that of indigenous peoples in the strict sense. At the other end of the
spectrum, this broad notion of indigenousness extends to groups that were historically first in a given geographic area and are today in control of their own nation state.

No. 1 refers to indigenous peoples in the narrowest sense, i.e. groups that are peoples for the purposes of general international law and common article 1 of the 1966 International Covenants but that nevertheless remain in a situation of dispossession in respect of another, now dominant population that controls the nation state. These groups are entitled to the right of self-determination under common article 1 but also to protection as minorities in the meaning of ICCPR article 27. The Sami of the Nordic countries and the Maori of New Zealand would fall into this category. It goes without saying that ILO Convention No. 169 is applicable in respect of these groups.

No. 2 refers to such indigenous groups that meet the criteria of article 1 (1) (b) in ILO Convention No. 169 and that, because of their minority situation within a nation state, enjoy the protection of ICCPR article 27. These groups meet the criterion of being first in a geographic area but do not, at least for the time being, qualify as ‘peoples’ under general international law – perhaps merely because of their small number or because they have not articulated a claim for peoplehood and for the right of self-determination that would follow it. Many aboriginal bands in Canada would on their own belong to this category, possibly at the same time constituting together with related bands a people in the meaning of category No. 1.

No. 3 comprises groups that technically meet the criteria of article 1 (1) (b) in ILO Convention 169 but that do not fit into the relational dimension of the concept of indigenousness, because of obtaining power in the nation state. Fiji or maybe Greenland in the future may constitute cases of such circumstances. When an indigenous people comes into power it retains its status as a people but loses the minority protection attached to being in a situation of dispossession in relation to the dominant population. ICCPR article 27 and ILO Convention No. 169 cease to apply.

No. 4 refers to most tribal groups in the world, in the meaning of being in a situation of dispossession analogous to indigenous peoples but not qualifying as indigenous under the strict application of the criterion of ‘being first’. They are entitled to protection under article 1 (1) (a) of ILO Convention 169 and under ICCPR article 27 but do not qualify as peoples under common article 1. Similarly to groups in category No. 2, they are not ‘peoples’ in the strict sense but it is nevertheless practical to include them in a unifying notion of ‘indigenous and tribal peoples’ due to the similarities of the situations. Many of the distinct communities of persons of African origin in Central America, being the offspring of former slaves, would belong to this category.

Finally, category No. 5 comprises tribal groups that due to their size, history, social and cultural distinctiveness and articulated self-identification as ‘peoples’ meet the criteria
of peoples under general international law but not the criterion of ‘being first’ in a specific geographic area. Hence, they are ‘tribal peoples’ in the meaning of article 1 (1) (b) of ILO Convention No. 169, ‘peoples’ in the meaning of common article 1, and at the same time entitled to minority protection under ICCPR article 27. As a consequence of historical population movements in Africa, there are in several groups in African countries that live side by side with one or more strictly indigenous groups but have less long-lasting ties to the territory. When they nevertheless are in a minority situation in relation to a dominant population group, they fall into category No. 5.

Conclusion

What is the sense of all this? Is it not divisive and destructive to construct lines of separation within the united world movement of indigenous peoples? Is there not much wisdom in the approach represented by the Draft Declaration of not ‘defining’ indigenous peoples but of taking, instead, a pragmatic approach of accepting on the bandwagon all groups that are similarly situated in terms of being dispossessed through colonization or other historical events? Are not all peoples equal, for instance in relation to the right of self-determination?

In my view it makes sense to strive for analytical clarity. The rest of the questions posed must be answered in the negative. The perceived unity of all indigenous peoples in the world is a fallacy if one tries to be serious about a people being entitled to specific rights that flow from the fact of being an indigenous people. The pragmatic approach of not including a definition into the Draft Declaration is tempting but the victories resulting from this pragmatism may be Pyrrhic in nature: the international community – which still today is primarily constituted of states – will not accept far reaching rights to indigenous peoples unless the scope of application of the legal concept of indigenous peoples is at least reasonably precise. In the ILO tradition of primarily focusing on workers’ rights, it was probably wise to include a broad notion of indigenousness, extended to tribal groups and giving emphasis to the group’s self-identification as indigenous or tribal. But the price tag attached to that extensive solution is visible in the product: article 1 (3) of ILO Convention No. 169 makes it clear that no group, even if it meets all criteria of general international law for being a people, may invoke that Convention as an argument for its recognition as a people under international law.

As to the equality of all peoples, my answer is that yes, indeed all peoples are equal and entitled to the right of self-determination. But this equality only strengthens the case for a need to make a distinction between peoples and ‘peoples’, as only the former enjoy the right of self-determination. Welcoming all self-proclaimed indigenous minorities and groups to jump on the bandwagon of the Draft Declaration damages the credibility

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18 See, article 1 (2).
of article 3 of the Draft, according to which ‘indigenous peoples have the right of self-
determination’. In order to have their right of self-determination recognized, indigenous
peoples will have to accept that being indigenous does not automatically bring with it
being a people.